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# **Country Review Report of the Kingdom of Swaziland**

Review by Botswana and Sri Lanka of the implementation by Swaziland 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

## **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 whose overall goal 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 Kingdom of Swaziland (hereinafter, Swaziland) of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Swaziland, 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 Botswana, Sri Lanka and Swaziland, by means of e-mail exchanges and any further means of direct dialogue in accordance with the terms of reference, and involving Mr. Linda Mluleki Dlamini, Ms. Gugu Patiance Simelane, Ms. Lungile Magagula Mgongo, Adv. Thanda A. Mngwengwe, Mr. Nkosinathi Maseko and M.C B Maphalala (CJ), from Swaziland, Mr. Andria German and Mr. Tumisang Phirie from Botswana and Mr. Dilan Ratnayake from Sri Lanka. The staff members of the secretariat were Ms. Tanja Santucci and Mr. Tim Steele.
6. A country visit, agreed to by Swaziland, was conducted in Mbabane from 21 to 23 July 2015. During the on-site visit, meetings were held with the Anti-Corruption Commission, Prosecution Department, Attorney General's Office, Royal Swaziland Police Service, Financial Intelligence Unit, Ministry of Justice and Constitutional Affairs and the judiciary. A meeting was also held with representatives of civil society.

## **III. Executive summary**

### ***1. Introduction: Overview of the legal and institutional framework of Swaziland in the context of implementation of the United Nations Convention against Corruption***

*The Convention was signed by the King of Swaziland on 15 September 2005 (C.N.821.2005.TREATIES-30) and subsequently ratified by the Government. Swaziland deposited its instrument of*

ratification with the United Nations on 24 September 2012 (C.N.500.2012.TREATIES-XVIII.14).

Accepted international agreements, once ratified by the Government, form an integral part of Swaziland's domestic law only when enacted into law by Parliament (article 238 (1) of the Constitution).

Swaziland operates a dual legal system of customary and Roman Dutch law. Corruption is criminalized under the Prevention of Corruption Act (No. 3) of 2006 (POCA) which criminalizes and punishes corrupt practices, including; bribery, money laundering, conflict of interest and cheating of the public revenue. The recovery of proceeds generated through corrupt activities is a concern and requires a conviction before any confiscation can take place.

Key institutions in the fight against corruption include: the Anti-Corruption Commission (ACC), Commission on Human Rights and Public Administration, Royal Swaziland Police Service, Financial Intelligence Unit (FIU), Auditor General's office, Attorney General, Swaziland Public Procurement Authority, office of the Director of Public Prosecutions (DPP), Parliamentary Public Accounts Committee, National Anti-Corruption Forum and the judiciary.

## **2. Chapter III: Criminalization and law enforcement**

### **2.1. Observations on the implementation of the articles under review**

Section 2 of POCA provides a non-exhaustive definition of "public officer" and "public office", although there are some limitations: officials who are unpaid are not covered. Further, Article 254 of the Constitution excludes a number of persons from the scope of the definition, including members of Parliament and members of the Constitutional commissions.

A lack of statistics evidencing implementation is noted.

#### **Bribery and trading in influence (arts. 15, 16, 18 and 21)**

Section 21 of POCA provides for the offence of active and passive bribery of public officers. Sections 23 and 42 of POCA cover promises of bribery and the giving of bribes. There are some discrepancies among the bribery offences in sections 21, 23 and 42 of POCA. Notably, section 21(1) covers offers, but not the promise or exchange of bribes. However, promises of bribes are covered in section 23 and the giving of bribes in section 42. Further, third party beneficiaries are not addressed in section 21, although they are covered in sections 23 and 42; and indirect acts of bribery are covered in section 42, but not in section 21. These measures should be harmonized in the legislation.

Swaziland has not adopted a specific offence of bribery of foreign public officials and officials of public international organizations.

Swaziland has not criminalized trading in influence.

Swaziland has criminalized bribery in the private sector (section 23, POCA).

#### **Money-laundering, concealment (arts. 23 and 24)**

Section 41 of POCA and section 4 of the Money Laundering and Financing of Terrorism (Prevention) Act 2011 (MLFTP) criminalize money laundering. Participatory acts, including performing any act

*in connection with criminal proceeds, whether independently or in concert with others, are covered (sections 41(1)(b) POCA, 4(d) MLFTP). Predicate offences are offences committed either: (i) in Swaziland and punishable under Swaziland law by imprisonment for at least 12 months or a fine of at least E15,000; or (ii) outside Swaziland which, had they occurred in Swaziland, would have constituted offences against Swaziland law punishable by the same penalty (section 4, MLFTP), and a conviction is required. However, it is not clear how the list of predicate offences in MLFTP (Schedule 1) is read in conjunction with section 4, which provides for an all crimes approach to predicate offences. Self-laundering is not precluded (section 4, MLFTP). Swaziland has not furnished copies of its AML laws to the United Nations.*

*Concealment is criminalized (sections 41(1)(b) and 41(2)(a), POCA; section 4(1)(b), MLFTP; section 191 Criminal Procedure and Evidence Act 1938 (CP&E)).*

*Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)*

*In addition to the common law offences of embezzlement and theft, the statutory offence of cheating the public revenue (section 24, POCA) partly covers the embezzlement, misappropriation or other diversion of property. While the diversion of money or Government property is addressed, acts of misappropriation or embezzlement more generally are not.*

*Swaziland has not criminalized abuse of functions, apart from the general offence of corruption (section 42, POCA).*

*Section 34 of POCA criminalizes the possession of unexplained wealth. Swaziland has also established a declaration of assets and liabilities regime in article 241 of the Constitution.*

*Swaziland has not criminalized embezzlement of property in the private sector, apart from the common law offences of embezzlement and theft.*

*Obstruction of justice (art. 25)*

*Section 29(3) of POCA covers obstruction of witnesses to interfere in the giving of testimony or the production of evidence.*

*Section 16 of POCA, section 86 of MLFTP, and section 23 (1) (c) of CP&E further address obstruction or interference with justice or law enforcement officials in accordance with the requirements of the Convention.*

*Liability of legal persons (art. 26)*

*Swaziland's law provides for criminal, civil and administrative liability of legal persons, which is established (despite the absence of case law) irrespective of the liability of the natural persons involved. The main legal provisions are sections 35 and 36 of POCA, sections 338 and 8 of CP&E, as well as section 76 read together with section 89 of MLFTP. Penalties against legal entities under POCA amount to fines up to E500,000. Administrative penalties, including endorsement of the conviction on a register, which may lead to debarment, contract rescission, disqualification from the tender process, and other penalties, are provided (section 38,*

POCA). Consideration should be given to whether the established penalties against legal persons are sufficiently dissuasive.

Participation and attempt (art. 27)

Swaziland has not criminalized the preparation of an offence, but provisions on attempt, conspiracy and complicity in various forms are in place (principally, sections 39 of POCA and 181 of CP&E).

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

Sections 35 and 36 of POCA and section 89 of MLFTP provide for penalties and additional penalties for Convention offences. Consideration should be given to enhancing the penalties for corruption-related offences, taking into account the gravity of the offences. Swaziland may also wish to consider adopting minimum penalties for corruption offences, as it was explained that this could provide for greater consistency in sentencing.

Swaziland law gives absolute immunity to the King and the Queen mother, which extends to testifying both in civil and criminal proceedings. While judges enjoy functional immunity for acts within the exercise of their functions, no other public officials enjoy criminal immunity. However, certain officials are excluded from the definition of public officer, pursuant to article 254 of the Constitution.

The DPP, in executing its mandate, prosecutes in the public interest and the interest of the administration of justice and has regard to the need to prevent abuse of the legal process. Moreover, the DPP shall be independent and not subject to the direction or control of any person or authority (article 162(6) of the Constitution). Section 28(3) of POCA further criminalizes corrupt activities relating to public prosecutors, including accepting bribes, showing favour or disfavour or exerting improper influence in connection with any civil or criminal proceedings. All corruption cases brought to the DPP have reportedly been indicted.

Section 95(3) of CP&E addresses the powers of the High Court regarding bail. Section 96(4) regulates conditions for bail to ensure the presence of the defendant at subsequent criminal proceedings; relevant case law was provided.

Section 329 of CP&E provides for the authority of the King to remit or commute a sentence either free or subject to lawful conditions. Article 78 of the Constitution further provides for the King's prerogative of mercy. The law does not provide for consideration of the gravity of offences before release on parole. There have been no corruption cases where the prerogative of mercy was applied or the sentence was remitted.

The law provides for suspension of public officials in articles 158(6), 162 and 187 of the Constitution and section 6 of POCA. Regulation 38 of the Civil Service Board (CSB) Regulations further allows for disciplinary action to be taken against public officers if a preliminary investigation or disciplinary inquiry discloses a possible criminal offence. Disciplinary punishments may include dismissal, termination and reassignment/demotion in rank. Interdiction is provided for, if disciplinary proceedings are being taken or about to be taken or if criminal proceedings are being instituted (Regulation 39, CSB Regulations).

*There are no specific laws or procedures for the disqualification of convicted persons from holding positions in public offices or public enterprises.*

*The Constitution provides for the protection, holding and rehabilitation of prisoners (article 190(1)). An ongoing programme to rehabilitate and integrate offenders into society is administered by the Swaziland Correctional Services.*

*Section 234 of CP&E encourages accomplices to testify on behalf of the State. Section 235 does not give immunity to accomplices but provides that their testimony may not be used against them. The law does not provide mitigating punishment; however, the courts may take the cooperation of offenders into account as a mitigating factor during sentencing. A Witness Protection Bill would protect offenders who cooperate with law enforcement insofar as they are treated as witnesses.*

*Protection of witnesses and reporting persons (arts. 32 and 33)*

*CP&E section 96 provides limited protections to witnesses by holding suspects who may interfere with such witnesses in custody. Swaziland does not have a witness protection programme, and a 2010 Bill on Witness Protection is pending.*

*POCA provides for the protection of informers in terms of not disclosing their identity. The law does not give protection against unjustified treatment to reporting persons.*

*Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)*

*Relevant provisions are found in POCA, the Serious Offences (Confiscation of Proceeds) Act, 2001 (SOCPA), MLFPA and the Suppression of Terrorism Act, 2008. Forfeiture is conviction-based. Forfeiture under SOCPA is of a general nature and applies to proceeds derived from all serious offences (section 4), including offences against POCA (Schedule). Forfeiture provisions in MLFPA relate to property, proceeds or instruments of any unlawful activity or money laundering offence. The confiscation or forfeiture of property of corresponding value is also provided for (section 9 SOCPA; section 57(3) MLFPA). Asset tracing provisions are found in sections 11 and 16-18 SOCPA and sections 49 and 71 MLFPA.*

*The confiscation of instrumentalities used or intended to be used in the commission of offences is provided for (section 57(2)(d)) MLFPA). However, the definition of 'proceeds of serious offence' in section 2, SOCPA covers only instrumentalities "used" in the commission of offences.*

*Section 19 of SOCPA addresses the management of seized property and section 11(7) deals with vesting seized property in a trustee to take control and custody of the property or for property to be disposed of or dealt with as specified in the court order. Confiscated property is sold and proceeds are deposited in the Consolidated Fund.*

*The law empowers the court or competent authorities to access or seize bank or financial records, which are routinely obtained for investigative purposes (e.g., section 12, POCA, sections 49 and 49 bis, CP&E). The ACC can obtain records through the FIU or request them directly by letter from the Commissioner. Section 35 of POCA provides for the additional penalty of forfeiture, where a person has been convicted of the possession of unexplained wealth (section 34,*

*POCA). Section 11(2) of the POCA and section 17(3) of MLFPTA also provide for access to financial records.*

*Statute of limitations; criminal record (arts. 29 and 41)*

*Swaziland has adopted a 20-year statute of limitations for corruption-related offences (section 20, CP&E), which runs from the time of commission of the offence and is not interrupted if the offender evades the administration of justice.*

*There is no legislative basis for judicial authorities to take into account previous foreign convictions.*

*Jurisdiction (art. 42)*

*Jurisdiction over certain POCA offences extends to acts within and outside Swaziland (sections 21 to 23, POCA). However, there is no general provision on the jurisdictional reach of the Act, which would also cover offences on board of vessels or airplanes. Acts by or against nationals and stateless persons; offences against the State, and cases where extradition is refused and the offender is present in its territory are not specifically regulated. Participatory acts to money laundering committed outside Swaziland are partly covered (section 39, POCA; sections 4 (a)-(d) and 5, MLFPTA).*

*Consequences of acts of corruption; compensation for damage (arts. 34 and 35)*

*Relevant measures to address the consequences of corruption are found in sections 35 to 38 of POCA. Section 36 provides for penalties that take into account restitution of property to the lawful owner. The law also provides for forfeiture to the State where the lawful owner cannot be ascertained or is implicated in the offence. Debarment, contract rescission, disqualification from the tender process, and other penalties, are provided for (section 38, POCA).*

*Compensation for damages may be obtained under common law principles.*

*Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)*

*Section 3 of POCA establishes the ACC as an independent Commission. Section 4(4) provides that, in the performance of their functions, the Commissioner and Deputy Commissioners shall be independent and shall not be subject to the direction or control of any person or authority. Sections 8 and 9 of POCA address staff selection and training.*

*The ACC produces annual reports as required by Section 20 of POCA; however, these are often published with significant delay and cannot be accessed electronically, because the ACC's website has not been updated since 2012.*

*Other relevant institutions include the DPP, Royal Swaziland Police Service and the Financial Intelligence Unit. Steps were being taken to establish a specialist anti-corruption prosecution unit in the DPP at the time of review.*

*Investigating and prosecuting agencies (DPP, ACC, police) and the FIU face challenges of limited capacity in investigations and detecting crimes. Capacity building in the judiciary, in particular for magistrates, is*

*needed and a specialization in the judiciary on corruption cases would be useful to address the backlog of cases.*

*There is an obligation by persons holding positions of authority (as defined in section 49(2) of POCA) to report corruption offences to the competent authorities. These also cover other offences such as fraud, extortion and forgery (section 49(1)(b), POCA), for which a duty to report is established, and the obligation to report also extends to certain officials in the private sector. However, no other measures are in place to encourage or require the cooperation of public authorities with law enforcement.*

*Cooperation between investigating and prosecuting authorities and entities of the private sector is established, in limited measure, principally through a memorandum of understanding (MOU) between the ACC and the Central Bank, as well as an MOU between the FIU, the ACC, Police and the Swaziland Revenue Authority (SRA). A Bank Liaising Committee comprising officers from the ACC, the banking sector, Financial Services Regulatory Authority (FSRA), SRA, Police, FIU and the DPP, which meets monthly to discuss issues of fraud in the banking sector.*

*Swaziland has adopted measures and reporting channels to allow for reporting (including anonymously) of corruption related offences.*

## **2.2. Successes and good practices**

*The following are highlights of the successful experiences and good practices in the implementation of Chapter III of the Convention:*

- Existence of a task team on corruption, which consists of the ACC, DPP and police and chaired by the DPP, as well as a National Task Force on Money Laundering.*

## **2.3. Challenges in implementation**

*To further enhance existing anti-corruption measures it is recommended that Swaziland:*

- Strengthen data collection systems to allow for the identification and tracking of corruption and money laundering cases that are investigated, prosecuted and adjudicated across agencies. Swaziland should consider publishing this data regularly in annual reports and on the ACC website.*
- Amend the definition of public officer to cover officials who do not receive payment, parliamentarians and other persons listed in article 2 of the Convention (see also, art. 30(2)).*
- Amend POCA to ensure that, for all relevant offences, promises and exchanges of bribery are covered, in addition to the offering of bribes, and to cover third party beneficiaries and indirect acts of bribery (art. 15).*
- Criminalize active bribery of foreign public officials and officials of public international organizations and consider criminalizing passive foreign bribery (art. 16).*
- Criminalize embezzlement, misappropriation and other diversion of all types of property, including public or private funds, securities or other things of value entrusted to public officials (art. 17).*



- *Consider adopting a specific offence of trading in influence (art. 18).*
- *Consider criminalizing abuse of functions (art. 19).*
- *Consider establishing an offence of embezzlement of property in the private sector (art. 22).*
- *Amend the MLFPA to: consider eliminating the schedule of predicate offences; eliminate the threshold requirement of imprisonment of at least 12 months or a fine of at least E15,000 for predicate offences; and remove the requirement for a conviction on the predicate offence (art. 23(2)(c)).*
- *Furnish copies of its AML laws to the United Nations (art. 23(2)(d)).*
- *Review and consider amending its legislation to ensure that penalties for legal entities engaged in corruption are sufficiently dissuasive (art. 26(4)).*
- *Consider amending its legislation to provide that the limitations period runs from the time of discovery of the offence and provide for its interruption if the offender evades the administration of justice (art. 29).*
- *Consider enhancing the penalties for corruption-related offences, taking into account the gravity of the offences, and consider adopting minimum penalties for corruption offences (art. 30(1)).*
- *Amend its legislation to take into account the gravity of offences when considering early release or parole of convicted persons (art. 30(5)).*
- *Consider adopting procedures for the disqualification of convicted persons from holding positions in a public office or public enterprise (art. 30(7)).*
- *Amend SOCPA to ensure that instrumentalities “destined for use” in offences are covered (art. 31).*
- *Consider strengthening the management of seized and confiscated assets building on the provisions in SOCPA (art. 31(3)).*
- *Provide effective protection, including physical and evidentiary, from retaliation or intimidation for witnesses, experts, victims and, as appropriate, their relatives or associates, including through the swift adoption and implementation of the 2010 Bill on Witness Protection (art. 32).*
- *Consider adopting measures to provide effective protection against unjustified treatment for reporting persons (art. 33).*
- *Strengthen the legal and operational independence of law enforcement institutions (ACC, police, DPP) and the FIU, and provide for capacity building of the judiciary (art. 36).*
- *Swaziland’s ACC take steps to produce annual reports and report regularly on its activities, including updating its website, as a matter of priority (art. 36).*
- *Take steps to accelerate the creation of a specialist anti-corruption prosecution unit in the DPP (art. 36).*

- *In consultation with development and technical assistance partners, undertake a comprehensive technical assistance needs assessment, using as a baseline the results of the present review, in order to develop a country-led and prioritized technical assistance action plan, to address the identified needs.*
- *Adopt measures to provide effective protection to cooperating defendants (art. 37(4)).*
- *Adopt measures to encourage or require the cooperation of public authorities with law enforcement (art. 38).*
- *Continue to strengthen cooperation and invest attention and resources to outreach, awareness raising and education on matters of corruption among the public (art. 39).*
- *Consider adopting measures to allow for previous foreign convictions to be taken into account in criminal proceedings (art. 41).*
- *Adopt a general provision on the jurisdictional reach of POCA (art. 42(1)), which could also cover acts by or against nationals and stateless persons (art. 42(2)(a) and (b)); offences against the State (art. 42(2)(d)); and cases where extradition is refused and the offender is present in its territory (art. 42(2)(e)).*
- *Provide for jurisdiction in respect of participatory acts to money laundering committed outside Swaziland (art. 42(2)(c)).*

#### **2.4. Technical assistance needs identified to improve implementation of the Convention**

- *Summary of good practices/lessons learned (arts. 22, 23, 31, 37, 39, 41)*
- *Model legislation, agreements or arrangements (arts. 22, 23, 26, 39, 41)*
- *Legislative drafting/legal advice (arts. 17, 22, 23, 26, 37, 39)*
- *Development of an action plan for implementation (arts. 22, 41)*
- *Capacity-building programmes (art. 37, 39).*

### **3. Chapter IV: International cooperation**

#### **3.1. Observations on the implementation of the articles under review**

*The reviewing experts note the absence of cases and data on any extradition and mutual legal assistance (MLA) requests Swaziland has received, and, more generally, the absence of a specific system for collecting data.*

##### *Extradition, transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45, 47)*

*The primary legislation governing extradition is the Extradition Act 1968 (EA). Extradition is rendered on the basis of an agreement and on conditions of reciprocity (section 3, EA), although Swaziland may also engage in extradition relations on the basis of reciprocity in cases where no treaty is in place. Section 4, EA refers to Swaziland's extradition treaties for determining extraditable offences. Swaziland*

*has not applied this Convention as the legal basis for extradition, although it could do so in principle. Swaziland is party to two bilateral treaties (Republic of South Africa and United States of America) and multilateral treaties through the Southern African Development Community (SADC) and the African Union. Under the Commonwealth, Swaziland can extradite through the London Scheme on Extradition.*

*Issues of dual criminality are considered according to the terms of the treaties (sections 3 and 4, EA). Dual criminality is not a condition precedent for extradition under EA (section 4), but is required under the terms of Swaziland's extradition treaty with South Africa. Extradition is limited to the extent that not all Convention offences are criminalized.*

*The conditions and grounds for refusal are found in the extradition treaties and section 5, EA. Swaziland refuses extradition where the offence is an offence of a political character (section 5, EA). The fact that the offence involves fiscal matters is not a ground for refusal under EA; however, there are some restrictions on extradition for fiscal offences under Swaziland's treaties.*

*Subject to any extradition agreement, a request for extradition shall be made to the Prime Minister (section 6, EA). In practice, requests are normally sent through the Ministry of Foreign Affairs or Ministry of Justice and forwarded to the DPP's Office to consider the request in light of the requirements of the Act and the applicable treaty, until the request is considered by the courts. The legislation does not address simplified procedures relating to extradition.*

*Swaziland does not restrict the extradition, or recognize the conditional surrender, of its nationals. Swaziland would grant extradition for the purposes of enforcing a foreign sentence, as provided for in the treaty with South Africa. It would not deny extradition requests on grounds of nationality, although there have been no cases to-date.*

*Fair treatment guarantees enshrined in the Constitution, which provides in for a fair and timely hearing (article 21), and domestic legislation (sections 9 and 10, EA). Non-discrimination and fair treatment protections are further contained in article 20(3) of the Constitution and sections 5 (b) and (c) and 14 of EA.*

*Swaziland has not established a duty to consult before refusing extradition.*

*There was only one reported incoming extradition request in the last four years in a fraud matter from South Africa, which was pending as of July 2015, and none related to corruption.*

*The Transfer of Convicted Offenders Act, No. 10 of 2001 provides for the transfer of convicted offenders to and from Swaziland. Swaziland has not entered into any treaties on the transfer of prisoners and there have been no transfers in corruption cases.*

*Swaziland's legislation does not address the transfer of criminal proceedings, and there is no law or practice on the matter.*

#### *Mutual legal assistance (art. 46)*

*The Criminal Matters (Mutual Assistance) Act 2001 (CMMAA) provides the legal framework for MLA. MLA under CMMAA is limited to countries designated in terms of the provisions of the Act*

*(currently only South Africa) by the Minister of Justice, who under the same Act is also the competent authority for making or receiving requests. In practice, however, requests are received through the Ministry of Foreign Affairs.*

*Swaziland has no bilateral MLA treaties, but is party to multilateral treaties under the African Union, the SADC Protocol and the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters (Harare Scheme). Swaziland is not precluded from considering the Convention as a legal basis for MLA, although there has been no experience in its application.*

*In the last 3 years, there have been 9 outgoing and 4 incoming MLA requests (from South Africa, Lesotho, Zambia and the OSCE, all of which were pending at the time of the country visit). All incoming requests related to fraud, corruption and money laundering. No requests have been refused by Swaziland to date.*

*Dual criminality is an optional requirement for MLA (Section 18, CMMAA) and hence the provision of MLA may be limited to the extent that Swaziland has not criminalized all Convention offences. Dual criminality is flexibly interpreted, considering the underlying conduct of the offence. The law does not provide that non-coercive assistance will be provided in the absence of dual criminality.*

*Swaziland has not adopted any guidelines, regulations, operating procedures or timeframes for handling MLA requests and could take steps to streamline MLA procedures, including the institutional setup.*

*Swaziland has not notified the United Nations of its central authority for MLA.*

*Section 17, CMMA sets out the format requirement for MLA requests. Requests must be made in English, although this is not specified in the CMMA and the United Nations have not been notified.*

*Grounds for refusal are established in section 18, CMMAA. Swaziland has not provided that reasons shall be given for any refusal of MLA.*

*Swaziland can share information spontaneously (section 4, CMMAA) and would honour a request to keep such information confidential.*

*The transfer of prisoners for MLA is regulated in section 21(3) CMMAA, although the obligation to keep such persons in custody and ensure their swift return is not addressed.*

*Swaziland's legislation does not preclude the examination of witnesses by videoconference, although there have been no such cases.*

*A limitation of use of information is addressed (sections 32 and 11, CMMLAA). The confidentiality of requests and their content is provided for (section 30, CMMLAA). However, there is no law or practice addressing the issue of costs of MLA.*

*Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49, 50)*

*Swaziland is party to a variety of arrangements and networks to facilitate law enforcement cooperation and there has been some*

*experience of such cooperation with the authorities in South Africa in money laundering cases.*

*Swaziland is not precluded from considering the Convention as a legal basis for law enforcement cooperation; however, there has been no experience in its application.*

*Swaziland could take steps to further strengthen its cooperation in the area of law enforcement cooperation at the international level.*

*Joint investigations may be conducted on a case by case basis on the basis of specific agreements or arrangements and through Interpol. Swaziland's legislation does not preclude the formation of joint investigation teams. There have been no joint investigations with other countries in corruption related cases.*

*Investigating authorities are empowered to conduct special investigative techniques, although the matter is not addressed in the legislation. Section 6(2) of the Electronic Records (Evidence) Act 2009 provides for the admissibility of evidence obtained by electronic means. Swaziland police have conducted surveillance and controlled delivery in matters not involving Convention offences.*

### **3.2. Challenges in implementation**

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

- Improve systems to collect data on the types of international cooperation requests (e.g., underlying offences), the timeframe for responding to these requests, and the response provided, including any grounds for refusal.*
- Undertake capacity building for authorities responsible for international cooperation (extradition and MLA), including in the application of domestic laws and the bilateral and multilateral treaties Swaziland is party to.*
- Take steps to expedite extradition procedures and simplify evidentiary requirements in respect of Convention offences, including simplifying the institutional setup (art. 44(9)).*
- Ensure that extradition will not be refused on the ground that the request involves fiscal matters, by amending its legislation and ensuring that the matter is addressed in its extradition agreements (art. 44(16)).*
- Adopt a legal provision or regulation addressing the duty to consult before refusing extradition (art. 44(17)).*
- In light of the limited number of extradition treaties, ensure that the Convention can be recognized as a legal basis for extradition in respect of Convention offences (art. 44(18)).*
- Ensure, where assistance is refused on grounds of dual criminality, that non-coercive assistance is provided (art. 46(9)(b)).*
- For prisoner transfers for MLA, adopt a provision to provide for the obligation to keep the person in custody and to return him swiftly (art. 46(11)(a) and (b)).*
- Take steps to streamline MLA procedures in respect of Convention offences, including the institutional setup, and consider adopting MLA guidelines, regulations or operating*

*procedures to spell out the procedure for handling requests and timeframes for execution; further, Swaziland should ensure that requests are executed expeditiously (art. 46(13), arts. 46(24) to (26)).*

- Notify the United Nations of its central authority (art. 46(13) and acceptable language for MLA (art. 46(14)).*
- Provide that reasons shall be given for any refusal of (this could be done through MLA regulations) (art. 46(23)).*
- Clarify the issue of costs of MLA in its legislation (art. 46(28)).*
- Consider establishing a legal or procedural framework for the transfer of criminal proceedings (art. 47).*
- Take steps to further strengthen its cooperation in the area of law enforcement cooperation at the international level (art. 48).*

### **3.3. Technical assistance needs identified to improve implementation of the Convention**

- Summary of good practices/lessons learned (arts. 44, 47, 49)*
- Model agreement(s)/arrangement(s) (art. 49)*
- Capacity-building programmes (arts. 44, 47, 49)*
- Development of an action plan for implementation (art. 44).*

## **IV. Implementation of the Convention**

### **A. Ratification of the Convention**

7. The Convention was signed by His Majesty the King of Swaziland on 15 September 2005 (C.N.821.2005.TREATIES-30) and ratified by the Government of Swaziland on 24 September 2012 as per Swaziland's Depositary Notification (C.N.500.2012.TREATIES-XVIII.14).
8. Article 238 (1) of the Constitution states that the Government may execute or cause to be executed an international agreement in the name of the Crown. Subsection (2) states that  
  
"An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by -  
(a) an Act of Parliament; or  
(b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament".
9. Subsection 4 states that "Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament". Subsection 6 provides that "For the purposes of this section, "international agreement" includes a treaty, convention, protocol, international agreement or arrangement". This generally means that accepted

international agreements when they have been ratified by Government form an integral part of Swaziland's domestic law only when enacted into law by Parliament.

10. Accordingly, the UN Convention against Corruption has become an integral part of Swaziland's domestic law following ratification of the Convention.

11. The implementing legislation includes:

- The Constitution of the Kingdom of Swaziland Act 2005
- Parliamentary Privileges Act 1967
- The Prevention of Corruption Act 2006 (also referred to as POCA)
- Procurement Act 2011
- The Money Laundering and Financing of Terrorism (Prevention) Act 2011
- Serious Offences (Confiscation of Proceeds) Act 2001
- Extradition Act 1968
- Criminal Matters (Mutual Assistance) Act 2001 (also referred to as CMMAA)
- Swaziland Extradition Agreement with South Africa 1968
- Swaziland Extradition Agreement with the United States of America 1935
- Electronic Records (Evidence) Act 2009
- High Court Act 1954
- Magistrate Court Act 1939
- Criminal Procedure and Evidence Act 1938
- Suppression of Terrorism Act 2008

## **B. Legal system of Swaziland**

12. The Kingdom of Swaziland is a small landlocked developing country which is bordered on the North, West and South by the Republic of South Africa and on the East by the Republic of Mozambique. It has a small-export oriented diversified economy which is closely linked to the South African economy. The country is part of a monetary union with the Republic of Namibia, the Republic of South Africa and the Kingdom of Lesotho. The South African currency (the Rand) circulates freely on par with these countries' national currencies within the union.

13. The proximity of the country to major cities in Mozambique and South Africa makes it a strategic transit country for illegal operations into these countries and Southern Africa at large. The major generators of corruption are facilitated through crimes such as trafficking in human beings and drugs, counterfeiting of goods and currency, fraudulent cross-border bank transfers, tax and customs evasion, forgery, and theft. As a result of the geographical location and economic profile of the country, the major crimes generating proceeds have manifestations of organized cross-border operations with the illicit funds invested within the monetary union, also known as the Common Monetary Area (CMA). Swaziland is committed to addressing these challenges through various initiatives such as the promotion of law enforcement coordination and cooperation within and outside of the country, setting up of institutions to promote good governance and transparency in both public and private sector spheres.

14. Swaziland engaged in a national corruption perception survey whose purpose was to inform future anti-corruption policy and legislative initiatives and encourage public participation in the fight against corruption. To elaborate further, according to the Survey,

perceptions on cultural practices yielded results, which suggested that some people did not recognize the potential elements of corruption in certain cultural practices.

15. Swaziland operates a dual legal system with Customary Law on one hand and Roman Dutch Law on the other hand, both of which command equal politico - legal standing. The offence of corruption is criminalized in Swaziland under the Prevention of Corruption Act, 2006. The Prevention of Corruption Act, however, does not define the offence of corruption but rather criminalizes and punishes corrupt practices. In addition the recovery of proceeds generated through corrupt activities is still a major concern given that the current legislative framework requires that a person should be convicted before any confiscation can take place. The aforementioned criminalized acts, include; bribery, money laundering, conflict of interest and cheating of the public revenue.
16. The institutions most relevant in the fight against corruption are the Anti-Corruption Commission, the Commission on Human Rights and Public Administration, the Royal Swaziland Police Service, the Financial Intelligence Unit, Auditor General's office, Attorney General, Swaziland Public Procurement Authority, the office of the Director of Public Prosecutions, Parliamentary Public Accounts Committee, the National Anti-Corruption Forum.
17. According to section 79 of the constitution of the Kingdom of Swaziland, the system of government for Swaziland is a democratic, participatory, Tinkhundla based system, which emphasizes devolution of state powers from central government to Tinkhundla areas and individual merit as a basis for election or appointment to public office. The Kingdom of Swaziland has three arms of government, the executive, legislative and the judiciary. The existence of strong political will has resulted in the signing and ratification of the UNCAC and enactment of various legislative instruments to enhance the fight against corruption.

## **C. Implementation of selected articles**

### **Chapter III. Criminalization and law enforcement**

18. As a general observation on the implementation of the chapter, a lack of statistics evidencing implementation is noted. It is recommended that Swaziland strengthen its data collection systems to allow for the identification and tracking of corruption and money laundering cases that were investigated, prosecuted and adjudicated by the relevant agencies. Swaziland should consider publishing this data regularly in annual reports and on the ACC website.

### **Article 15 Bribery of national public officials**

*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;*



*(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**

19. Section 21 of the Prevention of Corruption Act 3 of 2006 provides for the offence of bribery as follows:

**21. Bribery**

(1) A person who, whether in Swaziland or elsewhere, offers any advantage to any public officer as an inducement to, or a reward for, or otherwise on account of that public officer-

(a) performing or forbearing to perform or having performed or forborne to perform any act as such public officer;

(b) expediting, delaying, hindering or preventing or having expedited, delayed, hindered or prevented, the performance of any act, whether by that officer or by another public officer as such public officer; or

(c) assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed, any other person in the transaction of any business with a public or private body, commits an offence.

(2) A public officer who, whether in Swaziland or elsewhere, solicits or accepts any advantage as an inducement to, or a reward for or otherwise on account of the public officer-

(a) performing or forbearing to perform or having performed or forborne to perform any act as such public officer;

(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of any act, directly or indirectly, as such public officer; or

(c) assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public or private body, commits an offence.

20. Section 2 of POCA defines a public officer and public office. Section 2 provides for the definition of "public officer", although there are some limitations (eg officials who receive payment). Members of Parliament are not directly mentioned but could be covered by the term "including" in the definition of "public office".

**2. Interpretation**

In this Act, unless the context otherwise requires- ...

"public officer" means the holder of a public office;

"public office" includes judicial office or any office or position (whether fulltime or not) held by any person engaged in a public body or private body or any office or position (whether fulltime or not) in respect of which emoluments or allowances are payable from public funds or from Swazi National Treasury;

21. Article 254 of the Constitution is also relevant to the definition of public officer.

**254. References to public office, etc**

In this Constitution, unless the context otherwise requires, the expression "public office" –

(a) shall be construed as including the offices of judges of the High Court and Supreme Court, the offices of members of all other courts of law in Swaziland (other than courts-martial), and the offices of members of the Police Force and of members of the Prison Services; and

(b) shall not be construed as including the offices of President or Deputy President of the Senate, Speaker or Deputy Speaker of the House, Minister, Deputy Minister, Senator, member of the House or Member of any Commission established by this Constitution.

22. Sections 23 and 42 of POCA cover promises of bribery and the giving of bribes, respectively, and provide as follows:

**Corrupt transaction by or with public or private bodies**

23. A person who, directly or indirectly, alone or in conjunction with any other person (whether in Swaziland or elsewhere)-

(a) solicits or demands or accepts from another person either for that person or for any other person, any advantage as an inducement or a reward for, or on account of that person, doing or forbearing to do or having done or forborne to do anything in relation to any matter or transaction with which any public or private body is or may be concerned;

(b) gives or offers or promises to give any advantage to another person either for the benefit of that other person or any other person as an inducement or a reward for or on account of any such other person doing or forbearing to do or having done or forborne to do anything in relation to any matter or transaction with which any public or private body is or may be concerned,

commits an offence of corrupt activities relating to public or private bodies.

**General offence of corruption**

42. (1) Subject to the provisions of subsection (2), a person who directly or indirectly -

(a) demands or accepts or agrees or offers to accept any advantage whether for the benefit of that person or of another person; or,

(b) gives or agrees or offers to give any other person any advantage whether for the benefit of that other person or of another person,

is guilty of the offence of corruption and liable on conviction to the penalty prescribed under section 35(1).

(2) For an offence to be committed under subsection (1), the act complained of must cause that person or influence another person to act in a manner -

(a) that amounts to the

(i) illegal, dishonest, unauthorized, 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, fiduciary 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; or

(d) that amounts to any other unauthorized or improper inducement to do or not to do anything.

23. Swaziland also referred to the definition of “advantage” in Section 2 of POCA, which covers any types of advantages, including material and immaterial, and provides as follows:

“advantage” means-

- (a) any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;
- (b) any office, employment or contract;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or part;
- (d) any other service, favour or gratification other than entertainment;
- (e) the exercise or forbearance from the exercise of any right, power or duty; or
- (f) any offer, undertaking or promise, whether conditional or unconditional, of any advantage referred to in paragraph (a), (b), (c), (d) or (e);

24. Swaziland provided the following examples of implementation.

In *R v Timothy Manyosi Simelane and Jethro Tsela*, the accused persons are charged for contravening section 21 (a) and (b) of the Prevention of Corruption Act (POCA). During the period under review and at the time of the country visit, the case was still ongoing.

**(b) Observations on the implementation of the article**

25. It was confirmed by officials during the country visit that Members of Parliament and other categories of officials that are not specifically mentioned in the definition of “public office” in Section 2 of POCA are covered, given the use of the term “including” in the definition. However, article 254 of the Constitution excludes a number of persons from the scope of the definition, including members of Parliament and members of the Constitutional commissions.

26. Moreover, it is noted that unpaid persons are not covered by the definition of public officer in Section 2 of POCA. It is recommended that Swaziland amend the definition of public officer in line with article 2 of the Convention, in order to address the limitations (eg officials who do not receive payment, parliamentarians and other persons listed in article 2 of the Convention).

27. With respect to the bribery offence in sections 21, 23 and 42 of POCA, the following observations are made:

- Third party beneficiaries are not specifically addressed in section 21, although they are covered in sections 23 and 42.
- Section 21(1) covers offers, but not the promise or exchange of bribes. However, promises of bribes are covered in section 23 and the giving of bribes in section 42.
- Indirect acts of bribery are specifically covered in section 42, but not in section 21.

It is recommended that Swaziland amend its legislation to ensure that, for purposes of all of the relevant offences, promises and exchanges of bribery are covered, in addition to the offering of bribes, and to cover third party beneficiaries and indirect acts of bribery.

28. The observation made in the introduction on the need to maintain statistics on bribery and corruption cases by the ACC and other agencies is referred to.

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

*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.*

*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**

29. Swaziland cited sections 26 and 42 (quoted above) of the POCA. Promises are covered in terms of section 23 as cited above:

#### **26. Corrupt transactions by or with agents**

(1) An agent commits an offence of corruption where that agent corruptly demands or accepts, or agrees or offers to accept from any person, for himself or for any other person any advantage as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the affairs or business of the principal of that agent, or for showing or forbearing to show favour or disfavour to any person in relation to the affairs or business of the principal of that agent.

(2) A person commits an offence of corruption where that person corruptly gives or agrees to give or offers to give to any agent any advantage as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act or for showing or forbearing to show favour or disfavour to any person in relation to the affairs or business of the principal of that agent.

(3) A person or an agent commits an offence of corruption where that person knowingly gives to an agent, or where an agent knowingly uses with intent to deceive the principal of that agent, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to the knowledge of that person or agent is intended to mislead the principal.

30. According to section 2 of the POCA “agent” means any authorized representative who acts on behalf of a principal and includes a director, officer, employee or other person authorized to act on behalf of the principal, and “agency” has a corresponding meaning.

### **(b) Observations on the implementation of the article**

31. Swaziland has not adopted a specific offence of bribery of foreign public officials and officials of public international organizations. Section 26 is limited to corrupt transactions by or with agents. While section 42 applies in relation to any person engaged in acts of bribery or corruption, it is not directed at foreign public officials and officials of public international organizations. The observations made above in respect of this section are referred to.
32. The reviewers recommend that Swaziland adopt a specific provision to implement the article under review.

#### **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**

33. Section 24 of the POCA provides for the offence of cheating the public revenue as follows:

##### **24. Cheating the public revenue**

(1) A person commits the offence of cheating the public revenue where as a result of the fraudulent conduct of that person, money is diverted from the revenue and thereby depriving the public revenue of money to which the Government is entitled.

(2) A public official or any person commits an offence of cheating the public revenue where that official or person diverts any property belonging to the Government or its agencies, which that official or person has received by virtue of the position of that official or person, to an independent agency or individual for purposes unrelated to the purposes for which that property was intended, for the benefit of that official or that person or of a third party.

34. In addition, theft is provided for under common law.

35. Swaziland provided the following case examples.

R v Nelisiwe Shongwe.

##### **(b) Observations on the implementation of the article**

36. The offence of cheating the public revenue partly addresses the requirements of the article under review. While the diversion of money or Government property is covered, acts of misappropriation or embezzlement more generally are not.

37. In addition to the common law theft offence, it is stated under article 22 below that embezzlement is a common law offence (see R v Myeza and R v Polycarp Dlamini). It

was explained that the cited case *R v Nelisiwe Shongwe* involved a member of parliament who ran a company tendering for a public contract and was charged with cheating the public revenue under Section 24 of the POCA.

38. It is recommended that Swaziland adopt a provision covering embezzlement, misappropriation and other diversion of all types of property, not just money, including public or private funds, securities or any other thing of value entrusted to a public official by virtue of his or her position.

**(c) Challenges, where applicable**

39. Swaziland has identified following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*
2. *Specificities in its legal system.*

**(d) Technical assistance needs**

40. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. *Legislative drafting.*

*None of these forms of technical assistance has been provided to-date.*

## **Article 18 Trading in influence**

*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;*

*(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**

41. Sections 27 and 42 of the POCA provide for the general offence of corruption as follows:

**27. Conflict of interests**

(1) A member or an employee of a public body commits an offence of corruption where that member or employee or an immediate member of the family of that member or employee has a direct or indirect interest in any company or undertaking with which that public body proposes to deal, or that member or employee has a personal interest in any decision which that public body is to make, and that member or employee, knowingly

fails to disclose the nature of that interest, or votes or participates in the proceedings of that public body relating to that dealing or decision.

(2) It is a defence to a charge under this section where the person having an interest has first made in writing to the public body the fullest disclosure of the exact nature of interest and has been permitted after that disclosure to take part in the proceedings relating to that dealing or decision.

(3) For the purposes of this section “member of family” includes a paramour.

42. General offence of corruption

(1) Subject to the provisions of subsection (2), a person who directly or indirectly –

(a) demands or accepts or agrees or offers to accept any advantage whether for the benefit of that person or of another person; or,

(b) gives or agrees or offers to give any other person any advantage whether for the benefit of that other person or of another person,

is guilty of the offence of corruption and liable on conviction to the penalty prescribed under section 35(1).

(2) For an offence to be committed under subsection (1), the act complained of must cause that person or influence another person to act in a manner –

(a) that amounts to the

(i) illegal, dishonest, unauthorized, 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, fiduciary 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;

(b) designed to achieve an unjustified result; or

(c) that amounts to any other unauthorized or improper inducement to do or not to do anything.

43. Swaziland provided the following case examples.

R v Mduduzi Nkhambule, R v Petros Shongwe, R v Polycarp Dlamini

**(b) Observations on the implementation of the article**

44. Swaziland has not adopted a specific offence of trading in influence. Sections 26 and 42 are limited in their application to conflicts of interest and acts of bribery/corruption and are not directed at trading in influence which entails the abuse of real or supposed influence.

45. The reviewers recommend that Swaziland consider adopting a specific offence of trading in influence in line with the article under review.

## **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**

46. The article is partly implemented in terms of the general offence of corruption in section 42 of the POCA (quoted above), since this section relates to bribery (demanding/accepting an advantage) and not an abuse of functions where there is no exchange of benefits.

47. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

48. Section 42 of POCA covers bribery/corruption and not abuse of functions. The reviewers recommend that Swaziland consider adopting a specific offence of abuse of functions in line with the article under review.

**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**

49. Swaziland cited the provision on the declaration of assets and liabilities, as espoused in section 241 of the Constitution of Swaziland, and section 34 of the POCA which provide as follows:

**Constitution of Swaziland**

**241. Declaration of assets and liabilities**

(1) A person who holds an office mentioned in sub-section (2) shall submit to the Integrity Commission, a written declaration of all property, assets owned by, or any benefit gained or liabilities owed by the holder of that office whether directly or indirectly -

(a) within six months after the commencement of the Integrity Commission or before taking office as the case may be;

(b) at the end of every two years; and

(c) at the end of his term of office.

(2) Sections 240 and 241(1) apply to the holders of the following offices-

(a) Prime Minister, Deputy Prime Minister and Minister;

(b) member of the King's Advisory Council;

(c) member of Parliament including the Presiding Officers;

(d) Chairman and member of a Service Commission or Board;

(e) Army Commander and Deputy Army Commander;

(f) Commissioner of Customs;

(g) Commissioner of Police and Deputy Commissioner of Police;



- (h) Commissioner of Labour;
  - (i) Commissioner of Correctional Services and Deputy Commissioner of Correctional Services;
  - (j) Commissioner of Taxes;
  - (k) Justice of the Superior Court of Judicature and all judicial officers;
  - (l) Ambassador, High Commissioner, and Head of Diplomatic or Consular Mission;
  - (m) Secretary to the Cabinet;
  - (n) Commissioner and Deputy Commissioner of the Integrity Commission;
  - (o) Member of the Elections and Boundaries Commission;
  - (p) Attorney-General and Deputy Attorney-General;
  - (q) Head of Ministry of government or department;
  - (r) Director of Public Prosecutions and Deputy Director of Public Prosecutions;
  - (s) Managing Director, general manager and departmental head of a public corporation or company in which the Government has a controlling interest; and
  - (t) in the public service and any other public institution as Parliament may prescribe.
- (3) The Commissioner and Deputy Commissioner of the Integrity Commission shall make the declaration under this section to the Judicial Service Commission.
- (4) The declaration made under this section shall, on demand be produced in evidence before -
- (a) a court of competent jurisdiction; or
  - (b) an investigator appointed by the Integrity Commission.
- (5) Any property or assets acquired by an officer after initial declaration required under this section and which is not reasonably attributable to income, government loan, inheritance or any other legitimate source shall be deemed to have been acquired in contravention of this Chapter unless duly declared.
- (6) An allegation that an officer referred to in this section has contravened or has not complied with a provision of this Chapter shall be made to the Integrity Commission and in the case of a member of the Integrity Commission, to the Judicial Service Commission which shall, unless the person concerned makes a written admission of the contravention or non compliance, cause the matter to be investigated.
- (7) The Integrity Commission or the Judicial Service Commission, as the case may be, may take such action as the commission considers appropriate in respect of the results of the investigation or admission.

#### Section 34 of POCA

Possession of property etc. without reasonable explanation

- (1) Subject to the provisions of subsection (2), a person who being or having been a public officer -
- (a) maintains a standard of living above that which is commensurate with the present or past official emoluments of that person; or,
  - (a) is in control of pecuniary resources or property disproportionate to the present or past official emoluments of that person
- shall be presumed to have committed an offence under section 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32 or 33 and accordingly liable to the penalty prescribed in section 35.
- (2) The presumption referred to in subsection (1) shall not apply in a case where the public officer gives the Commissioner or investigating officer a satisfactory account or explanation of how the officer maintains that standard of living and how the pecuniary resources or property came under the control of that officer.
- (3) Where the Commissioner has reasonable ground to suspect that any person who has no known source of income or who is not known to be engaged in any gainful employment

possesses or is in control of any property or pecuniary resources, the Commissioner shall request that person to give satisfactory explanation in writing as to how the property or pecuniary resources have been acquired by or come under the control of that person.

(4) Where the person mentioned in subsection (3) is unable to give any satisfactory account or explanation that person shall be presumed to have committed an offence and liable on conviction to the penalty prescribed in section 35(1).

(5) Where a court is satisfied in the proceedings for an offence under sub-section (1) or (4) that there is reason to believe that a person was holding pecuniary resources or property in trust or otherwise on behalf of the accused, or acquired those resources or that property as a gift or a loan without adequate consideration, from the accused, having regard to the relationship of that person to the accused, those resources or that property shall be presumed to have been in the control or in the possession of the accused.

(6) In this section “official emoluments” includes a pension or gratuity or any other retirement benefit payable under any law for the time being in force or under any terms and conditions of service or employment applicable to the public officer.

50. In order to curb illicit enrichment, the Government of Swaziland has set a target to conduct four lifestyle audits during the period of 2014-2018.

51. No case examples were provided.

**(b) Observations on the implementation of the article**

52. Section 34 of POCA criminalizes the possession of unexplained wealth. Swaziland has also established a declaration of assets and liabilities regime in article 241 of the Constitution. These provisions are in accordance with the article under review.

53. It was explained that there was one case under Section 34 pending in court against a Cabinet Minister and that several investigations were ongoing at the time of the country visit. The case, *R v Shongwe* (Case Number 2/2015), involved an investigation of a Cabinet Minister for failing to explain approximately E2 million in cash that was deposited in his law firm trust account, in potential violation of Section 34 of POCA.

**Article 21 Bribery in the private sector**

*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;*

*(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**

54. The provision on Corrupt transaction by or with public or private bodies in section 23 of the POCA provides as follows:

23. Corrupt transaction by or with public or private bodies

A person who, directly or indirectly, alone or in conjunction with any other person (whether in Swaziland or elsewhere)-

(a) solicits or demands or accepts from another person either for that person or for any other person, any advantage as an inducement or a reward for, or on account of that person, doing or forbearing to do or having done or forborne to do anything in relation to any matter or transaction with which any public or private body is or may be concerned;

(b) gives or offers or promises to give any advantage to another person either for the benefit of that other person or any other person as an inducement or a reward for or on account of any such other person doing or forbearing to do or having done or forborne to do anything in relation to any matter or transaction with which any public or private body is or may be concerned,

commits an offence of corrupt activities relating to public or private bodies.

55. No case examples were provided.

**(b) Observations on the implementation of the article**

56. It was explained that the term “transaction” in section 23 covers any form of communication or action, and is not limited to financial transactions. The cited provision addresses the requirements of the article under review.

**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**

57. Currently embezzlement is a common law offence. In addition, theft of company property is dealt with under common law theft.

**(b) Observations on the implementation of the article**

58. No case law or case examples were provided. Swaziland may wish to adopt a relevant provision in the course of ongoing legislative amendments.

**(c) Challenges, where applicable**

59. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*

2. *Inadequacy of existing normative measures (Constitution, laws, regulations, etc.);*

3. *Specificities in its legal system.*

**(d) Technical assistance needs**

60. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. *Summary of good practices/lessons learned;*
2. *Model legislation;*
3. *Legislative drafting;*
4. *Development of an action plan for implementation.*

*None of these forms of technical assistance has been provided to-date.*

**Article 23 Laundering of proceeds of crime**

**Paragraph 1**

*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) (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**

61. Section 41 (2) of the POCA and section 4 of the Money Laundering and Financing of Terrorism (Prevention) Act 2011 provide for the offence of money laundering as follows:

**41. Money laundering**

(1) A 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 transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or,
- (b) performs any act in connection with that property, whether it is performed independently or in concert with any other person, commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand Emalangeni or to a term of imprisonment not exceeding ten years or to both.

(2) For an offence to be committed under this section, the agreement, performance, transaction or act in connection with the property must have or be likely to have an effect of -

- (a) concealing or disguising the nature, source, location, disposition or movement of that property or the ownership of that property or any interest which anyone may have in respect of that property; or,

- (b) enabling or assisting any person who has committed or commits an offence whether in the country or elsewhere -
  - (i) to avoid prosecution; or
  - (ii) to remove or diminish any property acquired directly as a result of a commission of an offence.

#### Offence of money laundering

Section 4. (1) A person who-

- (a) converts or transfers property knowing or having reason to believe that the property is derived directly or indirectly from those acts or omissions referred to in paragraph (c), with the aim of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of those acts or omissions to evade the legal consequences of those acts or omissions;
  - (b) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property knowing or having reason to believe that the property is derived directly or indirectly from those acts or omissions referred to in paragraph (c);
  - (c) acquires, possesses or uses property, knowing or having reason to believe that it is derived directly or indirectly from acts or omissions-
    - (i) in Swaziland which constitutes an offence against any law of Swaziland punishable by imprisonment for not less than 12 months or the imposition of a fine of not less than E15, 000; or,
    - (ii) outside Swaziland which, had they occurred in Swaziland, would have constituted an offence against the law of Swaziland punishable by imprisonment for not less than 12 months or the imposition of a fine of not less than E15, 000; or,
  - (d) participates in, associates with, conspires or attempts to commit, or aids, abets or facilitates the commission of any of the acts referred to in paragraphs (a) to (c);
- commits the offence of money laundering.

62. Swaziland provided the following case example.

R v Shongwe (Case Number 2/2015) (cited under article 20 above). The case against the Cabinet Minister charged violations of Sections 34 and 41 of POCA

#### **(b) Observations on the implementation of the article**

- 63. It was confirmed that there were three pending investigations into money laundering at the time of the country visit.
- 64. Money laundering cases are investigated by the police or the ACC, if linked to corruption.
- 65. With regard to the penalties for money laundering, the following sections of the Money Laundering and Financing of Terrorism (Prevention) Act 2011 are relevant.

#### Offence of money laundering

76. Any person who engages in any act in contravention of Section 4, commits an offence.

#### Penalties

89. (1) Notwithstanding anything contained in any other law, a person convicted of an offence mentioned in Section 76 or 77 is liable on conviction-

- (a) in the case of an individual, to imprisonment for 10 years or to a fine of not less than one hundred thousand Emalangeni (E100,000) or both; and,
- (b) in the case of a body corporate to a fine of not less than two hundred and fifty thousand Emalangeni (E250,000) or loss of authority to do business or both.

66. The provisions under review are legislatively implemented.

## **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**

67. Swaziland referred to section 41 (1) (a) and (b) of the POCA and section 4 (1) (c) of the Money Laundering and Financing of Terrorism (Prevention) Act 2011 (quoted above).

#### **(b) Observations on the implementation of the article**

68. The provision is legislatively implemented.

## **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**

69. Swaziland cited Section 41 (1) (b) of the POCA and section 4 (d) of the MLFTPA (quoted above).

#### **(b) Observations on the implementation of the article**

70. The provision is legislatively implemented.

## Article 23 Laundering of proceeds of crime

### Paragraph 2

*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;*

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

*(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**

71. Predicate offences are provided for in terms of Schedule 1 of the MLFTP as follows:

##### Schedule 1. Offences.

Blackmail;

Common law offences;

Corruption and bribery;

Counterfeiting currency;

Counterfeiting and piracy of products;

Environmental crime;

Extortion;

False accounting;

Forgery;

Fraud;

Illegal deposit taking;

Illicit arms trafficking;

Illicit trafficking in narcotic drugs and psychotropic substances;

Illicit trafficking in stolen and other goods;

Insider trading and market manipulation;

Kidnapping, illegal restraint and hostage taking;

Murder, grievous bodily harm;

Participation in an organized criminal group and racketeering;

Piracy;

Robbery or theft involving more than E10,000;

Sexual exploitation, including sexual exploitation of children;

Smuggling;

Tax Evasion;

Terrorism, including terrorist financing; and Trafficking in human beings and migrant smuggling.

72. Foreign predicate offences are covered in section 4 (c) (2) of the MLFPA (quoted above), subject to dual criminality.

73. No case examples were provided.

**(b) Observations on the implementation of the article**

74. Predicate offences for money laundering are offences committed either: (i) in Swaziland which are punishable under Swaziland law by imprisonment for at least 12 months or a fine of at least E15,000; or (ii) outside Swaziland which, had they occurred in Swaziland, would have constituted an offence against Swaziland law punishable by the same penalty (section 4 of the Money Laundering and Financing of Terrorism (Prevention) Act 2011).

75. It is not clear how the list of predicate offences in the MLFPA (Schedule 1) is read in conjunction with section 4, which provides for an all crimes approach to predicate offences. During the country visit, officials in the DPP confirmed that the schedule creates confusion and expressed the view that it should be superseded by section 4. It was further confirmed that all corruption-related offences are punishable by at least one year in Swaziland. Based on the above, it is recommended that Swaziland amend its legislation and consider eliminating the schedule.

76. Moreover, the reviewers welcome consideration being given by Swaziland to eliminating the threshold requirement of imprisonment of at least 12 months or a fine of at least E15,000 for predicate offences to money laundering. A draft bill from 2015 to amend the MLFPA in this regard was shared with the reviewers, which adopts instead an all-crimes approach in section 4. It is recommended that Swaziland adopt the relevant amendments.

77. It was explained by the authorities that the requirement in section 4 for a conviction on the predicate offence presented challenges in the prosecution of money laundering offences, and that it would be useful to amend the legislation in this regard. It is recommended that Swaziland amend its legislation accordingly.

**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**

78. Swaziland referred to the Prevention of Corruption Act 2006 and the Money Laundering and Financing of Terrorism (Prevention) Act 2011. Copies of the legislation have not been provided to the United Nations.

**(b) Observations on the implementation of the article**



79. It is recommended that Swaziland furnish copies of the MLFTPA and POCA (as amended) to the United Nations.
80. Swaziland is encouraged to send the aforementioned information to the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria ([uncac.cop@unodc.org](mailto:uncac.cop@unodc.org)).

## **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**

81. Swaziland indicated that self-laundering is not precluded by its domestic legislation. No further information was provided.

#### **(b) Observations on the implementation of the article**

82. It was confirmed that the offence of money laundering in section 4 of the MLTFPA does not distinguish between the person committing the predicate offence and the person laundering the proceeds of the predicate offence. The offence of money laundering applies to any person who deals with the proceeds from a predicate offence. It is therefore possible to charge a person both with committing the predicate offence and the money laundering offence arising out of the criminal proceeds.

#### **(c) Challenges, where applicable**

83. Swaziland has identified the following challenges and issues in fully implementing the provision under review:
- 1. Inter-agency co-ordination;*
  - 2. Specificities in its legal system.*

#### **(d) Technical assistance needs**

84. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the article under review:
- 1. Summary of good practices/lessons learned;*
  - 2. Model legislation;*
  - 3. Legislative drafting.*

*None of these forms of technical assistance has been provided to-date.*

## **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**

85. Section 41(1)(b) read together with Section 41(2) (a) of the POCA and Section 4 (1) (b) of the MLFPA and section 191 of the Criminal Procedure and Evidence Act 1938 (CP&E) provide as follows:

#### **POCA**

##### **41. Money laundering**

(1) A person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and- ...

(b) performs any act in connection with that property, whether it is performed independently or in concert with any other person, commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand Emalangeni or to a term of imprisonment not exceeding ten years or to both.

(2) For an offence to be committed under this section, the agreement, performance, transaction or act in connection with the property must have or be likely to have an effect of -

(a) concealing or disguising the nature, source, location, disposition or movement of that property or the ownership of that property or any interest which anyone may have in respect of that property;

#### **Section 4(1)(b) of the MLFPA**

"a person who- ...

(b) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property knowing or having reason to believe that the property is derived directly or indirectly from those acts or omissions referred to in paragraph (c); ... commits the offence of money laundering.

#### **Section 191 of the CP&E**

Joint charges of theft and receiving stolen property knowing it to be stolen.

(1) If charges of theft of any property and of receiving such property or any part thereof knowing it to have been stolen are joined in the same indictment or summons, the accused may, according to the evidence, be convicted either of theft of such property or of receiving it or any part of it knowing it to have been stolen.

86. No case examples were provided.

### **(b) Observations on the implementation of the article**

87. Swaziland has adopted provisions corresponding to the article under review. No case examples were provided.

## **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**

88. Swaziland cited section 29(3) of the POCA.

29. Corrupt activities relating to witnesses etc. during certain proceedings

(3) A 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 other person or any other person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission, or some other officer authorized by law to hear evidence or take testimony; or

(b) cause or induce any other 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 authorized by law to hear evidence or take testimony;

(ii) withhold testimony or to withhold a record, document, docket or other object at any trial, hearing or proceedings;

(iii) give or withhold information relating to any aspect at any trial, hearing or proceedings;

(iv) alter, destroy, mutilate, or conceal a record, document, docket or other object with the intent to impair the availability of that record, document, docket or other object for use at any trial, hearing or proceedings;

(v) give or withhold information relating to or contained in a docket;

(vi) evade legal process summoning that person to appear as a witness or to produce any record, document, docket or other object at any trial, hearing or proceedings; or

(vii) be absent from any trial, hearing or other proceedings,  
commits an offence of corrupt activities relating to witnesses and evidential material during certain proceedings.

89. The case Derrick Jele (14/2014) was pending in court at the time of the country visit. Derrick Jele, an attorney, was arrested for defeating the course of justice in the matter involving Wilton Nkambule, Nomsa Nkambule and Sidumo Zwane.

### **(b) Observations on the implementation of the article**

90. The provision is legislatively implemented. It was explained that the attorney in the referenced case helped an accused person to make a false affidavit to get bail.

## **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**

91. Swaziland cited section 16 of the POCA, section 86 of MLFTPA, and section 23 (1) (c) of the Criminal Procedure and Evidence Act, 1938.

##### **POCA**

16. Resisting or obstructing the Commissioner, etc,  
Any person who-

- (a) assaults, obstructs or resists the Commissioner, Deputy Commissioner or an officer of the Commission in the execution of their duties; or
  - (b) unlawfully hinders or delays the Commissioner, Deputy Commissioner or an officer of the Commission in effecting entry into or upon any premises, vessel, train, boat, aircraft or vehicle,
- commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand Emalangeneni or to imprisonment not exceeding five years or to both.

##### **Section 86 of the MLFTPA**

Obstructing of official in performance of functions

86. Any person who willfully obstructs, hinders or threatens an official or representative of the SFIU in the performance of their duties in exercise of their powers in terms of this Act, commits an offence.

##### **CP&E**

Section 23. When peace officer may arrest without warrant.

- (1) Any peace officer may, without any order or warrant, arrest any person – ...
- (c) who obstructs a policeman or other peace officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;

92. In R v. John Ndwandwe, the accused was prosecuted for interfering with the prosecutor in a criminal matter. The case was pending at the time of the country visit

#### **(b) Observations on the implementation of the article**

93. The provision is implemented.

## Article 26 Liability of legal persons

### Paragraphs 1 to 4

*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.*

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

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

*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

94. Swaziland cited sections 35 and 36 of the POCA, as well as sections 338 and 8 of the CP&E which provide as follows:

#### POCA

##### Penalties

35. (1) A person who is convicted of an offence referred to in section 21, 22, 23, 24, 25, 26, 27 or 34 shall be liable to a fine not exceeding one hundred thousand Emalangeni or imprisonment not exceeding ten years or to both.

(2) A person who is convicted of an offence referred to in section 28, 29, 30, 31, 32 or 33 shall be liable to a fine not exceeding two hundred thousand Emalangeni or imprisonment not exceeding twenty years or to both.

##### Additional penalty

36. (3) In addition to the fine a court may impose in terms of section 35, the court may impose a fine equal to five times the value of the advantage involved in the offence.

#### MLFPA

##### Offence of money laundering

76. Any person who engages in any act in contravention of Section 4, commits an offence.

##### Penalties

89. (1) Notwithstanding anything contained in any other law, a person convicted of an offence mentioned in Section 76 or 77 is liable on conviction-

(a) in the case of an individual, to imprisonment for 10 years or to a fine of not less than one hundred thousand Emalangeni (E100,000) or both; and,

(b) in the case of a body corporate to a fine of not less than two hundred and fifty thousand Emalangeni (E250,000) or loss of authority to do business or both.

#### CP&E

Liability to punishment in case of offences by corporate bodies, partnerships, etc.

338. (1) In any criminal proceedings under any statute or statutory regulation or at common law against a company, the secretary and every director or manager or chairman thereof in Swaziland may, unless it is otherwise directed or provided, be charged with the offence and shall be liable to be punished therefor, unless it is proved that he did not take part in the commission of such offence, and that he could not have prevented it.

(2) In any such proceedings against a local authority, the mayor, chairman, town clerk, secretary or other similar officer shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence\_

(3) In any such proceedings against a partnership, every member of such partnership who is in Swaziland shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.

(4) In any such proceedings against any association of persons not specifically mentioned in this section, the president, chairman, secretary, and every other officer thereof in Swaziland shall, unless it is otherwise directed or provided, be liable to be so charged, and in like circumstances punished for the offence.

(5) This section shall not be deemed to exempt from liability any other person guilty of the offence.

(6) In any criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of such corporate body within the scope of his activities as such, or any document which was at any time in the custody or under the control of any such director, servant or agent within the scope of his activities as such, shall be admissible in evidence against the accused.

(7) For the purposes of sub-section (6) any record made or kept by a director, servant or agent of a corporate body or any document which was at any time in his custody or control shall be presumed to have been made or kept by him or to have been in his custody or control within the scope of his activities as such, unless the contrary is proved.

(8) In any proceedings against a director or servant of a corporate body in respect of any offence, any evidence which would be or was admissible against such corporate body in a prosecution for such offence, shall be admissible against him.

(9) In this section-

"director" in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or where there is no such body or group, who is a member of that corporate body.

Neither acquittal nor conviction a bar to civil action for damages.

8. Neither a conviction nor an acquittal following on any prosecution shall be a bar to civil action for damages at the instance of any person who may have suffered any injury from the commission of an alleged offence.

95. Reference is also made to the provisions related to the Register for Tender Defaulters (sections 38-47 POCA), cited under article 34 of UNCAC below.

96. No case examples were provided

**(b) Observations on the implementation of the article**

97. Swaziland's law provides for criminal, civil and administrative liability of legal persons, which is established (despite the absence of any case law) irrespective of the liability of the natural persons involved. Sections 35 and 36 of POCA prescribe penalties for persons

committing offences under the Act. It was explained that the term “person” is defined to also include legal persons. Penalties against legal persons under POCA amount to fines up to E500,000. Administrative penalties, including endorsement of the conviction and sentence on a register, which may lead to debarment, contract rescission, disqualification from the tender process, and other penalties, are provided for in section 38 of POCA.

98. During the country visit, officials explained that the penalties for legal persons were not considered to be sufficiently dissuasive and welcomed an upward revision. It is recommended that Swaziland review and consider amending its legislation in this regard.

**(c) Challenges, where applicable**

99. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*
2. *Inadequacy of existing normative measures (Constitution, laws, regulations, etc.);*
3. *Specificities in its legal system.*

**(d) Technical assistance needs**

100. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. *Model legislation;*
2. *Legislative drafting.*

*None of these forms of technical assistance has been provided to-date.*

**Article 27 Participation and attempt**

*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.*

*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.*

*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**

101. Swaziland cited section 39 of the POCA and Section 181 of the CP&E which provide as follows:

POCA

Attempting, inciting etc, commission of offences

39. A person who, under this Part -

- (a) attempts to commit an offence;
  - (b) conspires with another person to commit an offence;
  - (c) aids, abets, induces, incites, instigates, commends, counsels or procures another person to commit an offence,
- commits an offence and is liable on conviction to a like penalty as if that person has been convicted of that offence.

#### CP&E

On trial for commission of an offence accused may be found guilty of attempt.

181. (1) If, on the trial of any person charged with any offence, it appears upon the evidence that the accused did not complete the offence charged, but that he was guilty only of an attempt to commit such offence, he shall not by reason thereof be entitled to be acquitted, but a verdict may be given that he is not guilty of the offence charged but is guilty of an attempt to commit such offence or of an attempt to commit any other offence of which he might under this Act be convicted on the indictment or summons.

(2) No person so tried shall afterwards be liable to be prosecuted for an attempt to commit the offence for which he was so tried.

(3) Any person charged with an offence, may be found guilty as an accessory after the fact in respect of such offence if such be the facts proved, and shall on conviction, in the absence of any penalty expressly provided by law, be liable to punishment at the discretion of the court convicting him:

Provided that in no case shall such punishment exceed that to which the principal offender would under any law be subject.

(4) Any person who attempts to commit any offence against a statute or a statutory regulation shall be- guilty of an offence and, if no punishment; is expressly provided thereby for such attempt, be liable on conviction to the punishment to which a person convicted of actually committing such offence would be liable.

(5) Any person who –

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands or procures any other person to commit;

any crime or offence, whether at common law or against a statute or statutory regulation shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing such crime or offence would be liable.

(Amended P .501194 7.)

102. Swaziland referred to the case Rex v Koli.

#### **(b) Observations on the implementation of the article**

103. Swaziland has not criminalized the preparation of an offence, but provisions on attempt and conspiracy as well as complicity in various forms are in place.

#### **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**

104. Section 20 of the Criminal Procedure and Evidence Act 67 of 1938 prescribes the time lapse of 20 years for any offence other than murder as follows:

**CP&E**

Prosecution for murder not barred by lapse of time, for other offence barred by lapse of 20 years.

20. The right to prosecute for murder shall not be barred by any lapse of time; but the right to prosecute any other offence, whether at the public instance or at the instance of a private party, shall, unless some other time is expressly provided by law be barred by the lapse of twenty years from the time when such offence was committed.

**(b) Observations on the implementation of the article**

105. Swaziland has adopted a 20-year statute of limitations for corruption-related offences.

106. It was explained during the country visit that the limitations period begins to run from the time of commission, not discovery, of the offence and that the period is not interrupted if the offender flees the country or evades the administration of justice. Officials in the DPP welcomed legal amendments in this regard. Based on the above, it is recommended that Swaziland consider amending its legislation.

**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**

107. Sections 35 and 36 of the POCA and Section 89 of the Money Laundering and Financing of Terrorism (Prevention) Act 2011 provide for penalties and additional penalties respectively as follows:

**Penalties**

35. (1) A person who is convicted of an offence referred to in section 21, 22, 23, 24, 25, 26, 27 or 34 shall be liable to a fine not exceeding one hundred thousand Emalangeni or imprisonment not exceeding ten years or to both.

(2) A person who is convicted of an offence referred to in section 28, 29, 30, 31, 32 or 33 shall be liable to a fine not exceeding two hundred thousand Emalangeni or imprisonment not exceeding twenty years or to both.

**Additional penalty**

36. (1) Where a person is convicted of an offence under this Part, the court shall in addition to any penalty it may impose under section 35 order the person convicted to pay

to the rightful owner the amount or value, as determined by the court, of any advantage actually received by that person.

(2) Where after reasonable inquiry, the rightful owner cannot be ascertained or traced or is implicated in the commission of that particular offence under this Part, the court shall order that the amount or value of that advantage be forfeited to the Government.

(3) In addition to the fine a court may impose in terms of section 35, the court may impose a fine equal to five times the value of the advantage involved in the offence.

#### Money Laundering and Financing of Terrorism (Prevention) Act 2011

##### Penalties

89. (1) Notwithstanding anything contained in any other law, a person convicted of an offence mentioned in Section 76 or 77 is liable on conviction-

(a) in the case of an individual, to imprisonment for 10 years or to a fine of not less than one hundred thousand Emalangeni (E100,000) or both; and,

(b) in the case of a body corporate to a fine of not less than two hundred and fifty thousand Emalangeni (E250,000) or loss of authority to do business or both.

108. Regarding examples of implementation, Swaziland provided that imprisonment with or without an option to fine, dismissal from work upon conviction on the part of judicial officers or public officer and endorsement of a register in the case of offences with regards to contracts and tenders as espoused by section 22 of the POCA.

109. In the matter between the King and Leo Ndvuna Dlamini (Criminal Case 12/13), the accused who was a judicial officer was convicted under Section 33(1) (b) (ii) read together with Section 33(2) (b) (i) of POCA for having unlawfully demanded or accepted an advantage from one Mihla Dlamini, an act which amounted to a violation of duty or a set of rules and /or abuse of authority and thus contravened the POCA. He was convicted without an option to fine. He was sentenced to five years imprisonment with no option of a fine. The 7-year sentence imposed by the court was reviewed by the Supreme Court and reduced as too harsh. The defendant served two years in prison, after the conviction was upheld.

110. Swaziland provided the following table of penalties under POCA.

#### **POCA penalties**

<b>Section</b>	<b>Penalty clause</b>
Bribery (section 21)	E100 000 fine or ten years, sec 35 (1)
Bribery in contracts and tenders (sec 22)	E100 000 fine or ten years, sec 35 (1)
Corrupt transaction by or with public or private bodies (sec 23)	E100 000 fine or ten years, sec 35 (1)
Cheating of the public revenue (sec 24)	E100 000 fine or ten years, sec 35 (1)
Offences relating to auctions (sec 25)	E100 000 fine or ten years, sec 35 (1)
Corrupt transactions by or with agents (sec 26)	E100 000 fine or ten years, sec 35 (1)
Conflict of interest (sec 27)	E100 000 fine or ten years, sec 35 (1)

Corrupt activities relating to law officers and public prosecutors (sec 28)	E200 000 fine or 20 years, sec 35 (2)
Corrupt practices relating to witnesses etc. during certain proceedings (sec29)	E200 000 fine or 20 years, sec 35 (2)
offences in respect of corrupt activities relating to politicians (sec 30)	E200 000 fine or 20 years, sec 35 (2)
Offences in respect of corrupt activities relating to sporting events (sec 31)	E200 000 fine or 20 years, sec 35 (2)
Offences in respect of gambling games and games of chance (sec 32)	E200 000 fine or 20 years, sec 35 (2)
Offences in respect of corrupt activities relating to judicial officers (sec 33)	E200 000 fine or 20 years, sec 35 (2)
Possession of property etc. without reasonable explanation (sec 34)	E100 000 fine or ten years, sec 35 (1)
Attempting, inciting etc, commission of offences (sec 39)	
Money laundering (sec 41)	E100 000 fine or ten years, sec 41 (1) (a) & (b)
General offence of corruption (sec 42)	E100 000 fine or ten years, sec 35 (1)
Failure to report corruption , extortion and fraud worth E10 000 (sec 49)	E 5000 or two years, sec 49 (1)

**(b) Observations on the implementation of the article**

111. The reviewers sought clarification during the country visit of how the sentences outlined in section 35 and 36 of POCA take into account the gravity of the offences. For example, the maximum fine in section 35(1) of 100,000 Emalangeni (approximately US\$ 8,400) in respect of offences such as bribery was established when POCA was adopted in 2006, and it was explained that there was a need to increase or adjust the penalty. Based on the above and the explanations provided by the authorities, it is recommended that Swaziland consider enhancing the penalties for corruption-related offences, taking into account the gravity of the offences.
112. Based on the case cited by Swaziland (King v Leo Ndzvuna Dlamini case 12/13) and the discussion during the country visit, Swaziland may also wish to consider adopting minimum penalties for corruption offences, as it was explained that this could be useful to provide for greater consistency in 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

113. Swaziland cited sections 11, 130 (1), 141 (4), 170 (2), 228 (2) and 229 (6) of the Constitution, section 17 of the POCA and section 36 of the MLFTPA which articulate immunity as follows:

##### Constitution

##### Protection of King and iNgwenyama in respect of legal proceedings

11. The King and iNgwenyama shall be immune from -

- (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and
- (b) being summoned to appear as a witness in any civil or criminal proceeding.

##### Parliamentary immunities and privileges

130. (1) The President, Speaker, members of Parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of Parliament or any of its committees shall be entitled to such immunities and privileges as Parliament may by law prescribe

##### 141. Independence of the Judiciary

(4) A judge of a superior court or any person exercising judicial power, is not liable to any action or suit for any act or omission by that judge or person in the exercise of the judicial power.

##### Vacation of office and immunity of Commissioners of the Commission on Human Rights and Public Administration

##### 170. Vacation of office and immunity of Commissioners

(2) A member of the Commission shall have such and like protection and privilege in the case of any action or suit brought against the Commission for any act done or omitted to be done in the honest execution of the duties of the Commission as is by law given to acts done or words spoken by a judge of the superior courts in exercise of the judicial office.

##### iNgwenyama

228. (1) iNgwenyama is the traditional head of the Swazi State and is chosen by virtue of the rank and character of his mother in accordance with Swazi law and custom.

(2) iNgwenyama enjoys the same legal protection and immunity from legal suit or process as the King.

##### The Ndlovukazi

229. (1) The Ndlovukazi (Queen Mother) is traditionally the mother of the iNgwenyama and the symbolic Grandmother of the Nation. ...

(6) The Ndlovukazi shall be immune from-

(a) suit and legal process in any civil case in respect of all things done or omitted to be done by her in her private capacity; and

(b) being summoned to appear as a witness in any civil or criminal proceedings.

#### POCA

Immunity of Commissioner, Deputy Commissioner etc:

17. No civil or other proceeding shall be brought against the Commissioner, Deputy Commissioner or an officer of the Commission in respect of any act or thing done or omitted to be done in good faith in the performance of their functions under this Act.

#### MLFPA

Immunity

36. No action shall lie against the Director, any officer, employee or agent of the SFIU or any person acting under the direction of the Director for anything done in good faith in the administration or discharge of any powers, duties or functions under this Act.

114. Swaziland further referred to Article 169 of the Constitution, which provides as follows:

Restrictions on matters for investigation

169. The Commission shall not, in investigating any matter leading to, resulting from or connected with the decision of a Minister, inquire into or question the policy of the Government in accordance with which the decision was made.

115. No examples of implementation were provided.

#### **(b) Observations on the implementation of the article**

116. Swaziland law gives absolute immunity to the King, the traditional head of the Swazi State and the Queen mother, which extends to testifying both in civil and criminal proceedings. While judges enjoy functional immunity for acts within the exercise of their functions, it was confirmed that no other public officials enjoy criminal immunity. However, certain officials are excluded from the definition of public officer, pursuant to Article 254 of the Constitution. The recommendation made under article 15 is referred to in this regard.

### **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**

117. Swaziland referred to articles 162 (4) and (6) of the Constitution, sections 10(1)(b) and 28 of POCA.

Constitution

Director of Public Prosecutions

162. Appointment, tenure, functions, etc

(1) There shall be a Director of Public Prosecutions whose office shall be a public office.

(2) The Director of Public Prosecutions, in this Chapter referred to as “the Director,” shall be appointed by the King on the advice of the Judicial Service Commission.

(3) A person shall not qualify to be appointed Director unless that person qualifies for appointment as a judge of the superior courts.

(4) The Director shall have power in any case in which the Director considers it proper to do so, to

(a) institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person against the laws of Swaziland;

(b) take over and continue any criminal proceedings that may have been instituted or undertaken by any other person or authority;

(c) discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or undertaken by the Director or any other person or authority; and

(d) perform such other functions as may be prescribed.

(5) The powers under subsection (4) may be exercised by the Director in person or by subordinate officers acting in accordance with the general or special instructions of the Director.

(6) In the exercise of the powers conferred under this Chapter, the Director shall -

(a) have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process; and

(b) be independent and not be subject to the direction or control of any other person or authority.

(7) Without derogating from the provisions of subsection (6), the Director shall, in the exercise of the powers under this Chapter, consult the Attorney-General in relation to matters where national security may be at stake.

(8) The Director shall be removed from office in the same manner and on the same grounds as a Judge of the superior courts, except that the Minister responsible for Justice shall initiate the proceedings in terms of section 158 (3).

POCA

Functions of the Commission

10. (1) The functions of the Commission shall be to- ...

(b) receive and investigate complaints of alleged or suspected corrupt practices made against any person, and refer appropriate cases to the Director of Public Prosecutions;

Corrupt activities relating to law officers and public prosecutors

28. Corrupt activities relating to law officers and public prosecutors

(1) Subject to the provisions of subsection (2), a person who -

(a) being a law officer or public prosecutor, directly or indirectly, demands or accepts or agrees or offers to accept any advantage, whether for the benefit of that officer or prosecutor or for the benefit of another person;

(b) directly or indirectly gives or agrees or offers to give any advantage to a law officer or public prosecutor, whether for the benefit of that person or the benefit of another person, commits an offence of corrupt activities relating to law officers and public prosecutors.

(2) An act under subsection (1) to constitute an offence must induce the law officer or public prosecutor to act or influence another person so to act in a manner -

(a) that amounts to the -

(i) illegal, dishonest, unauthorized, 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, fiduciary 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; or,

(d) that amounts to any other unauthorized or improper inducement to do or not to do anything.

(3) For purposes of subsection (1), “to act” includes-

(a) performing or not adequately performing a function relating to the-

(i) institution or conducting of civil or criminal proceedings;

(ii) carrying out of any necessary functions incidental to the institution or conducting of civil or criminal proceedings; or

(iii) continuation or discontinuation of civil or criminal proceedings;

(b) delaying, hindering or preventing the performance or commencement of a civil or prosecutorial function;

(c) aiding or assisting any particular person in the performance of a function relating to the institution or conducting of criminal or civil proceedings;

(d) showing any favour or disfavour to any person in the performance of a function relating to the institution or conducting of criminal or civil proceedings; or

(e) exerting any improper influence over the decision-making of any person, including a member of the office of the Attorney General or the Director of Public Prosecutions or a judicial officer, performing official functions.

118. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

119. Sections 10(1) of the POCA and article 162 of the Swaziland Constitution seemingly appear to be aligned to the provision under review. This is apparent specifically with regard to article 162(6) of the Constitution, according to which the DPP in executing its mandate prosecutes in the public interest and the interest of the administration of justice and has regard to the need to prevent abuse of the legal process. Maximizing the effectiveness of law enforcement measures and deterring the further commission of offences is a component of serving the public interest. Moreover, the DPP shall be independent and not subject to the direction or control of any other person or authority.

120. Section 28(3) of the POCA as cited further criminalizes corrupt activities relating to public prosecutors, including accepting bribes, showing favour or disfavour or exerting improper influence in connection with any civil or criminal proceedings.

121. Swaziland was requested to provide information on corruption cases where prosecutorial discretion was exercised, especially to not prosecute. The DPP confirmed that all corruption cases brought to the DPP had been indicted.

## **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**

122. Swaziland cited sections 95 (3) and 96 (4) of the CP& E as follows:

##### **CP&E**

Power of the High Court regarding bail.

95. (3) Subject to the provisions of this Act, the High Court shall, where an accused person is charged with any of the offences listed in the Fourth Schedule, if it determines that the circumstances warrant that the accused may be admitted to bail, admit the accused to bail and fix the amount of bail in an amount not less than E15,000 (Emalangeni fifteen thousand), in addition to any other conditions it deems fit.

##### **FOURTH SCHEDULE**

Offences referred to in sections 95 and 96.

Any offence relating to exchange control, money laundering, corruption, extortion, fraud, forgery, uttering or theft-

(a) involving amounts of more than E 500 000; or

(b) involving amounts of more than E 100 000, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(c) if it is alleged that the offence was committed by any law enforcement officer-

(i) involving amounts of more than E 10 000; or

(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

Indecent assault on a child under the age of 16 years.

An offence referred to in Part II of the First Schedule-

Bail application of accused in court.

96. (4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established-



- (a) where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or
- (b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;
- (c) where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- (d) where there is a likelihood that the accused, if released on bail, may undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or
- (e) where in exceptional circumstances there is a likelihood that the release of the accused may disturb the public order or undermine the public peace or security.

123. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

124. Swaziland cited sections 95(3) and 96(4) of the CP&E together with the fourth schedule outlining the offences that are bailable. These include corruption, money laundering, theft, etc. Section 96(4) in particular regulates conditions for bail to ensure the presence of the defendant at subsequent criminal proceedings. Swaziland is clearly compliant with the provision, although no case examples were provided.

125. It was confirmed that there have been corruption cases where bail was refused due to circumstances outlined in section 96 of the CP&E. The case of *R v Shongwe* cited above (Case Number 2/2015) involving a Cabinet Minister was referred to as an example.

## **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**

126. Section 329 of the Criminal Procedure and Evidence Act 67 of 1938 and article 78 of the Constitution provide for a prerogative of mercy as follows:

#### **Criminal Procedure and Evidence Act**

##### **329. Saving of Royal Prerogative of Mercy**

The power at any time to commute or remit any sentence of any court of criminal jurisdiction now or hereafter established in Swaziland, or to grant a pardon either free or subject to lawful conditions of any offender convicted by any such court, is vested in His Majesty under section 78 of the Constitution.

#### **Constitution**

##### **Prerogative of Mercy**

78. (1) The King may, in respect of a person sentenced to death or life imprisonment -  
 (a) grant a pardon, either free or subject to lawful conditions;

- (b) grant to any person a respite, either indefinite or for a specified period;
- (c) substitute a less severe form of punishment for any punishment imposed on any person for such an offence; or
- (d) remit the whole or part of that sentence, penalty or forfeiture otherwise due to the Government on account of that offence.
- (2) In the exercise of the powers conferred upon him by subsection (1), the King shall act on the advice of a Committee on the Prerogative of Mercy made up of two persons appointed by the King drawn from the King's Advisory Council, the Attorney-General, the Minister responsible for justice and a suitably qualified medical practitioner recommended by the Minister responsible for health and appointed by the King.
- (3) The King shall designate one of the members of the Committee as chairman.
- (4) The Committee may act notwithstanding any vacancy in its membership or the absence of any member, and the validity of the transaction of business by the Committee shall not be affected by the fact that some person who was not entitled to do so took part in the proceedings.
- (5) Whenever any person has been sentenced to death by any court in Swaziland other than a court-martial, the chairman shall cause a report on the case by the judge who presided at the trial (or, if a report cannot be obtained from that judge, a report on the case by the Chief Justice), together with such other information derived from the record of the case or elsewhere as the chairman may require, to be taken into consideration at the meeting of the Committee so that the Committee may advise the King whether or not to exercise the powers in terms of subsection (1).
- (6) The provisions of this section shall not apply in relation to any conviction by a court established under a law of a country other than Swaziland that has jurisdiction in Swaziland in pursuance of arrangements made between the Government of Swaziland and another Government or an international organization relating to the presence in Swaziland of members of the armed forces of that other country or in relation to any punishment imposed in respect of any such conviction or any penalty or forfeiture resulting from any such conviction.
- (7) Nothing in this section shall be construed as precluding an Act of Parliament from making provision of general application under which any sentence of imprisonment shall be reduced where such conditions (being conditions relating to good behaviour by the person on whom the sentence was imposed whilst serving that sentence) as are prescribed are fulfilled.

127. Swaziland also cited section 43 of the Prisons Act, 1964.

The Prisons Act, 1964

## PART VII

### REMISSION OF SENTENCES

#### 43. Remission of part of sentence of certain prisoners.

(1) Subject to this Act, criminal prisoners sentenced to imprisonment, for a period exceeding one month, whether by one sentence or consecutive sentences, may, by industry and good conduct, earn a remission of one-third of the remaining period of such sentence: Provided that in no case shall —

- (a) remission earned result in the release of a prisoner until he has served one month; and
- (b) remission be granted to a prisoner sentenced to be detained pending the signification of His Majesty's pleasure.

(2) A prisoner sentenced to imprisonment for life shall, for the purposes of this section, be deemed to be a prisoner sentenced to imprisonment for twenty years.

(3) For the purpose of giving effect to this section, a prisoner on admission shall be credited with the full amount of remission to which he would be entitled at the end of his sentence or sentences as if he would not lose such remission.

(4) A prisoner may lose remission as a result of its forfeiture upon his being found guilty of an offence against prison discipline.

(5) A prisoner shall not earn any remission in respect of a period spent in hospital through his own fault or while malingering, or while undergoing confinement in a separate cell as punishment for a prison offence.

(6) The Director may restore, in whole or in part, remission forfeited.

(Amended L.33/1966.)

128. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

129. Section 329 of the CP&E provides for the authority of the King to remit or commute a sentence either free or subject to lawful conditions. Article 78 of the Constitution further provides for the King's prerogative of mercy. The law does not provide for consideration by the King of the gravity of offences before release on parole. It is recommended that Swaziland amend its legislation in this regard.

130. It was explained by the DPP that there have been no corruption cases where the prerogative of mercy was applied or the sentence was remitted.

**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**

131. The issue of removal, suspension and reassignment is dealt with in terms of articles 158 (6), 162 (2) and (8) and 187 (1) of the Constitution, section 6 (1) of the POCA, as well as Regulations 37-39 of the Civil Service Board (General) Regulations, 1963, which provide as follows:

Constitution

Removal of Justices of superior courts

158. (6) Where the question of removal in terms of this section has been referred to the Commission the King may suspend from office the Chief Justice or the other Justice as the case may be for the duration of the inquiry.

Appointment, tenure functions, etc.

162. (2) The Director of Public Prosecutions, in this Chapter referred to as “the Director,” shall be appointed by the King on the advice of the Judicial Service Commission.

(8) The Director shall be removed from office in the same manner and on the same grounds as a Judge of the superior courts, except that the Minister responsible for Justice shall initiate the proceedings in terms of section 158 (3).

187. Appointment, promotion, transfer etc of public officers

(1) Subject to the provisions of this Constitution or any other law, the power of appointment (including acting appointments, secondments, and confirmation of appointments) promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers shall vest in the Civil Service Commission.

POCA

6. Vacation of office of Commissioner or Deputy Commissioner

(1) A member of the Commission may - ...

(b) be removed by the King from office for inability to perform the functions of the office whether such inability arises from infirmity of body or mind or any other cause or for stated misconduct.

Civil Service Board (General) Regulations, 1963

Criminal matters.

38. (1) If a preliminary investigation or a disciplinary inquiry discloses that an offence against any law may have been committed by an officer, the head of department, unless action taken by the Police has been or is about to be taken, shall consult the Director of Public Prosecutions as to whether a prosecution should be instituted; and if the Director of Public Prosecutions does not advise a prosecution, whether disciplinary action should be taken or continued.

(2) In the latter case the charges against the officer shall be framed after consultation with the Deputy Attorney-General before the officer is required to answer them or before the inquiry proceeds.

(3) If criminal proceedings are instituted against an officer in any court, disciplinary proceedings upon any grounds involved in the criminal charge shall not be taken pending the result of criminal proceedings.

(4) An officer convicted of a criminal charge shall not receive any emoluments from the date of conviction pending a decision on his case by the competent authority who, after referring it to the Board for advice, may dismiss him or subject him to some lesser penalty:

Provided that no final decision shall be taken pending the determination of any appeal from the conviction.

(5) The Board shall in order to advise on the case obtain as soon as possible a copy of the criminal court proceedings, and the recommendation of the head of department as to whether the officer should be further subjected to disciplinary proceedings.

(6) No officer acquitted of a criminal charge shall be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent the officer being dismissed or otherwise punished on any other charge arising out of his conduct in the matter, unless the charges raise substantially the same issues as those on which he has been acquitted.

Interdiction.

39. (1) If the Minister considers that the interest of the service require that an officer should cease forthwith to exercise the powers and functions of his office, he may interdict him from the exercise of those powers and functions, if disciplinary proceedings are being taken or about to be taken or if criminal proceedings are being instituted against him.

(2) The head of department shall inform the Board as soon as any officer in his department has been interdicted.

(3) An officer who is interdicted shall, subject to regulation 38 (4); 38 (5) receive such emoluments, not being less than one half of his normal emoluments as the Minister thinks fit.

(4) If the disciplinary proceedings do not result in the officer's dismissal or other punishment he shall be entitled to the full amount of the emoluments which he would have received if he had not been interdicted.

(5) If the punishment is other than dismissal he may be refunded such proportion of the emoluments withheld from him as a result of interdiction as the Minister may think fit in the light of the Board's advice.

(6) An officer who is under interdiction may not leave his station without the permission of the Minister.

## PART V

### DISCIPLINARY CONTROL AND PROCEEDINGS

#### A. GENERAL

Principles relating to disciplinary control.

37. (1) All acts of misconduct by officers shall be dealt with under these regulations as soon as possible.

(2) The Board shall apply a procedure in these regulations to all officers concerned in the same way irrespective of seniority or salary.

(3) The Board itself may conduct a formal enquiry into alleged misconduct in any case where it considers the holding of a formal inquiry to be necessary, or may otherwise arrange for the holding of a formal inquiry by a committee of officers.

(4) The disciplinary punishments which may be recommended as a result of disciplinary proceedings taken under this part include the following –

- (a) Dismissal,
- (b) termination of appointment,
- (c) retirement in the public interest,
- (d) reduction in rank,
- (e) reduction in salary,
- (f) fine,
- (g) withholding of contract gratuity,
- (h) stoppage of increment,
- (i) withholding of increment,
- (j) reprimand.

(5) The surcharging of any officer for any loss of, or damage to, public funds, stores or property, shall not be regarded as a disciplinary punishment for the purpose of these regulations and the Board shall not advise on surcharging.

(6) The Board shall, however, advise in any case where a head of department recommends that any other disciplinary punishment should be imposed upon any officer on grounds of his misconduct in addition to a surcharge.

132. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

133. The law provides for suspension under articles 158(6) and 162 of the Constitution (regarding justices of superior courts and the DPP), section 187 of the Constitution (in respect of public officers) and section 6 of the POCA (in respect of members of the Commission).
134. Regulation 38 of the Civil Service Board (CSB) Regulations further allows for disciplinary action to be taken or continued against a public officer if a preliminary investigation or disciplinary inquiry discloses that a criminal offence may have been committed. The decision is made by the head of department (as defined in the Schedule to the Regulations) following consultation with the DPP. Disciplinary punishments that may be recommended as a result of disciplinary proceedings include dismissal, termination and reassignment/demotion in rank. Interdiction is provided for, if disciplinary proceedings are being taken or about to be taken or if criminal proceedings are being instituted against a public official (Regulation 39, CSB Regulations).
135. More generally, disciplinary proceedings may not be taken pending the result of criminal proceedings upon any grounds involved in the criminal charge (Regulation 38(3), CSB Regulations)
136. The provision under review is adequately implemented in Swaziland's legislation and regulations.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 7**

*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*

*(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**

137. Swaziland referred to Section 38 of the POCA (Endorsement of register) (quoted under UNCAC article 26 above).
138. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

139. The question here is whether a criminal conviction (of corruption) also disqualifies a person from holding a position in a public office or in a public enterprise. Section 38 of POCA, on endorsement in the register of persons and enterprises convicted of stipulated

offences, is not considered to be relevant, as it is doubtful whether it would also apply to employment issues rather than procurement. This is borne out by section 38(6) POCA, which states that, where the Registrar has endorsed the register, in addition to any other legal action, the Accountant-General may issue an instruction terminating any agreement with the person or enterprise. Also, section 38(10)(b) provides that during the relevant period the person or enterprise is disqualified from making any tenders for procurement; finally the register is defined as the Register for Tender Defaulters and is maintained by the Minister of Finance (sections 43 and 44 POCA). Based on the above, Swaziland may wish to consider adopting procedures for the disqualification of convicted persons from holding a position in a public office or in a public enterprise.

## **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**

140. Swaziland cited section 187 (1) of the Constitution of Swaziland 2005 (quoted under paragraph 6 above).

141. No example of implementation were provided.

#### **(b) Observations on the implementation of the article**

142. Section 187 (1) of the Constitution of Swaziland provides for the dismissal and disciplinary control of public officers by the Civil Service Commission. Moreover, the Civil Service Board (General) Regulations, 1963 set out a detailed framework for disciplinary control and proceedings (Part V). The provision is adequately implemented.

## **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**

143. Swaziland referred to article 190 (1) of the Constitution of Swaziland and the Prisons Act, 1964 read together with the Prisons regulations, 1964 which provide for the establishment Correctional Services as follows:

#### **Constitution**

190. (1) The Correctional Services for Swaziland shall be responsible for the protection and holding on terms convicted persons and the rehabilitation of those persons and the

keeping of order within the correctional or prison institutions of the Kingdom.

144. There was a transition within the prisons service from being a prison authority to being a correctional or rehabilitating institution.

145. There is an ongoing programme to rehabilitate and integrate offenders into society.

146. Moreover, the mandate of the Swaziland Correctional Services is as follows:

**Objectives**

1. The objective of the His Majesty's Correctional Services is to ensure safe custody of offenders.
2. To ensure efficient resource management and utilization, to safeguard humane detention and treatment of offenders.
3. Also to provide rehabilitation and reintegration services to offenders. Supervise offenders in community service.
4. Produce food for self-sufficiency. Escort and produce awaiting trial inmates to court.
5. Participate in joint security operations and national events with sister forces.
6. Participate in the Royal Close Protection Unit (RCPU) and Royal Guard.

**(b) Observations on the implementation of the article**

147. Swaziland is compliant in so far as the Constitution provides for the protection, holding and rehabilitation of prisoners. Swaziland also alludes to a transition period where the Prisons Service was transformed from a Prison Authority to a correctional or rehabilitating institution.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 1**

*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;*

*(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**

148. Swaziland cited section 50 of the POCA, sections 3, 4, 9 and the schedule of the Serious Offences (Confiscation of Proceeds) Act, 2001, as well as section 57 of the Money Laundering and Financing of Terrorism (Prevention) Act 2011.



149. In addition, within its legislative framework issues of asset forfeiture are dealt with in terms of sections 30, 31, 32 and 33 of the Suppression of Terrorism Act 2008, which provides for non-conviction based forfeiture in respect of terrorism-related acts.

#### POCA

##### Application for restraining order and forfeiture order

50. (1) Where a person, who is the subject of an investigation under this Act or is about to be charged with an offence under Part III, the Director of Public Prosecutions may apply to the court for a restraining order under section 11 of the Serious Offences (Confiscation of Proceeds) Act, 2001, and accordingly the provisions of that Act shall have effect in respect of the application.

(2) Where a person has been convicted of any offence under Part III of this Act, the Director of Public Prosecutions may apply to court for a forfeiture order under section 3 of the Serious Offences (Confiscation of Proceeds) Act, 2001, and accordingly, the provisions of that Act shall have effect in respect of the application.

##### Serious Offences (Confiscation of Proceeds) Act 2001

##### 3. Application for forfeiture or pecuniary penalty order

(1) When a person has been convicted of a serious offence, the Director of Public Prosecutions may, subject to subsection (2), apply to the court convicting that person not later than 6 months after that person's conviction for either or both of the following orders:

(a) a forfeiture order in respect of particular property

(b) a pecuniary penalty.

(2) The Director of Public Prosecutions shall not, except with leave of the court, make an application under subsection (1)-

(a) if any application has previously been made under that subsection or any other law; and

(b) the application has been finally determined.

##### Forfeiture orders

4. (1) When an application is made to a court under section 3 the court may, if it considers it appropriate, order that the property be forfeited to the government if it is satisfied that the property was the proceeds of a serious offence.

(2) In considering whether to make an order under subsection (1) in respect of a particular property, the court may have regard to -

(a) the use that is ordinarily made or had been intended to be made of the property

(b) any hardship that may reasonably be likely to be caused to any person by the order

(c) the gravity of the offence committed. ...

##### Pecuniary penalty order

9. (1) If an application is made to the court under section 3 (1) (b) for a pecuniary penalty order in respect of the benefits derived by the person in respect of whose conviction the application is made, the court may -

(a) assess the value of those benefits;

(b) order the person to pay to the Government a pecuniary penalty equal to the value of such benefits as assessed under paragraph (a) less -

(i) the value (as at the time of making the order under this subsection) of any property in respect of which a forfeiture order has been made in relation to the same conviction; and

(ii) any amount payable by way of restitution or compensation in relation to the same conviction if the court thinks it desirable to take such assessed benefits into account.

(2) The amount payable by a person to the Government under a pecuniary penalty order shall for all purposes be taken to be a civil debt owed by that person to the Government.

(3) A pecuniary penalty order made by a court may be enforced as if it were an order made by the court in civil proceedings instituted by the Government against the person concerned to cover a debt owed by that person to the Government.

## SCHEDULE

### SERIOUS OFFENCES

1. Murder;
2. Culpable homicide;
3. Robbery or Extortion;
4. Arson'
5. Breaking and entering any premises with intent to commit an offence either at common r in contravention of any statute;
6. Theft either at common law or under statute;
7. Receiving stolen property knowing such goods or property to have been stolen"
8. Fraud; forgery or uttering of forged document knowing it to be forged;
9. Offences against the statute dealing with theft and kindred offences by public officers;
10. Offences against the law for the prevention of illicit dealing in or possession of precious met; or stones;
11. Offences against the law relating to the possession, conveyance or supply of dangerous or poisonous drugs or habit forming drugs;
12. Offences relating to cainage;
13. Illicit dealing in arms and ammunition;
14. Offences against the law relating to the prevention of corruption
15. Any conspiracy, incitement or attempt to commit any of the above offences

Section 57 of the MLFTP A which provides for the forfeiture of property, proceeds or instruments as follows:

#### 57. Forfeiture of property

(1) Where a person is convicted of an unlawful activity, an offence of money laundering or financing of terrorism, and the Court is satisfied that the person has derived, obtained or realised, directly or indirectly, property from the commission of any such offence the Court may, unless proved to the contrary, on the application of a competent authority or a person authorised by a competent authority, after the conviction of the person, make an order of forfeiture in respect of that property.

(2) Property subject to forfeiture order under subsection (1) shall include-

- (a) the assets laundered or terrorist property, the proceeds, income, and gains from such assets;
- (b) the assets intended to be laundered;
- (c) assets used to facilitate or commit the unlawful activity; and,
- (d) instrumentalities used or intended to be used in the commission of the offence, money laundering or financing of terrorism.

(3) Where the Court is satisfied that a forfeiture order should be made in respect of the property of a person convicted of an unlawful activity or instrumentalities used or intended to be used in the commission of the offence, money laundering or financing of terrorism but that the specified property or any part thereof or interest therein cannot, for whatever reason, be made subject to such an order and, in particular-

- (a) cannot, on the exercise of due diligence be located;

(b) has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the forfeiture of the property;

(c) is located outside Swaziland;

(d) has been substantially diminished in value or rendered worthless; or,

(e) has been commingled with other property that cannot be divided without difficulty, the Court may, instead of ordering the property or part thereof or interest therein to be confiscated, order the person to pay to the State an amount equal to the value of the property, part or interest.

(4) Where property subject to forfeiture has been commingled with property acquired legitimately or acquired using funds from legitimate sources, the Court shall in the forfeiture order, declare the nature, extent and value of the property which is to be forfeited only in regard of property subject to the unlawful activity or money laundering offence or financing of terrorism offence.

(5) A Court shall not make an order of forfeiture under this section in respect of any property where the Court is satisfied that the person, not being the person who was convicted, who is in possession of the property or purports to be its owner acquired the property-

(a) in good faith and for good cause; and,

(b) without knowing and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of its acquisition, property derived, obtained or realised from the commission of the unlawful activity or money laundering offence or financing of terrorism offence.

(6) A person who under this section claims an interest in any property in respect of which an application for forfeiture has been made may-

(a) before the Court makes an order of forfeiture; or,

(b) when the Court has made an order of forfeiture, within 30 days after the order was made,

apply to the Court against the granting of the order or, where the Court has made an order of forfeiture, for an order declaring the nature, extent and value of the claimant's interest; and-

(i) directing the Government to transfer the property to the claimant; or,

(ii) declaring that there is payable to the claimant by the Government an amount equal in value to the value of the claimant's interest declared under this section.

(7) If a Court is satisfied that a person referred to in subsection (5)-

(a) has an interest in the property which is the subject of the application; and

(b) has exercised reasonable care to ensure that the property is not the proceeds of a crime, or terrorist property, or would not be used to commit or facilitate the commission of an act of terrorism and would not be used by a terrorist group; and,

(c) is not a member of a terrorist group,

the Court shall order that the interest shall not be affected by the order. The order shall declare the nature and extent of the interest in question.

(8) Where-

(a) a Court has made an order of forfeiture under this section; and,

(b) the conviction of the person in relation to whom the order was made is set aside, the order of forfeiture shall cease to have effect and a person who claims to have an interest in any property in respect of which the order was made may apply to the Court for an order declaring the nature, extent and value of the claimant's interest; and,

(c) directing the Government to transfer the property to the claimant; or,

(d) declaring that there is payable to the claimant by the Government an amount equal in value to the value of the claimant's interest declared under this subsection.

(9) Where-

(a) the Court has made an order of forfeiture under this section; and,

(b) the conviction of the person in relation to whom the order was made is set aside, the competent authority shall, as soon as is practicable after the quashing of the conviction,

give notice to any person the competent authority has reason to believe may have an interest in any money or property in respect of which the order of forfeiture was made immediately before the order was made or to any other person or class of persons whom the Court considers appropriate.

(10) A person who makes an application under subsection (5) or subsection (6) shall give notice to the competent authority and the competent authority shall be a party to a proceeding on the application.

(11) Where an application has been made under subsection (1), the Court may, for the purpose of tracing of the property or preventing the circumventing of an order of forfeiture which the Court may make under this section, make such order or give such direction as the Court thinks necessary and may in particular make-

(a) a prohibition order against any registration under the Deeds Registry Act, 1968, or a restraining order;

(b) a production order; or,

(c) an order that any property be transferred to a named person to be held by the person pending the determination of the application.

(12) For the purpose of an order of forfeiture under this section, it shall be presumed that any money or property which appears-

(a) to have been under the control of the person convicted or held by that person any time after the person committed the offence and before the Court makes an order under subsection (1); or,

(b) to have been transferred to or by, or deposited with or by, the person convicted at any time after that person committed an offence and before the Court makes an order under subsection (1), is the proceeds of crime or used in or intended to be used in the commission of an unlawful activity, the offence of money laundering or the offence of financing of terrorism.

(13) In determining whether or not any property is derived from an unlawful activity or money laundering or related to financing of terrorism, the Court shall apply the standard of proof required in civil proceedings.

#### Suppression of Terrorism Act 2008

##### 30. Power to seize property used in commission of terrorist acts

(1) Where the Commissioner has reasonable grounds for believing that any property has been, or is being, used to commit an offence under this Act, the Commissioner may seize the property.

(2) The Commissioner may exercise the powers under subsection (1) whether or not any proceedings have been instituted for an offence under this Act in respect of that property.

(3) The Commissioner shall as soon as practicable after seizing any property under subsection (1), make an application, ex parte, to a Judge of the High Court for a detention order in respect of that property.

(4) A judge to whom an application is made under subsection (3), may subject to this subsection grant the detention order and shall not grant the detention order in respect of that property unless the Judge-

- (a) has given the person appearing to have interest in the property, a reasonable opportunity of being heard;
- (b) has reasonable grounds to believe that the property has been, or is being used to commit an offence under this Act.
- (5) Subject to subsection (6), a detention order made under subsection (4) shall be valid for a period of sixty (60) days and may, on application, be renewed by a Judge of the High Court, for a further period of sixty (60) days until such time as the property referred to in the order is produced in court in proceedings for an offence under this Act in respect of that property.
- (6) A judge of the High Court, on application by the property owner, lessee, custodian, the person named in the order or the Commissioner may release any property referred to in a detention order under subsection (4) where the Judge-
  - (a) is satisfied that there are no longer reasonable grounds to suspect that the property has been or is being used to commit an offence under this Act; or
  - (b) becomes aware that no proceedings are instituted in the High Court for an offence under this Act in respect of that property after the lapse of six (6) months from the date of the detention order.
- (7) Civil or criminal proceedings shall not lie against the Commissioner and the Government for a seizure of property made in good faith under subsection (1).

### 31. Orders for forfeiture of property after conviction

- (1) Where a person is convicted of an offence under this Act, the court may order that any property, used for or in connection with or received as payment or reward for the commission of that offence, be forfeited to the Government.
- (2) Before making an order under subsection (1) the court shall give any person who submits to the jurisdiction of the court and declares interest in the property in respect of which the order is proposed to be made an opportunity of being heard.
- (3) Property forfeited to the Government under subsection (1) shall vest in the Government-
  - (a) if no appeal has been made against the order, at the end of the period within which an appeal may be made against the order; and
  - (b) if an appeal has been made against the order, on the final determination of the appeal if unsuccessful.

### 32. Orders for seizure and restraint of property

- (1) Where a judge of the High Court is satisfied, on an ex parte application made to the judge in chambers, that there are reasonable grounds to believe that there is in any building, motor vehicle, aircraft, place or vessel, any property in respect of which an order of forfeiture may be made under section 33, the judge may issue-
  - (a) a warrant authorising a police officer to search the building, motor vehicle, aircraft, place or vessel for that property and to seize that property if found and any other property in respect of which that police officer believes, on reasonable grounds, that an order of forfeiture may be made under section 33;
  - (b) a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, that property other than as may be specified in the order.
- (2) On an application made under subsection (1), the judge may, at the request of the Attorney-General and if the judge is of the opinion that the circumstances so require-
  - (a) appoint a person to take control of, and manage or otherwise deal with, the whole or a part of that property, in accordance with the directions of that judge;

(b) call upon any person having possession of that property to give possession of that property to the person appointed under paragraph (a).

(3) The power to manage or otherwise deal with property under subsection (2) includes without further application to a judge-

(a) in the case of perishable or rapidly depreciating property, the power to sell that property; and

(b) in the case of property that has little or no value, the power to destroy that property.

(4) A management order under subsection (2) shall cease to have effect when the property which is the subject of the management order is returned to an applicant in accordance with the law or forfeited to the Government or destroyed.

(5) The Attorney-General may at any time apply to a Judge of the High Court to cancel or vary a warrant or order issued under this section.

### 33. Orders for forfeiture of property

(1) The Attorney-General may make an application to a Judge of the High Court for an order of forfeiture in respect of terrorist property.

(2) The Attorney-General shall name as respondents to an application under subsection (1) only those persons who are known to own or control the property which is the subject of the application.

(3) The Attorney-General shall give notice of an application under subsection (1) to the respondents named in that application in such manner as the Attorney-General may deem reasonable.

(4) If a judge is satisfied, on a balance of probabilities, that the property which is the subject of the application is terrorist property, the judge shall order that the property be forfeited to the Government.

(5) Where a judge refuses an application under subsection (1), the judge shall make an order that describes the property and declare that it is not property referred to in that subsection.

(6) On an application under subsection (1), a judge may require notice to be given to any other person who in the opinion of the judge, appears to have an interest in the property, and that person shall be entitled to be added as a respondent to the application.

(7) If a judge is satisfied that a person referred to in subsection (6)-

(a) has an interest in the property which is the subject of the application;

(b) has exercised reasonable care to ensure that the property-

(i) is not the proceeds of a terrorist act;

(ii) would not be used to commit or facilitate the commission of a terrorist act; and

(iii) would not be used by a terrorist group; and

(c) is not a member of a terrorist group, the judge shall order that the interest shall not be affected by the order and also declare the nature and extent of the interest in question.

(8) A person who claims an interest in property that has been forfeited and who has not been given notice under subsection (6) may make an application to the High Court to vary or set aside an order made under subsection (4) not later than sixty (60) days after the day on which the forfeiture order was made.

(9) A person who intends to appeal against an order under subsection (4) or a decision under subsection (8) shall do so within forty-five (45) days of the date of that order or decision.

(10) Pending the determination of an appeal against an order of forfeiture made under this section-

(a) property restrained under section 32 shall continue to be so restrained;

- (b) property seized under a warrant issued under section 32 shall continue to be so detained; and
- (c) any person appointed to manage, control or otherwise deal with the property under section 32 shall continue in that capacity.
- (11) The provisions of this section, unless otherwise expressly stated, shall not affect the operation of any other provision of this Act respecting forfeiture.

150. Swaziland provided the following example of implementation:

Rex v Mpumelelo Dlamini, High Court Case no:158/2010, in which section 11 of the Serious Offences (Confiscation of Proceeds) Act, pertaining to a restraining order, was applied.

**(b) Observations on the implementation of the article**

151. The following laws make up the asset forfeiture regime in Swaziland: the Prevention of Corruption Act, the Serious Offences (Confiscation of Proceeds) Act, 2001, the Money Laundering and Financing of Terrorism (Prevention) Act, 2001 and the Suppression of Terrorism Act, 2008. The term forfeiture is used in all the legislation and forfeiture is conviction-based.
152. Forfeiture under the Serious Offences (Confiscation of Proceeds) Act is of a general nature and applies to proceeds derived from all serious offences (section 4), which include offences against the POCA (Schedule). Forfeiture provisions in the Money Laundering and Financing of Terrorism (Prevention) Act relate to property, proceeds or instruments of any unlawful activity or a money laundering offence (section 57). The confiscation or forfeiture of property of corresponding value is also provided for (Section 9 of the Serious Offences (Confiscation of Proceeds) Act; and Section 57(3) of the MLFPA).
153. The confiscation of instrumentalities used or intended to be used in the commission of the offence is provided for in the Money Laundering and Financing of Terrorism (Prevention) Act (Section 57(2)(d)). Furthermore, under the Serious Offences (Confiscation of Proceeds) Act, ‘proceeds of serious offence’ are defined in section 2 to mean:
- “any property used in or in connection with the commission of serious offence or any property that is derived or realised directly or indirectly by any person from the commission of any offence or from any act or omission which had it occurred in Swaziland would have constituted a serious offence”.
154. While this definition covers instrumentalities “used” in the commission of offences, it does not appear to cover instruments ‘destined for use’ in offences, as required under UNCAC article 31(1)(b). It is recommended that Swaziland adopt a corresponding provision.

## **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**

155. Swaziland cited sections 11 and 16-18 of the Serious Offences (Confiscation of Proceeds) Act, as well as sections 49 and 71 of the MLFTP A which provide as follows:

Serious Offences (Confiscation of Proceeds) Act

Restraining orders

11. (1) If a person has been, or is about to be charged with a serious offence, the Director of Public Prosecutions may apply to the court for a restraining order under this section in respect of -

- (a) specified property of that person;
- (b) all the property of that person, including property acquired by that person after the making of the order; or
- (c) specified property of any other person which was used in, or in connection with, the commission of the offence or was derived or realised, directly or indirectly, by that other person, as a result of the commission of the offence.

(2) An application under subsection (1) shall be supported by an affidavit stating the following matters and the grounds therefor ~

- (a) that the person charged or about to be charged with the serious offence, committed the offence; and
- (b) in the case of an application in respect of specified property
  - (i) that a forfeiture order may be made in respect of the property, if the person is convicted of the offence;
  - (ii) that the property is the property of the person charged or about to be charged, and that a pecuniary penalty may be made if the person is convicted of the offence; and
- (c) in the case of an application in respect of all the property of the person, that a pecuniary penalty order may be made if the person is convicted of the offence; and
- (d) that there is a risk that before a forfeiture order or pecuniary penalty order is made, the person concerned would, unless restrained from doing so, be likely to be disposed of, or otherwise dealt with, the property to such an extent as to prevent the forfeiture or pecuniary penalty order being effected or complied with.

(3) An applicant for an order under this section shall give notice of the application in the manner prescribed by the appropriate rules of court -

- (a) to any person whose property is the subject of the application; and
- (b) to any other person whom the applicant has reason to believe has an interest in a property that is the subject of the application.

(4) The court may grant a restraining order notwithstanding that no notice of the application has been given under sub-section (3) if the court is satisfied that -

- (a) circumstances of urgency require the granting of the order; or
- (b) it is not in the public interest to give notice of the application

(5) The court may, at any time before the final determination of the application, direct the applicant to give or publish notice of the application to such other persons, in such manner and within such time as the court thinks fit.

(6) Any person whose property is the subject of the application and any other person who claims an interest in any such property is entitled to appear and to give evidence at the hearing of the application.



(7) On an application under subsection (9), the court may, if it considers that having regard to the matter contained in the affidavit, there are reasonable grounds in support of the application-

(a) direct that the property specified in the order is not to be disposed of or otherwise dealt with by any person, except in such manner and in such circumstances (if any) as specified in the order; or

(b) direct a trustee to take control and custody of the property

(8) If an application is made in anticipation of a charge being laid against the person of the offence in respect of which the application is made, the court shall not issue the restraining order unless it is satisfied that the person will be charged with the offence within 7 days.

(9) A restraining order may provide for meeting the reasonable living and business expenses of the person to whose property the order relates and reasonable costs and expenses of the person defending a criminal charge against that person.

#### PART IV: POWERS OF SEARCH AND SEIZURE

##### Search warrant

16. (1) A police officer may apply to a magistrate's court for a search warrant to be issued under this Part in respect of any premises if the officer has reasonable grounds to suspect that there is in or on the premises property that -

(i) was used in or in connection with the commission of a serious offence; or

(ii) was derived or realised, directly or indirectly, by any person as a result of the commission of a serious offence.

(2) The Court may, if satisfied that there are reasonable grounds for believing that there is in or on the premises property that -

(a) was used in or in connection with the commission of a serious offence; or

(b) was derived or realised, directly or indirectly, by any person as a result of the commission of the serious offence

issue a search warrant authorising the police officer to enter and search the premises for property of the kind referred to in the warrant and to search any person found in or on the premises, and to seize such property.

(3) There shall be stated in the warrant -

(a) the purpose for which the warrant is issued;

(b) the nature of the serious offence in respect to which the warrant is issued; and

(c) a description of the kind of property authorised to be seized.

(4) A warrant issued under subsection (2) shall be in the form prescribed under the Criminal Procedure and Evidence Act, 1938.

##### Search and seizure without warrant

17. Where by reason of circumstances of urgency a police officer after having obtained the approval of the Commissioner may without warrant -

(a) enter any premises and search for any proceeds of a serious offence;

(b) search any person in or on the premises for the proceeds of a serious offence and seize such proceeds if the officer believes on reasonable grounds that it is necessary to do so in order to prevent the disposal, concealment, loss or destruction of the proceeds of the offence.

##### Seizure of property under search warrant

18. (1) A police officer executing a search warrant may seize property of the kind described in the warrant.

(2) A police officer executing a search warrant may also seize property which is not of the kind described in the warrant if -

(a) the officer believes on reasonable grounds that the property is of a kind which would have been included in a search warrant issued under this Part;

(b) the officer believes on reasonable grounds that it is necessary to seize that property in order to prevent its disposal, concealment, loss or destruction or its use in the commission or continuing commission of a serious offence.

#### MLFTPA

##### 49. Seizure of Property subject to restraint order

(1) In order to prevent property subject to a restraining order from being disposed of or removed contrary to that order, any police officer may seize any such property if he or she has reasonable grounds to believe that such property will be so disposed of or removed.

(2) Property seized under subsection (1) shall be dealt with in accordance with the Court which made the relevant restraining order.

##### 71. Property tracking and monitoring

(1) Where a police officer has reasonable grounds for suspecting that a person has committed or is about to commit an unlawful activity or offence of money laundering or a financing of terrorism offence and that person or any other person has possession or control of -

(a) a document relevant to identifying, locating or quantifying money or other property of the person who has committed or is about to commit the offence; or,

(b) a document relevant to identifying or locating a document necessary for the transfer of money or property of the person who has committed or is about to commit the offence, the police officer may apply to a Court in accordance with subsection (2) for an order requiring that person or that other person to-

(i) produce to the police officer the document; or,

(ii) make available to the police officer for inspection the document.

(2) An application under subsection (1) shall be made ex parte and shall be in writing and be accompanied by an affidavit.

(3) A Court shall make an order under this section where the Court is satisfied on the statements of facts in the affidavit that there are reasonable grounds for making the order.

(4) An order made under this section shall specify the time when and the place where the document is to be produced or made available.

(5) Where a document is produced to a police officer pursuant to an order under subsection (3), the police officer may-

(a) inspect the document;

(b) take extracts from the document;

(c) make copies of the document; or,

(d) retain the document if, and for so long as, retention of the document is reasonably necessary for the purposes of this Act.

(6) Where a police officer retains a document under subsection (5)(d), the police officer shall give the person who produced the document a copy of the document certified by the police officer to be a true copy of the document.

(7) A person shall not be excused from producing or making available a document when required to do so by an order under subsection (3) on the ground that-

(a) the production or making available the document might tend to incriminate the person; or,

(b) the production or making available the document would be in breach of an obligation, whether imposed by written law or otherwise, of the person not to disclose the existence or contents of the document.

(8) The production or making available a document in compliance with an order under subsection (3) shall not be treated as a breach of any restriction or obligation, imposed by any written law or otherwise, on the person producing or making available the document.

156. Swaziland referred to the case example of *Rex v Qhawe Mamba*, an investigation into money laundering and fraud where vehicles were seized as a result of the transfer of criminal proceeds abroad. Swaziland also referred to a case involving the Central Transport Administration (CTA), which resulted in the conviction of one Polycarp Dlamini, who was an official of the CTA. Two luxury vehicles and a house were restrained in the case, and the matter was pending in the High Court at the time of the country visit.

**(b) Observations on the implementation of the article**

157. Swaziland's legislation is compliant with the provision under review.

**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**

158. Swaziland cited sections 3 and 11 (quote above) as well as section 19 of the Serious Offences (Confiscation of Proceeds) Act 8 of 2001 which provide as follows:

**19. Responsibility for seized property**

(1) When property is seized under this Part, the Commissioner of Police shall arrange for the property to be kept by making an inventory of all the properties seized and shall ensure that all reasonable steps are taken to preserve it while it is so kept until it is required for the purposes of this Act or disposed of under this Act.

(2) A person whose property has been seized shall be served with a copy of the inventory which copy shall be signed by the police officer effecting the seizure and the person whose property has been seized.

159. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

160. Section 19 of the Serious Offences (Confiscation of Proceeds) Act addresses the management of seized property and Section 11(7) deals with vesting the seized property in a trustee to take control and custody of the property or for the property to be disposed of

or dealt with as specified in the court order. It was explained by the DPP that confiscated property is sold and the proceeds are deposited in the Consolidated Fund.

161. Based on the above, it is recommended that Swaziland authorities consider additional measures to strengthen the management of seized and confiscated assets building on the provisions in the Serious Offences (Confiscation of Proceeds) Act.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraphs 4 to 6**

*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.*

*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.*

*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**

162. Swaziland referred to the provisions cited under paragraph 1 above: section 50 of the POCA, sections 3, 4, 9 and the schedule of the Serious Offences (Confiscation of Proceeds) Act, 2001, section 57 of the MLFTPA 2011, as well as sections 30, 31, 32 and 33 of the Suppression of Terrorism Act 2008. In particular, section 57 (3) and (4) of the MLFTPA provides as follows:

#### **MLFTPA**

##### **57. Forfeiture of property**

(3) Where the Court is satisfied that a forfeiture order should be made in respect of the property of a person convicted of an unlawful activity or instrumentalities used or intended to be used in the commission of the offence, money laundering or financing of terrorism but that the specified property or any part thereof or interest therein cannot, for whatever reason, be made subject to such an order and, in particular-

(a) cannot, on the exercise of due diligence be located;

(b) has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the forfeiture of the property;

(c) is located outside Swaziland;

(d) has been substantially diminished in value or rendered worthless; or,

(e) has been commingled with other property that cannot be divided without difficulty,

the Court may, instead of ordering the property or part thereof or interest therein to be confiscated, order the person to pay to the State an amount equal to the value of the property, part or interest.

(4) Where property subject to forfeiture has been commingled with property acquired legitimately or acquired using funds from legitimate sources, the Court shall in the forfeiture order, declare the nature, extent and value of the property which is to be

forfeited - only in regard of property subject to the unlawful activity or money laundering offence or financing of terrorism offence.

**(b) Observations on the implementation of the article**

163. In addition to section 57(3) and (4) of MLFPA, the confiscation or forfeiture of property of corresponding value is provided for in the Serious Offences (Confiscation of Proceeds) Act (Section 9). These sections adequately address the provisions under review.

**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**

164. Swaziland indicated that there are legal implications for not complying with investigations as espoused in terms of section 12 (1)(c) and (2)-(3) of the POCA, as well as sections 49 and 49 bis of the CP&E which provide as follows:

**POCA**

**12. Special powers of investigation**

(1) Where it appears to the Commissioner that an offence under this Act may have been committed by any person, the Commissioner may for the purposes of an investigation of that offence authorize an investigating officer to exercise the following powers, that is, to- ...

(c) investigate and inspect any bank account or other account of whatever description or kind and any banker's books or company books of, or relating to, the person named or otherwise identified in the authority; ...

(2) Any person, who has been lawfully required under subsection (1) to disclose any information or to produce any accounts, books or documents to an investigating officer shall, notwithstanding any other law to the contrary, comply with that requirement.

(3) Any person who-

(a) without reasonable excuse fails or neglects to disclose any information or to produce any accounts, books or documents required by an investigating officer under subsection (2); or

(b) obstructs an investigating officer in the execution of an authority made under subsection (1),

commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand Emalangeni or to imprisonment not exceeding five years or to both.

**CP& E**

49. Judicial officer may order seizure of books or documents in possession of any person

(1) If it appears from information on oath that any person is in possession of any book of account or document or any other thing whatsoever which is necessarily required in evidence in any criminal proceedings, any judicial officer presiding at such proceedings

may issue an order directing the officer to whom such order is addressed to take possession of such book or document or thing and hand it over to the person named in such order; and thereupon such officer may lawfully execute such order.

(2) Any person who resists or hinders, or aids, incites or encourages any other person to resist or hinder, such officer in executing such order shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand, or in default of payment thereof imprisonment not exceeding twelve months.

Section 49 bis. Production of account books, documents, etc., to the police for purposes of criminal investigation.

49bis. (1) If upon an application to the court by a police officer the Court is satisfied that any books of account, document, records or thing which is in the possession of any person including a company, bank or other financial institution is necessarily required in connection with any criminal investigation by the police, the Court shall make an order requiring that person, company, bank, or financial institution to produce such book, document, records or thing to the police subject to such conditions as the Court may impose.

(2) Any person who without reasonable excuse, proof of which shall be on him, refuses or fails to comply with an order of the Court under subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding ten thousand Emalangeni or to imprisonment not exceeding five years or to both. (Added A.14/1991.)

165. The authorities referred to the case of Andrea Nassi, in which money was transferred in Swaziland and South Africa, and the case of R v Polycarp Dlamini. In both cases financial records were obtained in the investigation.

**(b) Observations on the implementation of the article**

166. Swaziland is compliant with the provision under review to the extent that the law empowers its court or competent authorities to access or seize bank or financial records disregarding rules on bank secrecy. In terms of the procedure applied, for bank records the ACC can obtain the records through the FIU or request them directly and use them as evidence, by letter from the Commissioner. Officials in Swaziland reported that in 90 per cent of cases banks were asked to produce and provided such records.

**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**

167. Swaziland cited section 34 of POCA, section 21 (13) (a) of the Constitution of Swaziland, and sections 57 (5), (6) and (7) of MLFPA (quoted above), which provide as follows:

## POCA

### Possession of property etc. without reasonable explanation

34. (1) Subject to the provisions of subsection (2), a person who being or having been a public officer -

(a) maintains a standard of living above that which is commensurate with the present or past official emoluments of that person; or,

(b) is in control of pecuniary resources or property disproportionate to the present or past official emoluments of that person shall be presumed to have committed an offence under section 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32 or 33 and accordingly liable to the penalty prescribed in section 35.

(2) The presumption referred to in subsection (1) shall not apply in a case where the public officer gives the Commissioner or investigating officer a satisfactory account or explanation of how the officer maintains that standard of living and how the pecuniary resources or property came under the control of that officer.

(3) Where the Commissioner has reasonable ground to suspect that any person who has no known source of income or who is not known to be engaged in any gainful employment possesses or is in control of any property or pecuniary resources, the Commissioner shall request that person to give satisfactory explanation in writing as to how the property or pecuniary resources have been acquired by or come under the control of that person.

(4) Where the person mentioned in subsection (3) is unable to give any satisfactory account or explanation that person shall be presumed to have committed an offence and liable on conviction to the penalty prescribed in section 35(1).

(5) Where a court is satisfied in the proceedings for an offence under sub- section (1) or (4) that there is reason to believe that a person was holding pecuniary resources or property in trust or otherwise on behalf of the accused, or acquired those resources or that property as a gift or a loan without adequate consideration, from the accused, having regard to the relationship of that person to the accused, those resources or that property shall be presumed to have been in the control or in the possession of the accused.

(6) In this section “official emoluments” includes a pension or gratuity or any other retirement benefit payable under any law for the time being in force or under any terms and conditions of service or employment applicable to the public officer.

## Constitution of Swaziland

### 21. Right to fair hearing

(13) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of -

(a) subsection (2) (a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

168. No examples of implementation were provided.

### **(b) Observations on the implementation of the article**

169. Section 34 of POCA criminalizes the possession of unexplained wealth, for which the prescribed penalty is a fine not exceeding 100,000 Emalangeni or imprisonment up to ten years or both (section 35). The additional penalty that shall be imposed by the court under section 35 where the person is convicted of a corruption offence includes forfeiture to the Government of the amount or value of the advantage, provided the rightful owner cannot

be identified or is implicated in the offence. The cited measures address the provision under review.

## **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**

170. The following measures were deemed relevant.

Effect of forfeiture order on third parties

6. (1) Any person who claims an interest in any property in respect of which the forfeiture order has been made by a court may, subject to subsection (2), apply to the court for an order under subsection (4).

(2) An application under subsection (1) shall be made within 6 months after the making of the forfeiture order, and notice thereof shall be served on the Director of Public Prosecutions.

(3) Notwithstanding subsection (2), the court may permit a person to apply under subsection (1) after the expiration of the 6 months if it is satisfied that the failure to apply within that period was not due to any delay on the part of that person.

(4) If on an application under subsection (1), the court is satisfied -

(a) that the applicant was not in any way involved in the commission of the serious offence in respect of which the forfeiture order was made;

(b) that the applicant acquired the interest in the property in good faith and for value; and

(c) that the applicant acquired the interest in the property without knowing or in circumstances such as not to arouse a reasonable suspicion that the property -

(i) was used in, or in connection with, the commission of a serious offence; or

ii) was derived or realised directly or indirectly by any person as a result of the commission of a serious offence

the court shall make an order declaring the nature, extent and value (as at the time of making the order) of the applicant's interest in the property and for the transfer of the property to the applicant or for the payment to the applicant of the declared value of the applicant's interest in the property.

(5) If the applicant had been given notice under section 4 (3) of the application for the forfeiture order or had attended the hearing of the application for the forfeiture order, the court shall not make an order under subsection (4) unless it is satisfied that making of the order is justified on these special grounds:

(a) there is good reason why the applicant did not attend the hearing of the application for the forfeiture order;

(b) that the evidence now being given by the applicant was not available to the applicant at the time of the hearing of the application for the forfeiture order.

(6) No transfer duty or stamp duty shall be paid under the Transfer Duty Act, 1902 or the Stamp Duties Act, 1970 in respect of the transfer of any property under this section.

Restraining orders



11. (3) An applicant for an order under this section shall give notice of the application in the manner prescribed by the appropriate rules of court -
- (a) to any person whose property is the subject of the application; and
  - (b) to any other person whom the applicant has reason to believe has an interest in an property that is the subject of the application.
- (4) The court may grant a restraining order notwithstanding that no notice of the applicant has been given under sub-section (3) if the court is satisfied that -
- (a) circumstances of urgency require the granting of the order; or
  - (b) it is not in the public interest to give notice of the application
- (5) The court may, at any time before the final determination of the application, direct the applicant to give or publish notice of the application to such other persons, in such manner and within such time as the court thinks fit.
- (6) Any person whose property is the subject of the application and any other person who claims an interest in any such property is entitled to appear and to give evidence at the hearing of the application.

#### MLFTPA

##### Section 57. Forfeiture of property

- (5) A Court shall not make an order of forfeiture under this section in respect of any property where the Court is satisfied that the person, not being the person who was convicted, who is in possession of the property or purports to be its owner acquired the property-
- (a) in good faith and for good cause; and,
  - (b) without knowing and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of its acquisition, property derived, obtained or realised from the commission of the unlawful activity or money laundering offence or financing of terrorism offence.
- (6) A person who under this section claims an interest in any property in respect of which an application for forfeiture has been made may-
- (a) before the Court makes an order of forfeiture; or,
  - (b) when the Court has made an order of forfeiture, within 30 days after the order was made, apply to the Court against the granting of the order or, where the Court has made an order of forfeiture, for an order declaring the nature, extent and value of the claimant's interest; and-
  - (i) directing the Government to transfer the property to the claimant; or,
  - (ii) declaring that there is payable to the claimant by the Government an amount equal in value to the value of the claimant's interest declared under this section.
- (7) If a Court is satisfied that a person referred to in subsection (5)-
- (a) has an interest in the property which is the subject of the application; and
  - (b) has exercised reasonable care to ensure that the property is not the proceeds of a crime, or terrorist property, or would not be used to commit or facilitate the commission of an act of terrorism and would not be used by a terrorist group; and,
  - (c) is not a member of a terrorist group, the Court shall order that the interest shall not be affected by the order. The order shall declare the nature and extent of the interest in question.

#### **(b) Observations on the implementation of the article**

171. The cited sections cater for the interests of bona fide third parties. No examples of implementation were provided.

**(c) Challenges, where applicable**

172. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*
2. *Specificities in its legal system.*

**(d) Technical assistance needs**

173. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. *Summary of good practices/lessons learned.*

*None of these forms of technical assistance has been provided to-date.*

**Article 32 Protection of witnesses, experts and victims**

**Paragraphs 1 and 2**

*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.*

*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;*

*(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**

174. Swaziland indicated that it has partially implemented the provisions in terms of section 189 (1) and (2) of the Constitution 2005 and section 96 (4) (c) of the CP&E read together with section 96 (7) (a)-(h). In addition, sections 3, 4 and 5 of the Witness Protection Bill 2010 are relevant, although the measures have not yet been adopted into legislation.

Constitution

189. The Police Force

(1) The Royal Swaziland Police Service shall be responsible for preserving the peace, for prevention and detection of crime and the apprehension of offenders.

(2) The Police Service shall have and exercise such other powers and functions as may be prescribed.

175. The Royal Swaziland Police also provides protection for witnesses, experts and victims/survivors.

#### CP&E

96. Bail application of accused in court.

(4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established- ...

(c) where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence; ...

(7) In considering whether the ground in subsection (4) (c) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;

(b) whether the witnesses have already made statements and agreed to testify;

(c) whether the investigation against the accused has already been completed;

(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;

(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;

(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;

(g) the ease with which evidentiary material could be concealed or destroyed; or

(h) any other factor which in the opinion of the court should be taken into account.

176. In addition, sections 3, 4 and 5 of the Witness Protection Bill 2010 seek to establish an office within the Ministry of Justice and Constitutional Affairs called the Witness Protection Office. Section 4 of the Witness Protection Bill 2010 provides for the appointment of the Director and section 5 (1) (a) and (b) provides for the functions and duties of the Director as follows:

#### *Witness Protection Bill 2010*

##### *3. Establishment of Witness Protection Office*

*(1) There is hereby established an office within the Ministry called the Witness Protection Office.*

*(2) The Minister may, after consultation with the Director, by notice in the Gazette, establish a branch office of the office for any area consisting of one or more regions of the country.*

##### *4. Appointment of Director and members of office*

*(1) The Minister shall, subject to the laws governing the public service, appoint a person to the office of Director, who shall be the head of the Office.*

*(2) The Director shall, subject to directions from the Minister, perform the duties and functions assigned to the Director under this Act.*

*(3) The Minister may, whenever a Director is unable to carry out the functions of the Director, appoint a person as acting Director to carry out the functions of the Director.*

*(4) The Director shall, in the process of carrying out the functions of the Director, be assisted, subject to the control and directions of the Director, by witness protection*

*officers and any other officers from a public or other body who may be seconded to the office.*

*(5) A person seconded under subsection (4) who is not a member of the public service shall be entitled to such remuneration, including allowances for expenses incurred by the person in the performance of duties assigned by the Director, as the Minister, in consultation with the Minister of Finance may determine.*

## *5. Functions and duties of a Director*

### *(1) The Director-*

*(a) shall be responsible for the protection of witnesses and related persons, including temporary protection and related services in terms of this Act;*

*(b) shall carry out the administrative duties relating to the protection of witnesses and related persons, including temporary protection and related services;*

*(c) may make arrangements necessary to allow a witness to establish a new identity;*

*(d) may make arrangements to provide a witness with accommodation or to relocate a witness;*

*(e) may enter into agreements to make use of the services of persons, bodies, institutions or organizations;*

*(f) may make an arrangement with any Government department or enter into an agreement with any person, body, institution or organization-*

*(i) in terms of which the Office will be authorized to make use of the facilities or equipment belonging to or under the control of such Department, person, body, institution or organization;*

*(ii) in order to obtain documents and other information that may be required for the protection of a protected person; or*

*(iii) regarding any matter for the purpose of giving effect to the provisions of this Act;*

*(g) shall regulate the procedure and determine the manner in which the provisions of this Act shall be carried out;*

*(h) may designate places to be used as places of safety;*

*(i) shall exercise control over witness protection officers; and*

*(j) shall perform such other functions as may be assigned to the Director.*

*(2) Government departments shall render assistance reasonably required by the Director in the performance of the duties of the Director under this Act.*

*(3) The Director shall not obtain documentation that represents that a witness participating in the witness protection programme has a qualification that the witness does not have.*

177. Swaziland further referred to section 6 (2) of the Electronic Records (Evidence) Act 2009, which provides as follows:

### *6. Evidence of electronic records*

*(2) Unless otherwise provide in any other written law, where an electronic record is tendered in evidence for any purpose, such record shall be admissible if it is relevant and it is produced in an approved process.*

178. No examples of implementation were provided.

179. No information was provided on the number of witnesses or experts and their relatives or other persons close to them who have received protection or given testimony using video or other communications technology.

180. Swaziland does not have a witness protection programme.

**(b) Observations on the implementation of the article**

181. Section 189 of the Constitution is very general in that it mandates the police for preventing and detecting crime. It is noted that the section does not specifically deal with the protection of witnesses and experts from intimidation and retaliation.

182. It was explained that the cited CP&E section 96 (4) (c) read together with section 96 (7) provide for the protection of witnesses by holding suspects who may interfere with such witnesses in custody.

183. The cited section 6 of the Electronic Records (Evidence) Act provides for the admissibility of electronic records but does not indicate that evidence may be tendered through the use of electronic technology.

184. It is recommended that Swaziland adopt measures to provide effective protection, including physical and evidentiary, from retaliation or intimidation for witnesses, experts, victims and, as appropriate, their relatives or associates. In this context, the reviewers welcome the swift adoption and implementation of the 2010 Bill on Witness Protection.

**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**

185. Swaziland has not implemented the provision. Section 5 (1) (e) and (f) of the Witness Protection Bill (quoted above) would allow the Director to enter into relevant agreements with Government departments.

**(b) Observations on the implementation of the article**

186. Swaziland has not implemented the provision but the pending Bill would allow Swaziland to conclude relevant agreements.

**Article 32 Protection of witnesses, experts and victims**

**Paragraphs 4 and 5**

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

*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**

187. Swaziland has not implemented the provisions under review. However, Section 5 (1) (a) of the Witness Protection Bill (quoted above) would cover the protection of witnesses “and related persons” and section 17(1) and (2) of the same Bill would provide for civil proceedings in which a protected person is a party or a witness.

*Witness Protection Bill 2011*

*17. (1) Any civil proceedings in which a protected person is a party or a witness may, subject to subsection (2), be proceeded with in terms of the laws regulating such proceedings.*

*(2) If it appears to a judge of the High Court in an ex parte application made in chambers by the Director, that the safety of any person might be endangered by the institution or prosecution of any civil proceedings in which a protected person is a party or witness, whether in that High Court or in any lower court within its area of jurisdiction, the judge may make an appropriate order with regard to the institution or prosecution or postponement of those proceedings in a manner aimed at -*

- (a) preventing the disclosure of the identity or whereabouts of the said person; or  
(b) achieving the objects of this Act.*

188. “Protected person” is defined in the Bill as follows:

*“protected person” means any person who has been placed under protection;*

**(b) Observations on the implementation of the article**

189. Swaziland has not implemented the provision but the pending Bill would also extend protections to victims. It is recommended that Swaziland adopt the relevant measures.

**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**

190. Swaziland indicated that it has partially implemented the article in section 56 of the POCA which provides for the protection of informers as follows:

**POCA**

**56. Protection of informers**

(1) In any trial in respect of an offence under Part III of this Act a witness shall not be obliged to disclose the name or address of any informer or state any matter which might lead to the discovery of that informer.

(2) Where in any document which is in evidence or liable to inspection in any civil or criminal proceedings under this Act contains any entry or record in which an informer is

named or described or which might lead to the discovery of that informer, the court shall cause that entry or record to be concealed from view or to be obliterated in such a manner as in the opinion of the court may not disclose the identity of the informer.

(3) Where the court is of the opinion that an informer wilfully made to the Commission a material statement which that informer knew or believed to be false or did not believe to be true, or that justice cannot be fully done between the parties without the discovery of the informer, the court may require full disclosure of the identity of the informer.

191. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

192. POCA provides for the protection of informers in terms of not disclosing their identity. The law does not go all the way to give protection against unjustified treatment to reporting persons. The protection goes only so far as to prohibit their disclosure.

193. It is recommended that Swaziland consider adopting measures to provide effective protection against unjustified treatment for reporting persons, in accordance with the article under review.

**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**

194. Swaziland cited sections 35, 36, 37 and 38 (quoted above) of the POCA which provide as follows:

**POCA**

**35. Penalties**

(1) A person who is convicted of an offence referred to in section 21, 22, 23, 24, 25, 26, 27 or 34 shall be liable to a fine not exceeding one hundred thousand Emalangeni or imprisonment not exceeding ten years or to both.

(2) A person who is convicted of an offence referred to in section 28, 29, 30, 31, 32 or 33 shall be liable to a fine not exceeding two hundred thousand Emalangeni or imprisonment not exceeding twenty years or to both.

**36. Additional penalty**

(1) Where a person is convicted of an offence under this Part, the court shall in addition to any penalty it may impose under section 35 order the person convicted to pay to the rightful owner the amount or value, as determined by the court, of any advantage actually received by that person.

(2) Where after reasonable inquiry, the rightful owner cannot be ascertained or traced or is implicated in the commission of that particular offence under this Part, the court shall order that the amount or value of that advantage be forfeited to the Government.

(3) In addition to the fine a court may impose in terms of section 35, the court may impose a fine equal to five times the value of the advantage involved in the offence.

### 37. Dismissal on conviction

The conviction of a judicial officer or other public officer for an offence under this Part, shall, subject to any other law, warrant the dismissal from office of that judicial or public officer.

195. The following additional provisions were deemed relevant.

### Endorsement of register

38. (1) A court convicting a person of an offence contemplated in section 22, may, in addition to imposing any sentence contemplated in section 35, issue an order that-

- (a) the particulars of the convicted person;
- (b) the conviction and sentence; and
- (c) any other order of the court following that conviction and sentence, be endorsed on the register.

(2) Where the person convicted is an enterprise, the court may also issue an order that-

- (a) the particulars of that enterprise;
- (b) the particulars of any other partner, manager, director or other person, (i) who wholly or partly exercises or may exercise control over that enterprise; and
- (ii) who was involved in the offence concerned; or
- (iii) who knows or ought reasonably to have known or suspected that the enterprise committed the offence concerned; and
- (c) the conviction, sentence and any other order of the court following the conviction and sentence, be endorsed on the register.

(3) The court may also issue an order contemplated in subsection (1) in respect of any enterprise owned or controlled by the person so convicted, or the particulars of any partner, manager, director or other person who wholly or partly exercises or may exercise control over the enterprise, and which-

- (a) enterprise, partner, manager, director or other person; or,
- (b) partner, manager, director or other person knew or ought reasonably to have known or suspected that the enterprise, was involved in the offence concerned.

(4) Whenever the register is endorsed as contemplated in subsections (1), (2) or (3), the endorsement applies, unless the court directs otherwise, to 34 every enterprise to be established in the future, and which enterprise will be wholly or partly controlled or owned by the person or enterprise so convicted or endorsed, and the Registrar shall, in respect of every such enterprise, endorse the register accordingly.

(5) Where a court has issued an order in terms of subsections (1) (2) and the Clerk of that court shall forthwith forward the court order to the Registrar and the Registrar shall forthwith endorse the register accordingly.

(6) Where the Registrar has endorsed the register in terms of subsection (5), in addition to any other legal action, the Accountant-General may issue an instruction terminating any agreement with the person or enterprise referred to in subsection (1) or (2).

(7) In considering the termination of an agreement, the Accountant-General shall take into account, among other things, the following factors, namely-

- (a) the extent and duration of the agreement concerned;



- (b) whether he is likely to conclude a similar agreement with another person or enterprise within a specific time frame;
- (c) the extent to which the agreement has been executed;
- (d) the urgency of the services to be delivered or supplied in terms of the agreement;
- (e) whether extreme costs will follow that termination; and
- (f) any other factor which, in the opinion of the Accountant General may impact on the termination of the agreement.
- (8) Where the agreement involves any purchasing authority or a Government Department, the restriction may only be imposed after consultation with the purchasing authority or Government Department concerned.
- (9) The Accountant-General shall determine the period (which period may not be less than five years or more than ten years) for which the particulars of the convicted person or the enterprise referred to in subsections (1), (2), (3) or (4) shall remain in the register and during that period no offer in respect of any agreement from a person or enterprise referred to in those subsections may be considered by the Accountant- General.
- (10) During the period determined in subsection (9), the Accountant- General, the purchasing authority or any Government Department shall-
- (a) ignore any offer tendered by a person or enterprise referred to in subsection (1), (2), (3) or (4); or
- (b) disqualify any person or enterprise referred to subsection (1), (2), (3) or (4), from making any offer or obtaining any agreement relating to the procurement of a specific supply or service.
- (11) A restriction imposed in terms of subsection (6) only comes into effect after any appeal against the conviction or sentence or both has been finalized by the court.
- (12) Where the Supreme Court sets aside, varies or amends the order referred to in subsection (1), (2) or (3) the Accountant-General shall, where necessary, amend the restrictions imposed under subsection (6) accordingly.
- (13) Where the Accountant-General has terminated an agreement in terms of subsection (6), the Accountant-General may, in addition to any other legal remedy, recover from the person or enterprise any damages-
- (a) incurred or sustained by the Government as a result of the tender process or the conclusion of the agreement; or
- (b) which the Government may suffer by having to make less favourable arrangements thereafter.
- (14) The Accountant General-
- (a) may at any time vary or rescind any restriction imposed under subsection (6), (7), (8) or (9); and
- (b) shall, when the period determined in terms of subsection (9) expires, remove the particulars of the person or enterprise concerned, from the register.
- (15) Where the Accountant-General imposes a restriction under subsection (6), (7), (8) or (9), or amends or rescinds that restriction, the Accountant-General shall, within 14 days, in writing notify- (a) the person whose particulars have been so endorsed; (b) any purchasing authority on which it may decide; and
- (c) all Government Departments, of any resolution or decision relative to that restriction or the amendment or rescission, and request those authorities and departments to take similar steps.
- (16) Where, in subsequent agreement or tender process involving the Government, a person -
- (a) whose particulars, conviction and sentence have been endorsed on the register as contemplated in this section; and,

(b) who has been notified as contemplated in subsection (15) (a), fails to disclose that endorsement, conviction or sentence, as the case may be, commits an offence and is liable on conviction to a fine not exceeding fifty thousand Emalangeni or imprisonment for a period not exceeding five years or to both.

(17) For the purposes of this section-

(a) “agreement” includes an agreement to procure and supply services, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the Government;

(b) “enterprise” includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity;

(c) “Registrar” means the Registrar designated under section 44; and

(d) “register” means the register established in terms of section 43.

#### Establishment of register

43. Within six months after the commencement of this Part, the Minister responsible for finance shall establish a register, to be known as the Register for Tender Defaulters, within the office of the Accountant General.

#### Designation of Registrar

44. The Minister responsible for finance shall designate as Registrar a fit and proper person, with due regard to the experience, conscientiousness and integrity of that person.

#### Powers, duties and functions of Registrar

45. (1) The Registrar shall, subject to the provisions of section 38 and this Part, exercise and perform the powers, duties and functions under this Act subject to the control and directions of the Accountant General.

(2) The Registrar shall-

(a) maintain the Register;

(b) manage the office of the Registrar; and

(c) carry out the duties and perform the functions assigned under section 38, this Part or by the Accountant-General or any other law.

#### Access to Register

46. The Register is open to the public as may be prescribed.

#### Regulations pertaining to Register

47. (1) The Minister responsible for finance may, in consultation with the Minister, make regulations relating to-

(a) the maintenance and management of the Register, the particulars to be entered in such Register, the manner in which such particulars shall be recorded and the period for which the information in the Register shall be retained;

(b) access to information contained in the Register;

(c) the safe-keeping and disposal of records; or

(d) any other matter which the Minister may consider necessary to prescribe in order to achieve the objects of section 38 and this Part.

(2) Regulations made in terms of subsection (1) may, in respect of any contravention or failure to comply, prescribe as a penalty a fine not exceeding two thousand Emalangeni or imprisonment for a period not exceeding 12 months.

## CP&E

Liability to punishment in case of offences by corporate bodies, partnerships, etc.

338. (1) In any criminal proceedings under any statute or statutory regulation or at common law against a company, the secretary and every director or manager or chairman thereof in Swaziland may, unless it is otherwise directed or provided, be charged with the offence and shall be liable to be punished therefor, unless it is proved that he did not take part in the commission of such offence, and that he could not have prevented it.

196. No examples of implementation were provided.

### **(b) Observations on the implementation of the article**

197. Section 36 of the POCA provides for consequences of corruption by having penalties that take into account restitution of property to the lawful owner. The law also provides for forfeiture to the State where the lawful owner cannot be ascertained or is implicated in the commission of offences.

198. Swaziland's legislation further provides for consequences in terms of authorizing endorsement of persons and enterprises convicted of corruption in the register for tender defaulters maintained by the Minister of Finance (section 38 of the POCA). Specifically, section 38(6) POCA states that, where the Registrar has endorsed the register, in addition to any other legal action, the Accountant-General may issue an instruction terminating any agreement with the person or enterprise. Moreover, section 38(10)(b) provides that during the relevant period the person or enterprise is disqualified from making any tenders for procurement. It is the opinion of the reviewers that this section is applicable here. Debarment, contract rescission, disqualification from the tender process, and other penalties, are provided for in section 38 of POCA. The article is considered implemented in Swaziland's legislation.

## **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**

199. Swaziland indicated that there is no law that precludes a person from instituting civil proceedings for prejudice suffered as a result of corrupt practices.

200. No examples of implementation were provided.

### **(b) Observations on the implementation of the article**

201. Swaziland is not compliant but one would expect the civil law of the country to provide for the right to bring civil proceedings against a party who has caused loss by a person or entity. Usually such actions are joined with the criminal proceedings right after conviction but before sentence. If such proceedings are not brought up at this time then individual entities or persons may bring civil actions at any time before prescription.

202. However, the reviewers note that it is not clear whether the law would allow for a civil claim filed by a victim of corruption, e.g., where a company complains of fraud or corruption in the award of a tender. During the country visit it was reiterated that a claim could be brought under the common law at any time.

## **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**

203. The Anti-Corruption Commission (ACC) is in place and fully functional. In addition, a Commission on Human Rights and Public Administration (SCHRPA) has been established.

204. Swaziland referred to section 3 of the POCA, section 164 (1) (e) and (f) of the Constitution and section 19 of the MLFPA which provide as follows:

#### **POCA**

##### **3. Establishment of the Commission**

(1) There is established an independent Anti-Corruption Commission which consists of a Commissioner and two Deputy Commissioners.

(2) The Commission shall have such other officers as may be appointed in terms of section 8.

#### **Constitution**

Section 164 (1) (e) and (f) provides for the functions of the Commission on Human Rights and Public Administration as follows:

##### **164. Powers of the Commission**

(1) The Commission shall perform the following functions – ...

(e) investigate instances of alleged or suspected corruption and the misappropriation of public moneys or property by officials and to take or recommend appropriate steps, including reports to the Attorney-General or the Director of Public Prosecutions or the Auditor General;

(f) eliminate or foster the elimination of corruption, abuse of authority or public office;

#### **MLFPA**

##### **19. Establishment of the Swaziland Financial Intelligence Unit (SFIU)**

A financial intelligence unit to be known as the Swaziland Financial Intelligence Unit (“SFIU”) is hereby established which shall be an autonomous central national agency responsible for receiving, requesting, analysing and disseminating to competent

authorities disclosures of financial information as required under this Act in order to counter money laundering and financing of terrorism.

205. The Commission on Human Rights and Public Administration (SCHRPA) was appointed by His Majesty King Mswati III, on the advice of the Judiciary Service Commission, through Legal Notice No. 143/2009, and consisted of six members: the Commissioner/Chairperson and five Deputy Commissioners. SCHRPA has a three-fold function: 1. human rights; 2. public administration; and 3. integrity.

With respect to the public administration, the SCHRPA is empowered to investigate complaints of injustice, corruption, abuse of power in office and unfair treatment of any person by a public officer in the exercise of official duties. It is also empowered to investigate complaints concerning the functioning of any public service, service commission, administrative of organ of government, the armed forces, in so far as the complains relate to the failure to achieve an acceptable delivery of service or the recruitment to those services or fair administration by those services.

The SCHRPA is situated in the Ministry of Justice. SCHRPA produces an annual report to parliament on its performance, which includes statistics and details of complains received by the Commission and results of any investigations.

206. The Anti-Corruption Commission (ACC) was re-established in March 2008 under the Prevention of Corruption Act, 2006 (POCA) after the repeal of the Prevention of Corruption Order of 1993, under new leadership comprising the Commissioner and two Deputy Commissioners. The performance of the previous Commission that had been set up under the Order of 1993 was hindered by a number of factors, including a legal dispute about the legality of the legislation that constituted it, a lack of capacity, inadequate resources and a lack of political will.
207. The core objectives of the ACC are to prevent and combat corruption and to achieve zero tolerance against corruption. This could be achieved through implementation of the POCA and interaction with various partners. The Government of Swaziland developed a National Anti-Corruption Strategy and Action Plan in 2007 which, however, has not been implemented. The ACC's Strategic Plan for 2009 to 2012 was drawn from the National Strategy.
208. Swaziland provided the following information on the measures adopted to ensure the independence of the specialized bodies.

#### POCA

##### Section 4 (4)

##### 4. Appointment of Commissioner and Deputy Commissioners

(4) In the performance of their functions and in the carrying out of their duties the Commissioner and the Deputy Commissioners shall be independent and shall not be subject to the direction or control of any person or authority.

#### Annual Reports

20. (1) The Commissioner shall, not later than three months after the end of each financial year, submit to the Minister a report on the activities of the Commission during that year.

(2) The report of the Commissioner shall not contain the facts or findings of any pending investigation.

(3) The Minister shall, within thirty days after receipt of the report during the sitting of Parliament, cause the report to be laid before Parliament and if Parliament is not then sitting, within fourteen days of the next sitting of Parliament.

209. Regarding staff selection and training, Swaziland cited sections 8 and 9 of POCA.

#### POCA

##### 8. Officers of the Commission

(1) The Commission shall appoint such investigating and other officers to assist the Commission in the performance of its functions under this Act as the Commission may determine after consultation with the Minister.

(2) Officers recruited from other Government agencies shall be transferred from the public service or any other Commission without prejudice to their accrued benefits.

(3) The Commissioner may, subject to the relevant applicable law, terminate the appointment of an officer of the Commission if the Commissioner is satisfied that it is in the interest of the Commission to terminate such appointment and the Commissioner shall give reasons for such termination.

##### 9. Applicability of laws governing public service

An office in the Commission is a public office, and accordingly, except as otherwise provided in this Act or Regulations, the Commissioner, Deputy Commissioners and other officers of the Commission are subject to such laws and regulations as are generally applicable to officers of the public service of the particular designation.

210. Swaziland established an FIU in 2011 in accordance with the Money Laundering and Financing of Terrorism (Prevention) Act 2011. The FIU currently has two employees. It has the power to administratively freeze accounts for up to five days. Swaziland advises that the FIU has provided training to the majority of banks operating in the country. The FIU has begun receiving Suspicious Transaction Reports as follows:

2010 – 32 STRs received

2014 – 15 STRs received

2015 – 30 STRs received

2 STRs were referred to the Police for further investigation in 2014 (not related to corruption), and none were referred in 2015.

211. The Director of the FIU is appointed by the Minister of Finance in consultation with a Task Force on Money Laundering comprising representatives of the Central Bank, Police, Anti-Corruption Commission and Swaziland Revenue Authority. The FIU has adopted memoranda of understanding with the Police, the Revenue Authority and the Anti-Corruption Commission. Cabinet is considering amendments to the Act, which would inter alia provide for the independence of the FIU from the Central Bank. The reviewers welcome these steps.

212. The FIU provided the following statistics for all case types (not limited to corruption).

#### **Suspicious Transaction Reports**

Source of report	Number of STR received				
	2010	2011	2012	2013	2014
Banks	9	31	24	28	16
Insurance	0	0	1	1	1
Etc.	11	1	6	0	0
Total	20	32	31	29	17

NB. Etc includes Building Society and regulators

Agency Disseminated to	Number of STRs Disseminated <sup>1</sup>				
	2010	2011	2012	2013	2014
Police	1	0	1	0	1

NB. Dissemination is in terms of cases regardless of how many STRs may be related.

Domestic Requests of Information made to FIU					
Year	2010	2011	2012	2013	2014
Number of domestic requests for information received	1	0	0	1	0
Number of requests granted	0	0	0	0	0
Number of requests refused	0	0	0	0	0
Average time required to respond to a request	n/a	n/a	n/a	n/a	n/a

213. In addition, there are currently 40 police offices in the economic crimes unit of the Swaziland Police.

**(b) Observations on the implementation of the article**

214. The reviewers questioned the possibility of political interference where the Minister is consulted on appointments of officers of the ACC (section 8, POCA). It was explained that this has not happened in practice.

215. It is noted that the ACC produces annual reports on its operations as required by Section 20 of the Prevention of Corruption Act, 2006; however, these are often published with significant delay and cannot be accessed electronically, because the ACC's website has not been updated since 2012. It is recommended that Swaziland's ACC take steps to produce annual reports and report regularly on its activities, including updating its website, as a matter of priority. It was explained by the ACC that a project to update the website has been prioritised for implementation in the financial year beginning in April 2016.
216. It was also explained that currently there are fewer than 50 prosecutors in the country. Steps were being taken to establish an anti-corruption prosecution unit in the DPP, but this has not yet been done. The reviewers welcome the creation of such a specialist function within the DPP.
217. The different institutions cited under this article, and the answers provided, show that certain measures might still be required for a more efficient implementation. In particular it was confirmed that the investigating agencies (police, ACC as well as the FIU) face challenges of limited capacity in investigations and in detecting crimes. The challenges and technical assistance needs of the ODPP are also noted. National authorities further indicated that capacity building in the judiciary, in particular for magistrates, on corruption cases is needed and that a specialization in the judiciary on corruption cases (or the creation of a dedicated anti-corruption court) would be useful to address the backlog of cases. In this context the reviewers recommend that Swaziland, in consultation with its development and technical assistance partners, undertake a comprehensive technical assistance needs assessment, using as a baseline the results of the UNCAC review, in order to develop a country-led and prioritized technical assistance action plan, to address the identified needs.
218. Swaziland is also encouraged to take steps to strengthen the legal and operational independence of the institutions referenced above.

## **Article 37 Cooperation with law enforcement authorities**

### **Paragraphs 1 to 3**

*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.*

*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.*

*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**

219. The office of the DPP has the discretion to turn an accused person as state witness who may have participated in the commission of an offence. Sections 234 (1) and 235 of the CP&E provide as follows:

**234. Freedom from liability to prosecution of accomplices giving evidence**

(1) If any person who to the knowledge of the public prosecutor has been an accomplice, either as principal or accessory, in the commission of any offence alleged in any indictment or summons, or the subject of a preparatory examination, is produced as a witness by and on behalf of such public prosecutor and submits to be sworn as a witness, and fully answers to the satisfaction of the court or magistrate all lawful questions put to him while under examination, he shall thereby be absolutely freed and discharged from all liability to prosecution for such offence, either at the public instance or at the instance of any private party; or, when he has been produced as a witness by and on behalf of any private prosecutor who is aware of such person's complicity, from all prosecution for such offence at the instance of any such private prosecutor.

**235. Evidence of accomplice not to be used against him if he should thereafter be tried for the offence**

If any accomplice in any offence alleged in any indictment or summons, or the subject of a preparatory examination, has, as described in section 234, been produced as a witness by and on behalf of the public prosecutor, or of any private prosecutor (by whom there has been obtained from such officer as aforesaid, a written discharge of any such accomplice from liability to prosecution) and has given evidence upon a trial or preparatory examination, no part of the testimony which has been so given by him at such trial or preparatory examination may be given in evidence against him, if he is thereafter tried for such offence:

Provided this section shall not be construed as freeing or exempting any such accomplice who has been guilty of wilful and corrupt perjury while under examination as a witness in any such trial or preparatory examination from any penalties or forfeitures to which persons guilty of wilful and corrupt perjury are liable by law or as rendering incompetent or inadmissible any evidence which would otherwise be competent and admissible in the trial of such accomplice on a charge of wilful and corrupt perjury on his examination as a witness in any such trial or preparatory examination

**(b) Observations on the implementation of the article**

220. Swaziland is compliant where there is encouragement under section 234 of the CP&E to persons who have been accomplices to the commission of offences to testify on behalf of the State. It is the submission of the reviewers that Section 235 does not give immunity for the accomplice but that only his testimony might not be used against him.

221. The law does not provide mitigating punishment as provided for under paragraph 2 of the article under review. However, the Acting Chief Justice indicated during the country visit that the courts may take the cooperation of an offender in the investigation into account as a mitigating factor during sentencing.

## **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**

222. Swaziland indicated that it has partially implemented the provision and referred to the measures cited under article 32, namely section 189 (1) and (2) of the Constitution 2005 and section 96 (4) (c) of the CP&E read together with section 96 (7) (a)-(h). In addition, sections 3, 4 and 5 of the Witness Protection Bill 2011 are relevant, although the measures have not yet been adopted into legislation.

223. No examples of implementation where cooperating offenders have received protection were provided.

#### **(b) Observations on the implementation of the article**

224. Swaziland confirmed that the Witness Protection Bill applies to offenders who cooperate with law enforcement insofar as they are treated as witnesses.

225. It is recommended that Swaziland adopt measures to provide effective protection for persons who participated in the commission of offences and cooperate with the competent authorities in investigations and proceedings.

## **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**

226. Swaziland referred to section 10 of the Criminal Matters (Mutual Assistance) Act, 2001 (CMMAA) which deals with assistance in securing transfer of prisoners.

##### **10. Assistance in securing transfer of prisoners**

(1) Where there are reasonable grounds to believe that a prisoner in a designated country could give evidence for the purpose of any criminal proceedings, a request may be transmitted to the appropriate authority in the designated country requesting that the prisoner be transferred to Swaziland to give evidence for the purposes of such proceedings.

(2) The appropriate authority in the designated country shall notify the Ministry of any

conditions under which the prisoner may be transferred, and the Minister shall, except where he is unable to do so or that the appropriate authority waives the observance of such conditions, ensure that those conditions are observed.

(3) Subject to any conditions as may be prescribed by the designated country in any particular case, the provisions of the Correctional Services Act, 1964, with respect -

(a) to the conditions of imprisonment;

(b) to the treatment; and

(c) to the transfer from prison to prison,

of a prisoner, shall apply in so far as they are capable of application in relation to the prisoner who is in Swaziland pursuant to a request made under subsection (1).

227. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

228. Swaziland has not implemented the provision as the CMMAA supports transfer of prisoners to testify in a state party and not the transfer and protection of accomplices. As further envisaged by the provision under review, no agreements have been entered into by Swaziland with other State parties on the protection of witnesses.

**(c) Challenges, where applicable**

229. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*

2. *Specificities in its legal system;*

3. *Limited awareness of state-of-the-art programmes and practices for witness and expert protection.*

**(d) Technical assistance needs**

230. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. *Summary of good practices/lessons learned;*

2. *Legislative drafting;*

3. *Capacity-building programmes for authorities responsible for establishing and managing protection programmes.*

*None of these forms of technical assistance has been provided to to-date.*

**Article 38 Cooperation between national authorities**

*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**

231. Section 49 of POCA provides as follows:

**POCA**

**49. Duty to report corrupt transactions**

(1) A person who holds a position of authority and who knows or ought reasonably to have known or suspected that another person has committed-

(a) an offence under Part III; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document involving an amount of E10,000-00 or more, and fails to report that knowledge or suspicion or cause that knowledge or suspicion to be reported to any police officer or investigating officer of the Anti-Corruption Commission, commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand Emalangeneni or imprisonment not exceeding two years or to both.

(2) For purposes of subsection (1) the following persons hold a position of authority, namely-

(a) a principal secretary in charge of any Government Ministry, the head of a department or other establishment of Government, or equivalent officer, or a Regional Administrator, or Regional secretary;

(b) in the case of a municipality, the chief executive officer or town clerk as appointed in terms of any relevant law;

(c) any head, chairman, chief executive officer of any public or private body;

(d) any head, rector or principal of any school or college;

(e) the manager, secretary or director of any company;

(f) the executive manager of any bank or other financial institution;

(g) any partner in a partnership;

(h) any person who has been appointed as head or chief executive officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other institution or organization, whether established by legislation, contract or any other legal means;

(i) any other person who is responsible for the overall management and control of the business of an employer; or

(j) any person contemplated in paragraphs (a) to (i), who has been appointed in an acting or temporary capacity.

232. Regarding examples of implementation, Swaziland indicated that there is currently a functional task team on cases of corruption. Currently 14 cases of complex corruption, fraud and money laundering are being worked on by the task team. By way of example, one case involving the Central Transport Administration (CTA) has seen the conviction of one Polycarp Dlamini, who was an official of the CTA and also turned state witness.

233. There is also a National Task Force on Money Laundering appointed under section 38 of the MLFPA, as described under article 36 above.

**(b) Observations on the implementation of the article**

234. Swaziland has partly implemented the article. There is an obligation by persons holding positions of authority (as defined in section 49(2) of POCA) to report corruption offences to the competent authorities. In fact, Swaziland needs to be commended for also including other offences not envisaged in the article (such as fraud, extortion and forgery, see section 49 (1) (b) of the POCA) among offences for which a duty to report is established, as well as for extending the obligation to report to certain officials in the private sector.

235. Beyond the obligation for public bodies and company officials who hold a position of authority to report there is no indication that Swaziland has laws or measures that encourage or require cooperation between public authorities and those responsible for investigations and prosecutions. Swaziland is encouraged to adopt measures to encourage or require the cooperation of public authorities with law enforcement.

**(c) Successes and good practices**

236. The example of the task team on corruption, which consists of the ACC, DPP and police and chaired by the DPP, as well as the National Task Force on Money Laundering are positively noted by the reviewers.

## **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**

237. Swaziland indicated that there is currently a memorandum of understanding in place between the ACC and the Central Bank of Swaziland to ensure cooperation between national authorities and the private sector.

238. A Bank Liaising Committee has been established, which comprises of officers representing the ACC, the banking sector (currently 4 banks), Financial Services Regulatory Authority (FSRA), Swaziland Revenue Authority (SRA), Police, Financial Investigation Unit (FIU) and the DPP. The Committee meets on a monthly basis to discuss issues of fraud in the banking sector.

239. The FIU has adopted memoranda of understanding with the Police, the Revenue Authority and the Anti-Corruption Commission.

240. There is ongoing cooperation between national authorities and the private sector such as banks and the mobile network company, which facilitates information being readily made available when needed for investigations.

**(b) Observations on the implementation of the article**

241. Swaziland has taken steps to implement the provision. In regard to cooperation with the public and civil society, it is recommended that Swaziland continue to strengthen its cooperation and to invest attention and resources to outreach, awareness raising and education on matters of corruption among the public.

## **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**

242. Section 49 of the POCA (quoted above) provides for a duty to report corrupt transactions.

243. Presently, there is a Parliamentary Accounts Committee (PAC), which seeks to monitor government expenditure. In the event there are offences of corruption, there is a recommendation that these matters are referred to the Anti-Corruption Commission (ACC), the Royal Swaziland Police (for fraud-related allegations) or the controlling officer is urged to report these matters to the ACC or the Police.

244. A hotline is in place for offences of corruption to be reported to the ACC. However, the numbers relating to incoming reports are inconsistent as people also report in person.

245. It was explained that anonymous reports are given due consideration by appropriate authorities; however, no information was provided on how many such reports have been received.

246. No financial incentives are offered to encourage corruption reports.

#### **(b) Observations on the implementation of the article**

247. Swaziland has adopted measures and reporting channels to allow for reporting (including anonymously) of corruption related offences. This data is collected and analyzed for further action by the ACC and the police.

#### **(c) Challenges, where applicable**

248. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

- 1. Inter-agency co-ordination;*
- 2. Specificities in our legal system.*

#### **(d) Technical assistance needs**

249. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. *Summary of good practices/lessons learned;*
2. *Model legislation*
3. *Legislative drafting*
4. *Capacity-building programmes for authorities responsible for regulating matters related to the private sector*
5. *Capacity-building programmes for authorities responsible for the establishment and management of reporting programmes.*

*None of these forms of technical assistance has been provided to to-date.*

## **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**

250. Section 11(2) of the POCA, section 49 of the CP&E and section 17 (3) of MLFPTA provide as follows:

#### **POCA**

##### **11. Powers of the Commission**

(2) In the performance of the duties under this Act, the Commissioner or, if acting under the authority of a warrant issued for that purpose by or on behalf of the Commissioner, an officer of the Commission, shall have-

(a) access, where necessary with a court order, to all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any Government Ministry, Department or other establishment, or parastatal, public body or private body;

(b) access at any time, where necessary with a court order, to the premises of any Government Ministry, Department or other establishment, or parastatal, public body or private body, or to any vessel, boat, train, aircraft or any vehicle if the Commissioner or officer has reason to suspect that any property acquired in contravention of this Act has been placed, deposited or concealed in that vessel, boat, train, aircraft or vehicle .

#### **CP&E**

49. Judicial officer may order seizure of books or documents in possession of any person

(1) of the CP&E provides that if it appears from information on oath that any person is in possession of any book of account or document or any other thing whatsoever which is necessarily required in evidence in any criminal proceedings, any judicial officer presiding at such proceedings may issue an order directing the officer to whom such order is addressed to take possession of such book or document or thing and hand it over to the person named in such order; and thereupon such officer may lawfully execute such order.

(2) Any person who resists or hinders, or aids, incites or encourages any other person to resist or hinder, such officer in executing such order shall be guilty of an offence and

liable on conviction to a fine not exceeding two hundred rand, or in default of payment thereof imprisonment not exceeding twelve months.

#### MLFPTA

##### Section 17 (3)

##### 17. Privileged communication

(1) Nothing contained in section 12 of this Act requires any lawyer to disclose any privileged communication.

(2) For the purposes of this section, a communication is a privileged communication only if it is-

(a) a confidential communication, whether oral or in writing, passing between a lawyer in his or her professional capacity and another lawyer in such capacity; or,

(b) made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and,

(c) not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.

(3) Where the information consists wholly or partly of, or relates wholly or partly to receipts, payments, income, expenditure, or financial transactions of a specified person (whether a lawyer, his or her client, or any other person), it shall not be a privileged communication if it is contained in, or comprises the whole or part of, any book, account, statement or other record prepared or kept by the lawyer in connection with a trust account of the lawyer.

251. Regarding examples of implementation, Swaziland indicated that there is currently a memorandum of understanding between the ACC and the Central Bank of Swaziland, which makes it possible for the Commission to acquire information from banks without acquiring a court order, which addresses the bank secrecy laws. Moreover, as explained above, the ACC can obtain bank records by letter from the Commissioner.

#### **(b) Observations on the implementation of the article**

252. Swaziland law sufficiently provides for mechanisms for the overcoming of bank secrecy restrictions. The two case examples mentioned under article 31(7) above were referred to.

#### **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**

253. Swaziland has not implemented the article under review.

#### **(b) Observations on the implementation of the article**



254. Swaziland may wish to adopt measures to allow for previous foreign convictions to be taken into account in criminal proceedings.

**(c) Challenges, where applicable**

255. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*
2. *Specificities in its legal system.*

**(d) Technical assistance needs**

256. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. *Summary of good practices/lessons learned;*
2. *Model legislation*
3. *Development of an action plan for implementation.*

*None of these forms of technical assistance has been provided to-date.*

## **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**

257. Swaziland referred to section 139 (2) of the Constitution 2005, section 2 of the High Court Act 1954, section 4 of the Magistrate Courts Act 1939 as well as relevant provisions of POCA, which provide as follows:

Constitution

139. The Judiciary

(2) The Judiciary has jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as may by law be conferred on it.

Section 2 of the High Court Act of 1954 provides for the Jurisdiction of the High Court of Swaziland as follows:

2. (1) The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa.

(2) The jurisdiction vested in the High Court in relation to procedure, practice and evidence in criminal cases, shall be exercised in the manner provided by the Criminal Procedure and Evidence Act, No. 67/38.

Section 4 of the Magistrate Act of 1939 provides that the Minister may determine areas of jurisdiction as follows:

4. (1) Subject to subsection (2), a magistrate or a magistrate's court shall have jurisdiction over such area as the Minister may, by notice in the Gazette, determine and a magistrate above the rank of Senior Magistrate or a magistrate's court presided over by him shall, unless otherwise stated in any notice under this subsection, have jurisdiction within every district in Swaziland.

In addition, the issue of jurisdiction in as far as sections 21, 22 and 23 of POCA is extended through the words "whether in Swaziland or elsewhere".

258. Regarding examples of implementation, including related court or other cases, Swaziland indicated that corruption cases in the Magistrate Courts and High Court in Swaziland are currently ongoing.

**(b) Observations on the implementation of the article**

259. Swaziland has implemented the provision insofar as offences in POCA specify that jurisdiction extends to acts within and outside Swaziland. However, there is no general provision on the jurisdictional reach of the Act, and it is recommended that Swaziland include such a provision for greater legal certainty.

## **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**

260. Partly implemented in terms of section 11 (2) and (3) of the POCA which provides as follows:

#### **11. Powers of the Commission**

(2) In the performance of the duties under this Act, the Commissioner or, if acting under the authority of a warrant issued for that purpose by or on behalf of the Commissioner, an officer of the Commission, shall have-

(a) access, where necessary with a court order, to all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any Government Ministry, Department or other establishment, or parastatal, public body or private body;

(b) access at any time, where necessary with a court order, to the premises of any Government Ministry, Department or other establishment, or parastatal, public body or private body, or to any vessel, boat, train, aircraft or any vehicle if the Commissioner or

officer has reason to suspect that any property acquired in contravention of this Act has been placed, deposited or concealed in that vessel, boat, train, aircraft or vehicle .

(3) Any person who accompanies or assists the Commissioner, the Deputy Commissioner or any officer of the Commission to enter into any premises or upon any vessel, boat, train, aircraft or any vehicle, as the case may be, shall enjoy the same immunity as is conferred upon the Commissioner or an officer of the Commission in terms of section 17.

**(b) Observations on the implementation of the article**

261. Swaziland seems not to be compliant with the provision. The cited section 11(2) of the POCA refers to powers of entry, search and seizure by the ACC on, inter alia, premises, vessels, boats or aircraft but does not address the jurisdictional reach of the Act. The provision under review, on the other hand, envisages the assumption of jurisdiction aboard vessels flying the Swaziland flag or aircraft registered in Swaziland, also in cases where the offence would have been committed outside of Swaziland. It is recommended that Swaziland amend its legislation in this regard.

**Article 42 Jurisdiction**

**Subparagraph 2 (a) and (b)**

*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*

*(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**

262. Swaziland referred to the measures cited under article 42 (1) (a).

**(b) Observations on the implementation of the article**

263. It must be noted that the provisions provide that jurisdiction may be established on the basis of an offence being committed against a national of that State party or by a national or stateless person residing in Swaziland.

264. As noted above, the reviewers are of the view that ideally the provisions of POCA would generally provide a broad jurisdiction over any offences committed by persons in the Swaziland territory (para. 1 of article 42) and could also cover acts against or by nationals and stateless persons (as per paras. 2 (a) and (b)).

**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**

265. Swaziland referred to section 39 of the POCA and sections 4 (a)-(d) and 5 of the MLFPA, which provide as follows:

**POCA**

**39. Attempting, inciting, etc commission of offences**

A person who, under this Part -

- (a) attempts to commit an offence;
- (b) conspires with another person to commit an offence;
- (c) aids, abets, induces, incites, instigates, commends, counsels or procures another person to commit an offence, commits an offence and is liable on conviction to a like penalty as if that person has been convicted of that offence.

**Section 4 of the MLFPA**

**4. Offence of money laundering**

(1) A person who-

- (a) converts or transfers property knowing or having reason to believe that the property is derived directly or indirectly from those acts or omissions referred to in paragraph (c), with the aim of concealing or disguising the illicit origin of that property, or of aiding any person involved in the commission of those acts or omissions to evade the legal consequences of those acts or omissions;
- (b) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property knowing or having reason to believe that the property is derived directly or indirectly from those acts or omissions referred to in paragraph (c);
- (c) acquires, possesses or uses property, knowing or having reason to believe that it is derived directly or indirectly from acts or omissions-

(i) in Swaziland which constitutes an offence against any law of Swaziland punishable by imprisonment for not less than 12 months or the imposition of a fine of not less than E15, 000; or,

(ii) outside Swaziland which, had they occurred in Swaziland, would have constituted an offence against the law of Swaziland punishable by imprisonment for not less than 12 months or the imposition of a fine of not less than E15, 000; or,

- (d) participates in, associates with, conspires or attempts to commit, or aids, abets or facilitates the commission of any of the acts referred to in paragraphs (a) to (c); commits the offence of money laundering.

(2) A person who-

- (a) organises or directs others to commit;
- (b) attempts to commit;
- (c) conspires to commit; or,
- (d) participates as an accomplice to a person committing, or attempting to commit; an offence under subsection (1), commits an offence.

**(b) Observations on the implementation of the article**

266. Participatory acts to money laundering committed outside Swaziland are partly covered by the cited provisions. Swaziland may wish to include a provision clearly providing for jurisdiction in respect of participatory acts that would apply to all acts of money laundering.

267. It was explained that there have been no cases where the preparation or attempts of money laundering took place outside the country.

**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**

268. Swaziland indicated that it respects the sovereignty and territorial integrity of other States in implementing the contents of the Convention.

**(b) Observations on the implementation of the article**

269. Swaziland has not implemented the paragraph, and may wish to adopt a relevant provision.

**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**

270. Swaziland cited section 4 of the Extradition Act which provides as follows.

Extradition Act 1968

4. Persons liable to be extradited

Any person accused or convicted on an offence included in an extradition treaty and committed within the jurisdiction of a State which is a party to such agreement shall, subject to this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not such offence was committed before or after the date of commencement of this Act or before or after the date upon which such agreement comes

into operation and whether or not a court in Swaziland has jurisdiction to try such person for such offence.

**(b) Observations on the implementation of the article**

271. Swaziland does not restrict the extradition of its nationals. The provision therefore has limited application to Swaziland.

**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**

272. Swaziland referred to the measures cited under article 42 (1) (a).

**(b) Observations on the implementation of the article**

273. Swaziland has not implemented the provision, and may wish to adopt a relevant measure to establish jurisdiction in cases where extradition is refused and the person is found in the Kingdom.

**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**

274. Swaziland cited section 4 of the Criminal Matters (Mutual Assistance) Act 2001, which provides as follows:

Act not to preclude other forms of assistance.

4. Nothing in this Act shall prevent the provision or obtaining of international assistance in criminal matters otherwise than in accordance with this Act.

**(b) Observations on the implementation of the article**

275. Direct consultation among competent authorities is permitted in accordance with Swaziland's legislation, including the cited section of the MLA Act, and by agreement or arrangement among the authorities concerned.

## 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**

276. Swaziland referred to the measures cited under article 42 (1) (a).

#### **(b) Observations on the implementation of the article**

277. Swaziland has established jurisdiction as provided for in the paragraph under review.

## Chapter IV. International cooperation

278. The reviewing experts found it difficult to assess in detail Swaziland's international cooperation practice in corruption cases (extradition and mutual legal assistance), due to the absence of cases and data on any requests Swaziland has refused, and, more generally, the absence of a specific system for collecting data. It is recommended that Swaziland improve its systems to collect data on the types of international cooperation requests (e.g., underlying offences), the timeframe for responding to these requests, and the response provided, including any grounds for refusal.

279. The reviewers further recommend capacity building for authorities in Swaziland responsible for international cooperation (extradition and MLA), including in the application of domestic laws and the bilateral and multilateral treaties Swaziland is party to.

### **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**

280. Sections 3 and 4 of the Extradition Act 1968 (EA) provide as follows:

##### **Application.**

3. (1) Where an agreement has been made between the Minister and a State for the surrender on a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of Swaziland or such State of any offence specified in such agreement or any amendment thereof, the Minister may, by notice published in the Gazette, direct that this Act shall apply in the case of such State during the continuance of such agreement or any amendment thereof.

(2) Subject to the terms of such agreement, this Act shall, apply on the publication of the said notice in the Gazette.

##### **4. Persons liable to be extradited**

Any person accused or convicted on an offence included in an extradition treaty and committed within the jurisdiction of a State which is a party to such agreement shall, subject to this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not such offence was committed before or after the date of commencement of this Act or before or after the date upon which such agreement comes into operation and whether or not a court in Swaziland has jurisdiction to try such person for such offence.



281. Swaziland has two bilateral treaties (Republic of South Africa and the United States of America). There are also multilateral treaties (Southern African Development Community (SADC), African Union). Under the Commonwealth, Swaziland can extradite through the London Scheme on Extradition.

282. Article 2 (1) of the Extradition Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland provides as follows:

2(1) Extradition shall be granted in respect of offences which are offences under the laws of the requesting Party and of the requested Party and which are under both those laws punishable by a maximum sentence of imprisonment for a period of six months or more or by a more severe penalty. Where extradition is requested in respect of a person convicted and sentenced in respect of such an offence in the territory of the requesting Party for purposes of enforcing such sentence or the balance of such sentence extradition shall be granted irrespective of the period of the sentence imposed.

283. The extradition agreement with the United States of America follows a list approach to extraditable offences (article 3).

Article 3 of the Extradition agreement between United States of America and Swaziland Extradition shall be reciprocally granted for the following crimes or offences:

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.
2. Manslaughter.
3. Administering drugs or using instruments with intent to procure the miscarriage of women.
4. Rape.
5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.
6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.
7. Kidnapping or false imprisonment.
8. Child stealing, including abandoning, exposing or unlawfully detaining.
9. Abduction.
10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person provided that such crime or offence is punishable by imprisonment [\*4] for at least one year or by more severe punishment.
11. Bigamy.
12. Maliciously wounding or inflicting grievous bodily harm.
13. Threats, by letter or otherwise, with intent to extort money or other things of value.
14. Perjury, or subornation of perjury.
15. Arson.
16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.
17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.
18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.

19. (a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.
- (b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.
20. Forgery, or uttering what is forged.
21. Crimes or offences against bankruptcy law.
22. Bribery, defined to be the offering, giving or receiving of bribes.
23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.
24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.
25. Malicious injury to property, if such crime or offence be indictable.
26. (a) Piracy by the law of nations. (b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.
27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties.

284. Regarding extraditable offences, the provisions of the Extradition Act cited above refer to Swaziland's extradition treaties that are in place for determining extraditable offences (USA & Republic of South Africa (section 2)) and also principles of reciprocity. Swaziland engages in extradition relations on the basis of reciprocity in cases where no bilateral treaties are in place.

285. The Office of the DPP provided the following statistics on extradition.

There have been 14 outgoing extradition requests related to criminal matters in the last 4 years, of which 4 involved fraud or money laundering. 13 of the requests were made to South Africa, and one was sent to Italy in a fraud case (Gliter Zulu) on the basis of reciprocity. In the same time period, there was one incoming extradition request in a fraud matter from South Africa, which was pending (as of July 2015).

**(b) Observations on the implementation of the article**

286. Extradition is provided for under the Extradition Act, Fugitive Offenders Act and the Money Laundering and Financing of Terrorism (Prevention) Act. The Extradition Act provides for extradition only with countries with which Swaziland has entered into bilateral or multilateral agreements, whereas the Fugitive Offenders Act enables extradition only with designated countries. However, Swaziland engages in extradition on the basis of reciprocity where there is no treaty in place. It could also apply the London Scheme for Extradition within the Commonwealth, although it has not done so to date.

287. Issues of dual criminality are considered according to the terms of the treaties (sections 3 and 4 of the Extradition Act). Dual criminality is not a condition precedent for extradition under the Extradition Act. In fact, persons are liable to be extradited pursuant to the Act whether or not a court in Swaziland has jurisdiction to try the person for the offence (section 4). Dual criminality is required under the terms of Swaziland's

extradition treaty with South Africa. The extradition agreement with the United States of America follows a list approach to extraditable offences.

288. Extradition is limited to the extent that not all offences under the Convention are criminalized.

289. There has been only one reported incoming extradition request in the last four years in a fraud matter, as of July 2015, and none related to corruption.

290. It is recommended that Swaziland adopt a system to collect data on the type of requests (e.g., underlying offences), the timeframe for responding to requests, and the response provided, including any grounds for refusal. This recommendation applies to both extradition and mutual legal assistance cases.

## **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**

291. Swaziland indicated that it has not implemented the provision.

#### **(b) Observations on the implementation of the article**

292. Dual criminality is required under the terms of Swaziland's extradition treaty with South Africa. The extradition agreement with the United States of America follows a list approach to extraditable offences.

## **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**

293. Swaziland cited article 2(2) of the Extradition Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland which provides as follows:

2(2) If the request for extradition relates to more than one separate offence the punishment for some of which is less than that prescribed in paragraph (1) of this Article the requested Party may in its discretion grant extradition for the latter offences also.

**(b) Observations on the implementation of the article**

294. The provision is addressed in the bilateral treaty with South Africa. The matter is not addressed in the Extradition Act or the treaty with the United States of America.

**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**

295. As stated above, extradition offences are those included in Swaziland's extradition treaties and determined according to the principle of reciprocity.

296. Regarding the political offence exception, this is implemented in section 5(a) of the EA which states as follows:

5. A person shall not be extradited under this Act to any State, or be committed to, or kept in custody for the purpose of such extradition, if it appears to the court of committal or to the High court on an application for habeas corpus or on appeal or review against the decision of the court of committal that -

(a) the offence of which the person is accused or was convicted is an offence of a political character.

297. Subject to the terms of the treaties, corruption is not excluded from the offences that are extraditable under the EA.

298. Moreover, corruption offences are extraditable pursuant to article 2 of the extradition agreement with South Africa. Article 3 further provides as follows in respect of political offences:

(1) Extradition shall be granted in respect of offences which are offences under the laws of the requesting Party and of the requested Party and which are under both those laws punishable by a maximum sentence of imprisonment for a period of six months or more or by a more severe penalty. Where extradition is requested in respect of a person convicted and sentenced in respect of such an offence in the territory of the requesting Party for the purposes of enforcing such sentence or the balance of such sentence extradition shall be granted irrespective of the period of the sentence imposed.

(2) If the request for extradition relates to more than one separate offence the punishment for some of which is less than that prescribed in paragraph (1) of this Article the requested Party may in its discretion grant extradition for the latter offences also.

**Article 3**

## Political Offences

A person claimed shall not be extradited if the offence for which his extradition is requested is regarded by the requested Party as one of a political character, or if he satisfies the requested Party that the request for his extradition has in fact been made with a view to try or punish him for an offence of a political character.

299. The treaty with the United States of America further provides as follows:

### Article 6

A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

## **(b) Observations on the implementation of the article**

300. The legal provisions cited by Swaziland indicate that extradition will not be granted if the offence is deemed an offence of a political character. This position is further buttressed by article 3 of the Extradition Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland and article 6 of the Agreement with the United States of America.

301. Corruption-related offences are extraditable under the Extradition Act and the treaties. Swaziland could in principle consider this Convention as the legal basis for extradition in respect of UNCAC offences (see para. 7 below).

## **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**

302. Swaziland indicated that it does not make extradition conditional on the existence of a treaty. Swaziland engages in extradition relations on the basis of reciprocity in cases where no bilateral treaties are in place.

303. Swaziland has not to date applied this Convention as the legal basis for extradition in respect to UNCAC offences but could in principle do so (see para. 7 below).

304. The treaty requirements are set out in section 4 of the Extradition Act (quoted above).

## **(b) Observations on the implementation of the article**

305. Swaziland engages in extradition relations on the basis of reciprocity in cases where no bilateral treaties are in place. Moreover, Swaziland is not precluded from considering

the Convention as a legal basis for extradition in respect of UNCAC offences; however, there has been no experience in its application.

## **Article 44 Extradition**

### **Paragraph 6**

*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**

306. Swaziland does not make extradition conditional on the existence of a treaty. Extradition is possible on the basis of reciprocity in cases where no bilateral treaties are in place.

#### **(b) Observations on the implementation of the article**

307. The paragraph has limited applicability as Swaziland does not make extradition conditional on the existence of a treaty because it can proceed on the basis of reciprocity.

## **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**

308. Swaziland does not make extradition conditional on a treaty because it can proceed on the basis of reciprocity.

309. Swaziland can proceed on the basis of multilateral treaties like UNCAC or the SADC Protocol against Corruption in the same manner as with a bilateral treaty. There have been no incoming or outgoing requests using UNCAC as a legal basis. If such a request were received, Swaziland would proceed as with any other request.

310. Regarding recent extradition cases for offences established in accordance with the Convention, Swaziland indicated that, as stated above, corruption offences are extraditable under principles of reciprocity and according to its treaties.

311. There has been only one incoming extradition request in a fraud case (pending as of July 2015).

**(b) Observations on the implementation of the article**

312. Corruption offences are extraditable under principles of reciprocity and according to the legislation and treaties of Swaziland.

**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**

313. Swaziland cited section 5 of the Extradition Act, articles 2(1) and 3-6 of the Extradition Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland and articles 4-6 of the Extradition agreement between United States of America and Swaziland.

**5. General restrictions on surrender.**

A person shall not be extradited under this Act to any State, or be committed to, or kept in, custody for the purpose of such extradition, if it appears to the court of committal or to the High Court on an application for habeas corpus or on appeal or review against the decision of the court of committal that -

- (a) the offence of which the person is accused or was convicted is an offence of a political character;
- (b) the request for his extradition (though purporting to be made on account of an offence specified in the extradition agreement) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions;
- (c) the person might, if extradited, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions; or,
- (d) provision is not made by the law of such State or by the agreement that no person surrendered to such State shall be detained or tried in such State for any offence committed prior to his surrender other than the offence in respect of which extradition was sought until he has been returned to Swaziland or until the expiry of at least forty-five days after he has had an opportunity of so returning.

**Article 2(1) of the Extradition Agreement with the Republic of South Africa**

2(1) Extradition shall be granted in respect of offences which are offences under the laws of the requesting Party and of the requested Party and which are under both those laws punishable by a maximum sentence of imprisonment for a period of six months or more or by a more severe penalty. Where extradition is requested in respect of a person convicted and sentenced in respect of such an offence in the territory of the requesting Party for

purposes of enforcing such sentence or the balance of such sentence extradition shall be granted irrespective of the period of the sentence imposed.

#### Article 3

##### Political Offences

A person claimed shall not be extradited if the offence for which his extradition is requested is regarded by the requested Party as one of a political character, or if he satisfies the requested Party that the request for his extradition has in fact been made with a view to try or punish him for an offence of a political character.

#### Article 4

##### Military Offences

Extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Agreement.

#### Article 5

##### Fiscal Offences

Extradition shall be granted in accordance with the provisions of this Agreement for offences in connection with taxes, duties, customs and exchange, only if the Contracting Parties have so decided by Exchange of Notes in respect of any such offence or category of offences.

#### Article 6

##### Capital Punishment

Extradition may be refused if under the law of the requesting Party the offence for which extradition is requested is punishable by death and if the death penalty is not provided for such offence by the law of the requested Party.

Articles 4-6 of the Extradition agreement between United States of America and Swaziland

#### Article 4

The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

#### Article 5

The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

#### Article 6

A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition



for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

314. Swaziland has not refused extradition in any cases to date. There has been only one incoming request, which was pending as of July 2015.

**(b) Observations on the implementation of the article**

315. Grounds for refusal and other conditions to extradition are governed by the applicable extradition treaty in force or, otherwise, the laws of Swaziland.

## **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**

316. Sections 6, 9 (1) and 20 of the EA provide as follows:

6. Requests for extradition from Swaziland.

(1) Subject to any extradition agreement, any request for the surrender of any person to any State shall be made to the Minister by a person recognized by him as a diplomatic or consular representative of such State or by any Minister of such State communicating with the Minister through diplomatic channels existing between Swaziland and such State.

(2) Any such request received in terms of an extradition agreement by any person other than the Minister shall be handed to the Minister.

9. Proceedings for committal

(1) Any person detained under a warrant of arrest or a warrant for his further detention shall, without undue delay, be brought before a court of committal, whereupon it shall hold an inquiry with a view to the surrender of such person to the State concerned.

20. Return of person acquitted or not charged within a specified time.

The Minister may, at the request of any person surrendered to Swaziland, return him to the State in, or on his way to which, he was arrested if —

(a) in the case of a person accused of an offence, criminal proceedings are not instituted within six months of his arrival in Swaziland; or,

(b) he is acquitted of the offence for which his surrender was sought.

317. The following treaty provisions are deemed relevant.

Extradition Agreement with the Republic of South Africa  
Article 10

The Request and Supporting Documents

(1) The request shall be in writing and shall be communicated through the diplomatic channel.

(2) The request shall be supported by —

(a) if the person claimed is a person accused, the original or a certified copy of a warrant of arrest or court order having the same effect and issued in accordance with the law of the requesting Party and prima facie evidence of the commission of the offence by such person;

(b) if the person claimed is a person convicted, the original or a certified copy of that part of the record of the proceedings relating to the charge, the conviction and sentence and a statement showing how much of the sentence has not been carried out;

(c) a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible;

(d) a copy of the relevant enactment or a statement of the relevant law; and

(e) as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity.

#### Article 11

##### Documents Relating To Evidence

The authorities of the requested Party shall admit as evidence in any proceedings for extradition any deposition, statement on oath or affirmation taken in the territory of the requesting Party, any record of a conviction, any warrant, and a copy translation of the aforesaid documents, if —

(a) in the case of a warrant, by being signed by a judge, magistrate or other competent officer of the requesting Party; or,

(b) in the case of any other original document or copy or translation thereof, it is certified by a Judge, Magistrate or other competent officer of the requesting Party to be the original or true copy or translation thereof.

#### Extradition agreement between United States of America and Swaziland

##### Article 9

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

##### Article 11

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

#### **(b) Observations on the implementation of the article**

318. Subject to any extradition agreement, a request for extradition shall be made to the Minister (section 6 of the Extradition Act), who is defined in section 2 of the Act as the Prime Minister. In practice, requests are normally sent through the Ministry of Foreign Affairs or the Ministry of Justice to the Prime Minister's Office. The Prime Minister's Office then liaises with the DPP's Office to consider the request in light of the

requirements of the Act and the applicable treaty, until the request is considered by the courts.

319. The cited provisions cover evidentiary requirements but do not address simplified procedures relating to extradition. However, simplified procedures are available under the London Scheme on Extradition, which has not been applied to date.

320. In the absence of any data on the length of time to execute requests and reported delays in handling the request from South Africa, it is recommended that Swaziland take steps to expedite extradition procedures and to simplify evidentiary requirements in respect of UNCAC offences, including simplifying the institutional setup.

## **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**

321. Swaziland cited sections 7 (1), 8 and 16 of the EA which provide as follows:

##### **7. Requests for extradition from Swaziland**

(1) Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for his arrest —

(a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a State or for his provisional arrest in connexion with an intended request for such surrender has been received by the Minister; or,

(b) upon information of his being a person liable to be surrendered to a State which would, in the opinion of the magistrate, justify the issue of a warrant for his arrest, had it been alleged that he had committed an offence in Swaziland.

##### **8. Warrants for further detention of persons arrested without warrants.**

(1) Any magistrate may issue a warrant for the further detention of any person arrested without warrant under any law of Swaziland providing for the arrest without warrant of persons liable to be apprehended under any law relating to extradition.

(2) Such warrant may be issued upon information of his being a person liable to be surrendered to a State which 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 committed an offence in Swaziland.

##### **16. Custody.**

Any person arrested or remanded or committed under this Act shall be detained in a prison established under the Prisons Act, No. 40 of 1964, as if he were an unconvicted person in terms of such Act or any regulation made thereunder.

322. Article 14 of the Extradition agreement between South Africa and Swaziland provides for provisional arrest as follows:

#### ARTICLE 14 PROVISIONAL ARREST

(1) In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.

(2) The request for provisional arrest shall state that one of the documents mentioned in sub-paragraph (2)(a) or (b) of Article 10 of this Agreement exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought.

(3) A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.

(4) The provisional arrest of the person claimed shall be terminated upon the expiration of thirty days from the date of his arrest if the request for his extradition shall not have been received. However, this provision shall not prevent the re-arrest or extradition of the person claimed if the request for his extradition is received subsequently.

#### (b) Observations on the implementation of the article

323. The Kingdom of Swaziland has put in place measures which seek to implement this aspect of article 44. Sections 7, 8 and 16 of the Extradition Act provide such mechanisms. Furthermore, article 14 of the Extradition agreement between South Africa and Swaziland provides for provisional arrest. The provision is legislatively implemented.

### Article 44 Extradition

#### Paragraphs 11 to 13

*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.*

*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.*

*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**

324. Swaziland indicated that the provisions under review have limited applicability. Swaziland does not restrict extradition of nationals.

325. Moreover, Swaziland does not make extradition of nationals conditional on them serving the remainder of their sentence in Swaziland.

326. Swaziland would consider the enforcement of a foreign sentence in case of non-extradition of nationals. The Extradition Agreement with South Africa provides for extradition to be granted for purposes of enforcing a sentence, regardless of the period of sentence imposed.

**Article 2(1)**

... Where extradition is requested in respect of a person convicted and sentenced in respect of such an offence in the territory of the requesting Party for the purposes of enforcing such sentence or the balance of such sentence extradition shall be granted irrespective of the period of the sentence imposed.

327. There have been no such cases to date.

**(b) Observations on the implementation of the article**

328. Swaziland does not restrict the extradition, or recognize the conditional surrender, of its nationals.

329. Swaziland would grant extradition for the purposes of enforcing a foreign sentence, as provided for in the treaty with South Africa. It would not deny extradition requests on grounds of nationality.

**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**

330. Swaziland cited Article 21 of the Constitution 2005, which provides for the right to fair hearing, as well as Sections 9 and 10 of the Extradition Act:

**Constitution**

21. (1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.

- (2) A person who is charged with a criminal offence shall be-
- (a) presumed to be innocent until that person is proved or has pleaded guilty;
  - (b) informed as soon as reasonably practicable, in a language which that person understands and in sufficient detail, of the nature of the offence or charge;
  - (c) entitled to legal representation at the expense of the government in the case of any offence which carries a sentence of death or imprisonment for life;
  - (d) given adequate time and facilities for the preparation of the defence;
  - (e) permitted to present a defence before the court either directly or through a legal representative chosen by that person;
  - (f) afforded facilities to examine in person or by a legal representative the witnesses called by the prosecution and to obtain the attendance of witnesses to testify on behalf of that person on the same conditions as those applying to witnesses called by the prosecution; and
  - (g) permitted to have, without payment, the assistance of an interpreter if that person cannot understand the language used at the trial.

#### Extradition Act - Sections 9, 10

##### 9. Proceedings for committal.

- (1) Any person detained under a warrant of arrest or a warrant for his further detention shall, without undue delay, be brought before a court of committal, whereupon it shall hold an inquiry with a view to the surrender of such person to the State concerned.
- (2) Subject to this Act, the court of committal shall proceed in the manner in which a preparatory examination is held in the case of a person charged with having committed an offence in Swaziland and shall, for the purpose of holding such inquiry, have the same powers, including the power of committing any person for further examination and admitting any person detained to bail, as it has at a preparatory examination so held.
- (3) Any deposition, statement on oath or affirmation taken, whether or not taken in the presence of the accused person, or any record of any conviction or any warrant issued in any State, or any copy or sworn translation thereof, may be received in evidence at any such inquiry if authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court in Swaziland or in the manner provided for in the extradition agreement concerned.
- (4) The testimony of any witness at an inquiry may be obtained in the same manner as in criminal cases before magistrate's courts.
- (5) At any inquiry relating to a person alleged to have committed or to have been convicted of an offence in any State section 10 shall apply.

##### 10. Powers and duties of court of committal.

- (1) If, upon consideration of the evidence adduced at the inquiry, the court of committal finds that the person brought before it is liable to be surrendered to the State concerned and, if such person is accused of an offence, that there would be sufficient reason for putting him on trial for such offence had it been committed in Swaziland, it shall issue an order committing such person to prison to await the Minister's decision with regard to his surrender, at the same time informing such person that he may within fifteen days appeal against such order to the High Court or apply to the High Court for habeas corpus.
- (2) If the court of committal finds that the evidence does not warrant in the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, it shall discharge the person brought before it.

(3) The court of committal issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as it may deem necessary.

331. The issues of non-discrimination and fair treatment have not been invoked in any extradition cases related to UNCAC offences to date.

**(b) Observations on the implementation of the article**

332. The Constitution of Swaziland guarantees a person facing a criminal or civil case a fair and speedy public hearing within a reasonable time by an independent and impartial court. Furthermore, Sections 9 and 10 of the Extradition Act indicate that an inquiry into whether a person must be surrendered to a country requesting his extradition should be done without undue delay. Such inquiry shall furthermore be conducted in the manner of a preparatory examination where the court has powers of granting him bail. A person has a right under Section 10 to make an appeal against a committal order to the High Court or apply to the High Court for a writ of habeas corpus. These mechanisms cited can be viewed as ensuring fair treatment by the legal system in accordance with the provision under review.

## **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**

333. Swaziland cited article 20(3) of the Constitution, which provides as follows:

**20. Equality before the law**

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

(2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.

(3) For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

(4) Subject to the provisions of subsection (5) Parliament shall not be competent to enact a law that is discriminatory either of itself or in its effect.

(5) Nothing in this section shall prevent Parliament from enacting laws that are necessary for implementing policies and programmes aimed at redressing social, economic or educational or other imbalances in society.

334. Sections 5 (b) and (c) and 14 of the EA provides for restrictions on surrender as follows:

**5. General restrictions on surrender**

A person shall not be extradited under this Act to any State, or be committed to, or kept in, custody for the purpose of such extradition, if it appears to the court of committal or to the High Court on an application for habeas corpus or on appeal or review against the decision of the court of committal that -

(b) the request for his extradition (though purporting to be made on account of an offence specified in the extradition agreement) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions;

(c) the person might, if extradited, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions;

**14. Minister's right to order cancellation of warrants of arrest or discharge.**

The Minister may at any time order the cancellation of any warrant issued under this Act, for the arrest of any person 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 or that the real purpose for the request for such surrender is to prosecute or punish him on account of his race, religion, nationality or political opinions, or that he might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

335. The issues of non-discrimination and fair treatment have not been invoked in any extradition cases to date.

**(b) Observations on the implementation of the article**

336. Non-discrimination on the grounds of ethnic origin and gender are not covered in the cited provisions of the Extradition Act or the extradition treaties, but in the cited article of the Constitution.

**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**



337. The fact that the offence involves fiscal matters is not a ground for refusal under Swaziland's extradition law. Swaziland would extradite a person for fiscal or exchange control offences, as permitted under its extradition agreements.

338. In this regard article 5 of the Extradition Agreement with South Africa provides as follows:

**ARTICLE 5**

**FISCAL OFFENCES**

Extradition shall be granted in accordance with the provisions of this Agreement for offences in connection with taxes, duties, customs and exchange, only if the Contracting Parties have so decided by Exchange of Notes in respect of any such offence or category of offences.

339. There have been no reported cases in which extradition involving fiscal matters was granted.

**(b) Observations on the implementation of the article**

340. The fact that the offence involves fiscal matters is not a ground for refusal under the Extradition Agreement with the United States of America, although fiscal offences are not included in the list of extraditable offences. Moreover, the agreement with South Africa specifically requires reciprocal undertakings for extradition involving fiscal offences.

341. It is recommended that Swaziland ensure that extradition will not be refused on the ground that the request involves fiscal matters, by amending its legislation and ensuring that the matter is addressed in its extradition agreements.

**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**

342. Swaziland indicated that it has not implemented the provision under review.

**(b) Observations on the implementation of the article**

343. It is recommended that Swaziland adopt a relevant legal provision or regulation addressing the duty to consult before refusing extradition.

**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**

344. As stated above Swaziland has two bilateral treaties (Republic of South Africa and the USA). There are also multilateral treaties (SADC, African Union). Under the Commonwealth, Swaziland can extradite through the London Scheme on Extradition. Moreover, Swaziland can proceed with extradition on the basis of reciprocity, and has done so in the case of the outgoing request to Italy.

**(b) Observations on the implementation of the article**

345. In light of the limited number of extradition treaties, it is recommended that Swaziland ensure that it can recognize the Convention as a legal basis for extradition in respect of UNCAC offences.

**(c) Challenges, where applicable**

346. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*
2. *Specificities in our legal system.*

**(d) Technical assistance needs**

347. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. *Summary of good practices/lessons learned;*
2. *Capacity-building programmes for authorities responsible for international cooperation in criminal matters;*
3. *Development of an action plan for implementation.*

*None of these forms of technical assistance has been provided to-date.*

**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**

348. There is no treaty addressing the specific issue of transfer of prisoners, apart from in extradition or MLA matters.

**(b) Observations on the implementation of the article**

349. The Transfer of Convicted Offenders Act, No. 10 of 2001 provides for the transfer of convicted offenders to and from Swaziland. Swaziland indicated that it has not entered into any treaties on the transfer of sentenced persons and there has been no experience in the transfer of such persons in corruption cases.

350. It was clarified during the country visit that there is no need to enter into any prisoner transfer treaties, as the transfer of prisoners can be done on the basis of reciprocity and in accordance with the Transfer of Convicted Offenders Act, 2001. A case example involving the transfer of a prisoner (Lisa Zikalala) from Thailand following a request by Swaziland's Ministry of Foreign Affairs for her removal was referred to as an example. The prisoner, who had been convicted of drug trafficking and sentenced to life imprisonment in Thailand, was serving the rest of her sentence in Swaziland at the time of review.

## **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**

351. Mutual Legal Assistance is regulated in terms of the Criminal Matters (Mutual Assistance) Act 2001. Section 3 of the Act provides for the application of the Act to designated countries as follows:

##### **3. Application of Act to designated countries**

This Act shall apply to such foreign country as the Minister may designate from time to time by notice in the Gazette and referred to in this Act as the “designated country”.

352. The Act further requires any request for assistance to be made in writing to the Minister of Justice and Constitutional Affairs, as contained in section 17 (1) and (2) as follows:

##### **17. Request for assistance generally**

(1) All requests by a designated country for assistance under this Part shall be transmitted to the Minister or an authorised officer.

(2) A request shall normally be made in writing except in the case of emergency when it shall be made orally and confirmed in writing forthwith.

353. Swaziland has one designated country, South Africa, under the MLA Act. Designation is done by the Minister of Justice under section 3 of the Act. This can be done relatively easy by decision of Cabinet.

354. Dual criminality is a requirement for MLA. Section 18 of the Act (quoted below) makes dual criminality an optional ground for refusal. Dual criminality is flexibly interpreted.

355. Swaziland has no bilateral MLA treaties, but is party to multilateral treaties under the African Union, the SADC Protocol and the Harare Commonwealth Scheme on MLA.
356. In the last 3 years, there have been 9 outgoing requests for MLA and 4 incoming requests (from South Africa, Lesotho, Zambia and the OSCE, all of which were pending at the time of the country visit). All of the incoming requests related to fraud, corruption and money laundering. No requests for MLA have been refused by Swaziland to date.
357. The CPA case is an example of an outgoing request. This was a money laundering investigation, and also an MLA request was made for documents and records in relation to properties held in the name of the suspects in South Africa, Tanzania, Australia and the UK.
358. Requests for assistance are directed to the Minister of Justice and Constitutional Affairs, who then transmits them to the Director of Public Prosecutions (DPP) for action.
359. The National Prosecution Authority (NPA) has seconded officers to the DPP's chambers to assist in the investigation and prosecution of serious criminal cases. The current Commissioner of the Anti-Corruption Commission, Advocate Thanda Mngwengwe, is proof that such cooperation exist between South Africa and Swaziland, as he was first seconded to the DPP's chambers and later appointed as Commissioner of the ACC.

**(b) Observations on the implementation of the article**

360. MLA under the Criminal Matters (Mutual Assistance) Act is limited to countries designated in terms of the provisions of the Act (currently only South Africa) by the Minister of Justice, who under the same Act is also the competent authority for making or receiving requests for MLA from and to other jurisdictions. In practice, however, requests are received through the Ministry of Foreign Affairs. Swaziland can also cooperate through the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters (Harare Scheme), although there has been no experience in its application.
361. After a request is received (for example, by the Ministry of Foreign Affairs) it is referred to the Minister of Justice, who is the competent authority to deal with such requests. The Minister has delegated that function to the DPPs' Office.
362. Dual criminality is an optional requirement for MLA and hence the provision of MLA may be limited to the extent that Swaziland has not criminalized all the offences under the Convention. However, it was explained that in considering dual criminality issues, the authorities would consider the underlying conduct rather than the strict terminology of the offence. In practice no cases have been refused on the basis of dual criminality.
363. In the absence of data on MLA requests received and executed, it is not possible for the reviewers to assess the effective implementation of the article in practice. The observations in the introduction are referred to.

**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

364. Section 18 of the Criminal Matters (Mutual Assistance ) Act does not preclude legal assistance in respect of legal person, as it only provides grounds for refusal of assistance under the following circumstances:

#### 18. Refusal of request for assistance

(1) The Minister may refuse a request by a designated country for assistance under this Part if in the opinion of the Minister the criminal matter concerns -

- (a) conduct which would not constitute an offence under the law of Swaziland;
- (b) an offence or proceedings of a political character; or
- (c) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the designated country.

(2) Without prejudice to subsection (1), the Minister may refuse to comply in whole or in part with a request under this Part -

- (a) if it appears to the Minister that granting of the request would be contrary to the laws of Swaziland or would prejudice the security, international relations or other essential public interest of Swaziland;
- (b) if the Minister has reasonable grounds to believe that granting the request would facilitate the prosecution or punishment of a person on account of that person's race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request;
- (c) if the Minister is satisfied that the steps required to be taken in order to comply with the request cannot under the laws of Swaziland be taken in respect of the criminal matter to which the request relates if it has arisen in Swaziland.

(3) For the purposes of subsection (1), an offence shall be of a political character if it is an offence within the scope of any international convention to which both Swaziland and the designated country are parties and which imposes on the parties thereto an obligation either to extradite or prosecute the person accused of the commission of that offence.

365. Moreover, as noted under UNCAC article 26, Swaziland recognizes the criminal liability of legal persons. For example, section 338 of the CP&E and section 3 (1), (2) and (3) of the Companies Act 2009 are relevant.

#### CP&E

Liability to punishment in case of offences by corporate bodies, partnerships, etc.

338. (1) In any criminal proceedings under any statute or statutory regulation or at common law against a company, the secretary and every director or manager or chairman thereof in Swaziland may, unless it is otherwise directed or provided, be charged with the offence and shall be liable to be punished therefor, unless it is proved that he did not take part in the commission of such offence, and that he could not have prevented it.

#### Companies Act 2009

3. (1) This Act shall apply to a company incorporated under this Act, foreign company and, save as is otherwise provided herein, to an existing company incorporated under the repealed Act.

(2) Any reference in this Act, express or implied, to the date of incorporation of an existing company, shall be construed as a reference to the date on which such company was originally incorporated.

(3) Nothing contained in this Act shall affect any right or privilege acquired or liability incurred by any existing company or foreign company, whether by agreement or otherwise, before the commencement of this Act, or affect the validity of the memorandum and articles of any such existing company or the memorandum of an external company in force, or deemed to be in force at such commencement and not in conflict with the provisions of this Act.

366. No examples of implementation were provided. Swaziland referred to two outgoing requests involving legal persons. No incoming requests have been received for assistance related to offences committed by legal persons.

**(b) Observations on the implementation of the article**

367. There are no legal obstacles under the Act to the provision of MLA for offences involving legal persons. Moreover, Swaziland recognizes the criminal liability of legal persons. However, there has been no experience in the application of these measures in practice.

**Article 46 Mutual legal assistance**

**Subparagraphs 3 (a) to (i)**

*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;*

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

368. Swaziland can afford a wide range of CMMAA, as outlined in sections 19-26 of the Act.

369. For incoming requests, sections 19-24 of the CMMAA are relevant.

19. Assistance in locating or identifying persons in Swaziland

(1) A request may be transmitted by a designated country for assistance in identifying or locating any person believed to be in Swaziland who could give evidence for the purposes of, or who is or might be concerned in, or affected by, any criminal proceedings in the designated country.

(2) Any such request shall —

(a) state the purpose for which the information about that person is requested; and

(b) contain such information as is available to the designated country as to the whereabouts of that person and such other information as may facilitate the identification of that person in Swaziland.

## 20. Assistance in examination of witnesses in Swaziland

(1) A request may be transmitted by a designated country for assistance in the examination of witnesses in Swaziland for the purposes of any criminal proceedings in the designated country.

(2) Any such request shall specify as appropriate and so far as the circumstances of the case permit —

(a) the names and addresses or official designations of the witnesses to be examined;

(b) the questions to be put to the witnesses or the subject matter about which they are to be examined;

(c) whether the witnesses should be examined orally or in writing;

(d) whether the witnesses should be examined on oath or solemn affirmation; and

(e) any provisions of the laws of the designated country as to the manner of taking evidence relevant to its admissibility in that country.

(3) Subject to the provisions of the Criminal Procedure and Evidence Act, 1938, the accused person or his legal representative may attend the examination of witnesses and may examine such witnesses.

## 21. Assistance in arranging personal attendance of witnesses in designated country

(1) A request may be transmitted by a designated country for assistance in facilitating the personal attendance of witnesses before a court in the designated country.

(2) Any such request shall specify —

(a) the subject matter upon which the witnesses is to be examined;

(b) the reason for which the personal appearance of the witness is required; and

(c) details of the travelling, subsistence and other expenses payable by the designated country in respect of the personal appearance of the witness.

(3) The Minister shall refuse to comply with a request made under subsection (1) if the person concerned does not on reasonable grounds consent to the transfer.

(4) Where a person in custody is being transferred pursuant to a request under subsection (1), the Minister shall notify the designated country of the date when that person shall be released from custody and the date when he should be returned to Swaziland

(5) The competent authority in the designated country shall keep the person so transferred in custody for as long as his presence as a witness is required and shall return him to Swaziland when his presence is no longer required.

(6) The period during which the person so transferred is kept in custody in the designated country shall be deemed for all purposes to be the period served in custody in Swaziland.

## 22. Assistance in obtaining evidence by other means

When a request for assistance in obtaining evidence in Swaziland by any of the means stated in section 6 for the purposes of any criminal proceedings in a designated country,

the request shall specify as appropriate and as far as the circumstances of the case may permit —

- (a) the documents, records or property to be inspected, produced, photographed, copied or transmitted;
- (b) the samples of any property to be taken, examined or transmitted; or
- (c) the site to be viewed or photographed.

#### 23. Assistance in production of judicial and official records

(1) Where compliance with a request under this Part involves the transmission to the designated country of any document, record or property, the Minister may —

- (a) postpone the transmission of such document, record or property if it is required in connection with proceedings in a court or commission of inquiry in Swaziland, in which case certified copies of the document or record may be provided pending the transmission of the original;
- (b) refuse to effect the transmission of such document, record or property unless the designated country agrees to protect the interests of third parties in the document, record or property.

(2) A document, record or property transmitted to a designated country pursuant to a request under subsection (1) shall be returned to the Minister when it is no longer required in connection with the criminal matter in respect of which the request was made, or unless the Minister has indicated that he does not require the return of such document, record or property.

#### 24. Assistance for service of documents in Swaziland

(1) A request for assistance in the service of documents in Swaziland for the purposes of any criminal proceedings in a designated country shall be accompanied by the documents to be served.

(2) The Minister shall use his best endeavours to have the document served in accordance with the request unless such service is contrary to any other law for the time being in force.

(3) If the document is served, the Minister shall transmit to the appropriate authority in the designated country a certificate of service of the document or if it has not been served, the reasons which have prevented the service of the document.

370. For outgoing requests, section 6 of the CMMAA provides for assistance that Swaziland may request in obtaining evidence as follows:

#### 6. Assistance in obtaining evidence

Where there are reasonable grounds to believe that evidence for the purposes of any criminal proceedings may be obtained if in a designated country —

- (a) evidence is taken from any person;
- (b) judicial, official or other records or documents are produced;
- (c) samples of any matter or things are taken or examined; or
- (d) any site or thing is viewed or photographed,

a request may be transmitted to the appropriate authority in the designated country requesting that the evidence be so obtained for the purpose of such proceedings.

371. No examples of implementation were provided.

#### **(b) Observations on the implementation of the article**



372. The Criminal Matters (Mutual Assistance) Act in sections 5-16 enables the competent authority in Swaziland to render and request assistance in the following areas:

- obtaining evidence;
- identifying and locating persons;
- obtaining articles or things by search and seizure;
- arranging attendance of witnesses;
- securing transfer of prisoners;
- serving of documents;
- tracing proceeds of serious offences;
- production of judicial and official records;
- forfeiture of proceeds of serious offences and pecuniary penalty orders; and
- obtaining restraining orders.

## **Article 46 Mutual legal assistance**

### **Subparagraphs 3 (j) and (k)**

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(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**

373. In terms of incoming requests, sections 25-27 of the CMMAA are relevant.

#### **25. Assistance in tracing the proceeds of serious offences**

(1) The appropriate authority in a designated country may request for assistance in identifying, locating and assessing the value of any property believed to have been derived or obtained either directly or indirectly from, or to have been used in, or in connection with, the commission of a serious offence, and believed to be within Swaziland.

(2) Any such request shall contain information concerning the nature and location of the property and any person in whose possession or control the property is believed to be held in Swaziland.

#### **26. Seizure and confiscation of proceeds of serious offence**

(1) Where —

(a) the appropriate authority in a designated country requests the Minister to make arrangements for the enforcement of —

(i) a forfeiture order made in respect of a serious offence against property that is believed to be located in Swaziland; or

(ii) a pecuniary penalty order made in respect of a serious offence where some or all of the property available to satisfy the order is believed to be located in Swaziland; and

(b) the Minister is satisfied that —

(i) the person has been convicted of the offence; and

(ii) conviction and the order are not subject to further appeal in the designated country, the Minister may authorise the Director of Public Prosecutions in writing to apply for the registration of the order in the High Court.

(2) Where the appropriate authority in a designated country requests the Minister to make arrangements for the enforcement of a restraining order made in that country in respect of a serious offence against property that is believed to be located within Swaziland, the Minister may authorise the Director of Public Prosecutions in writing to apply for the registration of the order in the High Court.

(3) Where the Director of Public Prosecutions has applied for registration in the High Court or a forfeiture order or a pecuniary penalty order under subsection (1) or a restraining order under subsection (2), the High Court shall register the order accordingly.

#### 27. Effect of registration of forfeiture order, pecuniary penalty order or restraining order

A forfeiture order, a pecuniary penalty order or a restraining order registered under section 26 shall have effect and may be enforced as if it were a forfeiture order, a pecuniary penalty order or a restraining order made by the High Court under the Serious Offences (Confiscation of Proceeds) Act, 2000.

374. In terms of outgoing requests, Sections 14 and 15 respectively of the CMMAA provide for assistance tracing proceeds of serious offences and assistance in relation to forfeiture and pecuniary penalty orders as follows:

#### 14. Assistance in tracing proceeds of serious offences

Where —

(a) in Swaziland a person has been convicted of a serious offence or has been or is about to be charged with a serious offence; and

(b) there are reasonable grounds to believe that proceeds were gained from the commission of the offence by that person, and any of those proceeds are in a designated country,

a request may be transmitted to the appropriate authority in that country requesting that assistance be given in that country in identifying, locating or assessing the value of such proceeds.

#### 15. Assistance in relation to forfeiture and pecuniary penalty orders

Where under the Serious Offences (Confiscation of Proceeds) Act, 2001 —

(a) a forfeiture order or a pecuniary penalty order or a restraining order has been made against any person in respect of a serious offence; and

(b) there are reasonable grounds to believe that there is in a designated country —

(i) property available for the satisfaction of the pecuniary penalty order; or

(ii) property to which the forfeiture order relates,

a request may be transmitted to the appropriate authority in the designated country requesting that the order be enforced in the designated country in accordance with the terms of the request and subject to the law of that country.

375. No examples of implementation were provided.

#### **(b) Observations on the implementation of the article**

376. Swaziland's legislation allows for assistance to be provided in respect of the matters addressed in the provision under review.

## Article 46 Mutual legal assistance

### Paragraphs 4 and 5

*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.*

*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**

377. Swaziland indicated that its authorities, especially the police, may share information spontaneously through various law enforcement channels, including INTERPOL and sporadic MOUs among police departments, like with the Mozambique police.

378. A Crime intelligence information sharing system is used to transmit information to other countries, including INTERPOL notices. Additional channels for informal information sharing are outlined under article 48 below.

379. For example, when suspects move across the border, Swaziland police alerts the South African police so they can trace the suspect.

380. If Swaziland were to receive information spontaneously, its law enforcement authorities would honour a request to keep this information confidential. The intelligence is included in INTERPOL files with limited access to designated personnel who are bound by secrecy obligations. The information would be limited in terms of access to those staff members who need to handle the information.

381. No examples of implementation were provided.

#### **(b) Observations on the implementation of the article**

382. The reviewers were satisfied with the information provided. The following provision is also considered relevant.

CMMAA

Act not to preclude other forms of assistance

4. Nothing in this Act shall prevent the provision or obtaining of international assistance in criminal matters otherwise than in accordance with this Act.

## 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

383. Swaziland indicated that bank secrecy is not a ground for refusal under the CMMLAA. Swaziland allows seizure and confiscation of proceeds (article 26).

384. In the Andrea Nassi case, money was moved around in Swaziland and South Africa and Swaziland provided assistance, including bank records.

#### (b) Observations on the implementation of the article

385. There appear to be no obstacles to the provision of MLA arising from bank secrecy.

## Article 46 Mutual legal assistance

### Subparagraph 9 (a)

*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;*

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

386. As stated above, the dual criminality requirement for MLA is flexibly interpreted by Swaziland.

387. No examples of implementation were provided.

#### (b) Observations on the implementation of the article

388. As noted above, dual criminality is an optional requirement for MLA and hence the provision of MLA may be limited to the extent that Swaziland has not criminalized all the offences under the Convention. However, it was explained that in considering dual criminality issues, the authorities would consider the underlying conduct rather than the strict terminology of the offence.

## Article 46 Mutual legal assistance

### Subparagraphs 9 (b) and (c)

*9.(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;*

*9. (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**

389. Dual criminality is a non-mandatory ground for refusal. There have been no cases where Swaziland refused mutual legal assistance, whether on the ground of dual criminality or otherwise.

390. Regarding non-coercive action, such assistance would be provided in the absence of dual criminality. No information was provided on what measures Swaziland considers to be coercive and no examples were provided.

391. Regarding de minimis requests, there is no law or policy on the issue and there have been no such cases. Swaziland would consider the issue when it arises.

**(b) Observations on the implementation of the article**

392. Swaziland has not refused any MLA requests to date.

393. However, it is recommended that Swaziland adopt measures to ensure that, where assistance is refused on grounds of dual criminality, that non-coercive assistance is provided.

**Article 46 Mutual legal assistance**

**Paragraph 10**

*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.*

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

394. For incoming requests, see section 21(4) of the Criminal Matters (Mutual Assistance) Act 2001:

21. Assistance in arranging personal attendance of witnesses in designated country

(1) A request may be transmitted by a designated country for assistance in facilitating the personal attendance of witnesses before a court in the designated country.

(2) Any such request shall specify -

- (a) the subject matter upon which the witnesses is to be examined;
- (b) the reason for which the personal appearance of the witness is required; and
- (c) details of the travelling, subsistence and other expenses payable by the designated country in respect of the personal appearance of the witness.
- (3) The Minister shall refuse to comply with a request made under subsection (1) if the person concerned does not on reasonable grounds consent to the transfer.
- (4) Where a person in custody is being transferred pursuant to a request under subsection (1), the Minister shall notify the designated country of the date when that person shall be released from custody and the date when he should be returned to Swaziland.
- (5) The competent authority in the designated country shall keep the person so transferred in custody for as long as his presence as a witness is required and shall return him to Swaziland when his presence is no longer required.
- (6) The period during which the person so transferred is kept in custody in the designated country shall be deemed for all purposes to be the period served in custody in Swaziland.

395. For outgoing requests, see section 10 of the Criminal Matters (Mutual Assistance) Act 2001:

#### 10. Assistance in securing transfer of prisoners

- (1) Where there are reasonable grounds to believe that a prisoner in a designated country could give evidence for the purpose of any criminal proceedings, request may be transmitted to the appropriate authority in the designated country requesting that the prisoner be transferred to Swaziland to give evidence for the purposes of such proceedings.
- (2) The appropriate authority in the designated country shall notify the Minister of any conditions under which the prisoner may be transferred, and the Minister shall, except where he is unable to do so or that the appropriate authority waives the observance of such conditions, ensure that those conditions are observed.
- (3) Subject to any conditions as may be prescribed by the designated country in any particular cases, the provisions of the Correctional Services Act, 1964, with respect –
  - (a) to the conditions of imprisonment;
  - (b) to the treatment; and
  - (c) to the transfer from prison,
 of a prisoner, shall apply in so far as they are capable of application in relation to the prisoner who is in Swaziland pursuant to a request made under subsection (1).
- (4) Nothing in this section shall be construed as conferring any rights on the prisoner.
- (5) In this section "prisoner" in relation to a designated country means a person who is being held in custody or sentenced for or under a sentence of imprisonment for any offence against the law of that country.

#### 12. Immunities and privileges

- (1) Subject to subsection (2), a person who is in Swaziland pursuant to a request under section 9 or 10 -
  - (a) is not liable to be detained, prosecuted or punished for any offence that is alleged to have been committed or that was committed before the person's departure from the designated country to which the request was made;
  - (b) shall not be compelled to give evidence in relation to any -
    - (i) proceedings other than the proceedings in the criminal matter to which the request relates; or

(ii) matter, if he would not be compelled to do so in Swaziland or in the designated country to which the request was made.

(2) The provisions of subsection (1) shall not apply in relation to a person who -

(a) leaves Swaziland and returns otherwise than pursuant to the same or another request; or

(b) has had an opportunity of leaving Swaziland but has remained in Swaziland after the expiration of period of 15 days from the date when he was notified by the minister that his presence in Swaziland was no longer required for the purpose of the request.

396. There have been no cases of prisoner transfer for purposes of giving testimony or provision of evidence.

**(b) Observations on the implementation of the article**

397. The provision is legislatively implemented (section 21(3) CMMAA).

**Article 46 Mutual legal assistance**

**Paragraphs 11 and 12**

*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**

398. Swaziland indicated that it has not implemented the paragraphs under review and referred to the information provided under article 46, paragraph 10.

**(b) Observations on the implementation of the article**

399. Section 10(2) of the Act provides that the Minister shall ensure that any conditions on prisoner transfer imposed by the requested authority are observed, except where this is not

possible or the requested authority waives observance of such conditions. The obligation to keep the person in custody and to return him swiftly (UNCAC art. 46(11)(a) and (b)) is not addressed in the legislation, except on the part of the requested country under section 21(5) of the Act. It is recommended that Swaziland adopt a corresponding provision.

## **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**

400. The Central Authority for MLA in Swaziland is the Director of Public Prosecutions (DPP). As stated above, requests for assistance are directed to the Minister of Justice and Constitutional Affairs, who then transmits them to the Director of Public Prosecutions (DPP) for action.

401. The DPP's office has designated an officer to specifically handle MLA matters and is responsible for ensuring that the cases are handled quickly and properly. The National Prosecution Authority (NPA) has seconded officers to the DPP's chambers to assist in the investigation and prosecution of serious criminal cases.

402. Requests are normally received by the Ministry of Foreign Affairs through diplomatic channels. Requests can also be received through INTERPOL.

403. No depositary notification was made to the United Nations at the time Swaziland ratified UNCAC in 2012 (Depositary Notification C.N.500.2012.TREATIES-XVIII.14).

#### **(b) Observations on the implementation of the article**

404. In the absence of any data on the length of time to execute requests, including a number of reported pending cases, it is recommended that Swaziland take steps to streamline MLA procedures in respect of UNCAC offences, including the institutional setup.



405. As noted below under paragraph 23, it is recommended that Swaziland consider adopting MLA Guidelines, regulations or operating procedures to spell out the procedure for handling requests and timeframes for execution.

406. Swaziland should send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (uncac.cop@unodc.org).

## **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**

407. Requests must be made in English, although this is not specified in the CMMAA. Section 17, CMMAA (quoted below) sets out the format requirement.

408. No depositary notification was made to the United Nations about the acceptable language at the time Swaziland ratified UNCAC in 2012 (Depositary Notification C.N.500.2012.TREATIES-XVIII.14).

#### **(b) Observations on the implementation of the article**

409. In urgent situations, Swaziland would accept a request made orally if confirmed in writing forthwith (section 17(2) CMMAA).

410. Swaziland should send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (uncac.cop@unodc.org).

## **Article 46 Mutual legal assistance**

### **Paragraphs 15 and 16**

*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.*

*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**

411. Swaziland cited section 17 of the CMMAA.

**17. Request for assistance generally**

(1) All requests by a designated country for assistance under this Part shall be transmitted to the Minister or an authorised officer.

(2) A request shall normally be made in writing except in the case of emergency when it shall be made orally and confirmed in writing forthwith.

(3) A request shall -

(a) specify the nature of the assistance requested;

(b) contain information appropriate to the assistance sought as specified in this Part;

(c) state any time limit within which compliance with the request is desired and reasons therefor;

(d) contain the following information:

(i) the identity of the agency or authority initiating the request;

(ii) the identity of the accused person; and

(iii) whether or not criminal proceedings have been instituted;

(e) where criminal proceedings have been instituted, it shall contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identity of the accused person;

(iii) the offence of which that person stands accused, and a summary of the facts;

(iv) the stage reached in the proceedings;

(v) any date fixed for further stages in the proceedings;

(f) where criminal proceedings have not been instituted, state the offence which the designated country has reasonable grounds to believe have been committed, with a summary of the known facts; and

(g) any other information that may assist in giving effect to the request.

**(b) Observations on the implementation of the article**

412. Swaziland's legislation addresses the requirements of the provision under review.

**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**

413. Swaziland cited section 18 (2) of the CMMAA, which deals with grounds for refusal.

18. Refusal of request for assistance

(2) Without prejudice to subsection (1), the Minister may refuse to comply in whole or in part with a request under this Part -

(a) if it appears to the Minister that granting of the request would be contrary to the laws of Swaziland or would prejudice the security, international relations or other essential public interest of Swaziland;

**(b) Observations on the implementation of the article**

414. Requests are executed in accordance with the Swaziland laws and, where possible, any procedures specified in the request (see, e.g., section 20(2) CMMAA quoted below).

**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**

415. Swaziland cited Section 20, CMMLAA.

20. Assistance in examination of witnesses in Swaziland

(1) A request may be transmitted by a designated country for assistance in the examination of witnesses in Swaziland for the purposes of any criminal proceedings in the designated country.

(2) Any such request shall specify as appropriate and so far as the circumstances of the case permit —

(a) the names and addresses or official designations of the witnesses to be examined;

(b) the questions to be put to the witnesses or the subject matter about which they are to be examined;

(c) whether the witnesses should be examined orally or in writing;

(d) whether the witnesses should be examined on oath or solemn affirmation; and

(e) any provisions of the laws of the designated country as to the manner of taking evidence relevant to its admissibility in that country.

(3) Subject to the provisions of the Criminal Procedure and Evidence Act, 1938, the accused person or his legal representative may attend the examination of witnesses and may examine such witnesses.

416. Swaziland indicated that the Electronic Evidence Act does not preclude the possibility of hearings by videoconferencing and allows for admissibility in court of evidence obtained through any electronic medium (Section 2), although there have been no cases.

**(b) Observations on the implementation of the article**

417. Swaziland's legislation does not preclude the examination of witnesses as provided for in the paragraph under review.

**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**

418. Swaziland cited sections 32 and 11 of the CMMLAA.

**32. Limitation of use of information**

Unless with the consent of the Minister, no information obtained in response to a request for assistance under this Act shall be used in connection with any matter other than the criminal matter in respect of which the request was made.

**11. Restriction on use of evidence**

No evidence obtained under section 6 or given by any person or prisoner under section 9 or 10, or any article or thing seized pursuant to a request under section 8, shall be admitted or otherwise used for the purpose of any proceedings other than the criminal proceedings for which the evidence, article or thing was obtained, seized or given without the consent in writing of the appropriate authority in the designated country to which the request was made.

419. Information that is exculpatory to an accused would have to be disclosed under domestic laws, but Swaziland would consult with the requesting State prior to the disclosure.

**(b) Observations on the implementation of the article**

420. Swaziland's law corresponds to the provision under review.

## 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

421. Swaziland cited section 30 of the CCMMLAA.

##### 30. Confidentiality

Any request as well as any information or material furnished in compliance with any such request under this Act shall be kept confidential and shall not be disclosed to any person for any purpose other than that for which the request was made.

#### (b) Observations on the implementation of the article

422. The provision is legislatively implemented.

## Article 46 Mutual legal assistance

### Paragraph 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

423. Swaziland cited section 18 of the CMMLAA.

##### 18. Refusal of request for assistance

(1) The Minister may refuse a request by a designated country for assistance under this Part if in the opinion of the Minister the criminal matter concerns -

(a) conduct which would not constitute an offence under the law of Swaziland;

(b) an offence or proceedings of a political character; or

(c) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the designated country.

(2) Without prejudice to subsection (1), the Minister may refuse to comply in whole or in part with a request under this Part -

(a) if it appears to the Minister that granting of the request would be contrary to the laws of Swaziland or would prejudice the security, international relations or other essential public interest of Swaziland;

(b) if the Minister has reasonable grounds to believe that granting the request would facilitate the prosecution or punishment of a person on account of that person's race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request;

(c) if the Minister is satisfied that the steps required to be taken in order to comply with the request cannot under the laws of Swaziland be taken in respect of the criminal matter to which the request relates if it has arisen in Swaziland.

(3) For the purposes of subsection (1), an offence shall be of a political character if it is an offence within the scope of any international convention to which both Swaziland and the designated country are parties and which imposes on the parties thereto an obligation either to extradite or prosecute the person accused of the commission of that offence.

424. No requests for MLA have been refused by Swaziland to date.

**(b) Observations on the implementation of the article**

425. The provision is legislatively implemented.

**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**

426. Swaziland referred to the information in paragraph 21 of the article.

427. There were no reported requests for assistance for offences involving fiscal matters.

**(b) Observations on the implementation of the article**

428. The CMMAA does not provide that assistance may be refused on the ground that the offence also involves fiscal matters. Swaziland would not decline assistance in such cases.

**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**

429. Swaziland indicated that it has not implemented the provision under review. These matters are not spelled out directly in the CMMLAA. There are no MLA Guidelines or regulations or operating procedures in place.

**(b) Observations on the implementation of the article**

430. It is recommended that Swaziland adopt a corresponding provision. As there are no MLA Guidelines, regulations or operating procedures in place in the ODDP, it is recommended that Swaziland consider adopting such procedures, which could also address the requirements of this paragraph.

## **Article 46 Mutual legal assistance**

### **Paragraphs 24 to 26**

*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.*

*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.*

*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**

431. Swaziland indicated that it has not implemented the provisions under review and referred to the information under paragraph 23 of the article.

**(b) Observations on the implementation of the article**

432. As noted above, it is recommended that Swaziland consider adopting MLA Guidelines, regulations or operating procedures to spell out the procedure for handling requests, timeframes for execution, as well as the requirements of the paragraphs under review. Swaziland should ensure that requests are executed expeditiously.

## **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**

433. The safe conduct of witnesses is covered in terms of sections 21 and 12 of the CMMAA.

21. Assistance in arranging personal attendance of witnesses in designated country

(1) A request may be transmitted by a designated country for assistance in facilitating the personal attendance of witnesses before a court in the designated country.

(2) Any such request shall specify -

(a) the subject matter upon which the witnesses is to be examined;

(b) the reason for which the personal appearance of the witness is required; and

(c) details of the travelling, subsistence and other expenses payable by the designated country in respect of the personal appearance of the witness.

(3) The Minister shall refuse to comply with a request made under subsection (1) if the person concerned does not on reasonable grounds consent to the transfer.

(4) Where a person in custody is being transferred pursuant to a request under subsection (1), the Minister shall notify the designated country of the date when that person shall be released from custody and the date when he should be returned to Swaziland

(5) The competent authority in the designated country shall keep the person so transferred in custody for as long as his presence as a witness is required and shall return him to Swaziland when his presence is no longer required.

(6) The period during which the person so transferred is kept in custody in the designated country shall be deemed for all purposes to be the period served in custody in Swaziland.

12. Immunities and privileges

(1) Subject to subsection (2), a person who is in Swaziland pursuant to a request under section 9 or 10 -

(a) is not liable to be detained, prosecuted or punished for any offence that is alleged to have been committed or that was committed before the person's departure from the designated country to which the request was made;

(b) shall not be compelled to give evidence in relation to any -

(i) proceedings other than the proceedings in the criminal matter to which the request relates; or

(ii) matter, if he would not be compelled to do so in Swaziland or in the designated country to which the request was made.

(2) The provisions of subsection (1) shall not apply in relation to a person who -

(a) leaves Swaziland and returns otherwise than pursuant to the same or another request; or



(b) has had an opportunity of leaving Swaziland but has remained in Swaziland after the expiration of period of 15 days from the date when he was notified by the minister that his presence in Swaziland was no longer required for the purpose of the request.

434. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

435. The safe conduct of witnesses is addressed in the CMMAA.

**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**

436. Swaziland indicated that it has not implanted the provision. The issue of costs is not addressed in the CMMAA. There is no practice on the issue.

**(b) Observations on the implementation of the article**

437. In the absence of any MLA treaties, Swaziland is recommended to clarify the issue of costs of MLA in its legislation.

**Article 46 Mutual legal assistance**

**Paragraph 29**

*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;*

*(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**

438. Swaziland indicated that this is partially covered in terms of section 23 of the CMMAA.

23. Assistance in production of judicial and official records

(1) Where compliance with a request under this Part involves the transmission to the designated country of any document, record or property, the Minister may -

(a) postpone the transmission of such document, record or property if it is required in connection with proceedings in a court or commission of inquiry in Swaziland, in which case certified copies of the document or record may be provided pending the transmission of the original;

(b) refuse to effect the transmission of such document, record or property unless the designated country agrees to protect the interests of third parties in the document, record or property.

(2) A document, record or property transmitted to a designated country pursuant to a request under subsection (1) shall be returned to the Minister when it is no longer required in connection with the criminal matter in respect of which the request was made, or unless the Minister has indicated that he does not require the return of such document, record or property.

439. Swaziland will provide copies of publicly available Government records in accordance with its domestic law. For non-public records not implicating national security matters, sovereignty or public order these will be provided. No examples of implementation were provided.

**(b) Observations on the implementation of the article**

440. There are no legal obstacles to the provision of government records in accordance with the paragraph under review.

**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**

441. Swaziland has no bilateral MLA treaties, but is party to multilateral treaties under the African Union, SADC Protocol and the Harare Commonwealth Scheme on MLA.

**(b) Observations on the implementation of the article**

442. Swaziland is party to multilateral treaties on MLA. Swaziland is not precluded from considering the Convention as a legal basis for international cooperation in respect of UNCAC offences; however, there has been no experience in its application.

**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**

443. Swaziland indicated that, although the Criminal Matters (Mutual Assistance Act) does not expressly provide for transfer of criminal proceedings, section 17 may cover the transfer of proceedings as follows:

**17. Request for assistance generally**

(1) All requests by a designated country for assistance under this Part shall be transmitted to the Minister or an authorised officer.

(2) A request shall normally be made in writing except in the case of emergency when it shall be made orally and confirmed in writing forthwith.

(3) A request shall -

(a) specify the nature of the assistance requested;

(b) contain information appropriate to the assistance sought as specified in this Part;

(c) state any time limit within which compliance with the request is desired and reasons therefor;

(d) contain the following information:

(i) the identity of the agency or authority initiating the request;

(ii) the identity of the accused person; and

(iii) whether or not criminal proceedings have been instituted;

(e) where criminal proceedings have been instituted, it shall contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identity of the accused person;

(iii) the offence of which that person stands accused, and a summary of the facts;

(iv) the stage reached in the proceedings;

(v) any date fixed for further stages in the proceedings;

(f) where criminal proceedings have not been instituted, state the offence which the designated country has reasonable grounds to believe have been committed, with a summary of the known facts; and

(g) any other information that may assist in giving effect to the request.

**(b) Observations on the implementation of the article**

444. The legislation does not address the transfer of criminal proceedings. There is no law or practice on the matter. Swaziland is encouraged to consider establishing a legal or procedural framework for the transfer of criminal proceedings.

**(d) Challenges, where applicable**

445. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*

2. *Inadequacy of existing normative measures (constitution, laws, regulations etc.);*

3. *Specificities in our legal system.*

**(e) Technical assistance needs**

446. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. *Summary of good practices/lessons learned;*
2. *Capacity-building programmes for authorities responsible for international cooperation in criminal matters.*

*None of these forms of technical assistance has been provided to-date.*

## **Article 48 Law enforcement cooperation**

*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;*

*(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;*

*(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;*

*(d) 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;*

*(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;*

*(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.*

*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.*

*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**

447. Swaziland provided the following information.

- Swaziland currently has a very close relationship with INTERPOL.
- Swaziland police cooperates through the Southern African Regional Police Chief Cooperation Organisation (SARPCCO)
- SADC - Interstate Defence and Security Council under SADC
- SAFAC (Southern African Forum against Corruption)
- Bilateral agreements on law enforcement cooperation are in force with South Africa. Police officers have been trained at the Turkish police authorities for staff exchange.
- MOUs are in place with Lesotho and Mozambique.
- Internationally the FIU is not a member of the Egmont Group but it cooperates through the Eastern and South African Anti Money Laundering Group (ESAAMLG) and has concluded MoUs with South Africa, Botswana, Namibia, Zambia, Lesotho, Uganda and Zimbabwe.
- Swaziland ACC has engaged in staff exchanges/training at the Botswana Commonwealth African Anti-Corruption Center, and cooperates with countries like Tanzania. Swaziland ACC has cooperated through AACC (African Association of Anti-Corruption Authorities).
- Swaziland police posts liaison officers at embassies abroad (e.g., Pretoria, Mozambique, Ethiopia, London, Washington DC, Taiwan). Police have also received liaison officers from South Africa, Taiwan Defence. The police have also training officers from Equatorial Guinea.
- Officers from DPP have been sent to South Africa for training.
- Prosecutor placements have been done under the Asset Recovery Inter-agency Network in Southern Africa (ARINSA).
- Swaziland participates in the STAR INTERPOL focal points network.
- There is also an MoU on co-operation in the legal field with South Africa.
  - Article 2 of the MoU provides for the objectives as follows: The parties undertake to create framework for closer co-operation between institutions of the administration of justice of the parties and encourage co-operation and exchange programmes of the respective institutions.
  - Article 3 lists three areas of co-operation as follows: (a) Establishment of an institution in the Kingdom of Swaziland responsible for search, seizure, freezing and forfeiture of assets in criminal matters; (b) establishment of a Human Rights Commission in the Kingdom of Swaziland; (c) training of officials in legislative drafting; (d) secondment of officials to the Kingdom of Swaziland to assist with the

establishment of an institution responsible for asset forfeiture cases; (e) secondment of officials to the Kingdom of Swaziland to assist with the establishment of a Human Rights Commission; and (f) secondment of expert officials to the Kingdom of Swaziland to assist with investigation and prosecution of serious criminal cases.

- There has been no request for cooperation for the Police under UNCAC but if such a request were received the Police would cooperate on the basis of UNCAC.
- The Rex V T.V.J case is an example where Swaziland police cooperated with police in South Africa in a money laundering and fraud investigation.
- In Rex v. Andrea Nassi and Another, which was a money laundering and fraud investigation, prior to an MLA request being submitted to South Africa, the police cooperated with South African police to conduct investigative steps to identify the movement of funds involving the suspects account held in South Africa. The information and records were received from South Africa.

448. The following statistics were provided by the FIU.

Requests of Information received from other FIUs					
Year	2010	2011	2012	2013	2014
Number of requests received from other FIUs	0	0	0	3	2
Number of requests granted	0	0	0	0	0
Number of requests refused	0	0	0	0	0
Average time required to respond to a request	n/a	n/a	n/a	n/a	n/a

Spontaneous Referrals of Information by the FIU					
Year	2010	2011	2012	2013	2014
Number of spontaneous referrals of information made by FIU to foreign authorities	0	0	0	0	0

**(b) Observations on the implementation of the article**

449. Swaziland is party to a variety of arrangements and networks to facilitate law enforcement cooperation and there has been some experience of such cooperation with the authorities in South Africa in money laundering cases.
450. It was confirmed that Swaziland is not precluded from considering the Convention as a legal basis for law enforcement cooperation in respect of UNCAC offences; however, there has been no experience in its application.
451. Swaziland is encouraged to strengthen its cooperation in the area of law enforcement cooperation at the international level.

#### **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**

452. A Task Team comprising the Anti-Corruption Commission (ACC), the Swaziland Police (RSP), and the Director of Public Prosecutions (DPP) was established in early 2011 to deal with fourteen complex corruption, fraud and money laundering cases. One of these cases related to cooperation with South Africa involving a joint investigation in a fraud case (assets in South Africa were frozen following a joint investigation).
453. In addition, there is currently cooperation with Interpol at regional level, and there have been joint investigations through INTERPOL in fraud and money laundering cases.
454. There have been no joint investigations with other countries in corruption related cases, but Swaziland has had joint investigations in other criminal matters, including fraud.
455. Swaziland has been involved in joint investigations through SADC where parallel investigative steps were taken in a number of countries.

##### **(b) Observations on the implementation of the article**

456. Joint investigations may be conducted on a case by case basis on the basis of specific agreements or arrangements and through Interpol. Swaziland's legislation does not preclude the formation of joint investigation teams. There have been no joint investigations with other countries in corruption related cases.

##### **(c) Challenges, where applicable**

457. Swaziland has identified the following challenges and issues in fully implementing the provision under review:

1. *Inter-agency co-ordination;*
2. *Specificities in its legal system.*

**(e) Technical assistance needs**

458. Swaziland has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. *Summary of good practices/lessons learned;*
2. *Model agreement(s)/arrangement(s);*
3. *Capacity-building programmes for authorities responsible for cross-border law enforcement cooperation.*

*None of these forms of technical assistance has been provided to-date.*

**Article 50 Special investigative techniques**

*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.*

*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.*

*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.*

*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**

459. The ACC is empowered, subject to authorization by the ACC Commissioner, to conduct special investigations in terms of section 12 of the Electronic Records (Evidence) Act 2009 (quoted below).

460. Admissibility of evidence derived from special investigative techniques in a court of law is governed by Section 2 of the Electronic Evidence Act, which allows for admissibility in court of evidence obtained through any electronic medium (Section 2).

Electronic Records (Evidence) Act 2009  
Special powers of investigation



12. (1) Where it appears to the Commissioner that an offence under this Act may have been committed by any person, the Commissioner may for the purposes of an investigation of that offence authorize an investigating officer to exercise the following powers, that is, to-

(a) investigate the acquisition of any property (whether movable or immovable) in or outside Swaziland by or on behalf of that person, during such period as may be specified in the authority;

(b) require that person to furnish and produce all relevant information and documents in respect of-

(i) all expenditure incurred by that person personally or in respect of the spouse, children or parents of that person;

(ii) all liabilities incurred by that person, the agent or trustee of that person and specifying in respect of each such liability whether it was incurred jointly (and, if so, with whom) or severally;

(iii) any money acquired or sent outside Swaziland during the period as may be specified in the authority;

(c) investigate and inspect any bank account or other account of whatever description or kind and any banker's books or company books of, or relating to, the person named or otherwise identified in the authority;

(d) require from any person production of any accounts, books or company books of, or relating to, the person named or otherwise identified in the authority and the disclosure of all or any information relating to those accounts, books or documents;

(e) take originals or certified true copies of any accounts, books or documents or any relevant entry in those accounts, books or documents;

(f) require any person who is being investigated to furnish the investigating officer with a sworn statement containing any information referred to in paragraphs (a) and (b).

(2) Any person, who has been lawfully required under subsection (1) to disclose any information or to produce any accounts, books or documents to an investigating officer shall, notwithstanding any other law to the contrary, comply with that requirement.

(3) Any person who-

(a) without reasonable excuse fails or neglects to disclose any information or to produce any accounts, books or documents required by an investigating officer under subsection (2); or

(b) obstructs an investigating officer in the execution of an authority made under subsection (1),

commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand Emalangeni or to imprisonment not exceeding five years or to both.

(4) Where, in any proceedings for an offence under Part III, it is proved that the person charged with the offence refused to furnish a sworn statement required in terms of subsection (1) (f) when requested to do so that refusal shall, unless reasonable cause is shown, be treated as supporting any evidence given on behalf of the prosecution, or as rebutting any evidence given on behalf of the defence as regards the manner of the acquisition of the properties mentioned in paragraph (1) (a).

(5) The information referred to in paragraph (1)(f) shall be admissible as evidence during the trial of that person and if that person submits to be a witness, that information may be used in cross-examination and for purposes of impeaching the credibility of that person.

461. On the other hand the police are empowered by section 189 (1) and (2) of the Constitution, which provides as follows:

189. (1) The Royal Swaziland Police Service shall be responsible for preserving the peace, for prevention and detection of crime and the apprehension of offenders.

(2) The Police Service shall have and exercise such other powers and functions as may be prescribed.

462. Swaziland currently has a Memorandum of Agreement with South Africa on cooperation in the legal field which recognizes the sovereign equality and territorial integrity of all States. Article 1 of the MoU deals with purpose and scope as follows:

The purpose of this Memorandum of Understanding is pursuant to the agreement between the Government of the Kingdom of Swaziland and the Government of the Republic of South Africa creating or establishing a Joint Bilateral Commission for Cooperation (JBCC), which was entered into by and between the parties on the 12th December 2004 and the need to promote and develop co-operation on criminal matters, legislative drafting and advancement of human rights, including training and technical assistance.

463. In addition, the country also has a working relation with INTERPOL through the Southern African Regional Police Chief Cooperation Organisation (SARPCCO).

464. Examples of implementation include:

- The Anti-Corruption Commission (ACC) and police have ongoing special investigations.
- Controlled delivery is normally done in drug related investigations. Surveillance is an investigative tool used by the police on a daily basis. The CPA case is an example where surveillance was used in a fraud and money laundering investigation,
- Undercover investigations are used mainly done on the domestic side.
- ACC relies on the police for surveillance.

**(b) Observations on the implementation of the article**

465. Investigating authorities such as the ACC and the police are empowered to conduct special investigative techniques, although the matter is not specifically addressed in the legislation. It was explained that no formal agreement is required.

466. Reference is also made to section 6 (2) of the Electronic Records (Evidence) Act 2009, which provides for the admissibility of evidence obtained by electronic means.

**6. Evidence of electronic records**

(2) Unless otherwise provided in any other written law, where an electronic record is tendered in evidence for any purpose, such record shall be admissible if it is relevant and it is produced in an approved process.

467. Swaziland police have conducted surveillance and controlled delivery in counterfeiting and drug-related cases but not in any matters involving UNCAC offences.

468. In light of the information provided, Swaziland is encouraged to adopt necessary measures to allow for the use of special investigative techniques and the admissibility in court of evidence derived therefrom.

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