

## **EXPLANATORY MEMORANDUM**

### **RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF ACTS OF NUCLEAR TERRORISM.**

On 15 April 2005, the United Nations General Assembly adopted the above Convention, addressing the unlawful use of nuclear devices or material for terrorism. The conclusion of this Convention was the first after the terrorist attacks on the United States of America. The President signed the Convention in New York on 14 September 2005.

The Convention criminalises the possession or use of radioactive material for terrorist activities or the possession, use, or making of a device, or the damage of a nuclear facility in order to cause death or serious bodily injury, or substantial damage to property or the environment, or compelling a person, international organisation or State to do or refrain from doing an act.

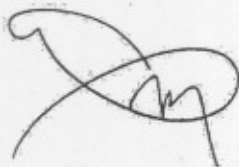
On 20 May 2005, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004) came into operation, criminalising terrorist and related activities.

The legislation provides for specific acts of terrorism (Convention offences) but also for terrorist activities and for offences associated or connected to terrorist activities eg. aiding, abetting, inciting, recruiting persons and even participating in training for terrorist activities.

The Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, in its Schedule amended the Nuclear Energy Act, 1990, by the insertion of the offences required to be enacted in terms of the Constitution.

Eleven of the twelve Counter Terrorism Conventions which, in terms of a Chapter VII United Nations Security Council Resolution (1267/1999), States must ratify or accede to, have been ratified or acceded to by the Republic. The Convention on the Physical Protection of Nuclear Material, of which the line function department is the Department of Mineral and Energy, is according to my information, in the Constitutional process of being acceded to.

In order to meet the Republic's international obligations, it is imperative to also ratify the abovementioned Convention.



**MINISTER FOR SAFETY AND SECURITY**

**C NQAKULA**

**Date: 2006 -06- 15**



DEPARTMENT: JUSTICE AND CONSTITUTIONAL DEVELOPMENT  
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Date: 10 April 2006

### RATIFICATION OF INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF ACTS OF NUCLEAR TERRORISM: YOUR 1/1/4/1 (229) DATED 16 MARCH 2006

#### Background and Legal Question

1.1 The South African Police Service, hereinafter referred to as "the SAPS", requires our opinion regarding the International Convention for the Suppression of Acts of Nuclear Terrorism, hereinafter referred to as "the Convention".

1.2 The legal question posed by the SAPS may be broken down as follows:

- (a) Is the Republic of South Africa in the Constitutional position to ratify the Convention; and
- (b) is the Republic of South Africa in the Constitutional position to fulfil all its obligations in terms of the Convention?"

## **Deliberation**

### *Ad question (a)*

2.1 The ratification of any convention and international agreement is a parliamentary process which is carried out as required by section 231(2) of the Constitution of the Republic of South Africa, 1996, hereinafter referred to as "the Constitution". Section 231 of the Constitution provides as follows:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect." (Our emphasis.)

A convention may be said to be ratified only once it has been approved in accordance with section 231(2) of the Constitution. It would therefore follow that as long as parliament is in session, it would be in a position to make a decision with regard to the approval or ratification of any convention or international agreement. The issue of whether parliament approves a convention or international agreement rests within the discretion of Parliament on which we can not opine.

### *Ad question (b)*

2.2 The obligations under any convention or international agreement may only be fulfilled once the provisions thereof become law in the Republic of South Africa. In



terms of section 231(4) of the Constitution, with the exception of self-executing provisions, any international agreement or convention will only become law if it is enacted into law by national legislation.

2.3 The Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004), hereinafter referred to as "the Act", was brought into operation on 20 May 2005. The objectives of the Act, as evident in its long title, are, *inter alia*, to **provide for measures to prevent and combat terrorist and related activities**, to **provide for an offence of terrorism** and other offences associated or connected with terrorist activities, to provide for Convention offences, **to give effect to international instruments dealing with terrorist and related activities and to provide for a mechanism to comply with United Nations Security Council Resolutions**, which are binding on member States, in respect of terrorist and related activities.

2.4 As nuclear terrorism is clearly terrorism, it is, in general and for the most parts, covered by the Act. Specific provisions of the Convention are, as correctly pointed out by the SAPS, also covered by the Act.

2.5 It should be emphasised that the issue of whether our domestic law adequately provides for every aspect of the Convention may only truly be tested upon implementation. Ratification of the Convention does not preclude Parliament from subsequently passing national legislation to provide therefor, either through an amendment of the Act or through the passing of new legislation. In fact, it **obliges** Parliament to provide therefor in its national legislation.

## **Conclusion**

3.1 We are of the opinion that the Republic of South Africa may, in light of the Act, be able to fulfil, if not all, most of its obligations under the Convention.

3.2 If necessary subsequent amendments to the Act may be effected in order to provide for those provisions of the Convention that may not be covered effectively by the Act.

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