ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

MEMORANDUM TO THE HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES

ENQUIRY INTO PARLIAMENTARY SCRUTINY OF INTER-GOVERNMENTAL CO-OPERATION UNDER THE TWO ADDITIONAL PILLARS OF THE PROPOSED EUROPEAN UNION

The Immigration Law Practitioners' Association, an association of practising lawyers, academics and others concerned with immigration and asylum issues welcomes the enquiry of the House of Lords Select Committee on the European Communities into the question of parliamentary scrutiny of inter-governmental co-operation under the two additional pillars of the European Union.

This Association, which currently has 480 members in the UK and co-ordinates an European network of a further 500 participants in other EC States, has, for some time been very concerned about the effectiveness of parliamentary control over inter-governmental activities in this area.

We have expressed our concerns at some length in our Memorandum to the Home Affairs Committee investigation into Migration Control at External Borders of the European Community (minutes of evidence, HMSO 5, 12 and 26 February 1992). We will not, on this occasion, try the patience of the Committee by repeating the substance of that previous published evidence here. Rather we will address specifically

the issues raised in the letter of request of the Clerk to the Committee.

THE STRUCTURE OF INTER-GOVERNMENTAL CO-OPERATION ALREADY IN PLACE

As is set out in the Memorandum of the Home Office to the Home Affairs Committee of 10th February 1993, the Ad Hoc Group: Immigration and its sub-groups constitute the main forum for the discussion of immigration and asylum matters among the Member States of the European Community.

The Ad Hoc Group: Immigration was, on establishment, in 1986 given the remit specifically "to work towards free movement in the Community in a manner compatible with the need to combat terrorism, drug-trafficking, other crime and illegal immigration".

According to the Home Office the Group has concentrated on the immigration - related aspects of free movement while the Trevi Group and other groups have dealt with other issues.

The Group is composed of senior immigration officials and reports to the immigration ministers who meet towards the end of each Presidency of the European Community. It is unfortunately the case that the identity of the ministers who meet to supervise the activities of the Ad Hoc Group: Immigration and the ministers of the Trevi Group on police co-operation is the same.

The meetings of these ministerial groups to consider immigration and police co-operation matters take place on consecutive days. The importance of separating ministerial consideration of migration issues from the activities of the Trevi Group on police matters was emphasised to your Committee by the European Commission when giving evidence to your investigation into Community Policy on Migration (17th November 1992). This Association also expresses its concern about the propriety of this overlap.

As the work of the Ad Hoc Group: Immigration has no Community framework and no Community budget allocation all drafting, planning, policy and monitoring of implementation in the field is the responsibility of the civil servants of which ever state holds the Presidency, which Presidency rotates every 6 months.

We understand that some co-ordinating facilities have been made available to the Group by the Council of Ministers of the European Communities offices in Brussels but we are unaware of the basis on which Community resources have been allocated for this purpose.

The informal nature of inter-governmental co-operation in the field of immigration and asylum has hampered efforts by members of the House of Commons to maintain effective scrutiny over its activities. On 19th October 1992 Mr Fraser MP asked by way of Written Parliamentary Question for information as to what treaties, agreements, resolutions or protocols were currently under consideration by the Ad Hoc

Group: Immigration.

The answer of Mr Charles Wardle, Under Secretary of State for the Home Department, was unfortunately vague (Hansard 19th October 1992, columns 51 and 52). Although the answer was provided only more than one month before the meeting of the immigration ministers in Westminster on 30th November 1992 in respect of asylum the Minister only referred to preparation of a Resolution on Manifestly Unfounded Asylum Applications. However at the ministerial meeting three documents were approved regarding asylum applications, a Resolution on Manifestly Unfounded Applications for Asylum, a Resolution concerning Host Third Countries and Conclusions on Countries in which there is Generally no Serious Risk of Persecution.

Mr Fraser MP again requested on 1st February 1993 information on the meetings of the Ad Hoc Group: Immigration and its sub-groups under the Danish Presidency (1st February 1993, Written Question No 164). Again, the answer by the Under Secretary of State for the Home Department, Mr Charles Wardle, provided no specifics on the matters under consideration advising "it will be for the Danish Presidency to determine the precise agenda for each of these meetings as they arise".

The Minister did, however, provide a list of the meetings of the various sub-groups of the Ad Hoc Group: Immigration. He advised that a total of 38 days had been allocated during the 6 month Danish Presidency for work in this area (Written Answer No 164, 1st February 1993). The allocation of 38 days

for meetings of senior officials of 12 European countries, leaving aside time needed to prepare for those meetings, would indicate that the matters under discussion are of major concern and interest to the participating governments. Under the circumstances it would appear somewhat odd that the UK Government would not consider the matters under discussion by the Ad Hoc Group: Immigration of sufficient interest to Parliament to provide more specific answers to members' queries.

Unlike the Committee to which we are addressing this Memorandum, which has indicated that it has not assumed that ratification [of the European Union Treaty] is a foregone conclusion, the Ad Hoc Group: Immigration labours under no such constraints.

Although the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Community (Dublin Asylum Convention) has yet to be ratified by all 12 signatory states, the Asylum and External Frontiers sub-groups of the Ad Hoc Group: Immigration are continuing to work on the preparatory measures required for implementation (Mr Charles Wardle, Written Answer No 164, 1st February 1993). Further, although the draft Convention on External Frontiers has not even been finalised let alone signed, let alone ratified, according to Mr Wardle, in the same answer, the Danish Presidency "will continue work on the preparatory measures required for implementation" of that draft Convention.

It is with deep regret that we note what would appear to be a certain laxity in approach to parliamentary process in these activities.

A further confusing element of the inter-governmental co-operation in immigration is the format which has been chosen to produce the results of that co-operation.

In 1990, the Ad Hoc Group: Immigration produced the Dublin Asylum Convention which was signed in Dublin on 15th June 1990 by 11 EC states. Subsequently, Denmark, the 12th, also signed the Convention. Whatever the shortcomings may be of that Convention at least it is fairly clear that it is at least an act of public international law.

At the Westminster meeting of the immigration ministers to consider the Group's activities on 30th November 1992 it was announced, by way of press conference (and in the UK, in advance of advising Parliament) that agreement had been reached on a number of documents relating to asylum and expulsion. These documents are entitled Resolutions, Recommendations and Conclusions and do not, at first sight, appear to come within the existing menagerie of Community measures, most importantly because they are made through the inter-governmental process specifically intended to be outside the Community ambit.

Nor are they called "Conventions" and they are not designed in a format which is clearly indicative of an act of public international law. Nonetheless, they have been approved by

the heads of government of 12 states and a number of the documents have deadlines by which time they should be implemented in the national law of the 12 states.

It is, of course, ultimately for the national courts and possibly the European Court of Justice to determine what legal status these documents have. Unfortunately it is not a foregone conclusion that the national courts of the 12 Member States will necessarily reach the same conclusion on that status.

CHANGES TO THE STRUCTURE WHICH WILL FOLLOW RATIFICATION OF THE TREATY

The European Court of Justice has continuously stressed that the treaties are the constitutional charter of a Community based on the rule of law (Opinion 1/91 of 14.12.91). Unfortunately Titles V and VI of the European Union Treaty while smaller and more specific than the first "pillar", (the existing Community of the three original treaties), are not self evidently compatible with the concept of a constitutional charter.

Unlike the first pillar both parliamentary and judicial control over action taken under Titles V and VI is limited. Article L of the Union Treaty provides that activities under Titles V and VI are not justiciable before the European Court of Justice. The European Parliament is merely to be consulted and informed and may ask questions and make recommendations in respect of Title VI (Article K6).

As has been pointed out elsewhere the legal order of the Union cannot be said to be synonymous with that of the Community, even if the objectives of the Union (Article B) partially overlap with those of the Community (cf Deidre Curtin, the Constitutional Structure of the Union: A Europe of Bits and Pieces). The Union institutional structure is the European Council.

The European Council will not act subject to a proposal by the Commission. There is, equally, no EC parliamentary control as is the case in respect of acts the Council of Ministers, the "executive" of the existing Community. However the European Council is charged with the responsibility of defining "general political guidelines" (Article D).

It must be queried whether such guidelines can bind the independent Community institutions since the establishment of the European Council does not amend the powers which these institutions have by virtue of the treaties. Therefore if acts of the European Council are adopted by the Community they must be subject to the rules governing the functioning of the Community including the judicial control of the European Court of Justice.

Accordingly acts of the European Council may be subject to the European Court of Justice, notwithstanding the terms of Article L. In view of the uncertainty as to the legal effect of the activities of the Ad Hoc Group: Immigration and the great risk of divergence in implementation, the possibility

of judicial scrutiny of Title VI is most welcome.

The European Union Treaty inserts a new Article 100c into the Treaty of Rome. It extends Community competence to the following areas:

1. Those countries whose nationals require a visa to enter any Community state.

2. A uniform format for visas.

In respect of the first area, those countries whose nationals must have visas to enter the "EC territory" (ie the territory of any EC state), the immediate question arises: visas to come to the EC territory for what purpose? In domestic immigration law, nationals of some countries must have a visa to come to the UK for any purpose but nationals of other countries, who may not need a visa to come to the UK for any purpose, will still be required to obtain a visa to come to the UK for some purposes.

For instance, take the position of a US national and his US citizen wife coming to the UK to relocate as the husband has been transferred here by his company. As the employer has obtained a work permit for its employee the husband does not require entry clearance to come to the UK. His wife and children, seeking to come to the UK as his dependants do however require entry clearance.

If the USA is not one of the countries on the Community "visa

national" list will the wife still be required to obtain entry clearance abroad before coming to the UK?

The second area of extended Community competence, a uniform format for visas, raises a different set of questions. If there is to be a common format for visas does this common format not then presuppose a common set of criteria which give rise to the issue of the common format visa? Further, does a common format visa not then also presuppose a common set of rights which attach to it?

For instance, if a common format visa issued by a French consular post gives a right to the bearer to permanent residence in France while a common format visa issued by a UK consular post gives no more than the possibility of a one week visit to the UK this provision of Article 100c would appear to be without content.

It is a curious result that the greater the number of countries whose nationals require a visa to come to the Community the wider the competence of the Community institutions extends in the area of immigration policy.

Moving to Title VI, Provisions on Co-operation in the Fields of Justice and Home Affairs, notwithstanding the shortcomings of Title VI in respect of judicial and European Parliamentary control, it cannot but be an improvement over the current ad hocery that there be some institutional framework for the harmonisation among the 12 EC States of matters relating to immigration and asylum. However, if the treaties are indeed

the constitutional charter of the Community based on the rule of law it is disturbing that the European Court of Justice is excluded from Title VI.

Although the Commission "shall be fully associated with the work in the areas referred to in this Title" (Article K.4(2)) it is unclear what "fully associated" means. Instead, a Co-ordinating Committee is to be set up consisting of senior officials, inter alia, to give opinions for the attention of Council (Article K.4(1)).

The Co-ordinating Committee, according to the Home Office Memorandum of 10th February 1993 comprises one official from each Member State and an official from the European Commission. Unlike the European Commission which is charged with safeguarding the implementation of the treaties, the Co-ordinating Committee appears to have no obligation to the Community as such. The national officials of which it is comprised cannot help but be informed by the national agendas of their Governments rather than by Community needs. If one may make an analogy it is as if UK government policy in immigration ceased to be informed by the Home Office and instead policy proposals were put forward exclusively from a minister's private office reflecting the concerns of his particular constituency in consultation with other ministers' private offices and the concerns of their constituencies.

The European Parliament is limited to consultation and information on matters arising under Title VI (Article K.6). It is to the credit of the European Parliament that its

Committee on Civil Liberties and Internal Affairs has already held a meeting with representatives of national Parliaments on this issue of democratic control of Title VI on 18th and 19th March 1993 in Brussels. This Parliament would appear determined to use its powers of consultation and information as fully as possible.

THE NEED FOR PALIAMENTARY ACCOUNTABILITY IN THESE AREAS

We submit that the need for accountability in respect of both Titles and V and VI is self-evident. The future structure and nature of our Community are fundamentally affected by the subject matter of these two Titles. In respect of immigration and asylum, fundamental human rights are at issue which rights are set out in a number of international instruments of which the EC states are parties (cf Basic Documents on International Migration Law, Dr Richard Plender QC). It is of critical importance that EC Member States should not be in breach of those obligations by virtue of activities under Title VI.

Further, Article 130u(3) of the EC Treaty as amended by the European Union Treaty states "the Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations". The Member States and the Community must not find themselves in breach of Article 130u on account of activities undertaken under Title VI.

Accordingly, in our view, considering the lack of European Parliamentary control, limitations on the role of the European Commission and purported exclusion of the European Court of Justice in respect of Title VI, the obligation on national Parliaments to provide effective democratic control over so-called "horizontal" activity in this area is paramount.

ADDITIONAL COMMUNITY DOCUMENTS TO BE DEPOSITED IN PARLIAMENT TO FACILITATE SCRUTINY

The difficulty here is not in respect of Community documents but rather in respect of inter-governmental or horizontal documents. If documents currently produced by the Ad Hoc Group: Immigration will hereafter be produced under the aegis of the Co-ordinating Committee of Article K.4 then a mechanism for parliamentary scrutiny must be found.

It is clear that many documents which are currently produced by the Ad Hoc Group: Immigration and which do not touch upon issues of national security are not being made available to Parliament. For instance, Mr Fraser MP requested that a document produced for the Strasbourg European Council on substantive and procedural law of asylum in the EC States be placed in the House of Common's library (Written Question No 157 of 19th February 1993). The Under Secretary of State for the Home Department, Mr Charles Wardle, refused to do so stating "this was a working document not intended for publication, and some of its contents are now out of date". (Written Answer No 157 of 19th February 1993).

We submit that the proposed texts directed towards agreement on common positions or joint action or the drawing up of conventions under Title VI should be deposited in Parliament at the time that they are proposed by the Presidency, any Member State or by the European Commission. Community legislation is normally published in the Official Journal as soon as it is proposed by the European Commission. We see no reason why a separate regime should apply to texts under Title VI as opposed to texts under the first pillar.

The argument that such proposals may not necessarily lead to any of the forms of action permitted under the Title is not persuasive. When the Commission proposes Community legislation it is of course unclear whether that legislation will ever be approved by the Parliament and the Council of Ministers. Indeed it is through the publication of such proposals that interested parties can discuss and intervene in the process of parliamentary and Council approval leading, it is hoped, to better legislation.

The current process of the Ad Hoc Group: Immigration is most unfortunate. The secrecy with which the intergovernmental group has proceeded has, understandable, created an atmosphere of suspicion and mistrust both at the European and national parliamentary level and among non-governmental organisations.

We can only hope that the ratification of the European Union Treaty will infuse greater transparency and accountability into the hitherto intergovernmental process. For this to

occur, however, we believe the active engagement of national parliaments in pursuit of such transparency and accountability is vital.

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