

MODULE 11.

RIGHT TO ASYLUM

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Learning outcomes

What is the right to asylum? How has it evolved from its inception to become a part of contemporary legal philosophy? How is it currently applied, and where is it headed? Are the countries of the Global North limiting this right by evading their legal obligations? Could this right be extended to victims of persecution on grounds of their gender identity or sexual orientation, or because of the consequences of climate change? In this capsule, we will learn how and why this right came into being, what form it has taken since the Second World War, the reasons behind recent developments affecting it, what forms it takes around the world, and how it has found specific expressions in a range of different historical and political contexts and periods.



KNOWLEDGE

- Gain knowledge of the right to asylum, its philosophical and political foundations, its historical origins and the ways in which it is applied.
- Learn about its recent evolution in relation to the European obsession with 'migration control', and its legal and personal consequences.



SKILLS

- Analyse the evolution of the right to asylum and political and governmental approaches to it. Analyse the impact of changes in approaches to the right to asylum for refugees.
- Apply a critical, anticolonial and intersectional perspective in analysis of the evolution and implementation of the right to asylum.



ATTITUDES

- Engage with and develop critical thinking towards the philosophical and political construction of the right to asylum and its practical application.
- Encourage commitment to the defence of human rights and in particular the right to asylum, upholding them in the face of authoritarian and xenophobic trends, and working to offset the causes that push people to seek refuge and asylum.

Contextualisation

To understand what exactly the right to asylum is, when and how it arose, and to contextualise its evolution and understand its implications, we must look at its origins, the historical and political context in which it came to be formalised, the evolution of nation states' approaches to it, how it is perceived politically and socially, and how it is applied in practice.

THE ORIGINS OF ASYLUM

When we think of the right to asylum, the post-World War II period immediately comes to mind, when the genocide of Jews, Gypsies, homosexuals, political opponents and other groups persecuted by Adolf Hitler's Nazi regime in Germany, as well as the large number of refugees and displaced people throughout Europe, led to the development of an international legal framework for protection under the auspices of the United Nations. However, the right to asylum did not emerge in modern times, nor is it exclusive to the Western world. History shows that institutions that protected the right to asylum can be found in ancient Egypt, ancient Greece and imperial Rome. There are even traces of it in the Old Testament, albeit with different nuances.

In ancient Greek, the word ἄσυλον (asulon, which translates as 'sanctuary') alluded to a legal precept by which people persecuted by their rulers were afforded the protection of the sovereign authority of the place in which they sought refuge. Likewise, places of worship of different religions acted as 'refuge' spaces from civil authorities.

This right was and continues to be present in other regions of the world, including in pre-colonial African societies: "Sacred sites and their surroundings, with a magical-religious character, soon become recognized as places of asylum" (Diallo, 1976).

The right to asylum today

HISTORICAL CONTEXT AND PHILOSOPHICAL AND POLITICAL BACKGROUND

¹ See, among others, the article published by Hanna Arendt in 1943 in *The Menorah Journal* entitled "We Refugees".

Following the Second World War, the United Nations took the initiative, driven by the philosophical and social attitudes of the time¹.

The 1948 UN Universal Declaration of Human Rights specifies that "everyone has the right to seek and enjoy asylum from persecution in other countries". The United Nations High Commissioner for Refugees (UNHCR) was founded in Geneva on 14 December 1950 to protect and support refugees and assist them in their return or resettlement.

However, it was not until 28 July 1951 when, at a special conference in Geneva, the UN ratified the Convention Relating to the Status of Refugees. This Convention gave form to the legal obligations which signatory countries are obliged to uphold under international law. It defines who a refugee is, the rules governing to whom the right to asylum is to be granted and the responsibilities of States, as well as which people are excluded from consideration (war criminals, for example). The scope of the right to asylum, which was initially limited to protecting European refugees from persecution prior to 1951, was extended in 1967, when the UN signed a Protocol on the Status of Refugees that removed existing geographical and temporal limitations.

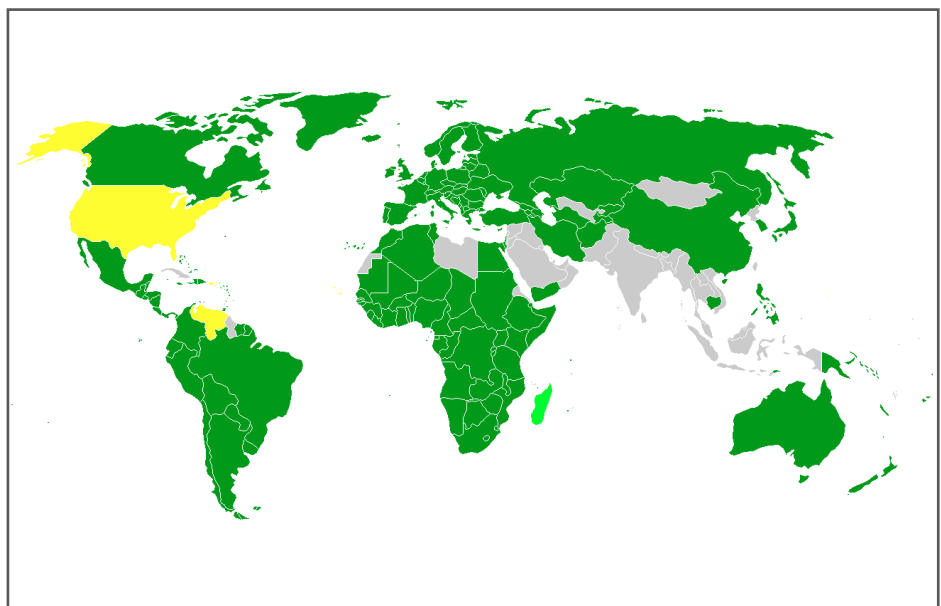


Image 11.1.
Signatory countries to the Convention Relating to the Status of Refugees.
Source: Wikipedia / Creative Commons

CONTENT AND DEFINITIONS

Article 1 of the 1951 Convention, as amended by the 1967 Protocol, provides the following definition of a refugee as a person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

DEFINITIONS PROVIDED BY REGIONAL INTERNATIONAL ORGANISATIONS

Taking this definition as a starting point, other international organisations have created broader rights to asylum. In 1969, the Organization of African Unity (OAU) – in an attempt to broaden the legitimate grounds for asylum to include escaping from colonial domination and anti-colonial warfare – approved a regional treaty expanding the definition of refugee to include any person who:

"...through aggression, occupation, foreign domination, or events gravely disturbing public order in part, or in all of his country of origin, or the country of which he has nationality, is obliged to leave his usual place of residence to seek refuge outside this country." (OAU 1969, Article 1)

Similarly, in 1984, ten Latin American countries adopted the "Cartagena Declaration" which added further protection for refugees in the region. According to the Declaration, "refugees" are:

people who have fled from their country because their lives, safety or liberty have been threatened by generalised violence, foreign aggression, internal conflicts, and massive violations of human rights or other circumstances that have seriously disturbed public order (Third Conclusion).

Consideration is also given to "diplomatic asylum" in Latin American jurisprudence. This can be defined as the protection that the State temporarily grants within the premises of a diplomatic mission to people of other nationalities who urgently seek protection from persecution for political or ideological reasons, as in the case of Julien Assange at the Ecuadorian Embassy in London.

Criticism of the scope of the right to asylum

In recent decades, the definition of the right to asylum, its nature and political use, and the lack of protection it affords to various categories of people have been subject to broad criticism. At the same time, grassroots campaigners have been critical of its practical application. This criticism has focused on its limited practical application by authorities on the one hand, and the negative effects of repressive migration policies on the other.

THE DISTINCTION BETWEEN 'REAL' AND 'FAKE' REFUGEES

In Europe, following the 1973-74 oil crisis, Central European countries shut down their formal channels for the recruitment of foreign workers. When events such as these occur, notions begin to spread across different countries that the right to asylum is routinely abused. This gives rise to a dichotomy between "genuine" refugees and others; that is, between those who are considered as deserving of refuge and those who are not. This has led to the distinction between political refugees and economic migrants which we see today, as well as the hierarchy that prioritises the welcoming of refugees to the detriment of other immigrants.

Paradoxically, this leads to a blurred approach in terms of political action, with the protection of refugees subordinated to the imperative of controlling immigration (Moreno Lax, 2008).

THE POLITICAL NATURE OF THE RIGHT TO ASYLUM

This wholly artificial distinction has become widespread, and is now completely normalised in political discourse. Karen Akoka (2011 and 2020) explains, however, that both the Convention Relating to the Status of the Refugee, and the status of "refugee" itself, are constructions of a very specific political and historical nature. There is no 'natural' refugee, nor is the Convention a neutral text of objective application, even when the institutions charged with doing so are truly independent. She additionally points out that any definition of 'refugee' based only on persecution could be seen as a symbol of the victory of Western perspectives regarding the right to asylum over those of communist states more disposed to recognising socio-economic injustices (i.e. the protection of economic and social rights) as a legitimate cause for granting asylum.

Akoka (2020) shows that these definitions tell us more about the states that observe them than about the individuals they are supposed to cover. The category of refugee is, in fact, subject to constant change over time, as power relations and political priorities change.

THE POLITICAL USE OF THE RIGHT TO ASYLUM

During the Cold War, the right to asylum was used on both sides as a political and diplomatic tool to support dissent and destabilise the opposing bloc. On the one hand, the US readily recognised the right to asylum of those fleeing 'enemy' countries and regimes such as Vietnam, Korea and Cuba: that is, those escaping from the communist bloc. On the other, the USSR – as well as some of its satellite countries – welcomed dissidents from the capitalist bloc alongside anti-colonial fighters they saw as kindred spirits.

Although the Cold War could be considered to have ended a long time ago, to this day many countries continue to use the right to asylum as a political and diplomatic bargaining chip to obtain advantages in international relations.

LACK OF PROTECTION ON GROUNDS OF GENDER IDENTITY AND SEXUAL ORIENTATION

The need to update the right to asylum to meet contemporary social and political circumstances has been raised across the board. At present, the majority of those who seek asylum do so more as a consequence of overarching ethnic conflicts than as a result of any individual threat of persecution.

Another of the most frequent criticisms points to the lack of consideration afforded to persecution on grounds of sexual orientation and gender identity as a legitimate cause for seeking and granting asylum. Definitions have been expanded modestly in recent times to incorporate a gender perspective and the experience of women, including certain cases of gender-based persecution, in particular female genital mutilation (Merino Sancho, 2008). Nevertheless, existing interpretative guidelines are non-binding, and there is no express recognition of gender or sexual identity as a motive for persecution in the general definition of the causes which enable individuals to avail of this right (Díaz Lafuente, 2014).

TOWARDS A RIGHT TO REFUGE FOR CLIMATIC REASONS?

Scientific evidence indicates that, each day, more and more vulnerable people are forcibly displaced due to the impacts of climate change. The climate crisis has caused and will continue to cause displacement of people to different countries around the world which, although difficult to predict in quantitative terms, will doubtless be significant (Pajares, 2017).

Organisations use the term 'climate refugees' or 'environmental refugees' to stir debate and encourage change, even though, at present, the concept does not exist in international refugee law. Offering such protection is posited as a matter of equality, fairness and justice in the face of a fundamental threat to human rights, as well as a response to the fact that climate change disproportionately affects the poorest people who have contributed the least to global warming.

Recent developments in the application of the right to asylum

LIMITATIONS ON SEEKING AND GRANTING ASYLUM IN THE GLOBAL NORTH

Jerôme Valluy (2009) explains that the right to asylum – the human right to seek refuge abroad – has gradually disappeared and been replaced by ‘asylum rights’ – the jurisprudence which covers asylum as a whole – as part of a suppression of the right to freedom of movement. Thus, the right to asylum as an exception (the exceptional authorisation of entry and residence, restricted and subject to States' sovereignty) replaces the axiological right to asylum (the protection of refugees who, it is supposed, are able to freely enter the country of refuge).

Karen Akoka (2011) considers that asylum today serves less to protect a group of individuals who fit, to a greater or lesser extent, with Western liberal conceptions of refugees than it does to use them as a humanist counterweight in legitimising increasingly restrictive immigration policy. According to Iker Barbero (2021), contemporary approaches to border control, through the instruments of containment/confinement they have created, condition the asylum process by seeking to accelerate it, with governments prioritising immediate deportation, deterrence or transfer to other European countries.

THE DUBLIN CONVENTION

Within Europe, changes in the right to asylum depend, in part, on the institutions of the European Union and the Common European Asylum System (CEAS). On 15 June 1990, EU countries signed the Dublin Convention to ‘streamline’ asylum claims. In other words, this meant determining which State holds the responsibility for managing the asylum claims: the first country to which a claimant arrives within EU borders². As such, it represents an attempt to prevent refugees from seeking asylum in the countries where the system works best, or making concurrent claims in different European countries. This is, de facto, an outsourcing of asylum management within the EU to its peripheries.

² In 2003, this was replaced by Regulation 343/2003, although in legal jargon this regulation continues to be referred to as “Dublin II”. On paper, the Dublin Regulation expressly prohibits transfers of asylum seekers to Member States where they are at risk of “inhuman or degrading treatment” and establishes a hierarchy between the applicable criteria for determining the Member State responsible for examining the asylum application (family considerations, issuance of a recent visa or residence permit in a Member State, and the regular or irregular nature of entry into the European Union).

THE OUTSOURCING OF MIGRATION CONTROL AND THE CONSEQUENCES FOR THE RIGHT TO ASYLUM

The outsourcing of migration control – that is, the delegation of control and repression of the movement of people to non-European countries – also has consequences for the right to asylum in terms of both application and grant (Gabrielli, 2017). This results in a de facto outsourcing of asylum, insofar as restrictions are applied indiscriminately towards all people on the move. Given that there are no safe channels to Europe for refugees seeking asylum, they are forced to resort to 'intermediaries' to follow very costly, long and above all exceptionally violent and dangerous migratory routes, during the course of which they are subject to mistreatment, exploitation, racism and violence (Gabrielli, 2014; Jones, 2017).

As for Spain, consideration must also be made of the cases concerning the UNHCR offices opened on the Spanish side of the Ceuta and Melilla borders during the late 2010s. Since their opening, black people have been unable to access them to request asylum, with Morocco – in collusion with Spanish authorities – ensuring that they are unable to physically do so.

THE "REFUGEE CRISIS" OF 2015 AS A SHIFT TOWARDS FURTHER LIMITATIONS ON THE RIGHT TO ASYLUM

The so-called "Syrian refugee crisis" of 2015 – which was, in fact, an accommodation crisis in Europe – represents a further shift towards the limiting of the right to asylum (Garcés Mascareñas, 2022). A good example is the EU-Turkey "shame" agreement (March 18 2016) to deport Syrian asylum seekers from Greece to Turkey in exchange for financial and diplomatic aid, while in parallel discussions and reproaches continued between European countries concerning the reallocation of a few thousand refugees.

Xavier De Lucas (2016) considers this to represent the denaturalisation of the right to asylum and the crossing of the red line of the principle of non-refoulement, that is, the prohibition of deporting a foreign person to a country where they will not be safe.

VIOLATION OF THE PRINCIPLE OF NON-REFOULEMENT

The violation of the principle of non-refoulement is one of the most important shifts in the right to asylum (Abrisketa, 2017). In Spain, 'express deportations' from Ceuta and Melilla and deportations from the Canary Islands stand as clear examples of how repressive policies designed to impede freedom of movement also affect how the right to asylum is upheld. Such deportations are often fast-tracked and carried out collectively, leaving individuals unable to request asylum. The right to request asylum is similarly constricted in the case of rescues at sea ³, both those carried out by European and neighbouring countries.

³ Italy is one such case, having been found guilty by the European Court of Human Rights of violating this principle in the case of Hirsi Jamaa and Others v. Italy (application no. 27765/09). In the Aegean Sea, the Border Forensic organisation has recorded 16 cases of 'drift-backs' into Turkish waters (expulsion at sea by repelling or towing boats) by Greek authorities and 'push-backs' (expulsion on land) across the Evros River.

DIRECT OUTSOURCING OF ASYLUM

Since the 2000s, a global trend towards the direct outsourcing of asylum has emerged. Tony Blair (in 2003) and Otto Schily (in 2004) both proposed the creation of EU camps in North Africa where refugees could apply for asylum (Frelick et al., 2016). Further examples include the announcements in 2023 by Italy's post-fascist Prime Minister Giorgia Meloni and the Conservative Prime Minister Rishi Sunak in the United Kingdom, in which they promised to outsource asylum management to Albania and Rwanda respectively, copying the discredited Australian model. This model involved the relocation of asylum management to neighbouring countries, in exchange for annual payment. In practice, this led to the infamous camps in Nauru and on Manus Island in Papua New Guinea, where numerous deaths and suicides were reported.

RIGHT TO ASYLUM AND RACIAL PREJUDICE: WHITE "REFUGEES" VS. NON-WHITE "IMMIGRANTS"

The arrival of large numbers of people fleeing Ukraine since February 2022 and, above all, the way in which this has been managed, has surprised many observers due to the radical difference in approach in comparison with flight from other places, such as Syria. On 4 March 2022, the EU introduced the Temporary Protection Directive, which had initially been adopted in 2001 following armed conflicts in the Western Balkans but had never been implemented. In 2015 and 2016, when Syrian refugees arrived, the political and institutional response by European countries bordered on the unethical. It is worth remembering the widespread alarm surrounding an alleged "invasion" of migrants and refugees, as well as the enormous difficulties which arose during negotiations of very modest refugee resettlement quotas.

Pasetti (2023) considers that "the right to asylum does not apply to everyone equally":

The response in accommodating Ukrainian refugees represents an exception rooted in a militaristic mentality of "friend-enemy". Conversely, the abandonment which "other" refugees have faced resides in a view of migration as "us vs. the rest" which, for years, has underpinned European migration governance. Both of these outlooks call into question the universality of the right to asylum.

Others consider that this highly differentiated treatment of refugees in Europe is also conditioned by refugees' skin colour or religion, and serves as a screen for othering, Islamophobia and racial prejudice (Esposito, 2022). Thus, while the EU provided temporary protection to 4.2 million people during the initial months of 2022, very little complaint was heard. "Why such a difference?", asks Blanca Garcés (2022). A fairly clear answer comes from the then-Bulgarian Prime Minister Kiril Petkov: "These are not the refugees we are used to... These people are Europeans... These people are intelligent, they are educated people... This is not the refugee wave we have been used to, people we were not sure about their identity, people with unclear pasts, who could have been even terrorists."(Esposito, 2022).

Asylum and reception system and procedures in Spain and Catalonia

A COMPLEX SYSTEM IN PRACTICE

There are a number of ways in which protection is provided within Spain to people at risk. According to CEAR, these can be separated into three overall procedures:

Refugee status

"This is a form of protection granted to those who can be considered refugees, that is, those with a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinions, belonging to a certain social group, gender or sexual orientation." (CEAR website).

The right to subsidiary protection

is provided to those who, without meeting the requirements to be recognised as refugees, have well-founded reasons to believe that, should they return to their country of origin, they would face a genuine risk of suffering serious harm, death, torture, inhumane treatment, etc.

International protection

is a term that encompasses both refugee status and subsidiary protection. It is often confused with the term refugee status, but it should be noted that international protection is broader.

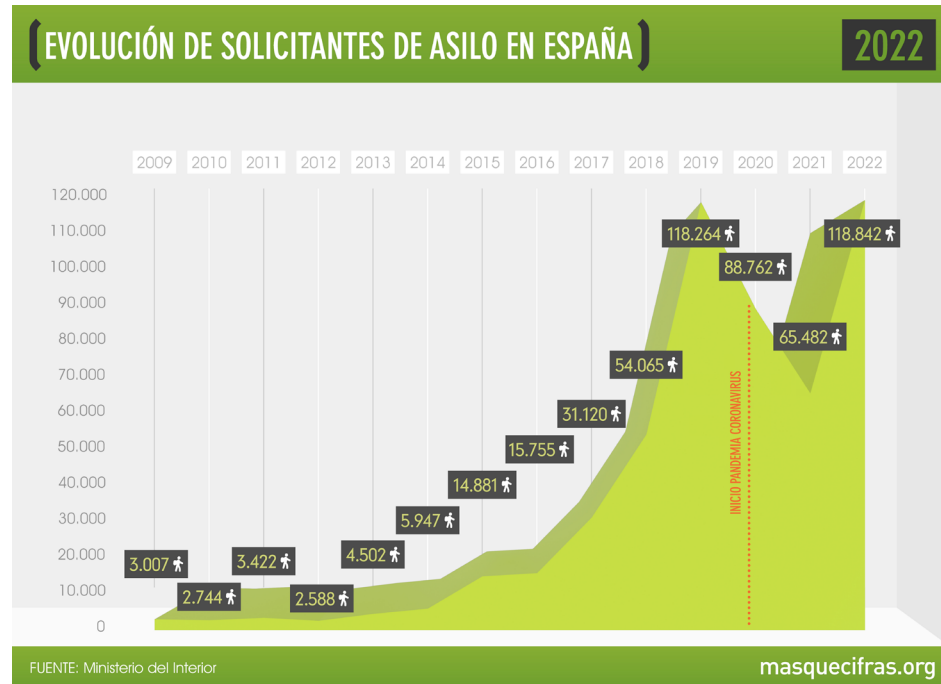
Humanitarian reasons

involve the granting of a temporary residence permit in certain cases, such as to asylum claimants whose application has been denied by the Interministerial Asylum and Refugee Committee (CIAR, in Spanish).

INFORMATION ON THE RIGHT TO ASYLUM, RECEPTION OF REFUGEES AND LIMITATIONS

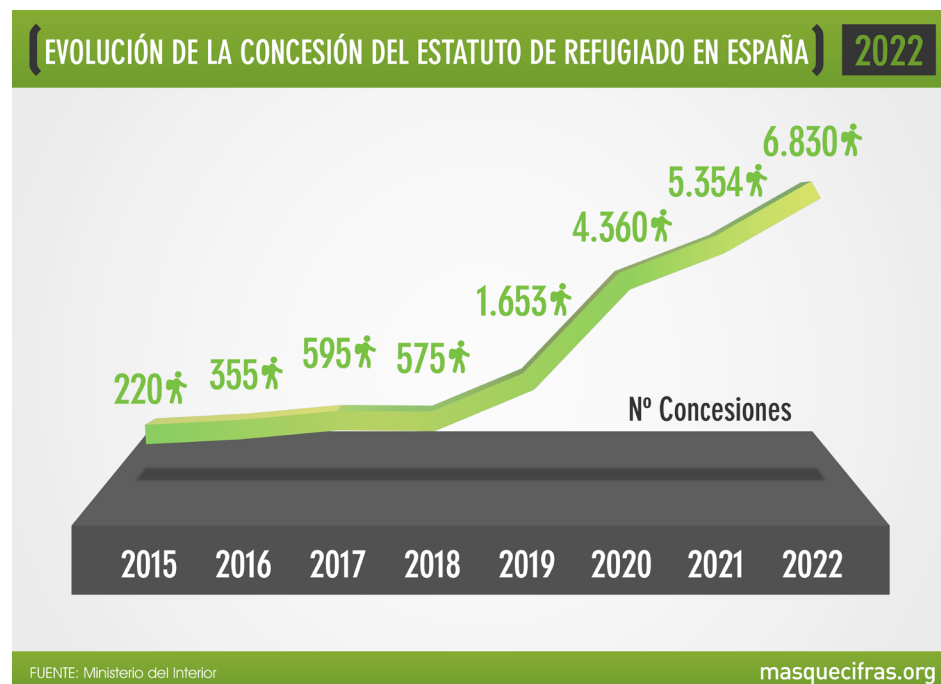
To conclude, we will look at how the right to asylum is applied, and the reception provided for refugees. Claims for asylum in Spain have been steadily increasing since 2009 (Table 1).

Table 11.1.
Evolution of asylum claims in Spain.
Source: CEAR.



Despite this increase, the number of applications approved, far from growing at the same rate, has lagged notably behind the number made (Table 2).

Table 11.2.
Change in refugee status granted in Spain – 2015-2022.
Source: CEAR.



Different forms of protection are available to other types of claimants. The partial data for 2022 (Table 3) shows that 7.85% obtained refugee status, 8.51% subsidiary protection, 24% protection for humanitarian reasons, and 59.5% had their claim rejected.

Table 11.3.
Results of applications for asylum in Spain - 2022.
Source: [CEAR](#).



Despite political and media interest in Africa, the Middle East and Asia, the majority of applications for asylum are in fact made by nationals of Latin American countries (Table 4). In addition, the outcome of these applications varies significantly depending on the country of origin (Table 5).

Table 11.4.
Origin of asylum claimants in Spain - 2022.
Source: [CEAR](#).



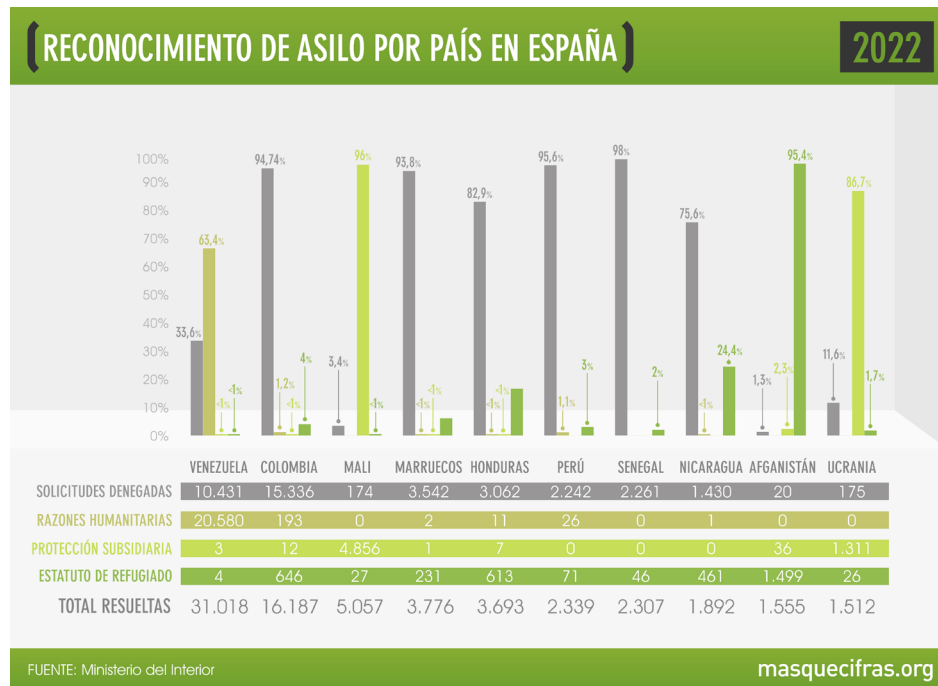


Table 11.5.
Asylum application approval rate by country of origin.
Source: [CEAR](#).

Lastly, it should be noted that the reception system in Spain has not developed proportionally to meet the increase in applications. Indeed, it has been under-resourced and on occasion completely overwhelmed, in spite of the delegation of certain responsibilities to NGOs. Garcés Mascareñas and Ribera Almandoz (2020) provide clear evidence of the ways in which refugees and asylum seekers are left destitute and routinely find themselves homeless and even sleeping on the street.



SELF-LEARNING ACTIVITY

1. You can learn about the hardships faced by people fleeing life-threatening persecution and seeking refuge in the Global North and Europe.

Start by consulting an interactive map which shows where refugees are in the world.

— **Interactive map of refugees around the world.** [The Refugee Project](#).

You can continue by looking at some more of the many interactive resources available:

— BBC. **Syrian Journey: Choose your own escape route.** [Interactive resource](#).

— RTVE. **La ruta de los refugiados.** [Interactive map](#).

— The Guardian (9-6-2015). **The Journey: A refugee's odyssey from Syria to Sweden.** [Interactive resource](#).

— The Guardian (14-1-2014). **The refugee challenge: can you break into Fortress Europe?** [Interactive resource](#).

— The Guardian. **Threads: A refugee's story in words and pictures.**

2. Pick a news item that tells the story of one or more refugees. Do you think that refugees and migrants are treated differently because of their skin colour, religion, geographical origin, social class or gender? Do you see any prejudice, either explicitly or implicitly?

By influencing media coverage, [racism also affects how refugees are treated](#) (Esposito, 2022; Ibañez Sales, 2023).



WHAT CAN YOU DO ABOUT IT?

1. Get involved in your local area on issues concerning the right to asylum, refugee reception and migration policies. Share what you learn with those around you (work colleagues, fellow students, neighbours, friends and family, etc.).

— Identifying how draconian policies affect people's lives and discussing how we can bring about change in a safe and welcoming setting can enable us to speak out against and change this situation individually and collectively.

— Find out if there are any refugee and asylum support groups in your school, workplace or local area which you can get involved in.

— Demand the repeal of Spanish immigration legislation which places severe limitations on the right to asylum and embodies racist attitudes towards people from the Global South.

2. Demand that the media stop giving a platform to xenophobic and racist stereotypes in its coverage of issues related to refuge, asylum and migration. Call for equal coverage of all conflicts and those fleeing them to seek safety, regardless of their religion, nationality, geographical origin, skin colour and gender.

Media reporting on wars and conflicts often reproduces bias relating to the religion, nationality, place of origin, skin colour and gender of those affected. The deaths of civilians in Africa and the Middle East attract less media attention than the deaths of Ukrainians, driving the idea that the need to provide asylum for the latter is more pressing. Use social networks to call on the media to carry out its work without bias.

3. Speak out about the impact of arms exports from EU countries in conflicts that, in addition to causing loss of life, displace refugees.

— You can consult the interactive map "[European weapons and Refugees](#)", created by the Delàs Center for Peace Studies.

— Support grassroots campaigns and groups working on these issues.

4. Participate in grassroots initiatives and protests to defend the right to asylum and support for refugees.

— You can support and join organisations and groups which work to defend the rights of refugees and migrants and provide them with legal and material assistance on a day-to-day basis.

5. Participate in campaigns, initiatives and protests which call for asylum for those suffering persecution on grounds of gender identity and orientation.

6. Support LGBTI refugees and migrants in your local area.

— You can support and participate in local organisations working in this field ([Acathi](#)).

7. Get involved in campaigns and initiatives for the recognition of 'climate refugees'.

— For more information, watch the video "[Forced to Move: A Climate Story](#)"

— You can also consult the following [document](#) from the European Parliament which elaborates on this concept.



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 **OTHER RESOURCES OF INTEREST****Web and blogs:**

CEAR (Spanish Commission for Refugees).

The CEAR has also created the website "Más que cifras" (More Than Just Numbers), through which updated data and graphic material on the subject are provided.

CCAR (Catalan Commission for Refugees).

ACATHI is an association that supports LGBTQI+ refugees.

Statewatch monitors state activity and restrictions on civil liberties.

Human Rights Watch.

The European platform ECRE – European Council on Refugees and Exilees is an alliance between 117 NGOs from 40 European countries which lobbies European institutions.

Climate Refugees is a research and advocacy organisation calling for protection from climate change.

Public sector resources:

UNHCR. UN Refugee Agency.

Full text of the Convention relating to the Status of Refugees (1951).

Full text of the Protocol relating to the Status of Refugees (1967).

European Union Agency for Asylum (EUA).

Care Service for Immigrants, Emigrants and Refugees (SAIER), Barcelona City Council.

Barcelona Ciutat Refugi.

Ministry of the Interior (Spain) refugee and asylum portal.

Educational materials:

UNHCR, "[Teaching about Refugees](#)".

CEAR, "[Sensibilización migración y refugio](#)".

Amnesty International, "[Derechos humanos de las personas en movimiento](#)".

Unicef, "[Passaport d'humanitat- Els drets dels infants migrants i refugiats](#)".

Audiovisual resources:

"Moolaade", by Ousmane Sembene, Senegal, France, Burkina Faso, Cameroon, Morocco, Tunisia, 2004.

"We were not born refugees", by Claudio Zulian, Catalonia, 2018.

"Persepolis", by Marjane Satrapi, France/USA, 2007.

"Capernaum", by Nadine Labaki, Lebanon, 2018.

"Dheepan", by Jacques Audiard, France, 2015.

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