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## Non-signatory States and the international refugee regime

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**Many of the world's top refugee-hosting countries have not acceded to the 1951 Refugee Convention and yet they engage with the international refugee regime in a number of ways. Not only are international refugee law norms being disseminated and adopted in these States but also non-signatory States often participate in the development of international refugee law by being present and active in global arenas for refugee protection.**

The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol form the foundation of the international refugee regime, namely the legal norms and supporting institutions that focus on the protection of refugees. The great majority of the world's nations have signed or ratified the Convention and its Protocol yet many of the world's top refugee-hosting countries have not done so: 149 UN Member States are currently party to the Convention, its 1967 Protocol or both, while 44 UN Members are not.

We find these non-signatory States mostly in the Middle East and in South and Southeast Asia. In the Middle East region, only Iran, Israel, Egypt and Yemen are party to the Convention, while States such as Iraq, Lebanon and Jordan and most States in the Gulf region are non-signatories. Important non-signatory States in South and Southeast Asia include India, Bangladesh, Pakistan, Sri Lanka, Malaysia and Indonesia. In other regions of the world, non-signatory States include Eritrea, Libya, Mongolia and Cuba. Uzbekistan is the only Commonwealth of Independent States country that is not a party to the Convention, while Guyana is the only non-signatory State in South America.

New accessions to the Convention are rare. In the first ten years of the Convention, 27 states ratified or acceded to the Convention; since 2006, however, only two States – Nauru (2011) and South Sudan (2018) – have become States Parties. The reasons for not acceding to the Convention are varied but the fact of not being a party has long been taken to mean that these States are 'exceptions' to the international refugee regime.<sup>1</sup>

This perceived 'exceptionalism' – though more recently (and rightly) challenged as a concept, including by Barbour in this FMR special feature – has notable historical roots stemming from the Convention's drafting process between 1946 and 1951. Although many of today's non-signatory States were not yet independent at the time of the Convention's drafting, States like Lebanon, Saudi Arabia, Syria, Iraq, Pakistan and India participated at various stages. Indeed, during this process, many Global South States disagreed with the proposed Convention's lack of universal applicability, and scholarship focusing on this process has long highlighted the many ways in which the process, and the resulting Convention, failed to reflect a reality beyond Europe.

The research project BEYOND ('Protection without Ratification? International Refugee Law beyond States Parties to the 1951 Refugee Convention')<sup>2</sup> aims to reconsider the impact of international refugee law by analysing the various ways in which non-signatory States relate to the international refugee regime. By examining this interplay more closely, we may in fact discover that many non-signatory States engage with the international refugee regime in a number of ways, and that the Convention plays a substantial role in some of these States.

As an introduction to this thematic feature, this article highlights firstly how UNHCR functions in non-signatory States and how international refugee law norms are being spread and used in these States, and secondly how non-signatory States participate in the development of international refugee

law by being present and active in global arenas for refugee protection.

### UNHCR and international refugee law

UNHCR has operated for decades in many non-signatory States, engaging in both international protection of and direct assistance to refugees and asylum seekers. Under UNHCR's Statute, its competence in refugee issues is universal in nature, without any geographical limitation.<sup>3</sup> As such, UNHCR's mandate permits it – with the host State's consent – to supervise refugees not only in signatory but also in non-signatory States. Indeed, in many of these States, UNHCR has a highly operational presence, often taking on responsibilities typically belonging to States, such as refugee status determination.<sup>4</sup> Central here is UNHCR's promotion and negotiation of 'protection space' for refugees, generally understood to be "...an environment sympathetic to international protection principles and enabling their implementation to the benefit of all those entitled to protection."<sup>5</sup>

One specific form of cooperation between UNHCR and non-signatory host States is the bilateral Memorandum of Understanding (MOU). By setting out the terms of cooperation and by reiterating core refugee protection principles, these MOUs can create an important link between non-signatory States and the Refugee Convention. However, there is no single approach to such agreements, and their content varies considerably.

One example is UNHCR's 1998 MOU with Jordan, discussed in the contribution by Clutterbuck and co-authors in this feature, which adopts a refugee definition similar to that of the Convention and declares Jordan's commitment to international standards of refugee protection, including the principle of *non-refoulement*. By comparison, in the case of Pakistan the substantive content of the agreement could bind the host State to observe norms and principles well beyond anything that could be derived from the Convention itself.<sup>6</sup> Sometimes, however, these agreements are far from benign and may even be a protection concern in themselves;

UNHCR's 2003 agreement with Lebanon's Directorate of General Security, for example, has been criticised in some quarters for being negotiated only with the country's security agency and, as such, for adopting the perspective of refugees as security threats.

UNHCR is often key in the creation of national spaces where State actors are 'socialised' into the international refugee law regime – that is, where such actors are drawn into accepting certain international standards, which in turn influences State behaviour. UNHCR's support for training and higher education in international refugee law is a good example of this; in India, UNHCR recently formed a research and advocacy initiative with academics working on refugee issues, and in Saudi Arabia it has collaborated with an academic institution in the dissemination of international refugee law to law enforcement officials from the region. In the same vein, UNHCR regularly co-organises courses on international refugee law at the International Institute of Humanitarian Law in San Remo, Italy, sponsoring the attendance of judges, government officials and civil society actors.

But socialisation can also occur in other, different spaces. In some States, UNHCR – often in collaboration with local and regional civil society organisations – also mobilises support for, and participates actively in, domestic legal reform. In Pakistan, UNHCR has argued that such legislative change "could be a first step toward getting Pakistan to sign the 1951 UN Convention on refugees".<sup>7</sup> In Indonesia, UNHCR has similarly supported the development of a national protection framework to assist the government in managing the presence of persons seeking asylum.

Finally, as the articles on Bangladesh and Hong Kong in this feature strongly indicate, domestic courts in non-signatory States also occasionally engage with international refugee law norms and principles. The Convention was directly referenced by the Bangladeshi Supreme Court in cases relating to unlawful expulsion orders against Rohingya refugees, while in Hong Kong a series of court cases led

July 2021

[www.fmreview.org/issue67](http://www.fmreview.org/issue67)

the Hong Kong government to launch its mechanism for determining claims for protection against *non-refoulement* with reference to Article 33 of the Convention.

### The development of international refugee law

Global forums on refugee protection are key spaces in which signatory and non-signatory States alike not only are socialised into the international refugee law regime but also where these same States reaffirm, and help develop, key concepts of international refugee law. UNHCR's Executive Committee (ExCom) was established in 1958 and today comprises 107 States, many of which have not acceded to the Refugee Convention. By participating in this forum, however, non-signatory States actively contribute to developing the substance of refugee law in drafting the annual ExCom conclusions. These conclusions, adopted in plenary by consensus, are formally non-binding but may nevertheless be highly relevant in their expression of an international consensus on legal issues concerning refugees.

In addition to the work in UNHCR's ExCom, non-signatory States also participate in other high-level meetings and forums. On the occasion of the 60th anniversary of the Convention in 2011, a Ministerial Communiqué was adopted in which representatives of signatory and non-signatory States alike reaffirmed:

*...that the 1951 Convention relating to the Status of Refugees and its 1967 Protocol are the foundation of the international refugee protection regime and have enduring value and relevance in the twenty-first century. We recognize the importance of respecting and upholding the principles and values that underlie these instruments, including the core principle of non-refoulement, and where applicable, will consider acceding to these instruments and/or removing reservations.<sup>8</sup>*

More recently, non-signatory States have participated in the negotiations leading to the adoption of the 2016 New York Declaration for Refugees and Migrants and the Global Compact on Refugees (GCR) in December

2018, and also participated in the first Global Refugee Forum in late 2019 where pledges were made to put the GCR into action. (The Forum was in fact co-convened by Pakistan.) In this FMR special feature, the article by Thanawattho and co-authors details the engagement of the Thai government in these processes, and how Thai civil society has followed up locally on the pledges made by the government at the international level.

Of these processes perhaps the most noteworthy is the GCR, which was adopted by 181 Member States, many of whom were non-signatory States. While it takes the Convention as its starting point and reaffirms many of the Convention's core principles, in many respects the GCR also goes beyond the legal commitments articulated in the 1951 Refugee Convention. One section of the GCR also explicitly acknowledges the contributions made by non-signatory States, with a call for these States to consider accession to the Convention.

What these examples arguably demonstrate is that the division between 'outsiders' and 'insiders' is often blurred when it comes to participation of non-signatory States in formal global arenas. By their participation at the international level, non-signatory States arguably help create soft law obligations that build on the hard law (the Convention) that these States have formally opted out of. An additional but complex and greatly overlooked aspect warranting further consideration is explored by Cole in her contribution in this feature: how non-signatory States engage in the international refugee regime by being important donor States, thereby potentially influencing the direction of UNHCR's operations and, through this, the provision of international protection and assistance.

### Conclusion

While there is a widespread and entrenched assumption that refugee protection is superior in signatory States when compared with non-signatories, there are no systematic and comparative studies supporting an argument that accession to the 1951 Refugee Convention automatically means better

protection. Rather, in many signatory and non-signatory States alike, limiting refugees' access to asylum has arguably become an increasingly common political aim, and in some cases protection may even be better in non-signatory States than in signatory States. We need to challenge the current emphasis only on signatory States in discussions of the international refugee regime. International refugee law also 'happens' in non-signatory States, and non-signatory States also 'do' international refugee law.

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