HELLENIC REPUBLIC

GREEK NATIONAL COMMISSION FOR HUMAN RIGHTS

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Proposal on the Ratification of International Conventions on the Protection of Migrant Workers*

I. INTRODUCTORY NOTES

In 2000 it was calculated by the International Organisation for Migration that there were approximately 11 million foreign migrants in the European Union (EU). From 1974 to the end of 2000, some 1.8 million foreign migrants were legitimated in seven country of the EU which implemented legitimation programmes (Belgium, Spain, France, Greece, Italy, the Netherlands, and Britain). The EU Commission publicly acknowledges that Europe has an immediate need for a labour and professional force of foreign immigrants, as it calculates that the actively employed population in the EU will remain static at 245 million in the next two decades, while in 2003 there will be a shortage of 1.7 million employees in the fields of information technologies and communications.[1] There can no longer be any doubt that the states of the EU have entered upon a period of maturity in showing that they realise the urgent need to adopt a flexible, but at the same time realistic, immigration policy, since they have themselves been converted *de facto* into multi-racial and multi-cultural nations. The seal has been set on this reality by a quasi-legal (binding) text, that of the provision of Article 22 of the Charter of Fundamental Rights of the EU.

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[1] *Migration News*, issue 9, No. 3, March 2002, 'Europe - EU: mobility, enlargement' (http://migration.ucdavis.edu/mn/).

This provision imposes in a characteristic way respect on the part of the Union for "cultural, religious and linguistic diversity". This is a provision which takes the form of a proclamation, but at the same time it carries very important specific legal and political weight. In order to realise the aim of this provision, the EU must proceed to a wide range of legislative - *inter alia* - actions which will safeguard all the human rights, of a positive and negative character, of all persons without exception, in accordance with the principle of universalism, including migrants, who are on the territory of the member-states of the EU. It should also be noted that the provision on social diversity of the united Europe has been introduced in the third chapter of the Charter, which concerns the principle of equality, and more specifically, *inter alia*, equality before the law, and the prohibition of all discrimination. These are funamental legal principles which are a *sine qua non* for the harmonious and creative continuation of the existence of social - in a broad sense - diversity on the continent of Europe.

The regulation of issues of migration, together with those of controls of external borders and of asylum, belongs among the so-called 'flanking measures' (to the free movement of persons) which the Council of the EU must take and implement in accordance with the post-Amsterdam Treat of the European Community (Title IV, Articles 61 *et seq*.). Of particular importance in the present context are the provisions of paragraphs 3 and 4 of Article 63 of the Treaty, which expressly call for the taking of "immigration policy" measures. At the Seville Summit (21 - 22 June 2002), the representatives of the EU states stressed that the action of the EU in the field of immigration should be based on the following principles, *inter alia*:[2]

* The 'legitimate ambition' of immigrants to achieve a better life must be harmonised with the capacity for reception of the EU and its

[2] Seville European Council 21 - 22 June 2002, *Presidency Conclusions*, Doc SN 200/02, para. 29.

member-states, while immigration must take place always within the framework of legality.

* Incorporation of lawful immigrants into the EU means the recognition of rights and obligations which stem from the fundamental rights which are recognised in the EU.

The NCHR would recall the *Athens Declaration* (November 2001),[3] according to which states should be inspired by the following basic principles in laying down their immigration policies:

"a) Immigration into a receiving State enriches the receiving State's economic, social, scientific and cultural life;

b) Immigrants should be treated in a manner which accords with humanitarian values and international human rights law, especially the principle of non-discrimination;

c) States should determine their reception capacities taking into consideration also the reasons for which migrants seek better living conditions."

Since the ratification of the Treaty of Amsterdam, the EU Commission has submitted to the Council and to the European Parliament a series of important proposals for Directives and of texts with policy guidelines on matters of migration and asylum. In late Apil 2002, there were on the table of the competent organs of the EU for discussion 18 (published) texts, of which eight concerned matters of asylum and 10 immigration issues. These European initiatives, chiefly of a legislative character, which are still in the first stages of their evolution, will have a positive effect particularly on domestic legal orders, such as that of Greece, which do not have evolved structures for the regulation of the matters in question.

Nevertheless, at an international level there is a series of international conventions on foreign migrant workers, of the International Labour Organisation (ILO) and the United Nations Organisation, which have not been ratified, or even signed, by Greece, in spite of the fact that

[3] See NCHR, *Annual Report 2001*, Athens 2002, pp. 335 - 338.

they contain important provisions on the laying down of immigration policy and the introduction of legislative regulations. These conventions are in force or have been adopted by the above international organisations, of which Greece is an active member.

Greece's accession to these international conventions on immigrant workers is deemed necessary because, over and above the fact that these can serve as particularly useful criteria for the necessary creation and evolution of Greece's immigration policy and legislation, as the NCHR has already stressed,[4] they will undoubtedly contribute to the realisation of the aims stated above of a 'united social Europe', as these have been laid down by the Charter of Fundamental Rights and the post-Amsterdam Treaty of the European Community.

II. CONVENTIONS OF THE INTERNATIONAL LABOUR ORGANISATION (ILO) ON THE PROTECTION OF IMMIGRANT WORKERS

1. The ILO is one of the specialist organisations of the UNO the purpose of whose existence and operation is "the promotion of social justice and internationally recognised human and labour rights".[5] The ILO has made a major contribution to the establishment of minimal standards of protection of workers' rights by means of a particularly large series of international conventions and recommendations. One special category of conventions and recommendations which the ILO has developed deals with the establishment of international labour standards for immigrant workers. The ILO's focusing on immigrant workers has a double purpose: on the one hand, the regulation of certain basic issues of the flows of immigrant workers and, on the other, the protection of immigrant workers by the host states - chiefly - but also by the states of origin.

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[4] See positions of the NCHR on Draft Law 2910/2001, NCHR, *Annual Report 2000*, Athens 2001, pp. 87 - 88.

[5] See www.ilo.org/public/english/about/mandate.htm. See also the web site of the Ministry of Labour and Social Security (http://www.labor-ministry.gr/index_gr.html), with the texts of the ILO Conventions in Greek (Department: International Affairs).

2. The ILO has rested its international legislative efforts up to the present in favour of immigrant workers on four basic principles:

* The host states and the states of origin must work together so that there is an organisation for the immigration of workers who can meet the needs of the host states.

* The decision of the immigrants to migrate in order to find work should be a rational decision based on a knowledge of the living and working conditions and of the real needs in terms of labour which exist in the host country.

* The protection of the rights of immigrant workers is directly bound up with the protection of indigenous workers.

* The establishment and protection of the principle of equality for immigrant workers in the host country, through the above texts of the ILO, promotes the statutory establishment of the equal value of the labour of the indigenous and foreign workforce.[6]

3. There are two basic conventions of the ILO on foreign (migrant) workers: the 'Migration for Employment Convention (Revised)'[7] of 1949 and the Convention on migrant workers of 1975 ('Concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers').[8] Both these conventions are based on the principle of universality and protect all migrant workers without discrimination based on their nationality. The principle of reciprocity does

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[6] See www.ilo.org/public/english/standards/norm/whatare/standards/migrant.htm. See also R. Cholewinski, *Migrant Workers in International Human Rights Law*, Oxford, Clarendon Press, 1997, pp. 92 - 136.

[7] Convention No. 97 'Migration for Employment Convention (Revised)', 1949, accompanied by Recommendation No. 86 'Migration for Employment Recommendation (Revised)', 1949 (http://ilolex.ch). *By 19 June 2002 this convention had been ratified by 42 countries, of which eight are members of the EU.*

[8] Convention No. 143, 'Migrant Workers (Supplementary Provisions) Convention', 1975, accompanied by Recommendation No. 151, 'Migrant Workers Recommendation', 1975 (http://ilolex.ch). *By 19 June 2002 this convention had been ratified by 18 countries, of which four are members of the EU.*

not apply to these texts - as is the case with all the legal texts protecting human rights.[9]

4. Although the above conventions contain basic, minimal, principles for the organisation between and within states of the migration of foreign workers (Convention of 1949) and for the protection of their fundamental rights in all the contracting countries (Convention of 1975), Greece has not yet acceded to these conventions which are in force.

5. The NCHR proposes the immediate accession of Greece to the above conventions in the belief that the implementation by this country of these international texts will contribute particularly to the reshaping of migration legislation with a view to the effective organisation and operation of the normative and administrative framework on migration currently in force.

6. The most important points of *ILO Convention 97 'On migrant workers'* which it is thought desirable to stress are the following:[10]

* Article 2 of ILO Convention 97 provides for the operation in the contracting countries of an adequate service to provide, free of charge, accurate information to foreign workers on labour matters in these countries.

* Article 4 of the Convention provides for the taking of measures by the contracting states, within its jurisdiction, to "facilitate the departure, journey and reception" of migrants for employment.

* Article 5 requires of the contracting states the creation of appropriate medical services, to be responsible for ascertaining and

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[9] See L. Picard, «Η προστασία των δικαιωμάτων των μεταναστών: Κανονιστικές δραστηριότες της ΔΟΕ» [The protection of migrants' rights: Regulatory activities of the ILO], IMDA (ed.), *Η Προστασία των Δικαιωμάτων των Μεταναστών Εργατών και των Οικογενειών τους* [The protection of the rights of migrant workers and their families], Athens, Estia, 1994, pp. 73 - 82.

[10] According to Article 11, para. 1 of ILO Convention 97, for the purposes of the Convention, the term *migrant for employment* means a person who migrates from one country to another with a view to be employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment. The Convention does not apply to "frontier workers", to "short-term entry of members of the liberal professions and artistes", or to seamen (Article 11, para. 2).

ensuring the good health of migrants for employment and their families on their departure and arrival.

* Article 6 of ILO Convention 97 provides for lawful immigrants in the host country "treatment no less favourable than that which it applies to its own nationals", on the following main issues, *inter alia*: (1) remuneration, minimum age for employment, apprenticeship and training, women's work , and the work of young persons - (2) membership of trade unions and collective bargaining - (3) social security - (4) the establishment of legal remedies to ensure the effective operation of the provisions of ILO Convention 97.

* Article 10 of the Convention provides in cases where the number of migrants going from the territory of one state to that of another, for the possibility of co-operation and entering into agreements between the competent authorities of the states involved, "whenever necessary or desirable", for the application of the provisions of the Convention which concern "matters of common concern".

* The First (optional) Annex to the Convention contains particularly important regulations on the organisation and operation of a legislative framework on the working conditions of foreign workers who are recruited by employers in another country, otherwise than under (inter)government sponsored arrangements for group transfer.

* The Second (optional) Annex to the Convention provides for equally important regulations on the recruitment and conditions of labour of foreign workers under government-sponsored arrangements for group transfer.

* The Third (optional) Annex to ILO Convention 97 contains provisions on the facilitation of the importation of personal effects, tools and equipment of migrants for employment in host countries.

7. The most important points in *ILO Convention 143 'Concerning Migrations in Abusive Conditions and the Promotion of Opportunity and*

Treatment of Migrant Workers', supplementing ILO Convention 97 which it is thought desirable to stress are as follows:[11]

* Article 1 of the Convention requires of the contracting states that they should "respect the basic human rights of all migrant workers". The provision, rightly, does not distinguish between lawful and unlawful migrant workers.

* The contracting states, in accordance with Article 2, undertake to determine whether there are illegally employed migrant workers on their territory and whether there depart from, pass through or arrive in their territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international instruments or national legislation. The same provision calls for consultation of the contracting states with the representative organisations of employers and workers on the above subjects.

* Article 3 of ILO Convention 143 requires the contracting states to adopt all "necessary and appropriate measures", with or without the collaboration of other contracting states:

(a) for the suppression of clandestine movements of migrants for employment;

(b) against the organisers of illicit or clandestine movements of migrants for employment and against those who employ unlawful foreign immigrants, with a view to combating and eliminating the infringements of Article 2 of the Convention.

* The contracting states, in accordance with Article 6 of ILO Convention 143, are under an obligation to introduce legislation for the

[11] According to Article 11 of ILO Convention 143, the term *migrant worker* means a person who migrates or who *has migrated* from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker. The Convention does not apply to "frontier workers", to artistes and members of the liberal professions who have entered the country on a short-term basis, seamen, persons coming specifically for purposes of education or training, or employees of organisations or undertakings which have entered the host country temporarily at the request of their employer to carry out a specific assignment (Article 11, para. 2).

effective detection of illegal employment of migrant workers and the definition and application of administrative, civil and penal sanctions in resopect of the illegal employment of these persons, and the organisation of movements of migrants which results in infringements of Article 2 of the Convention and the provision of assistance, for profit or otherwise, to such movements.

* Article 8 includes a provision of exceptional importance which stipulates that in cases of migrant workers who have worked lawfully in a contracting state, these must not lose the status of lawful residence solely because of the loss of their employment, which shall not of itself imply the withdrawal of the residence or work permit. Furthermore, the migrants in question shall enjoy equality of treatment with nationals in respect, *inter alia*, of guarantees of security of employment, provision of alternative employment, and retraining.

* Equally important for the protection of migrant workers is the provision of Article 9 of ILO Convention 143, according to which in cases where a migrant worker remains illegally in the host country without legitimation being possible, he and his family shall enjoy all the rights which stem from his past employments. In the event of dispute about these rights, the migrant in question must be able to present his case, in person or through a representative, before the authority competent to resolve the dispute.

* Of fundamental importance is the provision of Article 10 of ILO Convention 143, which provides that the contracting states must promote and guarantee for all lawful immigrants and the members of their families[12] equality of opportunity and treatment in respect of employment and occupation, social security, trade unionism, cultural rights, and "individual and collective freedoms".

[12] Reckoned as members of a family, in accordance with Article 13, para. 2 of the Convention are "the spouse and dependent children, father and mother". See also in this connection para. 13 of Recommendation 151 of the ILO on the implementation of the above Convention.

* In conclusion, Article 14 of ILO Convention 143 permits the establishment by the contracting states as conditions for the free choice of employment by the migrant worker the migrant's lawful residence in the host country for the purpose of employment for a prescibed period, which may not, however, exceed two years, or, if the relevant legislation provides for the conclusion of employment contracts of a fixed term of less than two years, the completion of the first employment contract.[13]

III. THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (1990)

1. This Convention was adopted by the General Assembly of the United Nations on 18 December 1990[14] after prolonged (ten years) inter-state negotiations within the framework of the UNO, was ratified by the twentieth country on 10 December 2002, and so is to come into force in 2003.[15] By the *Athens Declaration* (3 November 2001, para. III),[16] the Mediterranean National Committees, including that of Greece and the Organisations for the Promotion and Protection of Human Rights urged states to ratify the above International Convention, stressing, *inter alia*, that "Immigrants should be treated in a manner which accords with humanitarian values and international human rights law, especially the principle of non-discrimination".

The need for ratification/accession and implementation of the Convention by states has been repeatedly stressed by the UN High

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13 The Convention is accompanied by ILO Recommendation 151, of a non-binding character, with 'explanatory' provisions particularly important for practice.

14 A/RES/45/158. See also R. Cholewinski, *op. cit.*, pp. 137 - 204. H. Gahad, «Η εφαρμογή της Διεθνούς Σύμβασης που κωδικοποιεί τα δικαιώματα των μεταναστών εργατών και των μελών των οικογενειών τους» [The implementation of the International Convention which codifies the rights of migrant workers and members of their families], IMDA (ed.), *op. cit.*, pp. 37 - 56.

15 See UNHCHR, *Fact Sheet No. 24, The Rights of Migrant Workers*, Geneva (www.unhchr.ch).

16 See NCHR, *Annual Report 2001*, Athens 2002, p. 335.

Commission for Human Rights,[17] in pointing out that the Convention opened up a new chapter in the history of efforts to establish the rights of migrant workers and to safeguard their protection and respect for them, and that it is a comprehensive international convention, inspired by existing binding international agreements, human rights studies of the UNO [findings of experts, etc.].[18] The High Commission has also stressed that the Convention, as a convention protecting human rights, introduces standards for the creation of national legislation and the relevant judicial and national administrative procedures.[19]

The necessity for the ratification of the above Convention by Greece was recently driven home by the Public Prosecutor of the Court of Cassation of Areios Pagos (AP), who drew attention to the unenviable position of many foreign workers in Greece in his circular[20] to the Heads of the Prosecutors' Offices of the Courts of First Instance. In this circular, the Public Prosecutor of the Areios Pagos expressed his concern at the fact that "a host of violations of the rules of labour law [and by extension of Articles 2, para. 1 and 25 para. 1 of the Constitution] is heard of every day, particularly to the detriment of foreign migrant workers", and he therefore called upon the senior Public Prosecutors to show "the appropriate strictness with a view to the prevention or suppression of phenomena which degrade human beings and affront our democratic and civilised society".

2. The most important points of the Convention which it is desirable to stress are the following:

(a) Unlike the ILO Conventions referred to previously, the UN Convention applies, in principle, according to Article 1, to all migrant

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17 UN Human Rights Commission, 58th Session, Panel on Migrants, Introductory Statement by Mary Robinson, Geneva, 15.4.2002 (www.unhchr.ch).

18 UNHCHR, *Fact Sheet No. 24, loc. cit.*, introduction.

19 Idem. The same position has been expressed to the member-states of the EU by a large section of representatives of the European Parliament: para. 96, *Motion for a European Parliament Resolution on the human rights situation in the European Union (2001) (2001/2014 (INI)* in European Parliament, *Report on the human rights situation in the EU (2001)*, Doc A5-0451/2002, 12.12.2002.

20 AP 2834/circ. 4.

workers[21] and to the members of their families, "without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."

(b) Article 7 of the Convention safeguards the fundamental right of non-discrimination, on the above criteria, for all migrant workers and their families "in accordance with the international instruments concerning human rights".

(c) Part III of the Convention contains a series of provisions protecting fundamental human rights, and obligations, of *all* migrant workers *without exception* and the members of their families. The most important of these rights and obligations are the following:

- The right to life (Article 9).
- The right to freedom from torture or other forms of cruel, inhuman or degrading treatment or punishment (Article 10).
- Freedom from "slavery or servitude" and from forced or compulsory labour (Article 11).
- A right to freedom of thought, conscience and religion (Article 12), and the right to freedom of expression (Article 13).
- Protection of private life (Article 14).
- Protection of property (Article 15).
- Liberty and security of person (Articles 16 and 17).
- The right to equality of treatment with the citizens of the host state before the courts (Article 18).
- An express prohibition of the destruction by anyone of passports or similar documents of a migrant worker or a member of his family (Article 21).

[21] A 'migrant worker' means, according to Article 2, para. 1 of the Convention, a person "who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". Family members are considered to be, according to Article 4 of the Convention, "persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned".

- Prohibition of mass expulsion measures (Article 22).
- A right to enjoy "treatment not less favourable than that which applies to nationals of the State of employment", in respect, *inter alia*, of pay, conditions of work, and terms of employment (Article 25).[22]
- The right to take part in trade union activities (Article 26).
- The right to enjoy the same treatment given to nationals in respect to social security (Article 27).
- The right to medical treatment in emergencies (Article 28).
- The right of children of migrant workers to have access to education (Article 30).
- Respect for the cultural identity of migrants and facilitation by the member-states of maintenance of cultural links with the state of origin (Article 31).
- An obligation on migrants to comply with the laws and regulations of any state of transit and state of employment and to respect the cultural identity of the inhabitants of such states (Article 34).

(d) More particular rights are provided for *lawful* migrant workers and their families by Part IV of the Convention, the most important of which are the following:

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[22] This provision is in complete harmony with Article 7 of the International Convention on Economic, Social and Civil Rights (ICESR), ratified by Greece by Law 1532/1985 (OJHR A' 43). Article 25 of the International Convention on Migrant Workers is, however, also in accord with modern Greek labour law. The Athens Appeal Court, in its Judgment 23/2001 (*Arch Nom*, 2001, p. 872), specifically following Areios Pagos Judgment 389/1998 (*DEN*, 1998, p. 601), stressed that, in accordance with Greek legislation in force, "*not only are those employed with an employer with a valid dependent labour contract entitled to allowances (bonuses) for public holidays, holidays, holiday pay and allowance, but also those who provide their services by virtue of an invalid work contract with a simple labour relation … Consequently, in the case of an invalid work contract the employee is also entitled directly by law – and not by virtue of the provisions on unjustified enrichment – to holiday pay and allowance, and to allowances (bonuses) for public holidays …Further [in accordance with Greek labour law], it is to be concluded that in the case of a labour relation arising from an invalid contract, the employer, when he wishes to cease to accept the work with which he is provided, must denounce the relation and pay the severance pay which Law 2112/20 provides for denunciation, depending upon the duration of the labour relation*." This case law position was also adopted in Judgement 3790/2001 of the Athens Appeal Court (*EpithErgDik*, 2002, p. 163).

- A right, before their departure, or at the latest at the time of their admission, to be fully informed by the state of origin or employment of all the conditions of admission, stay and remunerated activities in the state of employment (Article 37).
- A right to be temporarily absent from the state of employment without the residence or work permit being affected by this (Article 38).
- A right to liberty of movement in the territory of the state of employment (Article 39)
- A right to engage in trade union activities (Article 40).
- A right of access to social and medical services, to vocational training and retraining facilities (Articles 43 and 45).
- A right to ensure the unity of the family (Article 44).
- The provision of a residence permit for at least as long as the work permit for remunerated activity is valid (Article 49).
- Protection of the residence status of members of the family in the event of the death of the migrant worker (Article 50).
- Equality of treatment with nationals in respect of protection from dismissal, unemployment benefits, and access to alternative employment in the event of the loss of a job or termination of remunerated activity (Article 54).
- The above also applies to frontier workers and seasonal workers (Articles 58 – 59).

(e) In conclusion, it should be noted that Part VI of the Convention contains particularly important provisions on the promotion, at a national and inter-state level, of "equitable and humane" conditions for foreign migrant workers, such as the following:

- The setting up of approriate services by the member-states for the formulation and implementation of migration policy, co-operation with other states involved, the provision of information to employers concerned and their organisations, and

the provision of information and support to migrants and their families (Article 65).

- Co-operation between the member-states on the orderly return of migrant workers and the members of their families (Article 67)
- Co-operation between member-states on the prevention and elimination of illegal movements and the illegal employment of migrant workers (Article 68).

Thus:

The NCHR believes that the above specialist international texts of the ILO and the UNO can make the greatest possible contribution to the creation and implementation by Greece of the necessary up-to-date and effective migration legislation and policy, based on the principles of international law on migrant workers and the protection of human rights. For these reasons, the NCHR proposes the immediate ratification by Greece of ILO Conventions 97 and 143, and of the International Convention on Migrant Workers and the Members of their Families (UNO 1990).

12 December 2002