

8. Bucking the trend? Liberalism and illiberalism in Latin American refugee law and policy

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We are used to speaking of a global decrease in the humanitarian space for refugee protection over the past 30 years, and a shift towards restrictive laws and policies: but does this hold true for Latin America? Certainly, the relative isolation of South and even Central America from other regions of the world has meant that they have sometimes been insulated from wider global trends. Can the same be said, though, in relation to such trends in the refugee field? Might Latin American law- and policymaking in respect of refugees and asylum-seekers therefore represent a liberal tide, even as the rest of the world slides towards ever greater ‘illiberalism’ in this field?¹

This chapter begins to sketch out a framework for appraising these questions. It takes as its conceptual starting point the observation that the claims of an increasing illiberalism towards refugees worldwide tend to draw their evidence principally from changes and developments in the field of law- and policymaking.² It opens with an assessment of how we can start to frame law- and policymaking as a discrete area of study. Building upon this foundation, the chapter turns to the existing scholarship that seeks both to describe and explain the move towards illiberalism in the field of refugee law and policy in contexts that range from Europe to Africa.

By contrast, the comparatively scarce studies of Latin American refugee law and policy have not as yet engaged with the question of whether these frameworks and processes reflect or buck wider trends towards illiberalism.³

- 1 For an early formal use of the concept of ‘liberalism’ to characterise practices in the asylum field, see UNHCR Executive Committee Conclusion no. 5 (XXVIII), 12 Oct. 1977.
- 2 In this respect, it must be pointed out that formal law and policy constitutes but one domain within which such claims of increasing restrictiveness or liberalism may be assessed. For example, the picture may look completely different if we shift to examine such claims in relation to other spheres such as, for example, those of legal/policy implementation or of ‘public opinion’.
- 3 The principal reference points in the wider literature on Latin American refugee law and policy are comprised of the contributions to a series of collaborative publications produced by the office of the UNHCR. Of particular note are: *Memoria del Coloquio: 10 Años de la Declaración de Cartagena sobre Refugiados*; *El Asilo y la Protección Internacional de los Refugiados en América Latina*; and *Memoria del Vigésimo Aniversario de la Declaración de Cartagena sobre los Refugiados (1984–2004)*.

The second half of this chapter provides a first entry into this theme by drawing attention to the strong claim of Latin American states to represent an increasingly liberal approach to refugee law and policy over the past 30 years that contrasts sharply with other regions of the world. In the field of refugee law and policy, do we thus have evidence of a liberal tide sweeping Latin America?

In this respect, the chapter suggests that the existence of a countervailing tendency must equally be acknowledged. This involves certain states in the Andean and Central American sub-regions introducing restrictive legal and policy measures inspired, particularly, by European practice. Indeed, it is a recent tendency of the past five years and finds particularly forceful expression in the adoption by these states of accelerated procedures as a form of admissibility screening prior to determination of eligibility for refugee status.

Drawing a comparison with the turn towards illiberalism in refugee policy in Europe and elsewhere during the 1980s, the chapter examines the extent to which the theoretical framework developed by scholars to understand that situation can illustrate and help to explain the recent trend in northern Latin America. By so doing, it also suggests ways in which the wider debate on legal and policy trends in the asylum field may be advanced. The analysis of legal and policy data sources is enriched by circumspect reference to interview data with officials and other knowledgeable commentators in these countries.⁴

Conceptualising law- and policymaking in the refugee field

The refugee protection regime comprises, in part, norms that bear directly on the closely-related questions of who refugees are and how they can or should be treated. These norms exist in a variety of different but interlinked forms and loci. On the whole, though, they acquire their normative character by virtue of states' actions. The other main part of the regime is thus composed of those states and other institutions that impose their views and actions on the refugee question.

At the international level, some norms have the force of international law. These may be universal in ambition – as with those binding on states parties to

⁴ The interview data for the Central American region was gathered between March and May 2013 as part of a wider project funded by the Economic and Social Research Council (ESRC) [grant number ES/K001051/1] as part of my project 'Pushing the Boundaries: New Dynamics of Forced Migration and Transnational Responses in Latin America'. Interview data for the Andean region and Panama was gathered between March and May 2011 as part of a wider project funded by UNHCR. Relevant interviews are listed at the end of the chapter and anonymised at the request of the subjects.

the Refugee Convention⁵ – or regional in nature, such as those of the Common European Asylum System.⁶ By contrast, other norms take the form of what some scholars seek to characterise as ‘global refugee policy’.⁷ This is often through international organisations’ non-binding resolutions, whether universal – as with those of the United Nations (UN) Security Council speaking to the civilian character of refugee camps⁸ – or regional, such as General Assembly of the Organization of American States (OAS) recommendations on asylum.⁹ The specialised agencies created by these international organisations also create important policy in this field, particularly in the form of guidance from the office of the UN High Commissioner for Refugees (UNHCR).¹⁰

At the domestic level, norms relating to refugee protection also take a wide variety of forms, not least since what ‘law’ is and how it is constituted can vary quite significantly between the constitutional and legal systems of different states. Nonetheless, in broad terms a split between domestic refugee law and policy can also be identified. Many states – including all of those in Latin America¹¹ – now accord the issue of refugee protection some legal foundation, rather than treating it as governed entirely by the higher degree of discretion associated with policy. Nonetheless, particularly in Latin America, the level of ‘legality’ can vary considerably. Whereas some states consecrate refugee

- 5 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention). Throughout this chapter, unless otherwise indicated, references to the Refugee Convention refer to this Convention as modified by its Protocol relating to the Status of Refugees (adopted 16 Dec. 1966, entered into force 4 Oct. 1967) 606 UNTS 267 (Protocol) or only to the Protocol with respect to states that have ratified it, but not the Refugee Convention.
- 6 See, for instance, Directive 2011/95/EU of the European Parliament and of the Council of 13 Dec. 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJEU 20.12.2011 L337/9-23.
- 7 Deardorff Miller, ‘Global refugee policy’.
- 8 UN Security Council Resolution 1208, 19 Nov. 1998.
- 9 For a recent example, see OAS General Assembly Resolution 2758 (XLII-O12), 5 June 2012.
- 10 However, a distinction should nowadays be drawn between such guidance as produced by UNHCR and that produced by its executive committee, a state-based oversight body. For an example of the former, see the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* and subsequent ‘Guidelines on international protection’. The latter principally takes the form of conclusions on international protection adopted by the executive committee (for a discussion, see Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation*).
- 11 Cuba is now the only Latin American state that is not party to any international treaty relating to refugees. Nonetheless, Art. 13 of its 1976 National Constitution, as reformed in 1992, gives expression to a very particular articulation of the right of asylum. A refugee concept appears in Cuba’s 1976 Migration Law, as amended by Decree no. 305/12, 11 Oct. 2012, see especially Arts. 80–1.

protection norms through a 'Law' adopted by the legislature,¹² others leave it to 'Decrees' enacted under devolved powers by a public authority such as the president.¹³

Studying norms in the refugee field is further complicated by the important interrelationships that exist between these forms and loci. The connection between the discrete levels is important to appreciate since international norms may be incorporated or reflected at the domestic level,¹⁴ but also because states' domestic practices may form the basis for the creation of law or policy at the international level.¹⁵ The relationship between legal and policy development is also interesting. Thus, at the international level, gaps or shortcomings in the formal legal framework are developed by policy for certain topics,¹⁶ but elsewhere it is policy that provides the basis for subsequent legal development.¹⁷ Similar dynamics also exist at the domestic level. Finally, the interrelationship of refugee norms with those from the separate domains of human rights, immigration control and penal practice raises questions as to where the boundaries of analysis should be drawn.

The existence of norms in refugee law and policy is usually taken as a given by the literature and results from the practical emphasis of scholarship in this field, which is largely oriented towards better understanding how such norms may apply in practice. It thus concentrates its analysis on questions to do with the status of the norms, the scope of the constituent rules, their coherence with other norms and their operational suitability for application. Of course, these are valid and useful lines of enquiry. However, they tell us little about the processes by which laws and policies in this field are created and changed or the reasons why this occurs.

Understanding law and policy creation and change within the refugee field is an important endeavour in its own right. The foundational norms such as those expressed by the Refugee Convention – referred to as the 'cornerstone'

12 An example would be Venezuela's Organic Law on Refugees and Asylees, 3 Oct. 2001.

13 See those referred to in footnotes below.

14 In referring to the incorporation of international legal norms, the theories of 'monism' and 'dualism' help to explain some such variation between states (for a discussion of the respective theories and their implications, see Dixon, *Textbook on International Law*, pp. 90–94.

15 In respect of law, this is the process by which international custom is created.

16 For example, where the Refugee Convention is silent on the question of the procedural standards to be applied to refugee status determination, international policy has provided a set of relevant standards (see, for example, UNHCR Executive Committee Conclusion no. 8 (XXVIII), 12 Oct. 1977.

17 For example, the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 3452 (XXX), 9 Dec. 1975, formed the basis for the subsequent adoption of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 UNTS 85 (entered into force 26 June 1987).

of international protection¹⁸ – may give the impression of being immutable and unchanging. However, even they are of relatively recent origin and have been subject to important modifications.¹⁹ Moreover, once we look beyond this fundamental piece of the refugee protection regime, the creation and revision of norms is still more evident in changes and modifications to the framework of applicable international law (for example, OAU Refugee Convention) and policy (EXCOM Conclusions on a range of topics) as well as more or less frequent revisions of domestic refugee law and policy in countries across the world.

In seeking to understand changing patterns of refugee protection, we need also to be aware of the issue of interpretation. Thus, there is widespread recognition on the part of most domestic authorities charged with expounding the Refugee Convention that, even though the text of the treaty may be fixed in black and white, its interpretation must take account of evolving wider circumstances. In other words, change in the normative framework of refugee protection takes the form not only of new or amended law or policy, but also the lens through which existing laws and policies are understood. The same point may equally be made for implementation of the norms in practice, which may produce a rather different picture. These raise questions about the extent to which we can study law and policy in isolation from their execution.

Behind all of these processes sit the states that, by virtue of their governmental function, take a primary role in creating, changing, interpreting and even implementing refugee laws and policies at the domestic and international levels. As the motor behind these processes, it is important to acknowledge each state as an independent actor with its own political forum, albeit one that is Janus-faced in nature, facing simultaneously inwards to domestic concerns and outwards to foreign objectives. The agency discharged by state representatives in the executive, legislative and judicial branches in creating, changing and interpreting law and policy is thus acted upon and shaped by a range of factors and other actors each capable of exerting different forms and degrees of influence. In the refugee field, the latter includes UNHCR and civil society amongst a broader set of interest groups in any particular society.

Illiberalism in refugee law and policy

This volume asks whether a liberal tide can be discerned in recent Latin American law and policy-making on asylum and migration. Implicit within

18 UNHCR, 'The 1951 Convention relating to the Status of Refugees and its 1967 Protocol', p. 1.

19 In relation to the Refugee Convention, the most fundamental modification was made by the 1967 Protocol in its removal of the 1 Jan. 1951 time-bar to the Art. 1A(2) refugee definition.

the question is a critical acknowledgment that in most other parts of the world the general tendency, at least in respect of refugees, is the opposite, that is, towards increasingly restrictive approaches on the part of states. Indeed, based on the literature cited in this section of the chapter, it would be fair to suggest that this purported wave of illiberalism towards refugees and asylum-seekers is taken to be one of the predominant global trends of the past few decades.

Almost every author concerned with refugee law and policy affirms the idea of a shrinking space for asylum in the past 30 years. Crucially for the purposes of this chapter, that claim is usually substantiated by reference to changes in the normative framework which have been effected at the domestic level.²⁰ In other words, the adoption of new laws and policies or the amendment of existing ones is the primary focus for the claim that increasingly restrictive approaches are being taken towards refugees and asylum-seekers. It will be apparent that analyses of this purported global tendency towards restrictionism take a range of perspectives and attempt to explain these increasingly illiberal forms of law- and policymaking in the asylum sphere through recourse to different theoretical methods.

Most commentators trace the emergence of a generalised move towards restrictive approaches to asylum to the sudden and chaotic arrival of increasing numbers of 'spontaneous' asylum-seekers from all parts of the globe to global north countries during the late 1970s and early 1980s.²¹ The tendency was particularly apparent in western Europe, where the numbers of new claims for asylum climbed from a recorded 20,600 in 1976 to 204,300 in 1986,²² and eventually peaked at 695,580 in 1992.²³ In the early 1980s, the proportion of these asylum-seekers arriving in industrialised countries from outside the region was estimated to have reached 70 per cent of all unscheduled arrivals and as much as 87 or 88 per cent in some European countries.²⁴ However, the key question is why these arrivals should have provoked the consolidation of more restrictive responses to refugees.

There are a number of different strands to the burgeoning scholarship that has considered this topic. Martin offers a starting point in arguing that these 'new asylum-seekers' were qualitatively different from earlier refugee movements in that they were comprised of persons from the global south who arrived spontaneously or irregularly to the territories of states in the global

20 See the footnoted references that follow in this section.

21 These authors concentrate their analyses predominantly on the tendencies observed in western Europe and North America, although reference is also made to the case of Australia among others.

22 Figures cited in Jaeger, 'Irregular movements', p. 32.

23 Salt, *Current Trends in International Migration in Europe*, p. 25.

24 Jaeger, 'Irregular movements', p. 29.

north.²⁵ Martin argues that these features put into question the refugee bona fides of such persons, who were viewed as motivated by preferential conditions in the global north rather than the need for protection.²⁶ The distinction has been noted also by scholars such as Chimni, for whom it shows the existence of a 'myth of difference', based on the idea that refugee movements in the global south are intrinsically different in their 'volume, nature and causes' from those that arrive to the global north.²⁷ In just such difference lie the roots of European government restrictions.

More recently, Dauvergne has sought to link the emphasis of these scholars on the irregular character of the refugee movements with broader migration trends.²⁸ Thus, for her, restrictionism towards refugees owes to their being caught up in the broader crackdown on illegal migration. As states – particularly in the global north – make migration outside the law more difficult, a distinction between asylum-seeking and illegally migrating becomes harder and harder to discern.²⁹ Although she locates the emergence of this conceptual fuzziness in the context of Australia after the *MV Tampa* incident in 2001,³⁰ her point about the increasing linkage in the global north between (undesirable) illegal migration and asylum-seeking has resonance. In a similar vein, Hamlin suggests that explaining restrictionism must take account of how states choose to categorise 'asylum-seekers' as either 'migrants' to be controlled through restrictive measures or 'refugees' to be protected.³¹

Most commentators seem to concur that the turn towards restrictive laws and policies for refugees in the global north is ultimately rooted in, and directed towards, public opinion in those states. For Martin, such measures reflect an attempt by governments to reassure the public of their state ability to maintain control over their borders.³² Gibney, meanwhile, suggests that such restrictiveness responds to the nature of liberal democratic states and the need to persuade the electorate that they exist to further its interests and goals.³³ As such, even if such states cannot show a substantial section of the electorate that its interests are particularly high on the agenda, at least they

25 Martin, 'The new asylum seekers', pp. 2–6.

26 Ibid., pp. 8–11.

27 Chimni, 'The geopolitics of refugee studies', p. 356.

28 Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law*.

29 Ibid., p. 62.

30 Ibid., pp. 51–60. Note, however, that the roots of this tendency appear to be much older. See, for example, the study by Jaeger published in 1988 ('Irregular movements').

31 Hamlin, 'Illegal refugees: competing policy ideas and the rise of deterrence in American asylum politics', p. 53.

32 Martin, 'The new asylum seekers', p. 11.

33 Gibney, 'The state of asylum: democratisation, judicialisation and evolution of refugee policy', p. 32.

can show these citizens that their concerns are more important than those of foreigners.³⁴ It is notable that such explanations are, at least in the last analysis, rooted in broader migration dynamics rather than being specific to refugees. Without a compelling argument to show that a public concern with foreigners or migration control began or reappeared in the 1980s, the question remains as to why the approach to asylum should have shifted so dramatically in Europe during that decade.

The scholarship largely frames the answer to this question as an assessment of the ways in which public opinion influences state policy. Thus, there is a compelling argument that the end of the Cold War meant that refugee law and policy was no longer insulated from domestic adverse public opinion as it had been during the Cold War due to its strategic importance to western states' international politics. This thesis appears particularly persuasive in relation to the USA, as shown by Hamlin's analysis of USA asylum policy during and after the Cold War.³⁵ Yet, as Gibney points out, at least in the case of Europe, restrictionism towards refugees began well before the end of the Cold War:³⁶ although it may have been an aggravating consideration, it is unlikely to be the primary reason and the explanatory weight of this factor appears to vary between countries.

Other analyses appear to locate the motor for change more squarely within the realm of the state. Steiner emphasises the role of asylum as an important part of European states' identity as 'liberal democracies' in order to argue that it is governmental perceptions of abuse of this institution that drive the adoption of restrictive measures.³⁷ Whereas this factor may sometimes be related to the views of the electorate, he implies that it nonetheless represents its own discrete form of state identity-based concern. Similarly, Jaeger partly directs his analysis towards governmental perceptions of national asylum systems' 'abuse' by irregular arrivals from the global south.³⁸ Stern has added a recent coda, which shows how on the global stage the Swedish state seeks to square its discursive identity as a liberal democracy with its raft of increasingly restrictive laws and policies.³⁹

34 Ibid., p. 33.

35 See Hamlin, 'Illegal refugees'.

36 Gibney, 'The state of asylum', p. 26.

37 Steiner, 'Arguing about asylum: the complexity of refugee debates in Europe', pp. 18–20.

38 Jaeger, 'Irregular movements', p. 29. He points out that governments tend to consider large flows of asylum-seekers from distant continents to be undesirable 'irregular movements', in part because they bring a higher proportion of manifestly unfounded or abusive claims for asylum and a greater propensity to use fraudulent (or no) documents to travel.

39 Stern, "'Our refugee policy is generous": reflections on the importance of a state's self-image', pp. 25–43.

Interestingly, this attention to the forum of state institutional politics also brings to light certain countervailing tendencies. For the present purposes, the most important is the apparent trend in many of these same western liberal democracies towards greater expansiveness in the field of human rights.⁴⁰ Although governments may seek to keep these fields separate,⁴¹ this tendency creates its own pressures towards liberalism in the asylum field: these appear to be given effect most often by the judicial branch, that is stated in the courts, although this is not always the case.⁴² The argument is that there has thus been a general broadening of eligibility grounds for international protection in these states over past decades, as well as the occasional reversing or toning down of restrictive measures adopted by the legislature or executive.

For some authors, the apparently increasingly generous scope of international protection *ratione personae* is the driving force behind the restrictionist tendencies of states in the global north. This is an argument that has been suggested by Martin's more recent proposal of understanding asylum as a 'scarce resource',⁴³ and taken up by Price as a key thesis.⁴⁴ However, Martin originally employed this perception to help explain why state responses to the 'new asylum-seekers' predominantly took the form of obstacles to arrival.⁴⁵ Gibney echoes this analysis, arguing that the mushrooming of external controls reflects increased legal protection by the courts.⁴⁶ Yet, although this factor might have helped to fuel increasing restrictionism in recent years, the liberal approaches to asylum eligibility implicated here largely post-date the lurch towards restriction of the 1980s.

These debates lead us to a further important consideration, namely that refugee law and policy is comprised of a number of different aspects in which the approach of states may be restrictive or liberal. Although there is slippage in the use of terminology,⁴⁷ authors identify three main areas of potential restriction: 1) barriers to entry – such as visa requirements, carrier sanctions and interceptions; 2) in-country treatment – such as detention, curtailing of

40 In the European context, see as an example Keyes, 'Expansion and restriction: competing pressures on United Kingdom asylum policy', pp. 395–426.

41 Dauvergne, *Making People Illegal*, pp. 62–6.

42 In this connection, see the discussion of European harmonisation processes among states in the early 2000s in Keyes, 'Expansion and restriction'.

43 Martin, 'The refugee concept: on definitions, politics, and the careful use of a scarce resource'. See also his more recent argument to this effect in relation to court attempts to impose a human rights framework on such state extra-territorial activities, 'Interdiction of asylum seekers – the realms of policy and law in refugee protection'.

44 Price, *Rethinking Asylum*.

45 Martin, 'The new asylum seekers', pp. 11–13.

46 Gibney, 'The state of asylum', pp. 33–44.

47 The term 'deterrence' is one such example. See Hassan, 'Deterrence measures and the preservation of asylum in the United Kingdom and United States', pp. 185–6.

access to social benefits and negative propaganda; and 3) in-country procedures – such as accelerated procedures, safe country of origin and third country mechanisms, and filing deadlines.⁴⁸ The focus on these areas is understandable in the context of the academic and humanitarian concern with restrictionism in this field. However, as suggested above, the global analysis of these trends should encompass all aspects of asylum, including such domains as the approaches to eligibility for protection and international cooperation among others, as well as the implementation of the law in practice.

Finally, it is important to note that restrictionism is not confined to the global north. For instance, on the African continent, Rutinwa identifies a shift away from its earlier liberal ‘open door’ policy towards increasingly restrictive approaches to refugees in the late 1980s/1990s – some ten years after Europe.⁴⁹ His argument is that this results from large numbers of refugees – but in this case African rather than extra-regional – and the associated impact on security and infrastructure, along with increased xenophobia in many countries. However, he also highlights the global aspects that help to drive such illiberal tendencies in Africa, specifically the absence of meaningful burden-sharing by other states and – importantly – the restrictive policies used by industrialised countries to keep out refugees.⁵⁰ Ultimately, whereas Steiner argues that European legislators remain committed to the principle of asylum but have become uncomfortable with the ‘quantity and quality’ of this obligation,⁵¹ Rutinwa suggests that African states have become ‘less committed to asylum’ itself.⁵²

Clearly, in evaluating global trends of liberalism or restrictiveness in the refugee field, we need to be aware of the internal political context of individual countries.⁵³ Nonetheless, the scholarship points strongly towards a global trend towards restrictiveness in refugee law and policy since the 1980s, at least in relation to access to asylum. The broad consensus is that the trend has been driven by the perception that the institution of asylum is vulnerable to abuse. In the global north, this appears to have resulted principally from the arrival of a large number of ‘new asylum-seekers’ calling into question the merits and

48 See, for example, Price, *Rethinking Asylum*, chapter 6.

49 Rutinwa, ‘The end of asylum? The changing nature of refugee policies in Africa’, pp. 12–41.

50 *Ibid.*, p. 13.

51 Steiner, ‘Arguing about asylum’, p. 15.

52 Rutinwa, ‘The end of asylum?’, p. 12.

53 For instance, Hamlin (‘Illegal refugees’) argues that the general global trend towards restrictive asylum policy is driven by a set of internal contextual political factors that will be particular to each individual state. The point is well made, yet one might equally observe that this does not preclude such factors themselves being part of a more general pattern of change at the regional or global level (in her case study of the USA, it is the end of the Cold War).

motives of protection. The changing international politics associated with the end of the Cold War may have served to help entrench these views in national policy forums, as has the example of certain states leading the ‘race to the bottom’ in asylum policy.⁵⁴ The example of these states also appears to have contributed to the development of similar tendencies in the global south.

Latin American law- and policymaking in global context

The extant literature describes the tendency towards increasingly illiberal manifestations of asylum law and policy as widespread across many regions and, implicitly, as even global in scope. Yet whether this broad trend extends also to Latin America has not as yet been the subject of sustained analysis. This chapter thus takes some preliminary steps towards formulating such an assessment.

Bucking the global trend: 30 years of liberal practices in Latin America

The paucity of scholarship on restrictive asylum policy in Latin America reflects the broader scarcity of research on refugee issues in that region, particularly when compared with the literature on refugee law and policy in the global north. Indeed, only in the last couple of years has the topic begun to receive the scholarly attention that it merits.⁵⁵ Even so, the absence of literature on the specific question of whether the purported global trend towards increasingly restrictive laws and policies in the refugee field is also to be found in Latin America may equally reflect a different type of consideration: that the empirical dynamics in the region themselves give comparatively little cause for concern and hence have not attracted such substantial interest from refugee protection advocates and scholars.

It is certainly the case that from the 1980s to the 2000s, the restrictive trend identified in Europe, North America and Africa is much less apparent in Latin American countries. Indeed, one might conclude that the tendency in this region is the opposite, with the law and policy of most Latin American states having moved in an increasingly ‘liberal’ direction over the period. This impression may be sustained with respect to five different areas of law- and policymaking: integration into the international refugee regime; adoption of domestic refugee laws and policies; scope of regional and domestic law concerning eligibility for protection; rights of refugees and asylum-seekers; and regional processes. A broad-brush overview of each area is briefly warranted.

Firstly, from the late 1970s to the early 2000s, when states in other regions appeared to be trying to scale back the scope of their commitments towards

54 See Dauvergne’s analysis of Australia in such terms in *Making People Illegal*, chapter 4.

55 A recent example is the edited collection by Lettieri, *Protección Internacional de Refugiados en el Sur de Sudamérica*.

refugees, Latin American states were increasing their international legal commitment to refugee protection through becoming party to the Refugee Convention and/or Protocol. This can be explained in part by the region's comparatively late arrival to refugee issues, reflecting a distinct pattern of external forced displacement, the perception on the part of many governments during the 1960s, 1970s and even later that the pre-existing international framework of political asylum was sufficient to address these problems, and a degree of reserve towards the 'European' refugee regime.⁵⁶ Nonetheless, the pattern of increasing ratification and adherence does suggest at least a growing openness to formalising their acceptance of refugee standards.⁵⁷

Secondly, and accompanying the shift towards integration into the international refugee regime, Latin American states have increasingly developed domestic frameworks for the protection of refugees over the past three decades. Promoted largely through a proactive UNHCR role in the region, these frameworks increasingly take the form of law rather than policy.⁵⁸ Thus, in the decades when states in other parts of the world were tending towards more restrictive domestic laws and policies, Latin American states were adopting laws for the first time or bringing them ever more into line with international legal and policy standards relating to refugee protection (see chapter 2, this volume).

Thirdly, the scope of international protection *ratione personae* consecrated in Latin American refugee law is relatively generous. At the international level, the 1984 Cartagena Declaration on Refugees exhorts states in the region to adopt a broader complementary refugee definition in their domestic legislation,⁵⁹ a call to which many states have responded.⁶⁰ Many Latin American states have also added gender-related persecution to the grounds expressed in Article 1 A(2) of the Refugee Convention,⁶¹ and El Salvador recognises persons

56 Cantor, 'European influence on asylum practices in Latin America', pp. 73–8.

57 Ibid.

58 See Murillo González, 'El derecho de asilo y la protección de refugiados en el continente americano'.

59 Conclusion 3. The Declaration's text can be found in UNHCR, *La Protección Internacional de los Refugiados en América Central, México y Panamá*, pp. 332–9.

60 Fifteen Latin American states have adopted an expanded refugee definition based on the Cartagena Declaration into their national laws (see Murillo González, 'El derecho de asilo', p. 57), although Ecuador has recently removed adopted new legislation that does not allow for an expanded refugee concept. See Decree no. 1182/12, 30 May 2012, Art. 8).

61 See Argentinian Law no. 26165, 28 Nov. 2006, Art. 53; Costa Rican Decree no. 36831-G, 28 Sep. 2011, Art. 13; El Salvadorian Law no. 918, 14 Aug. 2002, Art. 4(a); Guatemalan Governmental Accord no. 383-2001, 14 Sep. 2011, Art. 11(d); Honduran Decree no. 208-2003, 3 March 2004, Art. 42(3); Mexican Law on Refugees and Complementary Protection, 27 Jan. 2011, Art. 13(1); Nicaraguan Law no. 655, 20 June 2008, Art. 1A; Panamanian Decree no. 23/98, 10 Feb. 1998, Art. 5(2); Paraguayan Law no. 1938, 9 July 2002, Art. 1(a); Uruguayan Law no. 18076, 14 Nov. 2006, Art. 2A; Venezuelan Organic Law on Refugees and Asylees, Art. 5.

granted mandate refugee status by UNHCR.⁶² Many states in the region do not interpret Article 1A(2) by reference to restrictive concepts developed in the global north, such as internal flight alternative. Forms of complementary protection and humanitarian visas in some states further broaden the grounds for protection.⁶³ The exclusion and cessation clauses are also rarely applied.

Fourthly, the scope of rights enjoyed by refugees and asylum-seekers is relatively generous. Since the Central American refugee movements in the 1980s, there have not been any refugee camps in Latin America, despite the continuance of massive flows of refugees in the region. In addition to legal protection for refugees' rights in most states, asylum-seekers also often benefit from certain generous provisions relating to, for example, permission to work.⁶⁴ The law of many Latin American states also provides special protection for vulnerable classes of asylum-seekers, particularly women and children.⁶⁵ Although status determination procedures retain a high grade of state discretion in decision-making, UNHCR and – in some cases – civil society are accorded a formal role in the process,⁶⁶ and some type of review of negative decisions is usually possible.

Finally, the regional policy framework on refugees that was established during the 1980s through the Cartagena Declaration retains relevance through to the present day via its ten-year anniversary meetings.⁶⁷ Not only have these

62 Decree no. 79/05, 7 Sep. 2005, Art. 58. Special provision in respect of UNHCR mandate refugees is also made in Panamanian Decree no. 23/98, Art. 48.

63 See, for example, the complementary protection provisions in Brazilian National Immigration Council Recommendation no. 08, 19 Dec. 2006; Chilean Law no. 20430, 15 April 2010, Art. 4; Colombian Decree no. 2840/13, 6 Dec. 2013, Art. 1(c); Costa Rican Law no. 8764, 4 Aug. 2009, Arts. 6.6 and 94; Mexican Law on Refugees and Complementary Protection, Arts. 28–32; Nicaraguan Law no. 761, 6 July 2011, Art. 220; and Panamanian Decree no. 23/98, Arts. 80–3. As an example of a humanitarian visa, see that applied by Brazil to the situation of Haitians affected by the disaster (see chapter 6, this volume).

64 At least nine Latin American countries (Argentina, Brazil, Chile, Costa Rica, El Salvador, Nicaragua, Paraguay, Peru and Uruguay) allow asylum-seekers to access paid employment.

65 See, for example, Argentinian Law no. 26165, Art. 53; Bolivian Law no. 251, 20 June 2012, Art. 16; Chilean Law no. 20430, Arts. 38–9 and 41; Chilean Ministry of the Interior Decree no. 837, 14 Oct. 2010, Arts. 3 and 12; Colombian Decree no. 2840/13, Arts. 16–17; Costa Rican Decree no. 36831-G, Art. 47; Guatemalan Governmental Accord no. 383-2001, 14 Sep. 2011, Art. 11(d); Mexican Law on Refugees and Complementary Protection, Art. 20; Nicaraguan Law no. 655, Art. 10; Paraguayan Law no. 1938, Art. 32; and Uruguayan Law no. 18076, Arts. 36 and 38.

66 See, for example, Argentinian Law no. 26165, Arts. 23 and 35; Brazilian Law no. 9474, 22 July 1997, Art. 14; Chilean Law no. 20430, Art. 21; Chilean Ministry of the Interior Decree no. 837, Art. 40; El Salvadorian Decree no. 79/05, Arts. 9 and 47; Uruguayan Law no. 18076, Art. 24; and Venezuelan Organic Law on Refugees and Asylees, Art. 12.

67 For the 1994 San José Declaration on Refugees and Displaced Persons see UNHCR, *Memoria del Coloquio*, pp. 415–28. For the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, see UNHCR, *Memoria del Vigésimo*, pp. 385–400. The 2014 Brazil Declaration and Plan of Action is available at: www.refworld.org/docid/5487065b4.html (accessed 25 Feb. 2015).

interstate meetings produced the enunciation of additional liberal points of principle for the protection of refugees and other displaced persons but – in the shape of the 2004 Mexico Plan of Action – they form the basis for a programme of intra-regional resettlement of certain Latin American refugee profiles, particularly Colombians.⁶⁸ These liberal tendencies have also found further expression in other sub-regional fora, such as among the southern states of Mercosur.⁶⁹ In the region, the imposition of out-of-country obstacles to prevent asylum-seekers from accessing the territory of Latin American states has generally not been pursued.⁷⁰

Of course, the predominantly liberal character of the legal and policy framework in Latin America should not be taken to suggest that the refugee protection situation is ideal. Indeed, the implementation of these norms has not infrequently appeared to be unsatisfactory. The financial and human resources dedicated to refugee protection are relatively minimal in most states, such that asylum-seekers and refugees sometimes encounter difficulties in short-term subsistence and longer-term integration.⁷¹ Moreover, the administrative and legal processes are fraught by the wider problems affecting bureaucracies and courts in the region.⁷² Nonetheless, the trend in law- and policymaking in the region since the 1980s is predominantly liberal rather than restrictive.

However, the reason why Latin America has tended towards increasing liberalism in the refugee field over the past 30 years is less clear. One factor may be the nature of the refugee flows: historically the numbers of asylum claims in most countries are quite low, predominantly comprising other Latin Americans, often from neighbouring countries.⁷³ The region is not only relatively insulated from global refugee flows but such movements are also not so closely linked conceptually to undesirable illegal migration as in other parts of the world. Another factor may be Latin America's comparatively

68 See Spindler, 'The Mexico Plan of Action: protecting refugees through international solidarity', pp. 64–5.

69 See the 2000 Declaration on the Institution of Refuge, 10 Nov. 2000, www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2013/9082 (accessed 3 Dec. 2014) and the 2012 Declaration on Principles of International Refugee Protection, 23 Nov. 2012, www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2013/9080 (accessed 3 Dec. 2014).

70 However, see some recent examples to the contrary in this chapter's conclusion.

71 For example, in the context of Ecuador, see FLACSO, *Refugiados Urbanos en Ecuador*.

72 For instance, see the criticisms developed in Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America'.

73 For instance, UNHCR estimates that the LAC region is currently host to 490,350 of the world's population of 11,107,742 refugees and persons in a refugee-like situation (UNHCR, *Mid-Year Trends 2013*, p. 22). This equates to approximately 4.4% of the world population of refugees and persons in a refugee-like situation, the vast majority of those located in Latin America being Colombian nationals.

recent arrival to the refugee regime, suggesting that ‘asylum fatigue’ has not yet set in. Equally, the self-identification of Latin American states with their generous tradition of (political) asylum may help to sustain their commitment to refugee protection, especially on the part of legislators and senior officials who themselves benefited from asylum in earlier decades. In this connection, some scholars have linked the tendency to the increasing importance of the human rights discourse, especially for left-leaning governments in the region.⁷⁴ The general esteem in which UNHCR is held by governments, and its vigorous role in pushing for improved refugee protection, may also be a factor.

Bucking the regional trend? Recent illiberal practices in the Andes and Central America

Against this liberal backdrop, however, there has been a notable tendency towards the use of restrictive asylum practices on the part of certain states in the past five years or so, particularly within the neighbouring sub-regions of the Andes and Central America. Indeed, since 2008, some of these states have increasingly applied administrative detention for illegal entry⁷⁵ and more vigorously pursued the deportation of certain profiles of asylum-seekers.⁷⁶ Other ad hoc practices have also been recorded, such as pushing neighbouring states to readmit asylum-seekers who have passed through their territories.⁷⁷

Alongside these more-or-less formal practices, the most striking development in the field of law and policy has been the increasing adoption and implementation by states in these sub-regions of special procedural devices for dealing with ‘manifestly unfounded’ or ‘clearly abusive’ asylum applications. These measures now form an essential part in six states of the domestic refugee law frameworks: Colombia,⁷⁸ Ecuador⁷⁹ and Venezuela⁸⁰ in the Andean sub-

74 Freier, ‘A liberal paradigm shift?’.

75 Murillo González, ‘Principios básicos y posibles respuesta programáticas’, p. 20.

76 This was the case in Colombia. See IOM, *Informe Preliminar a la XI Conferencia Sudamericana sobre Migraciones*, p. 15.

77 Murillo González, ‘Principios básicos’, p. 21.

78 Colombian Decree no. 4503/09, 19 Nov. 2009, Arts. 11–12. The figure of accelerated procedures was removed from the Colombian domestic framework three years later when Decree no. 2840/13 again overhauled the entire asylum system.

79 Decree no. 1635/09, 25 March 2009, Art. 3. The implementing instrument was Ministerial Accord 003, 11 Jan. 2011, signed by the Minister for External Relations, Trade and Integration, unpublished, on file with the author. The following year, Decree no. 1182/12 was adopted to replace the earlier Ecuadorian instruments. It further formalised the use of accelerated procedures (Arts. 24–6 and 31–3).

80 Internal Regulations of the National Refugee Commission, 28 Jan. 2010, Arts. 24–5.

region; and Costa Rica,⁸¹ El Salvador⁸² and Panama⁸³ in the Central American sub-region. Broadly speaking, it will be apparent that these are the states clustered around the 'bridge' between Central and South America.

The concept of 'accelerated procedures' has formed part of global refugee policy for the past 30 years and in and of itself they do not necessarily imply a trend towards restrictiveness. Indeed, the concept was codified by the 1983 UNHCR Executive Committee Conclusion no. 30 to respond to 'manifestly unfounded or abusive' asylum applications.⁸⁴ This Conclusion – itself a form of international refugee policy – not only defines the terms 'manifestly unfounded' and 'clearly abusive' but also sets out guidelines on the minimum standards to be applied during accelerated procedures for determining such claims.⁸⁵ For UNHCR's Executive Committee, such measures thus represent a legitimate policy response to the 'serious problem' of large numbers of unjustified applications for asylum.⁸⁶

Nonetheless, the concept comes originally from regional policy developed by the Council of Europe Committee of Ministers in 1981 as a response to the wave of 'new asylum-seekers' in the preceding years.⁸⁷ Subsequently, another continent where such procedures have been further developed and implemented – indeed, to a greater extent than any other region – is Europe. In particular, they form a core component of the process of harmonisation, and ostensibly increasing restrictiveness, pioneered by the European Union as the Common European Asylum System (CEAS).

However, European states – especially those on the 'borders' of the CEAS – tend in practice to treat accelerated procedures as a form of screening prior to an asylum-seeker's admission to the substantive refugee status determination process, rather than an accelerated form of the normal process. In the case of Spain, an example of particular relevance for Latin American states, this led to a situation where, by the early 2000s, it was estimated that over 70 per cent of asylum claims lodged were denied access to substantive consideration through the application of this mechanism.⁸⁸

81 Decree no. 36831-G, Arts. 139–40.

82 Decree no. 79/05, Art. 15.

83 Decree no. 23/98, Arts. 40–1.

84 UNHCR Executive Committee, Conclusion no. 30 (XXXIV), 20 Oct. 1983.

85 *Ibid.*, paras. d–f.

86 *Ibid.*, para. c.

87 Council of Europe, Recommendation no. R(81) 16 of the Committee of Ministers to Member states on the harmonisation of national procedures relating to asylum, 5 Nov. 1981, para. 4. For further analysis of this point, see Cantor, 'European influence on asylum practices in Latin America', pp. 71–98.

88 Fullerton, 'Inadmissible in Iberia: the fate of asylum-seekers in Spain and Portugal', p. 669.

In contrast to Europe, the accelerated procedures appearing in Latin America have been developed in a piecemeal fashion, primarily at the level of domestic law and policy.⁸⁹ Nonetheless, they are – or have become – equally illiberal and punitive in nature as Europe's, functioning to limit the admission of asylum claimants to substantive status determination measures. This is explicit in the Ecuadorian and El Salvadorian frameworks, which describe the procedure in terms of admissibility.⁹⁰ While the Colombian and Panamanian instruments describe the measures as a rapid route to rejection of the substantive claim,⁹¹ in practice both have treated them as a form of admissibility proceeding.⁹² At least in the Andean region, as a result of the legal concepts of 'manifestly unfounded' and 'clearly abusive' being applied in an arbitrary fashion,⁹³ the percentage of asylum claims rejected without substantive consideration as a result of being declared inadmissible is described as worryingly high.⁹⁴ The impossibility of challenging any negative decisions on admissibility has been a further problem in some countries.⁹⁵ In general, the establishment of accelerated procedures in some Andean and Central American countries may therefore fairly be described as a trend that is illiberal in character.

For our purposes, it is important to understand why these procedures have been adopted or, in other words, what factors have prompted this new process of law- and policymaking in northern Latin America. In this regard, it is apparent that – with the exception of the outlier Panama, which adopted these measures in a 1998 Presidential Decree⁹⁶ – their emergence elsewhere is clustered into the last five years. In Colombia, accelerated procedures formed part of a 2009 Presidential Decree.⁹⁷ The relevant Venezuelan provisions were adopted in the

89 Latin American processes of refugee law harmonisation differ sharply from those undertaken in Europe. For a description, see Fischel de Andrade, 'Regional policy approaches and Harmonization', pp. 389–409.

90 Ecuadorian Ministerial Accord 003, Art. 7, now replaced by Decree no. 1182/12, Arts. 31–3; El Salvadorian Decree no. 79/05, Art. 15.

91 Colombian Decree no. 4503/09, Art. 12; Panamanian Decree no. 23/98, Art. 41.

92 Interviews 1, 61.

93 Interviews 1, 3, 16, 61, 96, 143.

94 Precise figures were not available at the time of fieldwork. Nonetheless, it was reported that in Ecuador even among Colombian claims some 30% were rejected as inadmissible (interview 16), while in Panama only 6% of cases actually reached consideration by the Commission, many of the remaining 94% having been rejected as inadmissible (interview 62).

95 See, for example, Panamanian Decree no. 23/98, Art. 41 and Ecuadorian Ministerial Accord 003, Art. 7, para. 3. The latter has now apparently been changed by Art. 33 of Ecuadorian Decree no. 1182/12, which gives claimants a period of 'up to three days' to challenge the decision on administrative grounds.

96 Decree no. 23/98, Arts. 40–1.

97 Decree no. 4503/09, Arts. 11–12.

national refugee authority's 2010 Regulations.⁹⁸ It is important in this respect also to differentiate between the appearance in law of these measures and their application in practice. Thus, whereas El Salvador made provision for accelerated procedures in its 2005 Presidential Decree,⁹⁹ they were not operationalised until around 2009.¹⁰⁰ Similarly, although a 2009 Presidential Decree in Ecuador provided for accelerated procedures,¹⁰¹ it was not until early 2011 that they were made operational through a Ministerial Accord.¹⁰²

For most of the relevant states, the time at which they adopted accelerated procedures to deal with manifestly unfounded and clearly abusive claims suggests that some common factor underpins this process of legal and policy change. In general, as I have argued elsewhere,¹⁰³ these restrictive measures were introduced in response principally to uncertainty arising from the appearance or identification of new kinds of forced displacement within the region. In this respect, the most significant factor in driving the adoption of accelerated procedures in the late 2000s and early 2010s is rooted in the challenges posed by the dramatic increase, since the second half of 2008, in claims from a set of 'new asylum-seekers', widely referred to by states and others as *extracontinentales* (persons from outside the continent).

This set of extra-regional migrants largely comprises groups of young men of working age whose arrival in Latin America is facilitated through international people-smuggling networks.¹⁰⁴ However, their ultimate destination is usually the USA or Canada, with Latin American states being simply points of transit in the route to the north.¹⁰⁵ They have tended to enter the region through either Ecuador or Brazil and then to travel onwards through Latin America by land and/or sea.¹⁰⁶ Indeed, the dramatic increase in the number of *extracontinentales* corresponds closely to Ecuador's elimination of visa requirements for most nationalities in 2008 as part of its president's 'universal citizenship' agenda,¹⁰⁷

98 Internal Regulations of the National Refugee Commission, 28 Jan. 2010, Arts. 24–5.

99 Decree no. 79/05, Art. 15

100 Interview A46.

101 Decree no. 1635/09, Art. 3.

102 Ministerial Accord 003.

103 See Cantor, 'European influence on asylum practices in Latin America', pp. 90–3.

104 FLACSO, *Diagnóstico sobre la Situación Actualcias y Necesidades de Protección y Asistencia de las Personas Migrantes y Refugiadas Extracontinentales en México y América Central*; IOM (ed.), *Migrantes Extracontinentales en América del Sur*.

105 Although in Brazil and Argentina some of the refugees settle permanently, this tendency is less notable in the Andes and Central America. See Murillo González, 'Principios básicos', pp. 19, 22.

106 IOM, *Informe Preliminar*, pp. 10–11; IOM, *Migrantes Extracontinentales*.

107 Interview 3. The concept of 'universal citizenship' is given expression in the 2008 Political Constitution of Ecuador, Art. 416(6).

although states in the region point equally to Europe's 'strengthening [of] border controls' against irregular migration as a factor pushing new migration through Latin America.¹⁰⁸

In this context, parallels with the 'new asylum-seekers' of Europe in the 1980s are illuminating, not least because the policy response of European states in that decade is a source of inspiration for Latin American states some 30 years later. Like Europe, many Latin American countries had received migrants from outside the region for a considerable period, including from western and eastern Europe. Looking specifically at extra-regional migrants from the global south, whereas applications for asylum had been received from such persons in the past, the numbers were relatively few and perceived as manageable. Moreover, as with Europe in the 1980s, in the last five years certain Latin American states found themselves receiving a suddenly exponential and – for their nascent asylum systems – unmanageable increase in the number of asylum applications made by these extra-regional migrants from the global south. Finally, as with the 'new asylum-seekers' in 1980s Europe, the migration dynamic is characterised by irregularity and close connections with people-smuggling networks – leading to concerns about abuse of the asylum system.¹⁰⁹

On the face of it, the trend of the last five years towards more restrictive legal approaches to refugees and asylum-seekers in the Andean and Central American sub-regions seems to be a response to the same kinds of empirical dynamics present in Europe in the 1980s: the sudden explosion in numbers of 'irregular' extra-regional asylum-seekers. However, many of the broader factors, identified by Martin and others as underpinning the move towards restrictionism in 1980s Europe, operate differently in the Latin American context. Firstly, although the numbers of extra-regional asylum-seekers in certain Latin American countries increased exponentially, the absolute figures remained very low, rarely exceeding a few hundred persons and usually significantly less.¹¹⁰ Secondly, these Latin American states were largely just points of transit for the *extracontinentales* and only a tiny number stayed on in their territories. Accordingly, the general shift towards illiberalism is not persuasively explained by recourse to their economic or social impact on these countries or public outrage in these nations.¹¹¹

Indeed, such concerns were voiced almost exclusively by persons within the state apparatus, particularly the relatively small circle of officials and politicians concerned with issues of asylum. Moreover, commentary from officials principally

108 Azuara, 'Panorama general de la migración extracontinental en las Américas', p. 3.

109 Murillo González, 'Principios básicos', p. 20. Interviews 1, 14, 17, 62. For El Salvador, see interview A46.

110 See IOM, *Migrantes Extracontinentales*.

111 To the extent that any wider public interest was taken in the situation of these individuals, these forms of immigration tended to be viewed as a curiosity rather than a threat.

painted the problem as one of the abuse and misuse of asylum procedures. They thus cited as a serious abuse of their asylum systems the fact that many *extracontinentales* only claimed asylum when detected by the authorities, and then abandoned the territory to travel northwards without waiting for the final decision, or even after having been recognised as refugees.¹¹² In line with Martin, the asylum-seekers' perceived motives were therefore crucial in prompting a restrictive response. However, as implied by Jaeger, they mattered in relation to the judgment of state officials and legislators rather than the general public. As per Hamlin, these perceived motives were the crucial factor in determining the categorisation of the extra-regional asylum-seekers as predominantly 'migrants' rather than refugees worthy of protection.

Contrary to Hamlin's suggestion that restrictionism can be explained only by reference to analysis at the level of individual states (see text and footnotes above), it is possible to explain the trend towards illiberal law- and policymaking in northern Latin America by reference to broad cross-cutting factors, particularly the concern among officials for the institution of asylum's integrity in the face of new challenges posed by an influx of 'new asylum-seekers'. Nonetheless, explaining variation within this broad trend requires shifting the analytical gaze towards individual states' internal domestic policy fora, as Hamlin suggests. Doing so will help future studies to explain why other states in the Andean and Central American sub-regions that had been receiving equally high numbers of extra-regional asylum-seekers – such as Nicaragua or Honduras – did not respond by moving towards increasingly restrictive law or policy.

Equally, the focus on the domestic institutional politics of individual states allows us to explain why Panama introduced accelerated procedures some ten years ahead of the curve. Within Latin America, over recent decades, Panama has tended to position itself towards the more illiberal end of the spectrum on refugee issues and so, for example, despite being one of the promoters of the Cartagena Declaration, Panama has consistently resisted calls to incorporate the expanded refugee definition contained therein into its national law and policy. This reflects the particularities of the Panamanian policy approach to migration in general, within which refugees tend to be viewed predominantly as a national security issue.¹¹³ Given Panama's size and the prolonged conflict affecting the border areas of its southern neighbour, Colombia, this is perhaps hardly surprising. Indeed, accelerated procedures were introduced as part of a tightening-up of asylum legislation in Panama in response to the intensification of the Colombian armed conflict in the 1990s.¹¹⁴

112 Murillo González, 'Principios básicos', p. 20.

113 Interview 61.

114 Indeed, a sustained increase can be charted in refugee numbers – predominantly Colombians – arriving in Panama in the two years preceding its adoption. See Table I.4 in UNHCR, *Refugees and Others of Concern to UNHCR: 1998 Statistical Overview*.

The fact that other countries neighbouring Colombia did not follow suit at that time can also be explained by reference to each state's domestic politics. In particular, it is notable that both Ecuador and Venezuela hosted large numbers of Colombians fleeing the armed conflict during the 1990s and 2000s, yet did not resort to generally illiberal laws or policies – indeed, quite the opposite. This points attention to the fact that such domestic political stances or debates equally have an element that is configured by reference to international relations and politics. Colombian refugees in Ecuador and Venezuela were received with an effectively 'open door' policy due to the tense relations between those two states and Colombia on the international stage.

Yet, from 2008, the improved bilateral relationship between Colombia and Ecuador was a key factor in altering the extent to which the Ecuadorian executive remained willing to ignore growing official unease and public ill-will towards Colombian refugees, and thus to enact increasingly illiberal laws to send a message of deterrence.¹¹⁵ Therefore, although officials initially signalled that the accelerated procedures would be applied only to *extracontinentales*, they are apparently also now applied to Colombian asylum claims.¹¹⁶ Most recently, this lurch towards restrictionism extended to removing the expanded Cartagena refugee definition from the new remodelled Ecuadorian domestic legislation,¹¹⁷ an unusual and potentially worrying exception to the broader global trend towards gradually expanding the scope of eligibility for international protection. In some circumstances, domestic and international political contexts can combine to create particularly illiberal tendencies in refugee law and policy.

Conclusion

Seen in broad context, recurrent themes emerge in processes of refugee law- and policymaking.¹¹⁸ Key among these has been the apparent consolidation over the past three decades of an ostensibly global tendency towards increasingly illiberal approaches to refugees and asylum-seekers. Yet more careful scrutiny of the law and policy field reveals a slightly more mixed picture. Alongside clear evidence of restrictionism in many important aspects of refugee law and policy, there are equally countervailing tendencies towards more liberal approaches in

115 There was a strong perception in official circles that this system had been too open to abuse by economic migrants and criminal elements from Colombia and was therefore responsible for increased insecurity in Ecuador (interviews 10, 11, 16, 54).

116 Interviews 16, 51.

117 The expanded definition is absent from Decree no. 1182/12.

118 See Betts and Loescher, 'Introduction: continuity and change in global refugee policy', pp. 1–7.

certain other aspects, particularly in relation to the scope of refugee protection eligibility.

Set against this backdrop, the practice of Latin American states over the past 30 years appears to buck the restrictive trend. In itself, this is an important and interesting proposition calling for more detailed examination than has been possible here. Although several possible explanatory factors have been proposed here, more detailed study – particularly at the level of individual states, as per Hamlin – will be necessary in order to give a more definitive account of this phenomenon, not least in relation to the role of UNHCR in the region. Nonetheless, the identification of Latin America as an exceptional case coheres with the region's distinctive history as well as its contemporary regional and international identity (see chapter 3, this volume).

The recent turn by certain Andean and Central American states towards introducing restrictive forms of refugee law and policy sits uneasily with the regional trend of the past few decades. In attempting to illustrate how this has come about, this chapter has drawn attention to certain interesting features. Firstly, even at the level of individual states, the negative measures – such as accelerated procedures – coexist with more liberal measures relating to the scope of eligibility, treatment of asylum-seekers and so on. Moreover, restrictive measures in these states are largely directed towards particular groups of asylum-seekers rather than generally applied. The picture is thus not quite so black and white. In this connection, it is important to observe that, at the end of 2013, Colombia adopted a new law that revised the asylum framework and did away with accelerated procedures.

Secondly, the chapter has shown the importance of particular events as a catalyst for the appearance of restrictive asylum law and policy. As in Europe during the 1980s, during the late 2000s the asylum field in the Andes and Central America was confronted with a sudden escalation in arrivals of asylum-seekers from other regions of the global south. In contrast to Europe, Latin America was merely a transit point rather than a final destination. Nonetheless, the motivation of such persons in claiming asylum in Latin America was rendered suspect, that is, the crucial factor was the perceived abuse of the asylum system, an institution of which Latin American states are justly proud.

Thirdly, the motor for change – or, more specifically, for restrictive tools to meet this particular challenge posed by these increased and largely abusive claims from *extracontinentales* – seems principally to have been located within the state apparatus. No doubt officialdom contemplated the issue of public opinion, but in these Latin American nations this was not the motor ultimately driving these changes, which may point to a need to revisit thinking on the presumed interrelationships between, on the one hand, attitudes to asylum and, on the other, changes to law and policy in this field.

Fourthly, the international determinants of legal and policy change should not be underestimated. In particular, as I have argued elsewhere,¹¹⁹ it seems clear that many of the states adopting restrictive measures, such as accelerated procedures as a form of admissibility, were inspired by European example. This speaks not only to the power and influence of that continent's example in developing refugee law and policy around the world but also to the importance of state identity in adopting such measures.

Finally, it is important to consider the ways in which law and policy are implemented in practice. Ecuador's re-/imposition of visa requirements for the top ten nationalities of *extracontinentales* – following lobbying by other Latin American states – reduced these migration flows somewhat.¹²⁰ Nonetheless, to the extent that such *extracontinentales* continue to find new routes to transit through the region, there are indications that some of these same states simply turn a blind eye and allow them to continue the journey to their destinations in North America. These contrasting examples illustrate the need to be more discerning when seeking to infer the 'approach' of states towards refugees and asylum-seekers from their law or policy.

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119 Cantor, 'European influence on asylum practices in Latin America'.

120 Interestingly, both Ecuador and Argentina have now imposed visa requirements on *extracontinental* nationalities from whom a high percentage of asylum claims have been received. This use of visa policies as a method of restricting access to the asylum system by preventing claimants' lawful access to the state's territory appears to have been inspired by the practice of global north states since the 1980s. See Jaeger, 'Irregular movements'. It remains an open question whether the practice of these two states represents a new area of policy in which tendencies towards restrictiveness may be discerned in Latin America.

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Interview list

Colombia

1. Project head, humanitarian organisation, Colombia, 31 March 2011
3. Lawyer, university law clinic, 1 April 2011
143. Official, humanitarian organisation, Colombia, 9 May 2011

Ecuador

10. Director, governmental body, Ecuador, 4 April 2011
- 11, 12, 17. Official, humanitarian organisation, Ecuador, 3–5 April 2011
14. Lawyer, humanitarian organisation, Ecuador, 5 April 2011
16. Official, humanitarian organisation, Ecuador, 5 April 2011
51. Head, humanitarian organisation, Ecuador, 14 April 2011
54. Director, governmental body, Ecuador, 14 April 2011

Panama

61. Director and three other lawyers, humanitarian organisation, Panama, 18 April 2011

62. Head, humanitarian organisation, Panama, 18 April 2011

96. Official, governmental body, Panama, 26 April 2011

El Salvador

A46. Director, governmental body, El Salvador, 16 April 2013