

**NATIONAL ASSEMBLY AND NATIONAL COUNCIL OF PROVINCES**

**RATIFICATION OF THE EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS TREATIES BETWEEN THE REPUBLIC OF SOUTH AFRICA AND THE REPUBLIC OF KOREA IN TERMS OF SECTION 231(2) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA**



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**1. PURPOSE**

The purpose of this memorandum is to provide the background and to seek Parliament's approval to ratify the abovementioned Treaties in terms of section 231(2) of the Constitution.

**2. BACKGROUND**

- 2.1 After the unauthorised signing of the abovementioned Treaties in 2007 by the then Deputy President, Mrs Phumzile Mlambo-Ngcuka, various avenues were followed in an attempt to rectify the unauthorised signing.
- 2.2 In one of these attempts, the Minister of the Department of Justice and Constitutional Development was requested to sign a letter to the Minister of International Relations and Cooperation in which it was proposed that the latter Minister takes up the matter with the Korean Ambassador to find a way to accommodate both parties.
- 2.3 In response to the Minister's letter, the Minister of International Relations and Cooperation, on advice of the State Law Advisers (International Law), proposed the following procedure to get the Treaties in force:
  - 2.3.1 request the President to authorize the Minister to sign the Treaties as if it was being done in the first instance;

- 2.3.2 the Treaties be signed by the Minister and Cabinet be requested to approve that the Treaties be submitted to Parliament for ratification; and
- 2.3.3 as soon as both Houses of Parliament have ratified the Treaties, the Korean authorities be notified that the Treaties have also entered into force for South Africa. It must also be indicated that the Treaties signed in 2007, which are exactly the same as the Treaties signed by the Minister and approved by Parliament, are regarded as being in force.
- 2.4 Subsequently, in a further memorandum submitted to the Minister on 23 June 2010, the Minister was requested to seek Presidential approval that the Minister re-signs the Treaties on behalf of the Government.
- 2.5 On 8 September 2010, President Zuma issued President's Minute 323, authorizing the Minister to sign the Treaties on behalf of the Government. The Treaties were resigned by the Minister on 22 June 2011.
- 2.6 After the signed Treaties were handed to the Treaty Section in the Department of International Relations and Cooperation (DIRCO), a meeting was convened by DIRCO to discuss an opinion that was given by the State Law Advisers (International Law) to the relevant desk in DIRCO. This opinion was never brought to the attention of the Department, only the letter referred to in paragraph 2.3. In the opinion, the view is held that it was not necessary for the Minister to resign the Treaties.
- 2.7 In a legal opinion dated 19 March 2009 from the State Law Advisers: International Law to the relevant desk in DIRCO, the Law Advisers discussed the reason why a Presidential Minute is requested when an international agreement is signed and also highlighted the distinction between section 231(2) and (3) agreements.

- 2.8 The main reason why a Presidential Minute is sought when international agreements are signed is because of the fact that the negotiating and signing of all international agreements is the responsibility of the National Executive. The President as the Head of the National Executive and the line function Minister on a specific issue are deemed to constitute the National Executive when they confer over an issue concerning the line function Minister. A Presidential Minute will therefore satisfy the requirements of section 231 (1) by ensuring that the relevant line function Minister and the President have conferred over an issue concerning the line function Minister.
- 2.9 The process of obtaining a President's Minute becomes particularly indispensable in agreements falling under section 231(3) of the Constitution, that is, agreements of a technical and administrative nature as such agreements become binding upon the Republic of South Africa upon signature. It is therefore imperative that prior to such signature the National Executive as represented by the President and the relevant line function Minister agree on concluding such agreements.
- 2.10 Agreements falling under section 231(2) of the Constitution, under which the said two Treaties fall, only binds the Republic after they have been approved by resolution in both the National Assembly and National Council of Provinces. The process of taking a section 231(2) agreement to Parliament requires that such an agreement must first be presented to the National Executive through a Cabinet Memorandum. The presentation to the National Executive on route to Parliament therefore satisfies section 231(1) of the Constitution. It is however normal procedure that even for section 231(2) agreements, a President Minute be obtained prior to signature. The submission to Cabinet in the form of a Cabinet Memorandum, thus satisfying section 231(1) would dispense with the absolute need for a President's Minute.

2.11 In a letter from the Office of the Chief State Law Adviser (International Law) dated 30 May 2012, received by the Department on 13 June 2012, it is indicated that the letter from the Minister of International Relations and Cooperation to the Minister, dated 10 December 2009 was not scrutinised by their Office and the impression may have been created that the Minister should resign the Treaties after obtaining a President's Minute and that the Department acted in response to the letter from the Minister of International of International Relations and Cooperation.

2.12 The Law Advisers conclude that the Department proceed with submitting the original set of Treaties signed on 3 May 2007 to Parliament for approval after Cabinet approval has been obtained. Once Parliament has approved, notification thereof can be given to Korea through the diplomatic channel, in order for the Treaties to enter into force.

2.13 In the light of the fact that the Korean authorities have completed their internal procedures for entry into force, it seems imperative that South Africa should, as soon as possible, ensure that it also complete all procedures for entry into force.

### **3. RECOMMENDATION**

In the light of the above and also to indicate to the rest of the world that South Africa will not be a safe haven for criminals, it is recommended that Parliament approve the ratification of the said Treaties.