Non-signatory States and the international refugee regime

Maja Janmyr

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 Refugee 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.¹

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’)² 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.³ 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.⁴ 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.”⁵

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.⁶ 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”.⁷ 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
referred to 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
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.8

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
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Beyond Asian exceptionalism: refugee protection in non-signatory States

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Few Asian States have acceded to the Refugee Convention yet they may have laws, policies, practices or systems that can be of use in responding to refugees’ protection needs.

The number of refugees in the Asia Pacific is consistently high, with nearly 4.2 million cited in UNHCR’s most recent Global Trends.¹ Statistics show only part of the picture, however, because of large numbers of unregistered populations and because of unreliable reporting by States. Despite the numbers and magnitude of needs, Asia has few States Parties to the 1951 Refugee Convention and even fewer that have passed specific legislation on refugee protection. Where refugee law exists, it is often not implemented, or is characterised by unfettered discretion in how it is applied and by a lack of transparency.

This context is well documented by practitioners and academics alike. Much of the scholarly literature recognises a lack of Asian State participation in international refugee protection and human rights regimes – what some refer to as ‘Asian exceptionalism’. Reasons cited for this include the Euro-centric origins of the Convention, political expediency, the non-interference principle of ASEAN (Association of Southeast Asian Nations), and economic and security-related factors.

There is also regional scholarship, however, that challenges the notion of Asian exceptionalism, attempting to find a different starting point for the analysis. Third World Approaches to International Law (TWAIL)² scholars highlight the impact that centuries of colonialism have had and continue to have for the countries of Asia. BS Chimni argues that Asian States should refuse to accede to the Refugee Convention as long as there is a “strategy of containment which seeks to shift the burden of caring for refugees to the poor world.”³ He suggests that the focus should first be on national systems before seeking a regional declaration, and calls for careful study of the needs and experiences of the countries in the region.

If we look more closely at any specific context in Asia, we can see that States have often committed to various legal obligations under international law, and often have human rights provisions in domestic law. In practice, they may have laws, policies,