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Inadmissible in Iberia: The Fate of Asylum Seekers in Spain and Portugal

MARYELLEN FULLERTON*

Abstract

During the past decade both Spain and Portugal have amended their legislation to add an inadmissibility phase to their asylum procedures. These inadmissibility proceedings follow an accelerated pace and include a broad array of grounds for rejecting applications. Asylum seekers deemed inadmissible under these procedures never receive a hearing on the substance of their claims for protection.

The expansive inadmissibility grounds in Spain and Portugal prevent an applicant from entering the refugee status determination proceeding if an inadmissibility examiner concludes that the application contains false, implausible, or outdated information or deems the application unfounded. Additionally, an examiner can declare inadmissible an asylum seeker with a well founded fear of persecution if the examiner concludes that the asylum seeker engaged in conduct that precludes refugee status. Despite the complex evidentiary issues raised, the inadmissibility examiners make their decisions on an expedited timetable in circumstances that exacerbate cultural and class biases that undercut reliable decision making.

This approach to inadmissibility proceedings thwarts the humanitarian purpose of asylum policy and increases the likelihood of *refoulement* to persecution, torture, and inhuman or degrading treatment. It deters asylum seekers and violates international obligations to protect refugees. Moreover, it conflicts with the proposed EU Procedures Directive, which limits inadmissibility grounds to ascertaining the state with the responsibility for hearing an asylum request and to repetitive petitions. Consequently, the great majority of contemporary justifications for inadmissibility decisions will be impermissible under the Procedures Directive, rendering much of the current Spanish and Portuguese inadmissibility proceedings unlawful.

1. Introduction

Spain and Portugal attract flocks of northern European pensioners, but they do not appear to entice asylum seekers to their shores. Although the Iberian peninsula is closer to regions of conflict and migratory routes than most European Union states, the numbers of asylum seekers registered in Spain and Portugal are far lower than in other member

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states of comparable size and economic development.¹ Geography certainly does not explain this situation. Spain and Portugal together have more than 6 700 kilometers of coastline that provide innumerable opportunities for access by sea.² At the Straits of Gibraltar, Africa is less than fifteen kilometers away.³ To the north, Belgium and Sweden each receive more than three times as many asylum seekers annually.⁴ Even the Czech Republic and Slovakia, with economies and infrastructures much less developed than Spain's and Portugal's, together receive triple the number of asylum seekers.⁵

While multiple factors deter refugees from seeking asylum in Spain and Portugal,⁶ their inadmissibility procedures are the most important. Both states employ an inadmissibility procedure which results in the rejection of a substantial majority of applicants for asylum prior to any hearing on the merits. The inadmissibility procedures consider more than threshold issues, such as whether another state is responsible for examining an asylum application. They also evaluate whether a claim is well-founded and whether an applicant's conduct precludes refugee status despite the existence of serious threats of persecution. These are issues touching on the merits that should be assessed after a full hearing, not in advance. Addressing such issues in a preliminary phase increases the possibility of erroneous decisions about life and death matters, and the accelerated pace of the inadmissibility process exacerbates the cultural and class barriers that infect asylum decisions.

New legal developments in the European Union highlight the problems inherent in the current inadmissibility procedures in Spain and Portugal. In particular, the proposed Council Directive on procedures

¹ In 2004, e.g., 5 535 asylum seekers filed asylum applications in Spain and only 113 in Portugal, while 117 321 asylum seekers filed applications in France, 75 200 in the United Kingdom, and 50 152 in Germany. United Nations High Commissioner for Refugees (UNHCR), *Statistical Yearbook 2004*, Table 5, Asylum applications and refugee status determination by country of asylum, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics> (UNHCR Statistics 2004).

² Central Intelligence Agency, *The World Fact Book 2003: Spain (2003); Portugal (2003)*, available at <http://www.odci.gov/cia/publications/factbook/geos/sp.html>; <http://www.odci.gov/cia/publications/factbook/geos/pt.html>.

³ The shortest distance across the Gibraltar Strait is 14.4 kilometers from Punta Oliveros, Spain, to Punta Cires, Morocco. WorldAtlas.Com, Message Board, available at <http://boardserver.superstats.com/list.html?num=&thread=4559&action=1&&f=1&u=johnmoen>.

⁴ Belgium received 20 373 asylum seekers in 2004; Sweden received 23 161. UNHCR Statistics 2004, n. 1 above.

⁵ In 2004, 5 476 sought asylum in the Czech Republic, while more than 11 000 sought protection in Slovakia. UNHCR Statistics 2004, n. 1, above.

⁶ Their histories as refugee-producing countries, the relatively recent development of their economies, and the practice in both countries of occasionally regularizing undocumented workers all contribute to the small numbers who register as asylum seekers. See generally Ortega Pérez, 'Spain: Forging an Immigration Policy', Migration Policy Institute, 2003, available at <http://www.migrationinformation.org/Profiles/display.cfm?ID=97>; Malheiros, 'Portugal Seeks Balance of Emigration, Immigration', Migration Policy Institute, 2002. *Ibid.*

for granting refugee status (the Procedures Directive)⁷ limits the grounds for rejecting a claim as inadmissible (1) to situations where the asylum seeker has obtained or should seek protection elsewhere and (2) to circumstances involving repetitive applications. The Spanish and Portuguese inadmissibility procedures dismiss asylum applications on far broader grounds, and therefore contravene the Procedures Directive.

The impact of the inadmissibility procedures on potential asylum seekers in Spain and Portugal can hardly be overemphasized. The inadmissibility proceedings, as currently applied, exclude many individuals who may well have a well-founded fear of persecution. The statistics present stark testimony to the magnitude of the problem. In recent years Spain and Portugal have rejected close to three-quarters of all asylum applications as inadmissible.⁸ Their inadmissibility procedures bar effective access to protection, and consequently place Spain and Portugal in violation of their international obligations to protect refugees.

2. International obligations regarding refugees

The 1951 Convention Relating to the Status of Refugees obliges states to refrain from returning refugees to lands where their lives or freedom would be threatened,⁹ and defines as refugees those who flee persecution based on race, religion, nationality, membership in a particular social group, or political opinion.¹⁰ The Convention itself does not require state parties to provide asylum to refugees, but many state parties — including Spain and Portugal — have enacted legislation that relies on the Convention definition in determining when to grant asylum.

European institutions and conventions have refined principles of refugee protection and are beginning to harmonize these obligations. The European Union (EU) has recently embarked on developing a joint asylum policy, which will impose new obligations on Spain, Portugal and the

⁷ Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. Council Document 14203/04, Asile 64, 9 Nov. 2004 (Procedures Directive).

⁸ Some 66% (4960 of 7533) of the asylum seekers were rejected as inadmissible in 2000; 72% (6535 of 9074) in 2001; 72% (4532 of 6261) in 2002, and 61% (4229 of 6948) in 2003. *Delegación Del Gobierno Para La Extranjería y La Inmigración, Ministerio del Interior, Anuario Estadístico de Extranjería 2000–2003, Resoluciones de Asilo según Continente y Nacionalidad por Tipo de Resolución* [Ministry of Interior, Office of Immigration and Aliens, Annual Statistics of Aliens 2000–2003] (Annual Statistics) available at http://www.dgei.mir.es/es/general/DatosEstadisticos_index.html. 70% (4653 out of 6629 decisions) were ruled inadmissible in 2004. *Oficina de Asilo y Refugio, Boletín de Asilo, n° 47–56, enero — diciembre 2004, Figura (C) Resoluciones de Asilo Firmadas por el Ministro del Interior* [Office of Asylum and Refugees, Asylum Bulletin, n°47–56, Jan.–Dec. 2004, Figure (C), Asylum Decisions entered by the Minister of Interior].

⁹ Art. 33, Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137; 19 UST 6260; TIAS No. 6577(1951 Refugee Convention).

¹⁰ *Ibid.*, Art. 1.A(2).

other member states.¹¹ Specifically, the EU has adopted directives setting forth standards for providing protection to those fleeing persecution and other serious harm¹² as well as a system for identifying large-scale population displacements that result in the need for temporary asylum.¹³ Further, an EU regulation has delineated the criteria for determining which of the member states is responsible for assessing an asylum application,¹⁴ and currently the EU has reached a political agreement to enact the Procedures Directive, which will establish minimum standards for asylum procedures.¹⁵ The Procedures Directive as currently drafted should force a revision of the Spanish and Portuguese inadmissibility procedures.

The United Nations High Commissioner for Refugees (UNHCR) has long articulated benchmarks for fair asylum procedures: those seeking asylum must receive a complete personal interview, must have a chance to present their claims to a neutral, qualified decision-maker, must have access to competent interpreters, and must be able to consult with legal representatives and advocates as they prepare their applications.¹⁶ In partial fulfillment of these benchmarks, the proposed Procedures Directive requires that member states provide each applicant for asylum access to the member state's asylum procedure,¹⁷ an appropriate examination of his or her claim,¹⁸ and the opportunity for a personal interview.¹⁹ A member state must also provide each applicant with the right to consult a legal advisor in an effective manner.²⁰ The Procedures Directive would also provide asylum seekers the right to an interpreter,²¹ the right to consult with the UNHCR,²² the right to remain in the member state

¹¹ The European Council met in Tampere, Finland in Oct. 1999 and agreed to work to develop a Common European Asylum System.

¹² Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualifications Directive).

¹³ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive).

¹⁴ Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the Member States by a third country national (Dublin II).

¹⁵ Procedures Directive, n. 7 above.

¹⁶ UNHCR Executive Committee, 'Determination of Refugee Status', Conclusion No. 8, 1977; UNHCR Executive Committee, 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum', para. (c), Conclusion No. 30 (XXXIV), 1983.

¹⁷ Art. 5, Procedures Directive, n.7 above.

¹⁸ *Ibid.*, Art. 7. An appropriate examination is one that is individual, objective, and impartial, and is undertaken by knowledgeable personnel who have precise and up-to-date information.

¹⁹ *Ibid.*, Art. 10.

²⁰ *Ibid.*, Art. 13.

²¹ *Ibid.*, Art. 9 (1)(b).

²² *Ibid.*, Art. 9 (1)(c).

pending the determination of his or her application,²³ and other protections.

The proposed Procedures Directive has been criticized by nongovernmental organizations and others as insufficiently protective of asylum seekers,²⁴ but in Spain and Portugal it should enhance their rights because it restricts denials for inadmissibility to two bases: situations where another state has or should provide protection to the asylum applicant and repetitive submissions of the same claim.²⁵ Only these grounds justify diverting cases from the refugee status determination procedure. While the Procedures Directive allows some claims to be dismissed as unfounded, such a dismissal may occur only after the determining authority has examined the application on the merits in light of the substantive standards requiring international protection set forth in the Qualifications Directive.²⁶ The proposed Procedures Directive also permits a member state to accelerate or prioritize certain procedures,²⁷ but it requires the member state to provide each applicant access to the asylum procedure itself²⁸ and an impartial examination of his or her individual request for protection.²⁹ Under the proposed Procedures Directive, member states must apply the international refugee definition in a 'full and inclusive' manner and ensure that 'nobody is sent back to persecution'.³⁰

With regard to inadmissibility proceedings, the proposed Procedures Directive is consonant with international instruments and with international law notions of procedural fairness. For example, the Council of Europe recently addressed the forum in which European states assess allegations that can lead to the exclusion of an individual from refugee status.³¹ Under the 1951 Refugee Convention states can refuse refugee status to an individual with a well-founded fear of persecution when there are serious reasons to believe the individual committed a serious

²³ *Ibid.*, Art. 6.

²⁴ E.g., see European Council on Refugees and Exiles, Comments on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 Nov. 2004, CO1/03/2005/ext.CN (ECRE Report); UNHCR Press Release, 30 Apr. 2004.

²⁵ Art. 25, Procedures Directive, n. 7, above. The application may be considered inadmissible if another member State has granted refugee status, Art. 25 (a), or equivalent protection, Art. 25 (d) or (e). It may be deemed inadmissible if another state is deemed a first country of asylum, Art. 25 (b), or a safe third country, Art. 25 (c). The last inadmissibility category refers to identical subsequent applications, Art. 25 (f), (g).

²⁶ *Ibid.*, Art. 29 (1).

²⁷ *Ibid.*, Art. 23 (3). This approach has been strongly denounced as a violation of international refugee law, see ECRE Report, n. 24 above. It raises concerns beyond the scope of this article.

²⁸ Art. 5, Procedures Directive, n. 7 above.

²⁹ *Ibid.*, Art. 7.

³⁰ Recital (2), Procedures Directive, n. 7 above.

³¹ Recommendation Rec (2005)6 of the Committee of Ministers to Member States on exclusion from refugee status in the context of Art. 1.F of the Convention relating to the Status of Refugees of 28 July 1951, adopted 23 Mar. 2005.

non-political crime before arriving in the state where he or she has requested asylum.³² The Committee of Ministers of the Council of Europe emphasized that these types of issues, which feature prominently in the inadmissibility procedures in Spain and Portugal, must be decided within the regular refugee status determination procedure.

Other international agreements protect individuals from being returned to countries where they would face persecution, inhuman or degrading treatment, or torture.³³ To carry out these provisions, states must afford applicants full and fair hearings concerning the threats of harm they face if returned home. The current Spanish and Portuguese inadmissibility procedures undercut these guarantees against *refoulement* by authorizing examiners to rely on multiple disqualifying grounds to reject an asylum seeker before considering the substance of an asylum claim. Moreover, the accelerated inadmissibility procedures often require officials to decide complex matters concerning events in distant cultures, which magnifies the risk that an individual might be returned to persecution, torture, or other inhuman treatment. As currently applied, the Spanish and Portuguese inadmissibility proceedings violate international legal obligations.

3. Spanish asylum law

The role that inadmissibility proceedings have in the Spanish asylum system can only be understood in light of Spain's emergence from dictatorship and political isolation and its relatively recent development of asylum law. Prior to the 1980s, Spain had neither an immigration law nor an asylum law.³⁴ During Franco's rule from 1939 until 1975 there were no legislative standards applicable to immigration. Non-citizens could be granted residence permits and work authorization by the executive, but those rejected had no recourse to courts.³⁵ It was a period of near absolute administrative discretion.³⁶

³² Art. 1.F (a), 1951 Refugee Convention, n. 9 above.

³³ E.g., the European Convention on Human Rights (ECHR), 213 UNTS 222, forbids state parties from exposing individuals to torture or inhuman and degrading treatment, Art. 3, and the European Court of Human Rights has ruled that returning individuals to persecution violates this prohibition. The European Convention also establishes procedural safeguards, requiring that legal rights and obligations be decided after fair hearings conducted within reasonable time limits. In addition, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465 UNTS 85, 26 June 1987, also precludes the expulsion of individuals to a state where there are substantial grounds that they may face severe physical or mental suffering or torture, Art. 3.

³⁴ Spain has a long history of emigration and immigration, as it once ruled colonies all over the globe, see Ortega Pérez, n. 6 above (3.5 million emigrated from Spain from 1850-1950; 100 000 emigrated each year from 1961-1974; since 1975 the number of immigrants has increased each year). Although migration has been important for economic and political reasons, it was not a major subject of Spanish law prior to the late 20th century.

³⁵ P. Santolaya Machetti, *Comentarios a la Ley de Extranjería* (Madrid: Lex Nova, 2da. ed., 2002).

³⁶ *Ibid.*

This began to change in the late 1970s, as Spain emerged from the dictatorship. Shortly before adopting the 1978 Constitution,³⁷ Spain acceded to the 1951 Geneva Convention Relating to the Status of Refugees³⁸ and the accompanying 1967 New York Protocol,³⁹ as part of its reintegration into the international community and adoption of the norms of international law.⁴⁰ Subsequently, during the drafting of the Constitution, Parliament vigorously debated whether to include a constitutional guarantee to asylum.⁴¹ A compromise was reached: the right of asylum was recognized in Title I, the section devoted to fundamental rights, but the procedural and substantive contours of this right were left to Parliament.⁴²

3.1 Early legislation

In 1984 at the time of the enactment of the first Asylum and Refugee Law,⁴³ many Spaniards recalled friends and family who had fled the Franco dictatorship,⁴⁴ and Parliament extended the right of asylum to all those fleeing persecution based on political or politically-related crimes

³⁷ The Spanish Constitution was approved on 31 Oct. 1978 by a plenary session of the Congress of Deputies and the Senate, ratified by the public in a referendum on 6 Dec. 1978, and formalized by the King in front of Parliament on 27 Dec. 1978. *Boletín Oficial del Estado* (BOE) n° 311, 29 Dec. 1978.

³⁸ 1951 Refugee Convention, n. 9 above.

³⁹ Protocol Relating to the Status of Refugees, 31 Jan. 1967, 606 UNTS 8791 (Protocol). Spain acceded to both the Refugee Convention and Protocol in 1978. BOE n° 252, 21 Oct. 1978, correction of errata in BOE n° 272, 14 Nov. 1978.

⁴⁰ Spain became the 68th state to recognize the international refugee definition. See UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, as of 1 Aug. 2004, available at <http://www.unhcr.ch>. To carry out its obligations, the government adopted a provisional regulation to implement the terms of the Refugee Convention while developing the new constitutional framework and the attendant legislative program, Orders of the Ministry of the Interior, 16 May 1979, BOE n° 124, 24 May 1979, and 31 Aug. 1979. In essence, the regulation provided that those already living in Spain under the protection of the United Nations High Commissioner for Refugees (UNHCR) would receive refugee status if they filed applications for refugee status by 1 Sept. 1979. The Ministry of the Interior, the Ministry of Foreign Affairs, and the UNHCR all participated in reviewing the applications, with the final decision by the Minister of the Interior, and subsequent appeal to the Council of Ministers. This action regularized the status of thousands of *de facto* refugees who had previously come to Spain, and it stabilized the situation and allowed time for a more considered approach to the issue of refugees and asylum. Interview with Maria Angeles Siemens, Secretary General, UNHCR Association in Spain, 5 Feb. 2002 (transcript of interview on file with author).

⁴¹ See Escobar Hernandez, 'Asylum and Refugee Status in Spain', 4 *IJRL* 58 (1992).

⁴² Art. 13.4, Spanish Constitution, n. 37 above, provides: 'The law will establish the terms under which citizens of other countries and those who are stateless will enjoy the right of asylum in Spain.'

⁴³ *Ley 5/1984, de 26 marzo 1984, Reguladora del Derecho de Asilo y de la Condición de Refugiado*, [Law 5/1984, Regulating the right to asylum and refugee status] (Law 5/1984), BOE n° 74, 27 Mar. 1984. It took Parliament more than four years to carry out the mandate of art. 13.4 of the Constitution. It appears that it was Spain's decision to join the European Union in the mid 1980s that moved migration and asylum issues onto the political agenda. Santolaya, n. 35 above.

⁴⁴ Franco died in 1975 after almost 40 years in power. S. Payne, *The Franco Regime* (London: Phoenix Press, 2000). See also Gil Bazo, 'The Role of Spain as a Gateway to the Schengen Area: Changes in the Asylum Law and their Implications for Human Rights', 10 *IJRL* 214 (1998).

not considered unlawful in Spain, as well as to those fleeing persecution based on race, religion, nationality, political opinion, or membership in a particular social group.⁴⁵

The legislation distinguished between (1) asylum,⁴⁶ an individual's right to seek protection in Spanish territory, and (2) refugee status,⁴⁷ the legal condition available to those who meet the criteria set forth in the 1951 Refugee Convention. The implementing regulation amplified the bifurcation between asylum and refugee status,⁴⁸ and the practice that developed accorded more rights to those granted asylum than to those recognized as refugees. Further, asylum, which had been envisioned as discretionary,⁴⁹ was, in effect, automatically conceded to those who fit within its broad ambit.⁵⁰ In contrast, refugee status, which had been devised as a declaration of the rights of those protected by international refugee law, was less frequently granted.⁵¹

Moreover, in an example of unintended consequences, the new system encouraged both refugees and non-refugees to use the asylum process as a means of immigrating to Spain.⁵² Filing an application for asylum brought with it both the right to enter Spain,⁵³ and the right to remain there during the entire length of the proceeding.⁵⁴ Because Spain had periodic amnesties, which allowed those who had been living in the country for a certain period of time to obtain residence permits,⁵⁵ the

⁴⁵ Art. 3, Law 5/1984 (protecting those persecuted due to their race, origin, religion, political opinion or activity, or membership in a particular social group, or due to the commission of crimes to obtain the recognition of rights and fundamental liberties protected by the Spanish legal system or to fight against non-democratic systems; or when justified for humanitarian reasons). In essence, Law 5/1984 grafted a somewhat romantic 19th century revolutionary notion of asylum onto the refugee definition that had developed in the post Second World War era.

⁴⁶ Art. 1, Law 5/1984.

⁴⁷ Art. 22.1, Law 5/1984.

⁴⁸ *Real Decreto 511/1985, 20 febrero 1985, por el que se aprueba el reglamento de aplicación de la Ley 5/1984* [Royal Decree 511/1985, 20 Feb. 1985, approving the regulation for the application of the law regulating the right to asylum and refugee status], BOE n° 94, 19 Apr. 1985.

⁴⁹ Art. 2.1, Law 5/1984.

⁵⁰ Siemens, n. 40 above.

⁵¹ *Ibid.* Asylum and refugee status, thus, were not identical. For a survey of distinctions between refugee status and asylum, see Escobar Hernandez, n. 41 above, 57. In one telling contrast, those granted asylum received the right to reside and work in Spain, whereas those recognized as refugees received identity papers and travel documents, but no right to permanent residence or right to work. This disparity resulted, on occasion, in scenarios where individuals recognized by Spain as refugees decided to file applications for asylum. *Ibid.*, 66-7.

⁵² *Ibid.*; Siemens, n. 40 above.

⁵³ Art. 4.1-2, Law 5/1984.

⁵⁴ Art. 5, Law 5/1984. All decisions concerning extradition and deportation were suspended until the end of the procedures, which included the opportunity to seek administrative, Art. 5.2, and judicial, Art 21.3, review. At any time during the asylum procedures, or after receiving a negative decision, asylum applicants could seek to regularize their legal status via a non-refugee solution. Siemens, n. 40 above.

⁵⁵ See Ortega Pérez, n. 6 above.

asylum process was a magnet for many — whether persecuted or not — who wished to regularize their status in Spain.⁵⁶

In the early 1990s this generous system was challenged. Spain had seen its numbers of asylum applications increase from 1 000 in 1984 to more than 12 000 in 1993.⁵⁷ Spain had completed its first five years of membership in the European Union, and had joined the Schengen Convention,⁵⁸ which committed its member states to reinforce external borders while simultaneously suppressing checks at internal borders. In light of these circumstances, Spain enacted its second round of asylum legislation. This time discouraging abuse of the asylum system was an important objective.

3.2 The 1994 Act

The 1994 Refugee and Asylum Act⁵⁹ made two thoroughgoing changes, one substantive and one procedural. Substantively, it deleted the distinction between refugee status and asylum,⁶⁰ and procedurally, it added a preliminary phase, the inadmissibility procedure, to the refugee status determinations.⁶¹ This procedural revision revolutionized the asylum system by establishing multiple bases for precluding asylum seekers from the full asylum procedure. The legislation specifies six bases of inadmissibility, some of which include several alternative grounds.

The Minister of the Interior . . . may [declare] any request for asylum inadmissible to the regular refugee status determination procedure . . . if the asylum seeker fits any of the following conditions:

- (a) Those provided for in articles 1.F and 33.2 of the 1951 Geneva Convention on the Status of Refugees.
- (b) None of the grounds for recognition of refugee status are invoked in the request for asylum.

⁵⁶ Siemens, n. 40 above.

⁵⁷ Inter-Governmental Consultations, reprinted in 8 *IJRL* 486 (1996), report 1 100 asylum applications in 1984, 2 300 in 1985, 2 300 in 1986, 2 500 in 1987, 3 300 in 1988, 4 000 in 1989, 8 600 in 1990, 8 100 in 1991, 11 700 in 1992, and 12 613 in 1993. See also Gil Bazo, n. 44 above, 216.

⁵⁸ Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, concluded 14 June 1985, and the Convention Applying the Agreement, done 19 June 1990, 30 *ILM* 68, 69, 73, 84 (in four parts)(hereinafter Schengen Convention). Spain ratified the Schengen Convention in July 1993, BOE n° 81, 5 Apr. 1994, 10390–10422. Additional EU states have since joined the five original members of the Schengen group. As of Jan. 2005, 15 states are members of the Schengen group.

⁵⁹ *Ley 9/1994, de 19 mayo, de modificación de la Ley 5/1984, de 26 de marzo, Reguladora del Derecho de Asilo y de la Condición de Refugiado* [Law 9/1994, of 19 May amending Law 5/1984, of 26 Mar. Regulating the Right to Asylum and Refugee Status] (Law 9/1994), BOE n° 122, 23 May 1994; BOE n° 131, 2 Jun. 1994.

⁶⁰ Art. 3.1, Law 9/1994.

⁶¹ Art. 5.6, Law 9/1994.

- (c) The request submitted is merely the reiteration of a request that has already been rejected in Spain, provided that no new circumstances have arisen in the country of origin involving a substantial change in the merits of the request.
- (d) The request is based on facts, information or allegations which are openly false, implausible or, because they are no longer valid or significant, do not constitute the basis of a need for protection.
- (e) When examination of the request is not the responsibility of Spain according to those International Conventions to which Spain is a party.
- (f) If the asylum-seeker has been recognized as a refugee and has the right to reside and be granted asylum in another State, or if the asylum-seeker has arrived from another State from which he could have requested protection.⁶²

3.3 The current procedure

The 1994 legislation, as amplified by the detailed implementing regulation adopted in 1995,⁶³ envisions a three-tiered system: (1) a centralized executive office within the Ministry of Interior examines asylum applications for inadmissibility; (2) a committee of representatives from different ministries reviews the merits of applications that have survived the inadmissibility phase and recommends which should be granted asylum by the Minister of Interior; who invariably adopts the recommendation, and (3) judicial review by the National Administrative Court. The central authority, the Office of Asylum and Refugees (OAR), employs a staff of interviewers to elicit information from asylum seekers and a cadre of asylum officers to examine asylum applications.⁶⁴ OAR also employs interpreters, social workers, and other administrative personnel.⁶⁵ One unit of OAR employees performs the inadmissibility screening; a second group within OAR reviews the persecution claims of those applicants who have passed through inadmissibility phase and prepares reports on each applicant.⁶⁶ The Inter Ministerial Eligibility Commission (CIAR) contains representatives from the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of the Interior, the Ministry of Labor, and the

⁶² Ibid.

⁶³ *Real Decreto 203/1995 de 10 de febrero, por el que se aprueba el reglamento de aplicación de la ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y la condición de refugiado, modificada por la ley 9/1994, de 19 de mayo* [Royal Decree 203/1995 of 10 Feb. 1995, approving the implementing regulation of Law 5/1984 of 26 Mar. (1984) regulating the right to asylum and refugee status as amended by Law 9/1995 of 19 May (1994)] (Implementing Regulation).

⁶⁴ Art. 3, Implementing Regulation.

⁶⁵ Interview with Eduardo Blanes Gomez, Chief of Special Proceedings Section, OAR (30 Apr. 2002) (transcript of interview on file with author).

⁶⁶ Ibid.

Ministry of Social Services Affairs.⁶⁷ CIAR meets monthly to review the reports that OAR prepares on individual cases.⁶⁸ The Office of the United Nations High Commissioner for Refugees (UNHCR) in Spain sends a non-voting representative to the CIAR meetings to present the UNHCR perspective on the applications under consideration.⁶⁹ The CIAR recommends a decision to the Minister of the Interior, who issues the final administrative decision.⁷⁰ Any asylum seeker whose application is rejected may file an appeal with the National Administrative Court in Madrid.⁷¹

This outline of the substantive legal standards and institutional framework conveys little of the reality of the asylum procedure, however. During the past few years over seventy per cent of those seeking asylum have been rejected at the inadmissibility phase.⁷² In these cases, neither the OAR asylum officers, the CIAR members, nor the Minister of the Interior reviewed evidence of persecution, and the courts rarely became involved. Thus, the inadmissibility examination was the only hearing most applicants for asylum received.

3.3.1 *The application process*

An asylum seeker in Spain initiates the asylum process by contacting the government and scheduling an interview.⁷³ The asylum seeker answers

⁶⁷ Art. 6, Law 9/1994.

⁶⁸ *Ibid.*

⁶⁹ The UNHCR representative in Spain is informed of all asylum applications, may interview asylum seekers and may issue opinions on the individual files considered by the Ministry of Interior. See Arts. 5, 6, 21, Law 9/1994; Arts. 2–6, 17–20, 21, 24, 37–39, Implementing Regulation.

⁷⁰ Art 7, Law 9/1994. The Minister of the Interior bases his decision on the recommendation forwarded by CIAR. Blanes, n. 65 above.

⁷¹ Art. 21.1, Law 9/1994; Art. 39.1, Implementing Regulation. The *Audiencia Nacional*, the Administrative Branch of the National Court, has jurisdiction over the entire Spanish territory. Asylum seekers must file a separate request for suspensive effect in order to remain in the country during the judicial review phase. Interview with Marta Garcia, UNHCR Legal Officer, Madrid, 15 Mar. 2002 (transcript of interview on file with author); European Council on Refugees and Exiles (ECRE), *Legal and Social Conditions for Asylum Seekers and Refugees in Europe, 2003, ECRE and Danish Refugee Council Publication* (2003 ECRE Report), available at <http://www.ecre.org/conditions/2003/spain%202003%20final.pdf>.

⁷² Annual Statistics, n. 8 above. This wholesale approach to inadmissibility has not enhanced the likelihood that those who survive this procedure will receive refugee status in Spain. The percentage of asylum seekers granted refugee status is exceedingly low: 4.9% (370 of 7 533) in 2000, 3.3% (298 of 9 074) in 2001, 2.8% (175 of 6 261) in 2002, and 3.3% (227 of 6 948) in 2003. In addition, a few received protection on other grounds. E.g., 72 asylum seekers in Spain in 2003 received protection on humanitarian grounds and 70 received other forms of protection. *Ibid.* In Portugal, 7% (16 of 224) asylum applicants received refugee status in 2000, 3% (7 of 232) in 2001, 5.8% (14 of 245) in 2002, 2% (2 of 88) in 2003, and 1.8% (2 of 113) in 2004. UNHCR Statistical Yearbooks 2000–2004, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics>.

⁷³ Art. 4.1, Implementing Regulation. Asylum applications may be filed at the OAR, border stations, Aliens Affairs Offices, Police Departments, or Spanish Consulates in foreign countries. In Madrid, where a majority of asylum claims are lodged, the OAR maintains a toll-free telephone number and OAR personnel set appointments for the initial interview during the telephone call. In Madrid OAR personnel interview the asylum applicant; elsewhere, a police officer typically

questions posed by the interviewer⁷⁴ concerning personal data, travel routes, and details of his or her asylum claim. These responses become the formal application for asylum.⁷⁵ At the interview the applicant receives written information (translated into multiple languages) concerning the Spanish asylum process and the governmental and non governmental organizations that provide legal assistance,⁷⁶ and the interviewer should inform the applicant that he or she may submit further supporting information within ten days.⁷⁷ Although an asylum seeker can bring a lawyer to the interview,⁷⁸ most do not.⁷⁹

An interviewer does not evaluate the claim, but passes it on to an OAR inadmissibility examiner,⁸⁰ who has two months to study it, evaluate the claim for asylum, seek additional information, and provide a written recommendation on the case.⁸¹ The OAR examiner scrutinizes the report of the interviewer and any supporting documents to determine if any of the inadmissibility grounds set forth in the 1994 legislation are present.⁸² In a majority of cases, the examiner concludes that the asylum is inadmissible because it fails to present grounds for granting refugee status or because it contains manifestly false or implausible allegations.⁸³

If an examiner concludes that a claim is inadmissible, the examiner notifies the Spanish office of the UNHCR.⁸⁴ A UNHCR attorney has ten days to visit the OAR office, review the file, and make a written recommendation.⁸⁵ The UNHCR has the right to interview the asylum seeker in person or by telephone, but rarely does. From the UNHCR's

does the interview and the interviews are then forwarded to OAR in Madrid to the examiners who make the inadmissibility decisions. Blanes, n. 65 above.

⁷⁴ Art. 4.1, Law 9/1994, and Art. 8.4, Implementing Regulation, specify that asylum seekers have the right to an interpreter. OAR maintains interpreters who speak several of the languages, such as English, French, and Russian, most commonly used by asylum seekers in Spain. Blanes, n. 65 above.

⁷⁵ Garcia, n. 71 above. In contrast to the practice in the U.S., an asylum seeker does not fill in a form that essentially provides applicants with a checklist of reasons for seeking asylum.

⁷⁶ Art. 5.1–5.2, Implementing Regulation. The OAR prints informational brochures in eight or nine languages. Garcia, n. 71 above.

⁷⁷ Art. 25.1, Implementing Regulation. Those who obtain lawyers often submit additional documents throughout the procedure, which are generally accepted. Garcia, n. 71 above.

⁷⁸ Art. 4.1, Law 9/1994; Art 8.4, Implementing Regulation.

⁷⁹ Blanes, n. 65 above.

⁸⁰ The examiners specialize by geographical regions. E.g., in the spring of 2002, two examiners focused on asylum applications from Colombia, one on Africa, except for Algeria and Sierra Leone, one on Algeria, Sierra Leone, and Romania, and one on other countries throughout the world. At that time two of the five examiners and the chief of the section had a university law degree. *Ibid.*

⁸¹ *Ibid.*; Art. 17.2, Implementing Regulation. During the 60 day period asylum seekers are authorized to remain in Spain, Art. 13.1, but they are not, at this point, eligible for shelter or other social assistance. Art. 15.1. Spanish authorities provide accommodations for exceptional cases, destitute families with small children, e.g., during the inadmissibility phase. Art. 15.3.

⁸² Blanes, n. 65 above.

⁸³ *Ibid.*

⁸⁴ Art. 17.1, Implementing Regulation.

⁸⁵ *Ibid.*

perspective, the inadmissibility phase should only winnow out claims with no conceivable grounds for asylum; if further questions of the applicant are necessary, that, in itself, should be sufficient to prevent dismissal at the inadmissibility phase.⁸⁶ If the UNHCR disagrees with the OAR examiner's conclusion of inadmissibility, the Chief of the OAR Inadmissibility Section reviews the conflicting recommendations and decides whether the claim is inadmissible.⁸⁷ An asylum seeker rejected as inadmissible, no matter the UNHCR's position, can appeal the OAR's decision only to the National Administrative Court.⁸⁸ The applicant has no right to seek administrative review by CIAR, which is charged with evaluating the need for asylum.⁸⁹ Nor can a rejected asylum seeker seek administrative review by the Minister of the Interior.

3.3.2 *The inadmissibility procedure at the border*

A majority of asylum seekers in Spain file applications at the central OAR unit in Madrid.⁹⁰ The small minority who seek asylum at the border face an even more truncated inadmissibility procedure that is completed within seventy-two hours, rather than sixty days. In theory, this process applies at all borders, but in fact is reserved for major airports⁹¹ and, on occasion, Spanish sea ports when stowaways on commercial ships seek asylum.⁹² Spanish officials, however, do not apply the truncated inadmissibility procedure to passengers who arrive on the coast in small unscheduled crafts, colloquially known as *pateras*.⁹³ An asylum seeker who lands clandestinely aboard a *patera* is subject to the routine sixty day inadmissibility proceeding.⁹⁴

⁸⁶ Garcia, n. 71 above.

⁸⁷ Technically, the decision is made by the Secretary of State for Foreigners and Migration, after a recommendation from the Secretary General of the OAR, who has received a recommendation from the head of the Inadmissibility Division. Blanes, n. 65 above.

⁸⁸ Art. 21.1, Law 9/1994; Art. 39.1, Implementing Regulation.

⁸⁹ The files of the few not rejected as inadmissible are forwarded to a different set of OAR examiners, who review the file, decide whether to schedule another interview, evaluate the country conditions, analyze the legal standards, and write a report proposing a resolution. Art. 3, Implementing Regulation. Art. 24.4, Implementing Regulation requires the asylum determination process to be completed within six months, but in practice the average case takes longer. Garcia, n. 71 above; 2003 ECRE Report, n. 71 above.

⁹⁰ Blanes, n. 65 above. In 2003, 2677 of the 3457 asylum applications lodged in peninsular Spain were filed in Madrid. Table IX.1, 2003 Annual Statistics, n. 8 above.

⁹¹ Garcia, n. 71 above. Art. 5.7, Act 9/1994 requires asylum seekers to remain in adequate premises at the border until the authorities decide on the admissibility of their claims. Such premises exist at the main international airports; the great majority of airport applications occur at the Madrid Airport at Barajas; others at the Las Palmas Airport in the Canary Islands and at the Barcelona Airport. 2003 ECRE Report, n. 71 above.

⁹² The applicants are typically confined to the ship that brought them to Spain while the truncated border procedure runs its course. Garcia, n. 71 above.

⁹³ 2003 ECRE Report, n. 71 above.

⁹⁴ Garcia, n. 71 above.

An asylum seeker who requests protection at a port of entry is assigned a lawyer, who comes to the airport to meet the applicant. Although refugee support organizations have lawyers available to assist asylum seekers at ports of entry, OAR prohibits these lawyers from speaking with an asylum seeker, unless the asylum seeker has requested assistance from that specific legal organization.⁹⁵ Instead, most asylum seekers meet with an 'on call' attorney provided by the local bar association, who generally is not an expert in immigration or asylum matters.⁹⁶ An OAR examiner interviews the applicant at the airport,⁹⁷ evaluates the case, and prepares a recommendation. The examiner then provides a copy of the interview summary to the UNHCR representative in Madrid.⁹⁸ A UNHCR attorney reviews the OAR notes, considers the circumstances, and notifies OAR of the UNHCR view of the applicant's inadmissibility,⁹⁹ which the Chief of the Inadmissibility Section considers,¹⁰⁰ before issuing a recommendation to the Minister of Interior.¹⁰¹ The Minister must decide whether the asylum seeker is inadmissible to the regular asylum procedure within seventy-two hours of the request for asylum.¹⁰² If the decision is not made within this time, the applicant is permitted to enter Spain to await the government's decision on whether he or she is inadmissible to the asylum procedure.¹⁰³ Those who clear the inadmissibility hurdle are allowed to enter Spain in order to have access to the regular asylum procedure.

⁹⁵ Most do not request a specific organization. Blanes, n. 65 above. If the asylum seeker does ask for the assistance of a lawyer from a particular organization, that organization sends someone to the airport. Interview with Belen Walliser, Director of Legal Service, *Comisión Española de Ayuda al Refugiado* (CEAR), Madrid Branch Office (22 Apr. 2002) (transcript of interview on file with author).

⁹⁶ The *Colegio de Abogados* [bar association] arranges a schedule with different lawyers who are responsible for responding on particular days and provides some training; the lawyers are not experts in immigration or asylum matters. This is similar to the Spanish system for providing legal counsel to those accused of a crime. Blanes, n. 65 above.

⁹⁷ The OAR examiners, not the interviewing team, go to the airport to do the interviews. Walliser, n.95 above.

⁹⁸ Art. 20.1 (a), Implementing Regulation. The UNHCR has the option to interview the asylum seeker and issue a recommendation within 24 hours. The UNHCR rarely interviews the asylum seeker for the reasons mentioned earlier, text at n. 86 above.

⁹⁹ Garcia, n. 71 above.

¹⁰⁰ Blanes, n. 65 above. The OAR usually waits for the UNHCR recommendation before deciding the airport cases, 2003 ECRE Report, n. 71 above; Garcia, n. 71 above.

¹⁰¹ Technically, the decision is made by the Secretary of State for Foreigners and Migration, after a recommendation from the Secretary General of the OAR, who has received a recommendation from the head of the Inadmissibility Division. Blanes, n. 65 above.

¹⁰² Art. 20.1 (b), Implementing Regulation.

¹⁰³ If the inadmissibility decision is not made within 4 days, the applicant is allowed to enter the regular determination procedure. Art. 5.7, Law 9/1994; Art. 20.2, Implementing Regulation. Further, the Implementing Regulation, Art 20.1(b) limits the stay at the border to 72 hours in order to avoid any possible conflict with art. 17.2 of the Spanish Constitution, which limits detention to 72 hours. If the OAR cannot make a decision within 72 hours, the asylum seeker is allowed to enter Spain and the OAR then uses the fourth day to finish the inadmissibility process. Blanes, n. 65 above.

Most applicants are rejected at ports of entry and are not allowed to enter Spain. An asylum seeker rejected as inadmissible at the border has twenty-four hours to request reconsideration¹⁰⁴ by the head of the Inadmissibility Division, the same official who made the original determination.¹⁰⁵ This decision on reconsideration is due within forty-eight hours.¹⁰⁶ An applicant rejected upon reconsideration may appeal to court, but like rejected applicants under the sixty day inadmissibility procedure, he or she has no administrative appeal to CIAR or the Minister of the Interior.¹⁰⁷ Pending judicial review, a rejected applicant remains at the border and can be expelled during the appeal unless he or she seeks and is granted a stay of removal by the court.¹⁰⁸ Anyone remaining at the airport is considered to be legally outside of Spanish territory, and can easily be removed if the court does not grant emergency relief. Only those found inadmissible at the border by OAR who receive a contrary recommendation by UNHCR are permitted to enter Spain while they seek judicial review of the government's inadmissibility determination.

4. Portuguese asylum law

Portugal, too, endured isolation under a lengthy dictatorship in the second half of the twentieth century, under Salazar from 1932 to 1968, followed by Caetano until 1974.¹⁰⁹ The 1976 Constitution recognized both the decades of dictatorship and the aftershocks of decolonization in Africa by enshrining a right to asylum for 'aliens and stateless persons persecuted as a result of their activities on behalf of democracy, national

¹⁰⁴ Art. 5.7, Law 9/1994; Art. 21.1, Implementing Regulation.

¹⁰⁵ Blanes, n. 65 above.

¹⁰⁶ Art. 5.7, Law 9/1994; Art. 21.1(b), Implementing Regulation. The UNHCR receives a copy of all requests for re-examination and assigns a different lawyer to examine the new request. If this review leads the UNHCR to conclude that the applicant's claim should be admitted to the regular asylum procedure, then the asylum seeker is allowed to enter Spain in order to seek judicial review of the admissibility decision, but not a review of the merits of the claim. Garcia, n. 71 above. Asylum seekers who do not file judicial appeals within two months will be expelled. Art. 39.2, Implementing Regulation. In effect, a positive recommendation by the UNHCR at the re-examination stage is equivalent to a grant of suspensive effect, and the OAR provides these asylum seekers with documents that authorize them to remain in Spain during the pendency of the court proceeding. Blanes, n. 65 above.

¹⁰⁷ Art. 21.1, Law 9/1994; Art. 39.1, Implementing Regulation.

¹⁰⁸ Blanes, n. 65 above. The court grants a relatively high percentage of the requests for suspensive effect filed by asylum seekers held at the airport. Garcia, n. 71 above.

¹⁰⁹ Military officers opposed to continuing military engagements in Africa mounted a coup in 1974. K. Maxwell, *The Making of Portuguese Democracy* (Cambridge: Cambridge U. Press, 1995) 16–22, 33–59. The following year the provisional military government held elections for an assembly to create a new constitution. *Ibid.*, 112–13. Like Spain, Portugal had a long history of emigration and immigration. By the late 15th century Portugal had established itself as a seafaring and colonizing nation. *Ibid.*, 7–10. From the 1850s to the 1950s almost 2 million emigrated to the Americas; from 1959 to 1974 more than 1.5 million emigrated to Europe. Malheiros, n. 6 above. In Portugal, as in Spain, many asylum seekers and other migrants come from former colonies. After decolonization more than 500 000 from Angola, Mozambique & Guinea-Bissau came to Portugal. *Ibid.*

and social liberty, peace among people, freedom and human rights, exercised in the state of their nationality or their current residence'.¹¹⁰ Several years later the constitutional protection was expanded to cover those who face a serious threat of persecution as well as those who have been persecuted.¹¹¹ The revised Constitution also added a provision, similar to Spain's, mandating that legislation would define refugee status.¹¹²

4.1 Early legislation

Portugal acceded to the 1951 Refugee Convention in 1960 under Salazar's reign,¹¹³ and at that time elected to restrict the refugee definition to those who had been displaced by events that occurred in Europe prior to 1951.¹¹⁴ There was no national legislation, however, to implement the Refugee Convention for the next two decades. Finally, in 1980, Portugal enacted legislation to guarantee asylum to those with a well-founded fear of persecution on account of race, religion, nationality, membership in a social group or political opinion.¹¹⁵ It also guaranteed asylum to those persecuted for their activities on behalf of democracy, social or national liberation, peace between peoples, liberty or human rights.¹¹⁶ Further, it provided that asylum could also be granted for other humanitarian reasons.¹¹⁷ This expansive view of asylum echoes the perspective Spain adopted in its first asylum legislation: a nation emerging from dictatorship vowed to protect those fighting for democracy, human rights, and national liberation.

The 1980 legislation was amended in 1983¹¹⁸ and then superseded by a new asylum law in 1993.¹¹⁹ The 1993 statute, enacted after Portugal joined the Schengen group¹²⁰ and ratified the Dublin Convention,¹²¹

¹¹⁰ Art. 22, 1976 Portuguese Constitution.

¹¹¹ Art. 33, *Lei Constitucional 1/82*, 30 Sept. 1982, *Primeira Revisao da Constituicao* [First Revision of the Constitution], *Diário da República*, I Série A, número 227, 30 Sept. 1982.

¹¹² *Ibid.*, Art. 33, para. 6: 'The status of political refugees shall be established by law.' The 2001 revision renumbered the asylum provisions as paras. 8 and 9.

¹¹³ *Decreto 43/201*, *Diário do Governo*, I Série, número 229, 1 Oct. 1960, with entry into force on 22 Mar. 1961 (Decree 43/201).

¹¹⁴ Art. 3, para. a, Decree 43/201 (elected restricted geographical and temporal option in Art. 1.B(1)(a)).

¹¹⁵ Art. 1, *Lei 38/80*, 1 Aug. 1980, *Direito de asilo e Estatuto do Refugiado*, [Law 38/80, Right to Asylum and Refugee Status], published in *Diário da República*, I Série, número 176, 1 Aug. 1980 (Law 38/1980).

¹¹⁶ Art. 1, Law 38/1980.

¹¹⁷ Art. 2, Law 38/1980.

¹¹⁸ *Diário da República*, II Série, número 14, 19 Feb. 1983.

¹¹⁹ *Lei 70/93*, 29 Sept. 1993, *Direito de asilo* [Right to Asylum], *Diário da República*, I Série A, número 229, 29 Sept. 1993 (Law 70/1993).

¹²⁰ Portugal had joined the Schengen group, n. 58 above, in 1991.

¹²¹ On 13 Feb. 93 Portugal ratified the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 15 June 1990, 20 *ILM* 425 (Dublin Convention). In 2003 the standards set forth in the Dublin Convention were incorporated into EU law. Dublin II, n. 14 above.

added significant new restrictions: asylum could be denied based on safe country of origin, transit through safe third countries, and accelerated procedures for manifestly unfounded claims.¹²² The 1993 innovations appeared to be effective in discouraging asylum applications; the number of asylum seekers dropped from 2 100 in 1993 to 270 in 1996.¹²³

4.2 The 1998 Asylum Law

Portugal enacted its current Asylum Law in 1998,¹²⁴ several years after Spain had substantially revised its asylum system. The Portuguese modeled their new approach on the Spanish legislation; one of its most important features is the preliminary inadmissibility proceeding.¹²⁵ The 1998 Portuguese legislation specifies multiple justifications for deeming an asylum claim inadmissible.

The petition shall not be admitted . . . [if] immediately obvious that:

- (a) It is groundless, because it is obvious that it does not meet any of the criteria defined by the Geneva Convention or by the New York Protocol, because the allegations that the applicant fears persecution in his or her country are unfounded, or because it constitutes an abusive usage of the asylum process;
 - (b) It is submitted by an individual who is a national or habitual resident in a country likely to be considered as a safe country or as a third host country;
 - (c) It comprises grounds mentioned in Article 1-F of the Geneva Convention;
 - (d) The application is submitted, without due justification, beyond the deadline prescribed in Article 11;
 - (e) The applicant had been subject to expulsion from national territory.¹²⁶
2. For the purposes of paragraph (a), it shall be considered as circumstantial evidence that the asylum petition is clearly fraudulent or that it constitutes an abusive usage of the asylum proceeding namely when the applicant:
- (a) Bases upon and justifies his or her request with evidence emerging from false or forged documents, when questioned about them declares that they are authentic, deliberately and in bad faith renders false statements related

¹²² Law 70/1993.

¹²³ 2002 UNHCR Statistical Yearbook, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/statistics/opedoc.pdf>.

¹²⁴ *Lei 15/98, 26 Mar. 1998, Estabelece um novo regime jurídico-legal em matéria de asilo e de refugiados* [Establishing a new legal framework for asylum and refugees], *Diário da República, I Série A, número 72, 26 Mar. 1998* (Law 15/1998).

¹²⁵ Art. 13–16, Law 15/1998. Other similar features include an accelerated procedure at the border, Art. 17–20, statutorily mandated role for the UNHCR, Art. 14, 18, 19, access to legal counseling, Art. 52.

¹²⁶ Art. 13.1(a)–(e); Law 15/1998.

to the object of the request or destroys documents that prove his or her identity;

- (b) Deliberately omits the fact that he or she has already submitted an asylum petition in one or in several countries, eventually using a false identity.¹²⁷

The 1998 legislation also defines as inadmissible other categories of asylum seekers excluded from eligibility for asylum:

- Those who have performed any acts that are contrary to Portugal's fundamental interests or sovereignty;
- Those who have committed crimes against peace, war crimes or crimes against humankind, as defined in the international instruments aimed at preventing them;
- Those who have committed felonious common law crimes punishable with more than three years of imprisonment;
- Those who have performed any acts contrary to the purposes and principles of the United Nations;¹²⁸
- Those whose protection would cause danger or well founded threat to the internal or external safety, or to public order.¹²⁹

4.3 The current procedure

The Asylum Law of 1998 also sets forth a tripartite institutional framework: (1) the Aliens and Frontier Department [*Servicio de Estrangeiros e Fronteiras*] (SEF), (2) the National Commissioner for Refugees, a newly created department within the Ministry of the Interior;¹³⁰ and (3) judicial review by the Administrative Court.

4.3.1 The application process

An asylum seeker must request asylum within eight days of entering Portugal.¹³¹ Any police department can receive an asylum application, which can be made orally or in writing.¹³² The Aliens and Frontier Department, charged with reviewing all asylum claims, notifies the asylum seeker to be ready to present his or her claim in five days, and notifies the UNHCR and the Portuguese Refugee Council that a claim has been filed.¹³³ This initiates the summary inadmissibility proceeding,

¹²⁷ Art. 13.2, Law 15/1998.

¹²⁸ Art. 3.1, Law 15/1998. Art. 13.1 lists 5 inadmissibility grounds, and incorporates by reference Art. 3, which includes 5 grounds. Two of the grounds in Art. 3, which set forth bases for exclusion from the asylum process in Portugal, duplicate 2 of the grounds listed in Art. 13.1.

¹²⁹ Art. 3.2, Law 15/1998.

¹³⁰ Art. 34, Law 15/1998.

¹³¹ Art. 14.1, Law 15/1998.

¹³² *Ibid.*

¹³³ Art 11.1, Law 15/1998.

which must be completed within twenty days.¹³⁴ As in Spain, an official of the central office examines the asylum claim for inadmissibility grounds, which are broader and more numerous under Portuguese law.¹³⁵

If the SEF concludes that none of the inadmissibility grounds is applicable, the asylum claim proceeds to the regular asylum procedure.¹³⁶ If the SEF rejects an asylum claim as inadmissible, it must notify the Portuguese Refugee Council and the UNHCR¹³⁷ as well as the asylum seeker and allow the rejected applicant ten days to leave Portugal.¹³⁸ The applicant may file a request for administrative reconsideration within five days with the National Commissioner for Refugees,¹³⁹ who must review the request within forty-eight hours.¹⁴⁰ This review automatically tolls the running of the ten day period to leave.¹⁴¹ If the National Commissioner affirms SEF's rejection of the application as inadmissible, the rejected asylum seeker can appeal to the Administrative Court.¹⁴² This appeal, however, lacks suspensive effect.¹⁴³

4.3.2 *The inadmissibility proceeding at the border*

An asylum seeker stopped at the border in Portugal also faces an accelerated and truncated inadmissibility proceeding. The SEF receives the applicant's claim and sends a report immediately to the Portuguese Refugee Council and the UNHCR office, which have forty-eight hours to interview the asylum seeker and prepare a written opinion.¹⁴⁴ Meanwhile, the SEF staff reviews the claim for inadmissibility grounds and,

¹³⁴ Art. 14.1, Law 15/1998.

¹³⁵ Several of the Portuguese bases for inadmissibility are flagrantly indeterminate: an applicant who has acted contrary to Portugal's fundamental interests or sovereignty is inadmissible, Art. 3(1)(a), as is an applicant who is a danger or threat to internal or external safety or to public order, Art. 3(2).

¹³⁶ The SEF staff then has sixty days, which can be extended by another sixty days, to investigate the merits of the case and reach a decision. During this time the Portuguese Refugee Council and the UNHCR may submit information and reports pertinent to each application. After completing its examination, the SEF sends a written report to the National Commissioner for Refugees. Art. 22. The Commissioner's staff then has ten days to prepare a proposed resolution, to receive and respond to submissions by the Portuguese Refugee Council, the UNHCR, and the applicant. Art. 23. All have five days to file their responses. The Commissioner's office has five more days to consider its proposal in light of the new comments, and must then submit a proposed resolution to the Minister of the Interior, who has eight days to issue a decision on asylum. Art. 23.

¹³⁷ Art. 14.3, Law 15/1998.

¹³⁸ Art. 15.1, Law 15/1998.

¹³⁹ Art. 16.1, Law 15/1998.

¹⁴⁰ Art. 16.2, Law 15/1998.

¹⁴¹ Art. 16.1, Law 15/1998.

¹⁴² Art. 16.2, Law 15/1998.

¹⁴³ Art. 16.2, Law 15/1998 provides for an appeal to court but does not stay the executive's ability to expel the applicant. In contrast, Art. 24.1 expressly provides for suspensive effect in appeals from the refugee determination ruling.

¹⁴⁴ Art. 18.1, Law 15/1998.

within five days of the request for asylum, issues a written decision explaining the Department's conclusion.¹⁴⁵

A successful applicant is allowed to enter Portugal. An asylum seeker whose claim is not decided within five days is also allowed to enter Portugal to begin the phase of the asylum procedure that examines the merits of claims.¹⁴⁶ An applicant who is declared inadmissible may file a request within twenty-four hours for an administrative reappraisal by the National Commissioner for Refugees, who has twenty-four hours to respond.¹⁴⁷ During that period the Portuguese Refugee Council and the UNHCR can add written submissions.¹⁴⁸ If the National Commissioner does not issue a decision within twenty-four hours, the asylum seeker is admitted to the refugee status determination procedure in Portugal.¹⁴⁹ Otherwise, a disappointed asylum seeker must remain at the border if he or she wishes to appeal the adverse decision by the Commissioner to the courts.¹⁵⁰

5. The iniquity of the inadmissibility procedures

The current inadmissibility proceedings in Spain and Portugal distort their asylum procedures, impair the systems' ability to reach accurate decisions, and risk returning individuals to face persecution. As a consequence, the current inadmissibility procedures impede Spain's and Portugal's implementation of their obligations under the refugee convention and human rights agreements. Moreover, these inadmissibility procedures run afoul of the Procedures Directive, soon to come into effect.

5.1 The scope of the inadmissibility procedure

Preliminary procedures can be appropriate so long as the focus is not on the substance of the claim, but rather on ascertaining state responsibility for hearing the asylum request.¹⁵¹ This might be a state where the individual had already found protection or it might be a state the asylum seeker passed through en route.¹⁵² These inquiries require individualized determinations about the accessibility and effectiveness of protection in

¹⁴⁵ Art. 18.3, Law 15/1998.

¹⁴⁶ Art. 20, Law 15/1998.

¹⁴⁷ Art. 19.1, Law 15/1998.

¹⁴⁸ Art. 19.2, Law 15/1998.

¹⁴⁹ Art. 20.3, Law 15/1998.

¹⁵⁰ The rejected applicant can request a 48 hour delay of return in order to seek an attorney to lodge an appeal. Art. 20.4. This appeal, like those filed on inadmissibility grounds within Portugal, lacks suspensive effect, n. 143 above.

¹⁵¹ UNHCR Global Consultation on International Protection, 'Asylum Processes (Fair and Efficient Asylum Procedures)', para. 7, UN doc. EC/GC/01/12, 31 May 2001.

¹⁵² *Ibid.*, para. 8. The safe transit country concept and the notions concerning first countries of asylum and safe countries of origin all raise complex and controversial issues beyond the scope of the current discussion. The focus here is on the distinction between the factual determinations relevant to

countries other than the applicant's homeland,¹⁵³ but the basis of the applicant's fear of persecution is irrelevant.¹⁵⁴

The proposed Procedures Directive essentially ratifies this approach. It provides that states may conclude that asylum applications are inadmissible to the asylum procedure in the following situations:

- the Dublin II Council Regulation assigns responsibility to another state
- another state has already granted refugee status
- another state has offered protection as a first country of asylum
- another state previously entered by the applicant will provide access to its asylum procedure and protection against *refoulement*.
- another state has offered protection equivalent to refugee status
- the asylum application is identical to one previously rejected after a final decision.¹⁵⁵

These provisions limit inadmissibility grounds to two categories: (1) circumstances in which another state already has reviewed the applicant's need for protection or should be responsible for assessing the asylum claim, and (2) circumstances in which review is precluded because the claim has already received full consideration. As discussed below, certain of the inadmissibility grounds recognized by Spanish and Portuguese law will pass muster under EU law; the majority of the inadmissibility decisions, however, will not comply with the Procedures Directive.

5.1.1 Identifying unfounded or abusive claims

Both Spain and Portugal view decisions concerning the fitness of the claim and the reliability of the supporting evidence as threshold matters that must be determined in the preliminary proceeding. Under Spanish law inadmissibility grounds include (1) asylum requests that do not explicitly invoke criteria that define refugee status,¹⁵⁶ and (2) requests based on false, implausible, or outdated information concerning the need for protection.¹⁵⁷ Analogous measures in Portuguese law provide that claims

assessing the substance of the asylum claim and the factual determinations relevant to assessing which state should assume responsibility for examining the asylum claim.

¹⁵³ *Ibid.*, paras. 10–11, 13–15.

¹⁵⁴ Indeed, the Dublin II Regulation criteria make clear that the nature of the persecution alleged and the quantity of proof available are not factors to be considered. Art. 3–15, Dublin II, n. 14 above.

¹⁵⁵ Art. 25, Procedures Directive, n.7 above. The Proposed Directive would also encompass asylum requests submitted by (1) applicants for protection equivalent to refugee status who are permitted to remain pending the decision on protection, Art. 25.2 (c), and (2) applicants' dependents who had earlier consented to include their cases in applications made on their behalf, so long as no facts had emerged that later justified separate applications. Art. 25.2(g).

¹⁵⁶ Art. 5.6 (b), Law 9/1994.

¹⁵⁷ Art. 5.6 (d), Law 9/1994.

are inadmissible if they obviously do not meet the Geneva Convention criteria, are unfounded, or constitute an abuse of the asylum process.¹⁵⁸ These grounds, authorized neither by international practice nor by the proposed Procedures Directive, result in the majority of the negative inadmissibility decisions.¹⁵⁹

Asylum seekers who have no valid claim to refugee status under the prescribed legal criteria can impose a serious burden on states, which can interfere with the rights of those who have substantial grounds for asylum.¹⁶⁰ The international community has recognized that states need the ability to address problems engendered by unfounded or implausible asylum claims, but these matters should not be resolved in preliminary inadmissibility proceedings. To achieve reliable decisions concerning the need for international protection, states must provide adequate resources and time for applicants to assert their claims coherently.

The inadmissibility phase proceeds so rapidly that it is almost impossible for an applicant to obtain legal assistance and to develop and present compelling evidence of the need for protection. Although Spanish law provides that asylum seekers have the right to legal assistance, most applicants do not consult lawyers. Even though for most asylum seekers the initial screening interview is the only meeting they have in which they can attempt to present a convincing need for protection, most come without a lawyer, and, more significantly, prior to the interview do not consult a lawyer.¹⁶¹ Moreover, mere consultation with an advocate is not a panacea. Knowledgeable lawyers or counselors need time to gain the confidence of the applicants and to gather supporting information to substantiate an asylum request. The pace of the inadmissibility procedure does not allow this. Although asylum seekers who arrive at Spanish airports do in almost all instances meet with a lawyer, the rotation system established by the local bar associations frequently results in lawyers on duty who are inexperienced in asylum law. At best, the level of legal representation is uneven.

Compounding the lack of effective access to legal assistance is the accelerated pace of the inadmissibility proceeding. The schedule does not accommodate the time an applicant may need to decipher Spanish and Portuguese legal procedures and to decode the social expectations. Nor does it recognize that leaving one's homeland is traumatic. Trying to survive on one's own in a different culture is wearying. Overcoming fear,

¹⁵⁸ Art. 13.1 (a), Law 15/1998.

¹⁵⁹ Blanes, n. 65 above.

¹⁶⁰ UNHCR Executive Committee, 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum', para. (c), Conclusion No. 30 (XXXIV), 1983.

¹⁶¹ Blanes, n. 65 above. Studies in the U.S., an admittedly different asylum system, show that asylum seekers represented by lawyers are four to six times as likely to receive asylum as unrepresented applicants. Schoenholtz, 'The State of Asylum Representation', (2002) 16 *Geo. Imm. L.J.* 739, 740.

depression, and traumatic stress takes emotional resilience and does not occur instantaneously.

Some might argue that despite these difficulties it is unnecessary to allow a claimant to enter the asylum procedure if he or she fails even to mention the refugee criteria. This is too harsh a standard to apply to individuals who come from distant lands with different cultures and frequently are presenting their claims in a foreign language. Speaking in a second or third language will often result in the use of a limited vocabulary and a rudimentary explanation of a situation. Speaking through an interpreter can exacerbate the problem. Yet, officials, particularly in Spain, reject many claims because they conclude that applicants are not worthy of protection if they fail to say plainly that they have suffered or fear they will suffer persecution on account of a specified ground.¹⁶²

Expecting a straightforward recital of persecution or a stark demand for asylum, while understandable by the voluble and highly expressive standards of Spanish and Portuguese discourse, betrays a cultural bias that disadvantages people from some societies. Moreover, this expectation is likely to have a disproportionately negative impact on women, many of whom may have had less experience in leading public lives. While male applicants also are often hesitant to tell a full history at an initial interview, matters of sexual violation and issues of family honor may well be impossible for many women to recount during the first meeting.

In addition, some asylum seekers consider it wise to be circumspect about criticizing their government in their first interview in a government office. Other examples of cultural barriers are easy to imagine. The humanitarian and legal obligation to provide protection should not turn on the applicant's omission of specific phrases. Moreover, as EU law has expanded to include notions of subsidiary protection¹⁶³ as well as refugee status, it is unlawful to reject a claim solely because it omits refugee criteria.

Claims that invoke the protection vocabulary but include false or implausible allegations are also rejected as inadmissible.¹⁶⁴ This, too, should be impermissible prior to a comprehensive review of the substance of the claim. It is no small matter to decide whether asylum seekers who have arrived from far away, and often remote, locations have included assertions that are not believable. Such decisions involve complex credibility determinations as well as up to date information about country conditions and situations that may be rapidly evolving.

Furthermore, false allegations sometimes appear because asylum seekers rely on unscrupulous individuals who require their charges to deny where

¹⁶² Art. 5.6(b), Law 9/1994, the inadmissibility standard most frequently cited by OAR, Blanes, n. 65 above, rejects applications that do not explicitly refer to one of the five types of grounds for recognizing refugee status: race, religion, nationality, political opinion, social group.

¹⁶³ Qualifications Directive, n. 12 above.

¹⁶⁴ Art. 5.6(d), Spanish Law 9/1994; Art. 13.1(a), Portuguese Law 15/1998.

they have traveled and other things they have experienced. The desperation that impels individuals to put their fates in the hands of those who traffic in human beings should not be underestimated. Rejection because a preliminary examination concludes that the application contains some false or implausible information or allegations is unwarranted.

In addition, the application of this standard disproportionately disadvantages asylum seekers who are not well-educated, articulate, and knowledgeable. Political, racial, religious, and social oppression frequently threatens less knowledgeable and uneducated people. That they repeat incorrect facts or exaggerate should not disqualify them from protection.

Similarly, concluding that an asylum applicant has relied on false or forged documents should not be a legitimate basis for inadmissibility.¹⁶⁵ These might sound like straightforward evidentiary matters, but they can be extremely complicated. A sophisticated and often time-consuming forensic system is necessary to identify reliably the inauthenticity of documents from far away countries that may have decentralized government authorities. Moreover, even if documents are established to be false, their use is not, in itself, dispositive, though they are relevant in light of all the circumstances of the case.¹⁶⁶ The asylum seeker may have believed them to be authentic, or forged documents may have been the only realistic manner of leaving a life-threatening situation. Implausible assertions and false or forged documents pose complex issues and should not be assessed in a preliminary proceeding.

Implausible allegations and false documents need not be ignored. Indeed, international principles have developed in response to applications that are not related to the criteria for obtaining protection or that are obviously fraudulent.¹⁶⁷ These can be reviewed expeditiously, without a full examination at every stage of the proceeding.¹⁶⁸ There must be a complete personal interview by a qualified official, however, even if the appellate rights are curtailed.¹⁶⁹ Due to the grave risks that can accompany erroneous rejection of an asylum seeker, the special proceedings must include safeguards that accommodate the logistical and cultural barriers that asylum seekers face in presenting their claims for protection.

The proposed Procedures Directive does not allow states to reject claims as unfounded or implausible in an inadmissibility proceeding. It provides that states may prioritize or accelerate procedures in a large number of circumstances, both positive and negative,¹⁷⁰ but these

¹⁶⁵ Art. 13.2(d), Portuguese Law 15/1998; Art. 5.6(d), Spanish Law 9/1994.

¹⁶⁶ UNHCR, Handbook on Procedure and Criteria For Determining Refugee Status, 1979, ¶ 199.

¹⁶⁷ UNHCR Executive Committee, 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum', para. (c), Conclusion No. 30 (XXXIV), 1983.

¹⁶⁸ *Ibid.*, para. (d).

¹⁶⁹ *Ibid.*, para. (c)(1).

¹⁷⁰ Art. 23, Procedures Directive, n. 7 above.

applications are not diverted from procedures that assess the merits of the claim. For example, officials may accelerate or prioritize applications they are likely to conclude are well founded,¹⁷¹ as well as applications they think clearly do not qualify for protection.¹⁷² They can also prioritize or accelerate applications that contain inconsistent, contradictory, or unlikely representations that make the claim clearly unconvincing,¹⁷³ and applications that present false and misleading information.¹⁷⁴

All accelerated or prioritized proceedings, however, must comply with the basic safeguards outlined in the Directive. Applicants must have access to the asylum procedure,¹⁷⁵ must have an impartial examination of their individual requests for protection,¹⁷⁶ and in most instances must have a personal interview that permits them to present their grounds for asylum in a comprehensive manner.¹⁷⁷

The Spanish and Portuguese asylum laws do not merely accelerate or prioritize disfavored applications, but rather divert them altogether from the asylum procedure. As a result, these inadmissibility procedures cut too wide a swath and improperly eliminate claims that merely appear weak without ever affording a review of the merits.

5.1.2 *Identifying grounds for exclusion*

The Spanish and Portuguese procedures also reject as inadmissible applicants who fear persecution but have been accused of conduct that, if true, would preclude refugee status. Spain expressly converts the exclusion grounds found in the 1951 Refugee Convention into bars that prevent applicants from admission to the asylum procedure. Specifically, inadmissibility grounds include the following:

- assertions that the applicant has committed a serious non-political crime outside Spain prior to admission to Spain

¹⁷¹ *Ibid.*, Art. 23.3.

¹⁷² *Ibid.*, Art. 23.4(a).

¹⁷³ *Ibid.*, Art. 23.4(g).

¹⁷⁴ *Ibid.*, Art. 23.4(d).

¹⁷⁵ *Ibid.*, Art. 5.

¹⁷⁶ *Ibid.*, Art. 7.

¹⁷⁷ *Ibid.*, Art. 10, 11.3. Under Art. 10.2(c), the personal interview may be omitted when a complete examination of the applicant's information indicates he or she has raised only irrelevant or minimally relevant issues, Art. 23.4(a), determines that the applicant is from a safe country of origin or a safe third country, Art. 23.4(c), has made inconsistent or contradictory statements that make the claim clearly unconvincing, Art. 23.4 (g), has submitted an identical subsequent asylum application, Art. 23.4 (h), or has filed a claim only to delay or frustrate removal from the country, Art. 23.4 (j). Some of the circumstances in which a personal interview may be omitted overlap with inadmissibility grounds. Although the Procedures Directive disfavors certain applications and allows them to be accelerated and even to dispense with an interview, this directive does not permit them to be dismissed without an examination of the merits. In contrast, Spain and Portugal provide a personal interview to every asylum seeker, but prevent an assessment of the substance of the claims in many instances.

- charges that the applicant has committed a war crime, crime against peace, or a crime against humanity
- allegations that the applicant has been guilty of acts contrary to the purposes and principles of the United Nations
- claims that the refugee is a danger to the security of the country
- evidence that the refugee has been convicted of a particularly serious crime and constitutes a danger to the community.¹⁷⁸

Portuguese law includes most of the grounds listed above and adds several other bases for inadmissibility:

- those who have performed acts contrary to Portugal's fundamental interests or sovereignty
- those who have committed felonious common law crimes punishable with more than three years of imprisonment
- those for whom the grant of asylum would cause danger or threats to public order or to internal or external security.¹⁷⁹

Without question, charges of criminal and dangerous acts warrant investigation and may justify the denial of asylum. These charges, however, are of sufficient gravity and can present such serious difficulties of proof that they must be explored in full proceedings, not in a preliminary phase. Accusations that an asylum seeker has been involved in conduct forbidden by the 1951 Refugee Convention, such as human rights violations or persecution of others,¹⁸⁰ should not be decided summarily, nor should charges that an applicant for asylum has committed a serious non-political crime prior to arrival. These matters can raise complex evidentiary issues:¹⁸¹ were criminal charges filed, were they non-political crimes, were the charges a pretext for political hostility? Such issues should be evaluated in the context of the entire claim for protection. The same holds true for other exclusion grounds, including the indeterminate

¹⁷⁸ Art. 5.6(a), Spanish Law 9/1994 deems inadmissible conduct described in Art. 1.F and Art. 33.2 of the 1951 Refugee Convention. The first three provisions listed above are found in Art. 1.F; the last two in Art. 33.2.

¹⁷⁹ Art. 13.1, Law 15/1998 excludes as inadmissible those whose conduct is listed in Art. 3. The three provisions listed above are found in Art. 3.1(a), Art. 3.1(c), and Art. 3.2. Art. 3 also excludes those charged with acts contrary to the purposes of the United Nations and those who have committed war crimes, crimes against peace, or crimes against humanity. Art. 13.1(c) reiterates that charges described in Art. 1.F of the 1951 Refugee Convention renders applications inadmissible.

¹⁸⁰ Art. 1.F, 1951 Refugee Convention, n. 9 above.

¹⁸¹ Art. 5.6(a), Spanish Law 9/1994 deems inadmissible conduct described in Art. 1.F of the 1951 Refugee Convention, which states that the Convention shall not apply to any person for 'whom there are serious reasons for considering that . . . (b) he has committed a serious non-political crime outside the country of refuge prior to his admission'. Art. 13.1(d), Portuguese Law 15/1998 also renders applicants inadmissible if they committed conduct in violation of Art. 1.F of the 1951 Refugee Convention. Further, Portuguese law incorporates as grounds for inadmissibility the commission of common law felonies punishable by more than three years in prison. Art. 13.1(c).

categories that refer to those whose protection would threaten the internal or external security or public order.¹⁸²

This concern compelled the Committee of Ministers of the Council of Europe recently to call on European states to interpret the exclusion clauses of the 1951 Refugee Convention restrictively.¹⁸³ More significantly, the Council of Europe emphasized that grounds for exclusion should be considered individually within the regular refugee status procedures,¹⁸⁴ and only in settings with traditional procedural safeguards in place.¹⁸⁵

The proposed Procedures Directive is consonant with this approach. It does not permit states to determine the applicability of the exclusion clauses during the inadmissibility procedure. Moreover, the Procedures Directive does not authorize states to rely on exclusion grounds as bases for accelerating or prioritizing an examination, with one exception. The file of an applicant considered dangerous to the national security or public order might be treated in an expeditious fashion, consistent with the basic guarantees of an individual examination of his or her claim to international protection,¹⁸⁶ but neither this nor other exclusion grounds may be decided in inadmissibility proceedings.

5.1.3 *Ascertaining state responsibility for assessing claims*

Under Spanish law, two of the inadmissibility grounds concern the responsibility of another state to assess the asylum request and offer asylum, if warranted. The Spanish legislation refers explicitly to situations in which international agreements assign the examination of the asylum application to another state,¹⁸⁷ and to circumstances in which the asylum seeker has been recognized as a refugee and granted the right to reside elsewhere or has arrived from a State in which he or she could have sought protection.¹⁸⁸ The Portuguese law, in contrast, does not expressly base inadmissibility on the legal obligation of another state to assume responsibility for reviewing the asylum request, but allows a finding of inadmissibility for asylum seekers who are nationals or residents of safe countries or third host countries.¹⁸⁹

The wisdom of focusing on opportunities that might have been available at earlier steps on an asylum seeker's journey and the genuineness of

¹⁸² Art. 3.2, Law 15/1998.

¹⁸³ Para. 1(a), Recommendation Rec (2005) 6, n. 31 above.

¹⁸⁴ *Ibid.*, para. 2(b).

¹⁸⁵ *Ibid.*, para. 2(a).

¹⁸⁶ Art. 23.4 (m), Procedures Directive, n. 7 above. This provision also applies to an applicant who has already received an enforceable expulsion order from the state where the asylum request is lodged for serious reasons of public security and public order.

¹⁸⁷ Art. 5.6 (e), Law 9/1994.

¹⁸⁸ Art. 5.6 (f), Law 9/1994.

¹⁸⁹ Art. 13.1 (b), Law 15/1998.

safety afforded via the safe third country principle are hotly disputed issues that are beyond the scope of the current analysis. Generally, though, it is clear that inquiry into another state's responsibility involves factual determinations about matters other than the merits of the request for protection. In this regard, these inadmissibility provisions raise threshold venue issues and they will likely survive the entry into force of the Procedures Directive.

5.1.4 *Precluding identical claims*

Spanish law rejects as inadmissible asylum claims that repeat requests already rejected by Spain, unless a change of circumstances would warrant reconsideration.¹⁹⁰ Portuguese law does not categorize repeat applications as inadmissible.

The Procedures Directive expressly permits previously decided cases to be rejected as inadmissible.¹⁹¹ This approach expands inadmissibility beyond venue concerns in an effort to preclude repetitive filings based on identical facts. Rather than the appropriate allocation of asylum allocation, consistency, as well as efficiency, is at stake here. Nonetheless, this preclusion ground is similar to the venue concerns discussed earlier in that both require examination of matters other than the substance of the claim. The Spanish inadmissibility provision concerning repetitive applications is broader than the standard prescribed in the proposed Procedures Directive, which limits preclusion to identical applications that have already resulted in a final decision. If modified to incorporate these limitations, this specific Spanish inadmissibility ground should comply with the new EU law.

6. Conclusion

The inadmissibility proceeding added to the asylum laws in Spain and Portugal during the past decade may have been motivated by the goal of quickly eliminating meritless claims so the government could devote more resources to applicants with good reasons to seek protection. This preliminary inadmissibility phase, however, has been assigned more functions than it legitimately can undertake. Ascertaining state responsibility for evaluating the asylum application at the inadmissibility phase is appropriate, but it is improper to use a preliminary proceeding to assess the implausibility and strength of a claim and to evaluate whether the applicant's personal conduct may preclude a grant of asylum. The expansive inadmissibility grounds in Spain and Portugal fly in the face

¹⁹⁰ Art. 5.6(c), Law 9/1994.

¹⁹¹ Art. 25.2 (f), Procedures Directive, n. 7 above.

of international legal standards that have developed over the past decades and the proposed EU Procedures Directive.

Moreover, the expedited nature of the inadmissibility phase exacerbates cultural and class biases that undercut reliable decision making. The short deadlines nullify the procedural protections theoretically available. These factors have contributed to the astonishing result that at the beginning of the twenty-first century almost three-quarters of the asylum applicants in Spain receive no hearing on the substance of their request for protection. The inadmissibility proceedings now in place on the Iberian peninsula prevent Spain and Portugal from complying with their legal obligations to refrain from returning individuals to threats of persecution, torture, and inhuman and degrading treatment.