



THE RIGHT TO ASYLUM UNDER INTERNATIONAL LAW

THE HISTORY OF REFUGEE LAW

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Part I: The History of Refugee Law

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Timothy P. Schmalz "Angels Unaware" (2019)

Image Source: [BBC News](#)³

*"No one leaves home unless home is the mouth of a shark.
You only run for the border when you see the whole city running as well.
You have to understand, that no one puts their children in a boat,
unless the water is safer than the land.
Who would choose to spend days and nights in the stomach of a truck*

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³ The sculpture Angels Unaware by Canadian sculptor Timothy P. Schmalz depicts migrants and refugees. Unveiled in the Vatican, St Peter's Square on the occasion of the Migrant and Refugee World. The sculptor depicts 140 migrants and refugees from different times in history: from indigenous people to Jews escaping Nazi Germany to Syrians and Africans fleeing war and famine today.

unless the miles travelled meant something more than a journey.

No one chooses refugee camps or strip searches,

where your body is left aching.

I want to go home, but home is the mouth of a shark

Home is the barrel of the gun.”⁴

-Warsan Shire

Introduction

In 2018, the United Nations Refugee Agency reported a record: **74.79 million persons of concern**.⁵ This figure comprises **20,360,562 refugees** and **3,503,284 asylum seekers**.⁶ International law protects their human rights from potential threats and violations through the tenets of Refugee Law – and International Human Rights Law more in general. It protects the special rights of refugees, including the right to seek and enjoy asylum in other countries as enshrined in Article 14 of the United Nations Declaration of Human Rights.⁷

To elaborate further on Refugee Law and its principles, this paper is divided into two parts. The first aims to address the historical background of Refugee Law to create a foundational basis for understanding the right to asylum in International Law. “The Right to Asylum under International Law – Part I: The History of Refugee Law” shall dive deeper into the right to asylum, the application requirements and the various challenges asylum seekers face when exercising this right. More specifically, we shall look at the historical background of Refugee Law before looking at the distinction between refugees and migrants. Consequently, this will create a solid understanding of the main theme of this article series on gender as a protected group in the Right of Asylum series.

“The Right to Asylum under International Law – Part II: Asylum Law and Procedural Requirements” clarifies the meaning of the word asylum seeker and outlines the origin and evolution of the right to asylum, alongside the requirements to obtain refugee status.

⁴ Home, Warsan Shire, 2015, Conversations about home. Warsan Shire is a Somali British poet who advocates for immigrant and refugee rights.

⁵ UNHCR, ‘Population Statistics’ (The UN Refugee Agency) < <http://popstats.unhcr.org/en/overview> > accessed 16 May 2020.

⁶ UNHCR, ‘Population Statistics’ (The UN Refugee Agency) < <http://popstats.unhcr.org/en/overview> > accessed 16 May 2020.

⁷ Universal Declaration of Human Rights 1984, article 14 (1).

Historical Background of Refugee Law

In history, the first account of refugees can be traced back to the Biblical narrative of the Israelites fleeing from the Assyrian conquest in 740 BCE. Much later, in the 16th Century, migration was mostly due to political and religious upheavals as seen in Netherlands, France and England, which hosted the largest immigrant communities.⁸⁹ Afterwards, at the beginning of the 20th Century, the world witnessed the Armenian genocide in Turkey,¹⁰ which involved the systematic murder and expulsion of 1.5 million ethnic Armenians as carried out by the Turks of the Ottoman government between 1914 and 1917.¹¹ The displaced Armenians fled to various European countries and the United States of America (USA), which opened its borders to nearly 80,000 Armenians.¹² This was a time when humanity rallied together, and USA citizens launched a fundraising campaign.¹³ Individuals fleeing from persecution have characterized human history, which is exemplified by more recent events, such as the Islamic persecution that has led to the highest number of displaced persons from Syria, Afghanistan, South Sudan, Myanmar and Somalia in 2019.¹⁴

However, the numbers of displaced persons, refugees and asylum seekers began to increase. This can be seen in the aftermath of World War II where 7-11 million people were displaced, leading to numerous refugee camps being set up in the USA, Canada, Australia and Brazil.¹⁵ These countries opened their doors to millions of persons who were fleeing from the devastation of the war and the Nazi persecution.¹⁶ It is estimated that there were more than 11

⁸ L B Luu, 'Migration and change: Religious refugees and the London economy, 1550-1600' (1996) DC 93, 93.

⁹ Umberto Cassuto, Elia Samuele Artom, 'The Books of Kings and Chronicles Modern View' (1981) 10.

¹⁰ Though Turkey denies the existence of a Genocide and prefers to use the term 'Genocide' claims the correct term is ethnic cleansing, over 32 countries formally recognize the event as a genocide. <https://www.armenian-genocide.org/recognition_countries.html> accessed 13 May 2020.

¹¹ John Kifner, Armenian Genocide of 1915: An Overview (The New York Times)<https://archive.nytimes.com/www.nytimes.com/ref/timestopics/topics_armeniangenocide.html?mcubz=3> accessed 13 May 2020.

¹² Dominik Jj. Schaller, Jurgen Zimmerer, 'Late Ottoman Genocides: The Dissolution of the Ottoman Empire and Young Turkish Population and Extermination Policies- Introduction', Journal of Genocide Research, Volume 10, 2008.

¹³ GlobeNewswire, 'Armenian-American Community's Feeding America Fundraiser Surmounts Goals' (GlobeNewswire) <<https://www.globenewswire.com/news-release/2020/05/01/2026278/0/en/Armenian-American-Community-s-Feeding-America-Fundraiser-Surmounts-Goals.html>> accessed 13 May 2020.

¹⁴ Islamic Relief Worldwide, 'Refugees and Displaced People' (Islamic Relief Worldwide), accessed 21 June 2021.

¹⁵ JSTOR Daily, 'Europe's Displaced Persons After World War II' (2006) <<https://daily.jstor.org/europes-displaced-persons-world-war-ii/>> accessed on 13 May 2020.

¹⁶ JSTOR Daily, 'Europe's Displaced Persons After World War II' (2006) <<https://daily.jstor.org/europes-displaced-persons-world-war-ii/>> accessed on 13 May 2020.

million displaced persons of non-German origin.¹⁷ In addition, many Jews fleeing the Nazi regime were turned away only to be captured and sent to concentration camps.

Notably, although those were kinder times, countries such as the USA, Canada and Cuba turned down and sent back numerous refugees in boats to hostile territories. An instance of this is evident in the former USA Displaced Persons Act (1948), which contained details of heavy discrimination against Jewish displaced persons.¹⁸



Image source: [History](#)¹⁹

From 1933 to 1945, more than 300,000 Jews emigrated from Germany and Austria, and nearly 100,000 of those found refuge in other European countries, which were later conquered by Germany.²⁰ After World War II, there was a significant increase in the labour force of migrant recipients, such as in the United States of America where the labour force grew from 60 million to 111 million from 1948 to 1982.²¹ The percentage of international migrants compared to the

¹⁷ James Carlin, 'Significant Refugee Crises since World War II and the Response of the International Community' (1982) 1.

¹⁸ H S Truman, 'Statement by the President Upon Signing the Displaced Persons Act - June 25, 1948' (June 1948) 382-384.

¹⁹ A ship the MS St Louis arrived on the coast of Miami, USA in June 1939. The ship was carrying 937 passengers, most comprised of Jews trying to escape Nazi Germany. The USA immigration stated that the ship did not have permission to disembark. Upon return of the ship to Europe nearly a third of the passengers were murdered.

²⁰ United States Holocaust Memorial Museum, (Holocaust Encyclopaedia < <https://encyclopedia.ushmm.org/content/en/article/refugees>> accessed 14 May 2020.

²¹ CATO Institute, 'Post- World War II Migration and Lessons for Studying Liberalized Immigration' (A Nowrasteh 2014) <<https://www.cato.org/blog/post-world-war-ii-migration-lessons-studying-liberalized-immigration>> accessed 21 June 2021.

global population has changed only slightly in the 23-year period, from 2.9 per cent in 1990 to 3.2 per cent in 2013.²² Between 1990 and 2013, the international migrant number has increased more than twice as fast in countries pertaining to more developed regions (by 53 million), compared to those countries located in less developed regions (by 24 million).²³

The current status of refugees is unimaginable. Millions of displaced people cross the high sea and hostile borders to seek liberty and safety. In June 2020, the United Nations High Commission for Refugees (UNHCR) estimated a little under 1% of the earth's population is either an asylum-seeker, internally displaced or a refugee.²⁴ One reason for this is long-term conflicts such as the ones in Afghanistan, Algeria and South Sudan, which have greatly contributed to the refugee crisis because of Holocaust-like persecution of ethnic minorities. For one, in 1994 the news of the Rwandan genocide was announced, in which nearly 1 million Tutsi were killed.²⁵ As history is known to repeat itself, the world's population stood by as injustice was committed, not forgetting the situation in Myanmar, where it is estimated that around 1.3 million Rohingya refugees have fled causing the Rohingya Refugee Crisis.²⁶

Today, the world faces the largest humanitarian crisis since World War II.²⁷ That is, nearly 70.8 million people were displaced at the end of 2018 with developing countries being the most affected.²⁸

²² United Nations Department of Economic and Social Affairs, 'Trends in International Migration' (United Nations, 2013

<https://www.un.org/en/development/desa/population/publications/pdf/policy/InternationalMigrationPolicies2013/Report%20PDFs/g_Ch_1.pdf > accessed 21 June 2021.

²³ United Nations Department of Economic and Social Affairs, 'Trends in International Migration' (United Nations, 2013

<https://www.un.org/en/development/desa/population/publications/pdf/policy/InternationalMigrationPolicies2013/Report%20PDFs/g_Ch_1.pdf > accessed 21 June 2021.

²⁴ The UN Refugee Agency, '1 percent of humanity displaced: UNHCR Global Trends report' (The UN Refugee Agency 2020) <<https://www.unhcr.org/news/press/2020/6/5ee9db2e4/1-cent-humanity-displaced-unhcr-global-trends-report.html>> accessed 21 December 2020.

²⁵ BBC, 'Rwandan genocide:100 days of slaughter'(BBC Africa, 4 April 2019) <<https://www.bbc.com/news/world-africa-26875506> > accessed 14 May 2020.

²⁶ OCHA, Rohingya Refugee Crisis (OCHA 2019) < <https://www.unocha.org/rohingya-refugee-crisis>> accessed 4 May 2020.

²⁷ BBC, 'UN: World facing greatest humanitarian crisis since 1945' (BBC News, 11 March 2017) <<https://www.bbc.com/news/world-africa-39238808>> accessed 14 May 2020.

²⁸ UNHCR, 'Figures at a Glance (2019) <<https://www.unhcr.org/figures-at-a-glance.html>>accessed 14 May 2020.

Consider this: *The largest humanitarian crisis is in Yemen- with 24.1 million people in need and 1.2 million people internally displaced. Into the bargain, Yemen still hosts the world's second-largest Somali Refugee population.*²⁹

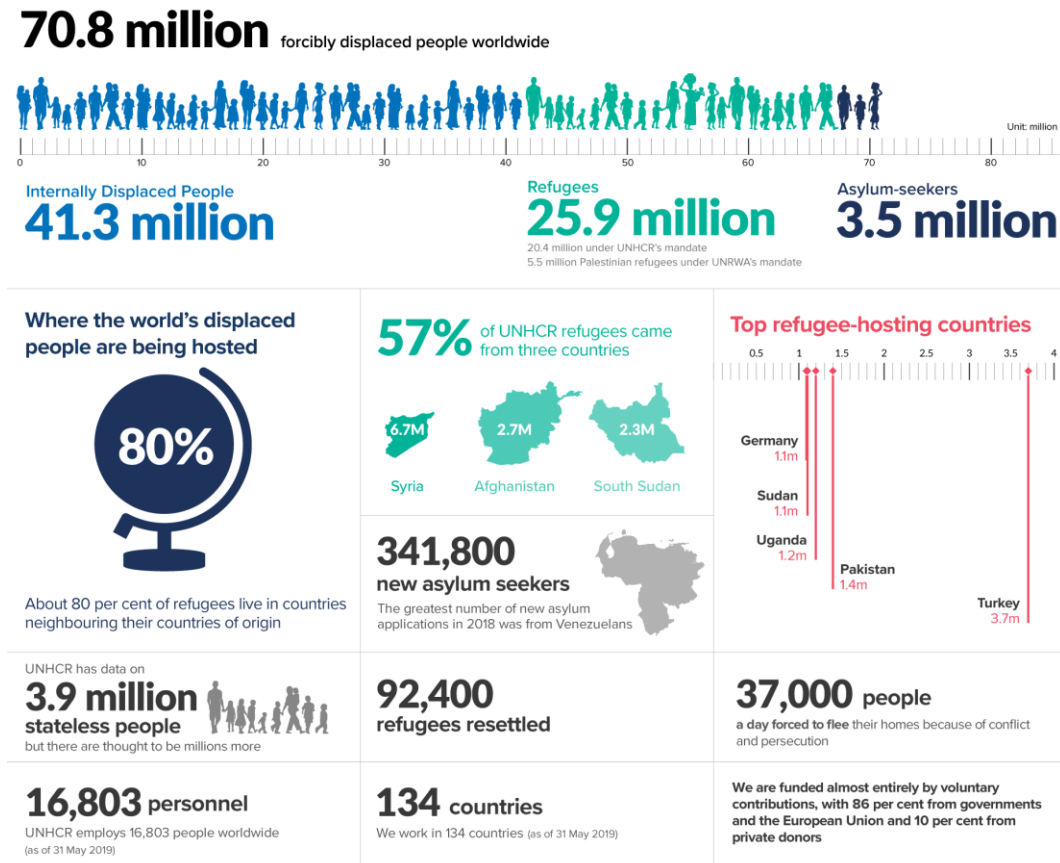


Image source: [UNHCR](https://www.unhcr.org/)

Since 1921, when the Norwegian Fridtjof Nansen was appointed as the High Commissioner for Refugees of the League of Nations,³⁰ states have been granting protection and special status to individuals fleeing from war, persecution and climate-related disasters. Many countries are refugee-hosting nations. As a result, state cooperation has led to the joint management of refugee camps with the help of **refugee assistance agencies**. Such camps were designed to be temporary facilities but have grown to fully-fledged cities.

²⁹ USA for UNHCR, 'Yemen Humanitarian Crisis' (UNHCR,2020) < [https:// www.unrefugees.org/emergencies/yemen/](https://www.unrefugees.org/emergencies/yemen/)>accessed 14 May 2020.

³⁰ P Weis, 'The Development of Refugee Law' (1982) MJIL 27, 27.

Did you know: *The largest refugee camps in the world are Kakuma, Dadaab and Ifo in Kenya, Kutupalong in Bangladesh, Zaatari in Jordan, Panian in Pakistan, Yida in South Sudan, Mishamo and Katumba in Tanzania.*³¹



Image Source: [Standard News Kenya](#)

The Definition of the Term “Refugee”

The term *refugee* derives from the French term *refuge* meaning hiding place. In Latin, the word *fugere* means to flee and *refugium* means to take refuge. The word first appeared in 1540 following the persecution of the French Huguenots Protestants looking for refuge from the French Catholics.³²

In modern usage, the term refers to “a person who has been forced to flee his/her country because of persecution, war or violence.”³³

In 1951, the **Convention Relating to the Status of Refugees** was adopted to set out **the rights of refugees and asylum seekers**. The definition of a refugee was highlighted to be:

³¹ Arcgis, ‘Inside the World’s 10 Largest Refugee Camps’ (2020) <<https://www.arcgis.com/apps/MapJournal/index.html?appid=8ff1d1534e8c41adb5c04ab435b7974b>> accessed 15 May 2020.

³² Tom Holland, ‘In the Shadow of the Sword: The Battle for Global Empire and the End of the Ancient World’ (2012) 25.

³³ UNHCR, ‘What is a Refugee?’ (UNHCR The UN Refugee Agency) < <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>> accessed 21 June 2021.

“An individual who as a result of events occurring before 1 January 1951³⁴ owing to a 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.”³⁵

Acknowledging that, more had to be done regarding the legal status of refugees: the **Protocol Relating to the Status of Refugees** was prepared and came into force in 1967³⁶ broadening the temporal and geographical scope of application of the 1951 Geneva Convention.³⁷ With time, more laws were enacted to account geographical and social differences when relating to refugee and asylum issues.³⁸

Refugees versus Migrants

However, there remains one common misconception. That is, the difference between being a refugee and a migrant. Both terms are used interchangeably, and this may cause confusion because even though people of these two groups have certain similarities, the circumstances surrounding their search for host states set their differences.

To understand the elements of the definition of a refugee, one must look at it alongside the definition of a migrant. This is why the UNHCR often emphasizes the differences between the two categories.

For one, a migrant is someone who chooses to voluntarily move to improve his/her life. This is not to say that migrants are not forced to leave their host State. They are also affected by involuntary compelling circumstances, such as economic strain. However, those who move to further improve and enrich themselves, even though their living conditions are not as bad, are

³⁴ This only catered to those who were refugees because of events occurring before 1 January 1951. This did not take into consideration new refugees.

³⁵ Convention and Protocol Relating to the Status of Refugees 1951, it also builds on Article 14 of the 1948 Universal Declaration of Rights that recognises the rights of persons to seek asylum.

³⁶ Protocol Relating to the Status of Refugees (1967).

³⁷ The words, “as a result of events occurring before 1 January 1951 and ...” were omitted.

³⁸ Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), Cartagena Declaration (1984).

also characterized as migrants.³⁹ As a result, a migrant goes through the usual immigration procedures that involve an application through an embassy.

On the other hand, a refugee is a person who flees persecution. Thus, refugees **have no choice** and are often forced out of their homes by external forces that render their current living situation unbearable — that is, forced migration.

*“The grounds for their fear or the violence they suffered can be of very different types. Yet, one common denominator is that **they are forced to leave abruptly and have little opportunity to take their belongings with them. They are uprooted and dispossessed and must start completely from scratch.**”*

-UNHCR⁴⁰

This is why refugees are protected by international laws such as the 1951 Convention Relating to the Status of Refugees and the Universal Declaration of Human Rights, which enforces the universal right to seek asylum in safer countries. A person is declared a refugee once he/she satisfies the criteria set out in the definition provided for by the 1951 Convention, which are critically analysed here below.⁴¹

a) The person has a well-founded fear of persecution.

The UNHCR states that this is often taken into the context of the person’s family background and personal experiences.⁴² This appears to be a flexible outlook to encompass the array of fear, violence or intimidation one may receive that causes him or her to fear for his or her well-being and survival.

The USA Supreme Court in *INS v Cardoza-Fonseca* held that “*a well-founded fear of persecution*” meant exactly what it said: a well-founded fear of persecution. In this case, Justice Steven goes ahead to give further elaboration as follows:

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C Gasparis, 'Chapter 7 Migration and Ethnicity in the Venetian Territories of the Eastern Mediterranean (13th to 15th Century)' (2020), MHMATZ 193, 193.

⁴⁰ UNHCR, 'UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual' (UNHCR) < <https://www.unhcr.org/4d944c319.pdf>> accessed 16 May 2020.

⁴¹ UNHCR, 'UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual' (UNHCR) < <https://www.unhcr.org/4d944c319.pdf>> accessed 16 May 2020.

⁴² UNHCR, 'UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual' (UNHCR) < <https://www.unhcr.org/4d944c319.pdf>> accessed 16 May 2020.

*“That the fear must be ‘well-founded’ does not alter the **obvious focus on the individual’s subjective beliefs**, nor does it transform the standard into a ‘more likely than not’ one. One can certainly have a well-founded fear of an event happening where there is less than a 50% chance of the occurrence taking place.”⁴³*

This appears to indicate that the individual’s beliefs and surroundings are indeed taken into consideration, rather than opting for a fixed definition of the phrase. Otherwise, a rigid interpretation would appear to lock out several individuals from asylum applications.

b) Persecution because of race, religion, nationality, membership of a particular social group, or political opinion.

From Article 33 of the 1951 Convention, it can be inferred that **a threat to life or physical freedom** constitutes persecution, as would other serious violations of human rights but - in this case - the following rights are often at risk: the right to freedom from torture, the right to freedom from slavery, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion.⁴⁴

Usually, the applicant demonstrates the violation of, or threat to, the enjoyment of his/her fundamental human rights, thus the 1951 Convention is accompanied by nexus grounds for such persecution, which are race, religion and affiliation to a social/political group.

An applicant seeking asylum must demonstrate persecution either on one or more of these five grounds in order to receive the status of refugee.

c) The person 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.

⁴³ INS v Cardoza-Fonseca, 480 U.S. 421 (1987), <<https://supreme.justia.com/cases/federal/us/480/421/>> accessed on 18 May 2020.

⁴⁴ UNHCR, ‘UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual’ (UNHCR) <<https://www.unhcr.org/4d944c319.pdf>> accessed 16 May 2020.

The applicants ought to have fled the country of their nationality to seek protection from the persecution they face. Failure to flee the country of nationality may lead them to be known as Internally Displaced Persons (IDPs).⁴⁵

Differences and Similarities between an IDP and a Refugee: *Both categories of individuals flee their home to survive. However, IDPs find safety within their own country, while refugees leave their home country and cross international borders to find safety.*

As a result of such persecution, the applicants must indicate how this hinders them from returning to their country of nationality in order to prevent recurrence of the violations.

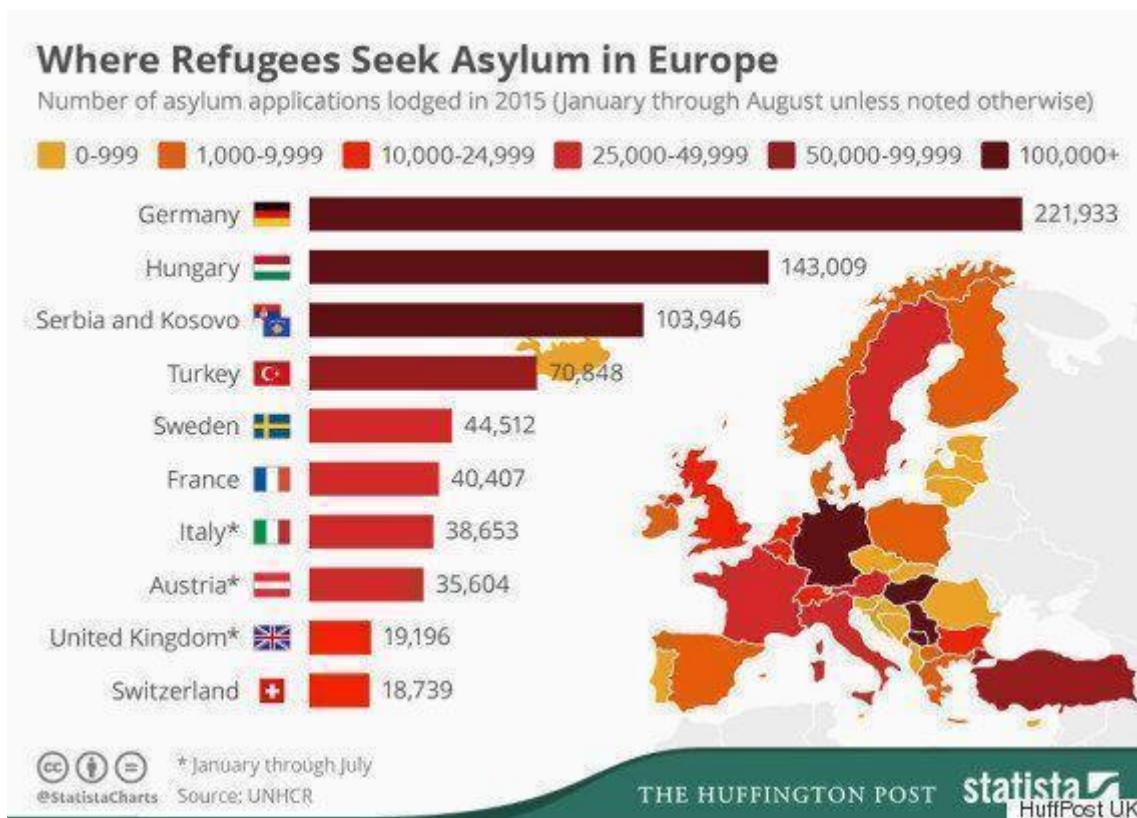


Image source: [Huffington Post UK](https://www.huffpost.com)

Conclusion

According to research studies, the major influx of people to Europe are those who are seeking safety, hence the imminent need to protect them from further human right violations. This

⁴⁵ Refugee Legal Aid Information for Lawyers Representing Refugees Globally, 'The 1951 Convention relating to the Status of Refugees and its 1967 Protocol - What they are' (Refugee Legal Aid Information) <<http://www.refugeelaidinformation.org/1951-convention>> accessed 16 May 2020.

culminated in what is now known as the **European immigrant/refugee crisis** due to an influx in the presence of refugees between 2014 and 2015.

Today, this is a vital part of European politics, where on the one hand, countries such as Hungary, Italy, Poland and Austria vote for the closing of borders to reduce the number of migrants; while on the other hand, many are dying at sea on the way to Europe, which has prompted a humanitarian outcry.⁴⁶

These individuals continue to seek international protection through claims for refugee status; however, these claims are often left undetermined, irrespective of when they were lodged. This causes the world to recognize them as ‘*asylum seekers*.’ Consequently, their need for special protection appears to be imminent with the rising dangers that follow them as they seek refuge from the various threats they face in the countries of origin.

The subsequent article in this [Right to Asylum series](#) examines the history and principles of Refugee Law to better portray the issue regarding women’s asylum rights.

⁴⁶ British Academy, ‘Refugees as new Europeans, and the fragile line between crisis and solidarity’ (Academia.Edu 24 February 2020) <[https://www.academia.edu/42953048/Refugees as new Europeans and the fragile line between crisis and solidarity](https://www.academia.edu/42953048/Refugees_as_new_Europeans_and_the_fragile_line_between_crisis_and_solidarity)> accessed 16 May 2020.