



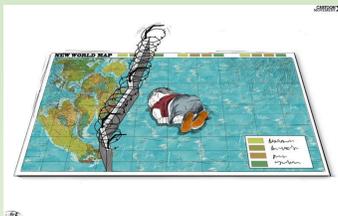
# Co-operation in the Field of Refugee Protection between Customary International Law and General Principles of Law

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## Introduction

Beginning from the fact that the subject of refugee law is the human person, this paper suggests that the state-centered approach does not provide a sufficient theoretical framework within which the concept of cooperation can be sufficiently engaged. It is an attempt to answer the question of precisely what approach any study of co-operation in the field of refugee law should adopt.

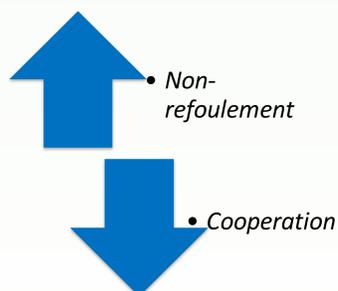


## Customary International Law, Co-operation and Refugee Law

Both state practice and scholarly analysis have established a clear relationship between *non-refoulement*, temporary refuge and cooperation. In more specific context, temporary refuge emerged from the incidents of conditioning *non-refoulement* on the international cooperation. However, no study has attempted to assess the impact of this relation upon the legal dimensions of cooperation.

## Non-Refoulement and Cooperation: A Problematic Relationship?

While the incorporation of the principle of *non-refoulement* into analyses of co-operation often provides considerable insight, there is always the problem of the fallacy analysis. This arises from the fact that, as long as *non-refoulement* is accepted as a customary peremptory norm, it should not be contingent on any other norm. Thus, state practices during mass influxes refugee cannot be understood to simultaneously confirm the existence of a customary/peremptory norm of *non-refoulement*; and, at the same time, confirm a customary norm of cooperation on which *non-refoulement* /temporary refuge is contingent – clearly this would result in a circularity fallacy. By way of illustration, it is perhaps helpful to imagine *non-refoulement*



and cooperation on a sliding scale. The more *non-refoulement* appears as pre-emptory, the more that the normativity of co-operation declines, and vice-versa.

However, it is insufficient to, on the one hand, accept state practice and the evolution of refugee law in relation to the principle of *non-refoulement* and then, on the other hand, fail to extend this understanding to cooperation; this mode of analysis is clearly problematic because each of the given objects is continuous and of the same normative value. Clearly, we cannot simply disregard this fact and then seek the sanctuary of a *dogmatic position*.

## General Principles of Law and Cooperation

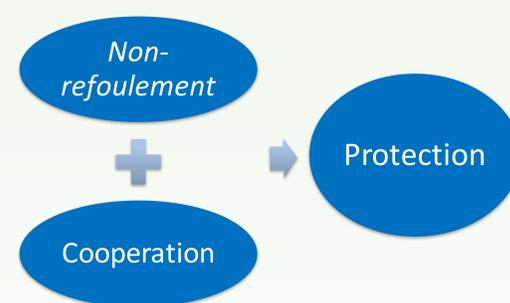
A restrictive textual approach to treaty interpretation and, more generally, an atomised approach to international law have led towards the conclusion that co-operation, when conceived within the framework of refugee law, is merely a moral or political duty.

International law, however, derives from a number of sources; for this reason, the fact that the 1951 convention does not include an explicit provision which articulates an obligation of co-operation does not inevitably lead us towards the conclusion that it is absent from international refugee law. Articles 26 and 31 of the (VCLT) both of which require states to perform and interpret their international treaties obligation in good faith are essential in further reiterating and underlining this point.

The references to co-operation in the 1951 Convention preamble and Recommendation D of the final act were not accidental or coincidental; rather they constitute part of a deliberate attempt to demonstrate how states should respond to mass refugee influxes.

## Cooperation as a Procedural Obligation of International Refugee Law

The ambiguous relationship between *non-refoulement* and cooperation can be critically evaluated using the procedural-substantive law distinction. States cooperate with the ultimate intention of protecting the rights of refugees. In this instance, co-operation appears as a procedural rule which is necessary to the effective application of the substantive rule of *non-refoulement* / temporary refuge.



If this ascription is accepted, it is relatively straightforward to understand how, in some instances, the breach of co-operation may result in the breach of *non-refoulement*; however, it is equally apparent that this would not undermine the normative value of *non-refoulement* as a substantive rule. To this extent, the application of the substantive-procedural rule enables us to simultaneously engage on a conceptual, theoretical and practical level of analysis. As long as *non-refoulement* is accepted as a substantive norm of *jus cogens* character, it follows that the interlinked procedural obligation of cooperation might be framed as obligation *erga omnes* in some instances.

### Resources

Guy S. Goodwin-Gill 'Non-refoulement, Temporary Refuge, and the "New" Asylum Seekers' in David James Cantor, Jean-Francois Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhof 2014).

J.-P.L. Fonteyne, *An Analysis of the Nature and function of International Solidarity in Cases of Mass Influx Refugees*, 8 Aust. YBIL 162 1978-1980.

Deborah Perllus, Joan F. Hartman, *Temporary Refuge: The emergence of Customary Norm*, 26 Va. J. Int'l . 19.