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United Nations Office on Drugs and Crime

Country Review Report of South Africa on the implementation of chapter III and chapter IV of the United Nations Convention against Corruption

This is the report of the review that was conducted by Mali and Senegal of the implementation by South Africa of articles 15 – 42 of Chapter III: Criminalization and Law Enforcement and articles 44 – 50 of Chapter IV: International Cooperation, of the United Nations Convention against Corruption for the review cycle 2010 - 2015

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LIST OF ACRONYMS

ACTT	Anti-Corruption Task Team
AFU	Asset Forfeiture Unit
CPA	Criminal Procedure Act, 1977 (Act 51 of 1977)
DPCI	Directorate of Priority Crime Investigations
FIC	Financial Intelligence Centre
ICCMA	The International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)
JCPS	Justice, Crime Prevention and Security Cluster
NACF	National Anti-Corruption Forum
NACH	National Anti-Corruption Hotline (0800 701 701)
NPA	National Prosecuting Authority
OECD	Organization for Economic Co-operation and Development
PDA	The Protected Disclosures Act, 2000 (Act 26 of 2000)
POCA	Prevention of Organized Crime Act, 1998 (Act 121 of 1998)
PRECCA	Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004)
RICA	The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act 70 of 2002)
SADC	South African Development Community
SAPS	South African Police Service
SARS	South African Revenue Service
SCCU	Specialized Commercial Crimes Unit
SIU	Special Investigation Unit
The Convention	United Nations Convention against Corruption
RSA	The Republic of South Africa
UN	United Nations
UNCAC	United Nations Convention against Corruption
WPA	Witness Protection Act, 1998 (Act 112 of 1998)

I. INTRODUCTION

1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process, the overall goal of which, is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

II. PROCESS

5. The following review of the implementation by the Republic of South Africa of the Convention is based on the completed response to the comprehensive self-assessment checklist received from the Republic of South Africa, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Mali and Senegal, by means of telephone conferences, e-mail exchanges and other dialogue and involving Ms. Pleasure (S.A.) Matshego of the Republic of South Africa, Boubacar Sidiki Samaké of Mali and Ibrahima Bakhoun of Senegal.
6. A country visit, agreed to by the Republic of South Africa, was conducted from 10 to 14 September 2012.
7. During the country visit, the expert review team met with representatives of non-governmental organizations. Participating organizations included Corruption Watch, the South African National Editors Forum, Business Unity South Africa (a member of National Anti-Corruption Forum), the National Council of Trade Unions and the Moral Regeneration Movement. It was remarked that there is no agreed upon definition of corruption in South Africa, although there is a perception that corruption remains a significant challenge in the country. PRECCA however, lists the activities that are considered corruption in South Africa. It was also noted that civil society would like to continue regular consultations with the government regarding anti-corruption legislation and challenges.
8. The National Anti-Corruption Forum was identified as a key body in the country. It was established in 2001 following an anti-corruption summit in 1999 in Cape Town. The Deputy President was the convener and the chairperson. It was agreed to hold an anti-corruption summit every second year to decide the essence of the anti-corruption programme for the year. In 2002, a comprehensive national anti-corruption strategy was developed. The last annual meeting of the Forum was held in December 2011.

Resolutions were adopted that addressed several issues, including criminalization, and these form the basis for the national anti-corruption framework, as follows:

“We, the delegates drawn from the various sectors of South African society -

Observe International Anti-Corruption Day on 9 December 2011, acknowledging that, while our country has adopted several laws in accordance with our Constitution of the Republic of South Africa, key international conventions aimed at combating corruption, it needs to find innovative ways to ensure their effective implementation;

Note with growing concern the worsening ratings measured by corruption perception indices of South Africa’s ethical performance, and the destructive impact and unsustainable effect on our social fabric of the combined ills of corruption at top levels and conspicuous consumption in a context of widening economic and social inequality;

Welcome the promised progress to strengthen transparency and accountability in the revised Public Service Integrity Management Framework, and call for its speedy implementation;

Acknowledge that some parts of civil society and the private sector have not yet consistently implemented similar financial disclosure provisions for directors in their organisations;

Acknowledge the positive role being played by various fora established by government to enhance cooperation and collaborative synergies, including the Inter-Ministerial Committee on Corruption, the Multi-Agency Working Group, the Anti-Corruption Task Team and the Public Service Anti-Corruption Unit;

Note reports of progress in the review of the Protected Disclosures Act, called for in NACF Resolutions of 2005 and 2008;

Acknowledge concrete steps taken by the private sector and government aimed at deepening cooperation in the fight against corruption, and encourage future collaboration between all sectors;

Welcome recent positive developments indicating greater resolve by government to take firm action in active support of the work of Chapter 9 institutions;

Recommit ourselves as individual delegates, organisations and sectors to actively promote good governance and an ethical culture in all spheres of South African life.

Resolve as follows:

1. We reaffirm the original vision of the NACF, as set out in the Memorandum of Understanding on its Establishment, as the primary platform for the development of a national consensus through the coordination of sectoral strategies against corruption.
2. Sector representatives commit to securing the renewed commitment of their leadership to give effect to the vision and objectives of the NACF.
3. We reaffirm our commitment to holding ourselves and each other accountable to report regularly on effective implementation of sectoral and joint strategies.
4. We commit to engage with our respective constituencies and with each other to revise the National Anti-Corruption Strategy and implementation modalities.
5. Sector representatives undertake to review their sectoral anti-corruption initiatives and programmes aimed at realising an agreed National Anti-Corruption Strategy.
6. Each sector commits to review and where necessary reconstitute its representation on the NACF.

7. We recognise that to give effect to the vision, objectives and programmes of the NACF it is necessary to identify and secure adequate resources to review and capacitate its structures at local, provincial and national level.
8. To develop a comprehensive education, awareness and communication campaign to promote an ethical culture, develop an improved understanding of the many facets of corruption, and the contributions being made to combat this scourge.
9. To reaffirm the resolutions adopted at previous Summits that remain unimplemented, call on all sectors to take urgent and decisive action to demonstrate their commitment to both their previous joint undertakings and to this shared Forum, and to include them in the National Anti-Corruption Programme. Previous resolutions are attached for ease of reference.
10. We commit ourselves to engage to consider options for the implementation of and respect for the Constitutional Court's ruling requiring the establishment of independent anti-corruption capacity.
11. Noting reference in the Preamble to the review of the PDA, we call for comprehensive protection for whistleblowers, and the right to access to information in line with the national Constitution.
12. The NACF is tasked to urgently produce a strategic programme of action supported by a business plan, including timeframes, to give effect to all resolutions."

III. EXECUTIVE SUMMARY

1. Overview of the legal and institutional framework of South Africa in the context of UNCAC implementation

The Convention was ratified on 22 November 2004 and signed by the President on 22 November 2004. South Africa deposited its instrument of ratification with the Secretary-General of the United Nations on 24 November 2004. In terms of section 231 (section 2 & 4) of the Constitution of 1996 an international agreement binds the Republic after it has been approved by resolution in both houses of Parliament and a self-executing provision of such an agreement is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament.

South Africa is a constitutional democracy with the President as head of state. The legal system is a hybrid of Statutory Law (Constitution and Acts of Parliament), Precedents (Judicial and Court decisions) and Customary Law, and represents a blend of legal traditions from English common law and Roman-Dutch civil law, with an infusion of indigenous African customary law. Notwithstanding these roots, in matters of judicial procedure, the common law tradition dominates, and despite adherence to the *stare decisis* principle, the Constitution grants judges the “inherent power...to develop the common law.” South African judges are appointed by the President, and have constitutionally protected independence. There are four primary courts: the Constitutional Court, the Supreme Court of Appeals, the High Courts and the Magistrates’ Courts. The Supreme Court of Appeals is the court of last instance in all matters not implicating constitutional issues. The High Courts and the Magistrates’ Courts are first instance courts.

South Africa has several mechanisms and oversight bodies that specialize in combating corruption offences.

Anti-Corruption Task Team (“ACTT”): Established in 2010 by the President as an interdepartmental body to fast-track high-priority and high-profile corruption cases, the ACTT works with government departments to strengthen governance systems, reduce risks and prevent corruption. Its Principal Committee includes the Head of the DPCI, the National Director of Public Prosecutions, the Head of the Special Investigating Unit and representatives of other institutions.

Directorate of Priority Crime Investigation (“DPCI”): In July 2009, the previous anti-corruption body, the Directorate of Special Operations (DSO) was replaced by the DPCI. Following a judgment in 2010 by the Constitutional Court that the DPCI lacked sufficient independence, legislation was passed on 14 September 2012 to grant the DPCI investigative independence.

National Prosecuting Authority (“NPA”): The National Director of Public Prosecutions determines prosecution policy in consultation with the nine Provincial Directors of Public Prosecutions, and may intervene in the prosecution process if policy directives are not complied with and may review decisions to prosecute or not. Special Directors of Public Prosecutions are in charge of Units dealing with priority tasks, such as witness protection, terrorism and commercial crimes (which include corruption). All Directors are appointed by the President. The NPA has complete independence in prosecutorial decisions.

Specialized Commercial Crimes Unit (SCCU): Established in 1999 within the NPA, its focus includes corruption, fraud, cybercrime and money laundering. A Special Director leads a

team of prosecutors and provides guidance to investigators. Under its 2012 Strategic Plan, corruption cases have been prioritised.

Special Investigation Unit (“SIU”): Established by law as an independent statutory body that fights corruption through investigations and litigation. This Unit conducts investigations pursuant to Presidential proclamation, and may refer cases – including corruption cases – to law enforcement agencies.

National Anti-Corruption Forum (“NACF”): Includes representatives from government, civil society and business sector to discuss corruption challenges and possible measures to address them. It meets approximately once every two years.

The Public Protector: Appointed by the President and independent of government, this office investigates public complaints, including with respect to corruption against government agencies and officials.

2. Chapter III: Criminalisation and Law Enforcement

2.1 Observations on the implementation of the articles under review

2.1.1 Bribery offences; trading in influence (articles 15, 16, 18, 21)

Section 3 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004) (“PRECCA”), creates a general offence of corruption for the offering or giving of a gratification, directly or indirectly, to any person, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person, in a manner that is illegal or amounts to an abuse of power or breach of trust. Section 3(a) makes it a crime to accept, agree or offer to accept, such a gratification. Section 4 applies to public “officers”. A “public officer” is defined broadly in section 1, but specifically excludes legislators, judicial officers and prosecutors. The same corruption offence, however, applies to these officials in sections 7, 8 and 9 of PRECCA, respectively. Solicitation of a gratification is included in the definition of “offers to accept”. Section 5 of the PRECCA applies to active bribery of foreign public officials. Although there is no specific statute addressing passive bribery of foreign public officials, the conduct could be covered by the general prohibition in section 3, which applies to “any person.” Section 3 also applies to cases of trading in influence and bribery in the private sector.

2.1.2 Laundering of proceeds of crime; concealment (articles 23 and 24)

Section 4 of the Prevention of Organized Crime Act, 1998 (Act 121 of 1998) (“POCA”), makes it a crime for any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities to: a) enter into any agreement or engage in any arrangement or transaction with anyone in connection with that property; b) perform any other act in connection with such property, which has the effect of concealing or disguising the nature, source, location, disposition or movement of the property or its ownership.

Section 5 of the POCA makes it a crime for a person, who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, to enter into any agreement, arrangement or transaction with anyone whereby the retention or the control by or on behalf of the other person of the proceeds of unlawful activities is facilitated, or the proceeds of unlawful activities are used to make funds available to the other person, acquire property on his or her behalf or benefit him or her in any other way.

In addition to potential fines and imprisonment upon conviction, laundered funds may be confiscated and forfeited with due consideration for the rights of bona fide third parties.

Predicate offences are not enumerated so as to maximize the scope of the money laundering provisions. Foreign offences count as predicate offences to the extent they would constitute offences in South Africa. A person can be convicted of both money laundering and the underlying predicate offence.

South Africa reported that it was in the process of formally furnishing copies of its money laundering legislation to the Secretary-General.

2.1.3 *Embezzlement; abuse of functions; illicit enrichment (articles 17, 19, 20, and 22)*

Embezzlement by a public official and in the private sector is grounded in the common-law offences of theft, fraud and embezzlement of property. These offences address the conduct envisioned in articles 17 and 22, and South Africa reported no investigation or prosecution challenges in that regard.

South Africa has not adopted a general statute that addresses the abuse of power by public officials under article 19. Some conduct would be covered by section 4 of the PRECCA to the extent that it involves an offer or solicitation by another person. It was also reported that some cases of abuse of power by a public official may rise to the level of the statutory offence of intimidation.

South Africa has not adopted a general statute to address illicit enrichment. However, section 23 of the PRECCA deals with this conduct by granting authority to the National Director of Public Prosecutions to apply to a Judge for an investigation direction based on evidence that a person: (a) maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets; or (b) is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and (c) maintains such a standard of living through the commission of corrupt activities or unlawful activities; and (d) such investigation is likely to reveal relevant information of unlawful activity. The National Director can thereafter summon the suspect, or any other person specified in the investigation direction, to answer questions and/or produce evidence. This information can be used to seize and confiscate property or lead to further criminal investigation. Although this section has not yet been applied in practice, South Africa reported that guidelines were under development to facilitate its proper application.

2.1.4 *Obstruction of justice (article 25)*

Section 18 of the PRECCA criminalises the direct or indirect intimidation or use of physical force to persuade or coerce witnesses to change, delay or prevent testimony. It also prohibits inducing a person to testify falsely, withhold testimony, alter or destroy evidence, or failure to appear in court.

Section 67 of the South African Police Service Act, 1995 (Act 68 of 1995) makes it a crime to interfere in the official duties of law enforcement officers through resisting, hindering or obstructing official duties, or using or threatening to use force against the official or their family. Similar conduct directed towards magistrates is contained in section 108 of the Magistrates' Court Act, 1944 (Act 32 of 144). Similar conduct towards judges is addressed by relevant common-law offences.

2.1.5 Liability of legal persons (article 26)

Convention offences apply to natural and legal persons alike. Section 2 of the Interpretation Act, 1957 (Act 33 of 1957) states that "person" includes: a) any company incorporated or registered as such under any law; or b) any persons corporate or unincorporated. Section 2(5) of the PRECCA defines person to include the person in the private sector. Section 1(xx) of the PRECCA defines "private sector" to include all persons or entities, including businesses, corporations or other legal persons.

Potential penalties include financial penalties and blacklisting from eligibility for public contracts. South Africa reported that the prosecution of the legal person is without prejudice to the potential prosecution of culpable natural persons.

2.1.6 Participation and attempt, and mental state (articles 27 and 28)

Section 21(c) of the PRECCA prohibits conspiracy, attempt, inducing another person to commit an offence, and any act that aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit a crime. Penalties are the same as those applicable to the underlying offence. Mere preparation to commit a criminal offence is not itself an offence.

2.1.7 Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (articles 30 and 37)

Section 26 of PRECCA sets forth potential penalties for corruption offences that are proportional to the severity of the crime. The National Prosecuting Authority Act, 1998 (Act 32 of 1998) vests the prosecuting authority with the discretion to make decisions regarding whether to institute or discontinue criminal proceedings.

South Africa does not provide immunity from criminal investigation or prosecution for public officials. Section 252A of the Criminal Procedure Act, 1977 (Act 51 of 1977) ("CPA") provides limited criminal immunity for law enforcement officers acting in an undercover capacity.

Section 60 of the CPA allows for granting bail at the presiding officer's discretion, based on several factors, including community safety, the likelihood of appearance at future proceedings and the risk of flight.

Section 276B(1)(a) of the CPA permits a court to fix a minimum sentence during which the person shall not be placed on parole. Under section 42 of the Correctional Services Act, 1998 (Act 111 of 1998), when parole becomes possible, several factors are considered, including the nature of the crime; the offender's rehabilitation; the probability of re-offending; and the risk to the victim and the community. Section 50 of the said Act promotes the re-integration of offenders into the community by supervision, relevant therapy and programmes.

An employee may be suspended during a disciplinary enquiry if: (a) The employee allegedly committed a serious offence, or (b) The presence of the employee at the workplace might jeopardize the investigation into the alleged misconduct.

For an offence under PRECCA sections 12 (relating to contracts) or 13 (relating to tenders), the Court may order the person to be placed on the Register for Tender Defaulters. The person thus endorsed must make this known in any subsequent agreement or tender with the State, in terms of section 28(6) of the PRECCA.

Under section 28 of the PRECCA, criminal accountability does not prevent disciplinary action. Although there is no general statutory prohibition to holding future public office or serving as an officer in a public enterprise, there are several sector-specific measures that prevent persons convicted of a corruption offence from serving in the public sector.

Under section 204 of the CPA, the prosecutor may agree with a cooperating accused to provide testimony and/or evidence in exchange for discharge from the offence. Under section 105A, the prosecutor may also enter into a plea and sentence agreement with an accused for a reduced penalty upon a guilty plea and cooperation. However, this agreement is subject to the presiding officer having the final ruling. Finally, the prosecutor may elect not to initiate prosecution in exchange for cooperation.

2.1.8 Protection of witnesses and reporting persons (articles 32 and 33)

Under section 1(1) of the Witness Protection Act, 1998 (Act 112 of 1998) (“WPA”), any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may request protection. Protection may include relocation or change of identity. The WPA established the Office for the Protection of Witnesses that facilitates both temporary and longer-term protection measures. Mechanisms exist to enable the views and considerations of victims to be presented and considered at all critical stages of criminal proceedings, including in parole consideration.

The Protected Disclosures Act, 2000 (Act 26 of 2000) (“PDA”) provides protection for both public and private sector whistleblowers. The PDA sets out procedures by which employees may report unlawful or irregular conduct. The PDA prohibits an employer from subjecting an employee to “occupational detriment” on account of having made a protected disclosure, which includes any disciplinary action; dismissal, suspension, demotion, harassment or intimidation; being transferred against his or her will; being refused a transfer or promotion; or being threatened with any such action. The extension of the PDA to cover independent contractors has been addressed in the proposed amendment of the PDA

2.1.9 Freezing, seizing and confiscation; bank secrecy (articles 31 and 40)

Under Chapters 4 to 6 of the POCA, extensive provisions address both conviction-based and non-conviction-based forfeiture. Under section 18 of Chapter 4, upon conviction, a defendant may be ordered to pay any amount the Court considers appropriate up to the value of the defendant’s proceeds derived from the offence. The Court will also look at benefits derived from “any criminal activity which the Court finds to be sufficiently related to those offences” of conviction. Such an order can be executed against any of the defendant’s assets. In addition, for particular “lifestyle”, criminals convicted of serious offences who have assets significantly greater than their means of acquiring lawful income, a legal presumption may be invoked by the prosecutor (upon approval of the National Director) to require a convicted defendant to establish the lawful origin of property, assets and income acquired during the previous 7 years or risk their forfeiture. The NPA’s Asset Forfeiture Unit is tasked with implementing these Chapters of the POCA to their maximum effectiveness.

The POCA also provides for the confiscation of proceeds of crime in the hands of third parties, or that constitute property, equipment or instrumentalities of the offence, under a civil forfeiture mechanism. Confiscation in these civil proceedings is determined on a balance of probabilities that the property in question is connected to, or derived from, unlawful activity. Where only a part of the property was used to commit the criminal offence, courts may rule that the entire property is subject to forfeiture. Chapter 2 of the CPA provides for the application and granting of search warrants, seizure, forfeiture and disposal of property. Sections 30 to 34 of the CPA govern the care and custody of property seized by the State.

Proceeds of an offence may be subject to pre-trial seizure. Under Part 3 of Chapter 5 of the POCA, a High Court may impose a restraint order on property belonging to a defendant or a person to be charged with an offence. Under section 38 of the POCA, the High Court may issue a preservation order for proceeds and instrumentalities of crime in a civil forfeiture proceeding. In any such order, the rights of bona fide third parties are protected.

Section 26(1) of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) permits an authorised representative of the Centre access to any records kept by or on behalf of an accountable institution, and may examine, make extracts from or copy any such records. Bank secrecy is not a ground to refuse to comply with a court order to disclose financial records related to an investigation.

2.1.10 Statute of limitations; criminal record (articles 29 and 41)

Under section 18 of the CPA, the right to institute a prosecution for corruption lapses after a period of 20 years from the time when the offence was committed. So long as charges have been brought, the defendant's flight from the jurisdiction will interrupt the limitations period.

Under section 271 of the CPA, the prosecution may produce to the court for admission or denial by the defendant a record of previous convictions. The Court shall take such convictions into account when imposing sentence.

2.1.11 Jurisdiction (article 42)

Section 90 of the Magistrates' Court Act (1944) establishes jurisdiction over all criminal offences committed within the territory of South Africa. Section 35(1) of the PRECCA establishes jurisdiction for offences under the Act, regardless of whether or not the act constitutes an offence at the place of its commission if the person is a citizen of the Republic, is ordinarily resident in the Republic or was arrested in the territory of the Republic.

Section 35(2) of the PRECCA establishes jurisdiction over offences occurring outside of South Africa, regardless of whether or not the act constitutes an offence at the place of its commission, if a) the act affects or is intended to affect a public body, a business or any other person in the Republic; b) the person is found in South Africa; and c) the person is not extradited by South Africa. Section 35(2) also provides for the prosecution of citizens of South Africa who commit crimes in foreign jurisdictions, but are not extradited.

2.1.12 Consequences of acts of corruption; compensation of damage (articles 34 and 35)

Acts of corruption and unlawful activity are considered to be relevant factors in legal proceedings to annul or rescind a contract, withdraw a concession or take other remedial action. Section 300(1) of the CPA provides that where a person is convicted of an offence which has caused damage to or loss of property, the court may award restitution. Apart from this, an interested person may also institute civil proceedings to recover the damage or loss of property.

2.1.13 Specialised authorities and inter-agency coordination (articles 36, 38, and 39)

South Africa has several specialized offices that work in the area of anti-corruption and law enforcement. These are detailed above, and are guaranteed investigative and operational independence.

Regarding inter-agency coordination, section 41(1) of the Constitution requires all spheres of government to cooperate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, consulting on matters of mutual interest and adhering to agreed procedures. Established policy of the NPA requires effective cooperation with investigative agencies, and non-compliance may lead to disciplinary proceedings.

In addition to the National Anti-Corruption Hotline, private sector entities have also established hotlines and mechanisms for reporting corruption. Efforts are currently in an advanced stage by the SAPS to develop a digital system to track a case from the initial complaint through to final disposition.

2.2 Successes and good practices

Overall, the following successes and good practices in implementing Chapter III of the Convention are highlighted:

- Detailed mechanism to facilitate the investigation of suspected cases of illicit enrichment by public officials.
- Comprehensive conviction-based and non-conviction-based forfeiture mechanisms, including the potential invocation, at the discretion of the prosecutor and upon conviction of a particularly serious offence, of a 7-year presumption that the assets and property of the convicted person are subject to forfeiture unless their lawful origin can be established by the defendant.
- Elaborate protection for witnesses and whistleblowers under the Witness Protection Act, 1998 and the Protected Disclosures Act, 2000 including broad scope of who qualifies as a witness and what counts as an “occupational detriment.”

2.3 Challenges in implementation, where applicable

The following steps could further strengthen existing anti-corruption measures:

- Consider adopting legislation to make passive bribery of foreign public officials a criminal offence under section 5 of the PRECCA.
- Consider the development and adoption of legislative or other measures to criminalise the abuse of functions by public officials.
- Continue to develop guidelines for implementation at the earliest possible time regarding section 23 of the PRECCA to address suspected cases of illicit enrichment.
- Consider a statutory prohibition for the obstruction of judges consistent with article 25(b) of UNCAC and the similar statutory prohibition with regard to magistrates and to law enforcement officials.
- Consider the adoption of further procedures to disqualify, for a period of time, persons convicted of Convention offences from holding public office or holding office in a public enterprise, in line with article 30(7) of the UNCAC.
- Consider mechanisms to facilitate video testimony of witnesses in safe houses or detention facilities (article 32(2)), and continue to explore opportunities to incorporate provisions into bilateral agreements to relocate witnesses in need of long-term protection (article 32(3)).

- Review the anti-corruption strategy and action plan to strengthen implementation and operationalization of anti-corruption laws and institutions, in partnership with civil society and the business sector.

3. Chapter IV: International cooperation

3.1 Observations on the implementation of the articles under review

3.1.1 *Extradition; transfer of sentenced persons; transfer of criminal proceedings (articles 44, 45, and 47)*

Extradition is addressed by the Extradition Act of 1962 (Act 67 of 1962). A new Extradition Bill is under development and is expected to be presented to Parliament in 2013. South Africa is party to 12 bilateral extradition agreements, with others having been signed or currently being negotiated. South Africa is also party to multilateral agreements such as the South African Development Community ("SADC") Protocol on Extradition and the African Union Convention on Extradition.

South Africa does not make extradition conditional to the existence of a treaty. If no treaty exists, the President must consent in writing for the extradition process to begin. South Africa also recognises UNCAC as a legal basis for extradition, in which case no Presidential approval is necessary, although to date, UNCAC has not been so invoked. In the absence of an agreement, or in the absence of specific provisions in the treaty, the Extradition Act, 1962 is to be applied.

Under the Extradition Act, 1962, extraditable offences include any offence, both in South Africa and the requesting state, that is punishable with a sentence of imprisonment for a period of six months or more. Dual criminality is therefore a prerequisite for extradition, and is determined on the basis of the factual conduct underlying the offence for which extradition is requested. All UNCAC offences have been criminalized under South African law with the minimum imprisonment of six months, and thus are eligible for extradition. Some bilateral agreements raise the jurisdictional punishment threshold to one year, or, in some cases, two years.

South Africa does not refuse extradition of its nationals. Extradition may be refused or deferred, however, where criminal proceedings are pending against the person in South Africa, to allow for completion of a sentence of imprisonment, based on the trivial nature of the offence, or if there is a risk of discrimination. Requests cannot be refused on the ground that the offence involves fiscal matters. If extradition is refused, the person may be prosecuted in South Africa, if South Africa has extra-territorial jurisdiction regarding that offence.

The central authority for extradition is the Office of the Director General of the Department of Justice and Constitutional Development. From there, the request would be sent to the Prosecutor's Office with 15 days for examination. The request is then presented to the Magistrate Court, and its decisions can be appealed. The Minister of Justice and Constitutional Development takes the final decision, which can also be appealed. Due process is observed at all stages of the consideration of an extradition request. South Africa observes conditions requested by the other State to the extent permitted by its legal system and Constitution.

In order to facilitate extradition with civil law countries, and to accelerate the process, the Magistrate must accept as conclusive proof a certificate issued by an appropriate authority in

charge of the prosecution in the foreign state, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.

South Africa has established a Committee on Extradition, comprising the Central Authority, the NPA, the South African Police Service (SAPS), Interpol and the Department of International Relations and Co-operation with the view to enhance and streamline extradition procedures, and to discuss and address the main issues faced in this process.

South Africa has not adopted provisions with regard to the transfer of sentenced persons, although it was considering the Draft Protocol on Interstate Transfer of Foreign Prisoners under SADC.

South Africa's legislation does not prohibit the transfer of criminal proceedings. Therefore, bilateral agreements providing for the transfer of criminal proceedings are possible.

3.1.2 Mutual legal assistance (article 46)

South Africa provides mutual legal assistance to the broadest extent possible, within the framework of the respect for human rights.

The International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996) ("ICCMA") seeks to facilitate the provision of evidence, execution of sentences in criminal cases and the confiscation and transfer of proceeds of crime. South Africa does not require an agreement for the provision of such assistance. It is party to 9 bilateral agreements, and has signed or is negotiating others. South Africa is also party to multilateral agreements such as the SADC Protocol on Mutual Legal Assistance. In the absence of an agreement, the ICCMA or UNCAC may be applied.

South Africa has applied the UNCAC or other UN Conventions as a basis for mutual legal assistance in the taking of statements, the provision of documents and the examination of objects and sites. The ICCMA enables South Africa to provide the widest legal assistance, both with regard to natural and legal persons, including all types of assistance listed in the UNCAC.

The Office of the Director-General of the Department of Justice and Constitutional Development is the central authority, and therefore coordinates all requests for assistance.

Dual Criminality is not a prerequisite to provide assistance. Bank secrecy is not a ground for refusal of a request. Assistance can only be refused where the requirements in the bilateral agreement are not met; for issues relating to sovereignty, national security or public order; or when the action requested would be contrary to law. To date, South Africa has replied positively to all assistance requests. South Africa manages the information confidentially.

In case of emergency, the request can be sent directly to the tribunal having jurisdiction in the place where the evidence is located, whereupon the NPA would be notified as soon as possible. Safe conduct for witnesses is guaranteed.

3.1.3 Law enforcement cooperation; joint investigations; special investigative techniques (articles 48, 49, and 50)

South Africa does not require an agreement to provide police-to-police cooperation, and cooperates regularly with law enforcement agencies outside of the framework of an agreement. To date, the SAPS has concluded approximately 30 police cooperation agreements, 12 of which specifically address corruption: Austria, Bulgaria, Cyprus, France, Malta, Nigeria, Portugal, the Russian Federation, Rwanda, Turkey, Uganda and the United

Arab Emirates. The SADC provides for broad police cooperation on a regional level, as does the Asset Recovery Inter-Agency Network Southern Africa. Direct informal contact is not precluded although often such contact would be made through Interpol, or through the police liaison officer placed in many embassies of South Africa.

South Africa is a key regional provider of interstate training, including in witness protection, corruption and money laundering.

Joint investigations with foreign law enforcement agencies can be, and have been conducted, in the absence of any agreement or on the basis of the SADC protocol.

Special investigative techniques, including electronic and video surveillance and undercover operations, have been successfully used in corruption and money laundering operations. These techniques are authorized by the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act 70 of 2002) and the CPA. A specific agreement is not necessary to use special investigative techniques, and South Africa coordinates closely to ensure legality and admissibility of evidence obtained. However, assistance requests made by South Africa have in some cases suffered delays due to the lack of a mechanism facilitating the provision of costs incurred for such requests.

3.2 Successes and good practices

Overall, the following successes and good practices in implementing Chapter IV of the Convention are highlighted:

- The establishment of the Committee on Extradition to improve the effectiveness of the extradition mechanism.
- The requirement that the Magistrate accepts as conclusive a certificate issued by an appropriate authority in charge of the prosecution in the foreign state concerned, stating that it has sufficient evidence at its disposal to warrant prosecution.
- South Africa can use, and has previously used, the UNCAC as a legal basis in the framework of mutual legal assistance requests.

3.3 Challenges in implementation, where applicable

The following steps could further strengthen existing anti-corruption measures:

- Continue to develop bilateral and multilateral agreements with foreign countries that are in process, to enhance international cooperation.
- Continue to explore opportunities to conclude bilateral and multilateral agreements regarding the transfer of sentenced persons.
- Continue to seek ways to address, where necessary, costs associated with requests for assistance made by South Africa.

IV. IMPLEMENTATION OF THE CONVENTION

A. Ratification of the Convention

1. The Convention was ratified by Parliament on 22 November 2004 and signed by the President of the Republic of South Africa on 22 November 2004. South Africa deposited its instrument of ratification with the Secretary-General of the United Nations on 24 November 2004.

B. Legal system of the Republic of South Africa

2. Section 231 of the Constitution of the Republic of South Africa ("the RSA") of 1996 states that generally accepted rules of international law and international conventions when they have been ratified by an act and have come into effect shall form an integral part of The RSA's domestic law and shall override any other contrary provision of domestic law.

Accordingly, the UN Convention against Corruption has become an integral part of The RSA's domestic law following ratification of the Convention by the Parliament on 22 November 2004 and entry into force on 14 December 2005 in accordance with Article 68 of the Convention.

The Convention ranks high among statutory instruments, just below the Constitution but above other laws. Accordingly, the provisions of the Convention override any other contrary provision in domestic law.

C. Political and legal systems of the Republic of South Africa

3. The Republic of South Africa is a constitutional democracy with the President as head of state. The legal system is a hybrid of the following: Statutory Law (Constitution and Acts of Parliament), Precedents (Judicial and Court decisions) and Customary Law. Parliament passes laws with an independent judiciary.

After a long period of apartheid, the country became a fully multiracial democracy with the adoption of an interim Constitution in December 1993 and the April 1994 general election. The Constituent Assembly (Parliament) approved a revised version of the RSA's Constitution which came into force in February 1997.

The Constitution provides for a strong central government headed by a President (currently Mr. Jacob Zuma, elected in 2009) elected for a maximum of two five-year terms as chief of state and head of government. The bicameral Parliament consists of a 400-member National Assembly, elected by proportional representation, and a 90-seat National Council of Provinces, elected by the nine provincial legislatures. Legislators of both houses serve five-year terms.

The Constitution of 1996 is the supreme law of the RSA and it vests the various government bodies with their respective scopes of power and jurisdiction.

The national Parliament retains exclusive legislative primacy over the provincial legislatures in all but a few areas of minor concern. In many cases, however, provincial governments are delegated authority and may exercise concurrent competence. In the end, any such legislative initiatives may be overturned by Parliament when they conflict

with national law, thus limiting the federal character of the South African government structure.

The legal system of the RSA is a hybrid of legal traditions from English common law and Roman-Dutch civil law, with an infusion of indigenous African customary law. Notwithstanding these historical roots, in matters of judicial procedure the common law tradition dominates, and there is firm adherence to the principle of *stare decisis*. Not only are decisions of higher courts binding on those below, but the Constitution also explicitly recognizes a certain measure of judicial activism in granting judges the “inherent power...to develop the common law.” South African courts enjoy a high level of constitutionally protected judicial independence. Judges are appointed by the President upon the recommendations of a peer-based Judicial Service Commission, and once appointed benefit from security of tenure and remuneration. The South African Constitution identifies four primary courts vested with the ultimate judicial authority of the state: the Constitutional Court, the Supreme Court of Appeals, the High Courts and the Magistrates’ Courts. The 11 member Constitutional Court sits at the top of the hierarchical judicial structure and may pass final binding judgments on all cases of constitutional importance; it also possesses the jurisdiction to decide which cases fall under this classification. The Supreme Court of Appeals is the court of last instance in all other matters.

One level down in the structure are 13 High Courts corresponding to South Africa’s pre-constitutional regional divisions. These have first instance jurisdiction over high-profile civil and criminal matters and appellate jurisdiction over judgments of lower courts. Decisions of the High Courts may be appealed to the Supreme Court of Appeals or to the Constitutional Court if the subject matter is of an appropriate constitutional character.

The Magistrates’ Courts rest at the bottom of the structure and deal with the majority of cases. These lower courts can be formally divided into two distinct types. District Magistrates’ Courts are found in most South African towns and cities and have the jurisdiction necessary to hear low-value civil cases and low-severity criminal cases. Regional Magistrates’ Courts are found in major population centers in order to serve a larger geographic area, and they exercise jurisdiction over a wider array of criminal provisions with a correspondingly increased sentencing discretion.

The legal and institutional framework has a number of elements. The Prevention and Combating of Corrupt Activities Act, 2004 (“PRECCA”) is at the center for anti-corruption. Other significant legislation includes the Protected Disclosures Act, 2000, Promotion of Access to Information Act, 2000, and the Financial Intelligence Center Act, 2001.

South Africa takes a partnership approach in the fight against corruption, involving various state entities as well as non-state actors and civil society. Several mechanisms exist to report corruption, including a toll-free national anti-corruption hotline, begun in September 2004, which is managed by the Public Service Commission in all official languages of the country.

Individual governmental departments also play a role in anti-corruption efforts, and are required to maintain minimum anti-corruption capacity requirements and identify certain pillars that each department must put in place to meet the requirements. These standards address both prevention and detection of corruption, and include such measures as fraud prevention plans, proper risk management and taking a pro-active approach to fighting corruption.

Since 1998, there is a single prosecuting authority in the Republic of South Africa, which was established by authority of the 1996 Constitution and an act of parliament – the

National Prosecuting Authority Act (1998). The National Director is the head of the National Prosecuting Authority (“NPA”) and is appointed by the President. Each province (9 of them) has a director of public prosecutions, who are also appointed by the President. In each office, there are also deputy directors of public prosecutions. The National Director determines general prosecution policy, in consultation with regional directors. The National Director will not interfere in the management of operations of the offices, but may review or intervene in one of the regional offices if there is a Constitutional basis for doing so, or if there may be a contravention of public policy. The National Director may also review a decision to prosecute or not to prosecute upon receipt of a complaint from the public or the government.

Special Directors also operate in the NPA to serve specific tasks, and hold the same ranking as a Director in the province, but with a specific mandate, such as witness protection or priority crimes. These Special Directors will lead the investigation and prosecution of such crimes. Sexual offences and commercial crimes are also covered by a specialized unit and a director. Commercial crimes encompass both the private and public sectors, and include economic crimes as well as corruption. Special Directors receive their appointment and mandate from a proclamation of the President. The National Director can decide which cases will be handled by regional prosecutors, such as foreign bribery, for example. Special Directors have national jurisdiction, but regional prosecutors provide assistance to carry forward cases. Special Directors must coordinate with the Director of the provincial prosecutor office.

D. Implementation of selected articles

In 2010, South Africa underwent the OECD Phase 2 assessment at which the effectiveness of anti-corruption measure was assessed, the report of which is available at www.oecd.org/investment/anti-briberyconvention/45670609.pdf

Chapter III: Criminalization and law enforcement

Article 15 Bribery of national public officials

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(a) Summary of information relevant to reviewing the implementation of the article

4. The RSA considers itself in compliance with this subparagraph.

Texts applicable

Section 3(b) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

Section 3(b) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004) (the "PRECCA") creates the general offence of corruption relating to the offering or giving of a gratification to any person. In terms of this section it is an offence for any person to, directly or indirectly, give or agree or offer to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner

- "(i) *that amounts to the*
 - (aa) *illegal, dishonest, unauthorised, incomplete, or biased; or*
 - (bb) *misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
- (ii) *that amounts to*
 - (aa) *the abuse of a position of authority;*
 - (bb) *a breach of trust; or*
 - (cc) *the violation of a legal duty or a set of rules; designed to achieve an unjustified result; or that amounts to any other unauthorised or improper inducement to do or not to do anything,."*

Part 2 of Chapter 2 of the PRECCA provides for offences in respect of corrupt activities relating to specific persons. Section 4 of the PRECCA creates offences in respect of corrupt activities relating to public officers. Section 4(1)(b) of the PRECCA deals with the situation where any person gives or agrees or offers to give a gratification to a public officer. This section creates an offence where any person, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner described above.

In terms of section 4(2) of the PRECCA the expression "to act" in section 4(1) includes:

- (a) *voting at any meeting of a public body;*
- (b) *performing or not adequately performing any official functions;*
- (c) *expediting, delaying, hindering or preventing the performance of an official act;*
- (d) *aiding, assisting or favouring any particular person in the transaction of any business with a public body;*
- (e) *aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;*
- (f) *showing any favour or disfavour to any person in performing a function as a public officer;*
- (g) *diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or*
- (h) *exerting any improper influence over the decision-making of any person performing functions in a public body.*

(b) Observations on the implementation of the article

5. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. During the country visit, there was discussion regarding the definition of public official. The RSA provided the supplemental legislation below from the PRECCA.

PRECCA definitions:

'public body' means-

- (a) *any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or*
- (b) *any other functionary or institution when-*

- (i) *exercising a power or performing a duty or function in terms of the Constitution or a provincial constitution; or*
 - (ii) *exercising a public power or performing a public duty or function in terms of any legislation;*
- 'public officer'** means any person who is a member, an officer, an employee or a servant of a public body, and includes-
- (a) *any person in the public service contemplated in section 8 (1) of the Public Service Act, 1994 (Proclamation 103 of 1994);*
 - (b) *any person receiving any remuneration from public funds; or*
 - (c) *where the public body is a corporation, the person who is incorporated as such, but does not include any-*
 - (a) *member of the legislative authority;*
 - (b) *judicial officer; or*
 - (c) *member of the prosecuting authority;*

Although the definition of public official does not expressly include members of the legislature, judiciary or prosecuting authority, such officials are covered by Sections 7, 8 and 9 of the PRECCA, respectively. This distinction is made by the RSA because the acts that they may perform could be different from ordinary public officials. "Act" is defined a bit differently depending on the type of official in this context, although the potential penalties are the same.

It was further clarified during the country visit that the "undue advantage" language in the Convention is satisfied by the "gratification" language in the PRECCA.

A promise is without effect unless there was consensus by both parties, in which case it amounts to an agreement or offer, thus covered by s4(1). Also see s2(3)(b)(i) of PRECCA. A promise could alternatively also be seen as inducement, which would be in contravention of s21.

PRECCA defines gratification as follows:

'gratification' , includes-

- (a) *money, whether in cash or otherwise;*
- (b) *any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;*
- (c) *the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;*
- (d) *any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;*
- (e) *any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;*
- (f) *any forbearance to demand any money or money's worth or valuable thing;*
- (g) *any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;*
- (h) *any right or privilege;*
- (i) *any real or pretended aid, vote, consent, influence or abstention from voting; or*
- (j) *any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.*

Case statistics for the period April 2011 to May 2012:

Sec. 4: April 2011 – May 2012 = 97 convictions

Sec. 9: April 2011 – May 2012 = 2

Sec. 10: April 2011 – May 2012 = 6

Sec. 12: April 2011 – May 2012 = 1

(c) Successes and good practices

The RSA reported the following cases in the prosecution of PRECCA offences, covering its relevant provisions with regard to the articles of the Convention:

Shaik and Others 2008 (1) SACR 1 (CC)

The first count was charges of corruption in terms of section 1(1)(a) of the Corruption Act, 119 (Act 94 of 1992). This charge is almost identical to a contravention of section 3(b) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

Central to the convictions on this count was the High Court's finding that the applicants had, from October 1995 to September 2002, corruptly made certain payments to Mr Zuma, the object being to influence him to use his name and political influence for the benefit of Mr Shaik and his business enterprises. At the time the payments were made Mr Zuma was, from October 1995 to mid-1999, the member of the Executive Council for Economic Affairs and Tourism in KwaZulu-Natal and then subsequently, from mid-1999 onwards, the Deputy President of the Republic of South Africa and leader of government business in Parliament.

The applicant appealed to the Supreme Court of Appeal and the Constitutional Court against his conviction and sentence in the High Court. Both Courts upheld the appeal. Mr Shaik was sentenced to 15 years' imprisonment for the first count of corruption.

S v Selebi (unreported decision of the Supreme Court of Appeal (trial court: Gauteng South High Court))

The former National Commissioner of the SA Police Service was charged with contravening section 4(1)(a) of the PRECCA in that during the period April 2004 to November 2006 he received gratification in the form of undue financial benefits from a known member of the criminal underground (drug dealer) (called A). The State alleged that the friendship between A and Selebi resulted in a corrupt relationship and that led to some undue funds been paid to Selebi, probably with the objective of buying favours if and when necessary. The defence alleged that A had lent money to Selebi but it was rejected by the court. The trial court ruled that a corrupt relationship existed and that on the evidence Selebi received an undue financial benefit and accordingly that corruption was proved. He was sentenced to 15 years' imprisonment. The conviction was confirmed on appeal - there was no appeal against the sentence.

S v Thiar (Western Cape, unreported)

The accused was sought in both South Africa and Namibia to face charges of fraud. The possibility of corruption was looked at but no supporting evidence could be found. The fact that he could have been tried in either country on the charges led to discussions and consultations between the two prosecuting authorities, during which it was decided that he should first face the charge in SA where he was convicted and sentenced. In the meantime Namibia has requested his extradition to be tried there. This is currently being considered.

State v Thembi Chili (SCCU, KwaZulu-Natal, Case No. 41/316/2010-unreported)

The trial was finalised on 8 Feb 2012. Accused was an Illembe district municipal official who tried to get her manager to approve payment on two fictitious invoices in the amounts of R72 000 and R63 000.

After the accused's manager queried her about the invoices and started an investigation, the accused contacted her work colleague and offered to share the proceeds of the fraudulent invoices with her if she prepared supporting documentation to convince her manager that the

fraudulent invoices were in respect of legitimate services that were rendered to the municipality. The work colleague refused to do this and instead reported the accused to her manager. The accused was charged with contravening section 3(b)(i)(aa) of the PRECCA together with 5 alternative counts from section 3 of the PRECCA. The State in its address before judgement argued that the most appropriate section to find the accused guilty of would be section 3 (b)(ii)(bb) the PRECCA. The Court acquitted the accused on the fraud charges and convicted on the corruption and defeating/obstructing the course of justice counts 3 and 4. The court did not indicate on what specific corruption count it based conviction. Counts 3 and 4 were taken together for purposes of sentence. The accused was sentenced to 3 years imprisonment wholly suspended for 3 years on condition that the accused should not be convicted of corruption during the period of suspension and the accused was also ordered to pay a fine of R12000

S v Nomandla (Unreported SCCU Northern Cape)

Sec 3 of the PRECCA – Guilty – R3000.00 or 6 months imprisonment

Accused was a clerk at the local municipality. He pretended to an applicant that he was in position to influence the result of a tender application in favour of the applicant. He hinted that he would do so if the applicant could make a loan to him. The applicant then reported the matter to the Police.

S v Morwe (Unreported SCCU Northern Cape)

Sec 3 of the PRECCA – Guilty – two charges – R10 000.00 or 18 months imprisonment + a further 18 months imprisonment suspended for 5 years.

The accused was a senior traffic official. He issued learner drivers licenses to applicants in exchange for a sum of money.

State versus Obakeng Galeboe and Timothy Hall (Unreported South Gauteng SCCC 312/10)

Accused 1 was a Reservist and Accused 2 was a Constable, stationed at Krugersdorp Police Station.

They pulled over a vehicle and questioned the driver on suspicion that he was driving the motor vehicle whilst under the influence of alcohol. They requested that the driver pay them R500 not to be arrested. The driver then paid the R500 and was released. The driver then reported the matter and the accused were arrested. Both Accused pleaded guilty to Contravening Section 3(a)(i)(aa) of the PRECCA. Both were sentenced to 3 years imprisonment of which 1 year was suspended for 5 years.

S v Ntombifikile Luzipho (unreported Eastern Cape SCCU)

Accused was convicted of 4 counts of contravening Section 3(a)(i)(aa) of the PRECCA. Accused was employed by the Department of Home Affairs and sold a false birth certificates and temporary identity documents for R 7 000.00. Accused was sentenced on 25 January 2011 to 3 years correctional supervision in terms of Section 276(1)(h) of the CPA on certain conditions and a further 4 years imprisonment wholly suspended for 5 years on certain conditions.

S v Ncediso Godfrey Mgushelo (unreported Eastern Cape SCCU)

Accused was convicted of 1 count of contravening Section 4(1)(a) of the PRECCA.

Accused was employed as a clerk at the Civil Section of the Department of Justice, Port Elizabeth. The complainant Zolani Xotongo was directed to the Civil Section to make an application to have a judgment against him rescinded. The accused explained to Xotongo that in order to have the judgment rescinded speedily, Xotongo must not make use of Legal Wise or Legal Aid attorneys, but that he should make use of “in house attorneys” at a cost of R 300.00. Xotongo decided to make use of an “in house attorney” upon which the accused took down his details and left, returning later with a court order reflecting that the judgment against Xotongo was rescinded. Xotongo handed over R 300.00 in cash to the accused. Accused was sentenced on 9 March 2012 to six (6) years imprisonment.

Accused	Accused Government employee	Government Department	Possible Corruption Charges	Amount Involved	Date Enrolled/Declined	Court Case Number	Date Finalised	Guilty by means of:	Sentence	Short Description
Du Plessis	Yes	Police	Section 4(a)	Less than R 500 000	05-Sep-11	127//11	21-Feb	105A	15 yrs imp	Accused is a member of the SAPS who sold dockets to the murder suspect
Mahlangu	no		Section 3(a)	Less than R 500 000	12-Jan-12	1//12	10-Feb-12	105A	5 years 276(1)(h)	(Spin off - S v Maringa.) Accused was a an employee at Peet Viljoen Attorneys . She bribed a SARS employee to give her Tax clearance certificates for certain property transactions
Msibi	Yes	Justice & Constitutional Development	Section 10	Less than R 500 000	17-Feb-12	SH12/2012	26-Jul-12	Guilty Plea	3 yrs impr	
Thabete Vusi Msibi	Yes	Justice & Constitutional Development	Section 10	Less than R 500 000	17-Feb-12	SH13/2012	17 July 2012	Trial	3 years imprisonment	
Rozelle Gaynor Lavita	Yes	Deeds Office	Section 3(a)	R 500 000 - R 1 Million	09-Dec-09	242/09	13-Apr-12	Guilty Plea	3 yrs impr susp for 5 yrs	Accused is employed at the deeds office and received a bribe to fast track deeds search
Johnston	Yes	Police	Section 4(a)	Less than R 500 000	22-Feb-12	10//12	17-May-12	Guilty Plea	3 yrs wholly suspended	Accused was an admin clerk at the SAPS. He solicited a bribe in order to facilitate speedy release of fire arm license
Khumalo	Yes	Police	Section 4(a)	Less than R 500 000	08-Mar-12	ESH288/11	14-Jun-12	Trial	3 yrs Sec 276(1)(i)	Accused was a member of the SAPS who bribed the complainant not to open a case for a theft of motor cycle

Accused	Accused Government employee	Government Department	Possible Corruption Charges	Amount Involved	Date Enrolled/Declined	Court Case Number	Date Finalised	Guilty by means of:	Sentence	Short Description
Namford/Ballwin	No	Deeds Office	Section 3(b)	Less than R 500 000	20-Sep-12	80//12	20-Sep-12	105A	10 years suspended for 5 years	Accused is a paralegal who bribed deeds office employees in order to fast track registration of properties
Tselapedi	No		Section 3(a)	No monetary value	31-Aug-11	125/11	31-Aug-11	105A	276(1)(h) 12 years suspended for 5 years	Corruption by a bank official
Litsie	No		Section 3(a)	Less than R 500 000	03-Jun-10	70//11	26-Apr-12	Guilty Plea	276(1)(h) 5 yrs suspended for 5 yrs	
J. Kabini, P. Van der Merwe, M.J. Marokane	Yes	Police	Section 3(a)	Less than R 500 000	27-Mar-09	60//09	19-Sep-11	Guilty Plea	Accused 1: 4 years in terms of sect 276(1)(i) Accused 2: 3 years in terms of sect 276(1)(i) Accused 3: 7 years imprisonment	Accused sold SAP 69 criminal records to the person whose record it was

Article 15 Bribery of national public officials

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

6. The RSA considers itself in compliance with this subparagraph.

Texts

Section 3 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)

Section 3 of the PRECCA creates the general offence of corruption. This offence applies to any person and covers offences committed in the public sector as well as the private sector. Section 3(a) of the PRECCA provides that any person who, directly or indirectly, accepts or

agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person in order to act, personally or by influencing another person so to act, is guilty of the offence of corruption.

Part 2 of Chapter 2 of the PRECCA provides for offences in respect of corrupt activities relating to specific persons. Section 4 of the PRECCA creates offences in respect of corrupt activities relating to public officers. In terms of section 4(1)(a) it is an offence if any public officer, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person in order to act, personally or by influencing another person so to act, in a manner as described in paragraph 1 above.

In terms of section 4(2) of the PRECCA the expression "to act" in section 4(1) includes:

- (a) *voting at any meeting of a public body;*
- (b) *performing or not adequately performing any official functions;*
- (c) *expediting, delaying, hindering or preventing the performance of an official act;*
- (d) *aiding, assisting or favouring any particular person in the transaction of any business with a public body;*
- (e) *aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;*
- (f) *showing any favour or disfavour to any person in performing a function as a public officer;*
- (g) *diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or*
- (h) *exerting any improper influence over the decision-making of any person performing functions in a public body.*

(b) Observations on the implementation of the article

7. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was clarified during the country visit that the PRECCA covers a public official who solicits an undue advantage ("gratification").

PRECCA, s2(3)(a) provides that a reference in this Act to accept or agree or offer to accept any gratification, includes to:

- (i) *demand, ask for, seek, request, solicit, receive or obtain;*
- (ii) *agree to demand, ask for, seek, request, solicit, receive or obtain; or*
- (iii) *offer to demand, ask for, seek, request, solicit, receive or obtain, any gratification.*

PRECCA, s21: Any person who:

- (a) *attempts;*
- (b) *conspires with any other person; or*
- (c) *aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act, is guilty of an offence.*

The RSA reported that there had been no convictions under this provision over the last 24 months.

(c) Successes and good practices

8. S v Matsabu 2009 (1) SACR 513 (SCA)

The appellant, a traffic policeman, was convicted of contravening section 1(1)(b) of the Corruption Act, 1992 (Act 94 of 1992), in that he had accepted R300 as a bribe from a police officer as an inducement not to issue a traffic summons to her. This charge is almost

identical to a contravention of section 3(a) of the PRECCA. A sentence of two years' imprisonment in terms of CPA The Appeal Court upheld the conviction and sentence.

Examples of corruption convictions under different sections of PRECCA as reported by Eastern Cape SCCU

Section 3 of PRECCA

S v Ntombifikile Luzipho

The accused person was convicted of 4 counts of contravening section 3(a)(i)(aa) of PRECCA. The accused was employed by the Department of Home Affairs and sold a false birth certificates and temporary identity documents for R 7 000.00.

The accused was sentenced on 25 January 2011 to 3 years correctional supervision in terms of section 276(1)(h) of the CPA, on certain conditions and a further 4 years imprisonment wholly suspended for 5 years on certain conditions.

Article 16 Bribery of foreign public officials and officials of public international organizations

Paragraph 1

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

(a) Summary of information relevant to reviewing the implementation of the article

9. The RSA considers itself in compliance with this paragraph.

Texts

Section 5 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

Section 5 of the PRECCA expressly provides for offences in respect of corrupt activities relating to foreign public officials. This section provides as follows:

"(1) Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner

- (a) *that amounts to the*
 - (i) *illegal, dishonest, unauthorised, incomplete, or biased; or*
 - (ii) *misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
- (b) *that amounts to*
 - (i) *the abuse of a position of authority;*
 - (ii) *a breach of trust; or*
 - (iii) *the violation of a legal duty or a set of rules;*

- (c) *designed to achieve an unjustified result;*
 - (d) *that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to foreign public officials.*
- (2) *Without derogating from the generality of section 2(4), "to act" in subsection (1) includes:*
- (a) *the using of such foreign public official's or such others person's position to influence any acts or decisions of the foreign state or public international organisation concerned; or*
 - (b) *obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation. "*

Section 1 of the PRECCA contains the following definitions that are relevant to section 5 of the PRECCA:

Subparagraph (v) defines "foreign public official" to mean

- any person holding a legislative, administrative or judicial office of a foreign state; or
- any person performing public functions for a foreign state, including any person employed by a board, commission, corporation or other body or authority that performs a function on behalf of the foreign state; or
- an official or agent of a public international organization.

In terms of subparagraph (vi), "foreign state" means any country other than South Africa, and includes

- any foreign territory;
- all levels and subdivisions of government of any such country or territory; or
- any agency of any such country or territory or of a political subdivision of any such country or territory.

In terms of subparagraph (iii), "business" means any business, trade, occupation, profession, calling, industry or undertaking of any kind, or any other activity carried on for gain or profit by any person within The RSA or elsewhere, and includes all property derived from or used in or for the purpose of carrying on such other activity, and all the rights and liabilities arising from such other activity.

Subparagraph (xxiii) defines "public international organisation" to mean

- an organization of which two or more countries are members; or
- an organization that is constituted by persons representing two or more countries;
- an organisation established by, or a group of organizations constituted by organisations of which two or more countries are members or organisations that are constituted by the representatives of two or more countries; or
- an organisation that is an organ of, or office within, an organisation described above;
- a commission, council or other body established by an organization or organ referred to above; or
- a committee or a subcommittee of a committee of an organisation referred to above; or
- of an organ, council or body referred to above.

(b) Observations on the implementation of the article

10. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. See previous comments regarding the scope of "gratification." The RSA reported that although there are cases currently being investigated under this provision, there has not yet been a conviction.

Article 16 Bribery of foreign public officials and officials of public international organizations

Paragraph 2

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

11. The RSA considers itself in compliance with this paragraph.

Texts

Sections 3(a) and 5(1) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)

Section 5(1) of the PRECCA does not specifically deal with passive corruption in respect of foreign public officials. However, in this regard section 3(a) of the PRECCA is applicable. This section provides that any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person in order to act, personally or by influencing another person so to act, in a manner described above. The expression "any person" includes a foreign public official.

(b) Observations on the implementation of the article

12. During the country visit, it was noted that this provision was drafted before the UNCAC entered into force and based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and therefore does not have express reference to passive bribery of foreign public officials. Although the RSA considers that cases of passive bribery of foreign public officials could be prosecuted under Section 3(a) of the PRECCA, the reviewing experts would recommend that the RSA consider whether there might be a need for a separate statute to address bribery of foreign public officials specifically.

The RSA reported that from April 2011 to May 2012, there were 72 convictions under Section 3 of the PRECCA.

Article 17 Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

(a) Summary of information relevant to reviewing the implementation of the article

13. The RSA considers itself in compliance with this article.

Texts

Section 4(1)(a) and 2(g) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

Section 4(1)(a) of the PRECCA provides in particular that any public officer commits an offence if he or she, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person in order to act, personally or by influencing another person so to act, in a manner described above.

Furthermore, in terms of section 4(2)(g) of the PRECCA the expression "to act" in section 4(1) of the PRECCA specifically includes "diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person".

Section 4(2)(g), of the PRECCA, was specifically included in the PRECCA in order to cover Article 17 of UNCAC.

(b) Observations on the implementation of the article

14. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. During the country visit, the RSA provided the following supplemental response:

In addition to what has been mentioned in SA's original response, which obviously is relevant only if supported by the facts, it is important to note that the common law crimes of theft and fraud will cover cases of embezzlement, diversion and misappropriation of property, provided the elements could be proven. If, for instance, a public servant diverts to someone else, or embezzles or misappropriates property entrusted to him with the intent to steal or to defraud the state, it constitutes theft or fraud. The embezzlement, diversion or misappropriation will have to be unlawful and accompanied by the required animus furandi or intent to defraud for it to constitute theft or fraud. Although mere diversion of property without any *mens rea* would not constitute a criminal offence, it may amount to misconduct, for which *culpa* is required, and for which the official could be dismissed.

(c) Successes and good practices

15. **Examples of corruption convictions under different sections of PRECCA as reported by Eastern Cape SCCU**

Section 4 of the PRECCA

S v Ncediso Godfrey Mgushelo

The accused was convicted of 1 count of contravening section 4(1)(a) of the PRECCA.

The accused was employed as a clerk at the Civil Section of the Department of Justice, Port Elizabeth. The complainant Zolani Xotongo was directed to the Civil Section to make an application to have a judgment against him rescinded. The accused explained to Xotongo that in order to have the judgment rescinded speedily, Xotongo must not make use of Legal Wise or Legal Aid attorneys, but that he should make use of "in house attorneys" at a cost of R300.00. Xotongo decided to make use of an "in house attorney" upon which the accused

took down his details and left, returning later with a court order reflecting that the judgment against Xotongo was rescinded. Xotongo handed over R300.00 in cash to the accused.

Accused was sentenced on 9 March 2012 to six (6) years imprisonment

Article 18 Trading in influence

Subparagraph (a)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

(a) Summary of information relevant to reviewing the implementation of the article

16. The RSA considers itself in compliance with this subparagraph

Texts

Section 3(b) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

Please see the response above in respect of Article 15(a) of the Convention.

(b) Observations on the implementation of the article

17. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 18 Trading in influence

Subparagraph (b)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

(a) Summary of information relevant to reviewing the implementation of the article

18. The RSA considers itself in compliance with this subparagraph.

Texts

Section 3 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

Please see the response above in respect of Article 15(b) of the Convention.

(b) Observations on the implementation of the article

19. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 19 Abuse of Functions

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

(a) Summary of information relevant to reviewing the implementation of the article

20. The RSA considers itself in compliance with Article 19.

Text

Section 3 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

See the response above in respect of Article 15(a) and (b) of the Convention.

(b) Observations on the implementation of the article

21. The reviewing experts observed that although some conduct relating to intimidation or assault may be addressed by the common law offences, there could be some conduct envisioned by Article 19 of the UNCAC that would not be considered criminal under the law of the RSA. Therefore, the reviewing experts would recommend that the RSA consider whether a specific statute to address abuse of functions by public officials would be appropriate.

Article 20 Illicit Enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

(a) Summary of information relevant to reviewing the implementation of the article

22. The RSA considers itself in compliance with Article 20.

Text:

Section 23 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

In terms of section 23 of the PRECCA, the National Director of Public Prosecutions can apply to a Judge in Chambers for the issuing of an investigation direction. The Judge will issue an investigative order if evidence is presented to him that a person

- (a) maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets; or
- (b) is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and
- (c) maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities; and
- (d) such investigation is likely to reveal information, documents or things which may afford proof that such a standard of living is maintained through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

The National Director can summon the suspect or any other person, specified in the investigation direction, to appear before the National Director or the person to be questioned or to produce that property, book, document or other object.

The law regarding privileges as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a suspect. Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge. No evidence regarding any questions and answers shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge.

Any person who obstructs or hinders the person conducting the investigation or any other person in the performance of his or her functions in terms of this section; or when he or she is asked in terms of for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading, shall be guilty of an offence.

(b) Observations on the implementation of the article

23. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. While the RSA has not established a criminal offence of illicit enrichment, it has established an administrative mechanism for addressing the problem. Under the new system directed by the NPA, the National Director approaches a judge in chambers with a view to ordering such an inquiry. If the judge allows such an inquiry, the person is summoned and questioned, with a shield against the use of the evidence in a criminal proceeding. This process can therefore be used against someone else if they are willing to testify. In practice, then, it is not necessary to summon the main principal, but rather an accomplice first to convince them to later testify against the principal. This may also be used as an investigative technique to refresh a stale investigation. In addition, there is the possibility of using or discovering derivative evidence as a result of the inquiry.

It was noted during the country visit that there have not yet been any application by the National Director for such an inquiry. There is currently an ongoing process to develop guidelines for the implementation of these procedures based on a previously developed strategy document. The reviewing experts would recommend that those guidelines be completed and approved at the earliest possible time so as to maximize the effectiveness of this mechanism.

It was also noted during the country visit that Section 104 of the Income Tax Act, 1962 (No. 58 of 1962) provides penalties for anyone who defrauds a revenue investigator. In addition, Chapter 6 of the POCA covering civil forfeiture may also address cases where a person has assets that he or she cannot reasonably explain.

The RSA provided the following supplemental statutory references:

PRECCA, s23: Application for, and issuing of investigation direction in respect of possession of property disproportionate to a person's present or past known sources of income or assets:

- (1) The National Director, or any person authorised in writing thereto by him or her (hereinafter referred to as the applicant), may apply to a judge in chambers for the issuing of an investigation direction in terms of subsection (3).*
- (2) An application referred to in subsection (1) must be in writing and must-*
 - (a) indicate the identity of the-*
 - (i) applicant and, if known, the identity of the person who will conduct the investigation; and*
 - (ii) person to be investigated (hereinafter referred to as the suspect);*
 - (b) specify the grounds referred to in subsection (3) on which the application is made;*
 - (c) contain full particulars of all the facts and circumstances alleged by the applicant in support of his or her application;*
 - (d) include the basis for believing that evidence relating to the ground on which the application is made will be obtained through the investigation direction;*
 - (e) indicate whether any previous application has been made for the issuing of an investigation direction in respect of the same suspect in the application and, if such previous application exists, must indicate the current status of that application; and*
 - (f) indicate the period for which the investigation is required.*
- (3) (a) A judge in chambers may upon an ex parte application made to him or her in terms of subsection (1), issue an investigation direction.*
 - (b) An investigation direction may only be issued if the judge concerned is satisfied that-*
 - (i) there has been compliance with the provisions of subsection (2); and*
 - (ii) on the facts alleged in the application concerned, there are reasonable grounds to believe that-*
 - (aa) a person-*
 - (aaa) maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets; or*
 - (bbb) is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and*
 - (bb) that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities; and*
 - (cc) such investigation is likely to reveal information, documents or things which may afford proof that such a standard of living is maintained through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.*
 - (c) An investigation direction-*
 - (i) must be in writing;*
 - (ii) must indicate the identity of the suspect and, if known, the person who will conduct the investigation;*
 - (iii) must specify the period for which it has been issued;*
 - (iv) may specify conditions of restriction relating to the conducting of the investigation; and*

- (v) may be issued in respect of any place in the Republic.
 - (d) An application must be considered and an investigation direction issued without any notice to the suspect to whom the application applies and without hearing that suspect: Provided that where any previous investigation direction has been issued in respect of a suspect, the applicant may only apply for a further investigation direction in respect of that suspect on the same facts, after giving reasonable notice to the suspect concerned.
 - (e) A judge considering an application may require the applicant to furnish such further information as he or she deems necessary.
- (4) If an investigation direction has been issued under subsection (3), the National Director or the person authorised thereto in the investigation direction, may, for the purposes of an investigation direction-
- (a) summon the suspect or any other person, specified in the investigation direction, who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any property, book, document or other object relating to that subject, to appear before the National Director or the person so authorised, at a time and place specified in the summons, to be questioned or to produce that property, book, document or other object;
 - (b) question that suspect or other person, under oath or affirmation administered by the National Director or the person so authorised, and examine or retain for further examination or for safe custody such property, book, document or other object; or
 - (c) at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises where the suspect is or is suspected to be or any premises on or in which anything connected with that investigation is or is suspected to be, and may-
 - (i) inspect and search those premises, and there make such enquiries as he or she may deem necessary;
 - (ii) examine any property found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the suspect or the owner or person in charge of the premises or from any person in whose possession or charge that property is, information regarding that property;
 - (iii) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from any person suspected of having the necessary information, an explanation of any entry therein; or
 - (iv) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the investigation in question, or if he or she wishes to retain it for further examination or for safe custody:

Provided that any person from whom a book or document has been taken under paragraph (b) or (c) (iv), may, as long as it is in the possession of the person conducting the investigation, at his or her request be allowed, at his or her own expense and under the supervision of the person conducting the investigation, to make copies thereof or to take extracts therefrom at any reasonable time.

- (5) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a suspect or any person referred to in subsection (4): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.
 - (b) No evidence regarding any questions and answers contemplated in paragraph (a) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in subsection (7) (b) , or in section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).
- (6) Subject to any directions, conditions or restrictions determined by the judge under subsection (3) (c) (iv), the provisions of sections 28 (1) (d) , (2) to (10) and 29 (2), (7) (a) ,

(9), (10) (b) and (11) of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), relating to the conducting of an investigation and the execution of a warrant in terms of those provisions, apply, with the necessary changes, in respect of an investigation conducted in terms of subsection (4).

(7) Any person who-

- (a) obstructs or hinders the person conducting the investigation or any other person in the performance of his or her functions in terms of this section; or
- (b) when he or she is asked in terms of subsection (4) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading, shall be guilty of an offence.

The purpose of the investigation direction is to gather evidence. For this reason accomplices or minor participants would be identified with a view of obtaining evidence from them which could be used as evidence against a major role player. Although the self-incriminating evidence may not be used against the suspect, it may disclose his or her defence which may then be further investigated or derivative evidence could be gathered based on the self-incriminatory.

Number of investigation directions issued = None.

Also note that in terms of section 104 of the Income Tax Act, 1962 (Act 58 of 1962) a person may be charged with tax evasion and s/he could face additional tax penalties.

Note further that Chapter 6 of POCA *inter alia* provides for **preservation of property orders** (section 38 (1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-

- (a) is an instrumentality of an offence referred to in Schedule 1; or
- (b) is the proceeds of unlawful activities), and for **forfeiture orders** (sec. 48 - (1) If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order).

Since the predicate crime in most tax evasion cases is fraud and the latter frequently gives rise to property (including money) being an instrumentality or the proceeds of crime, illicit enrichment is indirectly penalised as a criminal activity.

Article 21 Bribery in the private sector

Subparagraph (a)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

- (a) *The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;*

(a) Summary of information relevant to reviewing the implementation of the article

24. The RSA considers itself in compliance with this subparagraph.

Texts

Section 3 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

See the response above in respect of Article 15(a). Section 3 of the PRECCA creates the general offence of corruption. This offence applies to any person and covers offences committed in the public sector as well as the private sector.

(b) Observations on the implementation of the article

25. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 21 Bribery in the private sector

Subparagraph (b)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

(a) Summary of information relevant to reviewing the implementation of the article.

26. The RSA considers itself in compliance with this subparagraph.

Texts

Section 3 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)

See the response above in respect of Article 15(b). Section 3 of the PRECCA creates the general offence of corruption. This offence applies to any person and covers offences committed in the public sector as well as the private sector.

(b) Observations on the implementation of the article

27. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was noted during the country visit that the Financial Services Board often addresses such cases via its securities and exchanges regulations.

Article 22 Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position

(a) Summary of information relevant to reviewing the implementation of the article

28. The RSA considers itself in compliance with Article 22.

See the response above in respect of Article 17. The South African legislation applies to persons in the public and private sector.

(b) Observations on the implementation of the article

29. The reviewing experts observed that the RSA is in compliance with this provision of the Convention due to the supplemental response provided with regard to Article 17 above.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(a) Summary of information relevant to reviewing the implementation of the article

30. The RSA considers itself in compliance with this provision.

Texts

Sections 4 and 5 of the Prevention of Organized Crime, 1998 (Act No.121 of 1998 (POCA), and

Section 20 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

Section 4 of the POCA provides as follows:

"Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect

- (i) *of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or*
- (ii) *of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere*
 - (aa) *to avoid prosecution; or*
 - (bb) *to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence."*

Section 5 of the POCA creates an offence where a person, who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby:

- "(a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or*
- (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way".*

Furthermore, section 20 of the PRECCA provides as follows:

"Any person who, knowing that property or any part thereof forms part of any gratification which is the subject of an offence in terms of Part 1, 2, 3 or 4, or section 21 (insofar as it relates to the aforementioned offences) of this Chapter, directly or indirectly, whether on behalf of himself or herself or on behalf of any other person

- (a) enters into or causes to be entered into any dealing in relation to such property or any part thereof; or*
- (b) uses or causes to be used, or holds, receives or conceals such property or any part thereof, is guilty of an offence."*

(b) Observations on the implementation of the article

31. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. During the country visit, it was reported that from April 2011 to July 2012, there were 23 convictions for money laundering, although it was not known how many these cases involved an offence under the PRECCA.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a) (ii)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;*

(a) Summary of information relevant to reviewing the implementation of the article

32. The RSA considers itself in compliance with this provision.

Texts

See the above response above in respect of 38 subparagraph 1 (a)(i) of Article 23.

(b) Observations on the implementation of the article

33. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(a) Summary of information relevant to reviewing the implementation of the article

34. The RSA considers itself in compliance with this provision.

Text

Section 6 of the POCA:

In terms **of section 6 of the POCA** it is an offence for any person who acquires, uses or has possession of property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person.

(b) Observations on the implementation of the article

35. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (ii)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) Subject to the basic concepts of its legal system:

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

(a) Summary of information relevant to reviewing the implementation of the article

36. The RSA considers itself in compliance with this provision.

Text

Section 21(c) of the PRECCA:

Section 21(c) of the PRECCA relates to *“Attempt, conspiracy and inducing another person to commit offence”*. it provides, among others, that *“Any person who - [...] (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act, is guilty of an offence.”* Incitement, and aiding and abetting are specifically addressed under paragraph (c) of section 21. The provision also addresses instructing, commanding, counselling or procuring another person to commit an offence. Penalties for offences under section 21 are the same as those applicable to the offence for which the convicted person *“aided, abetted, induced, instigated, instructed, commanded, counselled or procured another person to commit.”* (See section 26(2) of POCA) However, mitigating factors may be found in respect of accomplices.

(b) Observations on the implementation of the article

37. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (a)

2. *For purposes of implementing or applying paragraph 1 of this article:*

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(a) Summary of information relevant to reviewing the implementation of the article

38. See responses provided in respect of Article 23 Subparagraph 2 (a).

Texts

Section 1 of the POCA

In terms of section 1 of the POCA, "proceeds of unlawful activities" means any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, "in connection with or as a result of any unlawful activity carried on by any person" and includes any property representing property so derived.

In terms of section 1 the definition of "unlawful activity" means "conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere."

From the above it is clear that the proceeds of crime may derive from any offence, notwithstanding the fact that such conduct was committed in or outside South Africa.

(b) Observations on the implementation of the article

39. The reviewing experts observed that the RSA was in compliance with this provision of the Convention. The absence of enumerated predicate offences satisfies the

requirements of the Convention. It was noted during the country visit that predicate offences include both statutory and common-law crimes. Foreign offences can count as predicate offences if they would constitute offences under the laws of the RSA.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (b)

2. For purposes of implementing or applying paragraph 1 of this article:

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

40. See response provided for Article 23 subparagraph 2(a).

(b) Observations on the implementation of the article

41. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

(c) Successes and good practices

42. See response provided for Article 23 subparagraph 2(a).

Article 23 Laundering of proceeds of crime

Subparagraph 2 (c)

2. For purposes of implementing or applying paragraph 1 of this article:

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(a) Summary of information relevant to reviewing the implementation of the article

43. See the response in respect of subparagraphs (a) and (b) above.

(b) Observations on the implementation of the article

44. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Foreign offences can count as predicate offences if they would constitute offences under the laws of the RSA. In practical terms, the RSA prefers in such cases to wait for the outcome of the proceedings in the underlying case, but will move forward without waiting, if necessary to achieve the interests of justice. In most cases, it is sufficient to provide the court with the judgment of conviction from the foreign

jurisdiction, although the court could look behind the judgment to entertain challenges to the original conviction in certain cases.

(c) Successes and good practices

45. See the response in respect of subparagraphs (a) and (b) above.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (d)

2. For purposes of implementing or applying paragraph 1 of this article:

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(a) Summary of information relevant to reviewing the implementation of the article

46. The RSA has not yet provided copies of its laws to the Secretary-General of the United Nations.

(b) Observations on the implementation of the article

47. The he RSA indicated that it would officially provide copies of its relevant laws to the Secretary-General of the United Nations in order to be in full compliance with this provision of the Convention.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (e)

2. For purposes of implementing or applying paragraph 1 of this article:

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

(a) Summary of information relevant to reviewing the implementation of the article

48. See the response in respect of subparagraphs (a) and (d) above.

(b) Observations on the implementation of the article

49. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. During the country visit, the RSA reported that a person can be convicted of both the underlying offence and the offence of money laundering, under Sections 4 and 5 of the POCA.

Sec. 4 – POCA:

Anyone who knows/ought reasonably to have known that property [s1-definition] is or forms part of proceeds of unlawful activity and enters into any agreement/ engages in an arrangement or transaction with anyone in connection with that property whether agreement/arrangement/

transaction is legally enforceable or not or performs any act in connection with such property whether independently or with somebody likely to have effect of concealing or disguising nature, source, location, disposition or movement, of property or ownership thereof or interest therein to enable/assist **any person** who commits/committed offence in the RSA/elsewhere to avoid prosecution or to remove/deminish any property acquired directly/indirectly as result of offence.

Sec 5 – POCA

Anyone who knows/ought to have known that **another** has obtained proceeds of unlawful activity and enters into an agreement/engages transaction/arrangement whereby retention/control of proceeds on behalf of other person is facilitated, or proceeds used to make funds available to the other or acquire property on his behalf or benefit him in any way.

Sections 4 and 5 of POCA are quoted above to illustrate that the RSA legislation regarding money laundering makes provision for the conviction of a perpetrator for both the predicate offence and of money laundering, whether the predicate offence was committed by the same perpetrator or not.

This submission is confirmed by the definition of money laundering in the Financial Intelligence Centre Act:

An activity that has/likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of any proceeds of unlawful activity or interest anyone has in such proceeds including activities under s64 of FICA ['stacking/smurfing'] and s4, 5 & 6 of POCA).

(c) Successes and good practices

50. See the response in respect of subparagraphs (a) and (d) above.

Article 24 Concealment

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

51. The RSA considers itself in compliance with Article 24.

Texts

Section 20 of the PRECCA sanctions any person who is an accessory to or after the offence. Section 20 provides as follows:

“Any person who, knowing that property or any part thereof forms part of any gratification which is the subject of an offence in terms of Part 1, 2, 3 or 4, or section 21 (insofar as it relates to the aforementioned offences) of this Chapter, directly or indirectly, whether on behalf of himself or herself or on behalf of any other person-

(a) enters into or causes to be entered into any dealing in relation to such property or any part thereof; or

(b) uses or causes to be used, or holds, receives or conceals such property or any part thereof,
(Emphasis added)

is guilty of an offence.”

(b) Observations on the implementation of the article

52. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 25 Obstruction of Justice

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

53. The RSA considers itself in compliance with Subparagraph (a) of Article 25.

Texts

Section 18 of the PRECCA provides for offences of unacceptable conduct relating to witnesses. This section provides as follows:

“Any person who, directly or indirectly, intimidates or uses physical force, or improperly persuades or coerces another person with the intent to

- (a) influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or*
- (b) cause or induce any person to*
 - (i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;*
 - (ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings;*
 - (iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings;*
 - (iv) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;*
 - (v) give or withhold information relating to or contained in a police docket;*
 - (vi) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or*
 - (vii) be absent from such trial, hearing or other proceedings, is guilty of the offence of unacceptable conduct relating to a witness.”*

Furthermore, in terms of section 19 of the PRECCA it is an offence for any person who, with intent to defraud or to conceal an offence in terms of this Chapter or to interfere with, or to hinder or obstruct a law enforcement body in its investigation of any such offence-

- “(a) destroys, alters, mutilates or falsifies any book, document, valuable security, account, computer system, disk, computer printout or other electronic device or any entry in such book, document, account or electronic device, or is privy to any such act;*
- (b) makes or is privy to making any false entry in such book, document, account or electronic device; or*
- (c) omits or is privy to omitting any information from any such book, document, account or electronic device ”.*

(b) Observations on the implementation of the article

54. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

The RSA reported that over the last 24 months, there were no convictions for having threatened or intimidated presiding officers or for having interfered with, defeating or obstructing the course of justice arising out of Convention offences.

Article 25 Obstruction of Justice

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

(a) Summary of information relevant to reviewing the implementation of the article

55. The RSA considers itself in compliance with the provision.

Texts

Section 67 of the South African Police Service Act, 1995 (Act No. 68 of 1995) and Section 19 of the PRECCA

Section 67 of the South African Police Service Act, 1995 (Act No. 68 of 1995), criminalises interference with members of the police. This section provides, among others as follows:

"(1) Any person who

(a) resists or wilfully hinders or obstructs a member in the exercise of his or her powers or the performance of his or her duties or functions or, in the exercise of his or her powers or the performance of his or her duties or functions by a member wilfully interferes with such member or his or her uniform or equipment or any part thereof; or

(b) in order to compel a member to perform or to abstain from performing any act in respect of the exercise of his or her powers or the performance of his or her duties or functions, or on account of such member having done or abstained from doing such an act, threatens or suggests the use of violence against, or restraint upon such member or any of his or her relatives or dependants, or threatens or suggests any injury to the property of such member or of any of his or her relatives or dependants, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

(2) Any person who

(a) conspires with or induces or attempts to induce any member not to perform his or her duty or any act in conflict with his or her duty; or

(b) is a party to, assists or incites the commission of any act whereby any lawful order given to a member may be evaded, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(3) Any person who induces or attempts to induce a member to commit misconduct shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months".

Section 19 of the PRECCA also prohibits such interference in respect of the investigation of corruption offences. This section provides as follows:

“Any person who, at any stage, with intent to defraud or to conceal an offence in terms of this Chapter or to interfere with, or to hinder or obstruct a law enforcement body in its investigation of any such offence

- (a) destroys, alters, mutilates or falsifies any book, document, valuable security, account, computer system, disk, computer printout or other electronic device or any entry in such book, document, account or electronic device, or is privy to any such act;*
- (b) makes or is privy to making any false entry in such book, document, account or electronic device; or*
- (c) omits or is privy to omitting any information from any such book, document, account or electronic device, is guilty of an offence.”*

(b) Observations on the implementation of the article

56. The reviewing experts observed that although the RSA has a statute to specifically cover conduct set forth in Article 25(b) of the Convention with regard to law enforcement officials and police, there is no similar statute to apply to justice officers. The RSA reported during the country visit that such crimes would be addressed through application of the common law offences of assault, intimidation, and defeating or obstructing the course of justice, as well as contempt citations. While this appears to satisfy this provision of the Convention, it was still observed to be incongruous to treat law enforcement officers and police statutorily while addressing similar conduct towards justice officers via common law offences that would appear to be equally applicable to law enforcement. Therefore, the reviewing experts would recommend that the RSA consider a statutory prohibition for the obstruction of justice officers, consistent with Article 25(b) and the similar statutory prohibition with regard to law enforcement officials.

(c) Successes and good practices

57. The crime of defeating or obstructing the course of justice is a common law offence in South Africa and is committed if a person unlawfully and intentionally performs any act to obstruct or defeat the administration of justice. See *S v Burger* 1975 (2) SA 601 (C) at pages 611-612.

The RSA also cited more recent cases wherein the courts expressed opinions on defeating or obstructing the course of justice: *S v W* 1995(1)SACR 606 (A); *S v Gaba* 1981(3)SA 745 (O); *S v Andhee* 1996(1) SACR 419 (A); *S v Binta* 1993(2)SACR 553 (C); *S v Cassimjee* 1989(3) SA 729 (N); *S v Perera* 1978(3) SA 523 (T); *S v Mene* 1988(3) SA 641 (A).

Article 26 Liability of legal persons

Paragraph 1

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

58. The RSA considers itself in compliance with this provision.

Texts

Section 2 of the Interpretation Act, 1957

Section 2(5) of the PRECCA

Section 332(10) of the Criminal Procedure Act, 1977 ("the CPA")

As a general rule, South African law is applicable to natural and legal persons alike. Section 2 of the Interpretation Act 1957 provides that a reference in any Act to "person" includes-

- (a) *any divisional council, municipal council, village management board, or like authority;*
- (b) *any company incorporated or registered as such under any law;*
- (c) *any body of persons corporate or unincorporated; "*

Further, section 2(5) of the PRECCA states that "*A reference in this Act to any person includes a person in the private sector*". As regards the definition of "private sector", section 1 (xx) of the PRECCA further specifies that:

"private sector" means all persons or entities, including any

- (a) *natural person or group of two or more natural persons who carries on a business;*
 - (b) *syndicate, agency, trust, partnership, fund, association, organisation or institution;*
 - (c) *company incorporated or registered as such;*
 - (d) *body of persons corporate or unincorporate; or*
 - (e) *other legal person,*
- but does not include*
- a. public officers;*
 - b. public bodies;*
 - c. any legislative authority or any member thereof;*
 - d. the judicial authority or any judicial officer; or*
 - e. the prosecuting authority or any member thereof;". (Emphasis added)*

These provisions appear to cover a broad range of legal persons in the private sector. They cover South African as well as foreign legal persons. In the South African law, criminal liability of a legal person depends on a culpable act by a representative of the legal person. Section 332 of the Criminal Procedure Act, 1977 ("the CPA") provides for the prosecution of corporate bodies, their directors and servants, and members of associations. Section 332(1) states that "For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law

- (a) *any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and*
- (b) *the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body. "*

Under section 332(10) of the CPA a "director" is defined as "any person who controls or governs that corporate body or is a member of a body or group of persons that controls or governs that corporate body, or, where there is no such body or group, who is a member of that corporate body". The purpose of this provision is to allow for the labelling of persons as "directors", even where such persons are not officially registered as such in terms of the Companies Act. The identity of directors is a factual issue, which must be proved through evidence in the ordinary way.

The term "servant" in section 332 is not defined. It is contended that the term "servant" would cover any person if he or she is regularly employed whether by contract or otherwise. Supporting case law includes the 1992 decision by the Appellate Division in *Ex parte Minister van Justisie v Suid-Afrikaanse Uitsaaikorporasie (SABC)* where the Court held that the

actions and intentions of “directors, servants and other persons” [emphasis added] may be ascribed to a legal person. More recently, in 2007, the Supreme Court of Appeal considered, in *Minister of Finance and Others v Gore NO*, (2007 (1) SA 111 (SCA) at paragraphs 29 and 30) that, where the fraudulent conduct was committed only partly for the employee’s own benefit, and resembled closely the duties performed in the course of his normal employment, then the employer should be visited with vicarious liability for the conduct of its employees. Doctrine also supports this approach and considers that “a corporation is liable for the wrongful acts of its employees committed in the course and scope of their employment”. Given the fairly recent entry into force of the foreign bribery offence, there is no case law available to date regarding liability of legal persons for acts of bribery committed by their employees.

To trigger the liability of the legal person, the offence must have been committed either “in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body” [emphasis added]. It should be underlined that these conditions are not cumulative. Consequently, even if a director or servant exceeds his/ her powers, liability of the legal person may still ensue, provided that the director or servant is acting in furthering or endeavouring to further the interests of the corporate body. Conversely, there is no systematic requirement that, in all cases, the offence be carried out for the benefit of the legal person.

Generally, proceedings against the legal person would be initiated and carried out simultaneously as the proceedings against the natural person. As provided by the Interpretation Act, a reference to “person” in any Act would include legal persons. Consequently, provisions in the CPA are applicable to legal persons.

The prosecutor, as provided under section 332(2) of the CPA, has a discretion in choosing which director or servant is to represent the corporate body. While, in theory, any director or servant may be chosen, in practice, prosecutors will take into account such factors as whether the director or servant is also being charged in his/her personal capacity, or whether the director or servant lives close to the seat of the court.

To prosecute the corporate body, it must be proved that a director or servant has committed an offence. This does not mean that a prosecution or conviction of a natural person is necessary to proceed against the legal person. It is not the actual identity of the specific director or servant which needs to be established, but only that the act was committed by a director or servant.

(b) Observations on the implementation of the article

59. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA reported no convictions of corporations or legal persons for Convention offences during the last 24 months.

Article 26 Liability of legal persons

Paragraph 2

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

(a) Summary of information relevant to reviewing the implementation of the article

60. See the response above in respect of paragraph 1 of Article 26.

Texts

Section 2 of the Interpretation Act, 1957

Section 2(5) of the PRECCA

Section 332(10) of the Criminal Procedure Act, 1977 ("the CPA")

(b) Observations on the implementation of the article

61. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA reported during the country visit that penalties imposed by a court in a criminal trial against a legal person would be limited to criminal penalties or sentences. Although the principles of sentencing are applicable also to legal persons, they generally would receive harsher financial penalties. Administrative penalties also are possible under Section 28 *et al* of the PRECCA, which include blacklisting of legal persons against taking public contracts.

Article 26 Liability of legal persons

Paragraph 3

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

(a) Summary of information relevant to reviewing the implementation of the article

62. See the response above in respect of paragraph 1 of Article 26.

Texts

Section 2 of the Interpretation Act, 1957

Section 2(5) of the PRECCA

Section 332(10) of the Criminal Procedure Act, 1977 ("the CPA")

(b) Observations on the implementation of the article

63. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA reported during the country visit that criminal proceedings against the legal person do not preclude proceedings against the natural persons who have committed the offences. the RSA provided the following supplemental explanation:

The criminal liability of a person is not dependent on his or her relationship vis-à-vis the corporate body s/he represents but is decided on the person's involvement in the crime and whether or not the elements of the crime could be proven. Whereas sec. 332(1) of the CPA allows the prosecution of a corporate body, subsection (2) prescribes that such corporate body shall be represented by a director or servant of such body and subsection (6) provides for evidence that is admissible against the corporate body to also be admissible against a director or servant who is prosecuted for such crime. Criminal liability of a director or servant

is obviously dependent on such person's involvement in the commission of the crime and whether the relevant elements could be proven against her or him.

Article 26 Liability of legal persons

Paragraph 4

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

(a) Summary of information relevant to reviewing the implementation of the article

64. The RSA considers itself in compliance with Article 26 paragraph 4.

Texts

Section 26(1)(a) of the PRECCA.

In terms of section 26(1)(a) of the PRECCA, corruption offences carry sanctions of imprisonment of up to 5 years or a fine at the Magistrate Court level, up to 18 years or a fine at the Regional Court level, and up to life imprisonment or a fine if decided by the High Court. With regard to the level of fines, the High Court has an unlimited jurisdiction, the Regional Court may impose a fine not exceeding ZAR 360 000 (EUR 28 150; USD 44 425), and the Magistrate's Court may impose a fine not exceeding ZAR 100 000 (EUR 7 820; USD 12 340). Section 1(1)(b) of the Adjustment of Fines Act 1991 specifies that imprisonment and fines can be imposed together.

There are no sentencing guidelines per se, but a large body of case law exists which provides guidelines on suitable sentences. For instance, the decision in *S. v. Zinn* (1969) specifies that the criminal, the crime, and the interests of society must be taken into consideration when a sentence is imposed.

Furthermore, minimum sentences for natural persons have been set out with regard to corruption offences.

Policy Directives for Prosecutors provides that all contraventions of the PRECCA must be prosecuted in the Regional Court. In addition, "in terms of a recent amendment to the Criminal Law Amendment Act 1997, the Regional Court has the same jurisdiction in respect of certain serious offences (including corruption) as the High Court". It would therefore not be relevant, in terms of the level of sanctions, whether an accused person is charged in the Regional Court or the High Court.

With regard to imprisonment sanctions which can be imposed on natural persons for acts of bribery, section 51 of the Criminal Law Amendment Act 1997, as amended in 2004, has increased the minimum sanctions applicable. For offences under Parts 1 to 4 of the PRECCA (i.e. including the foreign bribery offence), if the amount involved is above ZAR 500 000 (EUR 39 100; USD 61 700), or if the amount involved is above ZAR 100 000 and the offence was committed by a person "acting in the execution or furtherance of a common purpose or conspiracy", a Regional Court or High Court to which such a matter has been referred shall sentence the person to a minimum of 15 years imprisonment. It is unclear whether "the amount involved" refers to the amount of the gratification given or offered, or to the advantage received in exchange for the gratification. South Africa expresses the view that,

given that section 5 of the PRECCA addresses active bribery, the “amount involved” in this particular case would be the gratification given or offered. This minimum sanction can be waived if “substantial and compelling circumstances exist which justify the imposition of a lesser sentence”.

In addition to fines imposable under section 26(1), section 26(3) of the PRECCA provides for the possibility for the courts to “impose a fine equal to five times the value of the gratification involved in the offence.” This fine can be imposed in addition to an imprisonment sentence under section 26(1).

(b) Observations on the implementation of the article

65. The reviewing experts observed that the RSA was in compliance with this provision of the Convention. The RSA clarified during the country visit that the law does not provide specific penalties for legal persons other than that a financial penalty may be imposed, and therefore general principles of sentencing would apply, including that aggravating factors would be considered in deciding the sentence. Potential penalties under the PRECCA are the same for natural and legal persons, although if a specific fine is not mentioned, then the jurisdictional maximum of the court would apply. In the case of the high court, there is no jurisdictional maximum, which allows the court to impose a proportionate sentence in line with this provision of the Convention.

The RSA further reported that amendments were currently being considered to Section 26 of the PRECCA based on recommendations contained in the GRECO report.

Article 27 Participation and attempt

Paragraph 1

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

66. The RSA considers itself in compliance with Article 27 paragraph 1.

Texts

Section 21(c) of the PRECCA

Section 21(c) of the PRECCA provides, among others, for conspiracy and inducing another person to commit an offence”. It provides, among others, that “Any person who - [...] (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act, is guilty of an offence.”

The provision also addresses instructing, commanding, counselling or procuring another person to commit an offence. Penalties for offences under section 21 are the same as those applicable to the offence for which the convicted person “aided, abetted, induced, instigated, instructed, commanded, counselled or procured another person to commit.” However, mitigating factors may be found in respect of accomplices.

(b) Observations on the implementation of the article

67. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. With regard to the mitigating factors referred to in the response, the RSA reported during the country visit that in general terms, mitigating factors will always be examined in determining the final sentence imposed. This includes considerations of the seriousness of the offence, the interests of the community and the circumstances of the convicted person. In theory, the penalty could be exactly the same for both the principal and the associate. In addition, the RSA reported that a person can be convicted as an accomplice to an attempted crime where the crime was not completed.

Article 27 Participation and attempt

Paragraph 2

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

68. The RSA considers itself in compliance with Article 21 paragraph 2.

Texts

Section 21(c) of the PRECCA relates to “Attempt, conspiracy and inducing another person to commit an offence.”

(b) Observations on the implementation of the article

69. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Refer to additional observation regarding aiding and abetting, and attempt.

Sec. 21 of PRECCA provides that “Any person who-

- (a) attempts;*
- (b) conspires with any other person; or*
- (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act, is guilty of an offence.”*

Section 256 of the CPA also provides a general provision in terms of which an accused could be convicted of attempt should the primary crime not be proved. It provides as follows: “*If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence.*”

Article 27 Participation and attempt

Paragraph 3

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

70. The RSA considers itself in compliance with Article 27 paragraph 3.

In South African law an accused person's conduct must pass beyond the stage of mere preparation so as to constitute an attempt to commit the alleged offence. See *S v Rosenthal* 1980 (1) SA 65 (A).

(b) Observations on the implementation of the article

71. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Mere preparation to commit an offence is not itself an offence.

72. The RSA cited the case of *Rosenthal* 1980 (1) SA 65 (A).

Article 28 Knowledge, intent and purpose as elements of an offence

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

(a) Summary of information relevant to reviewing the implementation of the article

73. The RSA considers itself in compliance with the provisions of Article 28.

Texts

The South African offence of corruption does not specifically indicate whether *mens rea* is an element of this statutory offence. Whether *mens rea* is an element of this statutory offence depends on the intention of the legislature. Presently, the law developed by the Appellate Division is "to recognise, more frequently than used to be the case, the need for *mens rea* to accompany" statutory offences. (See *S v Van Staden* 1976 (2) SA 685 (N) at 694).

The basic approach that has emerged in South African case law is that, in accordance with the fundamental principle in the *maxims actus non facit reum, nisi mens sit rea* (the act does not render the perpetrator culpable unless he was conscious of its illegality) and *nulla poena sine culpa*, the legislature is presumed, unless there are clear and convincing indications to the contrary, not to have intended innocent violations of statutory prohibitions to be punishable. See *S v Arenstein* 1964 (1) SA 361 (A) at 365, *S v De Blom* 1977 (3) SA 513 (A) at 532.

The considerations, which the court will take into account in order to determine whether strict liability or *mens rea* was intended, are the following:

- (a) the language and context of the prohibition;
- (b) the scope and object of the statute;
- (c) the nature and extent of the penalty imposed;
- (d) the ease with which the prohibition can be evaded if reliance could be placed on the absence of *mens rea*; and
- (e) the reasonableness or otherwise of holding that *mens rea* is not an ingredient of the offence.

Without going into detail regarding these considerations, it can be accepted that the intention of the legislature was that *mens rea* is an element of the offence. Once it has been established that *mens rea* is an element of this statutory offence, the question arises as to

what form of *mens rea* is required. See *S v Naidoo* 1974 (4) SA 574 (N) at 596. In other words, is intentional wrongdoing (*dolus*) required or is negligence (*culpa*) sufficient? The South African case law deals in various judgements with this question.

If circumstances in a particular case are such that intent in the form of *dolus* (criminal intent) is required (as in cases of corruption), South African law requires that the perpetrator not only acted intentionally, but also with the knowledge that what he or she is doing is illegal. Proof that an accused person committed the prohibited act will create an inference that he or she acted with knowledge of the unlawfulness of his or her act. See *S v De Blom* 1977 (3) SA 513 (A) at 532. The inference will be dispelled by evidence that the accused person did not know that his or her act was contrary to the law or (what amounts to the same thing) was unaware that there was a statutory prohibition upon his or her conduct. Knowledge of unlawfulness exists where the accused person is aware of the fact that what he intends doing is unlawful. It is not essential that the accused person should be aware of the exact identity of the statutory provision that is being contravened, or whether there is a particular punishment for the contravention involved. There must, however, be some nexus between the accused person's awareness of unlawfulness and the charge he or she is facing.

Furthermore, it is not essential that an accused person should have actual knowledge that his or her conduct is unlawful. It is sufficient if he or she merely foresees the possibility that his or her act will be unlawful. See *S v De Blom* supra at 530; *S v Magidson* 1984 (3) SA 852 (T); *S v Hlomza* 1987 (1) SA 25 (A).

An accused person will lack knowledge of unlawfulness where he acts under a *bona fide* ignorance of the law. See *Attorney-General, Cape v Bestall* 1988 (3) SA 555 (A) at 567 D-E; *S v Potwane* 1983 (1) SA 868 (A) at 871. Such ignorance may exist simply because the accused person has received incorrect advice as to the state of the law. See *S v Rabson* 1972 (4) SA 574; *S v Zemura* 1974 (1) SA 584 (RA); *S v Bezuidenhout* 1979 (3) SA 1325 (T); *S v Reids Transport (Pty) Ltd* 1982 (4) SA 197 (E); *S v Barketts Transport (Pty) Ltd* 1986 (1) SA 706 (C) at 712; *S v Longdistance (Pty) Ltd* 1986 (3) SA 437 (N).

(b) Observations on the implementation of the article

74. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. the RSA reported that the legal principle contained in this provision of the Convention is followed by the courts of the RSA and determined by the fact finder. The RSA provided the following supplemental explanation:

Fault, either in the form of *dolus* or *culpa* is a requirement of all common law offences and is generally presumed in statutory offences unless the intention of the legislature is clear that it is a strict liability provision. Fault, like all elements of a crime may be inferred from the facts, whether direct or circumstantial. Knowledge, being a *substratus* of *dolus*, is no different and may thus also be inferred.

Article 29 Statute of limitations

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

(a) Summary of information relevant to reviewing the implementation of the article

75. The RSA indicates that it has adopted and implemented the provisions of Article 29 of the Convention.

Texts

Section 18 of the Criminal Procedure Act, 1977 (Act 51 of 1977)

In terms of section 18 of the CPA the right to institute a prosecution for corruption lapses after the expiration of a period of 20 years from the time when the offence was committed. The opinion is held that this period sufficiently covers the requirement set out in Article 29 of the UNCAC.

(b) Observations on the implementation of the article

76. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. During the country visit, the RSA reported that the statute of limitations will interrupt its application so long as the prosecutor has taken steps to apply for a warrant of arrest and/or serving of an indictment. An accused being brought before the court is sufficient to count for the statute of limitations that the case was brought in time. In addition, the RSA provided the following supplemental response:

Despite the provisions of section 18 of the CPA, the prescription period is interrupted by the institution of a prosecution. Accordingly, should a *prima facie* case be made out on paper and a warrant of arrest or a summons is issued for the accused, this will interrupt the prescription and may result in him being charged outside of the 20 year period. Although this interruption may be in conflict of the constitutional “speedy trial” principle, it is doubtful that the accused would be able to raise such defence if he caused such delay or interference in the criminal justice process.

Article 30 Prosecution, adjudication and sanctions

Paragraph 1

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

(a) Summary of information relevant to reviewing the implementation of the article

77. The RSA considers itself in compliance with Article 30 paragraph 1.

Texts

Section 26 of the PRECCA

The Offence of Corruption is contained in Part 2 of Chapter 2 of the PRECCA. In terms of section 26 of the PRECCA, the following penalties are applicable for such offence:

- (a) In the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life.
- (b) In the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years.

- (c) In the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years.

Section 26(2) of the PRECCA provides that a person convicted of an offence referred to in section 21 (attempts, etc), is liable to the punishment laid down as mentioned above, which that person attempted or conspired to commit or aided, abetted, induced, instigated, instructed, commanded, counselled or procured another person to commit.

In terms of section 26(3) of the PRECCA the court may, in addition to any fine prescribed above, impose a fine equal to five times the value of the gratification involved in the offence. The question arises as to how to quantify the "value of the gratification" for purposes of calculating the fine penalty. As mentioned above, in terms of section 1 of the Act, "gratification" includes

- (a) money, whether in cash or otherwise;
- (b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;
- (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;
- (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;
- (e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (f) any forbearance to demand any money or money's worth or valuable thing;
- (g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;
- (h) any right or privilege;
- (i) any real or pretended aid, vote, consent, influence or abstention from voting; or
- (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage".

It is presumed that a value could only be quantified where it is possible to attach a monetary value to the gratification, for example, if the gratification was in the form of money, goods, property, etc. In respect of any gratification that could be regarded as "property", section 15 of the Prevention of Organised Crime Act, 1998, may be applicable. This section deals with the value of property relating to the proceeds of crime and provides as follows:

- "(1) For the purposes of this Chapter, the value of property, other than money, in relation to any person holding the property, shall be*
- (a) where any other person holds an interest in the property*
 - (i) the market value of the property; less*
 - (ii) the amount required to discharge any encumbrance on the property; and*
 - (b) where no other person holds an interest in the property, the market value of the property.*
- (2) Notwithstanding the provisions of subsection (1), any reference in this Chapter to the value at a particular time of a payment or reward, shall be construed as a reference to the value of the payment or reward at the time when the recipient received it, as adjusted to take into account subsequent fluctuations in the value of money; or where subsection (1) applies, the value mentioned in that subsection, whichever is the greater value.*

If at the particular time referred to in subsection (2) the recipient holds the property, other than cash, which he or she received, the value concerned shall be the value of the property at the particular time; or property which directly or indirectly represents in his or her hands the property which he or she received, the value concerned shall be the value of the property, in so far as it represents the property which he or she received, at the relevant time."

There is a large body of case law giving guidelines on suitable sentences. These include general guidelines as well as guidelines in respect of specific offences within the sentencing options provided by the Legislature. It is submitted that it would not be practical to try and give an overall view hereof as it could comprise a book of its own. Suffice that in terms of the *locus classicus*, to with *S v Zinn* 1969 (2) SA 537 (A), the criminal, the crime, and the interests of society must be taken into consideration when sentence is imposed. It must also be pointed out that in terms of section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), as amended, a minimum sentence of 15 years' imprisonment is prescribed for, inter alia, an offence in Parts 1 to 4, or section 17, 20 or 21 (insofar as it relates to the aforementioned offences) of Chapter 2 of the PRECCA.

In ***Shaik and others v S*** [2007] 2 All SA 9 (SCA) the Supreme Court of Appeal considered Shaik's appeal on, inter alia, the sentences imposed by the trial court. He was sentenced to

- (a) 15 years' imprisonment on a charge of contravention of section 1(1)(a) of the Corruption Act, 1992 (count 1);
- (b) 3 years' imprisonment on a charge of fraud (count 2), in that the financial statements of the accused group of companies reflected three loan accounts as having been written off, on the false pretext that they were expenses incurred in the setting up of a project; and
- (c) 15 years' imprisonment on a charge of contravention of section 1(1)(a)(i) of the Corruption Act, 1992 (count 3), in that he solicited a bribe.

It was ordered that the sentences must be served concurrently.

For purposes of sentencing, the Supreme Court of Appeal referred to the following case law:

--In ***S v Kelly*** 1980 (3) SA 301 (A) the following appears at 313F:

"Bribing has been described by this Court as a corrupt and ugly offence. In the business world it undermines integrity for the temptations offered are often, as in this case, great. It is an insidious crime difficult to detect and more difficult to eradicate. It can, if unchecked or inadequately punished by the courts, have a demoralising effect on business standards and fair trading."

--In ***R v Sole*** 2004 (2) SACR 696 (LesHC) the Lesotho High Court considered appropriate sentences for a series of bribery convictions. At 699b-700b the Court referred to the abhorrence of bribery in Roman-Dutch law and the expressions of strong reproval that have multiplied with the years.

--The Constitutional Court in ***South African Association of Personal Injury Lawyers v Heath and others*** BCLR 7 (CC) at 80E-F said the following:

"Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."

--At paragraph 223 of the Shaik judgement:

"The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe".

In terms of section 75(1)(c) of the CPA an accused person shall be tried in any court which has jurisdiction and which has been designated by the Director of Public Prosecutions or any person authorised thereto by the Director of Public Prosecutions, whether in general or in any particular case. However, in terms of paragraph 1 of Part 11 of the Policy Guidelines for prosecutors, all contraventions of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), must be prosecuted in the Regional Court. In terms of a recent amendment to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), the Regional Court has the same jurisdiction in respect of certain serious offences (including corruption) as the High Court. It is therefore irrelevant whether an accused person is charged in the Regional Court or the High Court.

Policy Directives relating to sentencing must be observed by the prosecutors and in this regard Part 31 of the Policy Directives provides as follows:

- "1. Prosecutors perform an important function in assisting the courts in arriving at a just sentence. They are to play an active role in the pre-sentence proceedings.
2. Prosecutors must keep themselves informed on matters such as
 - (a) increases in the incidence of certain offences (especially violent crimes and crimes against women and children);
 - (b) the applicable penalty provisions for statutory offences; and
 - (c) reported decisions concerning sentencing.
3. It is the duty of the prosecutor to ensure that sufficient facts are placed before the court for it to impose an appropriate sentence. In this regard, prosecutors must ensure that the court is informed of the existence of aggravating and (particularly where the accused person is undefended) mitigating factors.
4. The accused person's record of previous convictions must, upon conviction, be placed on record either by submitting the form SAP 69 or form J14 (issued by the clerk of the court).
5. Where the SAP 69 is not available to the prosecutor and the offence of which the accused person has been convicted is not of a serious nature, the prosecutor may be guided by the investigating officer or other police official in the following manner:
 - (a) Where the accused person is known to the police and they can confirm that the accused person does not have any previous convictions, the presiding officer should be requested to finalize the matter.
 - (b) Where the police believe that the accused person does have previous convictions or where the accused person is unknown to them and may well have a record, an application for a postponement must be made in order to obtain and submit the SAP 69 before sentence.
6. In all cases of a serious nature, the prosecutor must apply for a postponement for the purposes of obtaining the SAP 69.
7. If an accused person denies a previous conviction, it must be proved in terms of section 272 of the Criminal Procedure Act, 1977, by calling a member of the Central Criminal Bureau in Pretoria or the Local Criminal Record Centre as a witness. This, however, should not be done if the previous conviction in question
 - (a) is irrelevant to the crime of which he or she has now been convicted; or
 - (b) would have no material impact on the sentence to be passed.
8. The prosecutor must exercise his or her right to lead evidence in aggravation of sentence in all applicable circumstances. It is to be noted that aggravating factors may also be revealed by the merits of the case. It is permissible to include evidential material, which has a bearing on aggravation in the presentation of the main case.
9. In cases of crimes of a serious nature (including violent crimes and sexual offences against women and children), prosecutors must lead evidence and, where necessary, expert evidence relating to:
 - (a) the impact of the crime on the victim/survivor;

- (b) the impact of the crime on the family members of the victim/survivor and the community;
 - (c) the harmful effect of sexual assault on a child victim/survivor;
 - (d) statistics regarding the frequency and relative seriousness of the offence;
 - (e) the degree of difficulty with which the commission of the specific crime (e.g. "child abuse ") can be anticipated and detected;
 - (f) the problems encountered in trying to prevent the commission of the crime in question; and
 - (g) any other aggravating factors relevant to the facts of the case, e.g. the question of premeditation or vulnerability of the victim/survivor (particularly children, the elderly and the disabled).
10. Due to the gravity of the offence and problems encountered in trying to prevent such offences, prosecutors must also lead evidence in respect of
 - (a) offences against state or public property;
 - (b) unlawful dealing in, and possession of drugs, firearms, ammunition or explosives;
 - (c) offences involving diamonds and precious metals;
 - (d) the contravention of legislation and regulations aimed at protecting the national economy, commercial interests and financial and marketing institutions;
 - (e) offences against the interests of various producers, dealers, industries and entrepreneurs;
 - (f) the contravention of legislation aimed at regulating health or social welfare;
 - (g) serious contraventions of transport, traffic and aviation legislation;
 - (h) the contravention of legislation created for the conservation of the environment, fauna and flora, and agricultural interests;
 - (i) offences aimed at thwarting State and administrative authority or the sound administration of justice;
 - (j) the contravention of the provisions of the Aliens Control Act, 1991 (Act No. 96 of 1991); and
 - (k) theft of trust money by attorneys.
 11. In serious cases where it appears that the accused person may present a danger to the physical or mental well-being of others and that the community should be protected against him or her, prosecutors must apply for an order to be made in terms of section 286A of the Criminal Procedure Act, 1977, for the declaration of the accused person as a dangerous criminal.
 12. Where applicable, prosecutors must apply for an order in terms of section 286 of the Criminal Procedure Act, 1977, for the declaration of the accused person as a habitual criminal.
 13. Where the accused person has caused damage to property (especially State property), by the commission of an offence, the prosecutor must, if so requested by the complainant, apply to the court for an order for compensation in terms of section 300 of the said Act.
 14. A condition of suspension of sentence in terms of section 297 of the said Act may also be utilized to effect reimbursement of the complainant.
 15. Where the accused person was 18 years or younger at the time of the commission of the crime, it is imperative for the prosecutor to immediately request and obtain pre-sentence reports upon the conviction of the accused person."

(b) Observations on the implementation of the article

78. The reviewing experts observed that the RSA is in compliance with this provision of the Convention, and that it is clear that both courts and prosecutors are obliged to take into account the gravity of the offence in determining recommendations and imposition of punishment at sentencing.

Article 30 Prosecution, adjudication and sanctions

Paragraph 2

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

79. The RSA considers itself in compliance with Article 30 paragraph 2.

Texts

Sections 204, 252A and 1 05A of the Criminal Procedure Act, 1977

On a very broad basis sections 204 and 1 05A of the CPA, could be regarded as a jurisdictional privilege based on investigation and prosecution techniques and privileges. In the case of section 105A there will be an agreement between an accused and the prosecution to plead guilty to certain charges, which may exclude a charge of corruption in lieu of fraud or even a lesser offence, because of whatever legitimate reason. In the case of section 204 it is also a decision that is made by the prosecution in consultation with the police to rather use a cooperating accused as a witness, in which case such witness, if meeting the requirements of section 204, will not be prosecuted. In both cases people who are *prima facie* guilty of corruption may not be charged.

A third example is the use of section 252A of the CPA in terms of which a Director of Public Prosecutions may authorize an agent of the state to be involved in *prima facie* unlawful activities with a view of gathering evidence against a suspect. Such agent will not be prosecuted since there was lawful authority based on a statutory justification. This is clearly an investigative method which may be used when investigating complex crimes such as organized crime, terrorism, corruption and gang-related crimes.

One may also argue that once an interception direction has been granted by a Designated Judge in terms of section 16 of RICA, the interceptor, being aware of the commission of a crime, is guilty as a participant should he not disclose such information, but rather retains it for purposes of the ongoing investigation. So, although such interceptor is aware of a conspiracy to commit corruption, for instance, he is not guilty of failure to disclose the information since he (together with the investigating team) is busy with a larger-scale investigation, the currently obtained information, of which is merely part of the evidential material in the bigger investigation of racketeering, for instance.

(b) Observations on the implementation of the article

80. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. During the country visit, the RSA reported that other than diplomatic immunity, there is no immunity granted to any public official of the country. As a result, any public official may be investigated or prosecuted for a criminal offence. There are some limited protections available for prosecutors and law enforcement officials, both of which are bound by their respective codes of conduct. Section 252A of the CPA for example, provides some protection to law enforcement officials from criminal liability for certain actions performed in an undercover capacity. In addition, the RSA provided the following supplemental response:

With the exception of diplomatic immunity which is granted to foreign diplomats and the immunity discussed in the original response, no immunity is granted to any official in this country. The head of state and any minister or government employee may be investigated and prosecuted.

The independence of the prosecution is guaranteed by section 179 of the Constitution while that of the judiciary by section 165. Both of these institutions are subject only to the Constitution and the law of the country. In all matters where any person may be exonerated from being prosecuted, his or her conduct will be balanced with the mandate (section 252A), the evidence (section 204) or the agreement (section 105A).

Article 30 Prosecution, adjudication and sanctions

Paragraph 3

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

81. The RSA considers itself in compliance with Article 30 paragraph 3 of the Convention.

Texts

Section 20(1) of National Prosecuting Authority Act, 1998 (Act 32 of 1998)

The National Prosecuting Authority Act, 1998 (NPA Act) vests the prosecuting authority with the discretion to make any decision regarding the criminal process, including decisions whether or not to institute, or to discontinue proceedings (See section 20(1) of NPA Act). Various provisions in the South African Constitution and in the NPA Act are aimed at guaranteeing the independent exercise of prosecutorial discretion. See for instance, section 179(4) of the Constitution and section 32(1)(a) of the NPA Act.

The NPA Act grants the power to institute, carry out and discontinue criminal proceedings to any Deputy National Director and any Director “subject to the control and directions of the National Director” and any prosecutor “to the extent that he has been authorized thereto in writing by the National Director.” In practice, such decisions are taken by the Directors of Public Prosecutions and the prosecutors, although the National Director is entitled to review it.

The Prosecution Policy Directives, issued by the National Director to all prosecutors, also provide some direction, and prescribe that “once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.” Factors to be taken into account when considering the public interest are further discussed below. These Directives implement the Prosecutorial Policy approved by Parliament which sets out the general policy orientations.

Once enrolled, a case may only be withdrawn on “compelling grounds”, as specified in the Prosecution Policy Directives. These “compelling grounds” can be compared to the “substantial and compelling circumstances” referred to in several South African Acts. The Courts have considered in their decisions that “substantial and compelling circumstances” would be constituted if, for instance, the evidence available is such that there is no longer a reasonable prospect of a successful prosecution. Accountability for decisions to open or not open prosecutions, and the termination of cases, is provided in the NPA Act. See section 32(1)(b) of the NPA Act. Specific offences also exist in relation to any actual or attempted interference with this independence. See section 41(1) of the NPA Act.

Prosecutors also have the possibility to enter into plea and sentence agreements with an accused in a criminal trial. See section 105A of the CPA. However, the National Director issued specific directives and guidelines regarding the application of this provision.

(b) Observations on the implementation of the article

82. The reviewing experts observed that the RSA is in compliance with this provision of the Convention, given the following supplemental response provided by the RSA during the country visit:

A prosecutor’s discretion to institute prosecutions or not is primarily prescribed by the law and the prosecution policy. Besides her or his duty to exercise the prosecution duty without any fear, favour or prejudice, a prosecutor has very limited discretion. Even though the *quantum* of damages or benefit may theoretically be taken into account, in reality it never will be. Whilst the common law principle of *de minimus non curat lex* is regarded as a defence excluding unlawfulness, in serious cases it never plays a role. It may, however, be considered as a mitigation factor by the court.

It should further be borne in mind that a prosecutor always acts within a particular mandate and under supervision and certain decision cannot be taken unless cleared out with the senior or chief prosecutor or the responsible Director of Public Prosecutions.

In the last instance please note that section 179(5)(d) of the Constitution provides for a review system in terms of which the National Director may at the request of an accused, a complainant or any other person the National Director considers relevant, review the prosecutor’s decision to institute a prosecution or not.

Without dealing exhaustively with section 105A of the CPA, suffice to say that there are sufficient safeguards built in to ensure effective compliance.

Contrary to some other jurisdictions, alternative dispute resolution, including penal negotiations, is promoted, albeit subject to the law and prosecution policy. This does not, however, make for a weak system or a failure to deter.

It is the prosecution’s duty to striking a balance between its right to without fear, favour or prejudice institute and conduct a prosecution and other interests pertinent to the accused or the community or factors that may constitute unconstitutional or unlawful conduct.

The courts are independent and subject only to the Constitution and the law and the judiciary must exercise its functions without fear, favour or prejudice. After conviction the court is obliged to consider all the facts and circumstances and balance the seriousness of the offence against the interests of the accused and the community before imposing a proper and justified sentence,

Law enforcement and prosecutorial training plays a big role in sensitizing members about the seriousness of the PRECCA offences and preparing them to properly conduct investigations and prosecutions.

Article 30 Prosecution, adjudication and sanctions

Paragraph 4

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

83. The RSA considers itself in compliance with the provisions of Article 30 paragraph 4.

Texts

Section 35(3) of the Constitution and Section 159 of the Criminal Procedure Act, 1977 (Act 51 of 1977)

In terms of section 35(3) of the Constitution every accused person has the right to a fair trial, which include the right to be present when being tried (section 35(3)(e)) and the right to be represented by a legal practitioner of his or her choice (section 35(3)(f)) or to have a legal practitioner assigned by the state and at state's expense, if substantial injustice would otherwise result (section 35(3)(g)).

Furthermore, in terms of section 159 of the CPA, criminal proceedings should be conducted in the presence of an accused person. However, the court may direct that an accused person be removed from the criminal proceedings if he or she conducts him or herself in a manner which makes the continuance of the proceedings in his or her presence impracticable.

(b) Observations on the implementation of the article

84. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was noted during the country visit that the presumption of innocence and other factors are taken into account in the decision on granting of bail pending trial. Bail is determined on a balance of the rights of the accused against the safety to the community and other factors, including chances that the person might evade justice or not appear in court in the future. Bail is always conditioned on certain behaviour, including that the person attend all future court dates, not interfere with witnesses, not leave the country or the court's district, shall report at regular intervals at police stations, etc. There is an appeal process in the RSA for the refusal to grant bail.

Article 30 Prosecution, adjudication and sanctions

Paragraph 5

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

85. The RSA considers itself in compliance with Article 5.

Texts

Section 276B(1)(a) of the Criminal Procedure Act, 1977 and Section 42 of the Correctional Services Act, 1998.

Section 276B(1)(a) of the CPA provides that if a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

When the possible release of an offender on parole is being considered, a great number of factors are taken into account, which inter alia includes the nature of the crime; the offender's response to programmes aimed at addressing offending behaviour as well as development and treatment programmes associated with rehabilitation; the existence and quality of support systems in the community; the probability of re-offending; the risk such an offender may pose to the community at large as well as the risk to the victim. The balance of all these factors will direct the Parole Board to take a decision.

Section 42 of the Correctional Services Act, 1998 provides that:

- (a) At each correctional centre there must be one or more Case Management Committees composed of correctional officials as prescribed by regulation.
The Case Management Committee must ensure that each sentenced offender has been assessed, and that for sentences offenders serving more than 24 months there is a plan specified in section 38 (1A);
- (b) interview, at regular intervals, each sentenced offender sentenced to more than 24 months, review the plan for such offenders and the progress made and, if necessary, amend such plan;
- (c) make preliminary arrangements, in consultation with the Head of Community Corrections for possible placement of a sentenced offender under community corrections;
- (d) submit a report, together with the relevant documents, to the Correctional Supervision and Parole Board regarding
 - (i) the offence or offences for which the sentenced offender is serving a term of incarceration together with the judgement on the merits and any remark made by the court in question at the time of the imposition of sentence if made available to the Department
 - (ii) the previous criminal record of such offender,
 - (iii) the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of such offender;
 - (iv) the likelihood of a release into crime, the risk posed to the community and the manner in which this risk can be reduced.

(b) Observations on the implementation of the article

86. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. In effect, in the RSA when the eventual granting of conditional release to a convicted criminal is provided for, a large number of factors are taken into consideration, which include, among others, the nature of the offence; the offender's reaction to programs seeking to remedy criminal conduct and developmental and treatment programs associated with rehabilitation; the existence and quality of community support systems; the likelihood of reoffending; the risk the offender may pose to the community in general terms; and the risk to the victim. The balance of all these factors provides the basis for parole boards to make their decisions. As courts must account for the gravity of the offence at the time of sentencing, this is accounted for in determining the fixed period of the sentence after which a convicted person may be eligible for parole. In addition, the Parole Board considers the views of the victims and members of the community in determining whether to grant parole in a particular case.

Article 30 Prosecution, adjudication and sanctions

Paragraph 6

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

(a) Summary of information relevant to reviewing the implementation of the article

87. The RSA considers itself in compliance with the provisions of Article 30 paragraph 6.

Texts

Section 28 of the PRECCA

Discipline in the public service has been transformed with effect from 1 July 1999. The transformation was done within the ambit of the new management framework that is based on the devolution of power to national and provincial departments. The transformation culminated in the parties to the Public Service Co-ordinating Bargaining Council (PSCBC) concluding and signing an agreement on a new disciplinary code and procedures for the public service (Resolution 2/99). The agreement was implemented on 1 July 1999.

An employee may be suspended for purposes of a disciplinary enquiry. A suspension may take the form of a suspension on full pay or a transfer of the employee (to another section/workplace). To suspend an employee, both the following elements have to be prevalent: (a) The employee must have allegedly committed a serious offence or (b) The presence of the employee at the workplace might jeopardise any investigation into the alleged misconduct or it might endanger the wellbeing or safety of any person or state property.

In terms of the Senior Management Services Handbook (for senior members of the public service), the employer may also suspend or transfer a member as indicated above.

Where an offence also constitutes an offence under section 12 (offences in respect of corrupt activities relating to contracts) or section 13 (offences in respect of corrupt activities relating to the procuring and withdrawal of tenders) of the PRECCA, the Court may also issue an order to the effect that details of the conviction of the natural or legal person are endorsed on a Register for Tender Defaulters, as provided under section 28 of the PRECCA. The natural or legal person thus endorsed must make this endorsement known in any subsequent agreement or tender with the State. The Court may further order that this be accompanied by termination of any ongoing agreement with the National Treasury. The National Treasury is also responsible for determining the length of time, necessarily between five and ten years, during which the person or enterprise is barred from entering into any public contract.

(b) Observations on the implementation of the article

88. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was noted during the country visit that the criminal proceedings run independent of any internal disciplinary or reassignment process. The Chief Executive Officer or Director-General of a particular government department or State Organ will take the decision whether to suspend or reassign an employee. In the case of the judiciary, the Chief Justice or any person designated by the Chief Justice will make the decision on suspension or reassignment. Members of the Cabinet may be suspended by the Head of State, which may be followed by impeachment (decided by the Parliament) or resignation.

Article 30 Prosecution, adjudication and sanctions

Subparagraph 7 (a)

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office; and

(a) Summary of information relevant to reviewing the implementation of the article

89. The RSA considers itself in compliance with this provision.

Texts

Section 28 of the PRECCA

Where an offence also constitutes an offence under section 12 (offences in respect of corrupt activities relating to contracts) or section 13 (offences in respect of corrupt activities relating to the procuring and withdrawal of tenders) of the PRECCA, the Court may also issue an order to the effect that details of the conviction of the natural or legal person are endorsed on a Register for Tender Defaulters, as provided under section 28 of the PRECCA. The natural or legal person thus endorsed must make this endorsement known in any subsequent agreement or tender with the State. The Court may further order that this be accompanied by termination of any ongoing agreement with the National Treasury. The National Treasury is also responsible for determining the length of time, necessarily between five and ten years, during which the person or enterprise is barred from entering into any public contract.

(b) Observations on the implementation of the article

90. The reviewing experts observed that the language of section 28 of the PRECCA does not confirm that in South Africa, persons found guilty of offences established under the Convention are rendered temporarily or permanently ineligible by a competent authority to hold public office. During the country visit, it was further noted that there is no legislation prohibiting a person convicted of a corruption offence from holding public office. It is possible that in some cases, a person may lose a professional license – just as the license to practice law – that could *de facto* bar the person from holding the same public office. It was recommended by the reviewing experts, therefore, that the RSA consider the adoption of further legislation or procedures to disqualify, for a period of time, persons convicted of Convention offences from holding public office, in line with this provision of the Convention.

Article 30 Prosecution, adjudication and sanctions

Subparagraph 7 (b)

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(b) Holding office in an enterprise owned in whole or in part by the State.

(a) Summary of information relevant to reviewing the implementation of the article

91. The RSA considers itself in compliance with this provision.

Texts

Section 28 of the PRECCA

See the response in respect of subparagraph (a) above.

(b) Observations on the implementation of the article

92. The reviewing experts observed that the language of section 28 of the PRECCA does not confirm that in South Africa, persons found guilty of offences established under the Convention are rendered temporarily or permanently ineligible by a competent authority to hold public office or hold an office in a public enterprise. During the country visit, it was further noted that there is no legislation prohibiting a person convicted of a corruption offence from holding public office. It is possible that in some cases, a person may lose a professional license – just as the license to practice law – that could *de facto* bar the person from holding the same public office or office in a public enterprise. It was recommended by the reviewing experts, therefore, that the RSA consider the adoption of further legislation or procedures to disqualify, for a period of time, persons convicted of Convention offences from holding office in a public enterprise, in line with this provision of the Convention.

In addition, the RSA provided the following supplemental information regarding disqualification of officeholders:

Although public enterprises have founding legislation, the requirements for directors remain in accordance with the governance provisions as envisaged by the Companies Act, No. 71 of 2008.

Section 69(8) of the Companies Act, 2008 provides for the disqualification of company directors: A person is disqualified to be a director of a company if—

- (a) *a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or*
- (b) *subject to subsections (9) to (12), the person—*
 - (i) *is an unrehabilitated insolvent;*
 - (ii) *is prohibited in terms of any public regulation to be a director of the company;*
 - (iii) *has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or*
 - (iv) *has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence—*
 - (aa) *involving fraud, misrepresentation or dishonesty;*
 - (bb) *in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or*
 - (cc) *under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Securities Services Act, 2004 (Act No. 36 of 2004), or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 (Act No. 12 of 2004).*

(9) A disqualification in terms of subsection (8)(b)(iii) or (iv) ends at the later of—

- (a) *five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or*
- (b) *at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).*

Not unlike par. 7(a) a person is not barred by the court convicting her or him from holding office in a public enterprise, but he may nevertheless be removed from such office or prevented from being appointed to such office.

Article 30 Prosecution, adjudication and sanctions

Paragraph 8

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

(a) Summary of information relevant to reviewing the implementation of the article

93. The RSA considers itself in compliance with this provision.

Texts

Section 28 of the PRECCA

See the response in respect of subparagraph (a) above.

(b) Observations on the implementation of the article

94. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 30 Prosecution, adjudication and sanctions

Paragraph 9

9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

Article 30 Prosecution, adjudication and sanctions

Paragraph 10

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

95. The RSA considers itself in compliance with Article 30 paragraph 10.

Texts

Section 50 of the Correctional Services Act, 1998 (Act 111 of 1998)

The community corrections system is aimed at supporting the re-integration of offenders into the community by means of supervision, relevant therapy and programmes.

Section 50 of the Correctional Services Act, 1998 (Act 111 of 1998), provides as follows:

- (1) The objectives of community corrections are to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future. These objectives do not apply to restrictions imposed in terms of section 62(f).
- (2) The immediate aim of the implementation of community corrections is to ensure that persons subject to community correction abide by the conditions imposed upon them in order to protect the community from offences which such persons may commit.

(b) Observations on the implementation of the article

96. The reviewing experts observed that the RSA was in compliance with this provision of the Convention.

(c) Successes and good practices

97. Statistical information on the community corrections system in South Africa is as follows:
- Number of financed positions: 2 070
 - Number of community corrections offices: 208

- Daily average number of probationers (supervision cases): 20 552
- Daily average number of parolees: 43 614
- Daily average number of awaiting trial detainees - Sec. 62(f): 1 904
- Total average daily active caseload: 66 070

Article 31 Freezing, seizure and confiscation

Subparagraph 1 (a)

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(a) Summary of information relevant to reviewing the implementation of the article

98. The RSA considers itself in compliance with Article 31 subparagraph 1(a).

Texts

Part 1 of Chapter 5 of the Prevention of Organised Crime Act, 1998 (POCA)

Part 1 of Chapter 5 of the POCA provides for the possibility of confiscating assets that constitute proceeds of unlawful activities or their financial equivalent. Section 1(xv) of the POCA specifies that “proceeds of unlawful activities” means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.”

Under section 18 of the POCA, whenever a defendant is convicted of an offence, the Court may, on application of the public prosecutor, order the defendant to pay any amount it considers appropriate, but not exceeding the value of the defendant’s proceeds of the offence. It should be pointed out that the Court will look not only at benefits derived from offences of which the defendant has been convicted, but also from “any criminal activity which the Court finds to be sufficiently related to those offences”. See section 18(1)(c) of POCA.

Section 19 of the POCA specifies that the value of the proceeds is determined as “the sum of the values of the property, services, advantages, benefits or rewards received or derived by him or her at any time [...] in connection with the unlawful activity”.

The POCA also provides for the possibility of confiscating proceeds of crimes in the hands of third parties. Section 1(xv) provides that proceeds of unlawful activities means proceeds “derived, received or retained, directly or indirectly” [emphasis added]. In addition, section 14 provides for the confiscation of “any property held by the defendant concerned”, as well as “any property held by a person to whom that defendant has directly or indirectly made any affected gift.” Section 12(1)(i) *ibid* defines an “affected gift” as “any gift- (a) made by the defendant concerned not more than seven years before the fixed date (b) made by the defendant concerned at any time, if it was a gift

- (i) of property received by the defendant in connection with an offence committed by him or her or any other person; or

(ii) of property, or any part thereof, which directly or indirectly represented in that defendant's hands property received by him or her in that connection.

Whether any such gift was made before or after the commencement of this Act;

Section 16(1) of the POCA provides that: a defendant shall be deemed to have made a gift if he or she has transferred any property to any other person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration supplied by the defendant.

This would appear to offer the possibility to confiscate proceeds of crime in the hands of third parties, be they natural or legal persons, which may not have been convicted. In practice, these provisions have been successfully relied on and restraint orders are regularly made against property of persons who will not be prosecuted. For case law relating to restraint orders against legal persons, see *National Director of Public Prosecutions v Phillips and others* (WLD, 2000), and *National Director of Public Prosecutions v Rautenbach and another* [2005] 1 All SA 412 (SCA).

Proceedings on application for a confiscation order or a restraint order are civil proceedings. Consequently, the rules of evidence applicable in civil proceedings (i.e. "balance of probabilities") apply to proceedings on application for a confiscation order, and not the stricter rules of evidence applicable in criminal proceedings (i.e. "beyond reasonable doubt").

The confiscation provisions available under the POCA were recently applied in practice in the recent prominent case of *Shaik and Others v S* [2007]. The Supreme Court of Appeal agreed, on most counts, with the High Court in its interpretation of the POCA provisions relating to confiscation of proceeds of unlawful activities, and confirmed (i) that proceeds include benefits received directly or indirectly; (ii) that proceeds cover any advantage, benefit, or reward, including those which a shareholder may derive if a company is enriched by the crime; and (iii) that the same proceeds can be considered proceeds of criminal activity in the hands of each intermediary and there can therefore be a multiplicity of confiscation orders for the same proceeds. It is worth noting that the South African Constitutional Court has drawn attention, in several recent decisions, to the need to interpret legislation such as the POCA in a manner that is consistent with the Constitution, and notably the property clause enshrined in terms of Section 25. See, for instance, *Mohunram and Another v National Director of Public Prosecutions and Another* (Law Review Project as Amicus Curiae) (CCT19/06) [2007] ZACC 4 (26 March 2007) and *S v Shaik* (CCT 86/06) [2007] ZACC (2 October 2007). Also note that section 25 of the South African Constitution provides for the protection against the arbitrary deprivation of property.

A very recent, 29 May 2008 decision of the Constitutional Court, however stressed the importance of going behind complex systems of camouflage to hide proceeds. It confirmed lower courts decisions in the matter of *Shaik and Others v S* [2007] to confiscate proceeds of crime in the amount of ZAR 34 million (EUR 2 734 000; USD 4 230 000).

(b) Observations on the implementation of the article

99. The reviewing experts observed that the RSA was in compliance with this provision of the Convention. In addition, during the country visit, the RSA's Asset Forfeiture Unit made a presentation on the asset forfeiture mechanisms in the RSA.

In the RSA, there are two types of asset forfeiture – conviction-based and non-conviction-based/civil asset forfeiture. The legal architecture of the forfeiture mechanism is applicable to all crimes, not only corruption. Although the mechanism is codified in the legislation to combat organized crime, it is applicable to corruption offences as well.

The NPA established the AFU in 1999 to ensure the law's implementation. It includes a specialist capacity for both lawyers and investigators, with approximately 160 staff plus 50 seconded detectives. Over its existence, the AFU has been responsible for frozen assets in 2,700 cases worth nearly 5 billion rand, and finalized around 2,300 cases with a value of 1.5 billion rand. The success rate of the Unit is around 90-95%, and has resulted in about 375 million rand going to a special account to fight crime. In addition, approximately 500 million rand has been returned to victims during this time. Statistically, around 60% of funds are confiscated via NCB forfeiture and 40% are confiscated via conviction-based forfeiture.

Regarding the conviction-based forfeiture mechanism, it follows the UK model of forfeiture. The forfeiture itself takes place during the criminal trial, but the process is civil in nature. The result is a confiscation order for the value of the benefit of the crime. If it is not paid voluntarily, the prosecutor can obtain a realisation order to execute against the person's property. It is also possible to seek a freeze order before charges are brought if there is probable cause through a restraint order to ensure property is not moved or dissipated. The advantage to this is that once the benefit is proved, the order can be executed against any property of the accused. This mechanism operates more broadly than normal civil litigation, since the state can recover assets "held by" the perpetrator (not owned); can recover gifts made in the last 7 years from third parties; the benefit amount is gross income (no deduction for expenses); and there is forced disclosure of all assets and gifts under oath with immunity against use in criminal proceedings. There are several operable presumptions at work as well aimed at lifestyle criminals with unexplained wealth where it is impossible to prove all the crimes they committed over many years. In such cases, once the conviction is entered and it is proved that the criminal has benefited from one crime, it is assumed that all income and expenditure over the past 7 years and all property held by perpetrator is a proceed of crime. These orders, however, do not reach assets held in the names of spouses, children or close relatives.

Regarding overseas assets, the court can order the convicted defendant to repatriate the property or face contempt. The court can also grant power of attorney to a receiver (often contested in foreign jurisdictions), and MLA requests can also be sent to the foreign jurisdiction.

The second mechanism is one of Civil Forfeiture – based on U.S. law for non-conviction based forfeiture. The standard of evidence is on a balance of probabilities. Preservation orders may be issued to freeze property. The advantage to this mechanism is that a criminal conviction is not necessary, and it operates as an action *in rem* against the property itself. It has to be proved to be tainted property – proceeds or instrumentalities of crime. There could be direct evidence against the specific property, circumstantial evidence against specific property, or some evidence that all property owned by a person are proceeds. This mechanism is useful in corruption cases where it is often difficult to find sufficient evidence to secure a conviction. This mechanism can extend to unlawful activities that might not exist in statute as crimes per se, but include some contravention of the law. Often perpetrators do not contest these cases to avoid having to testify under oath.

Article 31 Freezing, seizure and confiscation

Subparagraph 1 (b)

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

100. The RSA considers itself in compliance with this provision.

Texts

Part 1 of Chapter 5 of the Prevention of Organized Crime Act, 1998 (POCA)

See the response in respect of subparagraph 1(a) above.

(b) Observations on the implementation of the article

101. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Instrumentality of the offence is included in non-conviction-based forfeiture mechanism in Chapters 5 and 6, and under section 38(2)(a) of the POCA. The definition of instrumentality is addressed under (xv) of sub-section (1).

Article 31 Freezing, seizure and confiscation

Paragraph 2

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

(a) Summary of information relevant to reviewing the implementation of the article

102. The RSA considers itself in compliance with this provision.

Text

Chapter 2 of the CPA, Part 3 of Chapter 5 of the POCA and Section 38 (Chapter 6, Part 2) of the POCA

Chapter 2 of the CPA, provides for the application and granting of search warrants, seizure, forfeiture and disposal of property connected with any offence. Section 20 of the CPA covers the seizure of any article which is concerned or believed to be concerned in the commission or suspected commission of an offence. This provision could be relied on to seize the corrupt payment, in situations where the corrupt payment is still in the hands of the briber or, at least, on South African territory.

Sections 30 to 34 of the CPA provide for the disposal of the articles seized where such articles are not forfeited to the State. Section 35 provides for the possibility for the courts,

upon conviction, to declare the articles seized forfeited to the State, if such articles were used in the commission of the offence. If the bribe cannot be seized (i.e. where the bribe has left the country), and provided a monetary value can be attributed to the bribe, monetary sanctions of comparable effect may be available under section 26(3) of the PRECCA. This provision allows for the imposition of a fine equal to five times the value of the gratification involved in the offence. It can only be imposed if a conviction for a PRECCA offence is pronounced.

Proceeds of an offence (including corruption), may also be subject to pre-trial seizure. Under Part 3 of Chapter 5 of the POCA, a High Court may, on application of the public prosecutor, impose a restraint order on property belonging to a defendant where the defendant is being prosecuted or is to be charged with an offence, and a confiscation order has been made or there are reasonable grounds to believe that a confiscation order may be made against the defendant. In addition, under section 38 (Chapter 6, Part 2) of the POCA, the High Court may make a preservation order in respect of proceeds and instrumentalities of crime. This property can eventually be forfeited to the State if the Court finds, on the balance of probabilities, that the property concerned constitutes the proceeds of unlawful activities.

(b) Observations on the implementation of the article

103. The reviewing experts observed that the RSA was in compliance with this provision of the Convention. It was particularly noted that such orders may be granted by a court bailiff.

Article 31 Freezing, seizure and confiscation

Paragraph 3

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

104. The RSA considers itself in compliance with this provision.

Texts

Sections 30 to 34 of the Criminal Procedure Act, 1977

Sections 30 to 34 of the CPA provide for the disposal of the articles seized where such articles are not forfeited to the State.

Section 30 of the CPA: This section deals with the disposal by a police official of article after seizure. If the article is perishable, the police official may, with due regard to the interests of the persons concerned, dispose of the article in such manner as the circumstances may require. If the article is stolen property or property suspected to be stolen, the police official may, with the consent of the person from whom it was seized, deliver the article to the person from whom, in the opinion of such police official, such article was stolen, and shall warn such person to hold such article available for production at any resultant criminal proceedings, if required to do so. Articles seized must be given distinctive identification

marks and it must be retained in police custody with regard as the circumstances may require.

Section 31 of the CPA: This section deals with the disposal of articles where no criminal proceedings are instituted or where it is not required for criminal proceedings. If no criminal proceedings are instituted in connection with any article or if it appears that such article is not required at the trial, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it. If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

Section 32 of the CPA: This section deals with the disposal of articles where criminal proceedings are instituted and an admission of guilt fine is paid. If criminal proceedings are instituted in connection with any article and the accused admits his guilt the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it. If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.

Section 33 of the CPA: This section deals with the position where articles have to be transferred to the court for purposes of trial. If criminal proceedings are instituted in connection with any article and such article is required at the trial for the purposes of evidence or for the purposes of an order of court, the police official charged with the investigation shall deliver such article to the clerk of the court where such criminal proceedings are instituted. If it is by reason of the nature, bulk or value of the article in question impracticable or undesirable that the article should be delivered to the clerk of the court, the clerk of the court may require the police official in charge of the investigation to retain the article in police custody or in such other custody as may be determined. The clerk of the court must place any article received in safe custody, which may include the deposit of money in an official banking account if such money is not required at the trial for the purposes of evidence.

Section 34 of the CPA: This section deals with the disposal of articles after the commencement of criminal proceedings. The judge or judicial officer presiding at criminal proceedings must at the conclusion of such proceedings make an order that any article referred

- (a) be returned to the person from whom it was seized, if such person may lawfully possess such article; or
- (b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or
- (c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.

The court may, for the purposes of any order hear such additional evidence, whether by affidavit or orally, as it may deem fit.

The POCA provides for the administration of property seized or confiscated under the provisions of that Act. In terms of section 28 of the POCA a High Court may in respect of property relating to a restraint order, appoint a *curator bonis* to perform any particular act in respect of any of or all the property to which the restraint order relates; or to take care of the

said property; or to administer the said property; and where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking.

See also section 30 of the POCA in relation to the administration of realisable property; and section 32 for the functions of a *curator bonis*.

(b) Observations on the implementation of the article

105. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. In particular, sections 30 to 34 of the CPA provide for the storage and disposal of articles seized, even when such articles are not forfeited to the State. The Curator can be appointed by the court to take charge of and care for the property under the control of the State, subject to civil liability if the property is not preserved. Fiduciary duties apply to this role, allowing for normal depreciation.

Article 31 Freezing, seizure and confiscation

Paragraph 4

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

106. The RSA considers itself in compliance with this provision. See the response in respect of subparagraph 1 above. In South African Law, the "value" of the defendant's proceeds of the offence may be confiscated.

(b) Observations on the implementation of the article

107. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Proceeds under criminal forfeiture apply to any property at all. Under the non-conviction-based forfeiture mechanism, there needs to be a link to equipment or instrumentalities to unlawful activity.

Article 31 Freezing, seizure and confiscation

Paragraph 5

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

108. The RSA considers itself in compliance with this provision. See the responses in respect of subparagraphs 1 and 2 above

(b) Observations on the implementation of the article

109. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. An order under the conviction-based mechanism is a money order against any property up to the value of the proceeds. An order under the non-conviction-based mechanism goes against the property itself, so it can become more complicated. An example was provided that allowed for the forfeiture of an entire building where the relevant criminal activity only occurred on a particular floor. In terms of bank accounts, it may be that both legitimate and illegitimate funds are mingled in the account. In such cases, successful arguments have been made that the “clean” money operated as an instrumentality to conceal the illicit funds, resulting in the forfeiture of the entire account.

Article 31 Freezing, seizure and confiscation

Paragraph 6

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

(a) Summary of information relevant to reviewing the implementation of the article

110. See the responses in respect of subparagraph 1 above.

(b) Observations on the implementation of the article

111. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 31 Freezing, seizure and confiscation

Paragraph 7

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

112. The RSA considers itself in compliance with this provision.

Texts:

Sections 20 to 22 of the Criminal Procedure Act of 1977 and Sections 26(1) and 45B(1) of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)(FICA)

The general powers to search for, and seize, articles are contained in the Criminal Procedure Act of 1977. Search and seizure powers are provided for in terms of a warrant issued by a

judicial officer (sections 20 and 21 of the CPA). The CPA also provides for exceptions where a search and seizure may take place without a warrant (section 22 of the CPA). Articles which may be seized under these provisions include articles which may afford evidence of the commission or suspected commission of an offence. This can include information which is subject to confidentiality arrangements such as transaction records, identification information relating to a customer, account files, business correspondence and any other records relating to a customer which a financial institution may hold.

In terms of section 26(1) of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) (FICA), an authorised representative of the Centre has access to any records kept by or on behalf of an accountable institution and may examine, make extracts from or copies of, any such records for the purposes of obtaining further information in respect of a report.

Section 26(2) of the FICA provides that the authorised representative of the Centre may, except in the case of records which the public is entitled to have access to, exercise the powers mentioned above only by virtue of a warrant issued in chambers by a magistrate or regional magistrate or judge of an area of jurisdiction within which the records or any of them are kept, or within which the accountable institution conducts business. A warrant may only be issued if it appears to the judge, magistrate or regional magistrate from information on oath or affirmation that there are reasonable grounds to believe that the records referred to above, may assist the Centre to identify the proceeds of unlawful activities or to combat money laundering activities (see section 26(3)). An accountable institution must without delay give to an authorised representative of the Centre all reasonable assistance necessary to enable that representative to exercise the above powers (section 26(5)).

In terms of section 45B(1) of the FICA an inspector may, for the purposes of determining compliance with the FICA or any order, determination or directive made in terms of the FICA, at any reasonable time and on reasonable notice, where appropriate, enter and inspect any premises at which the Centre or reasonably believes that the business of an accountable institution, reporting institution or other person to whom the provisions of this Act apply, is conducted. In terms of subsection (2) an inspector, in conducting an inspection, may in writing direct a person to appear for questioning before the inspector at a time and place determined by the inspector; order any person who has or had any document in his, her or its possession or under his, her or its control relating to the affairs of the accountable institution, reporting institution or person --
to produce that document; or
to furnish the inspector at the place and in the manner determined by the inspector with information in respect of that document;

Furthermore, such inspector may open any strong room, safe or other container, or order any person to open any strong room, safe or other container, in which the inspector suspects any document relevant to the inspection is kept; or use any computer system or equipment on the premises or require reasonable assistance from any person on the premises to use that computer system to

- (i) access any data contained in or available to that computer system; and
- (ii) reproduce any document from that data.

Such an inspector may also examine or make extracts from or copy any document in the possession of an accountable institution, reporting institution or person or, against the issue of a receipt, remove that document temporarily for that purpose; and against the issue of a receipt, seize any document obtained, which in the opinion of the inspector may constitute evidence of non-compliance with a provision of this Act or any order, determination or directive made in terms of this Act.

In terms of subsection (7), no warrant is required for the purposes of an inspection in terms of section 45B.

Therefore, in South Africa the law enforcement authorities have no difficulty accessing banking and related financial information in the conduct of an investigation.

(b) Observations on the implementation of the article

113. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA reported that bank secrecy cannot be a bar to disclosure of financial records. Section 5 of the CPA allows for that type of disclosure.

Article 31 Freezing, seizure and confiscation

Paragraph 8

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

114. The POCA provides for such practice.

Texts

Section 22 of the POCA and Section 23 of the PRECCA

In confiscation matters the prosecution can make use of section 22 of the POCA presumptions in terms of which in appropriate cases there is a duty to rebut personal knowledge of the origin of the property.

Furthermore, section 23 of the PRECCA provides for such a further measure. In terms of section 23(1), the National Director, or any person authorised in writing thereto by him or her may apply to a judge in chambers for the issuing of an investigation direction in terms of section 23(3). A judge in chambers may upon an ex parte application made to him or her in terms of subsection (1), issue an investigation direction. The judge must be satisfied that, among others, a person maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets or that the person is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets and that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

If an investigation direction has been so issued, “the National Director or the person authorised thereto in the investigation direction, may, for the purposes of an investigation direction

- (a) summon the suspect or any other person, specified in the investigation direction, who is believed to be able to furnish any information on the subject of the investigation or to have in his or her possession or under his or her control any property, book, document or other object relating to that subject, to appear before the National Director or the

- person so authorised, at a time and place specified in the summons, to be questioned or to produce that property, book, document or other object;
- (b) question that suspect or other person, under oath or affirmation administered by the National Director or the person so authorised, and examine or retain for further examination or for safe custody such property, book, document or other object; or
 - (c) at any reasonable time and without prior notice or with such notice as he or she may deem appropriate, enter any premises where the suspect is or is suspected to be or any premises on or in which anything connected with that investigation is or is suspected to be, and may
 - (i) inspect and search those premises, and there make such enquiries as he or she may deem necessary;
 - (ii) examine any property found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from the suspect or the owner or person in charge of the premises or from any person in whose possession or charge that property is, information regarding that property;
 - (iii) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the investigation in question, and request from any person suspected of having the necessary information, an explanation of any entry therein; or
 - (iv) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the investigation in question, or if he or she wishes to retain it for further examination or for safe custody: Provided that any person from whom a book or document has been taken under paragraph (b) or (c) (iv), may, as long as it is in the possession of the person conducting the investigation, at his or her request be allowed, at his or her own expense and under the supervision of the person conducting the investigation, to make copies thereof or to take extracts therefrom at any reasonable time".

In terms of section 23(7), it is an offence if any person

"(a) obstructs or hinders the person conducting the investigation or any other person in the performance of his or her functions in terms of this section; or

(b) when he or she is asked in terms of subsection (4) for information or an explanation relating to a matter within his or her knowledge, refuses or fails to give that information or explanation or gives information or an explanation which is false or misleading, knowing it to be false or misleading,".

(b) Observations on the implementation of the article

115. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA addresses illicit enrichment via the mechanism described above under Article 20 of the Convention.

Article 31 Freezing, seizure and confiscation

Paragraph 9

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

(a) Summary of information relevant to reviewing the implementation of the article

116. The RSA considers itself in compliance with this provision.

Texts

Sections 20(5), 24(4), 30(3), 39(3), 53(3) and 54(1) of the POCA

In respect of any order that a court may make in terms of the provisions of the POCA, the right of any person who has an interest in the property concerned is recognized, and such a person must be afforded the opportunity to make representations before the order is made. See, for example, **sections 20(5), 24(4), 30(3), 39(3), 53(3) and 54(1) of the POCA**.

(b) Observations on the implementation of the article

117. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 31 Freezing, seizure and confiscation

Paragraph 10

10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 32: Protection of witnesses, experts and victims

Paragraph 1

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

(a) Summary of information relevant to reviewing the implementation of the article

118. The RSA considers itself in compliance with this provision.

Texts

Section 7 of the Witness Protection Act, 1998 (Act No. 112 of 1998), Section 18 of the PRECCA, and Protected Disclosures Act, 2000 (Act No. 26 of 2000)

Witness protection is provided under the Witness Protection Act 1998 (Act No. 112 of 1998) (WPA). The WPA does not place a restriction on the type of offences that may justify witness protection, and could therefore protect witnesses in the context of corruption proceedings. Section 7 of the WPA provides that a witness “who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness” may make an application for protection to law enforcement officials or other designated bodies under the Act. The WPA also makes provision for, inter alia, the establishment of a designated Office for the Protection of Witnesses; the functions, powers and duties of the Director for Witness Protection; the temporary protection of witnesses pending placement under protection; the placement of witnesses and related persons under

protection; services related to the protection of witnesses and related persons, and; witness services at courts.

Further, section 18 of the PRECCA provides as follows:

“Any person who, directly or indirectly, intimidates or uses physical force, or improperly persuades or coerces another person with the intent to

- (a) influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or*
- (b) cause or induce any person to*
 - (i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;*
 - (ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings;*
 - (iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings;*
 - (i) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;*
 - (ii) give or withhold information relating to or contained in a police docket;*
 - (iii) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings;*
or
 - (vii) be absent from such trial, hearing or other proceedings,*
is guilty of the offence of unacceptable conduct relating to a witness”.

Finally, the Protected Disclosures Act 2000 (Act No. 26 of 2000) (PDA or ‘Act’) provides protection for both public and private sector whistleblowers. The Act sets out procedures by which public and private sector employees may disclose information concerning unlawful or irregular conduct by an employer or an employee of that employer. The Act prohibits an employer from subjecting an employee to “occupational detriment” on account of having made a protected disclosure. The PDA defines “disclosure” as including “any information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show... that a criminal offence has been committed, is being committed or is likely to be committed.” The definition also includes information that shows or tends to show that such conduct “has been, is being or is likely to be deliberately concealed.” The disclosure of information concerning the act of corruption - being a criminal offence - would therefore be covered by the PDA. The Act protects whistleblowers from being subjected to “occupational detriment” which includes, inter alia, any disciplinary action; dismissal, suspension, demotion, harassment or intimidation; being transferred against his or her will; being refused a transfer or promotion or being threatened with any of such actions.

(b) Observations on the implementation of the article

119. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA reported that 13 persons (witnesses and related persons) are currently under witness protection for corruption-related cases. During the country visit, the RSA clarified that experts are considered to be witnesses under the legislation of the RSA. The relevant provision is set forth below:

Section 1 of the Witness Protection Act, No. 112 of 1998 defines a '**witness**' as any person who is or may be required to give evidence, or who has given evidence in any proceedings.

Proceedings are defined as: any-

- (a) criminal proceedings in respect of any offence referred to in the Schedule to this Act;
- (b) proceedings before a commission or a Tribunal;
- (c) proceedings under the Inquest Act, No. 58 of 1959;
- (d) proceedings relating to an investigation conducted by the Complaints Directorate; or
- (e) proceedings referred to in Chapters 5 and 6 of the Prevention of Organized Crime Act, 1998.

Accordingly, where an expert is a witness in a case in any proceedings, such expert is regarded as a witness for purposes of witness protection and s/he and/or related persons may, upon request, be placed on the witness protection programme.

Article 32 Protection of witnesses, experts and victims

Subparagraph 2 (a)

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(a) Summary of information relevant to reviewing the implementation of the article

120. The RSA considers itself in compliance with this provision.

Texts

Sections 1(1), 8, 10, 11 and 18 of the Witness Protection Act, 1998

In terms of section 1(1) of the Witness Protection Act, 1998 (WPA), any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may report such belief to certain officers and apply in the prescribed manner that he or she or any related person be placed under protection.

If a witness is for any reason unable to make such a report or application, any interested person or the investigating officer concerned, may make such a report or application on behalf of the witness. An application for protection of a minor may be made by or on behalf of the minor without the consent of his or her parent or guardian.

The Director may, whenever he or she deems it necessary, refer an application for protection submitted to him or her, to a witness protection officer for evaluation and the submission of a report as contemplated in section 9(1).

In terms of section 8 of the WPA, the Director or a witness protection officer may, pending the finalisation of an application for the protection of a witness or related person, place the witness or related person concerned under temporary protection as prescribed for a period

not exceeding 14 days, if he or she deems it necessary for the safety of such witness or related person.

In terms of section 10(1) of the WPA, the Director must in respect of an application for protection have due regard to the report and recommendations of the witness protection officer concerned or if such an application has not been referred to a witness protection officer in terms of section 7(4), any written recommendations by the interested functionary concerned as to whether the person concerned should be placed under protection or not.

Section 11(1) of the WPA provides that the Director must, before he or she places any witness or related person under protection enter into a written protection agreement with such witness and, where applicable, enter into a separate written protection agreement with each related person, setting out the obligations of the Director and the witness or related person in respect of his or her placement under protection.

In terms of section 18 of the WPA the disclosure of information relating to protected persons may be prohibited and in terms of section 19 a protected person is not obliged to disclose certain information.

In terms of section 1(1) of the Witness Protection Act, 1998, “protection” means any protection in terms of the Act, excluding temporary protection as contemplated in section 8, and may include the relocation or change of identity of, or other related assistance or services provided to, a protected person, as prescribed.

Texts

Witness Protection Act, 1998:

Definitions

1. (1) In this Act, unless the context otherwise indicates—
- (i) “commission” means any commission of inquiry appointed in terms of an Act of Parliament; (xv) 5
 - (ii) “Complaints Directorate” means the Independent Complaints Directorate, established under section 50 of the South African Police Service Act, 1995 (Act No. 68 of 1995); (xiv)
 - (iii) “Constitution” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996); (xi) 10
 - (iv) “Department” means the Department of Justice; (v)
 - (v) “Director” means the Director: Office for Witness Protection, appointed in terms of section 3(1); (vi)
 - (vi) “Director-General” means the Director-General: Justice; (vii) 15
 - (vii) “Director of Public Prosecutions” means any Director of Public Prosecutions appointed under section 13(1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998); (viii)
 - (viii) “interested functionary” means—
 - (a) the Director of Public Prosecutions responsible for the institution and conducting of criminal proceedings in respect of any offence referred to in the Schedule to this Act, in respect of which a witness is or may be required to give evidence or has given evidence on behalf of the State; 20
 - (b) any person designated thereto in writing by—
 - (i) the chairperson of a commission or the person presiding at proceedings before a commission; 25
 - (ii) the person presiding at proceedings before a Tribunal;
 - (iii) the judicial officer presiding at inquest proceedings under the Inquests Act, 1959 (Act No. 58 of 1959); or

Temporary protection

8. (1) The Director or a witness protection officer— 20
- (a) to whom a report referred to in section 7(1) has been made;
 - (b) who has been informed of an application for protection or to whom a written application for protection has been submitted as contemplated in section 7(3)(b); or
 - (c) if he or she is aware that a report or an application referred to in section 7 is 25 to be made,
- may, pending the finalisation of an application for the protection of a witness or related person, place the witness or related person concerned under temporary protection as prescribed for a period not exceeding 14 days, if he or she deems it necessary for the safety of such witness or related person: Provided that— 30
- (i) if a report or an application has been made as contemplated in section 7(2)(a), the witness or related person may only be placed under temporary protection if he or she has consented thereto; and
 - (ii) no minor shall be placed under temporary protection without the consent of 35 his or her parent or guardian,
- unless the Director is of the opinion that exceptional circumstances exist which do not warrant such consent.
- (2) If a witness protection officer places a witness or related person under temporary protection as contemplated in subsection (1), he or she must report such placement within 48 hours to the Director. 40

Consideration of application for protection

10. (1) The Director must in respect of an application for protection have due regard to the report and recommendations of the witness protection officer concerned, or if such an application has not been referred to a witness protection officer in terms of section 10 7(4), any written recommendations by the interested functionary concerned as to whether the person concerned should be placed under protection or not and must also take into account—
- (a) the nature and extent of the risk to the safety of the witness or any related person; 15
 - (b) any danger that the interests of the community might be affected if the witness or any related person is not placed under protection;
 - (c) the nature of the proceedings in which the witness has given evidence or is or may be required to give evidence, as the case may be;
 - (d) the importance, relevance and nature of the evidence given or to be given by 20 the witness in the proceedings concerned;
 - (e) the probability that the witness or any related person will be able to adjust to protection, having regard to the personal characteristics, circumstances and family or other relationships of the witness or related person;
 - (f) the cost likely to be involved in the protection of the witness or any related 25 person;
 - (g) the availability of any other means of protecting the witness or any related person without invoking the provisions of this Act; and
 - (h) any other factor that the Director deems relevant.

Protection agreement

11. (1) Subject to subsection (2), the Director must, before he or she places any 45 witness or related person under protection—
- (a) enter into a written protection agreement with such witness; and
 - (b) where applicable, enter into a separate written protection agreement with each related person,
- setting out the obligations of the Director and the witness or related person in respect of 50 his or her placement under protection.

18. Notwithstanding any other law, the presiding officer—

- (a) at any proceedings or at civil proceedings in which the protected person is a party or a witness; or
 - (b) at proceedings, other than the proceedings referred to in the definition of "proceedings" in section 1, instituted or conducted in terms of any law, in which the protected person is a party or a witness and in respect of which he or she is in terms of any law compellable to answer questions or to give evidence or to produce any book, record, document or object in his or her possession or under his or her control in such proceedings,
- must make an order prohibiting the publication of any information, including any drawing, picture, illustration, painting, photograph, whether produced through or by means of computer software on a screen or a computer print-out as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or not, pamphlet, poster or other printed matter, which may disclose—
- (i) the place of safety or location where he or she is or has been under protection or where he or she has been relocated in terms of this Act;
 - (ii) the circumstances relating to his or her protection;

- (iii) the identity of any other protected person and the place of safety or location where such person is being protected; or
 - (iv) the relocation or change of identity of a protected person.
- unless the Director satisfies the presiding officer concerned that exceptional circumstances, which are in the interest of justice, exist why such an order should not be made.

153. Circumstances in which criminal proceedings shall not take place in open court.—(1) If it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the

public or any class thereof shall not be present at such proceedings or any part thereof.

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct—

- (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;
- (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit—

- (a) any indecent act towards or in connection with any other person;
- (b) any act for the purpose of procuring or furthering the commission of an indecent act towards or in connection with any other person; or
- (c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage.

the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person *in loco parentis*, requests otherwise.

[Sub-s. (3A) inserted by s. 2 of Act No. 103 of 1987.]

(b) Observations on the implementation of the article

121. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 32 Protection of witnesses, experts and victims

Subparagraph 2 (b)

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

(a) Summary of information relevant to reviewing the implementation of the article

122. The RSA considers itself in compliance with this provision.

Texts

Section 153 of the Criminal Procedure Act, 1977:

Section 153(1) of the CPA provides if it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.

In terms of section 153(2) of the CPA, if it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct

- (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;
- (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

Section 153(3) of the CPA provides, among others, in criminal proceedings relating to a charge that the accused committed or attempted to commit extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage, the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(b) Observations on the implementation of the article

123. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. During the country visit, it was clarified that video testimony is possible under the laws and procedures in place in the RSA, although additional measures may be helpful to facilitate video testimony of a witness in detention facilities or safe houses to avoid having to transport that person to the court.

Section 158 of the Criminal Procedure Act, No. 51 of 1977 provides for the giving of testimony by means of electronic media.

- (1) Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.
- (2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.
- (b) A court may make a similar order on the application of an accused or a witness.

Article 32 Protection of witnesses, experts and victims

Paragraph 3

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

124. The RSA considers itself in compliance with this provision.

Text

Section 21(1) of the Witness Protection Act, 1998:

In terms of **section 21(1)** of the WPA, the Minister of Justice may enter into an agreement, either in general or on specific terms and conditions with any international body, institution, organisation or foreign country in order to place a person who is being protected under a witness protection programme administered by that body, institution, organisation or country under protection in terms of this Act or admit a protected person to a witness protection programme in terms of any law applicable to that body, institution or organisation or in that country.

A person may only be placed under such protection with the consent of the Minister.

(b) Observations on the implementation of the article

125. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It is possible for the Department of Justice to provide for such relocation on an ad hoc basis, although in the last 10 years, there have been no examples of this occurring in practice. Such relocation did occur during the time of the Truth and Reconciliation Commission through a mechanism via the Department of Justice. The reviewing experts would recommend that the RSA continue to explore the possibility of incorporating relevant provisions regarding relocation into general bilateral and multilateral agreements regarding mutual legal assistance.

Article 32 Protection of witnesses, experts and victims

Paragraph 4

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

(a) Summary of information relevant to reviewing the implementation of the article

126. The RSA considers itself in compliance with this provision.

See responses in respect of subparagraphs 1 to 3 above.

See the responses in respect of subparagraphs 1 to 3 above. The South African legislation applies to any "**witness**". In terms of section 1 of the WPA, "witness" is defined to include any person who is or may be required to give evidence or who has given evidence in any proceedings.

(b) Observations on the implementation of the article

127. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. All victims are considered to be potential witnesses, and thus subject to protection.

Article 32 Protection of witnesses, experts and victims

Paragraph 5

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

(a) Summary of information relevant to reviewing the implementation of the article

128. The RSA considers itself in compliance with this provision.

Texts

Section 179(5)(d) of the Constitution, 1996 and Section 105A(1)(b), 299A(1) and 342A of the CPA

The South African Law contains various provisions protecting the interest of victims. The following are examples:

- In terms of section 179(5)(d) of the Constitution the National Director of Public Prosecutions may review the decision to prosecute or not to prosecute. He may only do so after having consulted with the Director concerned and after taking representation from the accused person and the complainant (victim) or any other person the National Director considers to be relevant.
- In terms of section 342A of the CPA a court must, in considering whether there is a unreasonable delay in the trial, among, others, take into account the adverse effect on the interests of the public or the victim in the event of the prosecution being stopped on discontinued.
- In terms of section 105A(1)(b) of the CPA, the prosecutor may only enter into a plea and sentence agreement after consultation, among others, with the investigating officer and after having afforded the complainant the opportunity to make representations.
- In terms of section 299A(1) of the CPA a complainant has the right to make representations in certain matters with regard to the placement of a convicted person on parole.

(b) Observations on the implementation of the article

129. The reviewing experts observed that the RSA was in compliance with this provision of the Convention. It was clarified during the country visit that although the victim does not have a right per se to address the court, the prosecutor will often consult with the victim or witness on any potential plea agreement. It is in the prosecutor's discretion whether to call a victim to make a statement at the time of sentencing. This can also take the

form of a written statement. It was noted that the victim's concerns and interests would also be taken into account in decisions regarding pre-trial release and post-conviction parole.

Article 33 Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

130. The RSA considers itself in compliance with this article.

Text

Protected Disclosures Act, 2000 (Act No. 26 of 2000)

The Protected Disclosures Act, 2000 (Act No. 26 of 2000) (PDA or 'Act') provides protection for both public and private sector whistleblowers. The Act sets out procedures by which public and private sector employees may disclose information concerning unlawful or irregular conduct by an employer or an employee of that employer. The Act prohibits an employer from subjecting an employee to "occupational detriment" on account of having made a protected disclosure.

The PDA defines "disclosure" as including "any information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show... that a criminal offence has been committed, is being committed or is likely to be committed." The definition also includes information that shows or tends to show that such conduct "has been, is being or is likely to be deliberately concealed."

The disclosure of information concerning the act of corruption - being a criminal offence - would therefore be covered by the PDA. The Act protects whistleblowers from being subjected to "occupational detriment" which includes, inter alia, any disciplinary action; dismissal, suspension, demotion, harassment or intimidation; being transferred against his or her will; being refused a transfer or promotion or being threatened with any of such actions. The Act defines "employee" as any person "who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer."

Various South African companies have implemented specific measures to encourage whistleblowing, including through the establishment of internal hotlines, many of which are monitored by third parties.

Civil society has also been active in promoting whistleblowing and the establishment of whistleblower protection mechanisms. In this regard work has been undertaken in conjunction with the National Anti-Corruption Forum (NACF) to raise awareness of whistleblower protection through the dissemination of awareness-raising materials, including the provision of policy packs to businesses on implementation of the PDA. Approximately 25 per cent of businesses listed on the Johannesburg Stock Exchange have whistleblower policies in place.

A number of government departments have also implemented measures for whistleblowing and are prepared to direct employees to internal helplines.

The extension of the PDA to cover independent contractors has been the subject of investigation by the South African Law Reform Commission, which produced a report that recommends the strengthening of the PDA.

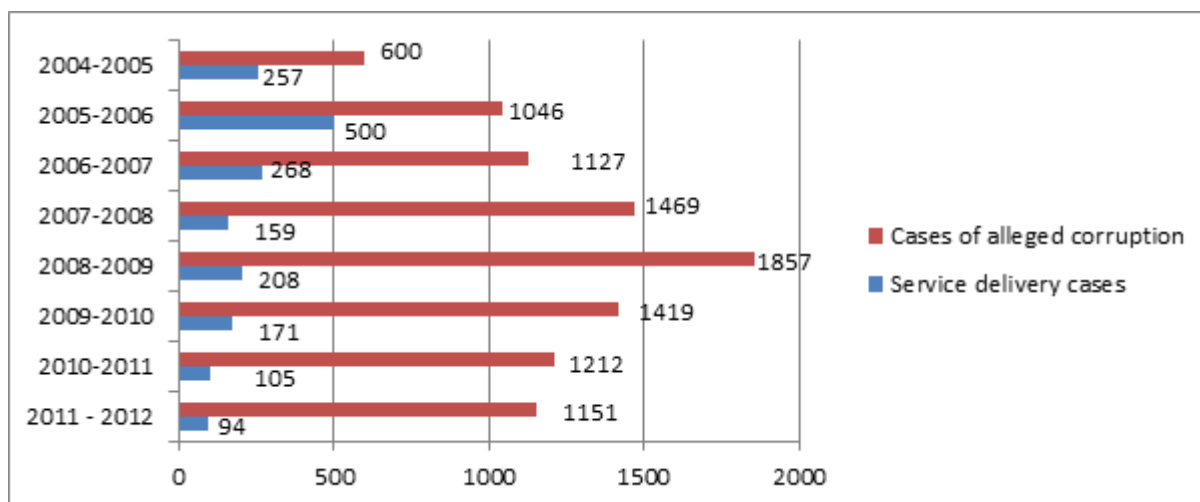
There is also a proposed amendment to the Companies Act, 2008 that would increase protection for private sector whistleblowers and apply to a wider range of persons who are not employees.

Statistics of the National Anti-Corruption Hotline:

Total calls: **137,512** (These includes abusive calls, wrong numbers, test calls, drop calls etc).

Reports generated by the Service Provider **14,300** and uploaded on the case management system (These are all reports generated and the allegations thereto were assessed for further investigation, to check whether they have full details, frivolous, outside mandate of the Public Service, etc).

10,700 cases were referred to Departments as at 31 August 2012 for further investigation.



The total number of **calls** received by the NACH for the period 01 September 2004 to 31 March 2012 is **137,512**. Out of the 137 512 calls, the total case reports of alleged corruption generated were **14,287** and service delivery case reports generated were **1,762**. The cases of alleged corruption and service delivery complaints have been referred to the respective national and provincial departments, and public entities for further investigation. A breakdown of cases registered on the CMS of the NACH over the years is shown at **Figure 1** below. Out of the **14,287** case reports, **9,881** cases were referred to departments or law enforcement agencies for investigation. These are the cases where after analysis, there was a need for further investigation.

Figure 1 above shows that the total number of cases of alleged corruption reported to the NACH for the 2011/2012 financial year (**1,151**) is the fifth highest since the inception of the NACH. The highest number of cases reported was in the 2008/09 financial year (**1,857**). **Figure 1** also shows that there has been a steady decline in the total number of cases

reported to the NACH over the last three financial years. The decline in the total number of cases reported to the NACH is attributed to the fact that members of public may or are inclined to report cases of alleged corruption. It was also noted that certain members of the public report cases of alleged corruption to the Presidential Hotline and other reporting mechanism. In an effort to create awareness on reporting corruption to the NACH, the PSC embarked on workshops and publicity programme, which included both print and electronic media.

(b) Observations on the implementation of the article

131. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was clarified during the country visit that the DPSC anti-corruption component works closely with the Witness Protection Office to determine when a whistleblower might become a witness or potential witness subject to protection. Under the PDA, a whistleblower's identity is protected unless they have to testify. With regard to false reporting, it was noted that providing false information generally, under oath, can be subject to prosecution for perjury or civil liability if the act was committed maliciously.

Article 34 Consequences of acts of corruption

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

(a) Summary of information relevant to reviewing the implementation of the article

132. The RSA considers itself in compliance with this article.

Text

Section 28 of the PRECCA

Where an offence also constitutes an offence under section 12 (offences in respect of corrupt activities relating to contracts) or section 13 (offences in respect of corrupt activities relating to the procuring and withdrawal of tenders) of the PRECCA, the Court may also issue an order to the effect that details of the conviction of the natural or legal person are endorsed on a Register for Tender Defaulters, as provided under section 28 of the PRECCA. The natural or legal person thus endorsed must make this endorsement known in any subsequent agreement or tender with the State. The Court may further order that this be accompanied by termination of any ongoing agreement with the National Treasury. The National Treasury is also responsible for determining the length of time, necessarily between five and ten years, during which the person or enterprise is barred from entering into any public contract.

(b) Observations on the implementation of the article

133. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 35 Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

(a) Summary of information relevant to reviewing the implementation of the article

134. The RSA considers itself in compliance with this article.

Text

Section 300(1) of the CPA

Section 300(1) of the CPA provides that where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss.

For the purposes of determining the amount of the compensation or the liability of the convicted person therefore, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally (**section 300(2)**).

An award made under section 300 shall have the effect of a civil judgment of the magistrates of the district in which the relevant trial took place **section 300(3)**.

Apart from the above compensation, an interested person may also institute civil proceedings to recover the damage or loss of property.

(b) Observations on the implementation of the article

135. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Regarding the potential for civil proceedings, it was clarified during the country visit that such actions may be instituted by the plaintiff in an independent action in a civil court based on contract or delict/tort law. The matter is not dependent on a conviction in a criminal case, although it would certainly help the plaintiff in prevailing in the civil matter. The acquittal of a person in a criminal case does not immunize that person from potential civil liability.

Article 36 Specialized authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

(a) Summary of information relevant to reviewing the implementation of the article

136. The RSA considers itself in compliance with this article.

Prior to July 2009, the Directorate for Special Operations (Scorpions) was a specialised Unit investigating, among others, corruption cases. With effect from July 2009, the Scorpions were disbanded and replaced by the Directorate of Priority Crime Investigation (DPCI).

As a result of the Constitutional Court (CC) judgement (Hugh Glenister vs President of the Republic of South Africa & Others), the SAPS Amendment Act, 2012 (No. 10 of 2012) was put into operation on 14 September 2012. This impacted on the position of the DPCI.

The majority of the CC found that Chapter 6A of the South Africa Police Services Act, 1995 (Act 68 of 1995), was inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the DPCI. The CC made the following two key findings:

- (a) In the first instance the CC found that the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. While the Constitution does not in express terms command that a corruption-fighting unit should be established, its scheme taken as a whole imposes a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption. This obligation is sourced in the Constitution and the international law agreements which are binding on the state. The Court points out that corruption undermines the rights in the Bill of Rights, and imperils our democracy. Section 7(2) of the Constitution imposes a duty on the state to “respect, protect, promote and fulfil” the rights in the Bill of Rights. When read with section 8(1) (which provides that the rights in the Bill of Rights bind all branches of government), section 39(1)(b) (which provides that Courts must consider international law when interpreting the Bill of Rights) and section 231 (which provides that an international agreement that Parliament approves “binds the Republic”), this provision places an obligation on the state to create an independent corruption-fighting unit. A number of international agreements on combating corruption have been approved by Parliament and are binding on the Republic. These agreements require that states create independent anti-corruption entities. Implicit in section 7(2) of the Constitution is the obligation that the steps the state must take to protect and fulfil constitutional rights, must be reasonable. To create an anti-corruption unit that is not adequately independent, thereby ignoring binding international law, is not a reasonable constitutional measure.
- (b) Secondly, the Court found that the DPCI does not meet the constitutional requirement of adequate independence. Consequently the impugned legislation does not pass constitutional muster. The main reason for this conclusion is that the DPCI is insufficiently insulated from political influence in its structure and functioning. This is because the DPCI’s activities must be coordinated by Cabinet. The relevant Act provides that a Ministerial Committee may determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences. This form of oversight makes the DPCI vulnerable to political interference. Further, the CC holds that the safeguards that the provisions create are inadequate to save the DPCI from a significant risk of political influence and interference. In addition, the conditions of service of the unit’s members and in particular those applying to its head make it insufficiently independent. Members of the DPCI thus have inadequate employment security to carry out their duties vigorously; the appointment of members is not sufficiently shielded from political influence; and remuneration levels are flexible and not secured. These aspects make the unit vulnerable to an undue measure of political influence.

In view of the above, the CC declared the offending legislative provisions establishing the DPCI constitutionally invalid to the extent that they do not secure adequate independence.

The CC consequently suspended the declaration of constitutional invalidity for a period of 18 months so as to give Parliament the opportunity to remedy the defect.

Both the majority and the minority judgments further concluded that the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit solely within the National Prosecuting Authority and nowhere else.

Soon after the judgement, the Minister of Police appointed a Task Team consisting of members of the South African Police and the Secretariat of the Police, to study and consider the judgement and prepare draft legislation to comply with the principles set out in the judgement with a view to submit same to Cabinet and Parliament for consideration.

Soon after the January 2010 Cabinet Lekgotla (a meeting called by government to discuss strategy planning), the President established the Inter-Ministerial Committee of Anti-Corruption. Furthermore, in July 2010, the President mandated the JCPS Cluster to create an Anti-Corruption Task Team (ACTT), to fast track the investigation and prosecutions of cases of corruption.

The process of establishing the ACTT has been informed by the need to institutionalise a more collaborative way for the Police and the prosecuting authority to work with each other in the combat, prevention, investigation and prosecution of priority crime and in particular corruption cases. Therefore, the purpose of the ACTT is to provide for the better co-ordination of governmental functions within the JCPS Cluster, with the aim of reducing corruption in South Africa.

The primary mandate of the ACTT is to expedite the effective investigation and prosecution of priority corruption cases. The secondary mandate of the ACTT is to work together with other government departments and initiatives to strengthen governance systems, reduce risks and to prevent the incidence of corruption.

The execution of the ACTT mandate is the responsibility of a Principal Committee, comprising of

- (a) the Head of the DPCI, who is also the Chairperson of the Principal Committee.
- (b) the National Director of Public Prosecutions;
- (c) the Head of the Special Investigating Unit (SIU); and
- (d) representatives from any of the secondary member institutions that wish to nominate a representative.

The Principal Committee will seek to take all decisions on a consensus basis. The Principal Committee will be supported in the performance of its responsibilities by a Management Committee (Manco), consisting of representatives of the DPCI, the SCCU of the NPA, the Asset Forfeiture Unit of the NPA, the SIU, the Office of the Accountant-General, the South African Revenue Service, and the Financial Intelligence Centre.

The ACTT is a specialised Unit and all members designated to the ACTT are driven by the values enshrined in the Constitution and will be required to

- (a) exhibit the highest form of personal and professional integrity;
- (b) exhibit inter-agency co-operation and teamwork, based on mutual respect;
- (c) seek to obtain consensus and deliberations will take place in the spirit of a multi-agency project with a single purpose, mandate and set of objectives.

The Principal Committee must develop policies and operating procedures, which must at least deal with the following

- (a) an objective case assessment procedure to govern the manner in which individual cases come to be investigated by members of the ACTT;

- (b) an integrated and multi-disciplinary methodology to be employed by the ACTT;
- (c) security and integrity management;
- (d) the nature and frequency of reporting within and by the ACTT.

The ACTT is different to the DPCI. The ACTT will only deal with specific cases of corruption. These cases include corruption cases involving specific amounts (i.e. at least R5 million); tender cases; corruption of foreign public officials; corruption involving procurement agreements in the public sector.

While the bulk of operations are conducted from Pretoria and will be centrally managed, a certain component will be located in the regions, namely, Kwazulu-Natal, the Western Cape and the Eastern Cape. Premises to co-locate the above operational capacity have been secured and already occupied in Pretoria.

(b) Observations on the implementation of the article

137. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was noted that the ACTT described above was established by the President to focus on high-priority and high-profile corruption cases. Its original goal was to prosecute more than 100 persons with a value of more than 5 million rand by March of 2014. The target has since been revised down in terms of value. The purpose of the ACTT is to fast-track the investigation and prosecution of corruption cases. Membership includes the DPCI, NPA, Special Investigations Unit (SIU), FIC, SARS, and others. The ACTT's operational team is headed by the chief of the DPCI's commercial crime unit. The ACTT Secretariat is responsible for coordination, headed by SAPS.

In terms of results, there has been mixed success. By 31 March 2012, the ACTT had been operational for 20 months. 22 persons were in court accused and 34 others were under investigation. In addition, 541 million rand had been frozen and 61 million rand had been forfeited. The ACTT faces a very high workload and challenges including the absence of a shared database between the NPA and the police, the complexity of the cases under investigation, and the broad mandate regarding both investigation and the prevention of corruption. It was noted that the first conviction was recently achieved.

New legislation strengthening the independence of the DPCI was approved and put into implementation in September 2012. A member of the DPCI can now go directly to the court to report any undue political influence in the investigation of corruption cases. In addition, while the DPCI remains a directorate within the police, it now operates independent of the National Commissioner with its own budget and appointment of its members. The head of the DPCI reports directly to the Minister of Police. Members of the DPCI are subject to strict integrity rules and procedures, which may include regular integrity testing, drug testing and polygraph tests.

During the country visit, the RSA reported the following additional information:

The Directorate for Priority Crime Investigation within the South African Police Service is responsible for the investigation of serious corruption. This includes offences committed under the PRECCA and in particular section 5 of the Act. In terms of section 17F of the SAPS Act personnel from other Government Departments or institution can be seconded which may include personnel from the South African Revenue Services, the Financial Intelligence Centre and the Department of Home Affairs. A person so seconded shall in the performance of his her functions act in terms of the laws applicable to the Government Department or institution from which he or she is

seconded, subject to conditions as may be agreed upon by the National Commissioner and the relevant Director-Generals or the Head of the Government Institution.

Members of the South African Police Service also serve on several forums with different entities/institutions and government departments where operational matters such as methods, techniques and trends of crime are discussed. One-on-one meetings also take place frequently. These interagency meetings include among others, with the following entities/departments:

- The South African Reserve Bank in respect of the transfer of money in and out of the country:
- The South African Revenue Services in respect of the non- declaration of funds
- The National prosecuting authority consisting of the Prosecutors, the Courts, the Asset Forfeiture Unit, and the Director of Public Prosecutions in respect of investigations, prosecutions and asset recovery.

Article 37 Cooperation with law enforcement authorities

Paragraph 1

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

138. The RSA considers itself in compliance with the provisions of Article 37 paragraph 1.

Text

Section 204(1) of the Criminal Procedure Act, 1977

In terms of section 204(1) of the CPA, the prosecutor may at criminal proceedings inform the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence. Thereupon the Court shall inform such witness that, among others, he or she is obliged to give evidence at the proceedings in question and; that he or she will be obliged to answer any question put to him or her; and that if he or she answers frankly and honestly all questions put to him or her, he or she shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified. Section 204(2) provides that if such witness answers frankly and honestly all questions put to him or her, he or she shall be discharged from prosecution for the offence so specified.

Subject to directives issued by the National Director, authorised prosecutors may enter into plea and sentence agreements with an accused person in terms of section 105A of the CPA. After the finalisation of the case, the accused person may be used as a witness against co-perpetrators.

(b) Observations on the implementation of the article

139. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was clarified during the country visit, that beneficial treatment is possible for an offender who provides information to a criminal investigation. Although there are no provisions for the granting of immunity from criminal prosecution, options include becoming a witness for the prosecution as a co-perpetrator or accomplice, subject to discharge from prosecution under section 204 of the Criminal Procedure Act. In addition, such cooperation by an accused could be reflected in a plea agreement to a reduced sentence under section 105A of the CPA. Finally, a prosecutor could decide not to file charges in a particular case in exchange for substantial cooperation and testimony in other criminal proceedings.

Article 37 Cooperation with law enforcement authorities

Paragraph 2

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

140. The RSA considers itself in compliance with the provisions of Article 37 paragraph 2.

Texts

See the response in respect of paragraph 1 supra. South African courts also take the cooperation of an accused person into account.

For example, in *De Sousa v S* [2009] 1 All SA 26 (SCA) the Supreme Court of Appeal took the following circumstances into account:

- The accused immediately undertook to repay the money, signed an acknowledgment of indebtedness and in fact has since repaid that amount to the complainant in full.
- Even before she came to be sentenced, she had furnished the investigating officer with a statement detailing her involvement as well the involvement of her boyfriend in the fraudulent scheme.
- Furthermore, it was evident that the investigating officer, who testified on her behalf during trial, was very well disposed towards her. The same could also be said of the complainant. It was thus abundantly clear that she has shown genuine remorse for what she has done.

In these circumstances the sentence of seven and half years' imprisonment was set aside and a sentence of four years' imprisonment substituted in its stead.

(b) Observations on the implementation of the article

141. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. With regard to mitigation of punishment, the RSA provided the following supplemental response during the country visit:

A clear distinction must be drawn between a witness (cooperating accused who agreed to testify against his former co-accused) who had been discharged from being prosecuted and an accused who had provided substantial information that led to solving the crime and arresting other accused persons. In the case of the section 204-witness, s/he is discharged from prosecution and may not be charged, whereas the cooperation by an accused surely will be taken into account as a mitigating factor by the court. Since this is a general principle of sentencing there are no guidelines or other criteria in this regard – every case will be dealt with on its own merit. This may be a typical example of a plea agreement in terms of which a sentence will be agreed to by the prosecutor and the defence counsel which needs to be confirmed and made an order of court by the judge.

Article 37 Cooperation with law enforcement authorities

Paragraph 3

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

142. See responses in respect of paragraph 1 supra.

(b) Observations on the implementation of the article

143. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was noted that under the law of the RSA, a person can initiate a private prosecution in matters not taken forward by the State. This has not occurred in a corruption cases to date, however. With regard to the assessment of the degree of cooperation, the RSA provided the following supplemental response during the country visit:

The independence of the prosecuting authority is protected by the Constitution. The views of the investigating officer regarding granting immunity to an accused will therefore be a consideration after the prosecutor has considered all other evidence as well as the interests of justice. The degree of cooperation will obviously play a role – if, for instance, the kingpin was traced and arrested because of the information disclosed by the cooperating accused, chances are that he would be a witness against such kingpin, in which case he will probably become a sec. 204 witness. A prosecutor may decide to withdraw charges against a cooperating accused and thus grant immunity against prosecution. This will not, however, prevent the institution of a private prosecution by a disgruntled victim or complainant. Secondly, the prosecution could withdraw charges against the cooperating accused and use him as a sec. 204-witness and after he had testified to the satisfaction of the court, he may be discharged from prosecution by the court. Thirdly, such cooperating accused may plead guilty and enter into a sentencing agreement in which the mitigation is clearly evident.

It is therefore a prosecutorial decision whether or not to prosecute or withdraw charges. The hierarchy of command and control, however, ensures that a prosecutor takes a decision in accordance with the prosecution policy.

Article 37 Cooperation with law enforcement authorities

Paragraph 4

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

144. The RSA considers itself in compliance with the provisions of Article 37 paragraph 4.

Texts

Section 1(1) of the Witness Protection Act, 1998

In terms of **section 1(1)** of the Witness Protection Act, 1998 (WPA), **any witness** who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may report such belief to certain officers and apply in the prescribed manner that he or she or any related person be placed under protection.

As indicated above, the WPA applies to "any witness". In terms of section 1 of the WPA, "witness" is defined to include any person who is or may be required to give evidence or who has given evidence in any proceedings. Therefore, a co-accused who must testify on behalf of the State also qualifies for witness protection.

(b) Observations on the implementation of the article

145. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. A cooperating accused who becomes a potential witness is subject to the same potential protection measures as any other witness in a criminal case. Such protection measures may be applied even prior to charges having been withdrawn against the cooperating accused or where the person intends to enter into a sentencing agreement with the prosecution.

Article 37 Cooperation with law enforcement authorities

Paragraph 5

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

146. The RSA considers itself in compliance with the provisions of Article 37 paragraph 5.

Text

No specific legislation.

Such agreements may be concluded with other State Parties.

(b) Observations on the implementation of the article

147. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA reported that such cooperation is certainly possible, although there are no official agreements in this regard and no cases like this have arisen in the context of the Convention. From a prosecution perspective, it is immaterial whether the cooperating accused is from a foreign jurisdiction. The same sentencing criteria and guidelines would apply.

Article 38 Cooperation between national authorities

Subparagraph (a)

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(a) Summary of information relevant to reviewing the implementation of the article

148. The RSA considers itself in compliance with the provisions of Article 38 subparagraph a.

Texts

**Sections 41 and 179 of the Constitution, 1996;
Section 22 of the NPA Act, 1998;
Section 18 of the South African Police Service Act, 1995; and
Prosecution Policy Directives issued in terms of section 179 of the Constitution, 1996**

In the first instance section 41 of the Constitution sets the principles of co-operative government and intergovernmental relations. In terms of subsection (1) all spheres of government and all organs of state must, among others, co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, consulting one another on matters of mutual interest and adhering to agreed procedures.

Paragraph 8 of the Policy Directives of the National Prosecuting Authority issued in terms of section 179 of the Constitution and section 22 of the NPA Act, provides among others as follows:

“Effective cooperation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it will less likely lead to a successful prosecution or result in a conviction.

The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The NPA is usually not involved in such decisions although it may be called upon to provide legal advice and policy guidance.

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.”

“With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close cooperation, with mutual respect for the distinct functions and operational independence of each profession.

Prosecutors should cooperate with other departments and agencies such as Correctional Service, Social Development, lawyers’ organisations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.”

Prosecutors are obliged to adhere to these directives. Non-compliance may lead to misconduct charges.

The South African Police Service has been mandated in terms of section 205 of the Constitution to prevent, combat and investigate crime. Furthermore, Parliament established the Directorate for Priority Crime Investigations to investigate and address serious organised crime, serious commercial crime and serious corruption that include, among others, corruption committed by foreign public officials (section 5 of PRECCA) and money laundering (sections 4, 5, 6 of POCA).

Section 18 of the South African Police Service Act, 1995 (Act 68 of 1995), makes provision for the establishment of community police forums and boards. The objectives of the forums and boards are to liaise with the community with a view to:

- (a) establish and maintain a partnership between the community and the Service;
- (b) promote communication between the Service and the community;
- (c) promote co-operation between the Service and the community in fulfilling the needs of the community regarding policing;
- (d) improve the rendering of police services to the community at national, provincial, area and local levels;
- (e) improve transparency in the Service and accountability of the Service to the community; and
- (f) promote joint problem identification and problem-solving by the Service and the community.

In terms of the South African Police Service Employment Regulations, 2008, published under Government Notice R973 in Government Gazette 31412 of 12 September 2008, there must be cooperation between employees of the South African Police Service and legislature, executive and public institutions, which are established under legislation and the Constitution, in order to promote public interest.

Good cooperation exists between the South African Police Service and the prosecuting authority in South Africa. Emerging from such a partnership between the South African Police Service, the National Prosecuting Authority, the Department of Justice and Business against Crime (BAC), Specialised Commercial Crime Courts were established in the major cities in South Africa. Cases of corruption will also be dealt with in these courts. What is important about the courts is the working relationships and procedural integration between the prosecutors attached to the courts and the investigating officers of SAPS, investigating the matters before the court.

(b) Observations on the implementation of the article

149. The reviewing experts observed that the RSA was in compliance with this provision of the Convention, in light of the supplemental response provided below during the country visit:

Reporting duties have been established regarding corruption and money laundering by section- 34 of PRECCA and Schedule 4 of FICA.

Examples of cooperation between law enforcement and the prosecution (and other state departments) are based on the following:

1. Interdepartmental cooperation and relations are governed and accordingly promoted by section 41(1)(h) of the Constitution.
2. Section 71 of the POCA provides that the National Director of Public Prosecutions may request any person employed by any government department or statutory body to furnish her or him with information that may be required for any investigation under the Act.
3. Section 252A of the CPA provides for prosecutorial oversight over undercover operations and traps. This entails very close cooperation between the prosecution and law enforcement.
4. The Regulation of Interception of Communications and Provision of Communication-related Information Act, No. 70 of 2002 (RICA) provides for the application for and issue of a judicial direction to intercept and monitor communications.
5. The Special Commercial Crimes Unit of the NPA has entered into an agreement with the DPCI (SAPS) regarding *inter alia* cooperation and training in an endeavour to more effectively address serious commercial crime, including PRECCA crimes. A copy of the agreement will be provided.
6. Section 17F of the Police Act, 1995 requires the NPA to have a dedicated capacity to assist the DPCI in its functions.

Article 38 Cooperation between national authorities

Subparagraph (b)

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(b) Providing, upon request, to the latter authorities all necessary information.

(a) Summary of information relevant to reviewing the implementation of the article

150. See the response provided in respect of Article 38 subparagraph a above.

(b) Observations on the implementation of the article

151. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. In addition to the information provided above, the the RSA police reported that cooperation is strong with prosecutors. Regarding the question to shared databases, the police reported that maintaining separate databases was necessary due to the difference in mandates. As long as the prosecutors and law enforcement officers are working closely together, this should satisfy the need to share critical, relevant information. It was noted that there is currently a project underway – the Integrated Justice System Programme – which would create an electronic digital platform to track cases from the beginning of the investigation through the entire criminal process, including post-conviction.

Article 38 Cooperation between national authorities

(Please include here only what was not mentioned in paragraphs (a) and (b).)

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

(a) Summary of information relevant to reviewing the implementation of the article

152. See information provided above.

Article 39 Cooperation between national authorities and the private sector

Paragraph 1

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

153. The RSA considers itself in compliance with the provisions of Article 39 paragraph 1.

Text

No specific legislation.

See the response in respect of paragraph 38 above.

A number of mechanisms exist to promote effective operational cooperation amongst the bodies combating money laundering and financing of terrorism.

A National Priority Committee on Commercial Crime under the Chairmanship of the South African Police Service with representatives from the Department of Justice and Constitutional Development, and the South African Banking Risk Information Centre meet on a monthly basis to identify threats, coordinate efforts to address and combat commercial crime.

A framework document exists between the National Prosecuting Service (NPA), the South African Police Service (SAPS) and the Asset Forfeiture Unit (AFU) to deal with organised crime, which includes money laundering. This document defines the level of co-ordination and co-operation between these structures. This operational co-operation exists at both a provincial and national level. A similar memorandum of understanding exists between the Specialised Commercial Crimes Unit, the SAPS and the AFU to deal with money laundering cases which are received from the SAPS Commercial Branch.

The Centre also plays a leading role in coordinating cooperation in relation to the Financial Intelligence Centre Act, 2001. Regular meetings and contact at various levels happen between the Centre and the various supervisors e.g. the South African Reserve Bank (SARB), the Financial Services Board (FSB), Estate Agency Affairs Board (EAAB), National Gambling Board (NGB), Independent Regulatory Board of Auditors (IRBA), Companies and Intellectual Property Registration Office (CIPRO), and Law Society of South Africa (LSSA). The FSB has entered into a MOU with the Centre to cooperate inter alia on matters relating to money laundering. The FSB is a member of the South African Regulators Forum where all regulators irrespective of the sector they regulate meet and discuss issues of mutual concern which include money laundering. The FSB has ongoing interaction with inter alia the Bank Supervision Department (BSD) in the SARB, the South African Revenue Services (SARS), the Competition Commission, the AFU, the Specialised Commercial Crimes Unit, the Centre and the Department of Trade and Industry.

(b) Observations on the implementation of the article

154. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA reported that agreements were in place with the Banking Council, the South African Banking Risk Information Centre (SABRIC), and the Business Against Crime, South Africa. In particular, the DPCI has a mechanism to facilitate cooperation with SABRIC in cases of corruption, money laundering, financial crimes and cybercrime. Regarding the prevention of corruption, there is currently in place a three-year programme of work between the government and business to promote integrity and counter corruption. The Financial Intelligence Centre Act, 2001 (referred to in the section on article 23 of the Convention above), governs cooperation with banks in the RSA.

Article 39 Cooperation between national authorities and the private sector

Paragraph 2

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

155. The RSA considers itself in compliance with the provisions of Article 39 paragraph 2.

Text

No specific legislation.

In South Africa, the Government has over the years made concerted efforts to deal with corruption in the Public Service. Key to such efforts was the establishment of the National Anti-Corruption Hotline (NACH) in 2004 which Cabinet mandated the Public Service Commission (PSC) to manage.

The NACH is a system designed to enable members of the public and public servants to report any form of corruption they happen to be aware or suspicious of in their respective areas. The NACH has, since its inception in 2004, registered 7922 cases of alleged corruption implicating national and provincial departments and public bodies. It is toll-free and operates 24 hours per day and seven days a week. While the public interfaces mainly with the call centre, the NACH has a broader infrastructure which contains various components. These components are elaborated in the document attached hereto.

South Africa does not offer financial incentives to encourage such reports.

The total number of calls received by the NACH for the period 01 September 2004 to 31 March 2011 is 122 601. Out of the 122 601 calls, the total case reports of alleged corruption generated were 8 730 and service delivery case reports generated were 1668. It needs to be mentioned that in 2007, the Public Service Commission (PSC) decided that service delivery complaints should be lodged directly with the respective Departments. However, despite such a decision, the PSC continues to receive service delivery complaints. Both cases of alleged corruption and service delivery complaints have been referred to the respective national and provincial departments, and public entities for further investigation. A breakdown of cases as registered on the Case Management System (CMS) over the years.

(b) Observations on the implementation of the article

- 156.** The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 40 Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

(a) Summary of information relevant to reviewing the implementation of the article

- 157.** The RSA indicates that it does not have or implemented the provisions of Article 40 on bank secrecy.

South Africa would not decline to render mutual legal assistance for criminal matters on the ground of bank secrecy. Neither the International Co-operation in Criminal Matters Act, 1996 (Act no. 75 of 1996), nor its bilateral treaties provide for the possibility of refusing MLA on the basis of bank secrecy.

South Africa does not have secrecy laws pertaining to the information held by financial institutions (banks). In terms of common law, the standard terms of a contract between a customer and a financial institution (banks) include an obligation on the financial institution to

hold the customer's information confidential. Case law confirms that this contractual obligation is not absolute. For example, see the cases of *G S George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd* 1988 (3) SA 726 (W) (at 736 G), which apply the principle laid down in the English case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA).

The obligation of confidentiality can therefore be overridden by, among others, due process of law, court order, a number of statutory provisions and the interests of the institution itself. In particular, the CPA 1977, POCA 1998 and FIC Act 2001 all enable investigators to access a customer's financial records. Legislation (FIC Act 2001) also allows supervisory bodies to access information held by financial institutions in client records.

(b) Observations on the implementation of the article

158. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Reference was made to the response provided above regarding Article 31 of the Convention.

Article 41 Criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

159. The RSA considers having adopted and implemented the provisions of Article 41.

Texts

Section 271(1) of the Criminal Procedure Act, 1977

In terms of section 271(1) of the CPA the prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions alleged against the accused.

Section 271(2) provides that the court must ask the accused whether he admits or denies any previous conviction. If the accused denies such previous conviction, the prosecution may tender evidence that the accused was so previously convicted (subsection (3)). If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted.

In terms of section 211 of the CPA, previous convictions are not admissible during the trial.

In respect of previous convictions relating to offences committed in another country, the prosecution will have to tender evidence that the accused was previously so convicted.

(b) Observations on the implementation of the article

160. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. The RSA reported that were a prior conviction to have been committed in a foreign jurisdiction, the prosecutor would submit the certificate of conviction to establish that fact under the ICCM Act, No. 75 of 1996.

Article 42 Jurisdiction

Subparagraph 1 (a)

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(a) The offence is committed in the territory of that State Party; or

(a) Summary of information relevant to reviewing the implementation of the article

161. The RSA considers itself in compliance with the provisions of Article 42 subparagraph 1(a).

Texts

Sections 90(5) and 90 of the Magistrates' Court Act, 1944 (Act 32 of 1944)

Section 90 of the Magistrates' Court Act, 1944 (Act 32 of 1944), regulates the local limits of the jurisdiction of South Africa's lower courts. In terms of section 90(1) of the Act "any person charged with any offence committed within any district or regional division may be tried by the court of that district or of that regional division." Section 90(2) sets out the territorial jurisdiction of these courts and provides as follows:

"When any person is charged with any offence

- (a) committed within the distance of four kilometres beyond the boundary of the district or of the regional division; or*
- (b) committed in or upon any vehicle on a journey which or part whereof was performed in, or within the distance of four kilometres of, the district or the regional division; or*
- (c) committed on board any vessel on a journey upon any river within the Republic or forming the boundary of any portion thereof, and such journey or part thereof was performed in, or within the distance of four kilometres of, the district or the regional division; or*
- (d) committed on board any vessel on a voyage within the territorial waters of the Republic and the said territorial waters adjoin the district or the regional division; or*
- (e) begun or completed within the district or within the regional division, such person may be tried by the court of the district or of the regional division, as the case may be, as if he had been charged with an offence committed within the district or within the regional division respectively."*

In terms of section 90(4) a person charged with an offence may be tried by the court of any district, or any regional division, as the case may be, wherein any act or omission or event which is an element of the offence took place.

Section 90(5) provides that a "person charged with theft of property or with obtaining property by an offence, or with an offence which involves the receiving of any property by him, may also be tried by the court of any district or of any regional division, as the case may be, wherein he has or had part of the property in his possession."

(b) Observations on the implementation of the article

162. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 42 Jurisdiction

Subparagraph 1 (b)

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

(a) Summary of information relevant to reviewing the implementation of the article

163. The RSA considers itself in compliance with the provisions of Article 42 subparagraph 1 (b). See the response in respect of subparagraph 1 above.

Text

Section 35(1) of the PRECCA

Section 35(1) of the PRECCA , establishes jurisdiction of South African courts for offences under the said Act, regardless of whether or not the act constitutes an offence at the place of its commission if the person to be charged is a citizen of the Republic or is ordinarily resident in the Republic or was arrested in the territory of the Republic, “or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed”.

(b) Observations on the implementation of the article

164. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Please see additional information provided above.

Article 42 Jurisdiction

Subparagraph 2 (a)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(a) Summary of information relevant to reviewing the implementation of the article

165. The RSA considers itself in compliance with the provisions of Article 42 subparagraph 2(a).

Texts

Section 35(2)(a) of the Prevention and Combating of Corrupt Activities Act, 2004.

Section 35(2)(a) of the Prevention and Combating of Corrupt Activities Act, 2004, is relevant. This section provides as follows:

“(2) Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1) shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that
(a) act affects or is intended to affect a public body, a business or any other person in the Republic; person is found to be in South Africa; and person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.”

(b) Observations on the implementation of the article

166. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 42 Jurisdiction

Subparagraph 2 (b)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

167. The RSA considers itself in compliance with the provisions of Article 42 subparagraph 2(b).

Text

Section 35(1) of the Prevention and Combating of Corrupt Activities Act, 2004

Section 35(1) of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004), establishes jurisdiction of South African courts for offences under the said Act, regardless of whether or not the act constitutes an offence at the place of its commission if the person to be charged is a citizen of the Republic or is ordinarily resident in the Republic or was arrested in the territory of the Republic.

(b) Observations on the implementation of the article

168. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 42 Jurisdiction

Subparagraph 2 (c)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

169. The RSA considers itself in compliance with the provisions of Article 42 subparagraph 2 (b).

Text

Section 35(1) of the Prevention and Combating of Corrupt Activities Act, 2004

Section 35(1) of the Prevention and Combating of Corrupt Activities Act, 2004, regulates this situation. This section provides as follows:

“(1) Even if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged

(a) is a citizen of the Republic;

(b) is ordinarily resident in the Republic;

(c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed; is a company, incorporated or registered as such under any law, in the Republic; or any body of persons, corporate or unincorporated, in the Republic.”

(b) Observations on the implementation of the article

170. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 42 Jurisdiction

Subparagraph 2 (d)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(d) The offence is committed against the State Party.

(a) Summary of information relevant to reviewing the implementation of the article

180. The RSA considers itself in compliance with this provision.

Text

Section 35(2)(a) of the Prevention and Combating of Corrupt Activities Act, 2004.

Section 35(2)(a) of the Prevention and Combating of Corrupt Activities Act, 2004, is relevant. This section provides as follows:

“(2) Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1) shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that
(a) act affects or is intended to affect a public body, a business or any other person in the Republic;
person is found to be in South Africa; and the person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.”

(b) Observations on the implementation of the article

181. The reviewing experts observed that the RSA is in compliance with this provision of the Convention.

Article 42 Jurisdiction

Paragraph 3

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

(a) Summary of information relevant to reviewing the implementation of the article

182. The RSA considers itself in compliance with the provisions of Article 42 paragraph 3.

Text

Section 35(2) of the Prevention and Combating of Corrupt Activities Act, 2004

Section 35(2) of the Prevention and Combating of Corrupt Activities Act, 2004, is relevant. This section provides as follows:

“(2) Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1) shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that
(a) act affects or is intended to affect a public body, a business or any other person in the Republic;
(b) person is found to be in South Africa; and
(c) person is for one or other reason not extradited by South Africa or if there is no application to extradite that person. ”

Therefore, if the “foreign natural person” is found to be in South Africa or visits the Republic at a later stage, South Africa may charge such a person if he or she is not charged by the other country or extradited to such country.

Therefore, South Africa may also extradite its own nationals.

(b) Observations on the implementation of the article

183. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was noted during the country visit that the statute referenced above covers the situation where a person is not extradited due to being a national of the RSA. A national of the RSA may be prosecuted under Section 1 of the law on jurisdiction referenced above, even if the offence is committed outside of the country. Therefore, the RSA is in compliance with this provision of the Convention.

Article 42 Jurisdiction

Paragraph 4

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

(a) Summary of information relevant to reviewing the implementation of the article

184. See the response in respect of paragraph 3 of Article 42 above.

Texts

Section 35(2) of the Prevention and Combating of Corrupt Activities Act, 2004

See the response in respect of paragraph 3 of Article 42 above.

(b) Observations on the implementation of the article

185. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. Section 1, referenced above, addresses this situation.

Article 42 Jurisdiction

Paragraph 5

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

(a) Summary of information relevant to reviewing the implementation of the article

186. The RSA considers itself in compliance with the provisions of Article 42 paragraph 5.

Text

No specific legislation.

Communication between competent authorities and the South African Police Service relating to the conducting of investigations or prosecutions in other States Parties takes place through the following processes:

- The Interpol Bureau's (informal process).
- A formal process (Mutual Legal Assistance) through the Central Authority in South Africa.

The formal process is regulated in terms of the International Cooperation in Criminal Matters Act, 1996.

- Police Cooperation Agreements.
- Through Embassies, Consulates or High Commission Offices in South Africa.
- South African Embassies and or High Commission Offices in foreign countries.
- Informal requests on a case by case basis where there are no agreements or arrangements in place.
- Foreign liaison officers in countries.

(b) Observations on the implementation of the article

187. The reviewing experts observed that the RSA is in compliance with this provision of the Convention. It was noted during the country visit that there have been many instances of cooperation between the RSA and other States with regard to criminal investigation, but none specifically in relation to corruption thus far.

Article 42 Jurisdiction

Paragraph 6

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

188. No other legal basis than the ones provided previously.

Chapter IV: International Cooperation

Article 44 Extradition

Paragraph 1

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

189. Under the Extradition Act, 1962, extraditable offences include any offence, both in South Africa and the requesting state, that is punishable with a sentence of imprisonment for a period of six months or more. Dual criminality is therefore a prerequisite for extradition, and is determined on the basis of the factual conduct underlying the offence for which extradition is requested. All UNCAC offences have been criminalized under South African law with the minimum imprisonment of six months, and thus are eligible for extradition. Some bilateral agreements raise the jurisdictional punishment threshold to one year, or, in some cases, two years.
190. The extradition process in South Africa takes place in two phases, firstly, an administrative phase, and thereafter, a judicial phase. The central authority for extradition is the Office of the Director General of the Department of Justice and Constitutional Development. The request arrives through diplomatic channel, and then referred to the central authority. From there it is forwarded to the relevant Prosecutor's Office for examination. This first administrative phase of analysis of the request must be completed within 15 working days.
191. The request is then presented to the Magistrate's Court, and its decision can be appealed. If the Court grants the extradition, the decision is then forwarded to the Minister of Justice, for the final decision to be taken. The decision of the Minister can be appealed.
192. Due process is observed at all stages of the consideration of an extradition request. South Africa observes conditions requested by the other State to the extent permitted by its legal system and Constitution. These might for example be related to the timeframe for the decision making process.
193. The suspect can be arrested for the purpose of extradition. For example, upon request, INTERPOL will issue a warrant of arrest that can be implemented in SA. In this case, the person under arrest can apply for bail and challenge the detention.
194. The legislation does not provide with the maximum length of the extradition process. A 15 days framework was adopted for the first administrative phase of the process. The possible appeal of the arrest, the Magistrate's Court Decision and the Minister's decision as well as the possibility to appeal on constitutional ground can increase the length of the process.

195. For extradition, dual criminality is a requirement in South Africa. The Extradition Act, 1962 (Act 67 of 1962, provides that a person may only be surrendered if the offence for which his or her extradition is sought is an extraditable offence. Section 1 of the Act defines an extraditable offence as follows “... *any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State...*”
196. In general, the offence, in order to be extraditable, should be punishable with a sentence of 6 months or more. Yet, this has been modified in certain extradition agreements and the jurisdictional punishment threshold was raised to one year, or in rare cases, 2 years.

Text applicable

Section 1 of the Extradition Act, 1962 (Act 67 of 1962)

“Extraditable offence” refers to any offence which is, in both the Republic and the requesting state, punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more (see definition in section 1 of the Extradition Act, 1962 (Act 67 of 1962)).

Examples of implementation:

197. South Africa has to date, not received a request relating to an offence established in accordance with this Convention (hereinafter referred to as a “relevant request”), where dual criminality issues were raised.
198. South Africa received the following requests where dual criminality requirement was met:
- CASE 1: the extradition of a person was sought to stand trial in the requesting State on charges of corruption and fraud. Corruption and fraud are offences in the requesting State and in South Africa. An extradition enquiry has been finalised and the person was found extraditable.
 - CASE 2: the extradition of a person was sought to stand trial in the requesting State on charges of corruption. Corruption is an offence in the requesting State and in South Africa. An extradition enquiry has been finalised and the person was found extraditable.
 - CASE 3: the extradition of a person was sought to stand trial in the requesting State on charges of fraud. Fraud is an offence in the requesting State and in South Africa. An extradition enquiry has been finalised and the person was found extraditable.

(b) Observations on the implementation of the article

198. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 2

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

199. Dual criminality is a requirement. However, all the offences covered by the Convention are punishable under South African law. The offence for extradition has to be punishable under the law of the Republic (domestic law) in accordance with the definition of an "extraditable offence" referred to above.

200. All offences covered by the Convention are punishable in South Africa. Therefore, although double incrimination is required, no extradition for Convention offences were or will be denied on the basis of double incrimination.

(b) Observations on the implementation of the article

201. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 3

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

(a) Summary of information relevant to reviewing the implementation of the article

202. Dual criminality is a requirement for each offence for which extradition is granted. There is no case where extradition was granted for offences which were not extraditable offences. The Extradition Act, 1962, prescribes a minimum period of imprisonment (i.e. 6 months). Unless the offence attracts the minimum sentence, the request for extradition cannot be granted.

203. There are no specific texts regulating instances where there is a combination of extradition and non-extraditable offences, therefore, there is space for diverse interpretations. It could be argued that where the extradition of a person is sought to stand trial on extraditable and non-extraditable offences, the person so sought may only be extradited to stand trial on the extraditable offence. On the other hand, it could be argued that, using the convention as legal basis, there could be the possibility of extraditing for both types of offenses as foreseen by this paragraph of the Convention.

(b) Observations on the implementation of the article

204. Although the possibility of an interpretation of the existing legislation in accordance with the paragraph 3 of article 44 exists, in the absence of a specific legal basis or practice, it cannot be said that this paragraph has been implemented.

Yet, this provision is not mandatory. Furthermore, all the offences established in accordance with the Convention are extraditable offences, and the jurisdictional punishment threshold is 6 months.

205. Therefore, the reviewers do not consider it necessary to make an observation on this paragraph.

Article 44 Extradition

Paragraph 4

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

(a) Summary of information relevant to reviewing the implementation of the article

206. All the offences established in accordance with the Convention are extraditable offences. All extraditable offences are included in South Africa's existing extradition agreements and agreements to be negotiated. Note that South Africa does not use the so called "listing method" whereby agreements list certain extraditable offences. In accordance with international practice, South Africa's agreements provide that all offences which carry a minimum period of imprisonment are offences for which person's extradition may be sought.

207. South Africa does not consider the offences established in accordance with the Convention as political offences.

208. The Convention can be used as a legal basis for extradition.

Text applicable:

Section 2(a) of the Extradition Act, 1962

209. Section 2(a) of the Extradition Act, 1962, makes provision for extraditable offences to be specified in extradition agreements entered into by the RSA. South Africa does undertake to include offences stipulated in Article 44(4) of the Convention.

There is no case where it was necessary to consider whether the offence for which extradition was sought is a political offence.

Section 2(1) (a) of the Act provides that the State President may enter into an extradition agreement as follows:

"1) The President may, on such conditions as he or she may deem fit, but subject to the provisions of this Act -

a) Enter into an agreement with any foreign State, other than a designated State, providing for the surrender on a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of the Republic or such State or any territory under the sovereignty or protection of such State, of an extraditable offence or offences specified in such agreement and may likewise agree to any amendment or revocation of

such agreement providing for Extradition of an extraditable offence, or offences specified in the agreement...

Note, as discussed above, that South Africa does not use the listing method. Also see section 1 of the Act as cited above.

Examples of implementation:

210. South Africa received the following requests:

- CASE 1: (Referred to above): the extradition of a person was sought to stand trial on charges of corruption and fraud. The request was made in terms of a multi-lateral extradition agreement, the SADC Protocol on Extradition. The Protocol provides for the extradition of a person for extraditable offences as follow: "...extraditable offences are offences that are punishable under the laws of both States Parties by imprisonment or other deprivation of liberty for a period of at least one year, or by a more severe penalty".
- CASE 2 (Referred to above): the extradition of a person was sought to stand trial on a charge of corruption. The request was made in terms of a bi-lateral extradition agreement. The agreement provides for the extradition of a person for certain offences as follows: "Extradition shall be granted in respect of offences which are...punishable, both under the laws of the requesting Party and of the requested Party, by imprisonment for a maximum period of at least twelve months or by some more severe penalty".
- CASE 3 (Referred to above): the extradition of a person was sought to stand trial on a charge of fraud. The request was made in terms of a bi-lateral extradition agreement. The agreement provides for the extradition of a person for extraditable offences as follows: "...extraditable offences are offences however described which are punishable under the laws of both Contracting States by imprisonment for a maximum period of at least one year or by a more severe penalty...".
- CASE 4 (Referred to above): the extradition of a person was sought to stand trial on a charge of corruption. The request was made in terms of bi-lateral extradition agreement. The agreement provides for the extradition of a person for extraditable offences as follows: "An offence shall be an extraditable offence if it is punishable under the laws in both States by deprivation of liberty for a period of at least one year or by a more severe penalty".

(b) Observations on the implementation of the article

211. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 5

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

212. South Africa does not make extradition conditional on the existence of an extradition agreement. Section 3(2) of the Extradition Act, 1962 provides for the extradition of a

person in the absence of an agreement as follows: “Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such State, if the President has in writing consented to his or her being so surrendered”.

213. However, if the other state party required a treaty, South Africa can consider the Convention as the legal basis for extradition. However, the provisions of the Convention have not yet been invoked in this framework.

(b) Observations on the implementation of the article

214. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Subparagraph 6 (a)

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

(a) Summary of information relevant to reviewing the implementation of the article

215. South Africa does not make extradition conditional to the existence of a treaty. If no treaty exists, the President must consent in writing for the extradition process to begin. South Africa also recognises UNCAC as a legal basis for extradition, in which case no Presidential approval is necessary, although to date, UNCAC has not been so invoked. In the absence of an agreement, or in the absence of specific provisions in the treaty, the Extradition Act is to be applied.

(b) Observations on the implementation of the article

216. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 7

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

(a) Summary of information relevant to reviewing the implementation of the article

217. All the offences established in accordance with the Convention are extraditable offences, regardless of the existence of a treaty. To date, South Africa has not received relevant request which was not based on an extradition agreement.
218. Of the extradition requests received, three were based on bi-lateral agreement and one on a multi-lateral agreement. Note that South Africa has pending cases where extradition will probably be granted on the basis of a multi-lateral treaty. In these cases, the persons are sought to stand trial in the Requesting States on several charges, including corruption and treason. These requests are based on the SADC Protocol on Extradition.

(b) Observations on the implementation of the article

219. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 8

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

(a) Summary of information relevant to reviewing the implementation of the article

220. The grounds for refusal of extradition are to be found in section 11 of the Extradition Act. South Africa does take into account the prevailing legislative framework of the requested State Party. There has been no corruption case for which South Africa has refused extradition.
221. In terms of South African law, extradition is subject to conditions provided for by South Africa's domestic law, in particular the Extradition Act, 1962 and conditions provided for by extradition agreements. All extradition agreements are in accordance with the Act.
222. The conditions provided for in the Extradition Act, 1962 and in South Africa's extradition agreements, include grounds for refusal. Sections 11 and 15 of the Act provides for discretionary grounds for refusal. Section 11 provides for the following grounds: pending criminal proceedings in South Africa, where the person sought is serving a sentence in South Africa, where the offence for which the extradition is sought is of trivial nature, where the request is not made in good faith or in the interest of justice, where the extradition of the person sought will be unjust, unreasonable or too severe a punishment or where the person will be prosecuted or prejudiced in the requesting State by reason of gender, race, religion, nationality or political opinion.
223. Section 15 provides that extradition may be refused if the offence for which the extradition of a person is sought is of a political character.

224. As discussed above, extradition is subject to the dual criminality requirement. The minimum penalty requirement is 6 months imprisonment but this threshold has been brought to 1 year or even 2 years in the framework of certain treaties.

Text applicable:

Section 11 provides as follows: The Minister may -

- a) Order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or
- b) Order that a person shall not be surrendered -
 - i. Where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such has been served;
 - ii. Where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
 - iii. At all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that of any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or
 - iv. If he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion.

Section 15 provided as follows: "The Minister may, at any time, order the cancellation of any warrant for the arrest of any person issued or endorsed under this Act, or the discharge from custody of any person detained under this Act, if he is satisfied that the offence in respect of which the surrender of such person is or may be sought, is an offence of a political character of that the surrender of such person will not be sought".

Examples of implementation:

225. In all the examples discussed above, that is, CASE 1 to CASE 4, the requests were dealt with in accordance with the provisions of the Act and the extradition agreements.

(b) Observations on the implementation of the article

226. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 9

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

227. South Africa has recently established a dedicated unit in the Office of the Director-General of the Department of Justice and Constitutional Development, which is the Central Authority, with the view of expediting the execution of extradition requests.
228. South Africa has established a Committee on Extradition, comprising the Central Authority, the NPA, the South African Police Service (SAPS), Interpol and the Department of International Relations and Co-operation with the view to enhance and streamline extradition procedures, and to discuss and address the main issues faced in this process.
229. The Act, and the proposed Bill, to be introduced by the Minister of Justice and Constitutional Development provide for simplified evidentiary matters to the extradition enquiry. Extradition enquiries are simplified as follows: Section 9(2) of the Act provides that an extradition enquiry is to be held in the manner of a preparatory examination, not a trial. Furthermore, section 10(2) provides that the magistrate holding an extradition enquiry may accept as proof a certificate that there is sufficient evidence. In this framework, in order to facilitate extradition with civil law countries, and to accelerate the process, the Magistrate must accept as conclusive proof a certificate issued by an appropriate authority in charge of the prosecution in the foreign state, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.
230. The legislation does not provide with the maximum length of the extradition process. A 15 days framework was adopted for the first administrative phase of the process. The possible appeal of the arrest, the Magistrate's Court Decision and the Minister's decision as well as the possibility to appeal on constitutional ground can increase the length of the process.
231. South Africa also takes into account where possible and compatible with the South African Constitution, the timeframe enacted by the legislation of the requesting state.
232. A draft Extradition Bill has been finalized. The Bill provides for minimum periods within which certain stages of the extradition process are to be finalized. The Bill seeks to integrate some of the recommendations made by the OECD Working Group on Bribery of Foreign Public Officials. It is currently in the process of review and is expected to be presented to the Parliament during the first quarter of 2013.

Text applicable

Section 9(2) of the Act provides as follows: *"Subject to the provisions of this Act, the magistrate holding the enquiry shall proceed in a manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held"*.

Section 10(2) of the Act provides as follows: *"For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned"*.

(b) Observations on the implementation of the article

233. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

(c) Successes and good practices

234. The establishment of the Committee on Extradition to improve the effectiveness of the extradition mechanism.

235. The requirement that the Magistrate accepts as conclusive a certificate issued by an appropriate authority in charge of the prosecution in the foreign state concerned, stating that it has sufficient evidence at its disposal to warrant prosecution.

Article 44 Extradition

Paragraph 10

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

236. South African law provides that a person whose extradition is sought may be arrested without a warrant of arrest when circumstances warrant an urgent arrest. In practice such a person is arrested in terms of section 40(1)(k) of the Criminal Procedure Act, 1977 (Act 51 of 1977) (CPA), after Interpol has received a request for the provisional arrest of such a person. After such a person's arrest, the person is brought before a court where the case is remanded for a formal extradition request to be submitted by the requesting State.

237. Section 5(1)(b) of the Extradition Act, 1962, provides that a magistrate may issue a warrant for the arrest of a person whose extradition is sought upon information that the person is accused or convicted of an extraditable offence committed within a foreign State. Such a warrant may be issued after a request for the provisional arrest of a person was received by Interpol and before a formal request for the extradition of the person is submitted by the requesting State.

238. There are cases where South Africa assisted with the provisional arrest of the person sought. Such arrested persons are remanded in custody for the formal extradition request to be received and processed.

Text applicable

Section 5(1)(b) of the Extradition Act, 1962, provides as follows: *"Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person -*

b) Upon such information of his or her being a person accused of convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic”.

Examples of implementation

239. To date South Africa has not received a request for the urgent and provisional arrest of a person sought for an offence established in accordance with the Convention.

240. In the examples discussed above (*vide* paragraph 20), that is, Cases 1 to 3, the persons sought were all arrested. They were not kept in custody, but released on bail to ensure their presence at the extradition enquiries.

(b) Observations on the implementation of the article

241. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 11

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

242. South Africa does not refuse extradition solely on the ground that the person is a South African national, and no request for extradition of a person was refused on the grounds that he or she is such a national.

243. Section 3 of the Extradition Act, 1962, makes provision for any person to be liable for extradition without distinction whether such a person is a national or not, as long as an extraditable offence has been committed.

244. South Africa does not refuse extradition of its nationals. Extradition may be refused or deferred, however, where criminal proceedings are pending against the person in South Africa, to allow for completion of a sentence of imprisonment, based on the trivial nature of the offence, or if there is a risk of discrimination. If extradition is refused, the person will be prosecuted in South Africa.

Text applicable

In respect of section 3 of the Extradition Act, 1962 the following new provisions are proposed in the Bill:

- (a) by the substitution for subsection (2) of the following subsection:
"(2) Any person accused or convicted of an offence contemplated by subsection (2) of section two and extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the State President has in writing consented to his or her being so surrendered."; and

- (b) by the addition of the following subsection:
"(3) Any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State shall be liable to be surrendered to such designated State, whether or not the offence was committed before or after the designation of such State and whether or not a court in the Republic has jurisdiction to try such person for such offence.".

(b) Observations on the implementation of the article

245. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 12

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

246. South Africa does not place a condition that a national whose extradition was granted must be returned to South Africa to serve the sentence imposed.
247. There is no case where South Africa granted the extradition of a national on condition that he or she must be returned to serve the sentence imposed.

(b) Observations on the implementation of the article

248. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 13

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

(a) Summary of information relevant to reviewing the implementation of the article

249. South Africa does not bar extradition solely on the ground that the person is a South African national.

250. There is no case where South Africa refused the extradition of a person on the basis that the person is a South African national.

(b) Observations on the implementation of the article

251. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 14

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

(a) Summary of information relevant to reviewing the implementation of the article

252. The Constitution and laws of South Africa provide for the relevant framework with regards to due process and human rights. South Africa guarantees and provides fair treatment at all stages of the extradition proceedings.

253. Fair treatment includes the following:

- Persons are brought before court within the prescribed period after arrest.
- Cases are remanded for legal representation to be obtained when so requested.
- Bail hearings are held and bail granted where appropriate.
- The *audi alterem partem* rule is adhered to during the extradition enquiries.
- Persons are allowed to lodge review and appeal proceedings.
- Cases are remanded to allow persons an opportunity to prepare presentations to be made to Minister.

Examples of implementation

254. The provision of this paragraph was implemented in the following cases:

- CASE 1 (Referred to above): the person whose extradition was requested was afforded fair treatment at all stages of the execution of the request. The fair treatment afforded included the following:
 - the person was brought before court within the prescribed period after arrest;
 - the case was remanded for the person to obtain legal representation;
 - the person was granted bail;
 - the *audi alterem partem* rule was adhered to during the extradition enquiry;
 - the enquiry was remanded for the person to prepare representation to the Minister;
 - the Minister is considering the representation.

- CASE 2 (Referred to above): the person whose extradition was requested was afforded fair treatment at all stages of the execution of the request. The fair treatment afforded included the following:
 - the person was brought before court within the prescribed period after arrest;
 - the case was remanded for the person to obtain legal representation;
 - the person was granted bail;
 - the ***audi alterem partem*** rule was adhered to during the extradition enquiry;
 - the person lodged an appeal against the finding of the magistrate that he is extraditable. The appeal is to be heard.
- CASE 3 (Referred to above): the person whose extradition was requested was afforded fair treatment at all stages of the execution of the request. The fair treatment afforded included the following:
 - the person was brought before court within the prescribed period after arrest;
 - the case was remanded for the person to obtain legal representation;
 - the person was granted bail;
 - the ***audi alterem partem*** rule was adhered to during the extradition enquiry;
 - the person instituted a review of proceedings after the magistrate found him extraditable;
 - the High Court ruled that an extradition enquiry was to be held ***de novu***;
- CASE 4
 - the person lodged an appeal against the finding of the magistrate that he is extraditable. The appeal is to be heard.

(b) Observations on the implementation of the article

255. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 15

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

(a) Summary of information relevant to reviewing the implementation of the article

256. There is no case where South Africa refused extradition on the ground that a person may be prosecuted, punished or prejudiced on account of that person's sex, race, religion, nationality, ethnic origin or political opinion.

257. Section 11 (b)(iv) of the Extradition Act, 1962, makes provision for refusal where the person concerned will be prosecuted or punished or prejudiced at his or her trial on the basis of any one of these reasons.

Text applicable

Section 11 (b)(iv)

The Minister may-

- (a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or
- (b) order that a person shall not be surrendered-
 - (i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
 - (ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
 - (iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender being required in good faith or in the interests of justice, that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or
 - (iii) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in foreign State by reason of his or her gender, race, religion, nationality or political opinion."

Examples of implementation:

258. South Africa has to date not refused the extradition of a person sought for an offence established in accordance with the Convention.

259. In CASE 1 referred to above, the person whose extradition is sought made representations to the Minister, requesting the Minister not to order his extradition on the basis that he would be prejudiced if he is extradited to the requesting State. The person argues that the prison conditions in the requesting State are inhumane. The Minister is considering the representations and may order the person not be extradited.

(b) Observations on the implementation of the article

260. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 16

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

261. The legislation lists the grounds of refusal of extradition. It does not provide that a request for the extradition of a person may be refused on the ground that the offence for which the extradition is sought involves fiscal matters.

(b) Observations on the implementation of the article

262. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 17

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

(a) Summary of information relevant to reviewing the implementation of the article

263. South African authorities, in particular the Central Authority, will consult with the requesting State before a request for the extradition of a person is refused. The requesting State will be afforded an opportunity to present its opinion and provide information. However, this has, not, to date been necessary, as all requests were granted.
264. The Extradition Act, 1962 does not provide for consultation before a request for the extradition of a person is refused, yet this would be done in the spirit of cooperation and in the interest of justice. However, to some extent of South Africa's extradition agreements do provide for consultation in that provision is made for reasons to be given for a refusal to extradite a person.
265. For example, the agreement between South Africa and the United States of America provides as follows: "reasons shall be given by the Requested State for any complete or partial refusal of a request for extradition". The agreement between South Africa and Botswana also provides that "reasons shall be given for any complete or partial rejection".

Examples of implementation:

266. In CASE 1 (Referred to above- *vide* par. 20), the Minister informed the requesting State of the contents of the representations made by the person whose extradition was sought and invited the requesting State to respond.

(b) Observations on the implementation of the article

267. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 44 Extradition

Paragraph 18

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

(a) Summary of information relevant to reviewing the implementation of the article

268. Section 2 of the Extradition Act, 1962, opens the possibility for the South Africa to enter into Extradition Agreements for purposes of surrender, on a reciprocal basis, of accused persons or convicted persons. These may be bilateral or multilateral.

269. South Africa, through the Department of Justice and Constitutional Development (and the Department of International Relations and Cooperation), on an ongoing basis, seeks to conclude extradition agreements.

270. In this respect, South Africa has entered into a number of bilateral agreements and is a signatory to multilateral agreements such as the SADC Protocol on Extradition and the EU Convention on Extradition.

271. The list of treaties to which South Africa is party is the following:

South Africa currently has extradition agreements with the following countries:

- 1) Botswana
- 2) Lesotho (approval to be ratified by Parliament on 07 November 2001, entered into force on 23 December 2003)
- 3) Malawi
- 4) Swaziland
- 5) United States of America (approval to be ratified on 09 November 2000, notice in Government Gazette 7100 of 29 June 2001)
- 6) Canada (approval to be ratified by Parliament on 03 April 2001, notice in Government Gazette 7063 of 18 May 2001)
- 7) Australia (approval to be ratified by Parliament on 09 November 2000, notice in Government Gazette 7132 of 01 August 2001)
- 8) Israel
- 9) Egypt (approval to be ratified on 11 November 2011, instruments of ratification exchanged on 16 September 2003, entered into force on 16 September 2003)
- 10) Algeria (approval to be ratified on 11 November 2002 but not yet in force)
- 11) Nigeria (approval to be ratified on 11 November 2002 but not yet in force)
- 12) China (approval to be ratified on 11 November 2002 and in force since November 2004)
- 13) Hong Kong (signed, ratified and in force since December 2011)

Treaties negotiated but not yet signed

- Zambia (Extradition and MLA)
- Argentina (Extradition and MLA)
- Hungary (Extradition) (covered under COE Convention and Extradition)
- Namibia (Extradition and MLA)
- Brazil (Extradition)
- Iran (Extradition and MLA)

Extradition and Mutual Legal Assistance Treaties signed but not ratified

- India (signed on 16 October 2003, submitted to Parliament for ratification)
- Iran (signed on 31 August 2004, submitted to Parliament for ratification)
- The Republic of China (Taiwan), signed on 30 December 1987, the Treaty is deemed to be terminated in terms of the Memorandum of Understanding between the Government of the Republic of South Africa (the RSA) and the Government of the People's Republic of China (PRC) on the Establishment of diplomatic relations between the the RSA and the PRC.

South Africa has Mutual Legal Assistance in Criminal Matters Treaties with the following countries:

- Canada (ratified by Parliament on 03 April 2001, entered into force 05 May 2001)
- USA (ratified by Parliament on 09 November 2000, entered into force on 25 June 2001)
- Lesotho (ratified by Parliament on 07 November 2001 entered into force on 23 December 2003)
- Egypt (ratified by Parliament on 11 November 2002 entered into force on 16 September 2003)
- Algeria (ratified by Parliament on 11 November 2002 but not yet in force)
- Nigeria (ratified by Parliament on 11 November 2002 but not yet in force)
- France (ratified by Parliament on 11 November 2002 but not yet in force)
- China (ratified by Parliament on 21 October 2003 in force since November 2004)
- India
- Hong Kong (signed, ratified and in force since December 2011)

The department is currently setting up negotiations for the conclusion of extradition and mutual legal assistance treaties with various countries including:

- United Arab Emirates
- Peru
- Uruguay
- New Zealand
- Taiwan (MLA - MOU)
- Chile
- Kuwait

Council of Europe's Convention on Extradition

South Africa's accession to the Council of Europe's Convention on Extradition entered into force on 13 May 2003. A request was also directed to the Council of Europe that South Africa accede to the Convention on Mutual Legal Assistance.

SADC Protocols on Extradition and Mutual Legal Assistance in Criminal Matters

This Protocol was signed by Summit on 03 October 2002 and ratified by Parliament on 14 April 2003. The Protocol will enter into force after ratification by two-thirds of SADC Member States. South Africa has deposited its instruments of ratification.

African Union Convention on Extradition

The African Convention on Extradition was finalized during a meeting of legal experts held in Ethiopia from 04 - 08 April 2001.

Extradition Act

In terms of the Extradition Act, any arrangement made with any foreign State which, by virtue of the provisions of the Extradition Act, 1870 to 1906 of the Parliament of the United Kingdom as applied in the Republic, was in force in respect of the Republic immediately prior to the date of commencement of the Act shall be deemed to be an agreement entered into and published on the said date by the President under the Act.

South Africa has also designated Ireland, Zimbabwe, Namibia and United Kingdom in terms of section 3(2) of the Extradition Act.

(b) Observations on the implementation of the article

272. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 45 Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

(a) Summary of information relevant to reviewing the implementation of the article

273. South Africa has not adopted provisions with regard to the transfer of sentenced persons although talks in this regard have taken place. It is currently discussing the Draft Protocol on Interstate Transfer on Foreign Prisoners under the SADC Multilateral. Internal discussions on Prisoner Transfer Agreement are also taking place within Government regarding compliance with the Conventions.

(b) Observations on the implementation of the article

274. Continue to explore opportunities to conclude bilateral and multilateral agreements regarding the transfer of sentenced persons.

Article 46 Mutual legal assistance

Paragraph 1

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

275. South Africa provides mutual legal assistance to the broadest extent possible, within the framework of the respect for human rights.

276. The International Co-operation in Criminal Matters Act (1996) ("ICCMA") seeks to facilitate the provision of evidence, execution of sentences in criminal cases and the confiscation and transfer of proceeds of crime. South Africa does not require an agreement for the provision of such assistance. It is party to 9 bilateral agreements, and has signed or is negotiating others. South Africa is also party to multilateral agreements such as the SADC Protocol on Mutual Legal Assistance. In the absence of an agreement, the ICCMA or UNCAC may be applied.

Text applicable

The ICCMA provides for the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime. The relevant sections provide as follows:

Section 7 of the ICCMA provides that the Director-General of the Department of Justice and Constitutional Development (Director-General) is the Central Authority to which requests for assistance are to be forwarded. Section 7 of the ICCMA further provides that the Director-General shall satisfy himself or herself that those proceedings have been instituted in the requesting State, or that there are reasonable grounds for believing that an offence has been committed in the requesting State, or that it is necessary to determine whether an offence has been committed and that an investigation in respect thereof is being conducted in the requesting State. If satisfied, the Director-General shall submit the request to the Minister for Justice and Constitutional Development (Minister) for approval. Upon receiving the Minister's approval, the Director-General shall forward the request to the magistrate within whose area of jurisdiction the investigation is to be conducted. In practice only requests that require coercive action are submitted to the Minister. If a request does not require coercive action, the Director-General approves that the request be executed. In practice requests are not only forwarded to the magistrate, but also to the National Prosecuting Authority and the South African Police Service (SAPS). However, depending on the action that is required, it may happen that a request is only forwarded to one of the abovementioned role players.

Section 7 provides as follows:

- 1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General.
- 2) Upon receipt of such request the Director-General shall satisfy himself or herself –
 - a) That proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or
 - b) That there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State
- 3) For purposes of subsection (2) the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph (a) or (b) of the said subsection.
- 4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval.
- 5) Upon being notified of the Minister's approval, the Director-General shall forward the request contemplated in subsection (1) to the magistrate within those area of jurisdiction the witness resides.

Section 8 of the ICCMA provides for the examination of a witness. A magistrate may issue a subpoena for a witness to appear before him or her to give evidence or to produce documents or objects. In practice, section 8 is only used when a witness is not willing to co-operate with the SAPS. Section 9 provides for the rights and privileges of witnesses who are subpoenaed in terms of section 8. Section 10 provides for offences committed by such witnesses.

Chapter 3 of the ICCMA provides for the execution of sentences and compensatory orders. In this regard, section 13 provides for assistance in recovering a fine or compensation order. Section 15 provides for the registration of a foreign sentence.

Chapter 4 of the ICCMA provides for the confiscation and transfer of proceeds of crime. In this regard, section 19 provides for the enforcement of a confiscation order. Section 23 provides for the enforcement of a restraint order.

Requests for assistance are also executed in terms of other domestic legislation once approval has been obtained from the Minister or the Director-General in terms of the ICCMA. Other relevant legislation includes the following:

- 1) The Criminal Procedure Act, 1977 (Act 51 of 1977) (CPA)
- 2) The Prevention of Organised Crime Act, 1998 (Act 121 of 1998) (POCA)
- 3) The Regulation of Interception of Communication and Provision of Communication-Related Information Act, 2002 (Act 70 of 2002) (RICA)
- 4) The Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004) (PRECCA)
- 5) The National Prosecuting Authority Act, 1998 (Act 31 of 1998) (NPA)

The following sections of the CPA are relevant:

Sections 20 to 22 provides for searches to be conducted and subsequent seizures of articles.

Section 205 of the CPA provides that a judge or magistrate may require the attendance of a person who is likely to give information (including documents) regarding an alleged offence.

Section 233 to 235 provide for the provision or production of records, including public documents, official documents and judicial proceedings.

POCA provides for the recovery of the proceeds of unlawful activity. Chapter 5 provides for confiscation orders upon conviction and Chapter 6 for civil recovery of property.

The RICA provides for the interception of certain communications. Section 3 provides for the interception under an interception order and sections 4 to 8 provide for interception without an order.

Section 29 of the NPA Act, 1998 provides for the entering of premises by an Investigating Director: Serious Economic Offences with a view to inspect and search the premises, make enquiries, examine any object and seize any object.

South Africa has concluded several bi-lateral mutual legal assistance agreements with other States and is also party to some multi-lateral mutual legal assistance agreements.

Examples of implementation:

277. The following examples illustrate the implementation of this paragraph:

- **CASE 1:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged corruption committed by a public official. South Africa was requested to take statements from persons, to provide documents and allow a foreign police official to assist with the investigations in South Africa. The Minister approved that assistance be afforded. South Africa has provided some evidence to date. Investigations are still ongoing.
- **CASE 2:** in the absence of an agreement, South Africa was requested to assist with the investigations regarding alleged corruption and fraud whereby a government owned company was defrauded. South Africa was requested to take statements from persons, provide documents and to recover assets. The Minister approved that assistance be afforded and the request has been fully executed.

- **CASE 3:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged fraud committed by a public official whereby a government owned company was defrauded. South Africa was requested to register a restraint order and to recover assets. The Director-General approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.
- **CASE 4:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged fraudulent trading and money laundering. South Africa was requested to take statements from persons and to allow a foreign police official to assist with the investigations. The Director-General approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.
- **CASE 5:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged fraudulent trading and money laundering. South Africa was requested to take statements from persons and to allow a foreign police official to assist with the investigations. The Director-General approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.
- **CASE 6:** based on a bi-lateral agreement and the United Nations Convention Against Transnational Organized Crime, South Africa was requested to assist with investigations regarding alleged corruption and fraud committed on international level. South Africa was requested to take statements from persons and to provide documents. The Minister approved that assistance be afforded and the request has been forwarded to the relevant players for execution.
- **CASE 7:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged corruption and fraud committed by a public official whereby a government was defrauded. South Africa was requested to take statements from persons, provide documents and to allow a foreign police official to assist with the investigations. The Minister approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.
- **CASE 8:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged theft, money laundering and misappropriation of funds committed by bank officials. South Africa was requested to take statements from persons and to allow a foreign police official to assist with the investigations. The Minister approved that assistance be afforded and the request has been fully executed.
- **CASE 9:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged bribery, corruption, misappropriation of funds and money laundering committed by company officials. South Africa was requested to examine objects and sites, provide documents and allow a foreign police official to assist with the investigations in South Africa. The Minister approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.
- **CASE 10:** based on a bi-lateral agreement, South Africa was requested to assist with investigations regarding alleged bribery and corruption committed by officials of a government owned company. South Africa was requested to take statements from persons and provide documents. The Minister approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.

- **CASE 11:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged corruption. South Africa was requested to take statements from persons, provide documents and allow a foreign police official to assist with the investigations in South Africa. The Minister approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.
- **CASE 12:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged bribery and corruption committed by a public official. South Africa was requested to take statements from persons and provide documents. The Minister approved that assistance be afforded. South Africa has been informed that assistance is no longer required.
- **CASE 13:** in the absence of an agreement, South Africa was requested to assist with investigations regarding alleged corruption involving a public official. South Africa was requested to take statements from persons. The Minister approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.
- **CASE 14:** based on the UNCAC, South Africa was requested to assist with investigations regarding alleged corruption involving a public official. South Africa was requested to take statements from persons and examine objects and sites. The Minister approved that assistance be afforded and the request has been forwarded to the relevant role players for execution.

(b) Observations on the implementation of the article

278. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

(c) Successes and good practices

279. South Africa can use, and has previously used, the UNCAC as a legal basis in the framework of mutual legal assistance requests.

Article 46 Mutual legal assistance

Paragraph 2

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

280. South Africa is able to afford assistance in investigations involving legal persons as the International Co-operation in Criminal Matters Act, 1996 (ICCMA) does not distinguish between natural and legal persons.

281. As discussed above, the ICCMA provides that the Director-General shall only satisfy himself or herself that proceedings have been instituted in the requesting State, or that there are reasonable grounds for believing that an offence has been committed in the

requesting State, or that it is necessary to determine whether an offence has been committed and that an investigation in respect thereof is being conducted in the requesting State.

Text applicable

The International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)

The IMCCA does not discriminate between natural and legal persons. The Act provides for the fullest extent possible in providing and cooperating on matters of mutual legal assistance.

Examples of implementation:

282. Several of the cases referred to above involve legal persons. These include CASE 2, CASE 4, CASE 7, CASE 9, CASE 10, CASE 11 and CASE 12. As discussed above, approval was granted in terms of the ICCMA that assistance be afforded and CASE 2 and CASE 11 have been successfully finalised.

(b) Observations on the implementation of the article

283. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Subparagraph 3 (a)

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;*
- (b) Effecting service of judicial documents;*
- (c) Executing searches and seizures, and freezing;*
- (d) Examining objects and sites;*
- (e) Providing information, evidentiary items and expert evaluations;*
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;*
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*
- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*
- (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

(a) Summary of information relevant to reviewing the implementation of the article

284. South Africa can provide the broadest assistance since all that is not specifically prohibited is allowed.

285. South Africa is able to afford the assistance set out in the provision in terms of the ICCMA and other domestic legislation including the CPA, POCA, the PRECCA, the RICA and the NPA Act.

286. South Africa has applied the UNCAC or other UN Conventions as a basis for mutual legal assistance in the taking of statements, the provision of documents and the examination of objects and sites. The ICCMA enables South Africa to provide the widest legal assistance, both with regard to natural and legal persons, including all types of assistance listed in the UNCAC.

Texts applicable:

Sections 2(1), 7, 8, 11 and 20 of the International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)

Section 2(1) of the ICCMA provides for the taking of "evidence" where such cannot be obtained without undue delay, expense or inconvenience. In terms of section 1 of the Act "evidence" includes all books, documents, and objects produced by a witness.

Section 8 of the ICCMA provides for witnesses to be subpoenaed and evidence to be obtained from witnesses for purposes of transmission to the requesting state.

Sections 2(1), 7, 8, 11 and 20 of the International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)

Section 2 of the ICCMA provides for requests to foreign states to assist in the obtaining evidence, whereas sections 7 and 8 of the ICCMA provide for requests to South Africa to assist in obtaining evidence. Therefore, nothing prohibits the examination of objects and sites, the provision of information, evidentiary items and expert evaluations, etc. As indicated above, the ICCMA encourages full cooperation in so far as it is possible and not contrary to domestic laws.

Section 11 of the ICCMA makes provision for service of a subpoena for the attendance of any person in any proceedings before the court of law in any State mentioned in Schedule 1 of the Act (i.e. Lesotho, Swaziland, Botswana, Malawi, Namibia and Zimbabwe).

Section 11

- (1) When a subpoena purporting to be issued by a proper officer of a competent court of law in any State mentioned in Schedule I for the attendance of any person in any proceedings before that court is received from such officer by any magistrate within whose area of jurisdiction such person resides or is, such magistrate shall, if he or she is satisfied that the subpoena was lawfully issued, endorse it for service upon such person, whereupon it may be served as if it was a subpoena issued in the court of such magistrate in proceedings similar to those in connection with which it was issued.
- (2) Upon service of the subpoena on the witness an amount sufficient to cover his or her reasonable expenses in connection with his or her attendance of the proceedings, shall be tendered to him or her.
- (3) Any person subpoenaed under this section who, without sufficient cause, fails to attend at the time and place specified in the subpoena, shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding three months.
- (4) Any magistrate's court within whose area of jurisdiction the subpoena has been served or the person subpoenaed resides, shall have jurisdiction to try such person for a contravention of subsection (3).
- (5) For the purposes of subsection (3) a return of service indicating that the subpoena was properly served on the person concerned, together with a certificate by the presiding officer of the court where the said person was to appear, to the effect that such person failed to appear at the time and place specified in the subpoena, shall be *prima facie* proof that the said person failed to appear as contemplated in that subsection".

Section 20 of the ICCMA makes provision for identifying and tracing proceeds of crime. The section makes it possible for the Republic to assist with a request for executing a foreign confiscation order. Section 20 of the ICCMA also makes provision for the confiscation and transfer of foreign proceeds of crime, amongst others.

Generally, in deciding whether assistance can be rendered, South Africa will consider other relevant legislation such as the Constitution of South Africa, 1996 (Act 108 of 1996), the Criminal Procedure Act, 1977 (Act 51 of 1977), the Prevention of Organised Crime Act, 1998 (Act 121 of 1998) and the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004).

Section 24 of the ICCMA makes provision for the registration of a restraint order when the Republic receives a request for assistance in enforcing a foreign (restraint) order for the property specified therein.

Chapter 4 of the International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)

Confiscation and transfer of proceeds of crime

Request to foreign State for assistance in enforcing confiscation order:

19. (1) When a court in the Republic makes a confiscation order, such court may on application to it issue a letter of request in which assistance in enforcing such order in a foreign State is sought if it appears to the court that a sufficient amount to satisfy the order cannot be realised in the Republic and that the person against whom the order has been made owns property in the foreign State concerned.
- (2) The amount to be levied by such request shall be sufficient to cover, in addition to the amount of the confiscation order, all costs and expenses incurred in the issuing and the executing of the request.
- (3) A letter of request contemplated in subsection (1) shall be sent to the Director-General for transmission-
 - (a) to the court or tribunal specified in the request; or
 - (b) to the appropriate government body in the requested State.

Registration of foreign confiscation order:

20. (1) When the Director-General receives a request for assistance in executing a foreign confiscation order in the Republic, he or she shall, if satisfied-
 - (a) that the order is final and not subject to review or appeal;
 - (b) that the court which made the order had jurisdiction;
 - (c) that the person against whom the order was made, had the opportunity of defending himself or herself;
 - (d) that the order cannot be satisfied in full in the country in which it was imposed; that the order is enforceable in the requesting State; and
 - (e) that the person concerned holds property in the Republic, submit such request to the Minister for approval.
- (2) Upon receiving the Minister's approval of the request contemplated in subsection (1), the Director-General shall lodge with the clerk of a magistrate's court in the Republic a certified copy of such foreign confiscation order.
- (3) When a certified copy of a foreign confiscation order is lodged with a clerk of a magistrate's court in the Republic, that clerk of the court shall register the foreign confiscation order-

- (a) where the order was made for the payment of money, in respect of the balance of the amount payable thereunder; or
 - (b) where the order was made for the recovery of particular property, in respect of the property which is specified therein.
- (4) The clerk of the court registering a foreign confiscation order shall forthwith issue a notice in writing addressed to the person against whom the order has been made-
- (a) that the order has been registered at the court concerned; and
 - (b) that the said person may, within the prescribed period and in the prescribed manner, apply to that court for the setting aside of the registration of the order.
- (5) (a) Where the person against whom the foreign confiscation order has been made is present in the Republic, the notice contemplated in subsection (4) shall be served on such person in the prescribed manner.
- (c) Where the said person is not present in the Republic, he or she shall in the prescribed manner be informed of the registration of the foreign confiscation order.

Effect of registration of foreign confiscation order:

21. (1) When any foreign confiscation order has been registered in terms of section 20, such order shall have the effect of a civil judgment of the court at which it has been registered in favour of the Republic as represented by the Minister.
- (2) A foreign confiscation order registered in terms of section 20 shall not be executed before the expiration of the period within which an application in terms of section 20(4)(b) for the setting aside of the registration may be made, or if such application has been made, before the application has been finally decided.
- (3) The Director-General shall, subject to any agreement or arrangement between the requesting State and the Republic, pay over to the requesting State any amount recovered in terms of a foreign confiscation order, less all expenses incurred in connection with the execution of such order.

Setting aside of registration of foreign confiscation order:

22. (1) The registration of a foreign confiscation order in terms of section 20 shall, on the application of any person against whom the order has been made, be set aside if the court at which it was registered is satisfied-
- (a) that the order was registered contrary to a provision of this Act;
 - (b) that the court of the requesting State had no jurisdiction in the matter;
 - (c) that the order is subject to review or appeal;
 - (d) that the person against whom the order was made did not appear at the proceedings concerned or did not receive notice of the said proceedings as prescribed by the law of the requesting State or, if no such notice has been prescribed, that he or she did not receive reasonable notice of such proceedings so as to enable him or her to defend him or her at the proceedings;
 - (e) that the enforcement of the order would be contrary to the interests of justice; or
 - (f) that the order has already been satisfied.
- (2) The court hearing an application referred to in subsection (1) may at any time postpone the hearing of the application to such date as it may determine.

Request to foreign State for assistance in enforcing restraint order

23. (1) When a court or judge in the Republic makes a restraint order, such court or judge may issue a letter of request in which assistance in enforcing such order in a foreign State is sought if it appears to such court or judge that the person

against whom the order has been made owns property in the foreign State concerned.

(2) A letter of request contemplated in subsection (1) shall be sent to the Director-General for transmission-

- (a) to the court or tribunal specified in the request; or
- (b) to the appropriate government body in the requested State. Registration of foreign restraint order

24. (1) When the Director-General receives a request for assistance in enforcing a foreign restraint order in the Republic, he or she may lodge with the registrar of a division of the Supreme Court a certified copy of such order if he or she is satisfied that the order is not subject to any review or appeal.
- (2) The registrar with whom a certified copy of a foreign restraint order is lodged in terms of subsection (1), shall register such order in respect of the property which is specified therein.
- (3) The registrar registering a foreign restraint order shall forthwith give notice in writing to the person against whom the order has been made-
- (a) that the order has been registered at the division of the Supreme Court concerned; and
 - (b) that the said person may within the prescribed period and in terms of the rules of court apply to that court for the setting aside of the registration of the order.
- (4) (a) Where the person against whom the foreign restraint order has been made is present in the Republic, the notice contemplated in subsection (3) shall be served on such person in the prescribed manner.
- (b) Where the said person is not present in the Republic, he or she shall in the prescribed manner be informed of the registration of the foreign restraint order.

Effect of registration of foreign restraint order:

25. When any foreign restraint order has been registered in terms of section 24, that order shall have the effect of a restraint order made by the division of the Supreme Court at which it has been registered.

Setting aside of registration of foreign restraint order:

26. (1) The registration of a foreign restraint order in terms of section 24 shall, on the application of the person against whom the order has been made, be set aside if the court at which the order was registered is satisfied-
- (a) that the order was registered contrary to a provision of this Act;
 - (b) that the court of the requesting State had no jurisdiction in the matter;
 - (c) that the order is subject to review or appeal;
 - (d) that the enforcement of the order would be contrary to the interests of justice; or
 - (e) that the sentence or order in support of which the foreign restraint order was made, has been satisfied in full.
- (2) The court hearing an application referred to in subsection (1) may at any time postpone the hearing of the application to such date as it may determine.

Examples of implementation:

287. The following examples illustrate the implementation of these subparagraphs:

Paragraph 3 (a):

See CASE 2 referred to above. In this case South Africa was requested to take statements from bank official and officials of the Registrar of Companies and the Deeds Office.

See CASE 4 referred to above. In this case South Africa was requested to take a statement from a private bank.

See CASE 5 referred to above. In this case South Africa was requested to take statements from a manager and employees of a company.

See CASE 6 referred to above. In this case South Africa was requested to take statements from private persons and a suspect.

See CASE 7 referred to above. In this case South Africa was requested to take statements from private persons.

See CASE 8 referred to above. In this case South Africa was requested to take statements from private persons.

See CASE 10 referred to above. In this case South Africa was requested to take statements from government employees and law enforcement officials.

See CASE 11 referred to above. In this case South Africa was requested to take statements from employees of a company.

See CASE 12 referred to above. In this case South Africa was requested to take statements from an employee of a company and a suspect.

See CASE 13 referred to above. In this case South Africa was requested to take statements from employees of a company.

Paragraph 3 (b):

See CASE 9 referred to above. South Africa was requested to search the premises of a company and seize documentation.

See CASE 14 referred to above. South Africa was requested to search the premises of a company and seize documents.

Paragraph 3 (c):

There is no case where South Africa received a request or made a request involving searches, seizures and freezing.

Paragraph 3 (f):

See CASE 1 referred to above. South Africa was requested to provide documents and records relating to bank accounts and company details.

See CASE 2 referred to above. South Africa was requested provide documents and recordings relating to bank accounts and documents in possession of the Office of the Registrar of Companies and the Deeds Office.

See CASE 5 referred to above. South Africa was requested to provide documents in possession of a company.

See CASE 6 referred to above. South Africa was requested to provide document and records relating to bank accounts and documents in possession of the Office of the Registrar of Companies and SAPS records.

See CASE 7 referred to above. South Africa was requested provide documents and records relating to bank accounts.

See CASE 9 referred to above. South Africa was requested to provide documents and rerecords relating to bank accounts.

See CASE 10 referred to above. South Africa was requested to provide documents in possession of a company relating and reports compiled by a law enforcement agency.

See CASE 11 referred to above. South Africa was requested to provide documents and records relating to bank accounts and documents in possession of a company.

See CASE 12 referred to above. South Africa was requested to provide documents and records relating to bank accounts and documents in possession of a company and a suspect.

Paragraph 3 (g):

There is no case where South Africa received or made a request involving the identification or tracing of proceeds of crime, property, instrumentalities or others things for evidentiary purposes.

Paragraph 3 (h):

See CASE 5 referred to above. South Africa was requested to inform witnesses that their evidence is required in the requesting State and to enquire as to whether they are willing to testify abroad

Paragraph 3 (i):

In several of the cases referred to above, South Africa was requested to allow foreign police officials to assist with the investigations in South Africa. See CASE1, CASE 4, CASE 7, CASE 8, CASE 9, and CASE 11.

In CASE 3 referred to above, South Africa was requested to register a restrain order issued in the requesting State.

Paragraph 3 (j)

See CASE 2 referred to above. South Africa was requested to urgently recover and repatriate assets derived from the commission of the crime to the requesting State.

See CASE 3 referred to above. South Africa was requested to freeze assets belonging to the suspect in South Africa with a view to satisfying a confiscation order issued in the requesting State.

Paragraph 3 (k)

See CASE 2 referred to above. South Africa was requested to urgently recover and repatriate assets derived from the commission of the crime to the requesting State.

See CASE 3 referred to above. South Africa was requested to freeze assets belonging to the suspect in South Africa with a view to satisfying a confiscation order issued in the requesting State.

(b) Observations on the implementation of the article

288. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance**Paragraph 4**

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

289. There is no specific legislation. However, there is one finalized case where a State transmitted information to the National Prosecuting Authority (NPA) without prior request to the South African authorities.

290. Yet, South Africa indicated that such information would be more likely to be shared through law enforcement cooperation, in the absence of a prior request, than through mutual legal assistance requests.

(b) Observations on the implementation of the article

291. The reviewing experts observed that, in the light of the non mandatory nature of this provision, South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 5

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

292. There is no case where exculpatory evidence was disclosed pursuant to paragraph 4.

293. South African authorities do respect the confidentiality of information received from a requested State. Such a principle has been introduced in various of South Africa's mutual legal assistance agreements provide for confidentiality and limitations on the use of information.

294. To date, South Africa has not received information in a relevant case where it was necessary to disclose the information and consult with the requesting State as set out in the provision.

(b) Observations on the implementation of the article

295. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 6

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

Article 46 Mutual legal assistance

Paragraph 7

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

Article 46 Mutual legal assistance

Paragraph 8

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

296. Bank secrecy laws do not impede on the rendering of legal assistance, and therefore, South Africa does not refuse assistance on the ground of bank secrecy.

297. Assistance can only be refused where the requirements in the bilateral agreement are not met; for issues relating to sovereignty, national security or public order; or when the action requested would be contrary to law. Bank secrecy does not constitute a ground for refusal.

(b) Observations on the implementation of the article

298. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Subparagraph 9

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

(a) Summary of information relevant to reviewing the implementation of the article

299. Dual criminality is not a requirement.

300. Section 7 of the ICCMA provides that the Director-General shall satisfy himself or herself that proceedings have been instituted in a court or tribunal exercising

jurisdiction in the requesting State or that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been so committed that an investigation in respect thereof is being conducted in the requesting State. The ICCMA does not require that the offence being investigated should be an offence in South Africa.

301. To date, South Africa has not received relevant request for mutual legal assistance relating to an offence which is not also an offence in South Africa.

(b) Observations on the implementation of the article

302. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Subparagraph 10 (a) and (b), 11 and 12

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

- (a) The person freely gives his or her informed consent;*
- (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

11. For the purposes of paragraph 10 of this article:

- (a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;*
- (b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*
- (c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*
- (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

303. The Correctional Services Act, 1998, (Act 111 of 1998), does not provide for a case where a person who is detained or serving sentence in South Africa may be transferred to another country for purposes set out in Article 10. However, South

Africa's mutual legal assistance agreements provide for the transfer of persons in custody. In this regard the agreements provide that the receiving State shall have the authority and the obligation to keep the person transferred in custody. Should a person be transferred to South Africa, South Africa shall respect the conditions under which such a person is transferred, including the conditions set out in the provision.

304. There has been no such transfer as yet.

(b) Observations on the implementation of the article

305. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 13

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent Authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

(a) Summary of information relevant to reviewing the implementation of the article

306. The Director-General of the Department of Justice and Constitutional Development (Director-General) is the Central Authority for the purpose of mutual legal assistance requests. In terms of section 7 of the ICCMA, request for mutual legal assistance are to be forwarded to the Director-General. After approval has been granted in terms of the ICCMA, requests are forwarded to the competent authorities to be executed. As discussed above, the authorities (referred to as role players above), include magistrates, the National Prosecuting Authority and SAPS. The Central Authority is to encourage the speedy and proper execution of requests. South Africa does not have regions or territories with separate systems.

Examples of implementation:

307. See CASE 1 to CASE 12. All the cases referred to were forwarded to the Central Authority. As discussed above, approval was granted in terms of section 7 of the ICCMA that assistance be afforded in all the cases, and the cases were forwarded to the relevant role players for execution.

(b) Observations on the implementation of the article

308. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 14

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

(a) Summary of information relevant to reviewing the implementation of the article

309. Section 7 of the ICCMA does not explicitly provide that requests for mutual legal assistance are to be made in writing. However, from the provisions of the ICCMA it is clear that only written requests can be processed. Section 7 of the ICCMA is silent as to whether requests may be made by e-mail, facsimile or other electronic transmission. It is foreseen that the Central Authority will be able to process letters of request forwarded by e-mail, facsimiles or other electronic transmission. The Central Authority will not be able to process requests made orally, unless confirmed shortly afterwards in written form.

Examples of implementation:

310. South Africa has, to date, not received an oral request or a relevant request. There is a case where South Africa received a request by fax. In cases like these, while the process could be initiated, the Requesting State should still send the original documents of the request.

(b) Observations on the implementation of the article

311. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 15

15. A request for mutual legal assistance shall contain:
(a) The identity of the authority making the request;
(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

- (e) Where possible, the identity, location and nationality of any person concerned; and*
(f) The purpose for which the evidence, information or action is sought.

(a) Summary of information relevant to reviewing the implementation of the article

312. All of South Africa's outgoing requests for assistance contain the information set out in the paragraph 15.
313. South Africa expects that all requests to be forwarded to the Central Authority contain the information set out in the paragraph. As discussed above, section 7 of the ICCMA provides that certain requirements are to be met before approval may be granted for assistance to be afforded. Only if a request contains the information set out in the paragraph, will the Director-General satisfy himself or herself that the requirements have been met.

Examples of implementation

314. All the requests referred to above, that is, CASE 1 to CASE 12, contained the information set out in the paragraph 15. South Africa has to date made one relevant request for assistance in investigations relating to embezzlement of funds, fraud and money laundering. The Director-General satisfied herself that the request contained the information set out in the question before she approved that request be forwarded to the requested State.

(b) Observations on the implementation of the article

315. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 16

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

(a) Summary of information relevant to reviewing the implementation of the article

316. In the spirit of cooperation in the interest of justice, South Africa would request additional information when it appears necessary for the execution of the request.

(b) Observations on the implementation of the article

317. The reviewing experts observed that, despite being a non-mandatory provision, South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 17

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

(a) Summary of information relevant to reviewing the implementation of the article

318. All requests are executed in accordance with South African law, including the ICCMA, the CPA, the POCA, the RICA, the PRECCA and the NPA Act. However, if it is compatible with the provisions of South African law, requests will be executed in accordance with the procedures specified in the request.

(b) Observations on the implementation of the article

319. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 18

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

320. South Africa is able to assist with the taking of evidence via video-link. Section 158(2) of the CPA provides for the taking of evidence via closed circuit television or electronic means.

Text applicable:

Section 158(2) of the CPA provides as follows: “a court may, subject to section 153, on its own initiatives or an application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.”

Example of implementation:

321. To date South Africa was not requested to take evidence via video-link in a relevant case.

(b) Observations on the implementation of the article

322. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 19

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

323. South Africa does not transmit or use information or evidence furnished for another purpose than that stated in the request without prior consent of the requested State. Although there are no specific provisions in the ICCMA relating to confidentiality, it is a general principle applied by South Africa. South Africa's mutual legal assistance agreements often provide specifically for confidentiality.

Example of implementation

324. To date, South Africa has not used information transmitted in a relevant case for another purpose as requested and there was no need for consultation in this regard.

(b) Observations on the implementation of the article

325. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 20

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

326. All mutual legal assistance requests are treated on a confidentiality basis. South Africa shall keep the facts and substance of requests confidential and inform the requesting State if it is unable to comply.

Example of implementation

327. All the requests referred to above, that in CASE 1 to CASE 12, were kept confidential.

328. In one case, the Minister for Justice and Constitutional Development approved that assistance be provided on the specific condition that the information transmitted be kept confidential and only to be used for the purpose of the criminal proceedings, and not for any other proceedings which were already under way.

(b) Observations on the implementation of the article

329. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Subparagraph 21

21. Mutual legal assistance may be refused:

- (a) If the request is not made in conformity with the provisions of this article;*
- (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*
- (c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*
- (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.*

(a) Summary of information relevant to reviewing the implementation of the article

330. Assistance can only be refused where the requirements in the bilateral agreement are not met; for issues relating to sovereignty, national security or public order; or when the action requested would be contrary to law.

Example of implementation

331. To date none of South Africa's requests for mutual legal assistance were refused.

(b) Observations on the implementation of the article

332. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 22

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

333. The ICCMA does not provide for any grounds for refusal. The ground that the offence involves fiscal matters is not included in any of South Africa's mutual legal assistance agreements. Therefore, mutual legal assistance cannot be refused on such grounds.

(b) Observations on the implementation of the article

334. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 23

23. Reasons shall be given for any refusal of mutual legal assistance.

(a) Summary of information relevant to reviewing the implementation of the article

335. Although there are no cases where South Africa refused mutual legal assistance, South Africa shall give reasons for any refusal of assistance.

(b) Observations on the implementation of the article

336. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 24

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

(a) Summary of information relevant to reviewing the implementation of the article

337. The ICCMA does not contain a provision regarding the period in which requests are to be executed and does not provide that information be given as the progress made with the execution of requests.

338. However, South Africa processes MLA requests as soon as possible and takes into account special deadlines as stipulated by the requesting state.

339. Similarly, the country responds positively to reasonable requests relating to information pertaining to the progress on the execution of the request. There has been some, though very few instances, where South Africa has been informed that assistance was no longer required.

340. In case of emergency, the request can be sent directly to the tribunal having jurisdiction in the place where the evidence is located, whereupon the NPA would be notified as soon as possible. Safe conduct for witnesses is guaranteed.

Examples of implementation

341. The following examples illustrate the implementation of this paragraph:

See CASE 1 referred to above. There was a delay in the execution of the request due to the following: the appointment of an investigation officer was delayed; the request had to be executed in several magisterial jurisdictions; and magistrates had to be designated as further evidence became known. The requesting State requested progress. South Africa responded

by giving reasons for the delay and took measures to prioritize the further execution of the request.

See CASE 2 referred to above. Due to the urgency of the matter and public interest in the matter in the requesting State, the requesting State often requested progress. South Africa kept the requesting State informed and several meetings took place to discuss the progress and way forward.

See CASE 4 referred to above. The requesting State requested progress. South Africa promptly informed the requesting State that the original request was awaited. The request was promptly processed after the original was received.

See CASE 5 referred to above. The Central Authority received the request, which was faxed on 28/02/2011. The request was perused on the same day, inadequacies identified and DIRCO was informed. An amended request was received on 02/03/2011 (within 2 working days). The responsible official of the Central Authority compiled a memorandum on the same day. The memorandum, which was perused by two senior officials, was submitted to the Director-General on the 10/03/2011 (within 6 working days). The Director-General granted approval on 12/03/2011 (within 2 working days). The Deputy Minister of Justice and Constitutional Development granted approval on 18/03/2011 (within 5 working days). The Minister of Justice and Constitutional Development granted approval on 30/03/2011 (within 7 working days). The request was forwarded to SAPS on the same day that memorandum was returned to the responsible official (on 01/04/2011).

See CASE 7 referred to above. The Central Authority received the request, which was hand delivered, on 01/03/2011. The request was promptly perused and a memorandum compiled. The memorandum, which was perused by a senior official, was submitted to the Director-General 03/03/2011 (within 3 working days). The Director-General granted approval on 10/03/2011 (within 5 working days). The Deputy Minister of Justice and Constitutional Development granted approval on 14/03/2011 (within 2 working days). The minister of Justice and Constitutional Development granted approval on 16/03/2011 (within 3 working days). The request was forwarded to the SAPS on the same day that the memorandum was returned to the responsible official (on 24/03/2011).

See CASE 9 referred to above. The requesting State requested progress. There was a delay in the appointment of an investigating officer. The Central Authority responded by giving reasons for the delay and took measures to prioritize the further execution of the request.

See CASE 10 referred to above. The requesting State requested progress. There was a delay due to several circumstances including the following: representations to the Minister by the company involved; consultations within the South African Government; legal opinions obtained by the South African Government; decision to postpone provision of assistance due to the pending judicial proceedings; and a delay in the appointment of investigating officer. The Central Authority responded by giving reasons for the delay and took measures to prioritise the further execution of the request.

See CASE 11 referred to above. The requesting State requested progress. There was a delay due to several circumstances including the following: South Africa requests additional information; the request was executed in different magisterial jurisdiction; magistrates had to be designated as further information became available; a legal opinion was obtained by the South African Government; and a court record had to be reconstructed. The Central Authority responded by giving reasons for the delay and took measures to prioritize the further execution of the request.

See CASE 12 referred to above. The requesting State requested progress. A meeting took place between officials of the requesting State and South Africa to discuss the contents of the request, the delay and the way forward.

342. It is difficult to provide information on the length of time between receiving requests and the execution thereof as it varies from case to case. Some requests have been finalised promptly whereas others have been outstanding for a substantial period.

(b) Observations on the implementation of the article

343. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 25

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

(a) Summary of information relevant to reviewing the implementation of the article

344. South Africa can postpone the provision of MLA if it is in the interest of justice to give preference to ongoing investigation, prosecution or any judicial proceedings that may be underway. The ICCMA does not provide that requests may be postponed. However, South Africa's mutual legal assistance agreements provide for postponement.

Examples of implementation

345. South Africa has, to date, postponed the execution of one relevant request. In CASE 10 referred to above. South Africa informed the requesting State that the execution of the request was to be postponed until the finalisation of arbitration proceedings between the Government of the requesting State and the company involved. The concern was that the execution of the request may interfere with the arbitration proceedings. The decision was later reconsidered.

(b) Observations on the implementation of the article

346. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 26

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

(a) Summary of information relevant to reviewing the implementation of the article

347. South Africa shall consult with the requesting State before refusing or postponing the execution of a request with a view to consider whether assistance may be granted subject to execution of a request with a view to consider whether assistance may be granted subject to terms and conditions. The ICCMA does not provide specifically for such consultation, yet this is done as a general practice. South Africa's mutual legal assistance agreements contain provisions implementing the paragraph 26.

Examples of implementation

348. See CASE 10 referred to above. As discussed above, the decision to postpone the execution of the request was reconsidered after consultation.

(b) Observations on the implementation of the article

349. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 27

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

(a) Summary of information relevant to reviewing the implementation of the article

350. The ICCMA does not directly provide for the protection of witnesses. However, South Africa's mutual legal assistance agreements provide for the protection of witnesses as set out in the provision. Similarly, in the framework of the Commonwealth, on the basis of the Harare Scheme, relating to mutual assistance in criminal matters, protection would be granted to the witness in this framework.

Examples of implementation

351. No case exists, where a person from abroad gave evidence in South Africa in the framework of this paragraph.

(b) Observations on the implementation of the article

352. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 28

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

(a) Summary of information relevant to reviewing the implementation of the article

353. South Africa shall bear the ordinary costs of the execution of a request and consult regarding extraordinary costs. The ICCMA does not provide for costs. However, South Africa's mutual legal assistance agreements provide that ordinary costs shall be borne by the requested Party and that consultation shall take place regarding extraordinary costs.

354. To date, South Africa has borne the costs of execution of all relevant requests and has not consulted with requesting States regarding extraordinary costs. However, assistance requests made by South Africa have in some cases suffered delays due to the lack of mechanism facilitating the participation of South Africa to the costs such requests entails.

(b) Observations on the implementation of the article

355. The reviewing experts observed that South Africa is in compliance with this provision of the Convention. However, the expert would recommend to continue to seek ways to address, where necessary, costs associated with requests for assistance made by South Africa.

Article 46 Mutual legal assistance

Subparagraph 29 (a)

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(a) Summary of information relevant to reviewing the implementation of the article

336. South Africa does provide copies of governmental documentation or information that are available to the general public. These include documents of the Deeds Office and Companies Office. Assistance was provided in the finalised case and the Minister for Justice and Constitutional Development approved that assistance be provided in the pending case.

Texts applicable

Section 233 of the CPA provides for the proof of such documents. To date, the Minister has approved in terms of section 7 of the ICCMA that such documents be provided.

Examples of implementation:

337. The following examples illustrate the implementation of this paragraph:

See CASE 1 referred to above. South Africa was requested to provide documents in possession of the Office of the Registrar of Companies. The Minister approves that assistance be afforded.

See CASE 2 referred to above. South Africa was requested to provide documents in possession of the Office of the Registrar of Companies and the Deeds Office. The request has been fully executed and the documents were forwarded to the requesting State.

See CASE 6 referred to above. South Africa was requested to provide documents in possession of the Office of the Registrar of Companies. The Minister approved that assistance be afforded.

(b) Observations on the implementation of the article

338. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Subparagraph 29 (b)

29. The requested State Party:

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

(a) Summary of information relevant to reviewing the implementation of the article

339. South Africa provides copies of governmental documentation or information that are not available to the general public. These include copies of South African Police Service criminal records and contents of police case dockets. The Minister for Justice and Constitutional Development approved that assistance be provided.

Examples of implementation:

340. See CASE 10 referred to above. South Africa was requested to provide reports compiled by a law enforcement agency. The Minister approved that assistance be afforded.

(b) Observations on the implementation of the article

341. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 46 Mutual legal assistance

Paragraph 30

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

(a) Summary of information relevant to reviewing the implementation of the article

342. The domestic legislation (ICCMA) has created a platform through which the country is able to cooperate with other State Parties through bilateral or multilateral agreements or arrangements. The Act serves to give practical effect and/or enhance the provisions of Article 46 of the Convention. To this end, South Africa has entered into a number of bilateral agreements and is also a State Party to the SADC Protocol on MLA.

Texts applicable

The International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)

Section 231 (1) of the Constitution provides that the national executive of South Africa has the power to conclude agreements.

Examples of implementation:

343. The list of treaties concluded in this framework was provided under article 44.

(b) Observations on the implementation of the article

344. The reviewing experts observed that South Africa is in compliance with this provision of the Convention. However, the experts recommend that South Africa should continue to develop bilateral and multilateral agreements with foreign countries that are in process, to enhance international cooperation.

Article 47 Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

345. In theory, the ICCMA, through section 27, allows the RSA to enter into any agreement with any foreign State for provision of mutual assistance in criminal matters, as it may deem fit. The transfer of proceedings for the prosecution of an offence, where such a transfer is considered to be in the interests of the proper administration of justice may be deemed to be such an instance. Transfers of proceedings are therefore possible, since statutes do not prohibit it.

Text applicable:

Section 27 of the International Co-operation in Criminal Matters Act, 1996 (Act 75 of 1996)

27. (1) The President may on such conditions as he or she may deem fit enter into any agreement with any foreign State for the provision of mutual assistance in criminal matters and may agree to any amendment of such agreement.
- (2) The Minister shall as soon as practical after Parliament has agreed to the ratification of, accession to or amendment or revocation of an agreement referred to in subsection (1), give notice thereof in the Gazette.

Example of implementation:

346. In the framework of corruption related offences, there has been no such transfer of proceedings. It was considered however with regards to two similar infractions committed by the same person on South Africa and Zambia to have the proceedings transferred, however, it was finally decided that the person would be judged in South Africa for the crimes committed in South Africa and that after serving his jail sentence, the person would be, on demand, extradited to Zambia to be tried for the crimes committed there.

(b) Observations on the implementation of the article

347. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 48 Law enforcement cooperation

Subparagraph 1 (a)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(a) Summary of information relevant to reviewing the implementation of the article

348. South Africa does not require an agreement to provide police to police cooperation. In many cases, South Africa cooperated very efficiently with other police forces such as Japan, Sweden, the United States, the United Kingdom, or Germany for example.

349. However, in order to facilitate even further police cooperation, South Africa has been negotiating agreements. Since 1995, over 30 police to police cooperation agreements were signed by South Africa. Most of these relate to Police cooperation in general (sometimes with specific provisions relating to drug trafficking offences). These are drafted in general terms allowing for very broad police cooperation.

350. 12 of these agreements have provisions focussing specifically on corruption. These are the agreements with the Federation of Russia, Rwanda, France, Nigeria, Portugal, Austria, Turkey, Bulgaria, Uganda, the United Arab Emirates, Malta and Cyprus. These

treaties can be found on the website www.saps.gov.za. South Africa is also part of the SARPCCO agreement, a regional instrument allowing for very close cooperation between police forces, including the possibility to operate, under certain conditions, in the territory of another state party.

351. South Africa is also active within the Assets recovery Information Network, at a regional level. South Africa is also signatory to the Council of Europe's Convention on Cybercrime which provides in its article 35 for a focal point for the exchange of information on cybercrime.
352. The contact point with regards to police cooperation in the absence of an agreement, is usually Interpol, however, direct individual contact is allowed (including through informal channels). There is also the possibility to go through the South African Embassy, where, in many cases, a liaison officers detached (such as for example for Swaziland, Thailand, The Netherlands, Zambia, Angola, Brazil, Senegal, The Democratic Republic of Congo, India, Peru, Botswana, etc.).
353. Communication in the South African Police Service takes places through the following:
- (a) Police Cooperation Agreements with other foreign police forces/agencies. To date the SAPS has engaged in approximately thirty (30) agreements. The manner of cooperation provided for in these agreements requires that competent authorities shall exchange information of interest relating to crimes which are being planned or have been committed in respect of persons and organisations involved in these crimes. In terms of the provisions of the Agreement, cooperation shall be rendered on the basis of request from the interested competent authority which deems such assistance to be of interest to the other competent authority.
 - (b) The Interpol Bureau's to foreign law enforcement agencies (Informal process).
 - (c) Mutual Legal Assistance: A formal process through a central authority is followed through which evidence is obtained from other countries relating to investigations and court cases. In South Africa this process is being regulated by the International Cooperation in Criminal Matters Act, 1996. A request is channelled through the Central Authority (the Director-General: Justice) to a foreign country.
 - (d) Information can also be requested and obtained to and from Embassies, Consulates and High Commissions, depending on the circumstances of the investigations.

Text applicable

Section 4 of the International Co-operation in Criminal Matters Act stipulates that

"(a) in a case of urgency a letter of request may be sent directly to the court or tribunal referred to in subsection (3)(a), exercising jurisdiction in the place where the evidence is to be obtained or to the appropriate government body referred to in subsection (3)(b).

(b) The Director-General shall as soon as practicable be notified that a letter of request was sent in the manner referred to in paragraph (a) and he or she shall be furnished with a copy of such a request".

(b) Observations on the implementation of the article

354. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 48 Law enforcement cooperation

Subparagraph 1 (b)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(a) Summary of information relevant to reviewing the implementation of the article

355. South Africa does not require an agreement to provide police-to-police cooperation, and cooperates regularly with law enforcement outside of the framework of an agreement. To date, the SAPS has concluded approximately 30 police cooperation agreements, 12 of which specifically address corruption: Austria, Bulgaria, Cyprus, France, Malta, Nigeria, Portugal, the Russian Federation, Rwanda, Turkey, Uganda and the United Arab Emirates. The SADC provides for broad police cooperation on a regional level, as does the Asset Recovery Inter-Agency Network Southern Africa. Direct informal contact is not precluded although often such contact would be made through Interpol, or through the police liaison officer placed in many embassies of South Africa.

356. In addition to the cooperation described in the paragraph above, the Police Cooperation Agreements also make provision for cooperation in respect of the searching for persons who are evading criminal prosecution or who are reported missing.

357. Through Interpol channels enquiries can be made on the whereabouts and activities of persons who are suspected of being involved in crime and on proceeds of crime or property obtained.

In terms of Chapter 4 of the International Cooperation in Criminal Matters Act, 1996 a formal process has to be followed to restrain and repatriate the proceeds of crime and or property derived from crime. It makes provision for

- the confiscation and transfer of proceeds of crime;
- foreign confiscation orders; and
- foreign restraint orders.

358. The Extradition Act, 1962 (Act No 67 of 1962) of South Africa provides for the extradition of persons accused or convicted of certain offences and for other incidental matters. An extraditable offence is any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State. The Act also makes provision for the extradition of persons where an extradition agreement is in force or deemed to be in force, including a multilateral convention to which the Republic is a signatory or to which it has acceded and which has the same effect as an agreement.

359. The cooperation can be extremely wide since, as no agreement is required, it is only limited by what can be legally done in South Africa.

Text applicable:

Chapter 4 of the International Cooperation in Criminal Matters Act, 1996 and the Extradition Act, 1962 (Act No 67 of 1962)

(b) Observations on the implementation of the article

360. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 48 Law enforcement cooperation

Subparagraph 1 (c)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(a) Summary of information relevant to reviewing the implementation of the article

361. In general, the Police Cooperation Agreements make provision for cooperation in scientific and technical research as well as the exchange of articles for investigation and or analytical purposes. SAPS can exchange exhibits provided that the integrity of such exhibits is maintained and the exchange of such exhibits does not jeopardise a criminal case in South Africa.

362. The Police Cooperation Agreements makes provision for the exchange of samples of drugs, psychotropic substances and substances used to make them with the national legislation of each party.

(b) Observations on the implementation of the article

363. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 48 Law enforcement cooperation

Subparagraph 1 (d)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(c) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(a) Summary of information relevant to reviewing the implementation of the article

364. The Police Cooperation Agreements make provision for cooperation in the prevention, detection and investigation of crime including, but not limited to the production of fraudulent documents.
365. Cooperation with other law enforcement entities whether formal or informal, provides for the exchange of information.

(b) Observations on the implementation of the article

366. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 48 Law enforcement cooperation

Subparagraph 1 (e)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(a) Summary of information relevant to reviewing the implementation of the article

367. South Africa is a key regional provider of interstate training, including in witness protection, corruption and money laundering.
368. Provisions for cooperation in personnel management and training have been inserted in the Police Cooperation Agreements. The same Agreements also make provision for the:
- exchange of working experience;
 - exchange of legislation; and
 - exchange on a mutually beneficial basis, of scientific and technical literature and data related to the functions of competent authorities.
369. Members of the South African Police Service also participate on an international level in conferences, seminars and workshops. The South African Police Service also hosts several international conferences, seminars and workshops.
370. The South African Police Service has agreements with certain countries in relation to the provision of training and to exchange personnel for specified periods. At present, the South African Police Service has placed 21 police officers at Interpol Bureau's worldwide.
371. Provision has been made in the South African Police Act, 1995, for the establishment of the Directorate for Priority Crime Investigation and the secondment of experts to the Directorate. The Directorate for Priority Crime Investigation within the South African Police Service is responsible for the investigation of serious corruption. This include

offences committed under the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004), and in particular section 5 of the Act.

372. In terms of section 17F of the South African Police Service Act, 1995 (Act 68 of 1995), personnel from other Government Departments or institution can be seconded which may include personnel from the South African Revenue Services, the Financial Intelligence Centre and the Department of Home Affairs. A person so seconded shall in the performance of his/her functions act in terms of the laws applicable to the Government Department or institution from which he or she is seconded, subject to conditions as may be agreed upon by the National Commissioner and the relevant Director-Generals or the Head of the Government Institution.
373. The Department of Justice and Constitutional Development does, through various mechanisms, exchange information, provide training and share expertise with a number of countries, especially in Africa. These interventions are made with due regard of the respective legal and administrative systems, with the overall goal of enhancing effective cooperation and coordination between the competent authorities.

Text Applicable

Section 17F of the South African Police Service Act, 1995 (Act 68 of 1995)

(b) Observations on the implementation of the article

374. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 48 Law enforcement cooperation

Subparagraph 1 (f)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

375. In South Africa, early warning and/or reporting systems can be found in the PRECCA Act which provides for the reporting of corrupt activities or a suspicion thereof. The Act places an obligation on a person of authority and who knows or ought reasonably to have known or suspect that a person has committed an offence in terms of the Act or certain offences referred to in the Act, to report such to any police official. Previously these reports were made to the SAPS. From 07 December 2012, such reports are made to DPCI.
376. The Financial Intelligence Centre Act, 2001, also makes provision for the reporting of suspicious or unusual transaction to the Financial Intelligence Centre. Reports are forwarded to the South African Police Service for investigation and are viewed as early identifications of offences covered in the Convention.

Texts applicable

The PRECCA Act, 2004

The Financial Intelligence Centre Act, 2001

(b) Observations on the implementation of the article

377. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 48 Law enforcement cooperation

Paragraph 2

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

(a) Summary of information relevant to reviewing the implementation of the article

378. To date, the SAPS has concluded approximately 30 police cooperation agreements, 12 of which specifically address corruption: Austria, Bulgaria, Cyprus, France, Malta, Nigeria, Portugal, the Russian Federation, Rwanda, Turkey, Uganda and the United Arab Emirates. The SADC provides for broad police cooperation on a regional level, as does the Asset Recovery Inter-Agency Network Southern Africa.

379. The South African Police Service has engaged in agreements with:

- countries such as Brazil, Russian Federation, France, Argentina, Chile, People's Republic of China, Egypt, Nigeria, Portugal, Rwanda, Austria, Iran, Turkey, Bulgaria, Uganda, United Arab Emirates, Malta, the Netherlands; and

- SARPCCO (SADC) countries such as Angola, Mozambique, Zambia, Zimbabwe, Tanzania, Malawi, Lesotho, Swaziland, Botswana, Namibia and Mauritius.

380. There is continued operation between South Africa and the SADC countries in respect of the SARPCCO Agreement relating to Police Cooperation. These agreements make provision for among others, the following:

- the co-operation of competent authorities in accordance with the provisions of the agreements.
- the co-operation of competent authorities in the prevention, detection, and investigation of crime.
- the exchange of information of interest relating to crimes which are being planned or have been committed and in respect of persons and organisations involved in these crimes.
- the exchange of information, including operation and forensic information.

381. The South African Police Service also send and receive Police Cooperation requests through the Interpol Bureau in South Africa. Interpol South Africa is authorised to

conduct Police Cooperation enquiries and the SAPS can respond to the requests or provide information.

382. South Africa recognises the UNCAC as basis for mutual law enforcement cooperation in respect of the offences covered by this Convention.

(b) Observations on the implementation of the article

383. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

(c) Successes and good practices

384. South Africa recognises the UNCAC as basis for mutual law enforcement cooperation in respect of the offences covered by this Convention.

Article 48 Law enforcement cooperation

Paragraph 3

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

(a) Summary of information relevant to reviewing the implementation of the article

385. The South African Police Service has established an Electronic Crime Unit within the Directorate for Priority Crime Investigation. The purpose of this Unit is to enhance the effectiveness of the investigation of crime that is being committed by using modern technology. The Unit will be supported by a Forensic & Analysis Cyber Laboratory and other role players such as the South African Banking Risk Intelligence Centre (SABRIC), the National Gambling Board, the Department of Communications, etc.

386. There is interaction and continuous cooperation between SAPS and other stakeholders to address and investigate offences that are committed through the use of modern technology such as the banking industry, the cyber crime environment, the communication environment and the gambling environment.

(b) Observations on the implementation of the article

387. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 49 Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

(a) Summary of information relevant to reviewing the implementation of the article

388. Joint investigations with foreign law enforcement agencies can be, and have been conducted, in the absence of any agreement or on the basis of the SADC protocol.

389. The South African Police Service has joint investigations with foreign law enforcement agencies in South Africa and abroad.

(b) Observations on the implementation of the article

390. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 50 Special investigative techniques

Paragraph 1

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

(a) Summary of information relevant to reviewing the implementation of the article

391. Special investigative techniques, including electronic and video surveillance and undercover operations, have been successfully used in corruption and money laundering operations. These techniques are authorized by the Regulation of Interception of Communications and Provision of Communication-related Information Act (2002) and the CPA. A specific agreement is not necessary to use special investigative techniques, and South Africa coordinates closely to ensure legality and admissibility of evidence obtained. However, assistance requests made by South Africa have in some cases suffered delays due to the lack of a mechanism facilitating the provision of costs incurred for such requests.

Texts applicable:

- The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002.
Electronic or other forms of surveillance such as video and interception of communications, either in oral or electronic format are also being utilised during investigations. The Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 regulate the use of these surveillance methods.
- Section 252A of the CPA. This section regulates all matters relating to undercover operations and police traps and includes the admissibility of evidence that was obtained during the undercover operations or the police trap. In terms of these provisions the Director of Public Prosecutions gives the necessary authority on application by an investigator to conduct undercover operations.

Examples of implementation:

392. The South African Police Service has used special investigative techniques such as controlled deliveries, undercover operations and electronic surveillance in criminal investigations and has it been successfully used in corruption and money laundering investigations.
393. The method of control deliveries has been successfully implemented for monitoring, investigating and combating of crimes including money laundering and corruption crimes.

(b) Observations on the implementation of the article

394. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 50 Special investigative techniques

Paragraph 2

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

(a) Summary of information relevant to reviewing the implementation of the article

395. The South African Police Service can utilise these methods in our own jurisdiction subject to the applicable domestic laws. No specific agreement is therefore required for a request to be made to South Africa.
396. Various of the agreements signed by South Africa provide for such cooperation. Of the twelve agreements mentioning specifically police cooperation in the framework of corruption related crimes, four provide for special investigation techniques (Austria, Rwanda, Bulgaria, and Uganda).

(b) Observations on the implementation of the article

397. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 50 Special investigative techniques

Paragraph 3

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

(a) Summary of information relevant to reviewing the implementation of the article

398. Law enforcement agencies can utilize the techniques with or without an agreement provided that there is compliance with domestic law. In these instances there will be direct contact with the country requesting assistance as well as our own prosecuting authority to ensure the admissibility of evidence obtained in this fashion.

(b) Observations on the implementation of the article

399. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

Article 50 Special investigative techniques

Paragraph 4

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

(a) Summary of information relevant to reviewing the implementation of the article

400. The South African Police Service has been engaging with other international law enforcement agencies with regard to controlled deliveries. These methods have been successfully implemented in the investigation of crimes including money laundering and predicate offences such as drug trafficking, illegal smuggling of goods and stolen motor vehicles. Often these crimes may include the bribery of custom officials.

(b) Observations on the implementation of the article

401. The reviewing experts observed that South Africa is in compliance with this provision of the Convention.

ANNEX 1: SOUTH AFRICA`S COOPERATION WITH OTHER STATE PARTIES ON INVESTIGATIONS ON CORRUPTION

NO	DATE	INTERPOL REFERENCE	REQUESTING STATE PARTY	STATE PARTY REQUESTED FROM	DETAILS OF CO-OPERATION
1	April 2011	33/04/2011	Lesotho	South Africa	Request for banking and other details as well as statements on a Fraud /Corruption case involving state monies deposited in FNB in the RSA.
2	July 2011	34/07/2011	Lesotho	South Africa	Request assistance from the RSA for investigation into allegations of corruption
3	Nov 2011	33/11/2011	Namibia	South Africa	Mutual Legal Assistance request in a corruption matter
4	Nov 2011	05/11/2011	United Kingdom	South Africa	Mutual Legal Assistance requested in Fraud and Corruption matter.
5	Dec 2011	60/12/2011	South Africa	Germany	A request for information on corruption forwarded to Germany
6	Feb 2012	20/02/2012	Uganda	South Africa	A request for assistance into allegations of corruption
7	April 2012	06/04/2012	London	South Africa	A request for assistance to settle a dispute relating to possible corrupt practice
8	April 2012	136/04/2012	Israel	South Africa	A request for assistance with a fraud and corruption matter.
9	Jun 2012	182/06/2012	South Africa Botswana	South Africa	Assistance to work with the RSA Investigators to finalize corruption matter.
10	Jul 2012	37/07/2012	Zimbabwe	South Africa	Request for assistance with investigations into allegations of corruption matter.
11	Aug 2012	144/08/2012	Botswana	South Africa	Assistance on corruption matter