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EUROPEAN ASYLUM LAW: RACE-TO-THE-BOTTOM HARMONIZATION?

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I. INTRODUCTION

As European states have inched towards greater legal harmony in the past decade, asylum law has remained the least coordinated. For starters, asylum is still determined by EU member states' national laws, which vary significantly.[1] At least one group of scholars sees the development of asylum law as occurring on the bilateral level between states, not from the top down through broad European harmonization.[2] This is in stark contrast to the U.S. federal powers over asylum and immigration,[3] which derive from the implicit need to preserve sovereignty and arguably from Article I, Section 8, clause 4 of the U.S. Constitution. In fact, in Europe, cooperation seems preferred to harmonization, leaving much discretion to the member states.[4] If forced to choose one word to capture the essence of European asylum law, it would be "cleaving," which simultaneously can mean "to join together" and "to break apart." Such schizophrenia appears when reviewing asylum law and policy of the past decade, with little hope of meaningful harmonization in the near future, especially with the EU Constitution on the brink of rejection.[5]

This article is divided into three sections. Section II traces the efforts to harmonize European asylum law to the present. Section III

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1. *See* CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 432-33 (2004).

2. *See generally* Rosemary Byrne, Gregor Noll & Jens Vedsted-Hansen, *Understanding Refugee Law in an Enlarged European Union*, 15 EUR. J. INT'L L. 355 (2004).

3. *See generally* Eric Stein, *Towards a European Foreign Policy?, The European Foreign Affairs System from the Perspective of the United States Constitution, in* INTEGRATION THROUGH LAW 1, 1 (Mauro Cappelletti et al. eds., 1986).

4. *See* Virginie Guiraudon, *Before the EU Border: Remote Control of the "Huddled Masses," in* IN SEARCH OF EUROPE'S BORDERS 191, 196 (Kees Groenendijk et al. eds., 2003).

5. *See The European Union Constitution: Dead, but Not Yet Buried*, THE ECONOMIST, June 4, 2005, at 47.

explores the reasons why it has been so hard to reach harmonization. Section IV addresses the popular idea that states are in a race to the bottom with asylum law, an idea this article rejects on account of faulty assumptions. Rather than linear, European asylum law's progress is cyclical, following a number of key indicators such as the business cycle, the waxing and waning of certain conflicts, and popular sentiments towards asylum in particular and immigration in general. Without federalization of the EU and asylum law, asylum law is doomed to a relatively fragmented existence.

Rational choice theory, which suggests that politicians will make decisions that maximize their chances of re-election, serves as the framework for understanding the cyclical nature of asylum law in Europe. Indeed, this incentive to appease public concerns over immigration issues has been observed since the 1970s in Europe.[6] When selecting its asylum policy, governments of host states must consider the interests of four groups: the electorate, other host states, asylum seekers and the countries of origin for those seekers.[7] The interests of other host states and asylum seekers would likely push for greater harmonization in order to advance predictability and coherence throughout the system. However, these groups typically have few constituents in the electorate, thus severely limiting their influence on politicians. The electorate in general will carry the most influence with politicians, subjecting asylum policy to the public's whims, which are often cyclical, depending on numerous factors discussed in Section IV. Finally, it must be noted that it would be impossible to provide a comprehensive overview of European asylum law, as there is much soft law and convoluted debate. Instead, this article merely provides a critical analysis of some of the issues from, admittedly, the perspective of an outsider.

II. A BRIEF HISTORY OF ASYLUM LAW HARMONIZATION

To begin, it is important to note that European asylum law is inextricably linked to the free movement of persons,[8] as third-country nationals can move freely within the Community once they have crossed external borders.[9] The European Community (EC) began to realize the free movement of persons in 1986 with the gradual removal

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6. *See* Guiraudon, *supra* note 4, at 192-93.

7. *See* Gregor Noll, Lecture at Leiden Univ. Honours Class: *Whither Refugee Protection?: The Common European Asylum System* (Apr. 25, 2005).

8. *See* JOHN HANDOLL, FREE MOVEMENT OF PERSONS IN THE EU 412 (1995).

9. *See* KOEN LENAERTS ET AL., CONSTITUTIONAL LAW OF THE EUROPEAN UNION 37 (2d ed. 2005).

of internal borders through the adoption of the Single European Act, and with it the coordination of policy regarding access and movement of these individuals. The European Council adopted the Palma Document in 1989, which aimed at harmonizing asylum law by calling for the creation of a convention to determine the state responsible for asylum applications and for rules to govern free movement of asylum seekers, among other things.[10] The idea of free movement was further developed through working groups that established the foundations for the Dublin and Schengen Conventions,[11] which, among other things, seek to limit asylum seekers to one request throughout the European Union.[12] The system started to work in 1995 under Chapter 7 of the Schengen Convention, which had many states that opted into it, and was incorporated into the EU system under the Schengen Protocol. It must be emphasized that these Conventions were not for harmonizing the rules for reviewing asylum applications, but instead for ensuring that only one state reviewed the application.[13]

Meanwhile, the 1993 Treaty on European Union concluded in Maastricht provided the competency to the European Union to cooperate on asylum and immigration issues.[14] While the European Union dealt with asylum procedures and refugee status during this time, this soft law had little domestic impact because it was covered by the Co-operation in the Fields of Justice and Home Affairs (CJHA) provisions. The Treaty of Amsterdam shifted this competency from this third pillar to the first pillar of the European Communities, the European Community Treaty itself.[15] This change is significant because it dealt with the concerns expressed before the Amsterdam Treaty about the paucity of judicial protection for individual asylum

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10. *See* FRIEDL WEISS & FRANK WOOLDRIDGE, FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY 182 (2002).

11. *See* HANDOLL, *supra* note 8, at 412.

12. Belgium-France-Federal Republic of Germany-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at their Common Borders and the Convention Applying the Agreement, arts. 28-38, June 19, 1990, 30 I.L.M. 68, 95-100 [hereinafter Schengen Implementation Agreement]; Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 427; Monica den Boer, *Justice and Home Affairs: Cooperation Without Integration*, *in* POLICY-MAKING IN THE EUROPEAN UNION 389, 400 (Helen Wallace & William Wallace eds., 3d ed. 1996).

13. *See* U.K. ASS'N FOR EUROPEAN LAW & UNIV. ASS'N FOR CONTEMPORARY EUROPEAN STUDIES, LEGAL ISSUES OF THE MAASTRICHT TREATY 272-73 (David O'Keeffe & Patrick M. Twomey eds., 1994).

14. *See* HANDOLL, *supra* note 8, at 416-17.

15. The Amsterdam Treaty also had an Asylum Protocol attached, which requires all EU member states to see one another as the same countries of origin, though providing a rebuttable presumption of this. However, the scope of that Protocol is severely limited. *See* TEC, *infra* note 17.

seekers.[16] Moreover, the Amsterdam Treaty provided the EC with the ability to adopt binding measures on immigration and asylum. That said, the European Court of Justice (ECJ) is still limited by its inability to address internal borders if the issue deals with the maintenance of law and order or safeguarding security.[17] In addition, the Treaty Establishing the European Community (TEC) Article 68(1) limits the jurisdiction of the ECJ for preliminary rulings to national court decisions where there is no remedy under Community law.[18] While this provision limits the burden on the Court from asylum seekers, it places a significant barrier on these asylum seekers who typically do not have the finances to appeal a decision to the highest national courts.[19] Therefore, the Amsterdam Treaty does not go far enough in protecting asylum seekers.

Regardless, the EC has used its competency found in TEC Article 63, to pass numerous directives, regulations and decisions in creating what has become known as the Common European Asylum System (CEAS).[20] This system started with a special European Council in Tampere in 1999, which had the aim to implement Title IV, by creating a common asylum policy.[21] The metaphor "fortress Europe," which has been used to describe the restrictive access to the European Union given to third-country nationals, is supported by nine articles comprising Title IV.[22] Article 61 provides the tasks needed to "establish progressively an area of freedom, security and justice" through "border control[] measures aimed at ensuring free movement of persons in accordance with Article 14 plus flanking measures in respect of external border controls, asylum, and immigration."[23] In line with this and other articles, the Tampere Council's goals were to partner with the countries of origin to make those states more attractive to their own people, establish a common European asylum system for procedure and recognition of asylum under the 1951 Geneva Convention, encourage fair treatment of third-country

16. *See* LAMMY BETTEN & NICHOLAS GRIEF, EU LAW AND HUMAN RIGHTS 131 (1998).

17. Consolidated Version of the Treaty on European Union and of the Treaty Establishing the European Community, art. 68, 2002 O.J. (C 325) 1, 61 [hereinafter TEC]; *see also* BETTEN & GRIEF, *supra* note 16, at 131.

18. TEC, *supra* note 17. WEISS & WOOLDRIDGE, *supra* note 10, at 33.

20. *See* Friedemann Kainer, *The European Concept of Integration and the Area of Freedom, Security and Justice, in* THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION 469, 480 (Adam Bodnar et al. eds., 2003).

21. *See* BARNARD, *supra* note 1, at 440 (noting that the implementation of Title IV was introduced by Amsterdam).

22. *See* Kenneth A. Armstrong, *Governance and the Single European Market, in* THE EVOLUTION OF EU LAW 745, 752 (Paul Craig & Gráinne de Búrca eds., 1999).

23. *See also* BARNARD, *supra* note 1, at 439.

nationals, and efficiently manage migration flows.[24] CEAS has further developed through numerous directives and regulations: 2003 Dublin II Regulation (mirroring the Dublin Convention); 2000 and 2002 regulations on EURODAC; 2004 Qualification Directive; 2001 Directive on Temporary Protection; 2003 Reception Directive; and the 2000 and 2005 Decisions on the European Refugee Fund.[25] However, as explained in Section III, these directives have not harmonized European asylum law or policy as the Tampere Council had hoped. Instead, these directives established a minimum standard of protection, which many think states are reluctant to go beyond. In this regard, European national asylum laws and policies may be seen as harmonizing through a race to the bottom, though Section IV refutes this assertion.

In short, the main problem with all of the instruments mentioned above, and the general spirit of the asylum regulation regime in Europe after the Tampere Council, is that most are one-sided in trying to control asylum seekers, not in protecting them through the bestowal of rights and freedoms.[26] Admittedly, the Qualification Directive, the Directive on Temporary Protection, and the Reception Conditions Directive all protect asylum seekers to a certain degree. For example, Article 3 of the Dublin Regulation provides clear rights for EU member states, including the right to examine any asylum application regardless of whether an obligation to examine the application exists.[27] However, these are the states' rights, with the individual asylum seekers only having the right under Article 3(4) to be informed in writing of the application of these regulations.[28] Admittedly, Articles 13 and 18 of the Qualification Directive appear to grant individuals the right to refugee status when they meet the requirements in Chapters II and III of that Directive.[29] However, these instruments are still soft law.

More than these protective measures, control measures have received stronger focus following the Amsterdam Treaty,[30] sometimes at the cost of conflicting with the 1951 Geneva Convention.[31] Such a focus on security likely has been influenced by post-9/11 and post-

24. *See id.* at 440-41.
25. *See* Noll, *supra* note 7; *see also* Armstrong, *supra* note 22, at 754-75.
26. *See* WEISS & WOOLDRIDGE, *supra* note 10, at 27.
27. *See* Council Regulation 343/2003, art. 3(2), 2003 O.J. (L 50) 1, 3 (EC).
28. *Id.* art. 3(4).
29. *See* Council Directive 2004/83, arts. 13, 18, 2004 O.J. (L 304) 12 (EC).
30. *See* Ryszard Cholewinski, *No Right of Entry: The Legal Regime on Crossing the EU External Border, in* IN SEARCH OF EUROPE'S BORDERS 105, 111 (Kees Groenendijk et al. eds., 2003).
31. *See* HANDOLL, *supra* note 8, at 412.

Madrid security concerns.[32] Indeed, all of the short-term measures proposed by the Action Plan of the Council and the Commission in implementing the Treaty Amsterdam, adopted in December 1998, deal with preventing third-country nationals from reaching the external borders of the European Union.[33] Primarily, these rules on visas harmonize the penalties on carriers of potential asylum seekers.[34] The longer-term measures focus merely on stemming system abuse by visa applicants and improving uniform visa security specifications.[35] Moreover, the Presidency Conclusions of the European Council concluded at a summit on asylum and immigration in Tampere in October 1999 that they must develop "a common active policy on visas and false documents, including closer co-operation between EU consulates in third countries," and "closer co-operation and mutual technical assistance between the member states' border control services."[36] Moreover, the Seville European Council made a common asylum policy a high priority, but this was primarily to allay security concerns, not to help in seekers' protection.[37] All of these points indicate that there is little discernable discussion about the favorable treatment of third-country nationals trying to enter the European Union.

One somewhat positive development for asylum seekers is that the transfer system, established by the Dublin and Schengen Conventions, is in alleged disarray, with only one percent of successful transfers under the regime.[38] Indeed, member states view the system in such disarray that they are reluctant to request transfers.[39] However, such disarray can only be of marginal comfort to asylum seekers in search of real protection and fair treatment. The measure that would best protect them – a right to seek asylum – is noticeably missing in all the key binding instruments,[40] including the European Convention on Human Rights.[41] With immigration remaining a highly charged

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32. *See* Armstrong, *supra* note 22, at 754.

33. *See* Cholewinski, *supra* note 30, at 111.

34. *See id.*; *see also* BARNARD, *supra* note 1, at 454.

35. *See* Cholewinski, *supra* note 30, at 111.

36. *See id.* at 111-12 (citing Tampere European Council: Presidency Conclusions, ober 16, 1999, *Bull. EU 10-1999*, 24, *available at* http://europa.eu.int/abc/doc/off/bull/en/9910/i1007. htm).

37. *See* Armstrong, *supra* note 22, at 754.

38. *See, e.g.*, Elspeth Guild, *The Border Abroad-Visas and Border Controls, in* IN SEARCH OF EUROPE'S BORDERS 87, 95 (Kees Groenendijk et al. eds., 2003).

39. *See, e.g., id.*

40. *See, e.g.*, Schengen Implementation Agreement, *supra* note 12, art. 5; Cholewinski, *supra* note 30, at 111-12, 120. Please note the exception with Articles 13 and 18 of the Qualification Directive mentioned above. Council Directive, *supra* note 29.

41. *See generally* CLARE OVEY & ROBIN C.A. WHITE, JACOBS AND WHITE: EUROPEAN CONVENTION ON HUMAN RIGHTS 82 (3d ed. 2002); *but see* Charter of Fundamental Rights (EC) No. 2000/C, art. 18, 2000 O.J. (C 364) 1, 12; LENAERTS ET AL., *supra* note 9, at 734.

political topic, even in states such as the United Kingdom where asylum applications are markedly down,[42] it is unlikely that this focus on security and restriction will change in the near future.

III. THE CURRENT STRUGGLE TO HARMONIZE

The European Commission and Council would point to the CEAS as a harmonized system. However, as already mentioned, national laws on substantive and procedural components for asylum remain diverse despite efforts to harmonize asylum law.[43] Indeed, only the rules on entry are truly harmonized throughout the EC.[44] This is so despite Article 2 of the Treaty of the European Union's (TEU) objective to adopt "appropriate measures" to regulate asylum, and the Article 14 requirement to harmonize national visa and asylum law.[45]

These broad goals aside, there are at least two policy reasons to harmonize asylum laws. First, under the principle of the free movement of persons, once an asylum seeker is in an EU member state, it is very difficult to control his or her movement. If there are substantial differences in the processing of asylum applications, then those states will be inundated with applications. Similarly, if there are substantial differences in the treatment of refugees once admitted, then those states will be inundated with refugees. Both types of states will have an incentive to worsen the situation and to discourage such inundation, leading potentially to a race to the bottom. Second, such differences could make it difficult to return or transfer these asylum seekers under the Dublin II Regulation. Under the Dublin system, the first state that deals with an asylum seeker retains responsibility for processing that application.[46] If a state is too liberal in letting seekers in, then it may face tremendous responsibilities in the future. Therefore, states have the incentive to become more restrictive at the beginning of the process. If states have different interpretations of such key terms such as "refugee," or are otherwise disharmonized, the Dublin system will not work properly.[47]

It should be noted that the provisions discussed in Section I have not expressly tried to harmonize asylum law. On the contrary, they

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42. *See From Flood to Trickle*, THE ECONOMIST, Sept. 4, 2004, at 55.

43. *See* Steve Peers, *EU Borders and Globalisation*, *in* IN SEARCH OF EUROPE'S BORDERS 45, 66 (Kees Groenendijk et al. eds., 2003).

44. *See id.*

45. *See* Wolfgang Weiß, *Defining the EC Borders*, *in* IN SEARCH OF EUROPE'S BORDERS 67 (Kees Groenendijk et al. eds., 2003) (citing Case C-387/97, *Wijsenbeek*, 1999 E.C.R. I-6207 at 6264, ¶ 40).

46. *See* Council Regulation 343/2003, *supra* note 27, arts. 3, 5.

47. *See generally* Noll, *supra* note 7.

have attempted to create the minimum safeguards for the procedures in processing applications, leaving the actual level of protection to be determined by the states. Such levels of protection vary. Indeed, Article 63(2)(a) of the TEC imposes obligations to adopt "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection."[48] The rest of Article 63 contains similar "minimum standards" language with regard to reception of asylum seekers in member states and on qualifications as refugees.[49] Such language falls short of a call for harmonization. Indeed, Article 63's measures are clearly not comprehensive for asylum.[50] For example, there is no mention of integration for asylum seekers. At a minimum, a comprehensive list of measures regarding asylum is needed.

There are several factors affecting the cyclical nature of asylum law, which frustrate efforts to harmonize these laws. First, the start and end of certain conflicts significantly impacts the pressure within a state to tighten or loosen asylum policies. For example, the flare-up of civil war in Bosnia, coupled with Germany's restrictive asylum policy in 1993, led to the Netherlands' highest number of asylum applications since the Second World War.[51] As that conflict subsided, the number of asylum applications subsided as well. This same phenomenon was also observed in West Germany,[52] with a recent drop in asylum applications resulting from the removal of unpopular Afghan and Iraqi governments.[53] The clearest cyclical nature of asylum seeking has been in Austria, where there have been surges of applications following each conflict in Eastern Europe – for example, the 1956 Hungarian uprising, the 1968 suppression of the Prague Spring, and the 1981 establishment of martial law in Poland.[54] Similar cyclical interests in asylum have been observed with regard to the European business cycle, where governments severely restricted immigration controls, including asylum, in proportion to rising unemployment in the late 1970s.[55] Even without an economic downturn, the electorate

48. TEC, *supra note* 17, art. 63

49. *Id.*

50. *See* WEISS & WOOLDRIDGE, *supra* note 10, at 30.

51. *See* Kees Groenendijk, *New Borders Behind Old Ones: Post-Schengen Controls Behind the Internal Borders and Inside the Netherlands and Germany, in* IN SEARCH OF EUROPE'S BORDERS 131, 135 (Kees Groenendijk et al. eds. 2003).

52. *See* Richard Davy, *The Central European Dimension, in* THE DYNAMICS OF EUROPEAN INTEGRATION 149 (William Wallace ed., 1990).

53. *See From Flood to Trickle*, *supra* note 42.

54. *See* Davy, *supra* note 52, at 14952.

55. *See* Guiraudon, *supra* note 4, at 193.

may become more xenophobic as third-country nationals flow into a country. This has been the case with the United Kingdom,[56] and is feared to happen in Spain following its most recent amnesty to 700,000 illegal immigrants.[57]

Moreover, scandals such as reports of "bogus refugees," can inflame public opinion and stigmatize asylum seekers similar to what was observed in Germany in the early 1990s.[58] With regard to the business cycle, access to full rights can be expensive for a host state. As fiscal policy tightens with the downturn of the business cycle, pressure increases to cut benefits to the minimum standards under the European Convention on Human Rights. For example, this is what happened with the new government in Denmark.[59] While there is some talk of establishing better burden sharing between states of these expenses, such ideas have not yet been implemented.

IV. THE RACE TO THE BOTTOM FALLACY

Even though the provisions in Section II are not aimed at harmonizing asylum law, the minimum standards established by the instruments discussed in Section III above are believed to be leading to harmonization through state reluctance to venture beyond these minimums for fear of being inundated by asylum shoppers.[60] The directives and regulations try to create the minimum safeguards for processing an application for asylum, temporary protection, and recognition of refugee status.[61] The problem will be that states are often tempted to stay at the minimum level. Indeed, there is very little incentive to give more than the minimum for fear of becoming viewed as attractive to asylum seekers. Media campaigns help get the word out to migrant networks, which then spread the word to potential asylum seekers to seek refuge in other, more hospitable states. However, commentators who see a race to the bottom overlook the possibility, or even the reality, that states can at times desire the admission of asylum seekers and other immigrants.[62] Such desires reverse the incentive structure outlined above in Section III, and states

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56. *See From Flood to Trickle*, *supra* note 42.

57. *See Let Them Stay*, THE ECONOMIST, May 14, 2005, at 56.

58. *See* Guiraudon, *supra* note 4, at 194.

59. *See* Noll, *supra* note 7.

60. *See* Olivier de Schutter, Lecture at Leiden Univ. Honours Class: *Towards a European Human Rights Policy* (May 30, 2005).

61. *See* WEISS & WOOLDRIDGE, *supra* note 10, at 172-74. Currently, there is only a draft directive on asylum procedures, so the minimum safeguards for processing applications still are not established.

62. *See* de Schutter, *supra* note 60.

at least stop trying to make their country seem inhospitable. At best, such desires make states seem welcoming to seekers.

Critics may question why states would want to become inviting to asylum seekers. There are at least three reasons. First, it has been well documented that most of Europe's population is aging due to its generally low birthrate. [63] Second, these demographic concerns throughout Europe and the shortage of skills in key sectors lead all states within the European Union to need increased skilled and unskilled labor.[64] Such labor is needed if the European Union is to achieve the Lisbon strategy to make the European Union the most competitive economy of the world. [65] Finally, many states are sincerely concerned about the plight of asylum seekers. Admittedly such concerns occasionally may take a back-seat to the political reality of populist politics, but the states' obligations under the 1951 Geneva Convention still remain the underlying shaper of asylum policy.[66] Just as states might want to increase admission of asylum seekers and other immigrants, states' attitudes can quickly change under populist politics, leading governments to reverse course, making their states seem less hospitable. However, the underlying business and demographic interests, which are not likely to go away anytime soon, ensure that sentiments will shift back again as populist politics surrounding immigration subside. Such swings, between economic and political considerations, lead to a cyclical asylum policy not a linear race to the bottom.

Moreover, as different states face different business cycles and varying political pressures with regard to asylum and immigration policies, it is highly unlikely that the *sui generis* asylum policies of the EU member states will synchronize without top-down unification of policy and law (perhaps through federalization of the EU and asylum law). The EU Constitution called for "a common policy on asylum, immigration and external border control, based on solidarity between member states, which is fair towards third-country nationals." [67] However, as it recently has become clear that the Constitution is on its

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63. *See* BARNARD, *supra* note 1, at 441.

64. *See id.*; *see also* Guiraudon, *supra* note 4, at 193.

65. *See* BARNARD, *supra* note 1, at 441.

66. However, some commentators see the Spanish Protocol as a clear violation of the Geneva Convention in that it discriminatorily concluded that citizens of EU member states cannot be admitted to asylum procedures. *See* Noll, *supra* note 7; *see also* Deirdre M. Curtin & Ige F. Dekker, *The EU as a "Layered" International Organization: Institutional Unity in Disguise*, *in* THE EVOLUTION OF EU LAW 83, 127 (Paul Craig & Gráinne de Búrca eds., 1999) (suggesting that the Amsterdam Treaty is in violation of the Geneva Convention requirements for limiting the access of EU citizens to asylum procedures).

67. Treaty Establishing a Constitution for Europe, art. III-257(2), Oct. 29, 2004, CIG 87/2/04; *see also id.* art. III-266.

way to being rejected,[68] European asylum law appears doomed to an uncoordinated existence for a while longer.

V. CONCLUSION

As the number of EU member states increases from 15 to 25 to 27 and beyond, with the level of development of asylum laws and policies varying significantly between states, the need has never been greater for harmonization. Unfortunately, political compromise likely will tend to push the minimum standards lower. For the protection of asylum seekers, it would be best to harmonize these laws as opposed to leaving it to the member states to decide the level of protection. A drawback from this harmonization is that both a ceiling and floor will be established, limiting member states' ability to provide protection. Such an approach pits sovereignty against community values, leading to a narrower ceiling-floor gap, causing greater harmonization. That said, without greater harmonization, asylum seekers remain at risk of neglect and uncertain status.

68. *See The European Union Constitution: Dead, but not yet Buried, supra* note 5.