



UNODC

United Nations Office on Drugs and Crime

Country Review Report of the Republic of Botswana

Review by Burundi and Bulgaria of the implementation by Botswana 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 Republic of Botswana (hereinafter referred to as Botswana) of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Botswana, 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 Burundi, Bulgaria and Botswana, by means of telephone conferences and e-mail exchanges and involving Ms. Botlhale Makgekgenene, Mr. Andria German and Mr. Ditshoto Mpale from Botswana, Mr. Léonidas Kanuma from Burundi and Mr. Florian Florov from Bulgaria. The staff members of the Secretariat were Ms. Tanja Santucci and Ms. Constanze von Söhnen.
6. A country visit, agreed to by Botswana, was conducted in Gaborone from 26 to 28 February 2014. During the on-site visit, meetings were held with the Directorate on Corruption and Economic Crime, Attorney General, Director of Public Prosecution, Financial Intelligence Agency, Botswana Police Service, Directorate of Public Service Management, Administration of Justice, and BOCONGO, a network of civil society organizations.

III. Executive summary

1. Introduction

1.1. Overview of the legal and institutional framework of Botswana in the context of implementation of the United Nations Convention against Corruption

7. *The Convention, to which Botswana acceded on 27 June 2011, entered into force in Botswana on 27 July 2011.*

8. *The country has a dual legal system, comprising customary law and received (or common) law, which consists of English and Roman Dutch law, as amended by statutes. As regards the written law, multiple specialized acts are relevant for this review, including the Corruption and Economic Crime Act (as amended) (CECA), the amended Proceeds of Serious Crime Act (POSCA), the Criminal Procedure and Evidence Act (CPEA), and the Penal Code (PC), which is applied as “lex generalis” to the specialized legislation.*
9. *The common law is constantly developed through case law, upon which the High Court and Court of Appeal, the highest court in Botswana, have ruled.*
10. *The Customary Courts have jurisdiction to hear a variety of civil and criminal matters, including offences of lesser gravity such as petty theft, but not corruption related matters.*
11. *Dedicated authorities to fight corruption are the Directorate on Corruption and Economic Crime (DCEC), the Director of Public Prosecution (DPP), the Attorney General, the Financial Intelligence Agency (FIA), the Police Service, the Directorate of Public Service Management (DPSM), the Administration of Justice (Courts), as well as other specialized law enforcement agencies.*

2. Chapter III: Criminalization and Law Enforcement

2.1. Observations on the implementation of the articles under review

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

12. *Sections 24 and 25 of CECA are the main provisions which criminalize active and passive bribery. Specific forms of bribery are covered in other sections, such as 26, 27 and 29 of CECA, 99 of PC and 94 of the Electoral Act. Case statistics on sections 24 and 25 were provided to demonstrate implementation.*
13. *CECA uses the term “public officer”, which was re-defined under Section 3(c) of the CEC (Amendment) Act, 2013 and covers “(...) any person holding an office by election or appointment”. This applies to magistrates, judges, all judicial officers as well as Members of Parliament. Section 3(b) covers persons working for public enterprises, parastatals and any other organs where public moneys are used (Section 3(b)).*
14. *Section 2(1) PC comprises a broad definition of the term “public officer” and “person employed in the public service”. However, harmonization alongside the corresponding definition in the CEC (Amendment) Act 2013 and against art. 2(c) of the Convention would ensure greater legal certainty.*
15. *Bribery of foreign public officials and officials of public international organizations is partially criminalized in Sections 99 and 2(1) of PC. The offence covers “any person in the employment of the government of a country other than Botswana, or of the United Nations or any agency thereof, who exercises functions of his office in Botswana”. It does not cover officials of other public international organizations. No cases exist to date.*
16. *Botswana partially criminalized active and passive bribery in the private sector in Sections 384 of PC and 28 of CECA, with limited application to principal-agent relations. Case examples were provided to show the implementation of the provisions. Additionally,*

Section 30 of CECA criminalizes corruption in public tendering procedures, and Section 94(f) of the Electoral Act addresses corruption in electoral matters.

17. Botswana has fully criminalized trading in influence in Section 25A CECA (introduced by the CEC (Amendment) Act, 2013). Also, Section 29(2) of CECA and Section 384 of PC contain relevant measures. There have been no prosecutions to date, but various cases are under investigation.

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

18. Botswana has criminalized money-laundering mostly in line with the Convention (Sections 14 and 15, POSCA). Botswana's law extends to legal persons and their directors and managers, and also covers suspected criminal proceeds. However, the acquisition or use of criminal proceeds is not specifically addressed, nor is self-laundering clearly provided for. Predicate offences ("serious offences," i.e. those punishable by imprisonment of not less than two years) include the majority, but not all UNCAC offences or foreign predicate offences. Pending legislation would address these issues. The reviewers welcome the continued collection of statistics on money-laundering.
19. Concealment and continued retention of property are criminalized in Section 15 of POSCA and Sections 317 to 320 of PC.

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

20. Botswana has criminalized embezzlement and misappropriation in various sections of CECA and PC, which cover all relevant aspects of the offence. The main provisions are Section 33 of CECA and Sections 102 and 103 of PC. Additionally, Section 24A of CECA could be of relevance for some misappropriation cases. The definition of property in Section 2 (1) (a) of PC is sufficiently broad to include all elements required by art. 2(d) of UNCAC. Case examples for Section 33 of CECA were provided.
21. Botswana has also considered the criminalization of embezzlement in the private sector, primarily in Sections 322 and 277 to 279 of PC. The content is limited to directors and officers of corporations or companies, which should capture the majority of cases, but not "all persons who direct or work in any capacity for a private sector entity" (UNCAC art. 22). Case examples were provided.
22. The abuse of functions by public officials is fully criminalized in Section 24A of CECA. Sections 104 and 100 of the Penal Code also contain relevant provisions that were used to prosecute cases before the 2013 CEC amendment. Case examples and statistics were provided for these PC provisions.
23. Botswana fully criminalized illicit enrichment in Section 34 of CECA. While there have been convictions, cases are at various stages of the criminal process, including one case before the court.

Obstruction of justice (art. 25)

24. Botswana has fully criminalized obstruction of justice in multiple provisions of PC. Section 123(f) covers "any person who (...) endeavours wrongfully to interfere with or

influence a witness”. This broad provision subsumes the various acts under art. 25(a) of the Convention. Moreover, Section 120(b) prohibits acts endeavouring to “dissuade, hinder or prevent” the provision of testimony or evidence and Section 120(c), more broadly, covers anyone who “obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal”. Sections 111, 113 and 118 of PC are also relevant.

25. *Obstruction of justice, in accordance with art. 25(b) of the Convention, is fully criminalized in Section 18(1) of CECA and Sections 109, 123(a), (c) and (i), 120(c) and 128 of PC. Section 109 of PC even addresses the obstruction of other categories of public servants than justice or law enforcement officials. Despite the broad legislation, only one case is currently with the DPP.*

Liability of legal persons (art. 26)

26. *Botswana has established the criminal liability of legal persons. It was explained that Section 2 of PC applies in regard to offences involving corporations of all kinds and any other association of persons capable of owning property, and that corporations could be made criminally liable for such corruption offences. Botswana also provided relevant case examples, including a case where both the natural and legal person were charged.*
27. *The penalties provided by Section 36 of CECA (which were not adjusted during the 2013 amendment) are applicable to both natural and legal persons alike and may not be sufficiently dissuasive for legal persons. It was positively noted that the Corruption and Economic Crime (Amendment) Act, 2013 had integrated the possibility of blacklisting companies through an endorsement of the conviction in the Public Procurement and Asset Disposal Register.*

Participation and attempt (art. 27)

28. *All relevant forms of participation are covered in Sections 21, 391 and 392 of PC.*
29. *Any person who attempts to commit an offence is guilty of an offence according to Sections 389 of PC, in conjunction with Sections 388 and 390 of PC. The preparation of an offence (other than for example attempt, conspiracy or assistance) is not covered.*

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

30. *Botswana’s legislation does not generally establish minimum penalties. The general penalty provision for most CECA offences is Section 36 of CECA which provides for a term of imprisonment up to ten years or a fine of P500 000, or both. In comparison, the PC provisions, which are relevant for the implementation of some offences under the Convention, mostly provide for imprisonment for up to one to three years, or a fine, or both. Penalty provisions are currently under review in Botswana. Within the legislative framework, the higher courts lay down sentencing principles by case law, considering the circumstances of the offence, the offender and interest of society.*
31. *According to Article 51 of the Constitution, the DPP has discretion to prosecute based on sufficient evidence vis-à-vis a reasonable possibility of conviction.*

32. Botswana does not provide for criminal immunities, except for the Head of State and only whilst he/she is in office (Section 41, Constitution). The period of tenure of office is not taken into consideration in regard to the statute of limitations.
33. The CPEA provides for the possibility of granting bail at the discretion of the court. Sections 109(2) and 111(2)-(4) of CPEA, in particular, address relevant conditions for release on bail that consider the defendant's presence at subsequent criminal proceedings.
34. Parole can be granted according to Section 85 of the Prisons Act after the individual case was considered by a parole board. A specific programme to promote the reintegration of offenders into society is not in place, although legislation is being drafted.
35. The DPSM, a successor of the Public Service Commission, is the single employer of public officers in the central and local government, including teachers. The Public Service Act and functions of the DPSM do not apply to members of the Botswana Defence Force, the Police Service and the Prison Service (Section 3, Public Service Act). These officers are governed by respective rules on disciplinary matters in the Defence Force Act and Police Act. For judicial officers, the Judicial Service Commission governs disciplinary proceedings (Part III, Constitution).
36. Public officers can be suspended pending investigation or trial, according to Section 35 of the Public Service Act (previously entitled 'interdiction'). Reassignment is not addressed in Section 35 but is possible as an administrative decision, according to DPSM. Disciplinary decisions can be taken notwithstanding criminal proceedings.
37. Corruption offences are normally considered serious misconduct (Section 27, Public Service Act) and lead to summary dismissal. A conviction of an offence or dismissal leads to disqualification from being reappointed in the public service, absent written approval by the Director or Permanent Secretary to the President (Section 18, Public Service Act). Out of 25 such requests, only 3 have been approved, none including a corruption offence. Section 18 of the Public Service Act does not clearly regulate cases of disqualification from holding office in an enterprise owned in whole or in part by the State.
38. The possibility of granting immunity to cooperating offenders is provided for by law. Sections 237 and 238 of CPEA contain relevant elements that protect the perpetrators, witnesses and accomplices who provide information and evidence relevant to an investigation. Decisions in regard to the mitigation of punishment are at the discretion of the courts on a case by case basis. No provisions for plea bargaining exist.

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

39. Section 123(1)(f) of PC establishes protection for witnesses in so far as it criminalizes broadly any interference with or influence of witnesses. Additionally, according to Section 123(1)(g) of PC any person who "dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding" is guilty of an offence. This could enable the pursuit of retaliation measures.
40. No specific witness protection scheme is in place, but CPEA provides for the possibility of closed hearings upon application of the parties. Also videoconferencing is possible on a

case by case basis. Further measures have been taken in specific cases, such as relocation. No agreements on witness protection exist with other States.

41. *Botswana has considered the protection of reporting persons (whistleblowers) in Section 45A of CECA by criminalizing threats against or intimidation of persons reporting corruption allegations. Additionally, the section provides for the protection of the identity of informers during criminal proceedings. Relevant case law was cited. Currently legislation is being drafted to establish a comprehensive Whistleblower Act.*

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

42. *Confiscation, seizure and freezing is addressed in POSCA (notably Sections 3-5, 8, 17, 18, 20) and CECA (37, 10, 11, 38), as well as PC and CPEA. The threshold is conviction of a serious offence which includes the majority, but not all UNCAC offences. In minor cases, instruments and proceeds can be forfeited under others laws, such as the Drugs and Related Substances Act. Instrumentalities of crime are not covered in the legislation, except in specific cases (e.g., Section 56, CPEA). Pending legislation (referenced above) would expand the application to all criminal offences and instrumentalities and also establish non-conviction based forfeiture. FIA has administrative freezing powers to suspend a transaction for up to ten days (Section 24, FI Act). Value-based confiscation is provided for. The appointment of a receiver (Section 9, POSCA) or a judicial officer (Section 58, CPEA) to manage seized or confiscated property is possible. Sections 8 of CECA and 28 of the FI Act, 2009 address the production of banking and financial documents. Section 40(1) of CECA allows an inference to be drawn if an offender cannot explain the lawful origin of pecuniary resources or property, and case examples were provided.*
43. *Bank secrecy provisions are not a challenge to the investigation and seizure of bank, financial and commercial records, as Section 43(2)(b), (d), and (g) of the Bank Act in conjunction with Sections 7 and 8 of CECA provide sufficient exceptions to the confidentiality principle. Further provisions, such as Sections 248 and 249 of CPEA, can be used to obtain relevant information.*

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

44. *Section 26 of CPEA provides a 20 year prescription period for any offence (except murder, which is not time-barred). The cited provision does not provide the possibility of suspension of the period of limitations where the alleged offender has evaded the administration of justice. Nevertheless, a case example was provided in which such a suspension had been granted in practice.*
45. *The courts may consider previous convictions in other States during sentencing but not to establish a defendant's criminal liability (Section 283, CPEA). However, this possibility has never been used.*

Jurisdiction (art. 42)

Jurisdiction is based on the territoriality principle, as regulated in Sections 4 and 5 of PC, and under general principles of common law.

46. According to Section 46 of CECA, the provisions of CECA apply in relation to citizens of Botswana, outside as well as within Botswana. Where an offence under Part IV of CECA is committed by a citizen outside Botswana, s/he may be dealt with in respect of such offence as if it had been committed in Botswana. The provision does not include stateless persons.

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

47. Section 42A of CECA provides the possibility of delisting or suspending companies convicted of offences under Sections 28 and 29 of CECA from acquiring projects.
48. The courts may decide on the compensation of damages and issue confiscation orders for convicted persons to pay compensation to victims (Sections 316 and 318, CPEA and Section 6, POSCA). Additionally, civil actions for damages can be instituted (Sections 12 to 16, CPEA).

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

49. The DCEC is mandated to combat corruption, economic crime and money laundering. The appointment of the Director-General is by the President and dismissal is regulated under the Public Service Act, although plans are underway to delink DCEC from the Public Service and as such enhance its independence. The budget of DCEC is shared with other agencies in the Ministry. Staff is selected on a competency basis and the DCEC has a Training and Development department to assess the training needs of the agency. DPP has established a dedicated corruption prosecution unit to only prosecute corruption matters at the specialized Corruption Court. Other relevant agencies include FIA, whose responsibility is to combat money-laundering and financial crimes, the Botswana Police Service and DPSM.
50. Botswana has taken various measures to strengthen inter-agency coordination, including service level agreements, anti-corruption units and corruption prevention committees in every Ministry. The efforts to improve cooperation are positively noted by the reviewing experts and should be continued.
51. In regard to the investigation and pursuit of corruption and money-laundering cases, the DCEC, Police and the DPP cooperate closely. Alleged corruption cases received by the police are referred to DCEC for investigation and DCEC relies on the police for support in specific situations.
52. Cooperation with the private sector is strengthened through various initiatives. FIA has conducted multiple trainings for financial institutions to familiarize them with their responsibilities and duties under the Financial Intelligence Act, 2009. Furthermore, a Memorandum of Understanding is in place between DCEC and the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM) as a basis for collaboration in training events and development of guidance material for the private sector.

2.2. Successes and good practices

- Specialized anti-corruption units in specific government offices facilitate preliminary investigations and reports of wrongdoing to relevant institutions, such as the DCEC

and the police. Further measures such as corruption prevention committees in every Ministry are noteworthy. These efforts should be continued.

- *Regional presence of DCEC through local offices, and the establishment and operation of the Commonwealth Africa Anti-Corruption Center, housed in the DCEC, as a regional center of excellence, learning and training on anti-corruption and to enhance the sharing of experiences among participating countries.*
- *A specialized prosecution team in the DPP to handle corruption cases, thus simplifying lines of responsibility between DCEC investigators and DPP prosecutors and facilitating communication and joint training.*
- *The creation of a specialized judicial unit in the High Court of Botswana to handle corruption cases could serve as a way of reducing backlog and case turnaround times.*
- *Effective cooperation among the DCEC, DPP and police, as necessary for the pursuit of corruption and money laundering cases, including through the exchange of personnel. The reviewers encourage continued cooperation among the DCEC, DPP, police, FIA and other relevant agencies, including the judiciary.*
- *Training of financial service institutions by FIA and the MoU between DCEC and BOCCIM, which lead to joint anti-corruption initiatives for the private sector.*
- *Jurisdiction in regard to corruption offences extends to conduct that occurred outside Botswana (Section 46 of CECA).*

2.3. Challenges in implementation

- *Ensure that the definition of “person employed in the public service” in Section 2(1) of PC covers the same scope of persons as under art. 2(c) of the Convention.*
- *Fully criminalize active bribery of foreign public officials and officials of public international organizations to include persons working for other public international organizations (Section 2(1), PC). In view of comprehensively addressing all relevant corruption offences, Botswana may wish to consider including the offence (also its passive form) in CECA.*
- *Ensure that predicate offences include all offences under the Convention, including foreign predicate offences (Section 15, POSCA), and consider revisiting the applicable penalties for money laundering; also fully address the acquisition and use of criminal proceeds, and provide for the possibility of self-laundering.*
- *Assess and address the potential risk of overlap in regard to investigation and prosecution of money laundering offences.*
- *Furnish copies of the money-laundering laws to the United Nations.*
- *Ensure that the confiscation, freezing and seizure of instrumentalities is covered and strengthen the management of frozen, seized and confiscated assets (as provided for in pending legislation).*
- *Consider broadening the scope of criminalization of corruption in the private sector beyond principal-agent relations.*
- *In regard to embezzlement in the private sector, consider if legislative amendments are necessary to cover “all persons who direct or work in any capacity for a private sector entity”.*

- *Consider provisions for the suspension of the statute of limitations in cases where an offender has evaded the administration of justice.*
- *Consider establishing penalties for corruption offences which are sufficiently dissuasive, specifically in regard to legal entities, including international corporations.*
- *Also, consider the alignment of penalties for corruption offences covered in the CECA and the PC and the introduction of sentencing guidelines.*
- *Endeavour to promote the reintegration into society of persons convicted of corruption offences.*
- *Consider adopting plea bargaining measures, as indicated by Botswana's authorities.*
- *Strengthen witness protection measures, for instance by developing a comprehensive legal framework and entering into agreements with other States, and ensure implementation of witness protection in practice.*
- *Further strengthen the available protection of reporting persons, including through a comprehensive Whistleblower Act.*
- *Strengthen the independence of the DCEC, including the appointment and dismissal of the Director-General and independence from the Public Service; consider establishing a Constitutional anchor for the Directorate; continue to dedicate, within existing means, sufficient resources for the operations of the agency; strengthen expertise and development of skilled personnel, especially for complex matters; continue awareness raising on corruption and methods to report complaints to relevant authorities.*
- *For DPP, additional resources and capacity building on corruption and money laundering cases, as well as asset confiscation and international cooperation are needed. The measures should include DCEC, FIA, and the police.*
- *Continue to monitor the need for specialized expertise at the level of the High Court to address case backlog and turnaround times.*
- *Consider extending jurisdiction for corruption and money laundering offences to cover art. 42, paragraphs 2 (c) and (d), 3 and 4.*
- *Consider strengthening collaboration between the DCEC and civil society on anti-corruption.*

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

- *Botswana indicated that it would require a range of technical assistance. On criminalization, such assistance predominantly includes summaries of good practices, on-site assistance and the development of implementation action plans. Specifically, subjects include the bribery of foreign public officials and the waiver of diplomatic immunities, awareness raising in regard to the latest amendment of CECA (e.g. abuse of function and illicit enrichment) and investigation and prosecution of money-laundering and concealment.*
- *In relation to law enforcement, model legislation and other assistance for the establishment of witness and whistle-blower protection programmes and for a social reintegration scheme was pointed out.*

- *Various capacity building needs in regard to money-laundering, confiscation, tracing, seizure and freezing of proceeds of crime for all relevant criminal justice institutions and the judiciary.*

3. Chapter IV: International cooperation

3.1. Observations on the implementation of the articles under review

Extradition (art. 44)

53. *Extradition is governed by the Extradition Act and two bilateral extradition treaties. The process of domestication of international treaties, including UNCAC, is an ongoing process in Botswana, which hinders the application of such treaties in practice. Extradition is subject to dual criminality and the existence of bilateral arrangements or the designation of countries (currently, all Commonwealth States). Extradition is limited to the extent that not all offences established under the Convention have been criminalized. Simplified extradition arrangements are available under the London Scheme.*
54. *The minimum imprisonment term of two years for an offence to be extraditable under the Act covers most but not all UNCAC offences and is subject to the terms of existing treaties. These establish a one-year threshold or take a list approach, and are being revised in line with international standards.*
55. *Botswana has refused extradition in four cases to date, three of which were due to the absence of a treaty and none of which related to corruption. An order by the Minister of Defence, Justice and Security authorizes the DPP to execute a request.*
56. *Political and military offences are exempted from extradition under Section 7(2) of the Extradition Act and the treaty with South Africa, and one extradition request has been refused on these grounds. Botswana recognizes grounds for refusal in line with the Convention. However, nationality of the requested person is a mandatory ground for refusal in the absence of reciprocity and the aut dedere aut judicare obligation is not addressed. Botswana has never refused the extradition of a national.*
57. *The issues of fair treatment or the discriminatory purpose have not been invoked to date.*

Transfer of sentenced persons; transfer of criminal proceedings (arts. 45, 47)

58. *Botswana has not concluded agreements or laws on the transfer of prisoners.*
59. *There is no law or practice on the transfer of criminal proceedings.*

Mutual legal assistance (art. 46)

60. *Botswana's Mutual Assistance Act (MACMA) provides the legal basis for mutual legal assistance (MLA). MLA is subject to dual criminality and the existence of bilateral arrangements (of which there are currently none) or the consent of the DPP. The Act is very broad in allowing Botswana to render assistance to any country upon consent of the DPP. Such consent was given in the past to non-Commonwealth countries, as necessary to execute incoming requests. MLA is limited to the extent that not all offences established under the Convention have been criminalized.*

61. *The process of domestication of international treaties, including UNCAC, is ongoing. Botswana subscribes to the Commonwealth (Harare) Scheme on MLA.*
62. *Requests are received through diplomatic channels and transmitted to the Office of the DPP, the central authority which assesses compliance of a request with the Act. A conduct based approach is taken when assessing dual criminality, as exemplified by case examples. Botswana applies both MACMA and other legislation, such as CPEA, CECA or PC in executing requests, and arrangements exist for information to be authenticated and transmitted. The average timeframe to execute a request is 1-2 months, and guidelines on applicable timeframes are in place.*
63. *MLA has not been refused to date, including in corruption-related matters. A case example was given where Botswana successfully recovered assets from another country.*
64. *Botswana relies on its cooperation through SARPCCO, INTERPOL and ARINSA (see below) to share pre-MLA information. Confidentiality requirements are observed. Bank secrecy is not a ground for refusal and banking records have been provided on request. The rule of specialty is observed in law and practice.*
65. *The CPEA provides for taking evidence on commission, and Botswana has authorized the taking of evidence by a foreign judicial authority.*
- Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49, 50)*
66. *Botswana is a member of the Eastern and South African Anti Money Laundering Group (ESAAMLG). Botswana's law enforcement authorities cooperate through the Southern African Regional Police Chiefs Cooperation Organization (SARPCCO) and INTERPOL. Botswana is also a member of the Southern African Development Community (SADC) and the Asset Recovery Inter-Agency Network of Southern Africa (ARINSA).*
67. *The DCEC is a member of the Southern African Forum against Corruption (SAFAC), the International Association of Anti-Corruption Authorities (IAACA), and the African Association of Anti-Corruption Authorities (AAACA).*
68. *Joint Permanent Consultative Commissions provide a platform for law enforcement cooperation with other countries. Some memoranda of understanding are in place (e.g. FIA and the police). INTERPOL channels have been used in the investigation of corruption matters and Botswana has executed requests through ARINSA to trace property in Botswana. Botswana could consider UNCAC as the basis for law enforcement cooperation.*
69. *Botswana participates in joint investigations and conducts special investigative techniques on a case by case basis in the absence of formal legal or administrative measures. Examples were provided.*

3.2. Successes and good practices

- *The electronic database in the DPP's office that classifies requests by date and category of offence is conducive to the timely, accurate and efficient execution and tracking of requests.*
- *Botswana has not refused any requests for MLA, including in corruption-related matters.*
- *The existence of guidelines on the timely execution of MLA requests by the central authority.*
- *The Commonwealth Africa Anti-Corruption Centre in DCEC to strengthen the capacity of anti-corruption agencies in 19 Commonwealth African countries.*

3.3. Challenges in implementation

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

- *The full domestication of international treaties on extradition and MLA as a matter of priority.*
- *Consider widening the scope of bilateral arrangements and countries designated for extradition and MLA, or providing for the possibility of extradition in the absence of a treaty (Section 3, Extradition Act).*
- *Revisit the Extradition Act and treaties to ensure all UNCAC offences are extraditable, including by reason of their period of imprisonment.*
- *Provide the notification under paragraph 6 of art. 44.*
- *Address the aut dedere aut judicare obligation and consider the enforcement of a foreign sentence where extradition of nationals is refused.*
- *Ensure that the discriminatory purpose on account of religion is covered among grounds for refusing extradition.*
- *Provide that consultations be held before extradition is refused, and before MLA is postponed or refused.*
- *Consider establishing a prisoner transfer law.*
- *Ensure that the element of non-coercive MLA is addressed.*
- *Consider more clearly specifying matters incidental to the temporary transfer of detained and convicted persons (art. 46(11) (c) and (d)).*
- *Adopt a limitation on use clause for greater legal certainty.*
- *Ensure that requesting States are notified of issues relating to confidentiality and any reasons for refusal.*
- *Consider addressing the postponement of MLA on the ground of ongoing criminal matters.*
- *Notify the United Nations of its central authority and required language for MLA.*
- *Consider legislatively clarifying the admissibility of evidence derived from special investigative techniques.*

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

- *Botswana indicated that it would require technical assistance, including legal advice and capacity-building, on extradition, MLA and prisoner transfer matters, and to enhance law enforcement cooperation.*

IV. Implementation of the Convention

A. Ratification of the Convention

71. Botswana acceded to the Convention on 27 June 2011. The Convention entered into force for Botswana on 27 July 2011.

B. Legal system of Botswana

72. Botswana has a dual legal system, comprising customary law and what is usually termed received law (or common law). Customary law is the law of any particular tribe or tribal community insofar as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice. Customary law is not written and has variations among different communities. The received law consists of English law and Roman Dutch law as it was in force at the Cape of Good Hope on 10 June 1891, and as amended by statutes from time to time and interpreted by the Courts. The two systems coexist although there are differences in the law and its application.
73. The highest court in Botswana is the Court of Appeal. It is the superior court of record to which appeals can be made from the High Court. The High Court has original jurisdiction to hear and determine civil and criminal proceedings. It acts as an appellate body for the Magistrate Courts and the Customary Court of Appeal.
74. The common law is made up of statute and precedents, which are cases upon which the High Court and Court of Appeal have ruled.
75. The Customary Courts derive their authority from the Customary Courts Act. The Customary Law Act also lays down rules which are meant to guide the courts in deciding whether customary or common law applies. The Customary Courts have jurisdiction to deal with a wide variety of matters of civil and criminal law such as financial disputes, petty theft, marital disputes, divorce (where the couple is married under customary law), livestock theft, insults and defamation, among others. The jurisdiction of the Customary Court is limited by the potential penalties or fines to be imposed, or the particular types of crimes or disputes to be adjudicated. When dealing with criminal matters the courts follow the Customary Court Procedure Rules.
76. Lawyers are not permitted to give legal representation at the Customary Courts. However, a person has the right to have a case transferred to another court (a common law court) where they have the right to legal representation if the permission to transfer is given by the Customary Courts of Appeal. If however an accused person instructs a lawyer to represent him, and the lawyer informs the courts that they wish to have the case

transferred, then the court is obliged to transfer the case so that the accused can access his right to have legal representation.

77. The Botswana Police Services tend to use Customary Courts on offences of lesser gravity. The High Court may refer matters to the Customary Court on issues involving divisions of the joint estate and married persons or where the Court finds that it will be equitable for such division of the joint estate to be dealt with by Customary Courts.
78. The Customary Court of Appeal deals with appeals from the Customary Courts. Decisions of the Customary Court of Appeal may be appealed to the High Court. On issues which refer to land claims, appeals can also be made to the Land Tribunal.
79. The High Court may refer matters to the Customary Court on issues involving divisions of the joint estate and married persons or where the Court finds that it will be equitable for such division of the joint estate to be dealt with by Customary Courts.
80. The Customary Court of Appeal deals with appeals from the Customary Courts. Decisions of the Customary Court of Appeal may be appealed to the High Court. On issues which refer to land claims, appeals can also be made to the Land Tribunal.

Institutional and legal framework in regard to corruption

81. As regards the written law, multiple specialized acts are relevant for this review, including the Corruption and Economic Crime Act, the Proceeds of Serious Crime Act, and the Criminal Procedure and Evidence Act.
82. The Penal Code also comprises various relevant provisions and is applicable as “lex generalis” in case the specialized acts do not comprise relevant legislation or provide for a deviation.
83. A number of dedicated authorities are responsible for the fight against corruption and economic crime in Botswana. These include the Directorate on Corruption and Economic Crime, the Attorney General, the Director of Public Prosecution, the Financial Intelligence Agency, the Police Service, the Directorate of Public Service Management, the Administration of Justice, as well as specialized law enforcement agencies, as described further under article 36 of the Convention below.

C. Implementation of selected articles

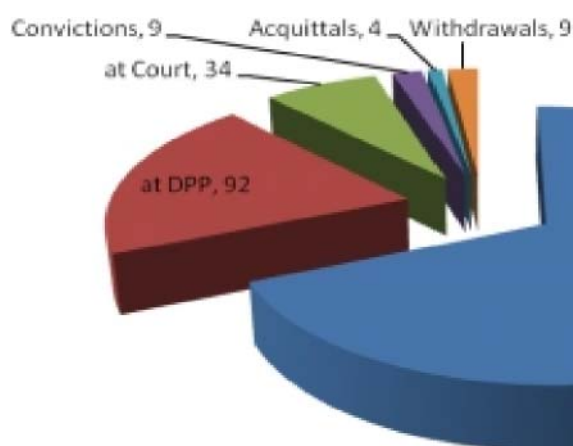
84. A general remark about the organization of the country visit is that the reviewers commended the interdisciplinary, participatory and transparent nature of the meetings and acknowledge, in particular, Botswana’s early preparations for the review and an apparent willingness by the national counterparts to improve the legal and institutional framework against corruption. While the collection and availability of statistics and data appears to be a general challenge across agencies, the reviewers acknowledge the efforts of the national counterparts to provide relevant statistics and encourage Botswana to continue to improve its data collection systems within existing means.

Chapter III. Criminalization and law enforcement

85. Botswana provided the following overall corruption statistics for the period 2010 and 2011, both under the Corruption and Economic Crime Act and under other laws. Further detail on investigations and convictions by year is provided under article 36 of the Convention in this report.

Overall - Corruption and Economic Crime Act Sections (For the period 2010 and 2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
321	92	34	9	4	9

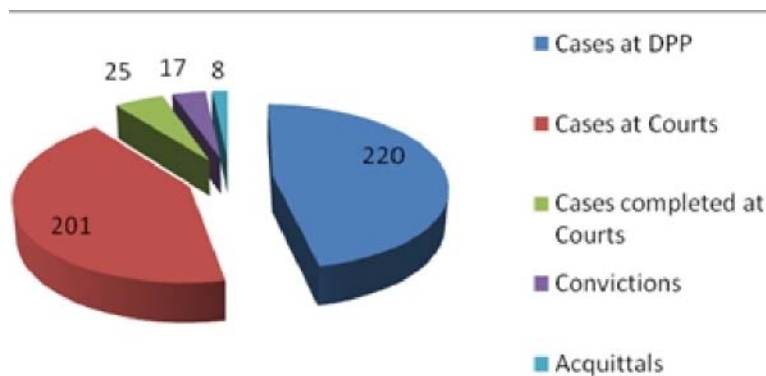


Looking at the overall investigations under the Corruption and Economic Crime Act in 2010 and 2011, it shows a total of 321 matters for investigation, of which 92 cases were sent to the DPP for advice. Nine cases secured conviction, four cases were acquittals and nine cases were withdrawn. Some of the investigation cases were under investigation at the end of 2010 and 2011 and some were closed without reference to the DPP. Some of the cases were resolved within the DCEC's Legal Services unit. The backlog of cases at the DPP causes concern, as it takes time for cases to be resolved.

There were other investigations under the Penal Code and the Proceeds of Serious Crime (POSCA) that are not incorporated above.

2010 and 2011 Annual Reports Statistics (These statistics are from the DCEC Annual Report and they show information on all cases for the period indicated without aligning them to any particular legislation.)

Cases at DPP	Cases at Court	Cases completed at Court	Convictions	Acquittals
220	201	25	17	8



The above statistics show that 220 cases were sent to the DPP in 2010 and 2011. 201 cases were at the courts and 25 cases completed at the courts during the same time period, while 17 cases secured convictions and 8 cases were acquitted. The above information is derived from 2010 and 2011 annual reports, and the information comprises all cases charged under sections of the CECA, Penal Code and Proceeds of Serious Crime Act.

Article 15 Bribery of national public officials

Subparagraph (a)

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

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

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

86. Botswana cited the following information.

CORRUPTION AND ECONOMIC CRIME ACT

Section 3, Corruption and Economic Crime (Amendment) Act, 2013

The Act is amended in section 2 –

(...)

(c) by substituting for the definition of “public officer, the following new definition - “public officer” includes any person –

(a) holding an office by election or appointment under any enactment or under powers conferred by any enactment

(b) who is or was at the relevant time paid from public funds; or

(c) who is or was at the relevant time responsible for the custody, safekeeping or collection of public funds or other property or public funds or other moneys;

Section 23. Definition of valuable consideration, Corruption and Economic Crime Act, 1994 (as amended) (hereinafter also referred to as CECA)

For the purposes of this Part “valuable consideration” means--(a) any gift, benefit, 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 in part; (d) any other service, or favor including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted; (e) the exercise or forbearance from the exercise of any right or any power or duty; and (f) any offer, undertaking or promise whether conditional or un-conditional, of any valuable consideration within the meaning of the provisions of any of the preceding paragraphs.

Section 24. Corruption by or of public officer, Corruption and Economic Crime Act, 1994

(2) A person is guilty of corrupting a public officer if he endeavors directly or indirectly to influence the conduct of the public officer in respect of the duties of his office by the gift, promise, or prospect of any valuable consideration to be received by the public officer, or by any other person, from any person.

Section 25. Corruption in respect of official transaction, Corruption and Economic Crime Act, 1994

(2) A person is guilty of corrupting a public officer if he gives or agrees or offers to give any valuable consideration to a public officer, whether for the benefit of that public officer or of another person as an inducement or reward for doing or forbearing to do anything in respect of any matter in which the public officer is concerned in his capacity as a public officer.

Section 27. Promise of bribe to public officer after doing act, Corruption and Economic Crime Act, 1994

If, after a public officer has done any act as such officer, any other of person agrees or offers to give to or procure for him or for any other person any valuable consideration on account of such an act, the person so agreeing or offering shall be presumed, until the contrary is shown, to have been guilty of having, before doing such act, corrupted the public officer in respect of such act.

Section 29. Bribery for giving assistance in regard to contracts, Corruption and Economic Crime Act, 1994

(2) A person is guilty of corruption if he directly or indirectly gives, or agrees or offers to give any valuable consideration to any public officer as an inducement or reward for or otherwise on account of the public officer giving assistance or using influence in, or having given assistance or used influence in, promoting, administering, executing or procuring any contract (including a subcontract) referred to in subsection (1).

Section 36. Penalty, Corruption and Economic Crime Act, 1994

Any person who is guilty of corruption or cheating the revenue under this Part shall, upon conviction, be liable to imprisonment for a term not exceeding 10 years or to a fine not exceeding P500 000, or to both.

PENAL CODE

Section 2. Interpretation, Penal Code

(1) Subject to subsection (2), in this Code, unless the context otherwise requires,

"public officer" means any person in the service of, or holding office under the State whether such service be permanent or temporary, or paid or unpaid;

"person employed in the public service" means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely

- (a) any public office;
 - (b) any office to which a person is appointed or nominated by or under any written law;
 - (c) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in paragraph (a) or (b) of this definition; or
 - (d) any office of arbitrator or umpire in any proceedings or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any written law;
- and the said term further includes
- (i) any member of a commission of inquiry appointed under or in pursuance of any written law;
 - (ii) any person employed to execute any process of a court;
 - (iii) any member of the forces;
 - (iv) any person in the employment of the Government;
 - (v) any person acting as a minister of religion of whatsoever denomination in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnization of marriage, or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect;
 - (vi) any person in the employment of a local authority;
 - (vii) any person in the employment of the government of a country other than Botswana, or of the United Nations or any agency thereof, who exercises functions of his office in Botswana;

Section 99. Official Corruption, Penal Code

Any person who-

- (b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to produce or attempt to produce, to, upon, or for any person employed in the public service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed, is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

Section 94, Republic of Botswana Electoral Act

The following persons shall be guilty of bribery—

- (a) any person who directly or indirectly, by himself or by any other person on his behalf, gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavor to procure, any money or valuable consideration to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to or refrain from voting, or corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting, at any election;
- (b) any person who directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, promises or promises to procure or to endeavor to procure, any office or employment to or for any voter, or to or for any other person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any voter having voted or refrained from voting, at any election;

- (c) any person who directly or indirectly, from the time at which nomination papers may be delivered to the returning officer in the constituency concerned until the declaration of the result of the poll by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement or agreement as aforesaid to or for any person, in order to induce such person or procure, or to endeavor to procure, the return of any other person as a Member of the National Assembly of the vote of any voter at any election;
- (d) any person who, upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procures, or engages, promises or endeavors to procure, the return of any person as a Member of the National Assembly or the vote of any voter at any election;
- (e) any person who advances or pays or causes to be paid any money to or for the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election;

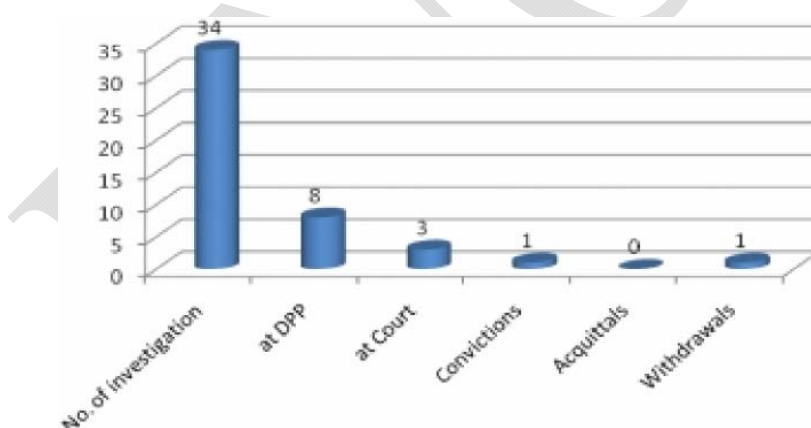
87. Botswana provided the following examples and statistics.

The State v Xiaoming Wang and Another MCHLB 000193/11.

The matter related to two Chinese nationals who offered to bribe the Permanent Secretary in the Ministry of Infrastructure to the tune of P500 000-00 in relation to a job that had not been done well and according to specifications. The Chinese citizens have, however, since skipped bail and a warrant for their arrest has been issued.

Section 24(2) (For the period 2010-2011)

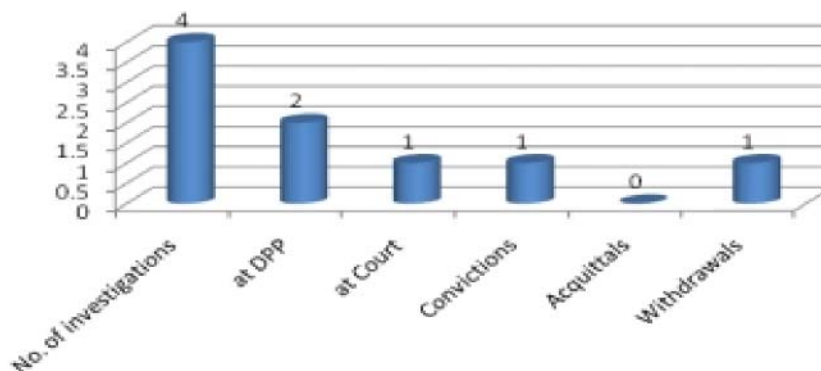
No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
34	8	3	1	0	1



Thirty four investigation cases were charged under Section 24(2) of the Corruption and Economic Crime Act, and three (3) cases out of thirty four were sent for prosecution consideration and one was withdrawn. There was 1 (one) conviction and no acquittals.

Section 25 (2) (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
4	2	1	1	0	1



There were 4 investigations under this section, 2 matters were sent to DPP for prosecution consideration and 1 was registered at court. One conviction was attained and a single withdrawal made.

NB: Please note that where there are no statistics for reported cases being completed in court the example of a case that would appear would be a carried forward matter from the previous years.

(b) Observations on the implementation of the article

88. Active bribery is criminalized in several sections of CECA. The main provisions are Sections 24 and 25, but CECA also includes sections which cover specific situations such as active bribery in relation to contracts (Section 29), or the giving of a valuable consideration to a person who acted as a public official (Section 27).

Public officer definition (the observation is only made once, but is relevant for multiple offences under UNCAC):

89. The term "public officer" was re-defined under Section 3 (c) of the CEC (Amendment) Act, 2013. The objective of the 2013 amendment of the public officer definition was to broaden the definition and to include the same scope of persons as under Section 2 of the Penal Code. The formulation of Section 3 (c) "(...) any person holding an office by election or appointment" applies to magistrates, judges, all judicial officers as well as to Members of Parliament.

90. However, it was discussed during the country visit if the new definition was wide enough to include all persons who are covered in the definition of "public official" in article 2 (c) of the Convention.

91. In this context, it was explained that the definition of public officer includes persons working in public enterprises. This emerges from the definition of "public body" in Section 3 (b) of the CEC (Amendment) Act, 2013 as "any office, organization, establishment, or body created by or under any enactment or under powers conferred by any enactment, and includes any company in which government has equity shares or any organization or body where public moneys are used". It was explained that the legislation extends to public enterprises, parastatals and any other organs where public moneys are used.

92. Moreover, the definition in the CEC (Amendment) Act includes in subparagraph (b) of Section 3 (c) persons who are “paid from public funds”. It was clarified, following the country visit, that this reference does not qualify the group of public office holders in subparagraph (a) of Section 3 (c), due to the use of the word “or”. Thus, a public officer includes any person “holding an office by election or appointment” *or* any person “paid from public funds...” As a result, also unpaid persons who hold office, by election or appointment, are covered, in line with article 2 (c) of the Convention.
93. The Penal Code in Section 2 (1) defines the term “public officer” and “person employed in the public service”. As the Penal Code criminalizes corruption as well as embezzlement and misappropriation, those definitions are equally relevant for the implementation of UNCAC. Although these terms are formulated rather broadly, it would be advisable to assess the definitions alongside the public officer definition in the CEC (Amendment) Act, 2013 and against the same standard of article 2 of the Convention.

Other key terminology:

94. It is noted that certain of the cited bribery provisions directly cover the notion of “refraining from acting” (e.g., Section 25 of CECA and Section 99 of the Penal Code), while others do not (e.g., Section 27 of CECA, which explicitly refers to an “act” by a public official). It was explained by officials that the various CECA and Penal Code provisions would be interpreted to include acts as well as omissions by a public officer. Section 24 of CECA, for instance broadly refers to “influencing the conduct” of a public official. Reference was made to the case **The State v Mogi Ditsele CMMSP 000267/11** (cited under UNCAC article 19 below), where a public official who failed to take action in order to benefit a friend during the hiring process was charged with abuse of office under Section 104 of the Penal Code. The cited Section 104 covers the ‘doing or directing ... of any arbitrary act’, and the same principle would apply under CECA provisions.
95. As regards the inclusion of cases in which an undue advantage is given to another entity, CECA refers to “any valuable consideration (...) for the benefit (...) of another person”. It was explained during the country visit that this formulation would not preclude cases in which an undue advantage was given to an entity (e.g. legal person, company), as the Penal Code in Section 2 (1) specifies that “person,” “owner” and other like terms when used with reference to property included corporations of all kinds and any other association of persons capable of owning property, and also when so used include the State and any local authority. Moreover, Botswana recognizes the criminal liability of legal entities (see UNCAC article 26).
96. In summary, the reviewing experts were of the opinion that, with the exception of the scope of the public officer definition, active bribery was sufficiently criminalized. The implementation of the provision in practice was demonstrated through case examples and statistics.

Article 15 Bribery of national public officials

Subparagraph (b)

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

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

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

97. Botswana cited the following measures.

Section 23. Definition of valuable consideration, Corruption and Economic Crime Act, 1994:

For the purposes of this Part "valuable consideration" means--(a) any gift, benefit, 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 in part; (d) any other service, or favor including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted; (e) the exercise or forbearance from the exercise of any right or any power or duty; and (f) any offer, undertaking or promise whether conditional or unconditional, of any valuable consideration within the meaning of the provisions of any of the preceding paragraphs.

Section 24. Corruption by or of public officer, Corruption and Economic Crime Act, 1994:

(1) A public officer is guilty of corruption in respect of the duties of his office if he directly or indirectly agrees or offers to permit his conduct as a public officer to be influenced by the gift, promise, or prospect of any valuable consideration to be received by him, or by any other person, from any person.

Section 25. Corruption in respect of official transaction, Corruption and Economic Crime Act, 1994:

(1) A public officer is guilty of corruption if he accepts, or agrees or offers to accept, for himself, or for any other person any valuable consideration as an inducement or reward for doing or forbearing to do anything in respect of any matter in which he is concerned in his capacity as a public officer.

Section 26. Acceptance of bribe by public official after doing act, Corruption and Economic Crime Act, 1994:

If, after a person has done any act as a public officer, he accepts, or agrees or offers to accept for himself or for any other person, any valuable consideration on account of such an act, he shall be presumed, until the contrary is shown, to have been guilty of corruption in respect of that act before the doing thereof.

Section 29. Bribery by giving assistance in regard to contracts, Corruption and Economic Crime Act, 1994

(1) A public officer is guilty of corruption if he directly or indirectly accepts or agrees or offers to accept for himself or for any other person any valuable consideration as an inducement or reward for or otherwise on account of his giving assistance or using influence in, or having given assistance or used influence in, promoting, administering,

executing or procuring (including any amendment, suspension or cancellation) of any contract (including a subcontract) with a public body.

Section 94(f), Republic of Botswana Electoral Act

(f) any voter who before or during any election, directly or indirectly, by himself or any other person on his behalf receives or contracts for any money, gift, loan or valuable consideration, office, place or employment, for himself or for any other person, for voting or agreeing to vote or for agreeing to refrain from voting at any such election: Provided that the aforesaid provisions shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any expenses bona fide incurred at or concerning any election.

98. Botswana provided the following cases and statistics.

The State v O. Ngubo and Menwane CMMSP 00095/07

The case involves a police officer in the traffic department who solicited and received money from an accused whom they had arrested for a traffic violation. The arrested person then reported to the DCEC prior to paying the amount requested and as such a sting operation was mounted culminating in the arrest of the police officer. The matter is currently pending before court.

The State v Christopher Chemelani Muzila CMMSP 000224/09

This case is an example of a public officer soliciting and offering to accept a bribe. The police detective here had solicited and accepted an amount of P5,000. He ultimately stole a police docket and handed it to the accused person and was arrested in a sting operation.

The State v Shimane Lisenda CMMSP 000399/10

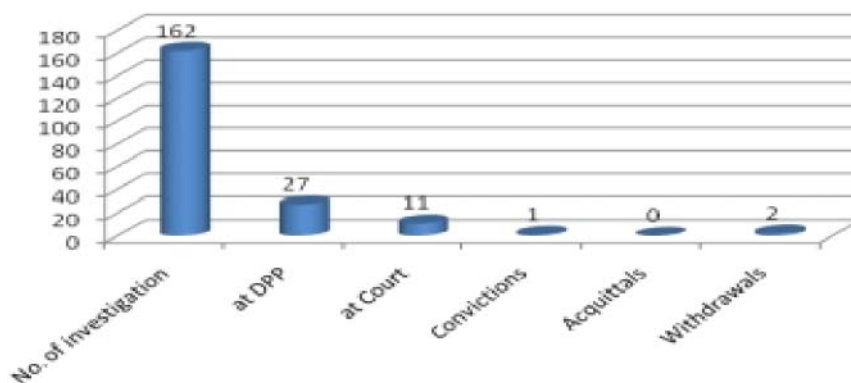
The accused person was a bye-law enforcement officer monitoring that businesses were licensed and that all the bye laws were adhered to. He entered a bar which had an expired license. The accused then requested the bartender to give him some money or else he would close the bar. The bar tender reported and the accused was arrested and finally convicted in court.

The State v Tebogo Mokoko 000004/10

The accused person was a police officer who when on patrol realized that a certain business had employed illegal immigrants. He thereafter sought the owner of the business and requested that he be paid an amount of P500-00 and that said amount will be the only way that the owner of the business could avoid being arrested. A sting operation was arranged and the accused police officer arrested. He was charged and convicted of corruption by a public officer and dismissed from work as a result.

Section 24(1) (For the period 2010-2011)

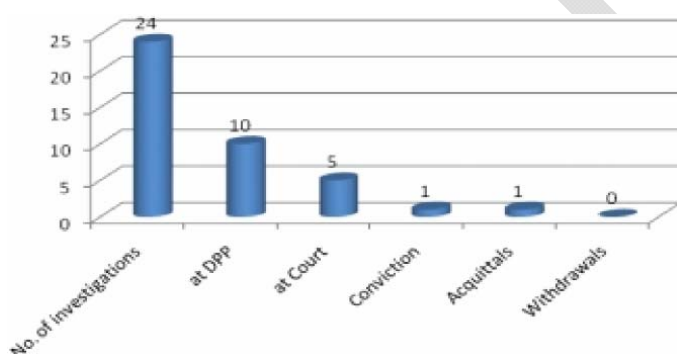
No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
162	27	11	1	0	2



Statistics indicate 162 investigation cases charged under Section 24(1) of the Corruption and Economic Crime Act in 2010 and 2011. 27 cases were sent to the Directorate of Public Prosecutions for advice and 1 (one) case secured a conviction while 2 (two) were withdrawn.

Section 25(1) (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
24	10	5	1	1	0



There were 24 investigation cases charged under Section 25(1) of the Corruption and Economic Crime Act. Ten (10) cases were sent for prosecution consideration. 5 were registered at court. There was 1 (one) conviction and 1 (one) acquittal.

(b) Observations on the implementation of the article

99. The observations and questions included under article 15 (a) of the Convention (above) are also referred to in the context of the present paragraph.

100. The legislation provided by Botswana does not mention the fact of "soliciting" an undue advantage by a public official. In practice however, the cases CMMSP No. 000 95/07, CMMSP000224/09, and CMMSP 000399/10 cited by Botswana properly illustrate cases of solicitation of undue advantages, which means that the formulation used in CECA can be interpreted sufficiently widely to cover the relevant cases.

101. Botswana has criminalized passive bribery in line with the Convention, with the exception of possibly not reaching the full scope of the public officer definition as laid out by article 2 (c) of the Convention.

(c) Challenges, where applicable

102. Botswana has identified the following challenges in fully implementing the article under review:

1. Limited capacity: Limited human resources at the DPP. There are currently only 10 prosecutors at the Corruption Prosecution Unit, most of whom are junior prosecutors. Only 3 are senior prosecutors but the amount of work is too much and the experience that should go with it is minimal.
2. Limited resources for implementation: Capacity building for both investigators, DPP officers and members of the judiciary.

(d) Technical assistance needs

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

1. Development of an action plan for implementation.

104. Botswana indicated that it has received the following forms of technical assistance:

The Australian and the New Zealand governments provided experts who are currently providing technical assistance but are limited to the DCEC personnel. The Australian expert's contract ends in December whilst that of the New Zealand expert ends in September 2014. The New Zealand expert is the current Deputy Director Training and Development. The Australian expert is dealing with issues of capacity building.

Botswana indicated that the expansion of this assistance would in part help it to better implement the article under review.

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

Paragraph 1

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

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

105. Botswana indicated that it has partially implemented the provision under review and cited the following measures.

Section 2. Interpretations, Penal Code

(1) Subject to subsection (2), in this Code, unless the context otherwise requires - "person employed in the public service" means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely

- (a) any public office;

(b) any office to which a person is appointed or nominated by or under any written law;
(c) any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind included in paragraph (a) or (b) of this definition; or

(d) any office of arbitrator or umpire in any proceedings or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any written law;

and the said term further includes

(i) any member of a commission of inquiry appointed under or in pursuance of any written law;

(ii) any person employed to execute any process of a court;

(iii) any member of the forces;

(iv) any person in the employment of the Government;

(v) any person acting as a minister of religion of whatsoever denomination in so far as he performs functions in respect of the notification of intending marriage or in respect of the solemnization of marriage, or in respect of the making or keeping of any register or certificate of marriage, birth, baptism, death or burial, but not in any other respect;

(vi) any person in the employment of a local authority;

(vii) any person in the employment of the government of a country other than Botswana, or of the United Nations or any agency thereof, who exercises functions of his office in Botswana;

Section 99. Official corruption, Penal Code

Any person who-

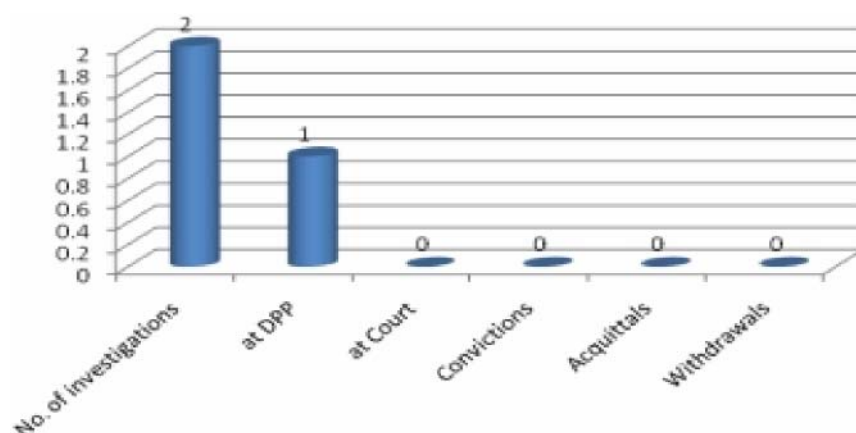
(b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to produce or attempt to produce, to, upon, or for any person employed in the public service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed, is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

106. Botswana indicated that there have been no cases relating to this article. Section 4 of the Diplomatic Privileges and Immunities Act (and the Schedule thereof) provides that employees and other staff of international organizations are immune from prosecution when they hold office. This has therefore contributed to the failure of the state organs to investigate and prosecute such cases. When investigated the procedure is that they would be referred to the relevant organization through diplomatic channels so that the organization either waives the immunity or conducts its own administrative hearing.

107. Botswana provided the following statistics.

Cases investigated by DCEC under Section 99, Penal Code (For the period 2010-2011)

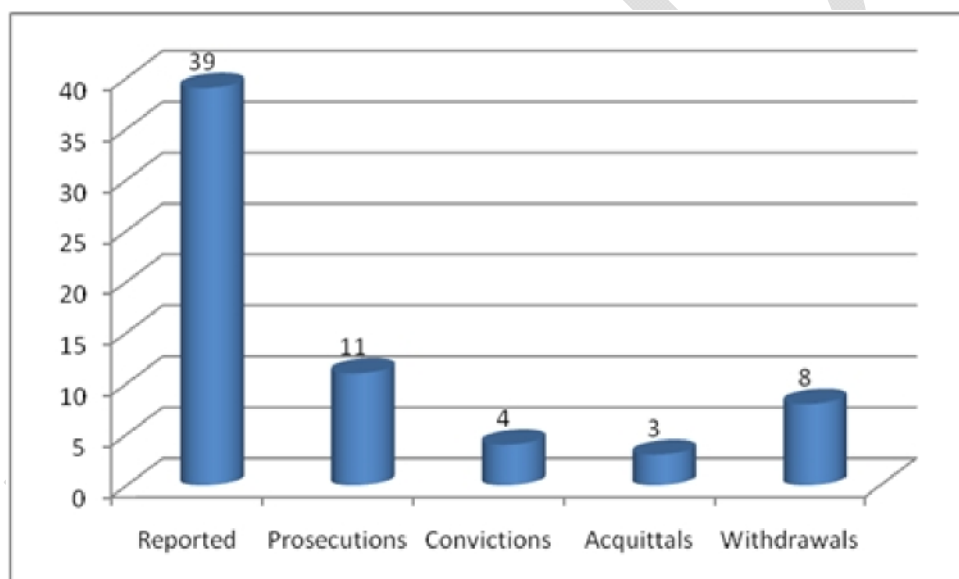
No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
2	1	0	0	0	0



Two investigation cases were charged under this section of the Penal Code. One was sent to DPP for advice.

Cases investigated by the Police under Section 99 (b), Penal Code (For the period 2010-2011)

No. of Cases reported	Prosecutions	Convictions	Acquittals	Withdrawals
39	11	4	3	8



Thirty nine cases were reported and charged under Section 99(b) of the Penal Code. 11 cases were sent to the DPP for prosecution consideration, and 4 of the cases secured convictions while 3 were acquitted and 8 withdrawn.

N.B. All these cases did not involve foreign public officials or officials of public international organizations but local people.

(b) Observations on the implementation of the article

108. CECA does not criminalize the active bribery of foreign public officials and officials of public international organizations. However, the relevant conduct is partly criminalized under Section 99(b) of the Penal Code to be read in conjunction with the

definition of “person employed in the public service” (Section 2 (1) of the Penal Code), which includes foreign public officials and persons working for the United Nations. However, the aspect of persons working in other international organizations is missing and would need to be addressed to be fully in line with this mandatory provision of the Convention.

109. In view of comprehensively addressing all relevant corruption offences in one law, Botswana may wish to consider including the offence of bribery of foreign public officials and officials of public international organizations in CECA.

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

Paragraph 2

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

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

110. Botswana indicated that it has partially implemented the provision under review and cited the following measures.

Section 2, Interpretation, Penal Code

"person employed in the public service" means any person holding any of the following offices or performing the duty thereof, whether as a deputy or otherwise, namely-

- (vii) any person in the employment of the government of a country other than Botswana, or of the United Nations or any agency thereof, who exercises functions of his office in Botswana;

Section 99. Official corruption, Penal Code

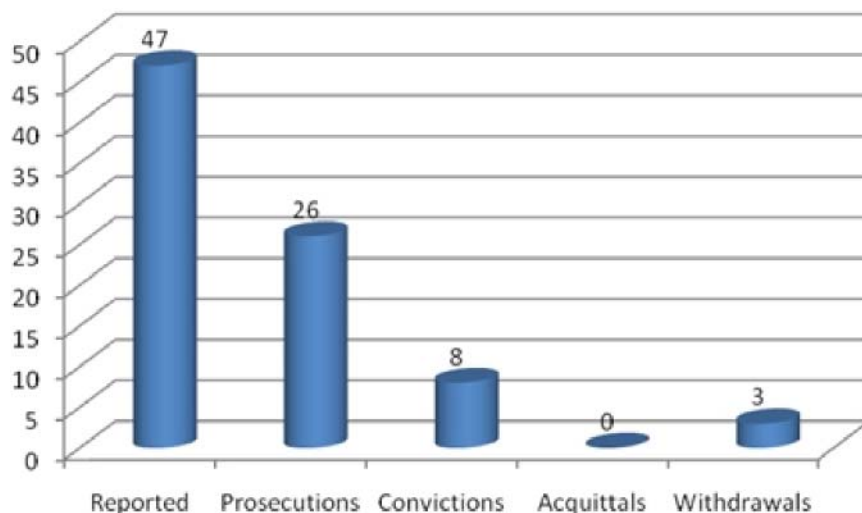
Any person who-

- (a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives, or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

111. Botswana indicated that there is no case law on this matter and provided the following statistics.

Cases investigated by the Police under Section 99(a), Penal Code (For the years 2010-2011)

No. of Cases reported	Prosecutions	Convictions	Acquittals	Withdrawals
47	26	8	0	3



There were 47 cases reported in different police stations that were charged under Section 99(a) of the Penal Code in 2010 and 2011. 26 cases were sent to the Directorate of Public Prosecutions for advice and 8 of them secured convictions, 3 cases were withdrawn. There were no cases acquitted.

N.B. Note that all the cases that the police register under their statistics include, if not all of them are brought by, the DCEC. Registration of such matters by the DCEC is done at police stations country-wide as the DCEC depends on the police for the previous conviction record. This therefore forces the DCEC to register cases at the police in order to have what is referred to as a charge register number.

112. In terms of the steps or action that domestic or other authorities would need to take to ensure full compliance with the provision under review, Botswana reported that the Diplomatic Immunities and Privileges Act (CAP 39:01), Sections 4-5, stipulates that certain individuals, like staff of international organizations, are immune from prosecution. International organization employees have always been regarded as having diplomatic immunity. Until the law is amended Botswana indicated that it cannot fully comply with the article.

(b) Observations on the implementation of the article

113. Botswana has criminalized the relevant conduct in regard to foreign public officials and persons working for the United Nations (Section 99 (a) and Section 2 (1) of the Penal Code). Persons working for other international organizations are not included. Botswana may wish to consider the inclusion of this group of persons.
114. Reference is made to the observation under paragraph 1, to consider the inclusion in CECA.

115. In regard to the implementation in practice, Botswana explained that no relevant case has come up so far to apply the provision in practice. However, due to the issue of diplomatic immunities challenges could be faced during the investigation and prosecution.

116. The reviewers took note of these concerns and point out that it may be useful to explore with Botswana how such privileges could be waived in case any relevant allegations come up. An amendment of the law may not be necessary.

(c) Challenges, where applicable

117. Botswana has identified the following challenges and issues in fully implementing the article under review:

1. Limited capacity: Limitations in skills to investigate and prosecute foreign bribery cases;
2. Competing priorities;
3. Specificities in our legal system;
4. Inadequacy of existing normative measures: The law limits law enforcement agencies from fully complying with the article.

(d) Technical assistance needs

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

The assistance needed here would relate to training (and funds to facilitate the training) on how to handle issues relating to employees of International Organizations.

1. Summary of good practices/lessons learned;
2. Model legislation;
3. Legislative drafting;
4. On-site assistance by an anti-corruption expert: Although the Directorate on Corruption and Economic Crime is fully staffed with the requisite personnel, some offences are new to the country and there is need to train people on issues, such as financial investigations, tracing of proceeds of crime, computer forensics and cybercrime.
5. Development of an action plan for implementation.

119. Botswana indicated that none of the forms of technical assistance mentioned have been previously provided.

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**

120. Botswana cited the following measures.

Section 102. Officers charged with administration of property of a special character or with special duties, Penal Code

(1) Any person who being employed in the public service, and being charged by virtue of his employment with any judicial or administrative duties respecting property of a special character, or respecting the carrying on of any manufacture, trade or business of a special character, and having acquired or holding, directly or indirectly, a private interest in any such property, manufacture, trade, or business, discharges any such duties with respect to the property, manufacture, trade or business in which he has such interest or with respect to the conduct of any person in relation thereto, is guilty of an offence and is liable to imprisonment for a term not exceeding one year.

(2) No prosecution for an offence under this section shall be instituted without the written consent of the Director of Public Prosecutions.

Section 33. Cheating of public revenue, Corruption and Economic Crime Act

A person is guilty of cheating the public revenue if as a result of his fraudulent conduct money is diverted from the revenue and thereby depriving the revenue of money to which it is entitled.

Further relevant legal provisions of the Penal Code:

103. False claims by officials

(1) Any person who, being employed in the public service in such a capacity as to require him or enable him to furnish returns or statements touching any sum payable or claimed to be payable to himself or to any other person, or touching any other matter required to be certified for the purpose of any payment of money or delivery of goods to be made to any person, makes a return or statement touching any such matter which is, to his knowledge, false in any material particular, is guilty of an offence.

(2) No prosecution for an offence under this section shall be instituted without the written consent of the Director of Public Prosecutions.

269. Theft by persons having an interest in the thing stolen

When any person takes or converts anything capable of being stolen under such circumstances as would otherwise amount to theft, it is immaterial that he himself has a special property or interest therein, or that he himself is the owner of the thing taken or converted subject to some special property or interest of some other person therein, or that he is lessee of the thing, or that he himself is one of two or more joint owners of the thing, or that he is a director or officer of a corporation or company or society who are owners of it.

276. Stealing by persons in public service

If the offender is a person employed in the public service and the thing stolen is the property of the State or came into the possession of the offender by virtue of his employment, he is liable to imprisonment for a term not exceeding seven years.

277. Stealing by clerks and servants

If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to

imprisonment for a term not exceeding seven years.

278. Stealing by directors or officers of companies

If the offender is a director or officer of a corporation or company, and the thing stolen is the property of the corporation or company, he is liable to imprisonment for a term not exceeding seven years.

279. Stealing by agents, etc.

If the thing stolen is any of the following things, that is to say

- (a) property which has been received by the offender with a power of attorney for the disposition thereof;
- (b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay, or deliver for any purpose or to any person the same or any part thereof or any proceeds thereof;
- (c) property which has been received by the offender either alone or jointly with any other person for or on account of any other person;
- (d) the whole or part of the proceeds of any valuable security which has been received by the offender with a direction that the proceeds thereof should be applied to any purpose or paid to any person specified in the direction;
- (e) the whole or part of the proceeds arising from any disposition of any property, which have been received by the offender by virtue of a power of attorney for such disposition, such power of attorney having been received by the offender with a direction that such proceeds should be applied to any purpose or paid to any person specified in the direction, the offender is liable to imprisonment for a term not exceeding seven years.

322. Fraudulent appropriation or accounting by directors or officers

Any person who

- (a) being a director or officer of a corporation or company, receives or possesses himself as such of any of the property of the corporation or company otherwise than in payment of a just debt or demand, and, with intent to defraud, omits either to make a full and true entry thereof in the books and accounts of the corporation or company, or to cause or direct such an entry to be made therein; or
- (b) being a director, officer, or member of a corporation or company, does any of the following acts with intent to defraud, that is to say
 - (i) destroys, alters, mutilates or falsifies any book, document, valuable security or account, which belongs to the corporation or company, or any entry in any such book, document or account, or is privy to any such act,
 - (ii) makes, or is privy to making, any false entry in any such book, document, or account, or
 - (iii) omits or is privy to omitting any material particular from any such book, document or account, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

323. False statements by officials of companies

Any person who, being a promoter, director, officer or auditor of a corporation or company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making, circulating or publishing any written statement or account which, in any material particular, is to his knowledge false, with intent thereby to effect any of the following purposes, that is to say

- (a) to deceive or to defraud any member, shareholder, or creditor of the corporation or company, whether a particular person or not;
- (b) to induce any person, whether a particular person or not, to become a member of, or to entrust or advance any property to, the corporation or company, or to enter into any security for the benefit thereof, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

324. Fraudulent false accounting by clerk or servant

Any person who, being a clerk or servant, or being employed or acting in the capacity of a clerk or servant, does any of the following acts with intent to defraud, that is to say

- (a) destroys, alters, mutilates or falsifies any book, document, valuable security or account which belongs to or is in the possession of his employer, or has been received by him on account of his employer, or an entry in any such book, document or account, or is privy to any such act;
- (b) makes, or is privy to making, any false entry in any such book, document or account; or
- (c) omits, or is privy to omitting, any material particular from any such book, document or account, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

325. False accounting by public officer

Any person who, being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statements or return of any money or property received by him or entrusted to his care, or of any balance of money or property in his possession or under his control, is guilty of an offence.

121. Botswana provided the following cases and statistics.

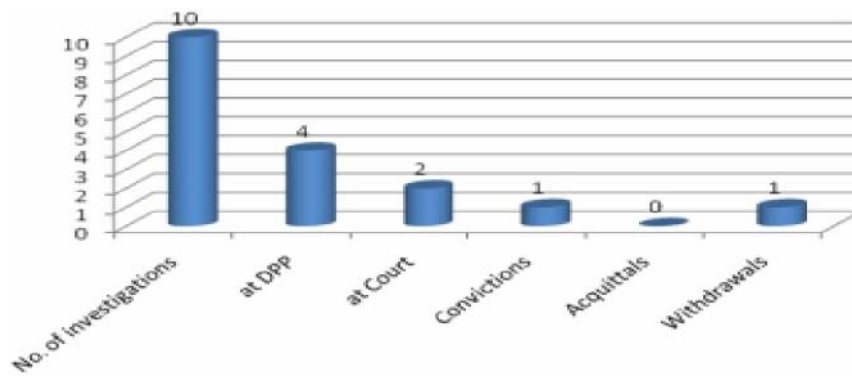
The DCEC has had cases involving Section 33 of the Corruption and Economic Crime, Act, as this falls directly under its mandate.

An example of a case is **The State v Tourism Development Consortium and others**. In this case a certain Louis Goodwill Nchindo had acquired a plot of land from the Debswana mining company. He was required by law to pay transfer duty to the government. Instead of paying the transfer duty the accused person caused the property to be transferred to his company. He was duly charged with, among others, cheating the public revenue under Section 33 of the Corruption and Economic Crime Act (CECA). Ultimately, in the Court of Appeal (which is the highest court in the country), the convictions on all the other counts were set aside, except for the charge under Section 33 of the CECA. See Appeal judgment **CLHLB 000143/ 10** in the case of the same name.

The statistical data relating to these offences are as hereunder listed.

Section 33 (For the period 2010-2011)

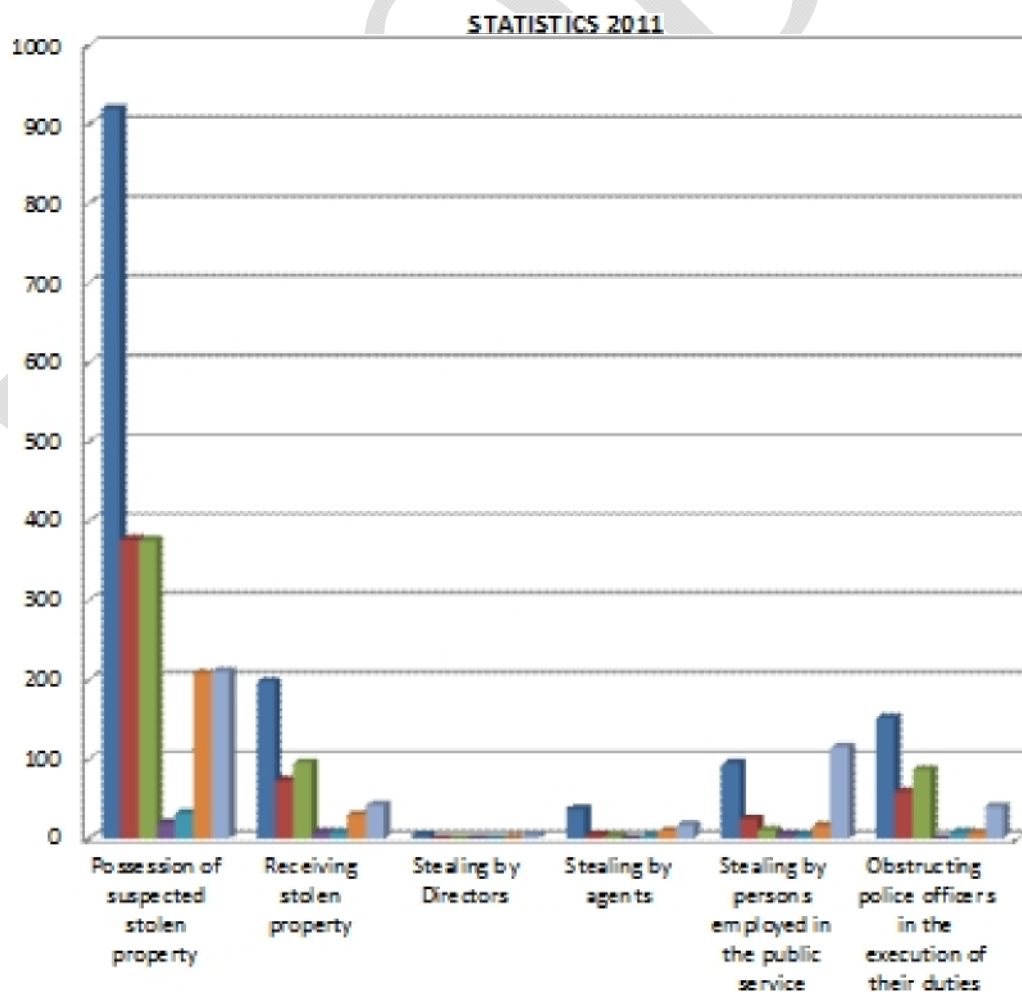
No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
10	4	2	1	0	1

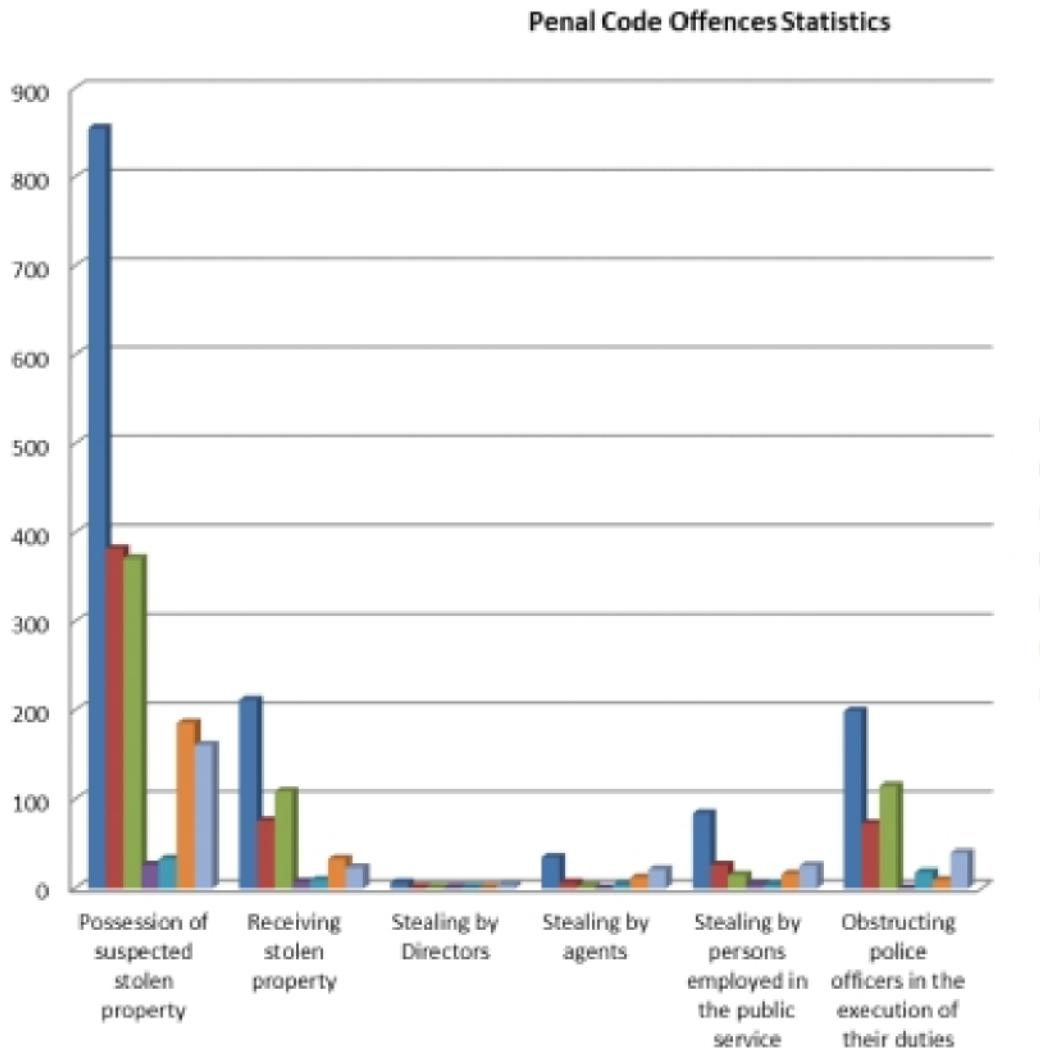


There were 10 investigation cases charged under Section 33 of CECA in 2010 and 2011, and 4 (four) cases were sent to the DPP. There were 2 (two) cases at court and 1 (one) case secured a conviction, while there was 1 (one) withdrawal and no acquittals.

Botswana further indicated that it has prosecuted cases under Section 33 of CECA, but they fall under a different time period to the one under review. Several cases have been prosecuted since the promulgation of the Act.

Statistics on Sections 103, 269, 276-279 and 322-325 of the Penal Code relating to this UNCAC article are as follows:





The above chart represents statistics for the year 2010 for the same offences as enunciated above. The discrepancies on the numbers of reported cases on the one hand and the total of prosecuted/closed/forwarded for prosecution/acquittals etc. is because of the fact that some convictions and/or completed matters at court were of matters carried forward from the previous years, not necessarily those under review.

(b) Observations on the implementation of the article

122. Botswana has criminalized embezzlement and misappropriation in CECA and the Penal Code. Relevant are specifically Section 33 of CECA and Sections 102 and 103 of the Penal Code. Additionally Section 24A of CECA (cited below in relation to the implementation of article 19 of the Convention) could be of relevance for misappropriation cases.

123. It was confirmed by the authorities, that the notion of “property of a special character” as used in Section 102 of the Penal Code, would not diminish the applicability of this section or pose any other challenge. Property is defined in Section 2 (1) (a) of the Penal Code to “include any description of movable or immovable property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any

money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise”.

124. However, the authorities highlighted that Section 102 was not often used. The case examples presented were related to Section 33 of CECA.
125. In the discussion with the DCEC and the DPP during the country visit, it was concluded that the relevant forms of embezzlement and misappropriation were covered by the legislation of Botswana, albeit in a fragmented manner in different pieces of legislation.

Article 18 Trading in influence

Subparagraph (a)

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

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

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

126. Botswana cited the following measures.

Section 29. Bribery for giving assistance in regard to contracts, Corruption and Economic Crime Act

(2) A person is guilty of corruption if he directly or indirectly gives, or agrees or offers to give any valuable consideration to any public officer as an inducement or reward for or otherwise on account of the public officer giving assistance or using influence in, or having given assistance or used influence in, promoting, administering, executing or procuring any contract (including a subcontract) referred to in subsection (1).

Sections 384. Corrupt practices, Penal Code

If

- (b) any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or
- (c) any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, 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 particulars, and which to his knowledge is intended to mislead the principal, he is guilty of an offence.

Section 25A. Trading in influence, Corruption and Economic Crime (Amendment) Act No. 6 of 2013 (introducing a new offence of Trading in Influence)

(1) A person is guilty of corruption if he or she directly or indirectly promises, offers or gives to a public body or any other person a valuable consideration; in order that the public body or the person abuses his or her real or supposed influence with a view to obtaining from that person an undue advantage for his or her or for any other person's own benefit.

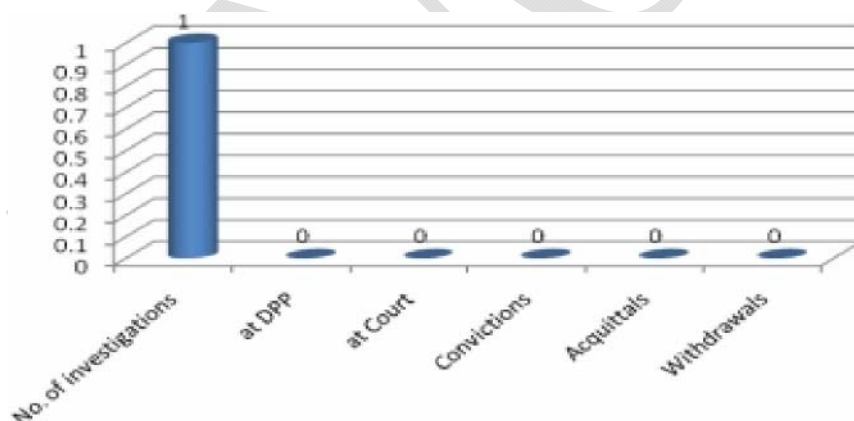
(2) A public officer or any other person shall be guilty of an offence if he or she directly or indirectly solicits or accepts, a valuable consideration for himself or herself or for another person, in order that the public officer or the person abuses his or her real or supposed influence with a view to obtaining from a public body a valuable consideration.

127. Botswana provided the following case examples and statistics.

The only case available is that which is pending prosecution before the courts. The case relates to Section 384 of the Penal Code. This is a case where the investigation centred on corrupt conduct in relation to the award of a tender. The challenge was that after assessing the evidence it was realised that there was no evidence pointing to a valuable consideration ever having been received. The DPP then decided to prefer charges under Section 384 of the Penal Code.

Section 384 (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
1	0	0	0	0	0



There was one case charged under Section 384 of the Penal Code and the same case was ultimately withdrawn to gather more evidence.

128. Botswana indicated that the Corruption and Economic Crime (Amendment) Act No. 6 of 2013 came into force on 26 July 2013. In this Act offences such as trading in influence have been clearly outlined.

(b) Observations on the implementation of the article

129. Botswana has fully criminalized the active form of trading in influence by the introduction of the offence in Section 25A (1) of the Corruption and Economic Crime (Amendment) Act, 2013.

130. Additionally, Section 29(2) of the Corruption and Economic Crime Act and Sections 384 (b) and (c) of the Penal Code contain measures relevant to criminalizing active trading in influence.

Article 18 Trading in influence

Subparagraph (b)

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

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

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

131. Botswana cited the following measures.

Section 101. Public officers receiving property to show favour, Penal Code

Any person who, being employed in the public service, receives any property or benefit of any kind for himself, on the understanding, express or implied, that he shall favour the person giving the property or conferring the benefit, or anyone in whom that person is interested, in any transaction then pending, or likely to take place, between the person giving the property or conferring the benefit, or anyone in whom he is interested, and any person employed in the public service, is guilty of an offence and is liable to imprisonment for a term not exceeding six years.

Section 29. Bribery for giving assistance in regard to contracts, Corruption and Economic Crime Act

(1) A public officer is guilty of corruption if he directly or indirectly accepts or agrees or offers to accept for himself or for any other person any valuable consideration as an inducement or reward for or otherwise on account of his giving assistance or using influence in, or having given assistance or used influence in, promoting, administering, executing or procuring (including any amendment, suspension or cancellation) of any contract (including a subcontract) with a public body.

Section 384. Corrupt practices, Penal Code

If

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal's affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; he is guilty of an offence.

Section 25A. Trading in influence, Corruption and Economic Crime (Amendment) Act No. 6 of 2013 (introducing a new offence of Trading in Influence)

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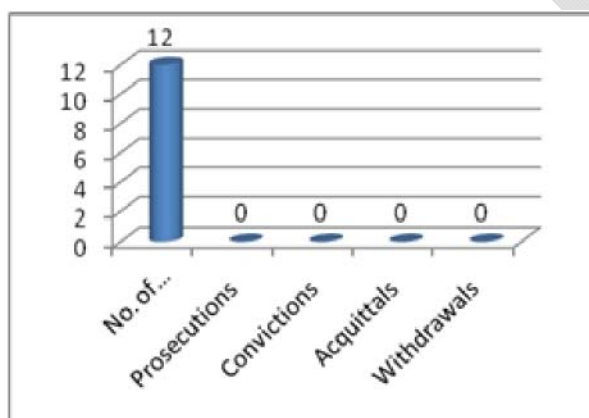
(2) A public officer or any other person shall be guilty of an offence if he or she directly or indirectly solicits or accepts, a valuable consideration for himself or herself or for another person, in order that the public officer or the person abuses his or her real or supposed influence with a view to obtaining from a public body a valuable consideration.

132. Botswana provided the following cases and statistics.

As stipulated above (under UNCAC article 18(a)), the charges that are currently pending prosecution relate to Section 384 (a) of the Penal Code.

Section 29(1) (For the period 2010-2011)

No. of investigations	Prosecutions	Convictions	Acquittals	Withdrawals
12	0	0	0	0



Twelve cases were charged under this section and no cases were sent to the DPP for prosecution consideration. The one that is before the courts is a case brought forward from previous years.

133. Botswana indicated that there have been no cases to evidence implementation since the amendment to CECA was enacted in 2013.

(b) Observations on the implementation of the article

134. Botswana has fully criminalized the passive form of trading in influence by the introduction of the offence in Section 25A (2) of the Corruption and Economic Crime (Amendment) Act, 2013.

135. Additionally, Sections 101 and 384(a) of the Penal Code as well as 29 (1) of CECA contain measures relevant to criminalizing trading in influence

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

136. Botswana cited the following measures.

Section 104. Abuse of office, Penal Code

(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of an offence.

(2) If the act is done or directed to be done for purposes of gain he is liable to imprisonment for a term not exceeding three years.

(3) No prosecution for an offence under this section shall be instituted without the written consent of the Director of Public Prosecutions.

Section 100. Extortion by public officer, Penal Code

Any person who, being employed in the public service, takes or accepts from any person for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, or any promise of such reward, is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

Section 24A. Abuse of public office, Corruption and Economic Crime (Amendment) Act No. 6 of 2013 (introducing a new offence of Abuse of Office, which is broader than the Penal Code offence).

(1) A public officer is guilty of corruption if he or she directly or indirectly, uses his or her public office or position in a public body to obtain any valuable consideration whether for the benefit of himself or herself or for any other person.

(2) For the purposes of sub-section (1) proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public officer, or any relative or any associate of his or hers has an interest, whether directly or indirectly, is in the absence of evidence to the contrary which raises reasonable doubt, sufficient evidence that the public officer has corruptly used his or her office or position in the public body in order to obtain a gratification.

(3) Any person who contravenes sub-section (1) shall be guilty of an offence and shall be liable on conviction to a fine of P5000-00 or to imprisonment for a term not exceeding three years or to both.

Section 31. Conflict of Interest, Corruption and Economic Crime (Amendment) Act No. 6 of 2013

(1) A member or employee of a public body is guilty of corruption if –

(a) He or she, the immediate member of his or her family has a direct or indirect interest, in any company or undertaking with which such body proposes to deal; or

(b) He or she has a personal interest in any decision which such body is to make,

and he or she, knowingly fails to disclose the nature of such interest, or votes or participates in the proceedings of such body relating to such dealing or decision without disclosing the nature of his or her interest.

(2) It is a defence to a charge under this section if the member or employee of a public body having an interest, has first made, in writing, to his or her appointing authority, the fullest disclosure of the exact nature of his or her interest and has been permitted thereafter to take part in the proceedings relating to such dealing or decision.

(3) For the purposes of this section –

(a) “direct interest in a company or undertaking” means a member or employee of a public body or the immediate member of the family of the member or employee of a public body –

(i) holds a position in,

(ii) is an employee of,

(iii) is a shareholder in, or

(iv) gives services for remuneration or reward to,
a company or undertaking referred to in subsection (1).

(b) “immediate member of the family” means the spouse, son, daughter, sibling or parent of the member or employee of a public body;

(c) “indirect interest in a company or undertaking” means an employee, agent or nominee of a member or employee of a public body or his or her immediate member of the family has a direct interest in a company or undertaking referred to in subsection (1).

137. Botswana provided the following cases and statistics.

The DCEC received information from a source alleging abuse of office by a certain Land Board Secretary, who is now Director of Land Board Services. Allegedly, on 22 May 2008, the officer applied for a borehole point to the north of a small village in a communal area. It is alleged that the officer did not go to the area in person to prospect for a suitable spot, but that instead he used information available to him by virtue of his position to identify the site. Allegedly, this information was not readily available to the public. The source complained that this has disadvantaged other public applicants, as evidenced by a legitimate concern made by one complainant to the Hukuntsi Sub Land Board. The matter is currently at DPP and charge sheets are being drafted.

The State v Mogi Ditsele CMMSP 000267/11

The accused person, an administrator at a government hospital, was tasked with writing a letter inviting potential drivers who had already undergone an interview to be hired for further tests at the Central Transport Organization. She then also invited a personal friend who had never been interviewed. When another interviewed candidate passed rather than her preferred candidate, she refused to collect this other person's results and only collected those of the preferred candidate, evidently in an attempt that the preferred candidate be appointed, although this person had never gone through the interviews, as is normal procedure. The accused was charged with abuse of office under Section 104 of the Penal Code and the matter is currently pending before the courts.

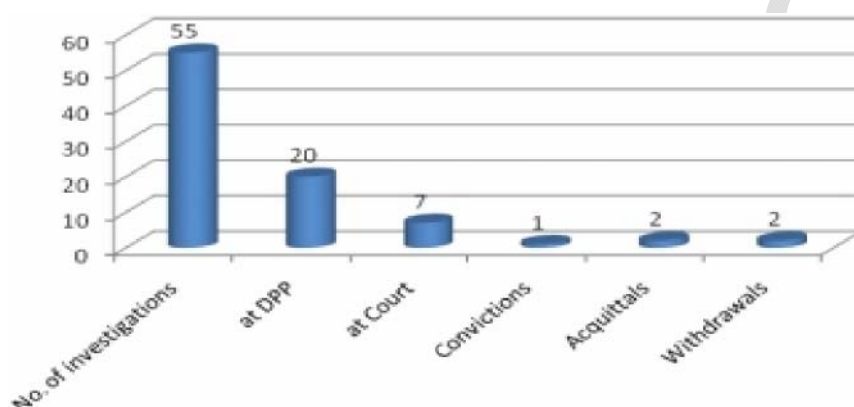
The State v Andrew Pitse CMMN 000355/2011

The accused person was an employee of the Tawana Land Board, a public body and also a body corporate. An entity called the Okavango Community Trust applied for

permission to use land for some purpose that did not meet the favour of the Board. Mr. Pitse then used his position as the Board Secretary to write the Trust a letter stating that their request had been approved. It was suspected that he had been given some valuable consideration in contravention of Section 24(1) of the Corruption and Economic Crime Act, but no evidence was found to support this. He was therefore charged with abuse of office under Section 104 of the Penal Code and the case is currently awaiting judgment.

Section 104 (For the period 2010-2011)

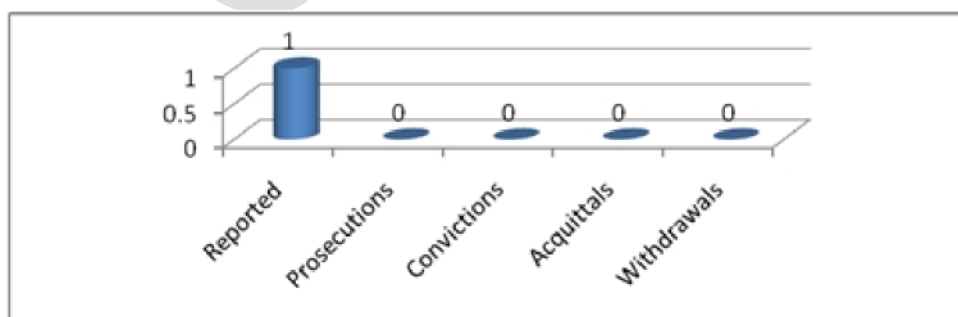
No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
55	20	7	1	2	2



There were 55 investigation cases charged under Section 104 of the Penal Code and 20 cases were sent to the DPP for prosecution consideration; there was one conviction, two acquittals and two withdrawals. The discrepancies between the numbers are that not all the investigated cases were sent to DPP, and not all were prosecuted as some are ultimately closed in the DCEC without recourse to the DPP.

Section 100 (For the period 2010-2011)

No. of Cases report	Prosecutions	Convictions	Acquittals	Withdrawals
1	0	0	0	0



There was one case charged under Section 100 of the Penal Code.

(b) Observations on the implementation of the article

138. Botswana has fully criminalized abuse of functions in Section 24A of the Corruption and Economic Crime (Amendment) Act, 2013. Sections 104 and 100 of the Penal Code also contain relevant elements implementing article 19 of the Convention. Case examples and statistics were provided.

(c) Challenges, where applicable

139. Botswana has identified the following challenges in fully implementing the article under review:

1. Limited resources for implementation: The latest amendment of the Corruption and Economic Crime Act requires raising awareness to the relevant stakeholders and the public. This requires resources in terms of finances and technical support.

(d) Technical assistance needs

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

1. Development of an action plan for implementation: The recent amendments need to be implemented and therefore there is a need for an action plan on the new provisions.

141. Botswana indicated that the above assistance has not been previously provided.

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

142. Botswana indicated that it has partially implemented the article under review. While legislation is in place, the challenge faced by Botswana relates to staffing constraints where there is a dearth of experience in financial investigations and tracing assets and their acquisition.

143. Botswana cited the following measures.

Section 34. Possession of unexplained wealth, Corruption and Economic Crime Act, 1994

(1) The Director or any officer of the Directorate authorized in writing by the Director may investigate any person where there are reasonable grounds to suspect that that person –

(a) maintains a standard of living above that which is commensurate with his present or past known sources of income or assets; or

(b) is in control or possession of pecuniary resources or property disproportionate to his past known sources of income or assets.

(2) A person is guilty of corruption if he fails to give a satisfactory explanation to the Director or the officer conducting the investigation under subsection (1) as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control or possession.

(3) Where a court is satisfied in any proceedings for an offence under subsection (2) that, having regard to the closeness of his relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise in behalf of the accused, or acquired such resources or property as a gift, or loan without adequate consideration, from the accused, such resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused

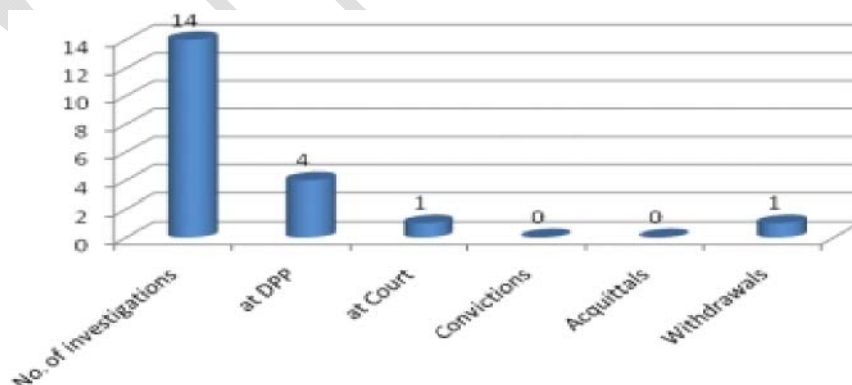
144. Botswana provided the following case and statistics.

The State v William

In this case a police officer attached to the police salaries department swindled the government of large amounts of money by allegedly syphoning funds to ghost employees. His wife, although not an employee of the government, was also on the government payroll. The matter has long been pending before the courts whilst the accused's property representing the proceeds of the crime has been impounded pending completion of the matter at court. Botswana's system of asset forfeiture is conviction-based. This case would be a retrial, as the matter was heard before and the High Court ordered a retrial.

Section 34 (For the period 2010-2011)

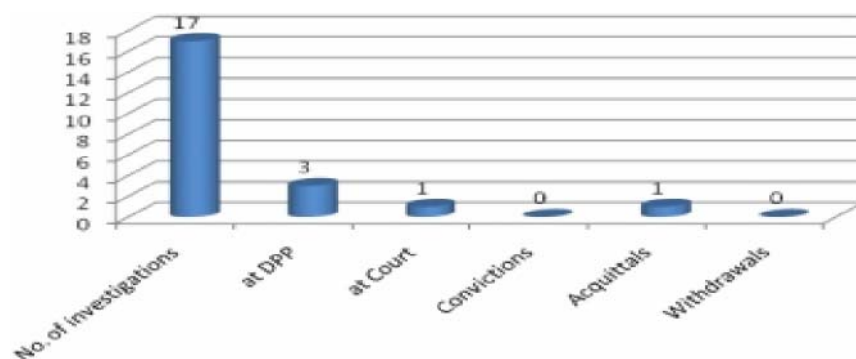
No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
19	4	1	0	1	1



14 investigation cases were investigated under Section 34 of the Corruption and Economic Crime Act, and there were 4 (four) cases sent for advice to the DPP. There was 1 (one) registered case at court and 1 (case) was withdrawn.

Section 34(1) (For the period 2010-2011)

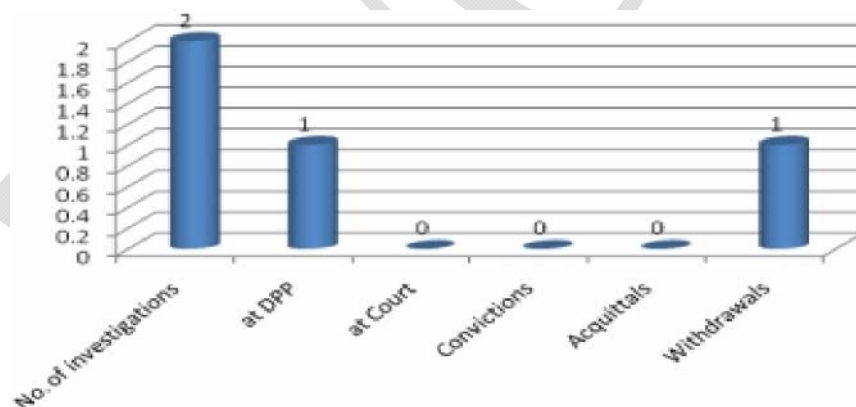
No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
17	3	1	0	1	0



There were 17 investigation cases under Section 34(1) of the Corruption and Economic Crime. Three (3) cases were sent to the DPP. There was 1 (one) case at court and 1 (one) acquittal. There were no convictions or withdrawals. This means that the rest have either been closed as undetected or are still under investigation.

Section 34(2) (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
2	1	0	0	0	1



There were two investigation cases under Section 34(2) of the Corruption and Economic Crime Act. There was one case sent to DPP for advice and one case was withdrawn.

145. Botswana indicated that it is partly compliant with the article under review, but there needs to be an improvement in the capacity of the officers tasked with the investigation of matters falling under this UNCAC article.

(b) Observations on the implementation of the article

146. Botswana has fully criminalized illicit enrichment in Section 34 CECA and provided case examples.

(c) Challenges, where applicable

147. Botswana identified the following challenge in fully implementing the article under review:

1. Limited capacity: Officers are not fully conversant with investigation of offences under this UNCAC article.

(d) Technical assistance needs

148. Botswana 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: This would help identify the best way to approach investigations of this nature and therefore equip officers of the DCEC.
2. On-site assistance by an anti-corruption expert: An onsite anti-corruption expert would assist in directing the work of the investigators of the DCEC.
3. Development of an action plan for implementation: As above.

149. Botswana has indicated that the forms of technical assistance previously mentioned have been partially provided.

The US Treasury has been offering training assistance through Botswana's Financial Intelligence Agency where participants in the DCEC, the police and reporting authorities were trained.

Training was also done by AUSTRAC, Australia's anti-money laundering and counter-terrorism financing regulator, which ran workshops for concerned parties.

In 2011, the US Treasury Department, Office of Technical Assistance, collaborated with Botswana's International Law Enforcement Agency to facilitate two training workshops for the Law Enforcement Agencies on financial investigation techniques. The first workshop (part one) was held from 9-13 May 2011 and second one (advanced module) was conducted on 26-30 March 2012.

In 2013, the US Department of Justice through Botswana's Financial Intelligence Agency offered technical assistance on "Financial Investigative Skills for Intellectual Property and Other White Collar Crimes". The workshop was held in Capetown, South Africa and was attended by other African countries. A copy of the programme was provided to the reviewers.

150. Botswana has indicated that an extension or expansion of such assistance would help it better implement the article under review.

Article 21 Bribery in the private sector

Subparagraph (a)

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

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

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

151. Botswana cited the following measures.

Division VIII, Offences relating to corrupt practices

Section 383. Interpretation, Penal Code

(1) For the purposes of this Division, the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(2) A public officer and any person serving under any local authority or any other public body having power to impose rates or entrusted with the expenditure of any Government funds or grants and a member of any such authority or board or other public body is an agent within the meaning of this Division.

Section 384. Corrupt practices, Penal Code

If,

(b) any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

(c) any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, 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 particulars, and which to his knowledge is intended to mislead the principal, he is guilty of an offence.

Section 28. Corrupt transaction by or with agents, Corruption and Economic Crime Act

(2) A person is guilty of corruption if he corruptly gives or agrees to give or offers to give to any agent any valuable consideration 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 his principal's affairs or business.

Section 30. Bribery for procuring withdrawal of tender, Corruption and Economic Crime Act

(2) A person is guilty of corruption if he directly or indirectly gives or agrees or offers to give any other person any valuable consideration as an inducement or reward for or

otherwise on account of the withdrawal of a tender, or the refraining from the making of a tender for such a contract as is referred to in subsection (1).

Section 94, Electoral Act

The following persons shall be guilty of bribery—

(a) any person who directly or indirectly, by himself or by any other person on his behalf, gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavor to procure, any money or valuable consideration to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to or refrain from voting, or corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting, at any election;

(b) any person who directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, promises or promises to procure or to endeavor to procure, any office or employment to or for any voter, or to or for any other person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any voter having voted or refrained from voting, at any election;

(c) any person who directly or indirectly, from the time at which nomination papers may be delivered to the returning officer in the constituency concerned until the declaration of the result of the poll by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement or agreement as aforesaid to or for any person, in order to induce such person or procure, or to endeavor to procure, the return of any other person as a Member of the National Assembly of the vote of any voter at any election;

(d) any person who, upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procures, or engages, promises or endeavors to procure, the return of any person as a Member of the National Assembly or the vote of any voter at any election;

(e) any person who advances or pays or causes to be paid any money to or for the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election;

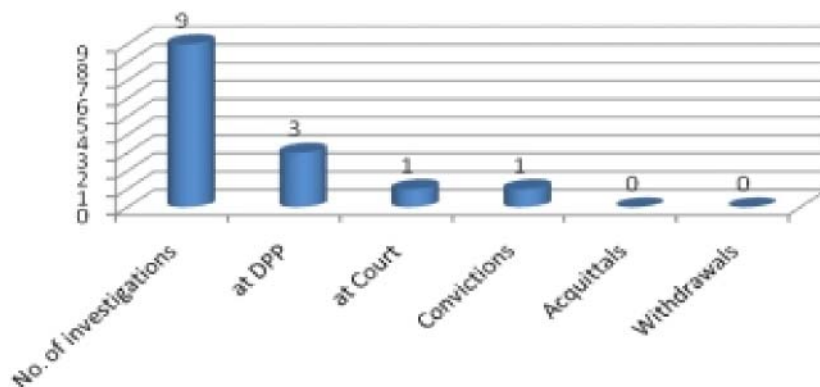
152. Botswana cited the following case and statistics.

The State v Mompoloki Kalasi CMMVL 000146/12

One of the accused persons was a registry clerk at a local university, Limkokwing University of Creative Technology, which is a private institution. He solicited and accepted bribes from students who had failed their examinations and thereafter altered the results to purport that those students had passed the exams. He was arrested and charged under Section 28 (1) of the Corruption and Economic Crime Act. Relevant to paragraph (a) of UNCAC article 21, the students in this case were charged with offering a bribe to a private sector employee so that he act in their favor. The students were ultimately used as accomplice witnesses.

Section 28(2), Corruption and Economic Crime Act (For the period 2010-2011)

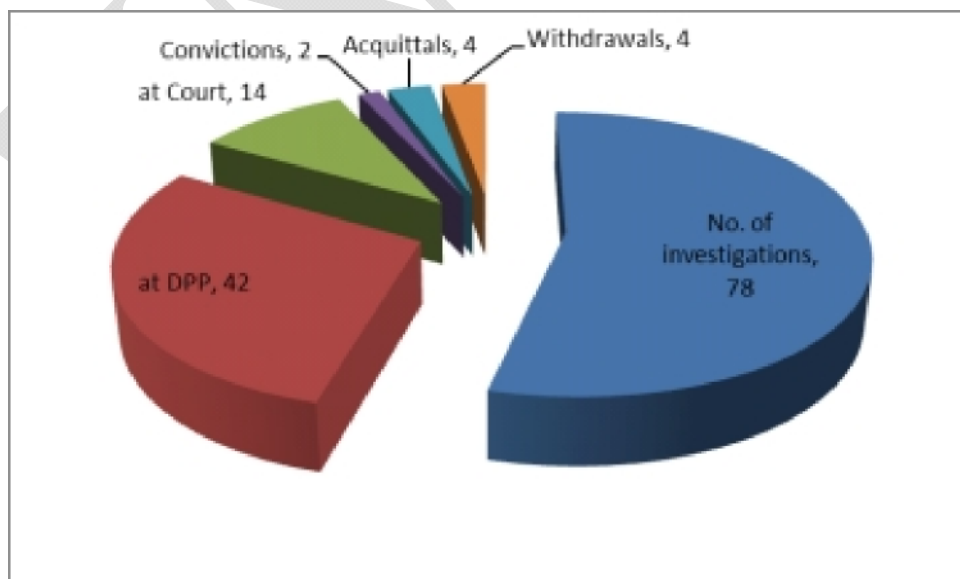
No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
9	3	1	1	0	0



Nine investigation cases were charged under Section 28(2) of the Corruption and Economic Crime Act. Three cases were sent to the DPP for prosecution consideration and one case secured a conviction. There were no acquittals or withdrawals. The remaining cases are either pending closure in the DCEC or have been closed without being referred to the DPP.

Sections 383 and 384, Penal Code (both active and passive bribery) (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
78	42	14	2	4	4



The above statistics indicate that there were 78 cases under investigation, 42 cases before the DPP, 14 cases before court and 10 completed cases under the stipulated

Penal Code sections. These statistics cover both articles 21(a) and (b) of the Convention.

(b) Observations on the implementation of the article

153. Botswana partially criminalized active bribery in the private sector in Section 384 (b) and (c) of the Penal Code and Section 28 (2) of the Corruption and Economic Crime Act. It is noted that the cited measures under the Penal Code and CECA are limited to bribery involving relations between a principal and an agent, and do not encompass transactions outside of this context. Botswana may wish to consider broadening the scope of criminalization of corruption in the private sector beyond these situations.

154. Additionally, the reviewers noted that Section 30 (2) of CECA criminalizes, for all persons, corruption in regard to public tendering procedures. This could include cases in which a private sector company bribes another to neglect its business opportunities and not to apply for a tender. Lastly, Section 94 of the Electoral Law criminalizes corruption in electoral matters.

Article 21 Bribery in the private sector

Subparagraph (b)

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

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

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

155. Botswana cited the following measures.

Division VIII, Offences relating to corrupt practices

Section 383. Interpretation, Penal Code

(1) For the purposes of this Division, the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another; and the expression "principal" includes an employer.

(2) A public officer and any person serving under any local authority or any other public body having power to impose rates or entrusted with the expenditure of any Government funds or grants and a member of any such authority or board or other public body is an agent within the meaning of this Division.

Section 384. Corrupt practices, Penal Code

If

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an

inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal's affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

he is guilty of an offence

Section 28. Corrupt transaction by or with agent, Corruption and Economic Crime Act

(1) An agent is guilty of corruption if he corruptly accepts, or agrees or offers to accept from any person, for himself or for any other person any valuable consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business.

Section 30. Bribery for procuring withdrawal of tender, CECA

(1) A person is guilty of corruption if he directly or indirectly accepts or agrees or offers to accept for himself or for any other person any valuable consideration as an inducement or reward for or otherwise on account of the withdrawal of a tender, or the refraining from the making of a tender, for any contract with a public body for the performance of any work, the providing of any service, the doing of any thing or the supplying of any article, material or substance.

Section 94(f), Electoral Act

(f) any voter who before or during any election, directly or indirectly, by himself or any other person on his behalf receives or contracts for any money, gift, loan or valuable consideration, office, place or employment, for himself or for any other person, for voting or agreeing to vote or for agreeing to refrain from voting at any such election: Provided that the aforesaid provisions shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any expenses bona fide incurred at or concerning any election.

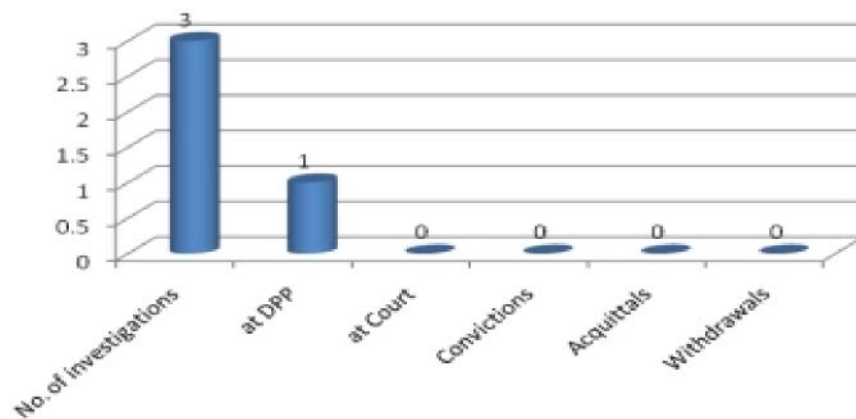
156. Botswana provided the following cases and statistics.

The State v Mompoloki Kalasi CMMVL 000146/ 12 (referred to above)

The accused person was an employee of a local university, the Limkokwing University of Creative Technology, which is a private institution. He was employed as a registry clerk. He solicited and got paid by students of the institution who had failed their examinations so that in return he altered records to pass the students. He had at the time of arrest received P2000.00 (two thousand pula) from about four students. The accused person was tried and convicted and sentenced to four (4) years imprisonment by the magistrates court.

Section 28(1), Corruption and Economic Crime Act (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
3	1	0	0	0	0



Three (3) cases were charged under Section 28(1) of CECA and one case was sent for prosecution consideration.

157. Botswana referred to the statistics for Sections 383 and 384 of the Penal Code (for both active and passive bribery) included under article 21(a) of the Convention above.

(b) Observations on the implementation of the article

158. Botswana partially criminalized bribery in the private sector in Sections 384 (a) of the Penal Code and 28 (1) of CECA. Additionally, Section 30 of CECA criminalizes corruption in regard to public tendering processes and Section 94 (f) of the Electoral Law criminalizes corruption in electoral matters.

159. As pointed out in the observations under article 21(a) of the Convention, it is noted that the cited measures under the Penal Code and CECA are limited to bribery involving relations between a principal and an agent, and do not encompass transactions outside of this context. Botswana may wish to consider broadening the scope of criminalization of corruption in the private sector beyond these situations.

160. The illustrative cases provided by Botswana show implementation of the provision 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

161. Botswana cited the following measures.

Penal Code

Section 322. Fraudulent appropriation or accounting by directors or officers,

Any person who

(a) being a director or officer of a corporation or company, receives or possesses himself as such of any of the property of the corporation or company otherwise than in payment of a just debt or demand, and, with intent to defraud, omits either to make a full and true entry thereof in the books and accounts of the corporation or company, or to cause or direct such an entry to be made therein.

277. Stealing by clerks and servants

If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for a term not exceeding seven years.

278. Stealing by directors or officers of companies

If the offender is a director or officer of a corporation or company, and the thing stolen is the property of the corporation or company, he is liable to imprisonment for a term not exceeding seven years.

279. Stealing by agents, etc.

If the thing stolen is any of the following things, that is to say

- (a) property which has been received by the offender with a power of attorney for the disposition thereof;
- (b) property which has been entrusted to the offender either alone or jointly with any other person for him to retain in safe custody or to apply, pay, or deliver for any purpose or to any person the same or any part thereof or any proceeds thereof;
- (c) property which has been received by the offender either alone or jointly with any other person for or on account of any other person;
- (d) the whole or part of the proceeds of any valuable security which has been received by the offender with a direction that the proceeds thereof should be applied to any purpose or paid to any person specified in the direction;
- (e) the whole or part of the proceeds arising from any disposition of any property, which have been received by the offender by virtue of a power of attorney for such disposition, such power of attorney having been received by the offender with a direction that such proceeds should be applied to any purpose or paid to any person specified in the direction, the offender is liable to imprisonment for a term not exceeding seven years.

162. Botswana indicated that the collaboration with the private sector through the Botswana Confederation of Commerce Industry and Manpower, on the one hand, and the DCEC, on the other, has helped to develop a policy on the conduct of the private sector, and this is an intervention to which the private sector has been slowly but surely signing up for.

163. Botswana provided the following cases and statistics.

1. Several cases that have been investigated and prosecuted under Section 277 of the Penal Code. One example is where an administration officer in a government school stole school fees amounting to P927.00. This was discovered after the accused failed to produce receipts or books of record for inspection. The students had also raised complaints that they were not issued with receipts after making payment. The police investigated and the accused accordingly brought to book.

2. Another example under section 279 of the Penal Code is that on 6 October 2010, a victim reported that she engaged an agent to facilitate the sale of her four (4) plots of land. The suspect sold them all in the amount of P832,500 but gave the victim a cheque amounting to P210,000 with a difference of P628,500. He promised to pay the complainant the remaining balance but never fulfilled his promise. The matter was ultimately reported to the police.

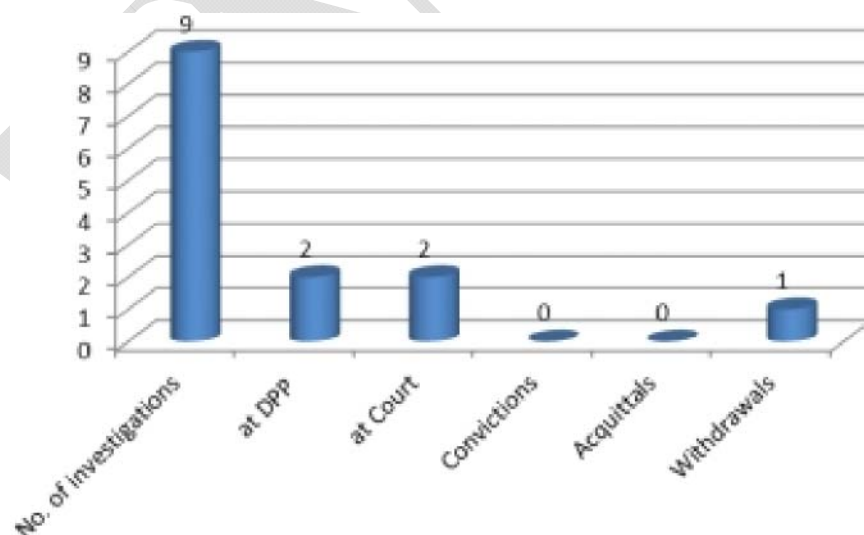
3. Under Section 278 of the Penal Code, on 15 April 2009, a company director reported that his co-director had withdrawn the sum of P25,000.00 from the company account without the director's knowledge. The suspect connived with the former Director, who resigned from the company without cancelling his signing powers at the bank. Both suspects used company cheque books to withdraw the money. The matter was reported to the police and handled accordingly.

The State v Portia Rakorong: in this case the accused stole money from her employer, a financial institution. The matter is still before court.

Malebogo Seeletso and another v The State (High Court Criminal Appeal No. CLHLB-000085-08). The appellants were charged in January 2003 with one count of Stealing by Servant, in contravention of Sections 271 and 277 of the Penal Code. It was alleged that the sum of P366, 045-94 was stolen by them from their employer, the Gaborone Private Hospital. A copy of the judgment was provided to the reviewers.

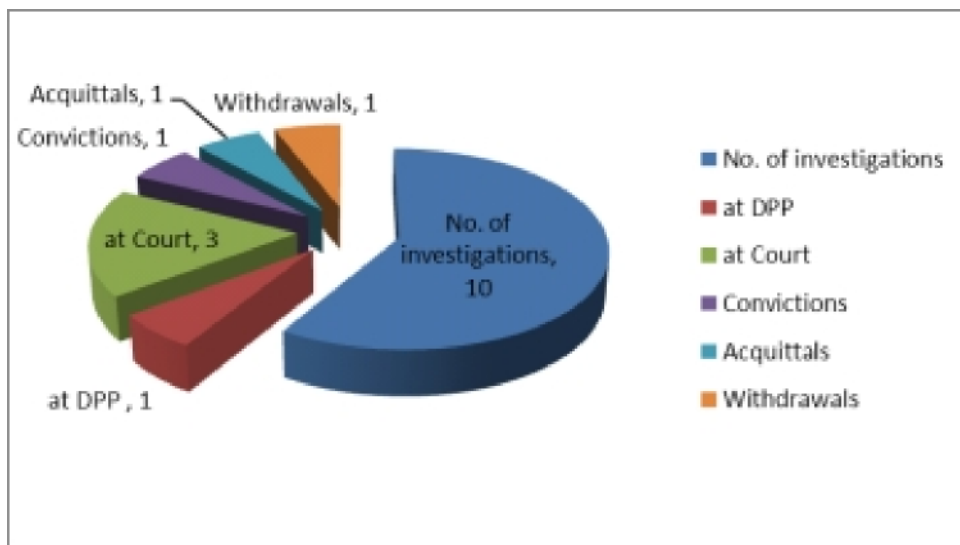
Section 277, Penal Code (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
9	2	2	0	0	1



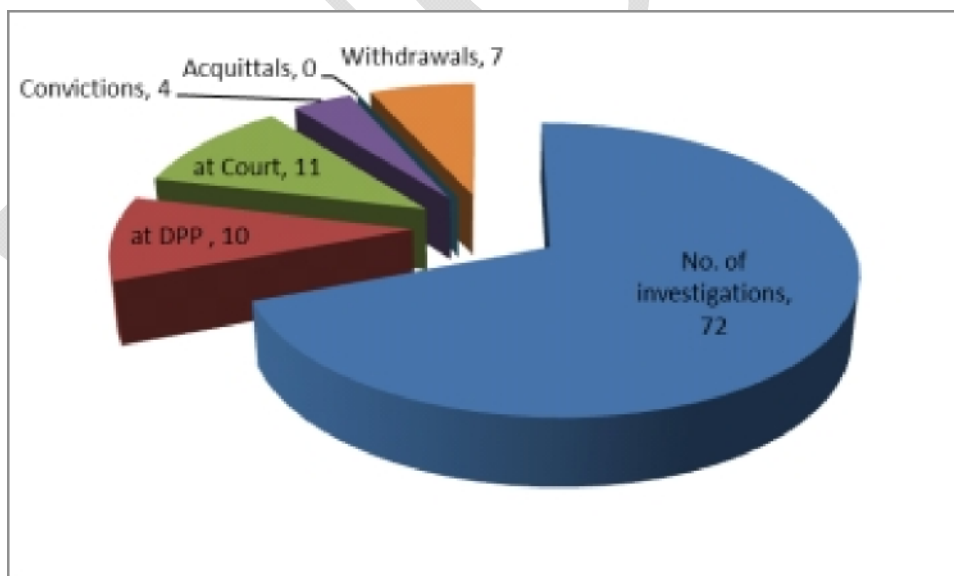
Section 278, Penal Code (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
10	1	3	1	1	1



Section 279, Penal Code (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
72	10	11	4	0	7



Discrepancies in the numbers are for cases that have either been closed for a lack of sufficient evidence or are still pending investigations.

(b) Observations on the implementation of the article

164. The reviewing experts acknowledge that Botswana has considered the criminalization of embezzlement in the private sector. Section 322 and Sections 277 to 279 of the Penal Code contain relevant elements of the article under review.
165. The reviewing experts noted that the content is limited to directors and officers of corporations or companies and that this should be able to capture the vast majority of cases. However, as the Convention refers to “all persons who direct or work in any capacity for a private sector entity”, Botswana may wish to monitor the application of the relevant sections of the Penal Code, as well as case law to assess if gaps exist.
166. In addition to Section 322 of the Penal Code, Sections 323 and 324 of the Penal Code (cited in relation to the implementation of article 17 of the Convention) also contain relevant provisions.
167. The case examples provided show that embezzlement cases can also be covered by the application of Sections 277 to 279 of the Penal Code.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a)

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

168. Botswana cited the following measures.

Section 14, Proceeds of Serious Crime Act, 1990 (as amended) (“POSCA”)

- (1) For the purposes of this section, a person shall be deemed to engage in money laundering if he engages, directly or indirectly, in a transaction that involves money, or other property, that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, or if he receives, possesses, conceals, disposes of, or brings into Botswana, any money, or other property that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, and the person knows, or ought reasonably to know, that such money or other property is derived or realised, directly or indirectly, from some sort of unlawful activity.
- (2) A person who engages in money laundering shall be guilty of an offence and shall be liable, if he is an individual to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then,

every person who at the time of the commission of the offence was a director, manager or partner of such body shall be liable to a fine not exceeding P25 000.

Section 15, Proceeds of Serious Crime Act, 1990 (as amended)

(1) Any person who receives, possesses, conceals, disposes of or brings into Botswana any money, or other property, that may reasonably be suspected of being proceeds of a serious offence, shall be guilty of an offence and liable, if he is an individual, to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then, every person who at the time of the commission of the offence was a director, manager or partner of such body, shall be liable to a fine not exceeding P25 000.

Section 2(a), Proceeds of Serious Crimes (Amendment) Act

Section 15 of the Proceeds of Serious Crime (hereinafter referred to as "the Act", is amended

(a) by substituting for subsection (2) thereof the following new subsection "(2) For the purposes of this section, references in subsection (1) to

(i) concealing money or property shall include references to concealing or disguising the nature, source, location, disposition, movement, ownership or any right with respect to such money or property;

(ii) disposing of any money or property shall include references to converting transferring or removing such money or property and the provision of advice or assistance in relation to disposing, converting, transferring or removing such money or property."

169. Botswana provided the following cases.

The State v Gabriel Kanjabanga

In this case the accused person was a practicing attorney. He stole money from a municipality by forging cheques that were drawn at a local bank. The attorney was ultimately arrested and investigated. Prior to the matter being registered in court, the attorney approached the complainants and offered to pay back the money amounting to thousands of pula. He did in fact pay, but the DPP maintained that he would prefer charges against the attorney. The matter is currently pending allocation to a presiding officer. The lawyer has been charged with money laundering, as he tried to conceal the origin of the money by putting it under the lawyer's law firm trust account.

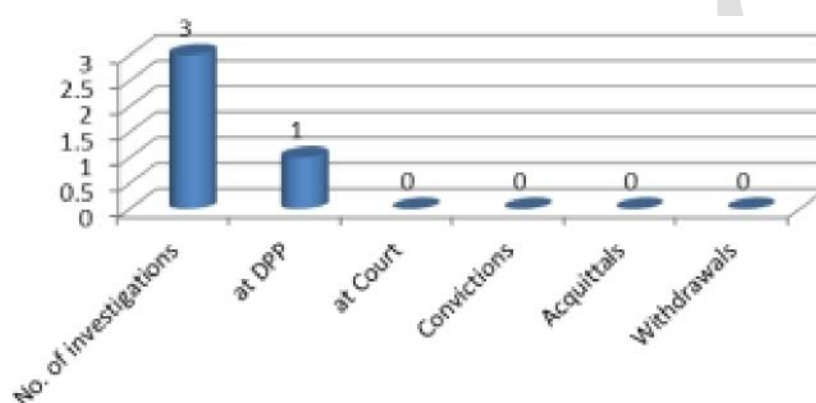
The State v Lyndon Mothusi and Others (referred to above)

The accused person, including his law firm, was an admitted attorney who forged cheques drawn on several banks and ultimately deposited the money on his law firm's trust account. This money was ultimately removed from the trust account on the pretention that services had been offered. Even on the trust account the proceeds were concealed therein as belonging to a client. After withdrawing the money the accused bought several vehicles for his own use further disguising the true nature and source of the funds. The accused was tried and convicted at the lower court, but discharged at the High Court due to the fact that the record of the trial had gone missing at court after the completion of the trial and at appeal no record of the proceedings could be submitted to the High Court as is procedural for it to consider the appeal.

170. Botswana provided the following statistical data. Officials noted that the number of cases might not tally with the number of reported and tried cases, because some cases are carried over from years that are not under assessment. Further, the number of reported and tried cases might be lower than the actual number, as the prosecutors in Botswana have mostly relied on Section 319 of the Criminal Procedure and Evidence Act to take proceeds of crime from offenders after the completion of the trial.

**Number of Cases under POSCA 2010/2011
Section 14**

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
3	1	0	0	0	0



Three investigation cases were charged under Section 14 of the Proceeds of Serious Crime Act in 2010 and 2011. There were no cases sent for prosecution to the DPP.

N.B. There is currently a pending bill that is at consultation stage with Parliament to amend the Proceeds of Serious Crimes Act (POSCA). The object of the bill, which is spearheaded by the Ministry of Defense, Justice and Security, is to repeal and re-enact the POSCA as the Proceeds and Instruments of Crime Act.

(b) Observations on the implementation of the article

171. Botswana has largely implemented the content of the paragraph in question. Botswana's law extends to legal persons and even punishes directors and managers of legal entities.

172. Moreover, the mental element in Section 15, POSCA ("property that may reasonably be suspected of being proceeds" of crime) and in Section 14 ("the person knows, or ought reasonably to know") is broader than the element of actual knowledge in UNCAC.

173. Under the current legislation, money laundering extends to proceeds of "serious offences" – i.e. those punishable by imprisonment of not less than two years. This includes the majority of UNCAC offences, but not for example embezzlement or misappropriation under Section 102 of the Penal Code (UNCAC article 17), which

carries a maximum one-year imprisonment term. Moreover, money laundering by companies is excluded, since the relevant conduct is punishable by fines. Please see paragraph 2 of the article below.

174. Under the current legislation, the punishment for money laundering is imprisonment for up to three years and/or a fine not exceeding P10,000. Botswana may wish to consider whether the relevant penalties for money laundering are sufficient to deter the commission of the offence, in particular for legal persons (fine not exceeding P25,000 established under POSCA). In this context it is noted that the applicable sanctions were not increased in the 2000 amendment to the 1990 Proceeds of Serious Crime Act. The need to revisit the applicable penalties for money laundering seems to be borne out in practice, since officials at the Office of the DPP explained that they routinely charge obtaining by false pretences (Section 317, Penal Code), which carries a maximum 7-year sentence rather than money laundering, which carries a maximum three year sentence.

175. During the country visit it was explained that the pending bill to amend the Proceeds of Serious Crimes Act had been passed by Cabinet and been officially gazetted, and was due to be submitted for approval by Parliament at its July 2014 session. Under the bill, the scope of predicate offences would include all criminal offences. In addition to raising the threshold for predicate crimes, it was explained by officials that the bill would provide for non-conviction based forfeiture (administrative and civil), including automatic forfeiture where a defendant failed to respond to the relevant confiscation or pecuniary penalty order (see UNCAC article 31 below). It would also raise the applicable penalties for money laundering. This was confirmed by the reviewers, since Section 47 of the Bill provides for a fine not exceeding P 20,000,000, or a term of imprisonment not exceeding 20 years, or both. The Bill also extends the offence to “proceeds of any crime” (Section 47).

The reviewers welcome this amendment. Should the relevant bill not be enacted, Botswana should ensure that the covered predicate offences and penalties for money laundering are addressed in line with UNCAC.

176. Statistics by the Financial Intelligence Agency (FIA) regarding the number of suspicious transaction reports or cash transaction reports collected or analyzed, and the number of cases referred to law enforcement agencies for further investigation or prosecution are not yet regularly published and thus no information was available on typology and money laundering trends. During the country visit, officials at the FIA explained that annual reporting was expected to begin in the near future, as the agency only recently began operating under the Financial Intelligence Act in 2009.

177. As noted under UNCAC article 36, the investigation and prosecution of money laundering offences is shared between various investigative agencies equipped with the key investigation tools, thus requiring sufficient coordination between these agencies. Investigations can be conducted by the DCEC, the Botswana Police Service (BPS), and the Botswana Unified Revenue Service (BURS). DCEC in particular has the mandate to investigate money laundering, especially when linked to corruption offences. The relevant provision appears to be Section 6 of the Corruption and Economic Crime Act, though the officials at the DCEC were unable to confirm the relevant citation. Prosecutions are led by the DPP.

178. There is lack of comprehensive statistics on money laundering investigations, prosecutions and convictions, due in part to a lack of effective coordination mechanisms. It is therefore difficult to determine how many money laundering cases have been investigated and prosecuted. Overall, it was not possible for the reviewers to reach an assessment of whether the AML legislation is effectively implemented. The reviewers recommend that appropriate statistics on money laundering be collected and analyzed, and that annual reports by the FIA analyzing STRs, typology and money laundering trends be published on its website.

179. The reviewers underscore the need expressed by Botswana's officials for training on money laundering and asset tracing/confiscation for all relevant criminal justice institutions, including the DCEC, police, FIA, DPP, as well as magistrates and judges, in particular under the 2014 Proceeds of Serious Crimes amendment Bill.

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

180. Botswana cited the following measures.

Section 2(5), Proceeds of Serious Crime Act, 1990

For the purposes of this Act a person shall be deemed to have obtained the proceeds of a serious offence if he receives a payment or other reward in respect of, or derives a pecuniary advantage as a result of-

(a) the commission of the offence; or

(b) any part of a course of conduct by him, alone or in association with any other person, having as its purpose or one of its purposes the carrying out or furtherance of criminal activities, of which the commission of the offence is shown to be a part.

Section 14, Proceeds of Serious Crime Act, 1990

(1) For the purposes of this section, a person shall be deemed to engage in money laundering if he engages, directly or indirectly, in a transaction that involves money, or other property, that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, or if he receives, possesses, conceals, disposes of, or brings into Botswana, any money, or other property that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, and the person knows, or ought reasonably to know, that such money or other property is derived or realised, directly or indirectly, from some sort of unlawful activity.

(2) A person who engages in money laundering shall be guilty of an offence and shall be liable, if he is an individual to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then, every person who at the time of the commission of the offence was a director, manager or partner of such body shall be liable to a fine not exceeding P25 000.

Section 15, Proceeds of Serious Crime Act, 1990

(1) Any person who receives, possesses, conceals, disposes of or brings into Botswana any money, or other property, that may reasonably be suspected of being proceeds of a serious offence, shall be guilty of an offence and liable, if he is an individual, to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then, every person who at the time of the commission of the offence was a director, manager or partner of such body, shall be liable to a fine not exceeding P25 000.

Section 2(a), Proceeds of Serious Crimes (Amendment) Act

Section 15 of the Proceeds of Serious Crime (hereinafter referred to as "the Act", is amended

(a) by substituting for subsection (2) thereof the following new subsection- "(2) For the purposes of this section, references in subsection (1) to

(i) concealing money or property shall include references to concealing or disguising the nature, source, location, disposition, movement, ownership or any right with respect to such money or property;

(ii) disposing of any money or property shall include references to converting transferring or removing such money or property and the provision of advice or assistance in relation to disposing, converting, transferring or removing such money or property."

Other relevant provisions are:

Receiving Property Stolen or Unlawfully Obtained and Like Offences (ss 317-320, Penal Code)

317. Receiving stolen property, etc.

(1) Any person who receives or retains any property knowing or having reason to believe the same to have been stolen, or unlawfully taken, extorted, obtained or disposed of, in a manner which constitutes an offence punishable under this Code with death, or with imprisonment for three years or more, is guilty of an offence and is liable to imprisonment for a term exceeding 14 years.

(2) Any person who receives or retains any property knowing or having reason to believe the same to have been unlawfully taken, obtained, converted or disposed of in a manner which constitutes any other offence, is guilty of an offence and is liable to the same punishment as the offender by whom the property was unlawfully obtained, converted or disposed of.

(3) Any person who assists in concealing or disposing of or making away with any property which he knows or has reason to believe to have been stolen or obtained, in any way whatsoever under circumstances which amount to an offence, is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

(4) No person shall be convicted of an offence under this section unless it is proved that the property which is the subject matter of the charge has in fact been stolen, or unlawfully taken, extorted, obtained, converted or disposed of.

318. Person suspected of possessing, carrying or conveying stolen property

Any person who is found by a peace officer to be in possession of, or carrying or conveying in any manner, anything which is reasonably suspected of having been stolen or unlawfully obtained and he is unable to give a satisfactory account as to how he came by it is guilty of an offence.

181. Botswana provided the following case and statistics.

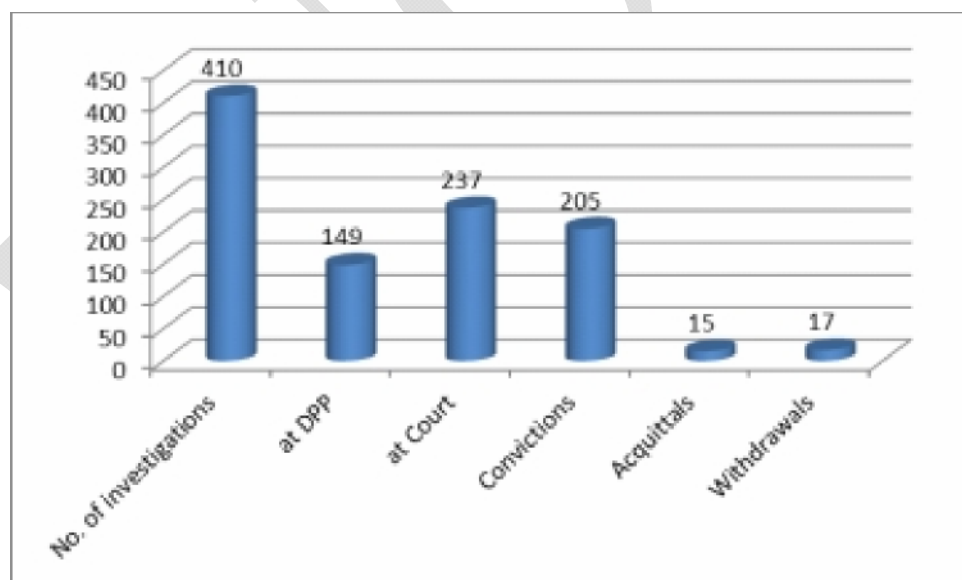
The State v Patrick Cole and Others

The accused persons obtained money from the Botswana Central Medical Stores (CMS). This was to the tune of around P17 000 000-00 (seventeen million pula). The accused persons claimed to have provided services by way of medical supplies to the CMS when in truth and in fact this was not true. After payment was made the accused persons wired the money to a bank in South Africa and withdrew parts of the proceeds with a view to using it for personal gain. They had been instrumental in the acquisition and possession of the same amount as outlined in the provision.

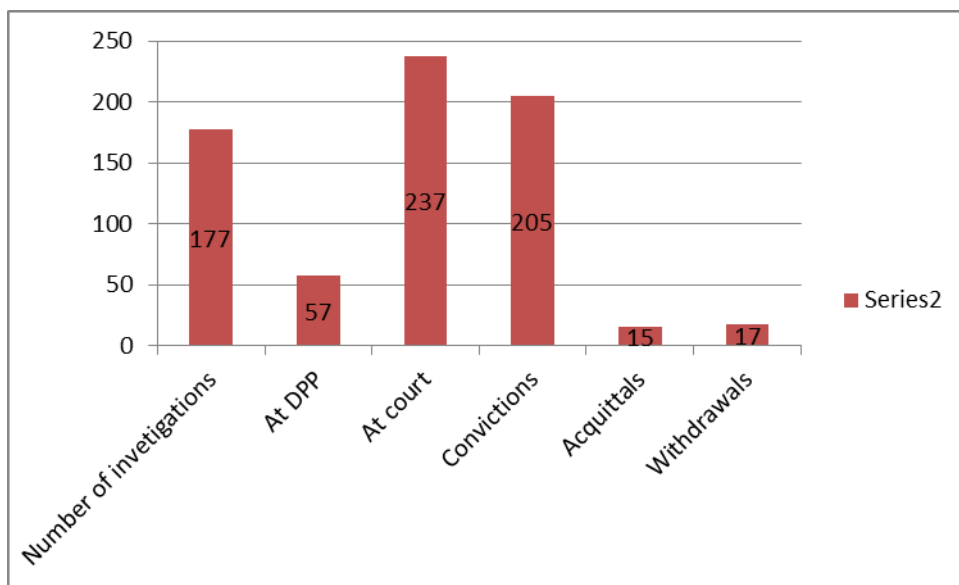
The following statistics are for relevant Penal Code sections:

Section 317, Penal Code (For the period 2010-2011)

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
410	149	237	205	15	17



Section 318, Penal Code (For the period 2010-2011)



No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
177	57	237	205	15	17

(b) Observations on the implementation of the article

182. Botswana has partially implemented the content of the subparagraph in question. The provisions cited by Botswana go beyond the elements required by paragraph 1 (b) (i) of the UNCAC, it being understood that even the person carrying or conveying a stolen object is guilty of an offence (Section 318 of the Penal Code).

183. However, the acts covered in Botswana's legislation (receiving, possessing, concealing, disposing of or bringing criminal proceeds into Botswana) do not correspond entirely to the elements of the paragraph under review, and Botswana should address this issue.

184. During the country visit, officials explained that in the case of **State v Patrick Cole and Others (Central Medical Stores)** (quoted above), the commission of the predicate offence (theft) was committed in Botswana and the money laundering occurred in South Africa, relating to funds or proceeds of crime that were deposited into bank accounts in South Africa for companies registered there. The funds were ultimately returned successfully to Botswana through the mutual legal assistance process.

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

185. Botswana provided the following information.

Penal Code, Parties to Offences (ss 21-24)

21. Principal offenders

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.

23. Counselling another to commit an offence

(1) When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

(2) In either case the person who gave counsel is deemed to have counselled the other person to commit the offence actually committed by him.

389. Attempts to commit offences

Any person who attempts to commit an offence is guilty of an offence.

390. Punishment of attempts to commit certain offences

Any person who attempts to commit an offence of such a kind that a person convicted of it is liable to the punishment of imprisonment for a term of 14 years or more, with or without other punishment, is liable, if no other punishment is provided, to imprisonment for a term not exceeding seven years.

391. Soliciting or inciting others to commit offence

Any person who solicits or incites or attempts to procure another to do any act or make any omission of such a nature that, if the act were done or the omission were made, whether by himself or that other person, an offence would thereby be committed, is guilty of an offence and liable to the same punishment as if he had himself attempted to commit that offence.

Conspiracies (ss 392-393)

392. Conspiracy to commit offence

Any person who conspires with another person to commit an offence is guilty of an offence and is liable to imprisonment for a term not exceeding seven years, or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for seven years, then to such lesser punishment.

186. Botswana provided the following cases and statistics.

The State v Lyndon Mothusi case cited previously bears reference. During the course of the trial at the magistrates court, the accused person approached a prison warden when there were allegations that one of the people alleged by the defence to have been at a prison in a village called Kasane was a fictitious person. The purpose of the approach by the accused person to the prison warden was to have him steal a prisoner docket. The two persons evidently conspired to commit the offence before the actual commission. After the theft of the docket, the document was altered to show that there was, at some point, a visit to a prisoner by the alleged fictitious person. The accused persons including their lawyer were therefore charged again. A conviction was secured at court.

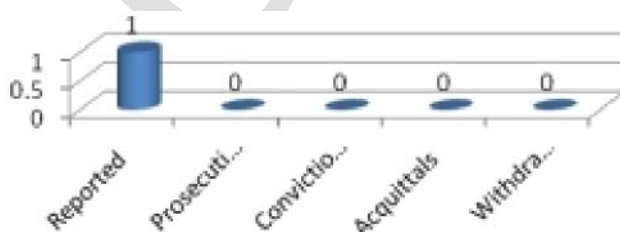
The State v Frank Molaletsi and others (CMMVL 000205/2008)

In this case, municipal employees were charged, inter alia, with having conspired to defraud the municipality in an amount of P21,000,000.00.

Statistics:

Section 389, Penal Code (For the period 2010-2011)

No. of cases reported	Prosecution	Convictions	Acquittals	Withdrawals
1	0	0	0	0

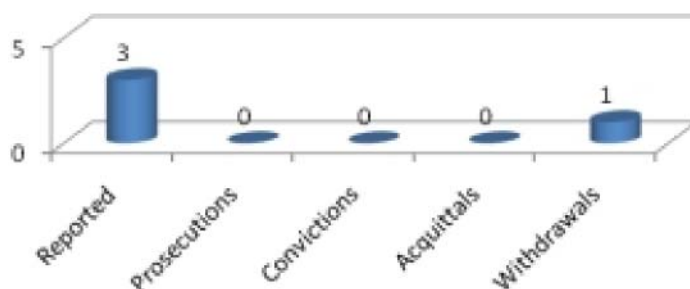


One case was charged under Section 389 of the Penal Code.

Section 392, Penal Code (For the period 2010-2011)

No. of cases	Prosecution	Convictions	Acquittals	Withdrawals
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reported				
3	0	0	0	1



There were three cases charged under Section 392 of the Penal Code, and one was sent for prosecution and ultimately withdrawn. The remaining two cases are pending investigations.

(b) Observations on the implementation of the article

187. The measures cited by Botswana on the implementation of paragraph 1 (b) (ii) of article 23 of UNCAC are consistent with the Convention because they show all the elements contained in the said paragraph. Botswana has implemented the paragraph under review. Moreover, Section 317(3) of the Penal Code addresses those who assist in concealing or disposing of criminal proceeds.

188. During the country visit officials at the office of the Director of Public Prosecution (DPP) explained that relevant measures in the Penal Code (e.g., participation) and the Criminal Procedure and Evidence Act (e.g., compensation) apply to offences under POSCA.

Article 23 Laundering of proceeds of crime

Subparagraphs 2 (a) and (b)

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;

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

189. Botswana provided the following information.

Section 2(1), Proceeds of Serious Crime Act, 1990

"serious offence" means an offence the maximum penalty for which is death, or imprisonment for not less than two years.

190. Botswana provided the following case and statistics.

The cases of **State v Frank Molaletsi, Daisy Loo and Others (CMMVL 000205/08)** and **State v Lyndon Mothusi and Others** are relevant. In both cases, because the offences were regarded as serious, proceeds of crime were recovered and forfeited to the State amounting to P24,000,000 (twenty four million pula), in the first case, and amounts worth about P1,000,000 (one million pula) and some property worth around P500,000 (five hundred thousand), in the second case. The Botswana Unified Revenue Service (BURS) participated in the investigation of the Daisy Loo case because of the potential loss of tax revenue.

(b) Observations on the implementation of the article

191. As noted above, the offences in Sections 14 and 15 of POSCA apply to “serious offences,” as defined in Section 2(1) of the Act – i.e. those punishable by imprisonment of not less than two years. This includes the majority of UNCAC offences, but not for example embezzlement or misappropriation under Section 102 of the Penal Code (UNCAC article 17), which carries a maximum one-year imprisonment term. Moreover, money laundering by companies is excluded, since the relevant conduct is punishable by fines.

192. The relevant threshold for receiving stolen property in the Penal Code (Section 317) is three years’ imprisonment or more, which excludes offences under the Electoral Act as predicate offences.

193. The reviewers welcome the draft law on the proceeds and instruments of crime that would expand the scope of predicate offences to include all criminal offences (Section 47). Should the relevant bill not be enacted, Botswana should ensure that the predicate offences for money laundering include offences under the Convention.

194. Botswana has partially implemented the paragraphs in question.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (c)

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

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

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

195. Botswana cited the following measures.

Section 2, Proceeds of Serious Crime Act

(1) In this Act, unless the context otherwise requires –

"confiscation order" has the meaning assigned to it under section 5;

"production order" means an order made under section 17 for the production of a document;

"restraining order" has the meaning assigned to it under section 8;

"serious offence" means an offence the maximum penalty for which is death, or imprisonment for not less than two years.

Section 14, Proceeds of Serious Crime Act, 1990

(1) For the purposes of this section, a person shall be deemed to engage in money laundering if he engages, directly or indirectly, in a transaction that involves money, or other property, that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, or if he receives, possesses, conceals, disposes of, or brings into Botswana, any money, or other property that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, and the person knows, or ought reasonably to know, that such money or other property is derived or realised, directly or indirectly, from some sort of unlawful activity.

(2) A person who engages in money laundering shall be guilty of an offence and shall be liable, if he is an individual to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then, every person who at the time of the commission of the offence was a director, manager or partner of such body shall be liable to a fine not exceeding P25 000.

196. Botswana explained that there is no clear case where the commission of the offence was outside the jurisdiction of Botswana and the proceeds were handled in Botswana.

(b) Observations on the implementation of the article

197. Section 14 POSCA applies to "proceeds of a serious offence, whether committed in Botswana or elsewhere". No such qualification is included in Section 15 of the Act. During the country visit, officials at the Office of the DPP confirmed that an amendment to clarify the application of Section 15 to foreign predicate offences would be helpful and the reviewers encourage such an amendment.

198. It is noted in this context that the 2014 POSCA Amendment Bill defines criminal proceeds to include "serious" foreign predicate offences, punishable by a fine of P 2,000 or 2-years' imprisonment, or both, as follows:

"proceeds" means property that was derived or realised, or substantially derived or realised, directly or indirectly, by any person from the commission of an offence or a serious crime related activity or foreign serious crime related activity and includes any property with which proceeds have been mixed;

"foreign serious crime related activity" means any act or omission that at the time of its commission, was a foreign offence that, if committed in Botswana, would have been a serious offence..."

"serious offence" means any offence for which the minimum penalty is a fine of P 2,000 or imprisonment for a period of 2 years, or to both;"

199. Thus, also under the POSCA amendment bill, not all UNCAC offences would qualify as foreign predicate offences for money laundering. Botswana should adopt measures to implement the provision under review.

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

200. Botswana indicated that it has not furnished copies of its laws to the Secretary-General of the United Nations, but copies will be forwarded immediately after completion of this review.

(b) Observations on the implementation of the article

201. It is recommended that Botswana furnish copies of its anti-money laundering laws to the United Nations by sending 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 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

202. Botswana indicated that its domestic system does not contain fundamental principles as referred to in the provision under review and indicated that an individual charged with the predicate offence may also be charged with money laundering.
203. Botswana indicated that a person can be charged with both money laundering and the predicate offence. Section 14 of the Proceeds of Serious Crimes Act envisages a situation where the accused committed the predicate offence and ultimately handles the money or proceeds in such a manner as to have laundered them.

204. Botswana referred to the case **State v Frank Molaletsi, Daisy Loo Pty Ltd and Others (CMMVL 000205/08)**, where the accused person had been charged with obtaining P21,000,000.00 from the municipal authority in Gaborone. The accused persons, some of whom were municipal employees, had connived with the owner of the company, Daisy Loo, to illicitly obtain money. The accused persons were charged with both the predicate offence and money laundering.

205. Examples cited by Botswana are **State v Lyndon Mothusi and Another; State v Tourism Development Consortium** and **State v Frank Molaletsi, Daisy Loo (Pty) Ltd and Others (CMMVL 000205/1998)**.

The accused persons were charged with the predicate offence and ultimately the Proceeds of Serious Crimes Act was used to confiscate the property involved.

206. Botswana indicated that the few cases mentioned are ones where data is available. The courts have always somewhat preferred restitution of property through the relevant provisions of the Penal Code and the Criminal Procedure and Evidence Act.

(b) Observations on the implementation of the article

207. Botswana's officials indicated that their law applies a double incrimination on the perpetrator of the predicate offence and the person who commits money laundering. This is not, however, spelled out directly in Sections 14 or 15 of the POSCA. On the contrary, Section 317(2) of the Penal Code, in particular, specifically addresses persons who conceal criminal proceeds without having participated in the predicate offence. During the country visit, officials at the Office of the DPP confirmed that the law does not specifically address self-laundering, as this is a gray area in practice.

208. In 2007, as noted in the ESAAMLG review, a court decision was pending on whether self-laundering could be prosecuted. No further information was available from Botswana's officials in this respect.

209. In the interest of greater legal certainty, Botswana should consider amending its legislation in this area. Such an amendment was welcomed by officials in the DPP's office during the country visit.

210. The reviewers note that the 2014 POSCA Amendment Bill addresses the issue of self-laundering in Section 48 as follows:

48. (1) The court may –

...

(b) upon single information or upon a separate information, convict a person of both money laundering and the offence alleged to have generated the proceeds that have been laundered; ...

(c) Challenges, where applicable

211. Botswana has identified the following challenges in fully implementing the article under review, and indicated that tracing of criminal proceeds in financial investigations is a challenge in terms of capacity.

1. Limited capacity: Capacity constraints in investigations are a challenge. Also, Magistrates need training in money laundering/asset confiscation cases and some consider that charging a person with a predicate offence and the money laundering charge would be duplicative.

2. Limited resources for implementation: Resources are also limited.

(d) Technical assistance needs

212. Botswana 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: Sharing from the experience of other countries/experts.

2. On-site assistance by an anti-corruption expert: This would lead to additions on the limited expertise the officers have.

3. Development of an action plan for implementation.

213. Botswana indicated that none of these forms of technical assistance have been previously provided.

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

214. Botswana cited the following measures.

Section 15, Proceeds of Serious Crime Act, 1990

(1) Any person who receives, possesses, conceals, disposes of or brings into Botswana any money, or other property, that may reasonably be suspected of being proceeds of a serious offence, shall be guilty of an offence and liable, if he is an individual, to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then, every person who at the time of the commission of the offence was a director, manager or partner of such body, shall be liable to a fine not exceeding P25 000.

(2) It shall be a defence to a charge under this section if the person charged satisfies the court that he did not know and had no reasonable grounds for suspecting that the money or property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

Section 2(a), Proceeds of Serious Crimes (Amendment) Act

Section 15 of the Proceeds of Serious Crime (hereinafter referred to as "the Act", is amended

(a) by substituting for subsection (2) thereof the following new subsection "(2) For the purposes of this section, references in subsection (1) to

(i) concealing money or property shall include references to concealing or disguising the nature, source, location, disposition, movement, ownership or any right with respect to such money or property;

(ii) disposing of any money or property shall include references to converting transferring or removing such money or property and the provision of advice or assistance in relation to disposing, converting, transferring or removing such money or property."

Penal Code

Receiving Property Stolen or Unlawfully Obtained and Like Offences (ss 317-320)

317. Receiving stolen property, etc.

(1) Any person who receives or retains any property knowing or having reason to believe the same to have been stolen, or unlawfully taken, extorted, obtained or disposed of, in a manner which constitutes an offence punishable under this Code with death, or with imprisonment for three years or more, is guilty of an offence and is liable to imprisonment for a term not exceeding 14 years.

(2) Any person who receives or retains any property knowing or having reason to believe the same to have been unlawfully taken, obtained, converted or disposed of in a manner which constitutes any other offence, is guilty of an offence and is liable to the same punishment as the offender by whom the property was unlawfully obtained, converted or disposed of.

(3) Any person who assists in concealing or disposing of or making away with any property which he knows or has reason to believe to have been stolen or obtained, in any way whatsoever under circumstances which amount to an offence, is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

(4) No person shall be convicted of an offence under this section unless it is proved that the property which is the subject matter of the charge has in fact been stolen, or unlawfully taken, extorted, obtained, converted or disposed of.

318. Person suspected of possessing, carrying or conveying stolen property

Any person who is found by a peace officer to be in possession of, or carrying or conveying in any manner, anything which is reasonably suspected of having been stolen or unlawfully obtained and he is unable to give a satisfactory account as to how he came by it is guilty of an offence.

319. Marking and possession of public stores

(1) The Minister may, by order published in the Gazette, give directions as to the marks which may be applied in or on any stores under the control of any branch or department of, and being the property of, the Government of Botswana.

(2) Any person who is charged with conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores so marked, which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court how he came by the same, is guilty of an offence.

(3) Any person conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores being the property of the armed forces of

Botswana, which may reasonably be suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, shall be guilty of an offence.

(4) For the purposes of this section, "stores" means goods and includes any single store or article or part thereof; and "marks" includes any part of a mark.

320. Receiving goods stolen outside Botswana

Any person who, without lawful excuse, knowing or having reason to believe the same to have been stolen or obtained in any way whatsoever under such circumstances that if the act had been committed in Botswana the person committing it would have been guilty of an offence, receives or has in his possession any property so stolen or obtained outside Botswana or having himself so stolen or obtained such property, brings the same into, or has it in his possession within Botswana is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

215. Botswana provided the following cases.

The State v Lyndon Mothusi; The State v Tourism Development Consortium and others.

In these cases, those persons who had received property that had been the proceeds of crime were charged. In the first case, the stolen prisoner register had been handed over to the attorney representing the accused persons and he had ultimately presented it in court. The attorney was also charged with receiving the stolen register. In the second case the plot of land that was the subject matter of the trial was forfeited to the State.

216. Botswana indicated that there is no statistical data available except for the two cases listed because no charges have been consistently preferred against accused persons under the relevant Proceeds of Serious Crime Act provisions. Instead, the prosecutors charge the predicate offence and thereafter, at the conclusion of the trial and upon conviction of the accused person, apply to the court that the proceeds be forfeited or restored to their legitimate owner under Section 319 of the Criminal Procedure and Evidence Act. The cited cases were also carried forward from previous years.

(b) Observations on the implementation of the article

217. The cited laws in this area contain elements relevant to implementing the UNCAC article under review. Botswana's law covers both concealment and the continued retention of property in the POSCA and the Penal Code.

218. Section 317(2) of the Penal Code, in particular, addresses the person who conceals criminal proceeds without having participated in the predicate offence.

219. It is noted that the same provisions, in particular Section 15 of POSCA, are cited in article 23 of UNCAC on money laundering, above.

220. However, the relevant threshold in Section 317 is three years' imprisonment, which does not cover all UNCAC offences.

(c) Challenges, where applicable

221. Botswana has identified the following challenge in fully implementing the article under review:

1. Limited capacity: There is need for capacity building for investigators and the Office of the DPP.

(d) Technical assistance needs

222. Botswana 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. On-site assistance by an anti-corruption expert.

223. Botswana indicated that none of the forms of technical assistance mentioned have been previously 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

224. Botswana cited the following measures.

Penal Code

Section 120. Conspiracy to defeat justice and interference with witnesses

Any person who

- (a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert, or defeat the course of justice;
 - (b) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or
 - (c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal,
- is guilty of an offence and is liable to imprisonment for a term not exceeding five years.

Section 123. Offences relating to judicial proceedings (1) Any person who

- (a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken;

- (b) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended, refuses to be sworn or to make an affirmation or, having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being had or taken, after the witnesses have been ordered to leave such room;
 - (c) causes an obstruction or disturbance in the course of a judicial proceeding;
 - (d) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken;
 - (e) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private;
 - (f) endeavours wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence, in connection with such evidence;
 - (g) dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding;
 - (h) wrongfully retakes possession of land from any person who has recently obtained possession by a writ of court; or
 - (i) commits any act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken, is guilty of an offence and is liable to imprisonment for a term not exceeding three years.
- (2) When any offence against paragraph (a), (b), (c), (d) or (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding P150 or, in default of payment, to imprisonment for a term not exceeding one month.
- (3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the High Court to punish for contempt of court.

Section 111. Perjury and subornation of perjury

- (1) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceedings, knowingly gives false testimony touching any matter which is material to any question then pending in those proceedings or intended to be raised in those proceedings, is guilty of the offence termed perjury.
- (2) For the purposes of subsection (1) it is immaterial –
 - (a) whether the testimony is given on oath or under any other sanction authorized by law;
 - (b) as regards the forms and ceremonies used in administering the oath of in otherwise binding the person giving the testimony to speak the truth, if such person assents to the forms and ceremonies used;
 - (c) whether the false testimony is given orally or in writing;
 - (d) whether the court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given;
 - (e) whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.
- (3) Any person who aids, abets, counsels, procures, or suborns another person to commit perjury is guilty of the offence termed subornation of perjury.

Section 113. Punishment of perjury and subordination

Any person who commits perjury or suborns perjury is liable to imprisonment for a term not exceeding seven years.

Section 118. Deceiving witnesses

Any person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of such person as a witness, is guilty of an offence.

225. Botswana indicated that there is no statistical data available for the period under study.

(b) Observations on the implementation of the article

226. Botswana has criminalized obstruction of justice in accordance with article 25 (a) of the Convention. Section 123(f) of the Penal Code covers any person who (...) endeavours wrongfully to interfere with or influence a witness". The various acts mentioned in article 25 (a) of the Convention, namely the "use of force, threats, intimidation or the promise, offering or giving of an undue advantage" can all be subsumed under this broad provision.

227. Moreover, Section 120(b) prohibits acts endeavouring to "dissuade, hinder or prevent" the provision of testimony or evidence and Section 120(c), more broadly, covers any act to obstruct or interfere with a legal process. Further, subornation of perjury (Sections 111 and 113, Penal Code) and deceiving witnesses (Section 118 Penal Code) are relevant.

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

228. Botswana cited the following measures.

Section 18. Resisting or obstructing officers, Corruption and Economic Crime Act, 1994

(1) Any person who resists or obstructs an officer in the execution of his duty shall be guilty of an offence.

(2) Any person guilty of an offence under this section or section 7(2) or 8(2) shall be liable on conviction to imprisonment for a term not exceeding five years, or to a fine not exceeding P 10,000, or to both.

Section 109. Threat of injury to persons employed in public service, Penal Code

Whoever holds out any threat of injury to any person employed in the public service, or to any person in whom he believes that person employed in the public service to be interested, for the purpose of inducing that person employed in the public service to do any act or to forbear or delay to do any act connected with the exercise of the public functions of such person employed in the public service is guilty of an offence.

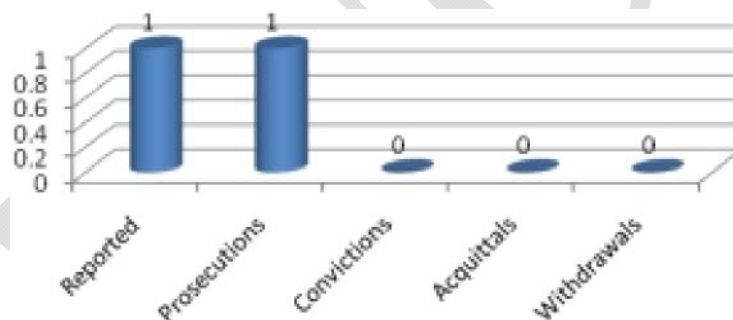
229. Botswana provided the following case example and statistics.

There are only three cases that occurred in the courts in Palapye and in Francistown where magistrates were attacked and physically assaulted by the accused persons. All cases have been tried and brought to finality. These are cases of obstruction of justice or contempt of court.

One example is that of a presiding magistrate who was assaulted by an accused person who was on trial. The accused person was arrested and a charge of assault and also of contravening Section 123 (1) (a) of the Penal Code preferred against him.

Statistics:**Penal Code, Section 109 (For the period 2010-2011)**

No. of Cases reported	Prosecutions	Convictions	Acquittals	Withdrawals
1	1	0	0	0



There was one cases charged under Section 109 of the Penal Code, which was sent to the DPP for advice.

(b) Observations on the implementation of the article

230. The laws cited by Botswana, particularly Section 18(1) of the Corruption and Economic Crime Act and Section 109 of the Penal Code, criminalize obstruction of justice in accordance with article 25 (b) of the Convention. Furthermore, Sections 123 (a), (c) and (i), 120 (c) and 128 of the Penal Code are relevant.

231. The cited laws cover officers of the DECC and public servants generally under the Penal Code. Section 109 of the Penal Code goes even further to protect other

categories of public servants than justice or law enforcement officials mentioned in the provision under review.

Article 26 Liability of legal persons

Paragraphs 1 and 2

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.

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

232. Botswana cited the following measures.

Section 2. Interpretation, Penal Code

"person" and "owner" and other like terms when used with reference to property include corporations of all kinds and any other association of persons capable of owning property, and also when so used include the State and any local authority;

171. Actions by shareholders against company, Companies Act, 2003

A shareholder of a company may bring an action against the company for breach of a duty owed by the company to him as a shareholder.

172. Actions by shareholder to require company to act, Companies Act, 2003

Notwithstanding section 171, the court may, on the application of a shareholder of a company, if it is satisfied that it is just and equitable to do so, make an order requiring the company or its Board or a director of the company to take any action that is required to be taken by the constitution of the company or this Act and, on making the order, the court may grant such other consequential relief as it considers appropriate.

173. Representative actions, Companies Act, 2003

Where a shareholder of a company brings proceedings against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject-matter of the proceedings, the court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest, and may, for that purpose, make such order as it considers appropriate including, without limiting the generality of this section, an order -

- (a) as to the control and conduct of the proceedings;
- (b) as to the costs of the proceedings; or
- (c) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

Article 3(24), Proceeds of Serious Crimes (Amendment) Act

Where an offence is committed by designated body, every director, officer or employee of designated body, every director, officer or employee of the designated body knowingly authorizes or permits the offence shall be liable to the same penalty as the designated body.

233. Botswana provided the following cases.

The State v Tourism Development Consortium and Others. In this case, a copy of the judgment of which was provided to the reviewers, companies were charged alongside natural persons on several counts, including Obtaining by False Pretences, Corruption and Cheating the Public Revenue. In this case the two legal persons charged were Tourism Development Consortium (Pty) Ltd and another called Golconda Holdings (Pty) Ltd. The land involved was forfeited to the State after the conviction.

Another example is **State v Frank Molaletsi and Others (CMMVL 000205/08)**. Here a company called Daisy Loo, a refuse collection company, was charged alongside its directors and municipal employees with corruption. After the conviction an amount of P24,000,000 was forfeited to the State.

Botswana's land Boards and local authorities are also legal persons who can sue in their own capacity; See **The Kweneng Land Board v Matlho (1992 BLR 292)**.

The State v Vincent Seretse, Serala (Pty) Ltd and Others. Serala Pty Ltd, being a legal person, was charged alongside the natural persons involved in the case. The case was pending before the High Court (Corruption Court) at the time of the country visit.

(b) Observations on the implementation of the article

234. Botswana has established the criminal liability of legal persons. It was confirmed during the country visit that Section 2 of the Penal Code would apply in regard to corruption and economic offences involving corporations of all kinds and any other association of persons capable of owning property, and that corporations could be made criminally liable for such offences. Section 2 is applicable as "lex generalis" also in regard to CECA and POSCA.

235. Botswana also provided relevant case examples. However, during the country visit it was mentioned that several cases were overturned by the Court of Appeals.

Article 26 Liability of legal persons

Paragraph 3

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

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

236. Botswana cited the following measures.

Section 3(24), Proceeds of Serious Crimes (Amendment) Act

Where an offence is committed by designated body, every director, officer or employee of designated body, every director, officer or employee of the designated body knowingly authorizes or permits the offence shall be liable to the same penalty as the designated body.

Section 332, Criminal Procedure and Evidence Act

In any criminal proceedings under any enactment against a company, the secretary and every director or manager or chairman thereof in Botswana 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 the offence, and that he could not have prevented it.

Section 24. Offences by corporations, societies, etc., Penal Code

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act of omission on his part, he was not aware that the offence was being or was intended or was about to be committed, or that he took all reasonable steps to prevent its commission.

237. Botswana provided the following case.

The State v Tourism Development Consortium.

This is a 2012 judgment where both natural and legal persons were charged.

238. Botswana indicated that the cases given above are the only examples and that no cumulative statistics are available.

(b) Observations on the implementation of the article

239. The provisions cited by Botswana are consistent with the UNCAC provision.

240. Botswana has implemented the provision in question.

Article 26 Liability of legal persons

Paragraph 4

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

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

241. Botswana indicated that under Botswana's judicial system, legal persons that have been charged are subject to punishments meted out by the courts. In the **Tourism Development Consortium** and **the State v Daisy Loo (Pty) Ltd** cases monetary

punishments were meted out against the legal persons. The sentencing of legal persons flows from the offence and therefore is in line with the law. There is no separate sentencing provision for legal persons separate from that of natural persons.

242. Botswana provided the following information.

PUNISHMENT MATRIX FOR THE REVIEWED ARTICLES
Summary of Relevant Punishment under Domestic Law by UNCAC Article

Article 15, subparagraph (a)

Bribery of national public officials

Section 1, 23, 24(2), 25(2), 27, 29(2), all of the Corruption and Economic Crime Act, 1994

Under the Corruption and Economic Crime Act punishments for all the offences are under Section 36: imprisonment for a term not exceeding 10yrs or to a fine not exceeding P500,000.00 or to both.

Section 2(1), 99(b) of the Penal Code 99: Punishable within the same section (imprisonment for a term not more than three years).

Section 94 Republic of Botswana Electoral Act

Section 94 is punishable under Section 95 of the Electoral Act (fine not exceeding P400 or imprisonment for a term not exceeding two years, or to both). The courts have however meted out very low sentences and in most instances suspended sentences and very minimal fines.

Article 15, subparagraph (b)

Bribery of national public officials

Section 23, 24(1), 25(1), 26, 29(1) of the Corruption and Economic Crime Act 1994

Under the Corruption and Economic Crime Act punishments for all the offences are under section 36.

Section 94(f) Republic of Botswana Electoral Act

Section 94 is punishable under Section 95 of the Electoral Act (fine not exceeding P400 or imprisonment for a term not exceeding two years , or to both).

Article 16, paragraph 1

Bribery of foreign public officials and officials of public international organizations Section 2(1), 99(b) of the Penal Code 99: Punishable within the same section (imprisonment for a term not more than three years).

Article 16, paragraph 2

Bribery of foreign public officials and officials of public international organizations

Section 2(1), 99(a) of the Penal Code. 99: Punishable within the same section (imprisonment for a term not more than three years)

Article 17

Embezzlement, misappropriation or other division of property by a public officer

Sections 102, of the Penal Code. 102 is punishable under the same provision of the Penal Code (a prison term not exceeding one year)

Section 103 of the Penal Code is punishable under section 33 of the Penal Code (imprisonment not exceeding a term of two years or a fine, or both).

Section 33 of the Corruption and Economic Crime Act. 33 is punishable under Section 36 Corruption and Economic Crime Act (10 years or a fine not exceeding P500,000, or to both).

Section 24A, Corruption and Economic Crime (Amendment) Act No. 6 of 2013 (new offence of Abuse of Public Office) is punishable under Section 24A(3) (fine of P500,000 or imprisonment up to three years or both).

Article 18, subparagraph (a)

Trading in influence

Section 29(2) of the Corruption and Economic Act. 29 is punishable under Section 36 Corruption and Economic Crime Act (10 years or a fine not exceeding P500,000, or to both)

Section 25A, Corruption and Economic Crime (Amendment) Act No. 6 of 2013 (new offence of Trading in Influence) is punishable under Section 36 (10 years or a fine not exceeding P500,000, or to both)

Section 384(b) & (c) of the Penal Code.

The punishment for Section 384 (b) and (c) is regulated under Section 33 of the Penal Code (imprisonment not exceeding a term of two years or a fine, or both).

Section 33 Penal Code (General punishment for offences) provides for imprisonment for a term not exceeding two years or a fine, or both; when no other punishment is specially provided for in the Code.

Article 18, subparagraph (b)

Section 101 of the Penal Code is punishable under the same provision of the Penal Code (imprisonment for a term not exceeding six years).

384(a) of the Penal Code. The punishment for Section 384 (a) is regulated under Section 33 of the Penal Code (imprisonment not exceeding a term of two years or a fine, or both).

Section 29(1) of CECA101 is punishable within the same Section (imprisonment for a term not exceeding six months)

Section 25A, Corruption and Economic Crime (Amendment) Act No. 6 of 2013 (new offence of Trading in Influence) is punishable under Section 36 (10 years or a fine not exceeding P500,000, or to both)

Article 19

Abuse of functions

Section 24A, Corruption and Economic Crime (Amendment) Act No. 6 of 2013 (new offence of Abuse of Public Office) is punishable under Section 24A(3) (fine of P500,000 or imprisonment up to three years or both).

Section 31, Corruption and Economic Crime (Amendment) Act No. 6 of 2013 (substitution of conflict of interest) is punishable under Section 36 (10 years or a fine not exceeding P500,000, or to both)

Section 100 of the Penal Code. 100 creating both offence and punishment (imprisonment for a term not more than three years)

Section 104 of the Penal Code, creating both offence and punishment (prison term not more than three years)

Article 20

Illicit enrichment

Section 34 of the Corruption and Economic Crime Act. 34 is punishable under Section 36 of the same Act (10 years prison term or a fine of P500,000, or to both)

Article 21, subparagraph (a)

Bribery in the private sector

Section 28(2) of CECA. 28(2) is punishable under Section 36 of the same Act (10 years prison term or a fine of P500,000, or both)

Section 30(2) of CECA is punishable under Section 36 (10 years or a fine not exceeding P500,000, or to both)

Section 383, 384(b) & (c) of the Penal Code. The punishment for Section 384 (b) and (c) is regulated under Section 33 of the Penal Code (imprisonment not exceeding a term of two years or a fine, or both).

Section 94 of Electoral Act. Section 94 is punishable under Section 95 of the Electoral Act (fine not exceeded P400 or imprisonment for a term not exceeding two years, or to both).

Article 21, subparagraph (b)

Section 383, 384(a) of Penal Code. The punishment for Section 384 (a) is regulated under Section 33 of the Penal Code (imprisonment not exceeding a term of two years or a fine, or both).

Section 28(1) of CECA. 28(1) is punishable under Section 36 of the same Act (10 years prison term or a fine of P500,000, or both)

Section 30(1) of CECA is punishable under Section 36 (10 years or a fine not exceeding P500,000, or to both)

Section 94(f) of Electoral Act. Section 94 is punishable under Section 95 of the Electoral Act (fine not exceeded P400 or imprisonment for a term not exceeding two years, or to both)

Article 22

Embezzlement of property in the private sector

Section 322 of the Penal Code. Punishable under the same section (imprisonment for a term not more than seven years)

Article 23 Subparagraph 1 (a)(i)

Laundering of proceeds of crime

Section 14 of the Proceeds of Serious Crime Act. Section 14 is punishable under the same section (a prison term not more than three years or P10 000 fine or both. If the offender is a juristic person a fine not more than 25 000)

Section 15 of the Proceeds of Serious Crime Act. Section 15 is punishable under the same section (three years prison term or to a fine not more than P10,000 and if it is a juristic person a fine not exceeding P25,000)

Article 23 Subparagraph 1 (a)(ii)

Section 2(a), of Proceeds of Serious Crime Act

Section 14 of Proceeds of Serious Crime Act

Section 2(a) of the Proceeds of Serious Crimes (Amendment) Act

Article 23 Subparagraph 1 (b)(i)

Section 2(5) of Proceeds of Serious Crime Act

Section 14 of Proceeds of Serious Crime Act

Section 15 of Proceeds of Serious Crime Act

Sections 14 and 15 are punishable under the same section (a prison term not more than three years or P10,000 fine or both. If the offender is a juristic person a fine not more than P25,000)

Article 23 Subparagraph 2(a) & 2(b)

Section 2(1) of Proceeds of Serious Crime

Article 23 Subparagraph 2(c)

Section 2 Proceeds of Serious Crime Act

Section 14 Proceeds of Serious Crime Act. Section 14 is punishable under the same section (a prison term not more than three years or P10,000 fine or both. If the offender is a juristic person a fine not more than P25,000)

Article 24

Concealment

Section 15 of the Proceeds of Serious Crime Act Punishable under the same section (three years or P10,000 fine if it is a natural person, as for juristic person a fine of not more than P25,000)

Article 25, subparagraph (a)

Obstruction of justice

Sections 120 and 123 of the Penal Code.

Section 120 is Punishable under the same section (a prison term not exceeding five years)

Section 123 is Punishable under the same section (a prison term not exceeding three years)

Section 111, 113 of the Penal Code is punishable under section 113 (a prison term not exceeding seven years).

Section 118 of the Penal Code is punishable under Section 33 of the Penal Code (imprisonment not exceeding a term of two years or a fine, or both).

Article 25, subparagraph (b)

Section 18 of the Corruption and Economic Crime Act. Punishable under the same section (a ten year prison term or a fine not exceeding P500,000, or to both

Section 109, Penal Code. Section 109 has no prescribed penalty. As such, Section 33 of the Penal Code would apply.

Article 26 Paragraph 1 & 2

Liability of legal persons

Section 2, Penal Code

Section 308, Penal Code. 308 is Punishable under the same section (imprisonment for a term not exceeding seven years)

Article 26 Paragraph 3

Section 3(24), Proceeds of Serious Crime (Amendment) Act

Section 332, Criminal Procedure and Evidence Act

Section 24, Penal Code. No punishment prescribed under Section 24. As such, Section 33 of the Penal Code is applicable

Article 27, paragraph 1

Participation and attempt

Section 21, Penal Code (no punishment applicable)

Article 27, paragraph 2

Section 388 (1), Penal Code

Section 389 and 390, Penal Code. Punishment under Section 390 of the Penal Code (imprisonment for a term not exceeding seven years) same as Section 389.

Article 27

Section 392, Penal Code. Punishment under the same section (imprisonment for a term not exceeding seven years).

Section 388, Penal Code. Section 388 is punishable under section 390 (imprisonment for a term not exceeding seven years).

Article 29

Statute of limitations

Section 26 of the Criminal Procedure and Evidence Act

These are not sections creating offences.

Article 30, paragraph 1

Prosecution, adjudication and sanctions

Section 32 of the Penal Code

Article 30, paragraph 2

Section 41, Constitution (no punishment applicable)

Section 14, Penal Code (no punishment applicable)

Section 21, CECA (no punishment applicable)

Section 27-29, Local Government (District Councils) Act (no punishment applicable)

Article 30, paragraph 3

Section 51, Constitution

Section 20, Penal Code

Section 7 and 10 Criminal Procedure and Evidence Act

Section 39, CECA

These are not sections creating offences.

Article 30, paragraph 4

Section 109, Criminal Procedure and Evidence Act

Article 30, paragraph 5

Section 85, Prisons Act (no punishment applicable)

Article 30, paragraph 6

Section 35, Public Service Act

Section 22, Public Service Act

Article 30, paragraph 7 (a)

Section 18, Public Service Act

Article 30, paragraph 7 (b)

Section 1, Public Service Act

Section 127, Constitution

Article 30, paragraph 8

Section 35(4), Public Service Act

Article 31, subparagraph 1(a)

Freezing, seizure and confiscation

Sections 3, 4 and 5 of the Proceeds of Serious Crime Act (no punishment applicable)

Section 37 of the Corruption and Economic Crime Act (no punishment applicable)

Article 31, paragraph 2

Section 17, Proceeds of Serious Crime Act

Section 18, Proceeds of Serious Crime Act

Section 20, Proceeds of Serious Crime Act

Section 11, CECA

Section 38, CECA

Article 31, paragraph 3

Section 9, Proceeds of Serious Crime Act

Article 31, paragraph 4, 5 and 6

Section 3, 4 and 5, Proceeds of Serious Crime Act
Section 37, CECA

Article 31, paragraph 7

Section 8, CECA

Article 31, paragraph 8

Section 40(1), CECA

Article 31, paragraph 9

Section 12, Proceeds of Serious Crime Act
Section 21, Proceeds of Serious Crime Act

Article 32, paragraph 1

Protection of witnesses, experts and victims

Section 123, Penal Code. Section 123 is punishable under the same section (imprisonment for a period not exceeding three years.)
Section 2, Criminal Procedure and Evidence Act

Article 33

Protection of reporting persons

Section 45, CECA (no punishment applicable)
Section 45A, Corruption and Economic Crime (Amendment) Act No. 6 of 2013, providing for a fine of P10,000 or five years imprisonment or both.

Article 34

Consequences of acts of corruption

Section 316 and 318 of Criminal Procedure and Evidence Act (no punishment applicable)

Article 35

Compensation for damage

Section 12, 14, and 16 of the Criminal Procedure and Evidence Act (no punishment applicable)
Section 316(1) of the Criminal Procedure and Evidence Act (no punishment applicable)

Article 36

Specialized authorities

Section 3 and 6, CECA (no punishment applicable)

Article 37, paragraph 1

Cooperation with law enforcement authorities

Section 6(e), Corruption and Economic Crime Act
Section 45, CECA (no punishment applicable)

Article 37, paragraph 3

Section 237, Criminal Procedure and Evidence Act

Article 38**Cooperation between national authorities**

Section 6(e) of the Corruption and Economic Crime Act (no punishment applicable)
Section 7, CECA

Article 39, paragraph 1**Cooperation between authorities and the private sector**

Section 6(e) of the Corruption and Economic Crime Act (no punishment applicable)
Section 7 and 8, CECA. Section 7 and 8 CECA are punishable under Section 18 (2) of the CECA, a term of imprisonment for a period not exceeding 10 years or to a fine not exceeding P10,000.00 or to both.

Article 40**Bank secrecy**

Section 43 of the Bank Act of 1995
Section 8, CECA. Section 8 (as noted above above) is punishable under Section 18 (2) of CECA by a term of imprisonment for a period not exceeding 10 years or to a fine not exceeding P10,000.00 or to both.
Section 248, Criminal Procedure and Evidence Act
Section 249, Criminal Procedure and Evidence Act

Article 41**Criminal record**

Section 283, 284 and 285 of the Criminal Procedure and Evidence Act (no punishment applicable)

Article 42, subparagraph 1(a)**Jurisdiction**

Section 5 and 61 of the Criminal Procedure and Evidence Act (no punishment applicable)

Article 42, subparagraph 2(b)

Section 46, CECA (no punishment applicable)

Article 44, paragraph 1

Extradition Section 1(2), 3 and 5 of the Extradition Act (no punishment applicable)

Article 44, paragraph 4

Section 7(1) and (2) of the Extradition Act (no punishment applicable)

Article 44, paragraph 8

Section 1(2), Extradition Act
Section 7, Extradition Act
Section 8, Extradition Act
Section 9, Extradition Act
(no punishment applicable)

Article 44, paragraph 9

Section 11, Extradition Act

Section 12, Extradition Act
Section 13, Extradition Act
Section 14, Extradition Act
Section 15, Extradition Act
Section 16, Extradition Act
Section 17, Extradition Act
(no punishment applicable)

Article 44, paragraph 10

Section 10, Extradition Act
Section 22, Extradition Act
(no punishment applicable)

Article 44, paragraph 11

Section 7(1) (no punishment applicable)

Article 44, paragraph 12

Article 45

Transfer of sentenced persons
(no punishment applicable)

Article 46

Mutual legal assistance
Section 3 of the same Act (no punishment applicable)

Article 47

Transfer of criminal record proceedings (no punishment applicable)

Article 48

Law enforcement cooperation
Section 6 of the Corruption and Economic Crime Act (no punishment applicable)

Article 49

Joint investigations
Section 6 of the Corruption and Economic Crime Act (no punishment applicable)

Article 50

Special investigative techniques
Section 7 of the Corruption and Economic Crime Act (no punishment applicable)

243. Botswana cited the following measures in relation to sanctions applicable to legal persons.

42A. Endorsement of conviction in register, Corruption and Economic Crime Act

(1) A court convicting a person under section 28 or 29 may, in addition to imposing a sentence provided for in section 36, issue an order that –

- (a) The particulars of the person;
- (b) The conviction and sentence; and
- (c) Any other order of the court consequent thereupon,

be endorsed in the register kept under section 124 of the Public Procurement and Asset Disposal Act.

(2) If the person referred to in subsection (1) is a body corporate or unincorporated body, the court may in addition to the conviction, issue an order that –

(a) The particulars of the body corporate or unincorporated body;

(b) The particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over that body corporate or unincorporated body and who was involved in the offence or who ought reasonably to be known or suspected that the body corporate or unincorporated body committed the offence, and

(c) The conviction, sentence and any other order of the court consequent thereupon, be endorsed in the register.

(3) The court may in addition to the conviction issue an order provided for in subsection (1) in respect of –

(a) any body corporate or unincorporated body owned or controlled by the person so convicted; or

(b) the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over such other body corporate or unincorporated body, and which –

(i) body corporate or unincorporated body, partner, manager, director or other person was involved in the offence; or

(ii) partner, manager, director or other person knew or ought reasonably to have known or suspected, that the body corporate or unincorporated body was involved in the offence.

(4) Whenever the register is endorsed as stipulated in subsection (1), (2) and (3), the endorsement applies, unless the court directs otherwise, to every body corporate or unincorporated body to be established in the future and which body corporate or unincorporated body will be wholly or partly controlled or owned by the person or the body corporate or unincorporated body so convicted or endorsed, and the register shall in respect of every such body corporate or unincorporated body, be endorsed accordingly.

(5) Where a court has issued an order under subsection (1), the clerk of such court shall forward the court order to the Public Procurement and Asset Disposal Board established under the Public Procurement and Asset Disposal Act.

Section 124, Public Procurement and Asset Disposal Act

Suspension and de-listing from the register

A contractor who does not comply either with the code of conduct or the contract concluded with a procuring entity may be suspended or delisted by the Board from the Register of Contractors.

Section 125, Public Procurement and Asset Disposal Board Act.

Non-registration of suspended contractors

A suspended contractor shall be debarred by the Board from registering a newly incorporated entity for the period of suspension in question.

Section 126, Public Procurement and Asset Disposal Board Act.

Restriction on defaulting contractor

Where the defaulting shareholders, directors and senior officers of the suspended contractor join another contractor in key operational positions, that contractor shall be debarred from bidding on new tenders until the period of suspension has lapsed.

244. Botswana provided the following case.

The State v Tourism Development Consortium (Pty) Ltd; The State v Daisy Loo (Pty) Ltd and the State v Lyndon Mothusi and Others where the law firm was also charged alongside its partners. The law, however, provides for choices on who to charge as between legal and natural persons or to charge both.

(b) Observations on the implementation of the article

245. Botswana indicated that under its judicial system, legal persons are subject to punishments prescribed under the various offences in its criminal laws, as summarized in the matrix.

246. During the country visit it was discussed how the punishments are applied to legal persons. Against the backdrop of the penalty framework provided by law, the decision on the amount of the fine is at the discretion of the court (Section 29. Fines, Penal Code). Although there is no legally specified “conversion guideline” between imprisonment and fines, the authorities agreed that the applicable penalties might not be sufficiently dissuasive for legal persons and noted that the amounts defined in Section 36 of CECA had not been adjusted in the last 20 years. The reviewers recommend that Botswana consider adjusting the applicable penalties for legal entities. The penalty framework should be sufficiently wide to allow for appropriate penalties on a case by case basis and deterrence of companies, including international corporations.

247. It was positively noted that the Corruption and Economic Crime (Amendment) Act, 2013 had integrated the possibility of blacklisting companies through an endorsement of the conviction in the Public Procurement and Asset Disposal Register.

Article 27 Participation and attempt

Paragraph 1

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

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

248. Botswana cited the following measure.

Penal Code

Section 21

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say

- (a) every person who actually does the act or makes the omission which constitutes the offence;
 - (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
 - (c) every person who aids or abets another person in committing the offence;
 - (d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
- (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
- (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.

Section 391. Soliciting or inciting others to commit offence

Any person who solicits or incites or attempts to procure another to do any act or make any omission of such a nature that, if the act were done or the omission were made, whether by himself or that other person, an offence would thereby be committed, is guilty of an offence and liable to the same punishment as if he had himself attempted to commit that offence

Section 392. Conspiracy to commit offence

Any person who conspires with another person to commit an offence is guilty of an offence and is liable to imprisonment for a term not exceeding seven years, or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for seven years, then to such lesser punishment.

249. Botswana provided the following case and statistics.

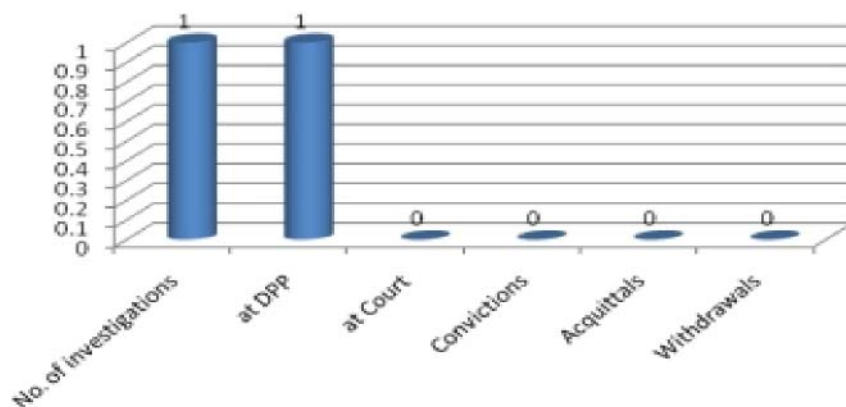
The case of **The State v Lyndon Mothusi and Others** is a case in point. The accused person, Lyndon Mothusi, planned to steal a prisoner docket at a prison. He connived with a prison warden who became his accomplice. The accused was therefore the instigator of the offence. Although the attorney for the accused person had not been fully engaged in the commission of the offence, he was nevertheless charged as a party to the offence, having received the stolen prison register and presented it in court. The attorney, therefore, also aided and abetted the commission of the offence.

Statistics:

SECTIONS UNDER PENAL CODE - 2010 & 2011

Section 21

No. of investigations	at DPP	at Court	Convictions	Acquittals	Withdrawals
1	1	0	0	0	0



There was one investigation case charged under Section 21 of the Penal Code in 2010 and 2011. The case was sent to the DPP for advice and there were no convictions, acquittals or withdrawals.

(b) Observations on the implementation of the article

250. The provisions cited by Botswana contain all relevant elements related to the participation in the commission of offences under the Convention.

251. Botswana has implemented the provision under review, although it is noted that the statistics relate to participation in Penal Code offences generally, not necessarily limited to corruption.

Article 27 Participation and attempt

Paragraph 2

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

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

252. Botswana cited the following measures.

Section 388. Attempt defined, Penal Code

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

Section 389. Attempts to commit offences, Penal Code

Any person who attempts to commit an offence is guilty of an offence.

Section 390. Punishment of attempts to commit certain offences, Penal Code

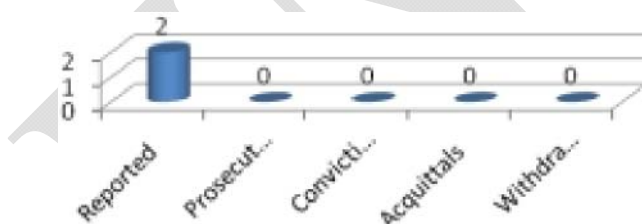
Any person who attempts to commit an offence of such a kind that a person convicted of it is liable to the punishment of imprisonment for a term of 14 years or more, with or without other punishment, is liable, if no other punishment is provided, to imprisonment for a term not exceeding 7 years.

253. Botswana provided the following case and statistics.

A case example is one for a charge of attempting to obtain money by false pretences. The case involved an allegation from an individual whose application for Botswana citizenship was rejected on grounds that he was not fluent in Setswana. Source alleges that he appealed and was told his application was on assessment, but that someone calling himself Kgopong (undisclosed surname), who purported to be an immigration officer, told him that he was the one assessing his application. It is alleged that Kgopong wanted the reporter to bring P1200 and two passport size photos for him to approve the application. Source states that Kgopong called the applicant to check if he still wanted to go ahead with the deal.

Cases before court**Statistics:
Section 388**

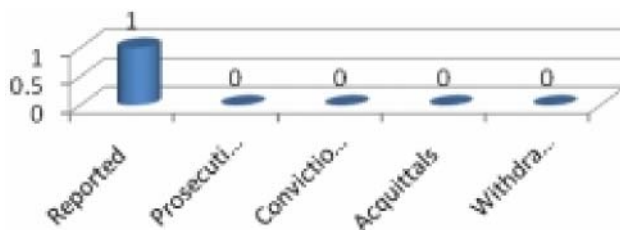
No. of Cases reported	Prosecutions	Convictions	Acquittals	Withdrawals
2	0	0	0	0



Two cases were charged under Section 388 of the Penal Code, and none of them was sent to the DPP for advice.

Section 389

No. of Cases reported	Prosecutions	Convictions	Acquittals	Withdrawals
1	0	0	0	0



One person was charged under Section 389 of the Penal Code.

(b) Observations on the implementation of the article

254. The provisions cited by Botswana contain all relevant elements implementing paragraph 2 of article 27.

255. Botswana has implemented the provision under review, although it is noted that the statistics relate to the attempted commission of Penal Code offences generally, not necessarily limited to corruption.

Article 27 Participation and attempt

Paragraph 3

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

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

256. Botswana provided the following information.

Section 392. Conspiracy to commit offence, Penal Code

Any person who conspires with another person to commit an offence is guilty of an offence and is liable to imprisonment for a term not exceeding seven years, or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for seven years, then to such lesser punishment.

Section 388. Attempt defined, Penal Code

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

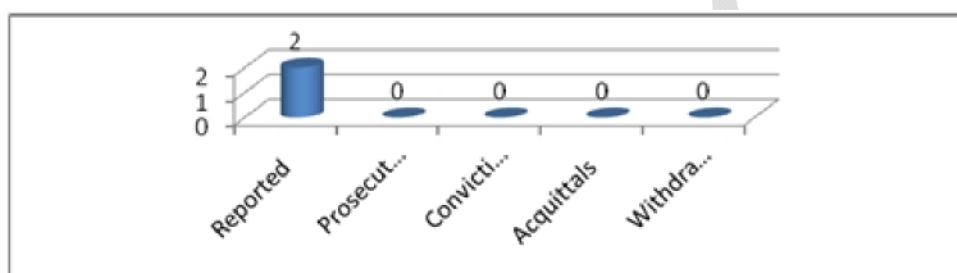
(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

257. Botswana provided the following case and statistics.

The case of **The State v Lyndon Mothusi and Others** is relevant here in that the prison officer who assisted the accused persons to steal a prison register was also charged with conspiring to steal said register and the theft of the register. As stipulated earlier, the attorney for the accused persons was also charged with conspiracy to commit the offence of theft and also the falsifying of the public record.

Section 388, Penal Code

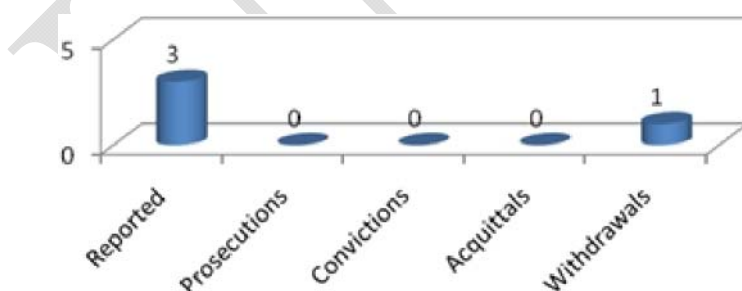
No. of Cases reported	Prosecutions	Convictions	Acquittals	Withdrawals
2	0	0	0	0



Two cases were charged under Section 388 of the Penal Code and none of them was sent to the DPP for advice.

Section 392, Penal Code

No. of Cases reported	Prosecutions	Convictions	Acquittals	Withdrawals
3	0	0	0	1



There were three cases charged under Section 392 of the Penal Code. There were no cases sent for prosecution and one case was withdrawn.

(b) Observations on the implementation of the article

258. Botswana does not seem to have implemented paragraph 3 of article 27 of the Convention. Section 388 covers attempt and Section 392 covers conspiracy. The

preparation of an offence is not apparently addressed. Also the case example seems to relate to assistance as defined in paragraph 1 of article 27.

259. Botswana could therefore consider including in its legislation a provision criminalizing the preparation of offences covered by this Convention.

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

260. Botswana provided the following information.

Section 26, Criminal Procedure and Evidence Act 1939

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

Section 10, Constitution

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognised by law.

Section 18(3), Constitution

If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 3 to 16 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

261. Botswana provided the following cases.

Although the statute limits the prosecution of offenders to a certain period from the date of commission of offence, it does not limit prosecution where the offender is outside the jurisdiction of the country. A case in point is that of **The State v Rabana CMMVL 0048 1/95** involving a former Botswana Housing Corporation Chief Executive Officer who was charged with corruption. The accused person has since about 18 years absconded and stayed in neighbouring South Africa. The extradition process has been ongoing but with no sight in end. Extradition proceedings have been pending since he absconded in the early 1990's and the court in South Africa is still to make a decision on the matter whether to extradite or not. The case is presently over 19 years old, but since the accused has been a fugitive all this while, the clock has not

started ticking against the State, although the accused is alleged to have committed the offence more than 20 years ago.

Another case worth mentioning is **Kanjabanga v The State**. The accused person stipulated that the State had taken too long before prosecuting him, and thus he applied for a permanent stay of prosecution. The High Court did not, however, agree with him and held that the nature of the investigation necessitated the delay.

The often-quoted case of **Sejammitlwa and Others v The Attorney General (2002) 2 BLR 75** is the locus classicus on unreasonable delay. The court stated what might be considered as unreasonable delay. The courts in Botswana will not entertain a prosecution of a case that has taken an unreasonably long time before the prosecution is commenced at no fault of the accused person.

262. Botswana indicated that the only case that is pending extradition of the accused person from South Africa is **The State v Rabana** (cited earlier) relating to the Botswana Housing Corporation's Chief Executive Officer who since the early 1990's left the jurisdiction of the courts in Botswana for South Africa. It was clarified during the country visit that the reason for the delay in this case was the defendant's absence from the jurisdiction. The other cases mentioned are those that were decided prior to the years under review. This, however, is a case that was brought forward from other years.

(b) Observations on the implementation of the article

263. Section 26 of the Criminal Procedure and Evidence Act 1939 cited by Botswana provides a 20 year prescription period for any offence (except murder, which is not time barred).
264. The cited provision does not establish a "longer" prescription period or provide for a suspension of the period of limitations "where the alleged offender has evaded the administration of justice", as in the UNCAC article under review.
265. Nevertheless, it is worth recognizing that the case example of *State v. Rabana* is a practical case involving an offender who evaded the administration of justice, although Botswana has no specific measure relating thereto. Although the 20 year statute of limitations had not posed a challenge so far for any corruption cases, Botswana should consider including in its legislation specific provisions to extend the prescription period or provide for the suspension of the statute of limitations in cases where an offender has evaded the administration of justice. Such an extension was welcomed by the officials in the Office of the Director of Public Prosecution.

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

266. The punishment matrix under UNCAC article 26(4) is referred to. The matrix depicts the types of punishment for the several corruption-related offences under Botswana laws.
267. Botswana indicated that the courts have usually been giving 1-3 years' imprisonment, wholly suspended on condition that accused persons do not commit similar offences. In addition to this, there would be a fine and thereafter the forfeiture of the proceeds of crime.
268. Botswana indicated that the Corruption and Economic Crime Act, together with the other statutes that criminalize corruption, prescribe the sentences applicable to the various offences they create. In addition, Section 33 of the Penal Code (General punishment for offences) provides that when the Code does not specially establish the punishment for any offence, it shall be punishable with imprisonment for up to two years or a fine, or both. Botswana cited the following measures.

Section 32. Discharge of offender without punishment, Penal Code

(1) Where, in any trial before a magistrate's court, the court thinks that the charge is proved but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge.

(2) An order made under this section shall, for the purpose of re-vesting or restoring stolen property, and enabling the court to make any order under the provisions of sections 318 and 319 of the Criminal Procedure and Evidence Act have the like effect as a conviction.

Section 33. General punishment for offences, Penal Code

When in this Code no punishment is specially provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

Section 27. Imprisonment, Penal Code

(4) Notwithstanding any provision in any enactment which provides for the imposition of a statutory minimum period of imprisonment upon a person convicted of an offence, a court may, where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment totally inappropriate, impose a lesser and appropriate penalty.

Section 29. Fines, Penal Code

(1) Where a fine is imposed under any law, then in the absence of express provisions relating to such fin in such law the following provisions shall apply –

- (a) where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;
- (b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or imprisonment shall be a matter for the discretion of the court;
- (c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in

every case of an offence punishable with a fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion –

- (i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentences; and also
 - (ii) issue a warrant for the levy of the amount in accordance with the provisions of section 303 of the Criminal Procedure and Evidence Act.
- (...)

269. There is no definite document outlining sentencing guidelines. Cases decided by the higher courts lay down the principles to be followed in addition to the penalty provisions of the statutory law. Some of the case law follows below.

1. It is well-recognized in Botswana that sentences are primarily a matter for the discretion of the trial courts. However, the discretion must not be exercised capriciously, arbitrarily or for wrong reasons, but must be exercised without anger and upon due consideration of all relevant factors. Therefore the sentence must fit the offender and the crime as well as safeguard the interests of society. (**State v Bogosinyana, 2006 (1) BLR 206 (CA)**).

2. The trial judge must always consider the triad consisting of the offence, the offender and the interests of society.

3. Discretion must be exercised within the parameters set by parliament, as interpreted by the courts over time.

4. The circumstances of the case, including the personal circumstances of the appellant, should be considered; corruption being a social evil which needs to be nipped in the bud by imposing a deterrent sentence. Corruption has been described as a crime that strikes at the very foundation of a developing country's economy and therefore merits severe punishment. (**Dube v The State, 1996 [BLR] 694**)

5. The trial judge has a wide discretion in deciding whether or not to impose a suspended sentence and is fully entitled to take into account the fact that both the appellants were foreigners when exercising this discretion (with the difficulty about imposing deferred sentences on foreigners was self-evident, it is proper to take such a factor into account when sentencing. (**Dube v The State, 1996 [BLR] 694**))

6. The courts should strive for a measure of uniformity in sentencing whenever this can reasonably and justly be done. Put differently, it is undesirable for courts to impose disparate sentences for similarly circumstanced accused persons. This is without derogating from the fact that no two cases ever be exactly the same and that each case must be treated on its own merits. **Masilo v The State [2006], 2 B.L.R. 545, CA at p 549H,**

7. It is not permissible to ignore peculiar circumstances of each individual case since no two cases can ever be exactly the same, and therefore substantial similarity is all

that one can hope to look for. (**Sekoto v The Director of Public Prosecutions [2007], 1 B.L.R. 392 (CA)**).

8. The practice of imposing disparate sentences for substantially and similarly circumstanced accused persons can bring the whole criminal justice system in this country into disrepute. (**Sekoto v The Director of Public Prosecutions [2007], 1 B.L.R. 392 (CA)**).

9. Public confidence in the justice system must be maintained by consistency of sentencing. **State v Mpelegang 2007, (3) BLR 706 (HC) at p.710**).

10. It is desirable to create restrictive rules to govern sentencing. **State v Mpelegang 2007, (3) BLR 706 (HC) at p.710**).

270. Botswana provided the following information on criminal and non-criminal sanctions imposed and sentences executed.

Criminal and non-criminal sanctions:

In **Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others, 2009 (1) BLR 24 (CA)**, the DPP obtained an order against Daisy Loo and others for a restraining order in terms of Section 8 of the Proceeds of Serious Crime Act, to restrain them from dealing in any way with, 'the "exhibit" being the proceeds held in the First National Bank account No. 62145177665'.

The DPP was also granted an order for the manager of the bank to hand over the proceeds and all accrued interest in the account to a court receiver appointed by the High Court, namely the Acting Accountant General, to deposit and hold same in an interest generating bank account pending the outcome of the criminal proceedings against the respondents.

The essential elements necessary for obtaining a restraining order were stated in that case as being an affidavit of a police officer of or above the rank of inspector, stating -

- (a) the serious offence or offences in respect of which the application is made;
- (b) that he has a reasonable belief that -
 - (i) the defendant committed the offence or offences; and
 - (ii) he received or derived proceeds of property which he identifies, from such commission; and
- (c) set out the basis for such beliefs.

In **Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others, 2009 (1) BLR 24 (CA)**, it was also stated that

“The Proceeds of Serious Crime Act deals with two types of orders viz confiscation orders and restraining orders. Each is dependent upon the court that is called upon to make the orders, being satisfied that the defendant has received, in the case of a confiscation order, or, in the case of a restraining order, has benefitted from, the proceeds of a serious offence. A confiscation order may be applied for where a defendant has been convicted of a serious offence; a restraining order where the defendant has been or is about to be charged with a serious offence, a serious offence being defined as one where the maximum penalty is death or imprisonment for not less than two years.”

The case cited above is an indication of the criminal and non-criminal sanctions that a court may pass in a corruption case.

Execution of sentences:

The courts issue committal warrants for convicted prisoners and payment of money is also to the Botswana Administration of Justice. A copy of a committal warrant in a case of manslaughter, *State v. Paul Koobatlile* (Gaborone High Court, CTHLB 000005-12, 29 November 2012) was provided to the reviewers.

(b) Observations on the implementation of the article

271. The previously analyzed articles show that the laws of Botswana provide for penalties in respect of offences established in accordance with this Convention. The matrix shows the types of penalties for most offences.
272. The penalties for offences in CECA are, apart from a few exceptions, provided for in Section 36 with a term of imprisonment up to 10 years or a fine of P500 000, or both. In comparison, the Penal Code provisions, which are relevant for the implementation of some of the offences of the Convention, mostly provide for imprisonment for up to 1-3 years.
273. The reviewing experts took note that the higher courts lay down sentencing principles by case law and that multiple factors, including circumstances of the offence, the offender and interest of society are taken into consideration.
274. The authorities during the country visit explained that penalty provisions were currently under review in Botswana. Against this backdrop the reviewing experts would like to reiterate the objective of the Convention, to establish effective, proportionate and dissuasive criminal sanctions and the damaging effects of corruption to society (as, for instance, pointed out in Botswana's case law **Dube v The State, 1996 [BLR] 694**).
275. As regards fines for legal persons, the reviewing experts would like to reiterate the remarks made under paragraph 4 of article 26 of the Convention.
276. Consistency of sentencing was another aspect discussed during the country visit in light of the relatively frequent imposition of wholly suspended sentences. It was noted by officials in the Office of the Director of Public Prosecution that sentencing guidelines might ensure greater consistency, notwithstanding the need for some judicial discretion on a case-by-case basis during sentencing in accordance with provisions such as section 27 of the Penal Code (quoted above). Guidelines would not revoke the discretion but could – in addition to case law – assure that certain factors were taken into consideration during sentencing, such as aggravating and mitigating circumstances. During its review of the penalty provisions, Botswana may wish to address the matter of sentencing guidelines.

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

277. Botswana provided the following information.

Section 41. Protection of President in respect of legal proceedings, Constitution

(1) Whilst any person holds or performs the functions of the office of President no criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official capacity or in his private capacity and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him in respect of anything done or omitted to be done in his private capacity.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the term of any person in the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are subsection (1) of this section may be brought against that person.

Various public officials, including judicial officers, CECA officers and others, are vested with functional immunities for acts within the scope of their duties, and Botswana quoted various sections of the legislation relevant thereto.

Section 14. Judicial Officers, Penal Code

Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by him in good faith in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do the act omitted to be done.

Similar provisions are, for instance, included in section 21 of CECA, section 27 of the Local Government (District Councils) Act, section 24 of the Intelligence and Security Services Act, section 124 of the Administration of Estates Act, section 95 of the Deeds Registry Act, or section 36 of the Financial Intelligence Act.

278. Botswana provided the following cases.

The Motswaledi v The President of the Republic of Botswana MAHLB 000486/2009

An example of implementation is the case involving the President of the Republic of Botswana and the Secretary General of the governing party of which he is President as well. The Secretary General of the Botswana Democratic Party sued the President before the courts of law and did not succeed because of the provision in the Constitution that, whilst the President holds office, he can neither be sued in his private nor personal capacity. The case judgment dismissing the case because it is prohibited by Section 41(1) of the Constitution was provided to the reviewers.

Section 24 of the Intelligence and Security Services Act (CAP 23:02) was analyzed several before the courts. In one matter, a Directorate of Intelligence and Security Services officer was sued before the High Court by a Somali national for conduct that related to his duties. The court invoked the provisions of the Intelligence and Security Services Act (CAP 23:02) at Section 24 and dismissed the matter on the grounds of functional immunity. The courts have, however, consistently pointed out that immunity will be availed only where the officer was in bona fide execution of his or her duties.

Further, the Intelligence and Security Services Office was sued by a bidder questioning the vetting process and asking the courts to order that it be disclosed to him why he was vetted out of the process. The High Court held that the intelligence officers were immune from civil prosecution and could not be required to disclose issues to anyone.

(b) Observations on the implementation of the article

279. During the country visit, it was explained that only the Head of State had criminal immunity whilst in office according to Section 41 of the Constitution. This protection from legal proceedings does not continue beyond the tenure in office, and the period of tenure is not taken into consideration in regard to the statute of limitations (de facto suspension of prescription). Case examples were cited where criminal proceedings were brought against members of Cabinet and senior prosecutors.

280. Public officials are not exempt from criminal prosecution. They are liable under criminal law for criminal offences.

281. The reviewing experts were satisfied with these explanations.

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

282. Botswana cited the following measures.

Section 51. Director of Public Prosecutions, Constitution of Botswana

(Now amended to be Section 51 A (3). The name Attorney General has been replaced with the name Director of Public Prosecutions)

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

(2) The Director of Public Prosecutions shall be the principal legal adviser to the Government of Botswana.

(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable to do so

(a) to 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;

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

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

(5) The powers conferred on the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

(6) For the purposes of this section, any appeal from any judgment in any criminal proceedings before any court, or any case stated or question of law reserved for the purpose of any such proceedings, to any other court shall be deemed to be part of those proceedings:

Provided that the power conferred on the Director of Public Prosecutions by subsection (3)(c) of this section shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved at the instance of such a person.

(7) In the exercise of the functions vested in him by subsection (3) of this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

Section 20. Consent of Director of Public Prosecution, Penal Code

Notwithstanding that in respect of any offence it is provided that no prosecution shall be instituted without the consent of the Director of Public Prosecutions a person may be arrested and charged for such offence and any such person may be remanded in custody or bail notwithstanding that the consent of the Director of Public Prosecutions to the institution of prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.

Section 7. Director of Public Prosecution vested with right of prosecuting all offences, Criminal Procedure and Evidence Act

The Director of Public Prosecutions is vested with the right and entrusted with the duty of prosecuting in the name and on behalf of the State in respect of any offence committed in Botswana.

Section 10. Director of Public Prosecutions-General's power of stopping prosecutions, Criminal Procedure and Evidence Act

The Director of Public Prosecutions may, at any time before conviction, stop any prosecution commenced by him or by any other person charged with the prosecution of criminal cases.

Section 39. Prosecution of offences, Corruption and Economic Crime Act

(1) If, after an investigation of any person under this Act, it appears to the Director that an offence under Part IV has been committed by that person, the Director shall refer the matter to the Director of Public Prosecutions for his decision.

(2) No prosecution for an offence under Part IV shall be instituted except by or with the written consent of the Director of Public Prosecutions.

104. Abuse of office, Penal Code

(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of an offence.

(2) If the act is done or directed to be done for purposes of gain he is liable to imprisonment for a term not exceeding three years.

(3) No prosecution for an offence under this section shall be instituted without the written consent of the Director of Public Prosecutions.

N.B. Where the name of the Attorney General appears in terms of criminal prosecutions it has now been amended to say the Director of Public Prosecutions, which is a new creature of the Constitution Amendment Act and was provided to the reviewers.

283. Botswana provided the following cases and information.

The case referred to earlier of the **Director of Public Prosecutions v Frank Molaletsi, Daisy Loo (Pty) Ltd and Others** is a case in point. The initiation of the proceedings was solely at the discretion of the Director of Public Prosecutions and no other institution. The discretion to withdraw or re-instate proceedings is also of the DPP alone. However, law enforcement officers can arrest and charge individuals and even take them to court prior to the consent of the DPP, as envisaged under Section 20 of the Penal Code.

The case of **The State v Vincent Seretse and others** (still pending before the courts) is also relevant. In this newly registered case, the defense objected to the matter being referred to the newly formed Corruption Court, saying the case should remain with the Magistrates Court. The Corruption Court is equivalent to a High Court. The DPP submitted that it was solely within his discretion to prefer charges against accused persons and the choice of court was also his prerogative. It was noted that the High Court having inherent jurisdiction could entertain all matters regardless of their gravity.

284. Botswana indicated that the information relating to cases where there was a contention relating to the powers of the DPP have not been recorded as and when they arose. There are, however, several cases in which, owing to their public interest, a record has always been kept as to what had transpired at the trial. This, however, should not be taken to mean that the record of proceedings will not capture everything.

(b) Observations on the implementation of the article

285. The provisions cited by Botswana in relation to paragraph 3 of article 30 generally indicate the discretion of the Director of Public Prosecutions. There is no right of appeal or complaint against a decision not to prosecute, nor are prosecution guidelines in place.

Botswana may wish to consider adopting relevant measures to maximize the effectiveness of law enforcement efforts in line with the provision under review.

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

286. Botswana cited the following measures.

Criminal Procedure and Evidence Act

A. After Preparatory Examination Is Concluded (ss 104-110)

104. Bailable offences

Every person committed for trial or sentence in respect of any offence except treason or murder may be admitted to bail in the discretion of the magistrate: Provided that (i) the refusal by the magistrate who has committed any person for trial, to grant such person bail shall be without prejudice to such person's rights under section 113, and (ii) the magistrate may admit to bail a person under the age of 18 committed for trial on a charge of murder.

105. Verbal application for bail

It shall be competent for the accused at the time of the commitment to apply verbally to the judicial officer granting the warrant of commitment, to be liberated on bail.

106. Application for bail after commitment

(1) At any period subsequent to the time of commitment it shall be competent for the accused to make written application to the magistrate who granted the warrant of commitment, or to a magistrate having jurisdiction within the district in which he was committed for trial, or to a magistrate having jurisdiction within the district in which he is in custody, unless bail has already been refused by any magistrate. When the commitment is on a warrant issued by the High Court it shall only be competent to apply for bail to the High Court.

(2) Every such written application for bail shall be in a form of a petition and shall be accompanied by a copy of the warrant of commitment or by affidavit that a copy is denied.

107. Magistrate to determine whether the offence is bailable

(1) Every magistrate to whom an application for bail is made under section 106 shall within five days thereafter if the offence is bailable by him, fix the amount of the bail to be given, or after consideration of such application may, in his discretion, refuse to grant bail.

(2) In determining whether the offence for which the accused has been committed is bailable or not by him, the magistrate shall, in the ordinary case, take the charge against the accused as he finds it on the face of the warrant of commitment.

108. Refusal of bail from the uncertain issue of act committed

In cases where a doubt may arise concerning the degree and quality of the offence from the uncertain issue in the case of an injury of which it cannot be foretold whether the person injured will die or recover, every judicial officer to whom application for bail is made may refuse to grant the same until all danger to the life of the person injured is at an end.

109. Conditions of recognizances (emphasis added)

(1) The recognizance which is taken on the admission of an accused person to bail under sections 104 to 108 of this Part shall be taken by the judicial officer either from the accused alone or from the accused and one or more sureties in the discretion of the judicial officer according to the nature and circumstances of the case.

(2) The conditions of the recognizance shall be that the prisoner shall appear and undergo any further examination which the magistrate or the Director of Public Prosecutions may consider desirable and also answer to any indictment that may be presented, or charge that may be made, against him in any competent court for the offence with which he is charged at any time within a period of 12 months from the date of the recognizance; that he will also attend during the hearing of the case and to receive sentence; and that he will accept service of any summons or warning to undergo further examination and any such indictment or charge, notice of trial, and summons thereon and any other notice under this Act at some certain and convenient place within Botswana chosen by him and expressed therein.

(3) The recognizance shall continue in force notwithstanding that for any reason, when the trial takes place, no verdict is then given, unless the indictment or charge is withdrawn.

110. On failure of accused to appear at trial, recognizance to be forfeited

If upon the day appointed for the hearing of a case it appears by the return of the proper officer or by other sufficient proof that a copy of the indictment and notice of trial or, in case of a remittal to a magistrate's court, the summons or warning has been duly served or given and the accused does not appear after he has been three times, in or near the court premises, called by name, the prosecutor may apply to the court for a warrant for the apprehension of the accused, and may also move the court that the accused and his sureties (if any) be called upon their recognizance, and, in default of his appearance, that the same may be then and there declared forfeited; and any such declaration of forfeiture shall have the effect of a judgment on the recognizance for the amounts therein named against the accused and his sureties respectively.

B. In Cases Tried By Magistrates' Courts (s 111) (emphasis added)

111. Power to admit to bail, nature of bail and provision in case of default

(1) When a criminal case before a magistrate's court is adjourned or postponed and the accused remanded, the magistrate may in his discretion, admit the accused to bail in manner herein provided:

Provided that the accused shall not be remanded for more than one month if not in custody, or for more than 15 days if in custody.

(2) When a magistrate decides to admit an accused person to bail under this section, a recognizance shall be taken from the accused alone or from the accused and one or more sureties, as the magistrate may determine, regard being had to the nature and circumstances of the case. The conditions of the recognizance shall be that the accused shall appear at a time and place to be specified in writing and as often as and at such intervals not exceeding one month as may be necessary thereafter within a period of six months, until final judgment in his case has been given, to answer the charge of the offence alleged against him or the charge of any other offence which may appear to the Director of Public Prosecutions or the local public prosecutor to have been committed by the accused.

(3) The magistrate may further add to the recognizance any conditions which he may deem necessary or advisable in the interest of justice as to

(a) times and places at which and persons to whom the accused shall present himself;

(b) places where he is forbidden to go;

(c) prohibition against communication by the accused with witnesses for the prosecution or any named person; or

(d) any other matter relating to his conduct.

(4) If it appears to the magistrate that default has been made in any condition of a recognizance taken before him or if it appears to the magistrate before whom an accused person has to appear in terms of any recognizance entered into before another magistrate that default has been made in any condition of such recognizance, such magistrate may

(a) issue an order declaring the recognizance forfeited, and such order shall have the effect of a judgment on the recognizance for the amounts therein named and against the person admitted to bail and his sureties respectively; and

(b) issue a warrant for the person admitted to bail and afterwards, on being satisfied that the ends of justice would otherwise be defeated, commit him, when so arrested, to a goal until his trial.

C. General For All Criminal Cases (ss 112-122)

112. Excessive bail not to be required

The amount of bail to be taken in any case shall be in the discretion of the judicial officer to whom the application to be admitted to bail is made:

Provided that no person shall be required to give excessive bail.

113. Appeal to High Court against refusal of bail

Whenever an accused person considers himself aggrieved by the refusal of any magistrate to admit him to bail or by such magistrate having required excessive bail, he may apply in writing to the judge of the High Court who shall make such order thereon as to him in the circumstances of the case seems just.

114. Power of the High Court to admit to bail

Except where otherwise expressly provided the High Court shall have power, at any stage of any proceedings taken in any court in respect of an offence, to admit the accused to bail, whether the offence is or is not one of the offences specifically excepted in section 104.

115. Insufficiency of sureties

If, through mistake, fraud, or otherwise, insufficient sureties have been accepted or if they afterwards become insufficient, the judicial officer granting the bail may issue a warrant of arrest directing that the accused be brought before him and may order him to find sufficient sureties, and on his failing to do so may commit him to prison.

116. Release of sureties

(1) All or any sureties for the attendance and appearance of an accused person released on bail may at any time apply to the judicial officer before whom the recognizance was entered into to discharge the recognizance either wholly or so far as relates to the applicants.

(2) On such application being made, the judicial officer shall issue a warrant of arrest directing that the accused be brought before him.

(3) On the appearance of the accused pursuant to the warrant or on his voluntary surrender, the judicial officer shall direct the recognizances to be discharged either wholly or so far as relates to the applicants and shall call upon the accused to find other sufficient sureties and, if he fails to do so, may commit him to prison.

117. Render in court

The sureties may bring the accused into the court at which he is bound to appear during any sitting thereof and then, by leave of the court, render him in discharge of such recognizance at any time before sentence, and the accused shall be committed to a goal there to remain until discharged by due course of law; but such court may admit the accused person to bail for his appearance any time it deems meet.

118. Sureties not discharged until sentence or discharge of the accused

The pleading or conviction of any accused person released on bail as aforesaid shall not discharge the recognizance, but the same shall be effectual for his appearance during the trial and until sentence is passed or he is discharged; nevertheless the court may commit the accused to a goal upon his trial or may require new or additional sureties for his appearance for trial or sentence (as the case may be) notwithstanding such recognizance; and such commitment shall be a discharge of the sureties.

119. Death of surety

When a surety to a recognizance dies before any forfeiture has been incurred, his estate shall be discharged from all liability in respect of the recognizance, but the accused may be required to find a new surety.

120. Person released on bail may be arrested if about to abscond

Whenever an accused person has been released on bail under any of the provisions of this Part, any judicial officer may, if he sees fit, upon the application of any peace officer and upon information being made in writing and upon oath by such officer or by some person on his behalf that there is reason to believe that the accused is about to abscond for the purpose of evading justice, issue his warrant for the arrest of the accused, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, commit him, when so arrested, to goal until his trial.

121. Deposit instead of recognizance

(1) When any person is required by any judicial officer to enter into recognizances with or without sureties under any of the provisions of this Act, such judicial officer may, except in the case of a bond for good behaviour, instead of causing such

recognizances to be entered into, permit him or some person on his behalf to deposit such sum of money as the judicial officer may fix. Conditions in writing shall be made, in respect of such a deposit of money, of the same nature as the conditions prescribed by this Part in respect of recognizances, and all the provisions of this Part prescribing the circumstances in which recognizances taken from the accused alone shall be forfeited, his arrest if about to abscond, and remission of forfeited bail, shall apply mutatis mutandis in respect of any such deposit of money.

(2) Where the charge against the accused person is not one of the offences mentioned in subparagraphs (i) and (ii) of paragraph (b) of section 28 any policeman of or above the rank of Sub-Inspector, may, at a police station and at such times as no judicial officer is available, admit to bail an accused person who makes or on whose behalf is made a deposit of such a sum of money as such police officer may in the particular circumstances fix. The provisions of subsection (1) as to conditions, forfeiture and remission of forfeited bail shall mutatis mutandis apply in respect of a deposit of money made under this subsection.

122. Remission of bail

The President may in his discretion remit any portion of any amount forfeited under this Part and enforce payment in part only.

287. Botswana referred to the following cases.

A corruption matter involving Chinese nationals who were charged with corruption. The court laid down the bail conditions at its own discretion to ensure that the accused persons were available within the jurisdiction of the court at the time of the trial. This is the case of **The State v Xiaoming Wang and Xiaoxing Qiu (CMMVL 000276/2011)**. A copy of the judgment varying the conditions of bail to allow one of the accused persons to travel while retaining a plot of land bonded to the State was provided to the reviewers.

The State v Tourism Development Consortium is also a case in point addressing issues relating to bail. The accused person, who had been incarcerated following the sentence by the court, applied for bail pending his appeal to the High Court. The court applied its discretion whether to grant bail or not, and bail was ultimately granted.

(b) Observations on the implementation of the article

288. The legal provisions cited by Botswana in relation to paragraph 4 of article 30 refer to various forms of release on bail. Moreover, Sections 109(2) and 111(2)-(4) of the Criminal Procedure and Evidence Act, in particular, address relevant conditions for release on bail that consider the defendant's subsequent presence.

In addition, Botswana explained that the prosecution had requested the court to refuse bail in the case of **The State v Xiaoming Wang and Xiaoxing Qiu**, but the final decision was at the discretion of the judge. The courts had also declared it unconstitutional to not grant bail for certain offences, but stated that bail always should be considered along with the bail provisions set out by law.

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

289. Botswana cited the following measure.

Section 85, Prisons Act

Subject to the other provisions of this Part, a prisoner shall be eligible for release from prison on parole if he is serving

(a) a determinate term of imprisonment of not less than four years (whether that term consists of a single punishment or punishments running concurrently or consecutively), neither the whole nor part of which was imposed for stealing stock or for unlawful dealing in or possession of precious stones, and he has served one half of that term or three years' imprisonment, whichever is the longer;

(b) a determinate term of imprisonment of more than five years (whether that term consists of a single punishment or punishments running concurrently or consecutively), the whole or part of which was imposed for stealing stock or for unlawful dealing in or possession of precious stones, and he has served one half of that term or five years' imprisonment, whichever is the longer; or

(c) a term of imprisonment for life or is confined during the President's pleasure and has served seven years imprisonment.

290. Botswana indicated that examples of implementation may be gleaned from the following statistics provided by the Department of Prisons and Rehabilitation with respect to criminal matters generally (not limited to corruption).

PAROLE STATISTICS

Year of submission: 2009

Number of applications submitted to the Minister for consideration: 4

Released on Parole: 2

Offences: • Stealing stock • Defilement of an imbecile • Rape • Murder with extenuating circumstances•

Remarks: One of the persons released on parole was sentenced to 8 years' imprisonment. He served 5 years before his release on parole. The other one was sentenced to 20 years imprisonment. She served 11 years before her release on parole.

• They both served on parole until their sentences expired.

Year of submission: 2010

Number of applications submitted to the Minister for consideration: 5

Released on Parole: 1

Offences: • Murder • Robbery and car theft • Armed robbery • Defilement of persons under the age of 16 years•

Remarks: The person released on parole was sentenced to 20 years imprisonment; he served 11 years before his release on parole • He re-offended and the Honourable

Minister recalled him to prison before expiration of his sentence, as prescribed by Sections 88 and 89 of the Prisons Act.

Year of submission: 2011

Number of applications submitted to the Minister for consideration: 3

Released on Parole: 1

Offences: • Murder • Murder with extenuating circumstances • Robbery and theft of motor vehicles •

Year of submission: 2012

Number of applications submitted to the Minister for consideration: 3

Released on Parole: 2

Offences: • Rape • Defilement murder • Robbery • Store breaking and theft • Armed robbery • Stealing of motor vehicle • Housing breaking and theft

Remarks: Still pending

NB. The statistics have been availed from the office of the Commissioner of Prisons and Rehabilitation.

(b) Observations on the implementation of the article

291. Botswana further explained during the country visit, that decisions on parole were taken by the Minister after the individual case was considered by a parole board. The specific conditions for parole were also specified on a case by case basis.

292. The reviewing experts were satisfied with the explanations provided and observe that Botswana has implemented the provision.

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

293. Botswana provided the following information.

Section 35. Suspension, Public Service Act

(1) If the supervising officer becomes aware that criminal proceedings have been or are about to be instituted against an employee, or considers that disciplinary proceedings should be instituted against a public officer, and is of the opinion that such officer should be suspended from the performance of his or her duties pending the taking of proceedings against him or her, the supervising officer shall report the matter in writing to the Permanent Secretary recommending the suspension of such employee: Provided that where the Permanent Secretary is the supervising officer, he

or she shall take such action as may be taken by a supervising officer in accordance with subsections (2) and (3).

(2) On receipt of a report under subsection (1) the Permanent Secretary shall decide whether the employee should be suspended.

(3) An employee's salary shall not be withheld during the period of his or her suspension.

(4) Disciplinary proceedings may be brought and concluded against an employee notwithstanding that criminal proceedings arising out of the same facts are being investigated or are pending against that employee:

Provided that no statement made or evidence given by the officer in the disciplinary proceedings shall be used against him or her in any criminal proceedings arising from the same facts.

Part VII of the Public Service Act regulates the termination of appointment and retirement. Section 27 foresees summary dismissal including in cases of corruption.

Section 27. Summary dismissal, Public Service Act

(1) An employee who is guilty of serious misconduct shall be summarily dismissed from the public service on the basis of that serious misconduct.

(2) Except in those cases in which the employer cannot reasonably be expected to hold a disciplinary enquiry, subsection (1) shall not be construed as permitting the employer to disregard the rules of natural justice in dealing with cases of summary dismissal.

(3) For the purposes of this section, "serious misconduct" shall, without prejudice to its general meaning, include the following –

(...)

(j) offering or receiving a bribe;

(k) acts of theft, misappropriation or wilful dishonesty against Government, another employee or client of Government;

(...)

(o) accepting a gift without declaration;

Part IX (Sections 36 to 41) deals with issues of misconduct and unsatisfactory service.

Section 37. Particular types of misconduct

It is misconduct for an employee to –

(...)

(c) engage in any activity outside his or her official duties which is likely to involve him or her in political controversy or to lead to his or her taking improper advantage of his or her position in the public service;

(...)

(e) appoint or promote any person to a post in the public service or send any person on a course of training on the basis of consanguinity, affinity, amity, amorous relationship, tribe, favouritism, or on any other consideration other than on merit based on fair and open competition;

Section 40. Punishment for misconduct, Public Service Act

The following are the punishments that may be imposed in disciplinary proceedings under this Act in respect of misconduct –

(...)
(g) dismissal.

Section 13. Interdiction, Botswana Police Act

An officer may be interdicted pending the outcome of a criminal or administrative hearing on his conduct.

The Botswana Defence Force Act has a similar provision

294. Botswana provided the following examples of implementation.

Interdiction of public officials has, since the promulgation of the Public Service Act, been according to its provisions. Prior to the current Public Service Act most rules governing the suspension of public officials was done under General Orders which enunciated the processes and procedures for suspension of officers.

A judge who was convicted of a criminal offence left office when the President, in association with the Judicial Service Commission, established a Commission of Inquiry into the conduct of the judge, whether he was a fit and proper person to hold office as a judicial officer. This is indicative of the fact that procedures are in place.

Several police officers were dismissed from work after they were arrested for corrupt conduct. Some of the dismissals were effected before the criminal trial was completed, as the relevant authorities administratively dealt with the conduct of such officers. Such cases include **The State v Tebogo Mokoko; The State v Chemelani Muzila; and The State v Odirile Moeng cited earlier.**

Another example is the case where an attorney was employed in a municipal authority and the appointing authority overlooked the requirement to seek the approval of the Permanent Secretary to the President. The attorney, having at some point been convicted of a criminal offence, ultimately left the post. Although he did not wait for any administrative action to be taken, when the anomaly was realized, he voluntarily left the employ of the public service.

295. The cases mentioned above are cases in point. During the time of the country visit no statistics were available, but Botswana explained that disaggregated statistics about employees who were dismissed because of corruption related offences were being compiled and would be shared at a later stage.

296. Botswana provided the following statistics.

The total number of public officers on interdiction and/or suspension is 32. This number represents all public officers in the Republic of Botswana.

1. Officers suspended pending criminal proceedings: 5
2. Officers against whom disciplinary proceedings were undertaken pending their trial outcome: 3
3. Officers fined on the basis of disciplinary action undertaken pending their criminal trial: 1
4. Officers whose employment was terminated as a result of disciplinary proceedings: 8
5. Officers whose employment was terminated after a criminal conviction: 8
6. Officers whose salaries were withheld as a result of being interdicted: 25

(b) Observations on the implementation of the article

297. During the country visit further details of the cited legislation and its implementation were provided.
298. The Directorate of Public Service Management (DPSM) is the single employer of public officers in the central and local government, including teachers. Its mandate is based on Chapter VII of the Constitution of Botswana, which refers to the Public Service Commission (PSC). The PSC was gradually transformed since its establishment and became the DPSM in 1986.
299. The Public Service Act does not apply to members of the Botswana Defence Force, the Police Service and the Prison Service (Section 3 of the Public Service Act). These officers are governed by respective rules on disciplinary matters in the Police Act, which establish nearly identical measures as the Public Service Act (e.g. Section 13 of the Botswana Police Act and Section 117 of the Botswana Defence Force Act). Furthermore, for judicial officers, the Judicial Service Commission governs disciplinary proceedings (Part III of the Constitution of Botswana).
300. Some slight variations exist, e.g. Section 13 of the Botswana Police Act and Section 117 of the Botswana Defence Force Act foresee interdiction instead of suspension, which includes a reduction of salary to an amount being not less than one-half of the salary. Interdiction had also been part of the Public Service Act prior to its amendment in 2008 (old Section 22 of the Act). This was changed to the measure of suspension which does not result in a reduction of salary (Section 35 of the Public Service Act).
301. The transition to the measure of suspension is nearly finalized. The total number of officers who were on interdiction was 40 but most of them have since been put on suspension following the enactment of Public Service Act No. 30 of 2008. DPSM is currently updating its report on such disciplinary measures as it was not available during the time of the country review.
302. With respect to the Public Service Act, Section 35 applies both in regard to criminal and disciplinary proceedings. Section 35 does not establish the alternative of reassigning a public official accused of an UNCAC offence to another position pending outcome of the proceedings (nor does Section 40 on punishments for misconduct based on the outcome of proceedings include such a provision). During the country visit, officials in the DPSM explained that such a measure might still be possible as an administrative decision. It was further clarified that reassignment is done currently as a matter of practice. The practice is that officers who are accused of having committed an offence can be reassigned as and when deemed necessary by the appointing authority. Although Section 35(1) of the Public Service Act provides only for suspension with pay, the practice has been to also reassign officers depending on the circumstances of each case.
303. The reviewing experts noted that Botswana has implemented the provision under review.
304. During the meeting with DPSM it was also highlighted that corruption offences were in general considered a grounds for dismissal.

Article 30 Prosecution, adjudication and sanctions

Subparagraph 7 (a)

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

(a) Holding public office; and

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

305. Botswana provided the following information.

Part VII of the Public Service Act regulates the termination of appointment and retirement. Section 27 foresees summary dismissal including in cases of corruption. (see above at article 30, paragraph 6)

Section 18. Disqualification, Public Service Act

A person who has been convicted of an offence involving moral turpitude, or who has been dismissed from the public service shall not be appointed to any public office without the written approval of the Director or Permanent Secretary to the President as the case may be, for positions which they appoint for.

Relevant provisions in the Botswana Police Force Act are sections 8, 15, 28 and 35.

Removal of High Court and Court of Appeal Judges under article 97 and 101 of the Constitution.

Article 127 Constitution

"public office" means, subject to the provisions of subsections (2) and (3) of this section, an office of emolument in the public service;

"public officer" means a person holding or acting in any public office;

"the public service" means the civil service of the Government.

(2) In this Constitution, unless the context otherwise requires, references to offices in the public service shall be construed as including references to the offices of judges of the Court of Appeal and judges of the High Court and the offices of members of all subordinate courts (being offices the emoluments attaching to which, or any part of the emoluments attaching to which, are paid directly out of moneys provided by Parliament).

(3) For the purposes of this Constitution a person shall not be considered to be a public officer by reason only that he is in receipt of any remuneration or allowance as the President, Vice-President, a Minister or Assistant Minister, Speaker, Deputy Speaker or Member of the Assembly, a Member of the House of Chiefs or a member of any Commission established by this Constitution.

306. Botswana provided the following cases.

307. Out of a total of 25 officers who requested to be pardoned following their dismissal from the Public Service, only 3 of such requests were approved. The three matters specifically related to Unauthorised Absenteeism, Desertion from Duty following completion of studies and Examination Maladministration. Most of the declined requests are related to Misconduct (Stealing by person employed in the Public Service), Sexual Harassments of Students.

(b) Observations on the implementation of the article

308. During the meeting with DPSM it was highlighted that corruption offences were in general considered a grounds for dismissal. This would lead to disqualification from being reappointed, except in cases where the Director or Permanent Secretary provided a written approval to the President. The approval would take the gravity of the offence and the circumstances of the case into consideration.

309. The reviewing experts observe that Botswana has implemented paragraph 7(a) of article 30.

Article 30 Prosecution, adjudication and sanctions

Subparagraph 7 (b)

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

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

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

310. Botswana referred to the information under subparagraph 7 (a) of article 30 above.

(b) Observations on the implementation of the article

311. Subparagraph (b) of paragraph 7 of article 30 addresses the possible disqualification of convicted public officials from holding positions in companies which are wholly or partly owned by the State.

312. The cases cited by Botswana relate only to the public service. It was clarified that, where entities are held in part by the State the practice is for the Boards that govern those entities to ask the relevant agency to vet the individual. As a result of the vetting procedure, persons convicted of corruption-related offences would be precluded from holding office in State-owned enterprises.

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

313. Botswana provided the following information.

Section 35(4) of the Public Service Act allows for administrative action to be taken against an offending officer where the criminal case is still pending.

314. Botswana provided the following case example.

The **State v Chemelani Christopher Muzila** (cited earlier). In this case, a police detective arrested for corruption was tried in court for the criminal matter when his disciplinary case had long been dealt with by the Police Services. He was by then (at the time of the trial) already dismissed from the Police Service.

(b) Observations on the implementation of the article

315. Botswana has adopted measures providing for the establishment of administrative proceedings of a disciplinary nature against public officials notwithstanding criminal proceedings.

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

316. Botswana indicated that it has not implemented this provision, but there have been efforts to formulate policy and a draft is still at consultation stage by the relevant authorities. It has, however, still to be reviewed by stakeholders before it can be made public. It is envisaged that within the next year the policy will be functional.

(b) Observations on the implementation of the article

317. During the country visit the reviewing experts were informed that the general aim of reintegration is acknowledged in Sections 90 and 91 of the Prison Act. Some years back there had been an initiative supported through a dedicated Presidential fund to assist former inmates to regain employment and receive business licenses. However, no such programmes were in place at the time of the country visit. It was also highlighted that former inmates had formed a society to raise awareness on the subject and to support the reintegration of others.

318. The reviewing experts note that Botswana currently does not have measures in place to promote the reintegration of offenders, including offenders convicted of corruption

offences. They encourage Botswana to continue its efforts to formulate a policy and bill dealing with the issue of social reintegration in line with the provision under review.

(c) Challenges, where applicable

319. Botswana has identified the following challenges in fully implementing the article under review:

1. Limited resources for implementation: Setting up structures would require training of personnel to man the structure and finances to set up the required structure.
2. Inadequacy of existing normative measures: Laws and structures should be set to allow for reintegration.

(d) Technical assistance needs

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

1. Model legislation: There is currently no law on reintegration.
2. Development of an action plan for implementation: Assistance of the relevant authorities to adequately implement the envisaged policy

321. Botswana indicated that none of the forms of technical assistance mentioned have been previously provided.

Article 31 Freezing, seizure and confiscation

Subparagraph 1 (a)

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

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

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

322. Botswana cited the following measures.

Section 3, Proceeds of Serious Crime Act, 1990 (as amended) (“POSCA”)

(1) Where a person has been convicted of a serious offence, the Director of Public Prosecutions may apply to the court before which the conviction was obtained, or to the High Court, for a confiscation order in respect of that serious offence, or, if convictions were obtained for more than one serious offence, in respect of all or any of those offences.

(2) An application under subsection (1) shall be made within 12 months of the date of the conviction for the offence in respect of which it is made.

Section 4, Proceeds of Serious Crime Act, 1990 (as amended)

(1) Where an application is made under section 3, the court shall satisfy itself that the defendant in the case concerned has received the proceeds, as defined in section 2 (5), of the serious offence or offences in respect of which the application is made, and if it decides that he has, shall proceed to assess the value of the proceeds received by him: Provided that in making such assessment where more than one serious offence is involved, the court shall make an assessment of the proceeds received by the defendant in respect of each offence separately.

(2) For the purpose of making an assessment under subsection(1), the court may –

(a) treat any property which the court is satisfied was held by the defendant since his conviction for the offence in respect of which the application is made, or was transferred to him at any time within a period of 5 years prior to the date when he was charged with that offence, or, in the case of a serious offence of which he is deemed to have been convicted by virtue of section 2 (4), within a period of 5 years prior to the date when he was so convicted, as having been received by him as payment or reward in connexion with the commission of the offence;

(b) treat any payment, reward or pecuniary advantage as having been received or derived by him, notwithstanding that it was received or derived by another person at the request or at the direction of the defendant, or that it was received or derived by him or so received or derived by that other person before the commencement of this Act, or outside Botswana;

(c) treat any property vested in any trustee or receiver by reason of the defendant's bankruptcy, as continuing to be the defendant's property;

(d) treat property as being held by the defendant if he holds an interest in it, or as having been transferred to him if an interest in the property has been transferred or granted to him;

(e) disregard any expenses or outgoings of the defendant in connexion with the offence or any other serious offence.

(3) For the purpose of making an assessment under this section, the court may treat as property of the defendant any property that, in the opinion of the court, is subject to the effective control of the defendant, whether or not the defendant has any legal or equitable estate or interest in it, or any right, power or privilege in connexion with it.

(4) Without limiting the generality of subsection (3), the court may have regard to –

(a) shareholdings in, debentures over or directorships of any company that has an interest (whether direct or indirect) in the property;

(b) any trust that has a relationship to the property; and

(c) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (a), or trusts of the kind referred to in paragraph (6), and any other person or persons.

(5) For the purpose of satisfying itself in accordance with subsection (1) in respect of a serious offence, the court may have regard to the transcript of any proceedings against the defendant for the offence or offences.

(6) For the purpose of making an assessment under this section, the court shall value property, other than money, at its market value determined as at the date when the court makes the assessment, and when any person other than the defendant holds an interest in the property, the value of that interest shall be taken into account in determining the value of the property to the defendant.

Section 5, Proceeds of Serious Crime Act, 1990 (as amended)

(1) When a court has satisfied itself in accordance with section 4 that the defendant has received or derived any benefit from proceeds of a serious offence, it shall issue an

order (in this Act referred to as a "confiscation order") ordering the defendant to pay to the Government a pecuniary penalty of an amount equal to its own assessment of the value of the proceeds of the offence, received by the defendant or from which he has benefited, unless the court for good reason decides that the penalty shall be for a lesser amount.

(2) The penalty ordered under subsection (1) shall, for all purposes, be deemed to be a civil debt owed by the defendant to the Government, and may be enforced as if it were an order made by the court in civil proceedings instituted by the Government against the defendant to recover a debt due by him to the Government.

(3) A confiscation order following the conviction of the defendant may be issued before or after the court trying the offence or offences has passed sentence: Provided that –

(a) where a confiscation order is made before sentence has been passed, the court in passing sentence shall take into account the total value of the confiscation order when assessing the amount of any fine or order for compensation or restitution to be imposed on the defendant; and

(b) where a confiscation order is made after sentence has been passed, the court in assessing the size of any such order shall take into account any fine or order for compensation or restitution passed by the court which sentenced the defendant.

Section 37, Corruption and Economic Crime Act

Where a person has been convicted of corruption or cheating the public revenue under this Part, the Director of Public Prosecutions may apply for a confiscation order under section 3 of the Proceeds of Serious Crime Act, 1990, and accordingly, the provisions of that Act shall have effect in respect of the application.

The sections cited below of the Penal Code and the Criminal Procedure and Evidence Act have been the main bases for the repossession of instruments and proceeds of crime from accused persons for their restitution to rightful owners or to be forfeited to the State:

Penal Code

306. Forfeiture

When any person is convicted of an offence, or of an attempt to commit an offence or of counselling or procuring the commission of an offence, under this Division, the court may order that any dangerous or offensive weapon or instrument of house-breaking carried or used in connection with the offence shall be forfeited to the State.

Criminal Procedure and Evidence Act

PART XIX. Costs, Compensation and Restitution

316. Court may order accused to pay compensation

317. Compensation to innocent purchaser of stolen property

318. Restitution of stolen property

319. Return of exhibits, etc.

320. Miscellaneous provisions as to awards or orders under this Part

323. Botswana provided the following cases in which proceeds were confiscated.

In **Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd, 2009 (1) BLR 24**, P24,000,000 was recovered. Note that this case is the same as *The State v Frank*

Molaletsi, Daisy Loo and Others cited earlier. The difference in name is that the former was an interlocutory application before the main case started, which therefore caused the difference in name.

In the case involving the Central Medical Stores (**The State v Patrick Cole and others**), about P17,000,000 which had been stolen from the government was recovered through the stipulated provisions. Most of the money was recovered outside the country through mutual legal assistance.

In the **Tourism Development Consortium** case, a huge chunk of land costing a large sum of money was forfeited to the state. The State however lost an appeal to the Court of Appeal on the ground of third party interests and the land stood to be retrieved through some other means other than the criminal process. The case outcome was that the money was returned to the owner with no recovery by the government.

In **Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others 2009 (1) BLR 24 (CA)** it was also stated that:

“The Proceeds of Serious Crime Act deals with two types of orders viz confiscation orders and restraining orders. Each is dependent upon the court that is called upon to make the orders, being satisfied that the defendant has received, in the case of a confiscation order, or, in the case of a restraining order, has benefitted from, the proceeds of a serious offence. A confiscation order may be applied for where a defendant has been convicted of a serious offence; a restraining order where the defendant has been or is about to be charged with a serious offence, a serious offence being defined as one where the maximum penalty is death or imprisonment for not less than two years.”

The court ultimately ordered that P24,000,000 (twenty four million pula) be forfeited to the State after the conclusion of the trial. This was the initial P21,000,000 plus interest that had accrued whilst the proceeds were in the receiver's possession. The receiver was the Accountant General who had been appointed by the court to keep the funds in an interest bearing account with a local bank.

(b) Observations on the implementation of the article

324. Botswana has implemented the provision under review.

325. The relevant threshold for confiscation is conviction of a serious offence. Officials explained that corruption is covered through the application of Section 37 of the Corruption and Economic Crime Act. Furthermore, in minor cases not regarded as serious, instruments and proceeds can be forfeited under various laws, for instance the Drugs and Related Substances Act and the Criminal Procedure and Evidence Act. Nonetheless, the observations under article 23 regarding the applicable threshold for serious offences under POSCA and the pending amendments under the POSCA bill are referred to also in the context of the present article.

326. Officials in the Office of the DPP explained during the country visit that the confiscation of assets corresponding to the value of criminal proceeds is possible through pecuniary penalty orders under Section 5 of the Act (see the further explanation under UNCAC article 31(4) and (5) below).

327. Regarding the case of **Central Medical Stores (The State v Patrick Cole and others)** cited above and also referred to under UNCAC article 23, the officials explained during the country visit that the case involved the predicate crime of theft in Botswana, and that money that was laundered in South Africa was recovered from South Africa through the MLA process, following a joint investigation and direct law enforcement cooperation with South African authorities in the investigation.
328. Under the Financial Intelligence Act, the Financial Intelligence Agency (FIA) is mandated to request, receive, analyze and disseminate information relating to suspicious transactions involving “financial offences,” defined as “money laundering, financing of terrorism or the acquisition of property from the proceeds of any other offence”. Further information on the FIA is included under UNCAC article 36.
329. The reviewers underscore the need expressed by Botswana’s officials for awareness raising and training on asset tracing/seizing and confiscation for all relevant criminal justice institutions, including the DCEC, police, FIA, DPP, as well as magistrates and judges, in particular under the 2014 Proceeds of Serious Crimes amendment Bill. The reviewers note that the implementation of the 2014 POSCA amendment bill (described below) may address concerns expressed during the country visit that under the current conviction-based regime the pursuit of assets begins relatively late during or after the criminal investigation, although a confiscation order must be filed within 12 months (Section 3(2) POSCA) of the conviction. The reviewers welcome further training on the application of the non-conviction based forfeiture system and more generally under the new legislation for all relevant institutions and the judiciary.

Article 31 Freezing, seizure and confiscation

Subparagraph 1 (b)

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

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

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

330. Botswana provided the following information.

Forfeiture of instrumentalities is usually done by court order, which at the end of the trial will make a decision on forfeiture.

Section 18(3) of the Drugs and Related Substances Act CAP 63:04 also allows for forfeiture to the State of any vehicle, receptacle or other instrumentality used in the transportation of the drugs in question.

Section 75 Wildlife Conservation and National Parks Act of 1992, Forfeitures, etc.

(1) Where any person is convicted of an offence under this Act, the court may order, and shall order where the offence is one punishable with a fine of P2 000 or over, that

any weapon, trap, animal, vehicle, aircraft or boat used for the purpose of or in connection with the commission of the offence, shall be forfeited to the State.

(2) Where the holder of a licence, permit, authority or permission issued or granted under this Act is convicted of an offence under the Act for which the penalty prescribed is P1 000 or over, such conviction shall have the effect of cancelling such licence, permit, authority or permission, unless the court in any particular case decides otherwise.

(3) Anything forfeited to the State under this section shall be disposed of as the Minister may direct:

Provided that such disposal shall not in any way include returning any of the items to the offender or any party to the offence.

331. Botswana provided the following examples of cases where instrumentalities were confiscated. The cases do not relate to corruption offences.

The State v Moganiwa and others CMMLN 000254/2008.

The accused person were arrested for hunting without a license. The accused persons appeared before court and were convicted and the vehicle they had used in the commission of the offence, a Toyota hilux 4X4 was confiscated by order of court and sold by public auction.

The State v Elvis Tafa CMMF 00998/1998.

In this case the accused was as well convicted with an offence of Hunting preserved animal and hunting out of season. The exhibit gun was forfeited to the state besides the fine that was meted out on the accused.

This example involved the forfeiture of a firearm, where the accused persons were ambushed by the police during an attempt to rob one of the local wholesalers. The accused persons dropped the firearm when the police were pursuing them and this was forfeited through an order by a judicial officer under Section 53 of the Criminal Procedure and Evidence Act. This was in 2011.

NB: Two of these cases fall outside the period of review.

332. Botswana provided the following information on the amount/types of property, equipment or other instrumentalities confiscated.

Usually what is confiscated are firearms possessed illegally or those possessed legally but used for an unlawful purpose; vehicles; money and other movable or immovable property which the court determines to have been illegally obtained or used in an unlawful manner.

(b) Observations on the implementation of the article

333. Botswana has partially implemented the provision under review.

334. It is noted that instrumentalities of crime are not covered in the definition of proceeds in Section 2(5) of POSCA, which reads as follows:

2. (5) For the purposes of this Act a person shall be deemed to have obtained the proceeds of a serious offence if he receives a payment or other reward in respect of, or derives a pecuniary advantage as a result of—

(a) the commission of the offence; or

(b) any part of a course of conduct by him, alone or in association with any other person, having as its purpose or one of its purposes the carrying out or furtherance of criminal activities, of which the commission of the offence is shown to be a part.

It was confirmed by officials in the Office of the DPP that instrumentalities of crime are not covered in the legislation, although they are covered separately in certain cases (e.g., Section 56 of the Criminal Procedure and Evidence Act relating to drugs/alcohol cases). The cited case law illustrates this, as the cases are not related to corruption.

The reviewers note that instrumentalities of crime are covered in the 2014 POSCA amendment Bill. Specifically, “instruments” are defined in Section 2(1) of the Bill as “property that—

(a) was used, or was intended to be used in, or in connection with, the commission of an offence or serious crime related activity or foreign serious crime related activity; or

(b) was derived or realised, or substantially derived or realised, directly or indirectly, from property referred to in paragraph (a);”

The reviewers welcome this amendment in line with UNCAC. Should the relevant amendment not be enacted, Botswana should ensure that the confiscation, freezing and seizure of instrumentalities is adequately covered.

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

335. Botswana provided the following information.

Section 8, Proceeds of Serious Crime Act, 1990 (as amended)

8. (1) Where a person has been or is about to be charged with a serious offence, the Director of Public Prosecutions may apply to a magistrate's court or the High Court, ex-parte, for a restraining order.

(2) An application for a restraining order may be made in respect of one, or more than one, serious offence and shall be supported by an affidavit of a police officer of or above the rank of Inspector stating —

(a) the serious offence or offences in respect of which the application is made;

(b) that the officer has a reasonable belief that the defendant committed the offence, or each of the offences, as the case may be, and that he received or derived proceeds from the said commission;

(c) identifying the property which the officer reasonably believes to represent the proceeds received or derived by the defendant from the said commission; and

(d) setting out the basis for such beliefs.

(3) An application for a restraining order shall not be made or continued if proceedings against the defendant in respect of the serious offence or offences are abandoned or cease to have effect.

(4) Where, on an application under this section, the magistrate's court or the High Court is satisfied that there is reasonable cause to believe that the defendant has benefited from the proceeds of the serious offence or offences in respect of which the application is made, the court may, by order, (herein referred to as a "restraining order",) prohibit any person from dealing in any way with any property to which the order applies, subject to such conditions as may be specified in the order.

(5) A restraining order shall identify the defendant and the offence or offences in respect of which it is made, and shall provide for notice to be given to any person affected by the order.

(6) A restraining order may apply to —

(a) property described in the order, being property —

(i) of the defendant, or

(ii) received in connexion with, or derived from, the commission of the offence and held by any person, other than the defendant in the order, or

(b) all property of the defendant, whether described in the order or not, and including property acquired by the defendant after the making of the order.

(7) The conditions, subject to which a restraining order may be made, may include conditions with respect to the meeting of reasonable living and business expenses of any person to whom the order applies, or who is affected by the order.

(8) The magistrate's court or the High Court may rescind or vary an order made under this section if the defendant gives security, satisfactory to the court, for the payment of any future pecuniary penalty which may be made in respect of any serious offence to which the application for a restraining order relates, or if the defendant gives undertakings, satisfactory to the court, concerning any of his property which might become liable to a future pecuniary penalty.

Section 17, Proceeds of Serious Crime Act, 1990 (as amended)

(1) Where a person has been convicted of a serious offence, or there are reasonable grounds for suspecting that documents relevant to the offence, or that may assist in any way in tracking or identifying the proceeds of the offence, or in assessing the value of those proceeds, or in tracking, identifying or assessing the value of any property of the person convicted of the offence, or suspected of having committed the offence, are in the possession of or under the control of any person, the Director of Public Prosecutions may apply to a magistrate or a judge of the High Court for a production order in respect of those documents.

(2) An application for a production order shall be supported by an affidavit sworn by a police officer of or above the rank of Inspector setting out the grounds for the application, and the basis for any suspicions as to the commission of the offence, or as to the location of any such documents as are referred to in subsection (1).

(3) A magistrate or a judge before whom an application is made under this section, may, if he is satisfied that there are reasonable grounds for making the order, issue a production order, subject to such conditions as he may think fit to impose, ordering any person to produce to a police officer any document of the kind referred to in subsection (1) that are in such person's possession or under his control, or to make such documents available to a police officer for inspection, at such time or place as may be specified.

(4) Where a document is produced or made available to a police officer under this section he may take extracts from it or make copies of it, and if it was ordered to be produced to him, he may retain it if, and for so long as, its retention is reasonable necessary for the purposes of this Act.

(5) A person shall not be excused from producing or making available a document when ordered to do so under this section on the ground that producing it or making it available might tend to incriminate him or make him liable to a penalty, or that it would or might be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or content of the document. Provided that any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document shall not be admissible in evidence against the person producing it or making it available in any criminal proceedings except in respect of an offence under section 18.

(6) For the purposes of the proviso to subsection (5) proceedings on an application for a confiscation order or a restraining order are not criminal proceedings.

(7) Where a police officer retains a document pursuant to an order under this section, he shall, on request of the person to whom the order is addressed, give to that person a copy of the document, certified under his hand to be a true copy of the document.

(8) Where a production order requires a person to produce a document to a police officer, the person may apply to a magistrate's court or the High Court for a variation of the order, and if the court is satisfied that the document is essential to the business activities of the person, and the interests of justice will not thereby be jeopardized, it may vary the terms of the production order so that it requires the person to make the document available to a police officer for inspection.

Section 18, Proceeds of Serious Crime Act, 1990

Where a person is required in accordance with the terms of a production order to produce a document to a police officer or to make a document available to a police officer for inspection, and contravenes the order without reasonable excuse, or in purported compliance with the order produces or makes available which he knows or has good reason to know is false or misleading in a material particular without disclosing that the document is so false or misleading, and without providing correct information, if he possesses or can reasonably acquire such correct information, shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding P 10,000, or both.

Section 20, Proceeds of Serious Crime Act, 1990 (as amended)

Where a person has been convicted of a serious offence, or there are reasonable grounds for suspecting that a person has committed a serious offence, and there are reasonable grounds for suspecting that there is on any land, or upon any premises, any document such as is described in section 17(1) in relation to the offence, the Director of Public Prosecutions may apply to a magistrate or a judge of the High Court for a search warrant in respect of that land or those premises.

(2) A police officer of or above the rank of Inspector may, under the authority of a search warrant issued under subsection (1), enter upon any land or upon or into any premises specified in the warrant, to search for and seize any document which he believes on reasonable grounds to be a document such as is described in section 17(1).

(3) A magistrate or judge shall not issue a search warrant under this section unless he is satisfied that—

- (a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of it;
 - (b) a production order has been given in respect of the document and has not been complied with;
 - (c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that it would not be complied with; or
 - (d) the investigation for the purposes of which the search warrant is sought might be seriously prejudiced if immediate access to the document is not obtained without prior notice to any person.
- (4) If, in the course of a search authorized under this section, a document or any other thing is found that the person conducting the search believes in reasonable grounds to be a document such as is referred to in section 17(1), though not of a kind specified in the warrant, or such as will afford evidence, relating to the serious offence in respect of which the warrant was issued, or to any other serious offence, and it is believed on reasonable grounds that it is necessary to seize that document or thing immediately to prevent its concealment, loss or destruction, the warrant shall be deemed to authorize such seizure.

Section 10, Corruption and Economic Crime Act, 1994

- (1) An officer authorized in that behalf by the Director may, without warrant, arrest a person if he reasonably suspects that that person has committed or is about to commit an offence under this Act.
- (2) Where, during an investigation by an officer of a suspected offence under this Act, another offence is disclosed, the officer may, without warrant, arrest a person if he reasonably suspects that that person is guilty of that other offence, and he reasonably suspects that such other offence was connected with, or that either directly or indirectly its commission was facilitated by the suspected offence under this Act.
- (3) An officer referred to in this section may—
- (a) use such force as is reasonable in the circumstance in effecting an arrest under this section; and
 - (b) for the purpose of effecting an arrest, enter and search any premises or place if he has reason to believe that there is in the premises or place a person who is to be arrested.
- (4) No premises or place shall be entered under subsection (3) unless the officer has first stated that he is an officer and the purpose for which he seeks entry and produced his identity card to any person requesting its production.
- (5) On compliance with the provisions of subsection (4), the officer may enter the premises or place by force, if necessary.

Section 11, Corruption and Economic Crime Act, 1994

- (1) Where an officer has arrested a person under section 10, he may—
- (a) search that person and the premises or place in which he was arrested;
 - (b) seize and detain anything which such officer has reason to believe to be or to contain evidence of any of the offences referred to in Part IV.
- (2) A person shall not be searched under subsection (1) except by a person of the same sex.

Section 38, Corruption and Economic Crime Act

Where a person, who is the subject of an investigation under this Act has been or is about to be charged with an offence under Part IV, the Director of Public Prosecutions

may apply for a restraining order under section 8 of the Proceeds of Serious Crime Act, 1990, and accordingly, the provisions of that Act shall have effect in respect of the application.

Section 56, Criminal Procedure and Evidence Act, Seizure of vehicle or receptacle used in connection with certain offences

On the arrest of any person on a charge of an offence specified in Part I of the First Schedule the person making the arrest may seize any vehicle or receptacle in the possession or custody of the arrested person at the time of the arrest and used in the conveyance of or containing any article or substance in connection with which the said offence is alleged to be or to have been committed.

336. Botswana provided the following examples of implementation.

In Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others, 2009 (1) BLR 24 (CA), the DPP obtained an order against Daisy Loo and others for a restraining order in terms of Section 8 of the Proceeds of Serious Crime Act, to restrain the respondents from dealing in any way with, 'the "exhibit" being the proceeds held in the First National Bank account No. 62145177665'.

The DPP also obtained an order for the bank manager to hand over the proceeds and all accrued interest in the bank account to a court receiver appointed by the High Court, namely the Acting Accountant General, to deposit and hold the same in an interest generating bank account pending the outcome of the criminal proceedings against the respondents.

The essential elements necessary for obtaining a restraining order were stated in that case as being an affidavit of a police officer of or above the rank of inspector, stating -

- (a) the serious offence or offences in respect of which the application is made;
- (b) that he has a reasonable belief that -
 - (i) the defendant committed the offence or offences; and
 - (ii) he received or derived proceeds of property which he identifies, from such commission; and
- (c) set out the basis for such beliefs.

In Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others, 2009 (1) BLR 24 (CA), it was also stated that

“The Proceeds of Serious Crime Act deals with two types of orders viz confiscation orders and restraining orders. Each is dependent upon the court that is called upon to make the orders, being satisfied that the defendant has received, in the case of a confiscation order, or, in the case of a restraining order, has benefitted from, the proceeds of a serious offence. A confiscation order may be applied for where a defendant has been convicted of a serious offence; a restraining order where the defendant has been or is about to be charged with a serious offence, a serious offence being defined as one where the maximum penalty is death or imprisonment for not less than two years.”

In this case, a P21,000,000 cheque that had been issued to the Daisy Loo company was traced, seized and frozen for ultimate confiscation in the event of a conviction. At the end of the trial there was a conviction and the proceeds were all forfeited to the State.

337. Botswana provided the information on the cases and amount of money/value of property frozen or seized.

P24,000,000 in total was confiscated from the Daisy Loo Company. The amount has since accumulated to P34,000,000.00 as a result of having been in an interest bearing account.

In the **Lyndon Mothusi Case** about P3,000,000 in money and property were frozen.

(b) Observations on the implementation of the article

338. Freezing, seizing or restraining orders are provided for under the POSCA, CECA and CPEA. The Daisy Loo case clarifies that a restraining order may be issued where a defendant has benefitted from criminal proceeds and was or is about to be charged with a serious offence. However, instrumentalities are not covered in the current legislation, as noted above.

339. Botswana's Financial Intelligence Agency has temporary administrative freezing powers to suspend a transaction for up to ten days under Section 24 of the Financial Intelligence Act 2009, where it has reasonable grounds to suspect that a transaction may involve the commission of a financial offence (i.e., money laundering, financing of terrorism or the acquisition of property from the proceeds of any other offence).

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

340. Botswana cited the following measures.

Section 9, Proceeds of Serious Crime Act

(1) The High Court may appoint a receiver to take possession of any property to which a restraining order relates, and, in accordance with such directions, or subject to such conditions or exceptions as the court may give or impose, to manage or otherwise deal with any property in respect of which he is appointed.

(2) Any person having possession of any property in respect of which a receiving order is made under this section, shall give control or possession thereof to the receiver.

(3) The High Court may, on application, or of its own motion, revoke the appointment of a receiver, or vary the conditions or exceptions subject to which he was appointed.

(4) Where a confiscation order is made against the defendant, any property in respect of which the receiver was appointed and which is in his possession or under his control, shall be made available by the receiver, to such extent as may be necessary, to

satisfy the amount of the pecuniary penalty imposed under the confiscation order, unless the High Court otherwise directs.

(5) A person appointed a receiver under subsection (1) shall be paid such remuneration as may be specified by the High Court.

(6) Where the appointment of a receiver ceases, whether by reason of the discharge of the restraining order or for some other reason, any property in respect of which he was appointed and which is then in his possession or under his control, shall be dealt with by the receiver as the High Court directs.

(7) Where a receiver takes any action in relation to property which is not property in respect of which he was appointed, being action which he would be entitled to take if it were such property, and believing and having reasonable grounds for believing, that he is entitled to take that action in relation to that property, he shall not be liable to any person in respect of any loss or damage resulting from his action, except in so far as, and to the extent that, the loss or damage results from his own negligence.

Section 58 of the Criminal Procedure and Evidence Act, Disposal of property seized

(1) When on the arrest of any person on a charge of an offence relating to property, the property in respect of which the offence is alleged to have been committed is found in his possession, or when anything is seized or taken under the provisions of this Act, the person making the arrest or (as the case may be) the person seizing or taking the thing shall deliver, or cause to be delivered, the property or thing to a judicial officer within such time as in all the circumstances of the case is reasonable.

(2) Whenever anything is so seized or taken, marks of identification when practicable shall, by the person seizing it, be placed thereon at the time of the seizure or taking or as soon thereafter as can conveniently be done.

(3) The judicial officer shall cause the property or thing so seized, or taken to be detained in such custody as he may direct, taking reasonable care for its preservation until the conclusion of a summary trial or of any investigation that may be held in respect of it;

and if any person is committed for trial for any offence committed with respect to the property or thing so seized or taken, or for any offence committed under such circumstances that the property or thing so seized or taken is likely to afford evidence at the trial, the judicial officer shall cause it to be further detained in like manner for the purpose of its being produced in evidence at such trial.

(4) At the conclusion of the summary trial or (as the case may be) if the Director of Public Prosecutions declines to prosecute, the judicial officer shall direct that the thing be returned to the person from whose possession it was taken, unless he is authorized or required by law to dispose of it otherwise.

341. Botswana provided the following examples of implementation.

In Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others, 2009 (1) BLR 24 (CA,) the DPP obtained an order against the Daisy Loo Company and others for a restraining order in terms of Section 8 of the Proceeds of Serious Crime Act, to restrain them from dealing in any way with, 'the "exhibit" being the proceeds held in the First National Bank account No. 62145177665'.

The DPP was also granted an order for the bank manager to hand over the proceeds and all accrued interest in the account to a court receiver appointed by the High Court,

namely the Acting Accountant General, to deposit and hold same in an interest generating bank account pending the outcome of the criminal proceedings against the respondents.

Botswana currently has no centralized office for the administration of frozen, seized or confiscated property.

(b) Observations on the implementation of the article

342. The provisions provided by Botswana on paragraph 3 of the article under review are consistent with the spirit of that paragraph. The appointment of a receiver (Section 9, POSCA) or a judicial officer (Section 58, Criminal Procedure and Evidence Act) is possible under current legislation.

343. Botswana is encouraged to take measures to strengthen the management of frozen, seized and confiscated assets, including by exploring the possibility of establishing a specialized, centralized unit to manage such assets, and officials in the Office of the DPP welcomed such an office as an important measure.

344. The reviewers note in this context that the 2014 POSCA Amendment bill makes provision in Section 68 for the establishment of a “Confiscated Assets Trust Fund” and provides as follows:

“68. (1) The Minister shall establish a Fund to be known as the Confiscated Assets Trust Fund to which all moneys collected under this Act shall be paid into.
(2) In addition to any moneys which may be collected under this Act, any profits derived or investments and sales made by the Receiver in relation to property confiscated under this Act shall be paid into the Fund.”

The reviewers encourage the full implementation of the proposed amendment.

Article 31 Freezing, seizure and confiscation

Paragraphs 4 and 5

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.

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

345. Botswana provided the following information.

Section 3, Proceeds of Serious Crime Act, 1990 (as amended)

(1) Where a person has been convicted of a serious offence, the Director of Public Prosecutions may apply to the court before which the conviction was obtained, or to the High Court, for a confiscation order in respect of that serious offence, or, if

convictions were obtained for more than one serious offence, in respect of all or any of those offences.

(2) An application under subsection (1) shall be made within 12 months of the date of the conviction for the offence in respect of which it is made.

Section 4, Proceeds of Serious Crime Act, 1990

(1) Where an application is made under section 3, the court shall satisfy itself that the defendant in the case concerned has received the proceeds, as defined in section 2 (5), of the serious offence or offences in respect of which the application is made, and if it decides that he has, shall proceed to assess the value of the proceeds received by him: Provided that in making such assessment where more than one serious offence is involved, the court shall make an assessment of the proceeds received by the defendant in respect of each offence separately.

(2) For the purpose of making an assessment under subsection (1), the court may –

(a) treat any property which the court is satisfied was held by the defendant since his conviction for the offence in respect of which the application is made, or was transferred to him at any time within a period of 5 years prior to the date when he was charged with that offence, or, in the case of a serious offence of which he is deemed to have been convicted by virtue of section 2 (4), within a period of 5 years prior to the date when he was so convicted, as having been received by him as payment or reward in connexion with the commission of the offence;

(b) treat any payment, reward or pecuniary advantage as having been received or derived by him, notwithstanding that it was received or derived by another person at the request or at the direction of the defendant, or that it was received or derived by him or so received or derived by that other person before the commencement of this Act, or outside Botswana;

(c) treat any property vested in any trustee or receiver by reason of the defendant's bankruptcy, as continuing to be the defendant's property;

(d) treat property as being held by the defendant if he holds an interest in it, or as having been transferred to him if an interest in the property has been transferred or granted to him;

(e) disregard any expenses or outgoings of the defendant in connexion with the offence or any other serious offence.

(3) For the purpose of making an assessment under this section, the court may treat as property of the defendant any property that, in the opinion of the court, is subject to the effective control of the defendant, whether or not the defendant has any legal or equitable estate or interest in it, or any right, power or privilege in connexion with it.

(4) Without limiting the generality of subsection (3), the court may have regard to –

(a) shareholdings in, debentures over or directorships of any company that has an interest (whether direct or indirect) in the property;

(b) any trust that has a relationship to the property; and

(c) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (a), or trusts of the kind referred to in paragraph (6), and any other person or persons.

(5) For the purpose of satisfying itself in accordance with subsection (1) in respect of a serious offence, the court may have regard to the transcript of any proceedings against the defendant for the offence or offences.

(6) For the purpose of making an assessment under this section, the court shall value property, other than money, at its market value determined as at the date when the court makes the assessment, and when any person other than the defendant holds an

interest in the property, the value of that interest shall be taken into account in determining the value of the property to the defendant.

Section 5, Proceeds of Serious Crime Act, 1990

(1) When a court has satisfied itself in accordance with section 4 that the defendant has received or derived any benefit from proceeds of a serious offence, it shall issue an order (in this Act referred to as a "confiscation order") ordering the defendant to pay to the Government a pecuniary penalty of an amount equal to its own assessment of the value of the proceeds of the offence, received by the defendant or from which he has benefited, unless the court for good reason decides that the penalty shall be for a lesser amount.

(2) The penalty ordered under subsection (1) shall, for all purposes, be deemed to be a civil debt owed by the defendant to the Government, and may be enforced as if it were an order made by the court in civil proceedings instituted by the Government against the defendant to recover a debt due by him to the Government.

(3) A confiscation order following the conviction of the defendant may be issued before or after the court trying the offence or offences has passed sentence: Provided that –

(a) where a confiscation order is made before sentence has been passed, the court in passing sentence shall take into account the total value of the confiscation order when assessing the amount of any fine or order for compensation or restitution to be imposed on the defendant; and

(b) where a confiscation order is made after sentence has been passed, the court in assessing the size of any such order shall take into account any fine or order for compensation or restitution passed by the court which sentenced the defendant.

Section 37, Corruption and Economic Crime Act

Where a person has been convicted of corruption or cheating the public revenue under this Part, the Director of Public Prosecutions may apply for a confiscation order under section 3 of the Proceeds of Serious Crime Act, 1990, and accordingly, the provisions of that Act shall have effect in respect of the application.

346. Botswana provided the following cases.

In Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others, 2009 (1) BLR 24 (CA), it was stated that the accused persons had obtained money from the municipal authority by fraudulent means. The accused persons were entitled to a certain amount much less than that which had been paid to them by the authority on the grounds of the fraudulent conduct. The proceeds were eventually confiscated, but the money they had been initially entitled to was paid to them.

In the **Lyndon Mothusi** case mentioned above the court held that a Range Rover vehicle was a conversion of the proceeds of crime (the money) and thus ordered its confiscation.

347. Botswana indicated that no further statistics are available.

(b) Observations on the implementation of the article

348. During the country visit, officials at the Office of the DPP explained that the direct confiscation of objects and proceeds of crime is possible under Section 4 of POSCA. Only where evidence demonstrates that the defendant has “received or derived” a further benefit in addition to the criminal proceeds will the court order the defendant to pay a pecuniary penalty order (Section 5) in respect of “rewards” or “pecuniary advantages” resulting from the crime (Section 2(5) of POSCA). The valuation process is outlined in Section 4(2). As noted under this article above, officials in the DPP’s office confirmed during the country visit that value based confiscation is possible under Section 5. Also Botswana’s law allows the court to “treat any property held by the defendant since his conviction .. or transferred to him” as proceeds subject to confiscation, including property “subject to his control”.

349. Under the current legislation, the forfeiture of converted, transformed and intermingled property is possible through value-based confiscation. Botswana has legislatively implemented the provisions.

350. It was explained during the country visit that the POSCA amendment Bill continues to provide for value-based confiscation. The reviewers note that under the Bill, in addition to other confiscation measures (e.g., Parts II and IV), value-based confiscation is possible under Section 4 in respect of benefits derived from the commission of an offence. The valuation is set out in Part III, which provides a non-exhaustive list of elements to be considered by the court (“the value of benefits derived ... may include”). There is also a catch-all provision to cover “(f) any other thing that the court thinks fit to treat as benefits...”.” Furthermore, under the Bill proceeds include intermingled property:

“proceeds” means property that was derived or realised, or substantially derived or realised, directly or indirectly, by any person from the commission of an offence or a serious crime related activity or foreign serious crime related activity and includes any property with which proceeds have been mixed;

Article 31 Freezing, seizure and confiscation

Paragraph 6

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

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

351. Botswana cited the following measures.

Section 3, Proceeds of Serious Crime Act, 1990 (as amended)

(1) Where a person has been convicted of a serious offence, the Director of Public Prosecutions may apply to the court before which the conviction was obtained, or to the High Court, for a confiscation order in respect of that serious offence, or, if convictions were obtained for more than one serious offence, in respect of all or any of those offences.

(2) An application under subsection (1) shall be made within 12 months of the date of the conviction for the offence in respect of which it is made.

Section 4, Proceeds of Serious Crime Act, 1990

(1) Where an application is made under section 3, the court shall satisfy itself that the defendant in the case concerned has received the proceeds, as defined in section 2 (5), of the serious offence or offences in respect of which the application is made, and if it decides that he has, shall proceed to assess the value of the proceeds received by him: Provided that in making such assessment where more than one serious offence is involved, the court shall make an assessment of the proceeds received by the defendant in respect of each offence separately.

(2) For the purpose of making an assessment under subsection (1), the court may –

(a) treat any property which the court is satisfied was held by the defendant since his conviction for the offence in respect of which the application is made, or was transferred to him at any time within a period of 5 years prior to the date when he was charged with that offence, or, in the case of a serious offence of which he is deemed to have been convicted by virtue of section 2 (4), within a period of 5 years prior to the date when he was so convicted, as having been received by him as payment or reward in connexion with the commission of the offence;

(b) treat any payment, reward or pecuniary advantage as having been received or derived by him, notwithstanding that it was received or derived by another person at the request or at the direction of the defendant, or that it was received or derived by him or so received or derived by that other person before the commencement of this Act, or outside Botswana;

(c) treat any property vested in any trustee or receiver by reason of the defendant's bankruptcy, as continuing to be the defendant's property;

(d) treat property as being held by the defendant if he holds an interest in it, or as having been transferred to him if an interest in the property has been transferred or granted to him;

(e) disregard any expenses or outgoings of the defendant in connexion with the offence or any other serious offence.

(3) For the purpose of making an assessment under this section, the court may treat as property of the defendant any property that, in the opinion of the court, is subject to the effective control of the defendant, whether or not the defendant has any legal or equitable estate or interest in it, or any right, power or privilege in connexion with it.

(4) Without limiting the generality of subsection (3), the court may have regard to –

(a) shareholdings in, debentures over or directorships of any company that has an interest (whether direct or indirect) in the property;

(b) any trust that has a relationship to the property; and

(c) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (a), or trusts of the kind referred to in paragraph (6), and any other person or persons.

(5) For the purpose of satisfying itself in accordance with subsection (1) in respect of a serious offence, the court may have regard to the transcript of any proceedings against the defendant for the offence or offences.

(6) For the purpose of making an assessment under this section, the court shall value property, other than money, at its market value determined as at the date when the court makes the assessment, and when any person other than the defendant holds an interest in the property, the value of that interest shall be taken into account in determining the value of the property to the defendant.

Section 5, Proceeds of Serious Crime Act, 1990

(1) When a court has satisfied itself in accordance with section 4 that the defendant has received or derived any benefit from proceeds of a serious offence, it shall issue an order (in this Act referred to as a "confiscation order") ordering the defendant to pay to the Government a pecuniary penalty of an amount equal to its own assessment of the value of the proceeds of the offence, received by the defendant or from which he has benefited, unless the court for good reason decides that the penalty shall be for a lesser amount.

(2) The penalty ordered under subsection (1) shall, for all purposes, be deemed to be a civil debt owed by the defendant to the Government, and may be enforced as if it were an order made by the court in civil proceedings instituted by the Government against the defendant to recover a debt due by him to the Government.

(3) A confiscation order following the conviction of the defendant may be issued before or after the court trying the offence or offences has passed sentence: Provided that –

(a) where a confiscation order is made before sentence has been passed, the court in passing sentence shall take into account the total value of the confiscation order when assessing the amount of any fine or order for compensation or restitution to be imposed on the defendant; and

(b) where a confiscation order is made after sentence has been passed, the court in assessing the size of any such order shall take into account any fine or order for compensation or restitution passed by the court which sentenced the defendant.

Section 37, Corruption and Economic Crime Act

Where a person has been convicted of corruption or cheating the public revenue under this Part, the Director of Public Prosecutions may apply for a confiscation order under section 3 of the Proceeds of Serious Crime Act, 1990 , and accordingly, the provisions of that Act shall have effect in respect of the application.

352. Botswana indicated that there are no examples of cases of intermingled property, but if such cases of intermingling of property occurred it would not have any challenge as to enforcement.

(b) Observations on the implementation of the article

353. Section 5 of the Proceeds of Serious Crime Act refers to benefits from proceeds of a serious offence. As noted above, officials explained during the country visit that this section allows the court order the value-based confiscation of criminal proceeds, defined to include “rewards and pecuniary advantages” from which a defendant has benefited. Specifically, the definition of criminal proceeds in Section 2(5) refers to any “reward in respect of, or .. a pecuniary advantage as a result of” the commission of a crime.

354. As confirmed by the authorities during the country visit, value-based confiscation is possible (Section 5, POSCA), although no further information was available on how the court valuation process for pecuniary penalty orders under Section 5 works in practice (“amount equal to its own assessment of the value of the proceeds of the offence, received by the defendant or from which he has benefited”).

355. Based on the information provided, Botswana appears to have legislatively implemented the paragraph under consideration.

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

356. Botswana cited the following measure.

Section 8, Corruption and Economic Crimes Act

(1) If, in the course of any investigation into any offence under Part IV, the Director is satisfied that it would assist or expedite such investigation, he may, by notice in writing, require -

(a) any suspected person to furnish a statement in writing -

(i) enumerating all movable or immovable property belonging to or possessed by him in Botswana or elsewhere or held in trust for him in Botswana or elsewhere, and specifying the date on which every such property was acquired and the consideration paid therefore, and explaining whether it was acquired by way of purchase, gift, bequest, inheritance or otherwise;

(ii) specifying any moneys or other property acquired in Botswana or elsewhere or sent out of Botswana by him or on his behalf during such period as may be specified in such notice;

(b) any other person with whom the Director believes that the suspected person had any financial transactions or other business dealing, relating to an offence under Part IV, to furnish a statement in writing enumerating all movable or immovable property acquired in Botswana and elsewhere or belonging to or possessed by such other person at the material time;

(c) any person to furnish, notwithstanding the provisions of any other enactment to the contrary, all information in his possession relating to the affairs of any suspected person and to produce or furnish any document or a certified true copy of any document relating to such suspected person, which is in the possession or under the control of the person required to furnish the information;

(d) the manager of any bank, in addition to furnishing any information specified in paragraph (c), to furnish any information or the originals, or certified true copies, of the accounts or the statements of account at the bank of any suspected person.

357. Botswana explained that Section 8 CECA is used only in relation to cases before the Directorate on Corruption and Economic Crime. The police in their daily operations obtain orders from a judicial officer through the use of Section 250 (1) of the Criminal Procedure and Evidence Act CAP 08:02, which covers the inspection of bankers' books by the police and provides for penalties to anyone who hinders a police officer in executing a warrant under the section.

Section 28 read along with Section 4, Financial Intelligence Act, 2009

Section 4

(1) The Agency shall be the central unit responsible for requesting, receiving, analyzing and disseminating to an investigatory authority, supervisory authority or comparable body, disclosures of financial information:

- a) concerning suspicious transactions;
- b) required by or under any enactment in order to counter financial offences; or
- c) concerning the financing of any activities or transactions related to terrorism

Section 28

(1) Where a report of a suspicious transaction has been made to the Agency, the Director may, for the purposes of assessing whether any information should be disseminated to an investigatory or supervisory authority, request further information in relation to the suspicious transaction from:

- a) the specified party or person who made the report;
- b) any other specified party that is, or appears to be involved in the transaction;
- c) an investigatory authority;
- d) a supervisory authority; or
- e) other administrative agencies of the Government.

(2) Information requested under subsection (1) shall be provided without a court order and within such time limits as may be prescribed.

(3) A person who refuses to supply information requested under this section shall be guilty of an offence and liable to a fine not exceeding five years or to both.

358. Botswana provided the following cases and statistics.

A few examples of notices issued pursuant to Sections 8 and 7 of the Corruption and Economic Crime Act evidencing implementation were provided to the reviewers, including a notice under Section 7(1)(c) for the production of documents, a notice under Section 8(1)(d) for bank statements and banking records, and a notice under Section 8(1)(c) for corporate records. Relevant statistics on notices served by the DCEC are provided below.

NUMBER OF NOTICES SERVED: 2010 – 2011

Year	No. of notices served	No. complied with	No. not complied with
2010	410	410	0
2011	466	466	0
Total	876	876	0

NB: Note here that the number of notices in most instances would indicate the number of cases being investigated. Here the number of cases goes up because it encompasses all cases, including those under the Penal Code, not segregated by type of corruption or money laundering offence.

(b) Observations on the implementation of the article

359. Section 8 (ii) (c) and (d) of the Corruption and Economic Crimes Act contains elements relating to the production and supply of documents on banking, financial and economic matters, and Section 8(1)(d) specifically refers to the production of bank records. As summarized in the table of notices provided by Botswana, all such production orders have been complied with in 2010-2011. Section 28 of the Financial Intelligence Act further contains relevant factors relating to the production and supply of documents on economic and financial matters. Botswana has implemented paragraph 7 of article 31 of the UNCAC.

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

360. Botswana provided the following information.

Section 40(1), Corruption and Economic Crime Act

(1) In any proceedings against a person for an offence under Part IV, the fact that the accused was, at or about the date of or at any time since the date of the alleged offence, is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his present or past known sources of income or assets, or that he had, at or about the date of or at any time since the date of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken by the court -

- (a) as corroborating the testimony of any witness giving evidence in such proceedings that the accused accepted or agreed or offered to accept any valuable consideration; and
- (b) as showing that the consideration was accepted or agreed or offered to be accepted as a valuable consideration as an inducement or reward.

361. Botswana indicated that, although no case have been presented to the courts under Section 40(1) as yet, the Directorate has been investigating and still receives a large number of cases for investigation relating to this section.

362. Botswana provided information on recent cases where an offender has been required to demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation.

The State v Lyndon Mothusi cited earlier. The lawyer also had in his possession some property bought through suspected proceeds and he was required to explain the origins of his property and/or gains. The failure to account satisfactorily was taken to support the evidence of witnesses testifying in court.

(b) Observations on the implementation of the article

363. Section 40(1) of CECA allows an inference to be drawn if an offender cannot explain the lawful origin of pecuniary resources or property, and is thus relevant to the implementation of the article. Moreover, the cited case shows a practical case of implementation of paragraph 8 of article 31 of UNCAC.

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

364. Botswana cited the following measures.

Section 12, Proceeds of Serious Crime Act, 1990 (as amended)

(1) Where a confiscation order is made in respect of property subject to a restraining order, then, by virtue of this section, and unless the High Court otherwise directs, a charge is created on the property to secure payment to Government or the victim of the offence, as the case may be, of the amount of any pecuniary penalty imposed under the confiscation order.

(2) A charge created by subsection (1) shall be subject to every encumbrance to which the property was subject immediately before the confiscation order was made, but shall have priority over all other encumbrances, and shall remain on the property despite any disposal of the property: Provided that this subsection shall not affect the title of a bona fide purchaser of the property for value, who acted in good faith and who, at the time of the purchase, had no notice of the charge.

(3) A charge on property created by this section shall cease to have effect if the confiscation order is discharged, or if the property is disposed of with the consent of the High Court, or in the circumstances referred to in the proviso to subsection (2).

Section 21, Proceeds of Serious Crimes Act, 1990 (as amended)

There shall be a right of appeal by any interested party in respect Appeals of the issue of a confiscation order, a restraining order or a search warrant under this Act, or by the Director of Public Prosecutions against the refusal of a court to issue a confiscation order, a restraining order or a search warrant.

Proceeds of Serious Crimes Act, 1990 (as amended)

Part XIX Costs, Compensation and Restitution (ss 316-320)

Section 316.

Court may order accused to pay compensation

(1) When any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon the application of the injured party, forthwith award him compensation for such injury, damage or loss.

(2) For the purposes of determining the amount of compensation or the liability of the accused therefor, the court may refer to the proceedings and evidence at the trial or

hear further evidence upon affidavit or verbal or the amount of compensation which may be awarded by the court in accordance with an agreement reached between the person convicted and the person to be compensated.

(3) The court may order a person convicted upon a private prosecution to pay the costs and expenses of such prosecution in addition to the sum (if any) awarded under subsection (1): Provided that if such private prosecution was instituted after a certificate by the Director of Public Prosecutions that he declined to prosecute, the court may order the costs thereof to be paid by the State.

(4) When a magistrate's court has made any award of compensation, costs or expenses under this section, the award shall have the effect of a civil judgment of that court, and when the High Court has made any such award, the Registrar of that Court shall forward a certified copy of the award to the clerk of the magistrate's court of the district wherein the convicted person underwent the preparatory examination held in connection with the offence in question, and thereupon such award shall have the same effect as a civil judgment of that magistrate's court.

(5) Any costs awarded as aforesaid shall be taxed according to the scale, in civil cases, of the court which made the award.

(6) Where any moneys of the accused have been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made forthwith from those moneys.

(7) Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been so made, and who has accepted the award, to any other civil proceedings in respect of the injury for which compensation has been awarded.

317. Compensation to innocent purchaser of stolen property

When any person has been convicted of theft or of any offence whereby he has unlawfully obtained any property, and it appears to the court by the evidence that he sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the convicted person on his apprehension, the court may, on the application of such purchaser and on restitution of such property to its owner, order that, out of the money so taken from the prisoner and belonging to him, a sum, not exceeding the amount of the proceeds of the sale, be delivered to such purchaser.

318. Restitution of stolen property

(1) If any person is convicted of theft or receiving stolen property knowing it to have been stolen, or otherwise unlawfully obtaining any property, such property may be restored to the owner or his representative on application by him to the court.

(2) In every such case the court before which such person is tried for any such offence shall have power to award from time to time writs of restitution in respect of the said property or to order the restitution thereof in a summary manner.

(3) If it appears, before any award is made, that any valuable security has been bona fide paid or discharged by any person liable to the payment thereof or, being a negotiable instrument has been bona fide taken or received by transfer or delivery by any person for a just and valuable consideration without notice or without any reasonable cause to suspect that the same had by any offence been stolen or otherwise unlawfully obtained, or if it appears that the property stolen or received as aforesaid or otherwise unlawfully obtained has been transferred to an innocent purchaser for value

who has acquired a lawful title thereto, the court shall not award or order the restitution of such security or property.

319. Return of exhibits, etc.

(1) The court may, after the conclusion of any trial and subject to any special provision contained in any law, make a special order as to the return to the person entitled thereto of the property in respect of which the offence was committed or of any property seized or taken under this Act or produced at the trial. If no such order is made the property shall, on application, be returned to the person from whose possession it was obtained (unless it was proved during the trial that he was not entitled to such property) after deduction of the expenses incurred since the conclusion of the trial in connection with the custody of the property; but if within a period of three months after the conclusion of the trial no application is made under this section for the return of the property, or if the person applying is not entitled thereto or does not pay the expenses aforesaid, the property shall vest in the State.

(2) The court convicting any person of any offence which was committed by means of any weapon, instrument or other article produced to the court may, if it thinks fit, declare such weapon, instrument or other article to be forfeited to the State.

(3) The court convicting any person of any offence specified in Part I of the First Schedule who was arrested while in possession or custody of any vehicle or receptacle used in the conveyance of or containing any article or substance in connection with which the said offence was committed may, if it thinks fit, declare that vehicle or receptacle, or the convicted person's right thereto, to be forfeited to the State:

Provided that such declaration shall not affect any rights which any person other than the convicted person may have to the vehicle or receptacle in question if it is proved that he did not know that it was being used or would be used for the conveyance of, or as receptacle for, the said article or substance, or that he could not prevent such use.

(4) During the trial resulting in any such declaration of forfeiture and at any time after the making of such declaration, the court which is holding or which held the trial may inquire into and determine any person's rights to the vehicle or receptacle in question; and if such determination is adverse to any person, he may appeal therefrom as if it were a conviction by the court making the determination, and such appeal may be heard either separately or jointly with an appeal against the conviction as a result whereof the forfeiture was declared, or against a sentence imposed as a result of such conviction.

(5) If any such declaration is set aside or varied after the sale, on behalf of the State, of the vehicle or receptacle or rights declared to be forfeited, the person whose rights were upheld by the setting aside or variation of the declaration may, at his option, enforce those rights against any person in possession or custody of the vehicle or receptacle in question, or claim from the Government an amount equal to the value of those rights but not exceeding the proceeds of the sale of those rights.

320. Miscellaneous provisions as to awards or orders under this Part

(1) Any award or order of restitution made under this Part may be made subject to the applicant giving security de restituyendo in case the award or order be reserved on appeal or review.

(2) The court may in any case refer a party applying for compensation under this Part to his remedy under the ordinary law.

(3) When any such award or order is made against two or more persons it shall be joint and several.

365. Botswana provided the following examples of implementation.

Currently there are cases pending before the High Court where an innocent purchaser has sought an order of court for property that he acquired after it had been illegally obtained by the seller. Innocent purchasers also have the courts come to their rescue at the end of the trial when the court, after an application made by the prosecutor, makes an order for restitution of the property in line with the Criminal Procedure and Evidence Act at Sections 317 and 318.

In the **Tourism Development Consortium** case mentioned earlier, the Court of Appeal reversed the decision of the lower courts partly because there were people who had purchased the plot of land and were regarded as innocent buyers. The case outcome was that the money was returned to the owner with no recovery by the government.

The other case pending before the High Court is the one involving an innocent purchaser of plots where the seller presented to them all the relevant documents evidencing ownership of land.

(b) Observations on the implementation of the article

366. Botswana's legislation contains provisions consistent with the relevant prescriptions in paragraph 9 of article 31 of the UNCAC. Botswana has implemented this paragraph.

(c) Challenges, where applicable

367. Botswana has identified the following challenges in fully implementing the article under review:

1. Limited resources for implementation
2. Inadequacy of existing normative measures: Botswana indicated that the country's asset forfeiture regime is solely conviction based and there is need to widen the scope to civil forfeiture as well. It was explained during the country visit and confirmed by the reviewers that this would occur as a result of the 2014 amendment to POSCA.

(d) Technical assistance needs

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

1. Capacity-building programmes for authorities responsible for identifying and tracing such property or instrumentalities. The reviewers underscore the need expressed by Botswana's officials for awareness raising and training on asset tracing/seizing and confiscation for all relevant criminal justice institutions, including the DCEC, police, FIA, DPP, as well as magistrates and judges, especially under the 2014 POSCA amendment Bill.
2. Capacity-building programmes for authorities responsible for the establishment and management of systems for the administration of frozen, seized or confiscated

property. The reviewers encourage capacity building for authorities on the development and operation of a central dedicated unit on administering such assets.

3. Summary of good practices/lessons learned

4. Model legislation

5. Development of an action plan for implementation

369. Botswana indicated that none of the forms of technical assistance mentioned previously have been previously provided.

Article 32 Protection of witnesses, experts and victims

Paragraph 1

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

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

370. Botswana indicated that it has partially implemented the provision and cited the following measures.

Section 123. Offences relating to judicial proceedings, Penal Code

(1) Any person who

(a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken;

(b) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended, refuses to be sworn or to make an affirmation or, having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being had or taken, after the witnesses have been ordered to leave such room;

(c) causes an obstruction or disturbance in the course of a judicial proceeding;

(d) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken;

(e) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private;

(f) endeavours wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence, in connection with such evidence;

(g) dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding;

(h) wrongfully retakes possession of land from any person who has recently obtained possession by a writ of court; or

(i) commits any act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken, is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

(2) When any offence against paragraph (a), (b), (c), (d) or (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding P150 or, in default of payment, to imprisonment for a term not exceeding one month.

(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the High Court to punish for contempt of court

Section 2. Procedure for offences, Criminal Procedure and Evidence Amendment Act

Subsection (4) of section 178 of the Criminal Procedure and Evidence Act is hereby amended by substituting for that subsection, the following new provisions –

"(4) The High Court may, whenever it thinks fit, and any magistrate's court, may, if it appears to that court to be in the interest of good or public morals or of the administration of justice, direct that a trial shall be held within closed doors; and the court may direct that all or any persons, not being members or officers of the court or parties to the case, their legal representatives, or persons otherwise directly concerned with the case, be excluded from the court during the trial."

371. Botswana indicated that it currently does not have a witness protection programme but that this might be included in the envisaged whistleblower legislation.

372. Botswana provided the following case.

State v Tokwe, 1984 BLR 162

In this case the court set out the principles to be followed when determining whether a matter should be heard *in camera* or not. Issues to be considered are that an application should have been made and reasons advanced. Some of the reasons for *in camera* hearings are that trial in open court might prejudice the interests of justice; in interlocutory proceedings; in the interest of defense, public safety, order, public morality or the welfare of persons under the age of eighteen. The latter part has always been used where minors have been raped or indecently assaulted.

373. Botswana indicated that there is a need to promulgate laws that will cater for witness protection as the current laws are not adequate. Amending the law is a lengthy process involving consultation and following Parliament's own calendar, which will occasion a lot of delay. There is, therefore, a need for some time which cannot readily be estimated, as the process will involve multitudes of stakeholders.

(b) Observations on the implementation of the article

374. Section 123(1) (f) of the Penal Code establishes protections for witnesses insofar as it criminalizes broadly any interference or influence of witnesses. Additionally, according to Section 123(1) (g) any person who "dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding" is guilty of an offence relating to judicial proceedings and liable to imprisonment for a term not exceeding three years. This could

enable the pursuit of unjustified treatment in retaliation of a person who gave evidence in a case.

375. Moreover, the Criminal Procedure and Evidence Act provides for the possibility of closed hearings upon application of the parties, and a corruption case in Francistown was referred to as a case example. Officials in the High Court explained that the possibility of videoconferencing can be taken on a case by case basis.

376. Botswana's legislation does not provide specific protection measures for witnesses, experts and victims (such as safe houses, temporary or long-term relocation programmes, or similar) in addition to the measures mentioned above. However, if a witness, expert or victim feels threatened, it was explained that concrete measures could be taken on a case by case basis. The Central Medical Stores case (**State v Cole and Others**, cited under UNCAC article 23 above) involving the offence of false pretences was referred to as a case example where a witness was moved to a safe place. Witness protection was also provided in the case of **State v Lyndon Mothusi and Others** (see UNCAC article 23).

377. The reviewing experts acknowledge the possibilities provided under the legislation and recommend that Botswana strengthen the existing measures by developing a comprehensive legal framework on witness protection and ensure its implementation in practice.

Article 32 Protection of witnesses, experts and victims

Subparagraph 2 (a)

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

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

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

378. Botswana indicated that it has not implemented the provision under review.

(b) Observations on the implementation of the article

379. The reviewing experts refer to the observations made under paragraph 1 of article 32 of the Convention.

Article 32 Protection of witnesses, experts and victims

Subparagraph 2 (b)

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

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

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

380. Botswana indicated that it has partially implemented the provision and provided the following information.

Botswana has relied more on the common law system where the country's history allows for the application of common law rules (see the brief background of the country in the introduction to this report above). In one case, an accused person was charged with rape and the court allowed a witness to testify through video conferencing. There are several other extradition matters where the courts agreed that evidence be lead from the United Kingdom through video conferencing.

Recently, an amendment to the Rules of the Magistrate Courts, Statutory Instrument No. 13 of 2011, allows for evidence to be lead electronically or through video conferencing. See Order 45, Rule 2, sub-rule 3.

381. Botswana referred to the following cases.

The State v Robert Masitara. Consider also the extradition matter from the United Kingdom cited earlier where evidence was taken through video conferencing.

The State v Robert Masitara, where video conferencing was permitted by the court. The case showed that witnesses or experts have given testimony using video or other communications technology.

(b) Observations on the implementation of the article

382. Botswana has implemented subparagraph (b) of paragraph 2 of article 32 in its common law and has provided illustrative cases. Additionally, the reviewing experts refer to the information provided and the observations made under paragraph 1 of article 32 of the Convention.

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

383. Botswana indicated that it has not implemented the provision.

(b) Observations on the implementation of the article

384. Botswana should consider adopting agreements or arrangements necessary for the implementation of this paragraph.

Article 32 Protection of witnesses, experts and victims

Paragraph 4

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

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

385. Botswana indicated that it has partially implemented the provision and cited the following measures.

Section 6, Magistrates Court Act CAP 04:04 provides for protection of victims in that hearings may be held in camera where publicity shall prejudice the interests of justice or in the interests of the defense, public safety, public order, public morality, or the welfare of persons under the age of 18.

Section 123, Penal Code (see citation above)

Section 2, Criminal Procedure and Evidence Amendment Act (see citation above)

386. Botswana indicated that there are no examples of implementation where victims have been relocated and no agreements to such with other States.

387. There are times when trials are held in camera to protect minors and victims, as provided for in the Criminal Procedure and Evidence Act Section. Apart from this, the reviewing experts refer to the information provided and the observations made under paragraph 1 of article 32 of the Convention.

(b) Observations on the implementation of the article

388. Since Botswana has partially implemented this paragraph, it is desirable to consider adopting appropriate measures to fully implement the paragraph under consideration to ensure the full protection of victims in corruption-related cases.

Article 32 Protection of witnesses, experts and victims

Paragraph 5

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

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

389. Botswana indicated that it has partially implemented the provision and it provided the following information.

Section 318 of the Criminal Procedure and Evidence Act is applicable here. It relates to the restitution of property to the lawful owner. Victims are covered under lawful owners and they can file claims under Section 317 of the same Act. At the appropriate

stage of the criminal trial, the prosecutor would look out for the interests of the victim of crime by making an application for restitution to the court.

Section 318, Criminal Procedure and Evidence Act

(1) If any person is convicted of theft or receiving stolen property knowing it to have been stolen, or otherwise unlawfully obtaining any property, such property may be restored to the owner or his representative on application by him to the court.

(2) In every such case the court before which such person is tried for any such offence shall have power to award from time to time writs of restitution in respect of the said property or to order the restitution thereof in a summary manner.

(3) If it appears, before any award is made, that any valuable security has been bona fide paid or discharged by any person liable to the payment thereof or, being a negotiable instrument has been bona fide taken or received by transfer or delivery by any person for a just and valuable consideration without notice or without any reasonable cause to suspect that the same had by any offence been stolen or otherwise unlawfully obtained, or if it appears that the property stolen or received as aforesaid or otherwise unlawfully obtained has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court shall not award or order the restitution of such security or property.

Section 316, Criminal Procedure and Evidence Act

(1) When any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon the application of the injured party, forthwith award him compensation for such injury, damage or loss.

(2) For the purposes of determining the amount of compensation or the liability of the accused therefor, the court may refer to the proceedings and evidence at the trial or hear further evidence upon affidavit or verbal or the amount of compensation which may be awarded by the court in accordance with an agreement reached between the person convicted and the person to be compensated.

(3) The court may order a person convicted upon a private prosecution to pay the costs and expenses of such prosecution in addition to the sum (if any) awarded under subsection (1):

Provided that if such private prosecution was instituted after a certificate by the Director of Public Prosecutions that he declined to prosecute, the court may order the costs thereof to be paid by the State.

(4) When a magistrate's court has made any award of compensation, costs or expenses under this section, the award shall have the effect of a civil judgment of that court, and when the High Court has made any such award, the Registrar of that Court shall forward a certified copy of the award to the clerk of the magistrate's court of the district wherein the convicted person underwent the preparatory examination held in connection with the offence in question, and thereupon such award shall have the same effect as a civil judgment of that magistrate's court.

(5) Any costs awarded as aforesaid shall be taxed according to the scale, in civil cases, of the court which made the award.

(6) Where any moneys of the accused have been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made forthwith from those moneys.

(7) Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been so made, and who has accepted the award, to any other civil proceedings in respect of the injury for which compensation has been awarded.

390. Botswana indicated that there are no readily available statistics but applications for compensation are an everyday occurrence where property has been stolen or lost because of the accused person's conduct.

391. Botswana indicated that the Criminal Procedure and Evidence Act is currently undergoing review and it is believed that at the end of this exercise such issues will be addressed.

(b) Observations on the implementation of the article

392. It was highlighted that in practice and in addition to the provisions of Part XIX of the Criminal Procedure and Evidence Act, the views and concerns of victims were taken into consideration during the criminal proceedings. The reviewing experts were satisfied with the answers provided.

(c) Challenges, where applicable

393. Botswana has identified the following challenges in fully implementing the article under review:

1. Inadequacy of existing implementing normative measures

(d) Technical assistance needs

394. Botswana 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: The country would do well to learn from those with experience in this particular field.
 2. Legal advice
 3. Model legislation: Need to promulgate laws catering for all aspects of the witness protection regime.
 4. Capacity-building programmes for authorities responsible for establishing and managing witness and expert protection programmes.
- There will also be need thereafter to train people to capacitate them in all these areas.

395. Botswana indicated that none of the forms of technical assistance mentioned have been previously provided.

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**

396. Botswana cited the following measures.

Section 45, Corruption and Economic Crime Act, 1994

(1) In any trial in respect of an offence under Part IV, a witness shall not be obliged to disclose the name or address of any informer, or state any matter which might lead to his discovery.

(2) Where any books, documents or papers which are evidence of liable to inspection in any civil or criminal proceedings under this Act contain an entry in which any informer or person is named or described or which might lead to his discovery, the court, before which the proceedings are held, shall cause all such passages to be concealed from view or to be obliterated so far as may be necessary to protect the informer or such person from discovery.

(3) If in any proceedings before a court for an offence under this Act the court, after full inquiry into the case, is satisfied that an informer willfully made a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceedings a court is of the opinion that justice cannot be fully done between the parties thereto without disclosure of the name of an informer or a person who has assisted the Director, the court may permit inquiry and require full disclosure concerning the informer or such person.

Section 45A, Corruption and Economic Crime (Amendment) Act No. 6 of 2013

The amendment came into force on 26 July 2013 and introduces a new Section 45A which makes it an offence to intimidate reporting persons or informers.

Section 45A. Intimidation of informers

Any person who threatens or intimidates another for reporting allegations of corruption under this Act shall be guilty of an offence and shall be liable, on conviction, to a fine not exceeding P10,000 or to imprisonment for a term not exceeding five years, or to both.

Section 26, Financial Intelligence Act

(1) No civil or criminal proceedings shall lie against any person for having

(a) Reported in good faith, any suspicion he or she may have had, whether or not the suspicion proves to be well founded following investigation; or

(b) Supplied any information to the Agency pursuant to a request made under section 28 (1).

(2) No evidence concerning the identity of a person, who has made, initiated or contributed to a report under this part or who has furnished additional information concerning the report shall be admissible as evidence in proceedings before a court unless the person testifies at the proceedings.

Section 24, Intelligence and Security Services Act (Chapter 23:02)

Indemnity of members of staff of Directorate

No action shall be brought against a member of staff of the Directorate (or any other person authorised by the Director General to perform any act under this Act), in respect of any act or thing done or omitted to be done in good faith, upon reasonable grounds, in the exercise of his or her duties under this Act.

Section 257, Criminal Procedure and Evidence Act

Privilege from disclosure of facts on the grounds of public policy.

No witness shall, except as in this Act is provided, be compellable or permitted to give evidence in any criminal proceeding as to any fact, matter or thing, or as to any communication made to or by such witness, as to which, if the case were depending in the Supreme Court of Judicature in England, such witness would not be compellable or permitted to give evidence, by reason that such fact, matter or thing, or communication, on grounds of public policy and from regard to public interest, ought not to be disclosed and is privileged from disclosure:

Provided that it shall be competent for any person, in any criminal proceeding, to adduce evidence of any communication alleging the commission of an offence if the making of that communication prima facie constituted an offence, and it shall be competent for the officer presiding at such proceeding to determine whether the making of such communication prima facie did or did not constitute an offence, and such determination shall, for the purposes of those proceedings, be final.

Section 11, Ombudsman Act Chapter 02:12

For the purposes of the law of defamation, the publication, by the Ombudsman or by any member of his staff, of any report or communication and the publication to the Ombudsman or to any member of his staff, or to any member of the National Assembly in accordance with the provisions of section 5 (I), of any complaint or other matter shall, if made in accordance with the provisions of this Act, be absolutely privileged.

397. Botswana indicated that the draft Whistleblower Act would also provide for the protection of reporting persons in a more robust and comprehensive way. The draft is still with the Attorney General Drafting section to prepare it before being sent to Cabinet for deliberations.

398. Botswana provided the following examples.

The courts have always supported any law enforcement agent who testified and refused to state where they got their information from. This is meant to protect the identity of informers or reporting persons. The courts rarely agree to making exceptions to this general rule. See the case of **Attorney General v Lebotse 1987 BLR 462**.

In this case the police impounded two vehicles from the respondent and also applied to the High Court to prevent any person, including the respondent, from operating the accounts of the respondent at two banks and the Botswana Building Society. The court granted a temporary interdict and the respondent applied for dismissal of the rule nisi on the ground that the order had been granted on the basis of an affidavit that contained hearsay evidence. The respondent further applied that the State should disclose its sources, but the court stated that as a general principle sources of information cannot be disclosed except where lack of disclosure occasions a miscarriage of justice.

(b) Observations on the implementation of the article

399. Botswana has considered the aspect of whistleblower protection in Section 45A of the Corruption and Economic Crime (Amendment) Act by criminalizing threats against or intimidation of persons reporting allegations of corruption. Additionally, Section 45A provides for the protection of the identity of the informer during criminal proceedings and relevant case law was cited.

400. The reviewers welcome the initiative of Botswana to further strengthen the available protection through a comprehensive Whistleblower Act and recommend steps to pursue this legislative initiative.

(c) Challenges, where applicable

401. Botswana has identified the following challenges in fully implementing the article under review:

1. Limited capacity: When the whistleblower legislation is enacted, there will be a need for capacity building for officers.
2. Limited resources for implementation
3. Other issues: The law governing the protection of sources of information is not adequate, as it only looks at punishing the offender but not much is said on witness protection. It's actually a proactive approach to witness protection.

(d) Technical assistance needs

402. Botswana 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. Development of an action plan for implementation

403. Botswana indicated that none of the forms of technical assistance mentioned have been previously provided.

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

404. Botswana provided the following information.

Section 316, Criminal Procedure and Evidence Act

(1) When any person has been convicted of an offence which has caused personal injury to some other person, or damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon the application of the injured party, forthwith award him compensation for such injury, damage or loss.

(2) For the purposes of determining the amount of compensation or the liability of the accused therefor, the court may refer to the proceedings and evidence at the trial or hear further evidence upon affidavit or verbal or the amount of compensation which may be awarded by the court in accordance with an agreement reached between the person convicted and the person to be compensated.

(3) The court may order a person convicted upon a private prosecution to pay the costs and expenses of such prosecution in addition to the sum (if any) awarded under subsection (1): Provided that if such private prosecution was instituted after a certificate by the Director of Public Prosecutions that he declined to prosecute, the court may order the costs thereof to be paid by the State.

(4) When a magistrate's court has made any award of compensation, costs or expenses under this section, the award shall have the effect of a civil judgment of that court, and when the High Court has made any such award, the Registrar of that Court shall forward a certified copy of the award to the clerk of the magistrate's court of the district wherein the convicted person underwent the preparatory examination held in connection with the offence in question, and thereupon such award shall have the same effect as a civil judgment of that magistrate's court.

(5) Any costs awarded as aforesaid shall be taxed according to the scale, in civil cases, of the court which made the award.

(6) Where any moneys of the accused have been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made forthwith from those moneys.

(7) Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been so made, and who has accepted the award, to any other civil proceedings in respect of the injury for which compensation has been awarded.

Section 318, Criminal Procedure and Evidence Act

(1) If any person is convicted of theft or receiving stolen property knowing it to have been stolen, or otherwise unlawfully obtaining any property, such property may be restored to the owner or his representative on application by him to the court.

(2) In every such case the court before which such person is tried for any such offence shall have power to award from time to time writs of restitution in respect of the said property or to order the restitution thereof in a summary manner.

(3) If it appears, before any award is made, that any valuable security has been bona fide paid or discharged by any person liable to the payment thereof or, being a negotiable instrument has been bona fide taken or received by transfer or delivery by any person for a just and valuable consideration without notice or without any reasonable cause to suspect that the same had by any offence been stolen or otherwise unlawfully obtained, or if it appears that the property stolen or received as aforesaid or otherwise unlawfully obtained has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court shall not award or order the restitution of such security or property.

Section 6, Proceeds of Serious Crimes Act.

(1) Notwithstanding the provisions of section 5 the court, instead of issuing a confiscation in favour of the Government, may on the application of the victim of the offence make the confiscation order in favour of the victim of the offence.

(2) A confiscation order made under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an action between the victim of the offence as

plaintiff and the offender as defendant and may be enforced as if it were an order made by the court in civil proceedings instituted by the plaintiff against the defendant to recover a debt due by him to the plaintiff.

Public Procurement and Asset Disposal Board Act

PART XII. Registration of Contractors (ss 116-127)

Section 116, Register of contractors

The Board shall maintain an up-to-date register of contractors in works, supplies and services, or any combination thereof, however classified in order to be cognisant at all times of the workload and the performance record of contractors pursuant to its powers as set out in section 49.

Section 124, Public Procurement and Asset Disposal Board Act.

Suspension and de-listing from the register

A contractor who does not comply either with the code of conduct or the contract concluded with a procuring entity may be suspended or delisted by the Board from the Register of Contractors.

Section 125, Public Procurement and Asset Disposal Board Act.

Non-registration of suspended contractors

A suspended contractor shall be debarred by the Board from registering a newly incorporated entity for the period of suspension in question.

Section 126, Public Procurement and Asset Disposal Board Act.

Restriction on defaulting contractor

Where the defaulting shareholders, directors and senior officers of the suspended contractor join another contractor in key operational positions, that contractor shall be debarred from bidding on new tenders until the period of suspension has lapsed.

Section 9, Corruption and Economic Crime (Amendment) Act No. 6 of 2013

Section 9 introduces a new Section 42A, whereby the convictions of companies and individuals convicted of offences under Sections 28 and 29 of the Corruption and Economic Crime Act will be forwarded by the Clerk of Court to the Public Procurement and Asset Disposal Board for noting in the register kept under Section 116 of the Public Procurement and Asset Disposal Board Act. This therefore means that a further consequence of acts of corruption by body corporates or persons directing the affairs of such body corporates will be their delisting or suspension from acquiring projects.

405. Botswana provided the following examples.

Examples are **The Tourism Development Consortium** and **The State v Daisy Loo and Others** cases cited earlier.

(b) Observations on the implementation of the article

406. Section 9 of the Corruption and Economic Crime (Amendment) Act is applicable to the consequences of corruption. The other articles and cases cited by Botswana are also relevant. Botswana has implemented the article.

(c) **Challenges, where applicable**

407. Botswana has identified the following challenges in fully implementing the article under review:

1. Other issues: Best practices from other countries with relevant experience.

(d) **Technical assistance needs**

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

1. Development of an action plan for implementation

409. Botswana indicated that none of the forms of technical assistance mentioned have been previously provided.

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**

410. Botswana cited the following measures.

Section 12, Criminal Procedure and Evidence Act

Neither a conviction nor an acquittal following on any prosecution is 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.

Section 14, Criminal Procedure and Evidence Act

In all cases where the Director of Public Prosecutions declines to prosecute for an alleged offence, any private party who can show some substantial and peculiar interest in the issue of the trial, arising out of some injury which he individually has suffered by the commission of the offence, may prosecute in any court competent to try the offence, the person alleged to have committed it.

Section 16, Criminal Procedure and Evidence Act

(1) Any public body or any person on whom the right to prosecute in respect of any offence is expressly conferred by law, may prosecute in any court competent to try the offence, the person alleged to have committed it.

(2) The right is hereby conferred on city councils, town councils, district councils and township authorities to prosecute in respect of offences against their bye-laws.

411. Botswana provided the following example.

The **Tourism Development Consortium** case. In this case the court, after considering that the accused persons were guilty, permitted the State to make an application for the

forfeiture of the land that was the subject of the trial. This process usually gets joined at the end of the trial to avoid a situation where the concerned party has to start all over with the civil process.

The State v Daisy Loo (Pty) Ltd and Others also bears reference.

(b) Observations on the implementation of the article

412. Botswana has implemented the article in question.

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

413. Botswana provided the following information.

Section 3, Corruption and Economic Crime Act 1994

(1) There is hereby established a Directorate to be known as the Directorate on Corruption and Economic Crime (in this Act referred to as "the Directorate") which shall consist of a Director, Deputy Director and such other officers of the Directorate as may be appointed.

(2) The Directorate shall be a public office; and accordingly, the provisions of the Public Service Act shall, with such modifications as may be necessary, apply to the Directorate and the officers thereof.

Section 6, Corruption and Economic Crime Act 1994

The functions of the Directorate shall be

- (a) to receive and investigate any complaints alleging corruption in any public body;
- (b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
- (c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;
- (d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;
- (e) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue

414. The DCEC mandate is to combat corruption and economic crime as well as money laundering. The DCEC cooperates with other law enforcement agencies like the Botswana Police, Customs and Excise, Immigration Department, Ombudsman and Wildlife Department and also international organizations such as INTERPOL. The DCEC operates from offices in Gaborone, Francistown and Maun.

415. Botswana referred to the legislation establishing DCEC, the DCEC (Amendment) Act 2013, as a measure adopted to ensure the independence of DCEC as a specialized body. Furthermore, in receiving reports of corruption, the DCEC has a panel made up of senior members of the management team, and as such no single person takes a decision on whether a reported matter should be investigated or not. This is also a further safeguard against influence. Plans are underway for the DCEC to delink from the Public Service and as such there will be more independence.

416. Recently, the Chief Justice who makes rules for the good running of the judiciary, made provision for a specialized court. There is now in existence a Corruption Court that is manned by a judge of the High Court. It is, therefore, at the same level as a High Court.

417. To cater for the establishment of the Corruption Court, the Directorate of Public Prosecutions established a fully-fledged Corruption Prosecution Unit to only prosecute corruption matters at the above stipulated court. The DPP under Section 51 of the Constitution (cited above) has independence, as well as the Attorney General.

418. The Financial Intelligence Agency (FIA) is established under the provisions of Section 3 of the Financial Intelligence Act, 2009. Its duties and functions are also outlined under Section 4 of the same Act. It is an autonomous body under the Ministry of Finance and Development Planning that is the central agency for requesting, receiving, analyzing and disseminating information on financial disclosures relating to suspicious transactions. The Agency is one of several whose responsibility is to combat financial crimes, in particular money laundering, the financing of terrorism and the acquisition of property from the proceeds of any other offence. The FIA has applied for membership in the Egmont Group of Financial Intelligence Units. The following provision of the Financial Intelligence Act is deemed relevant.

Financial Intelligence Act, 2009

29. (1) Where the Agency, on the basis of its analysis and assessment of information received by it, has reasonable grounds to suspect that the information would be relevant to the national security of Botswana, the Agency shall disclose the information to the Directorate.

(2) The Agency shall record in writing, the reasons for its decision to disclose information in accordance with subsection (1).

(3) Where the Agency becomes aware of information which may be relevant to —

(a) the functions of any supervisory authority;

(b) investigation or prosecution being conducted by an investigatory authority; or

(c) a possible corruption offence, as defined in the Corruption and Economic Crime Act, the Agency shall disclose the information to the supervisory authority or investigatory authority concerned.

...

(6) The Agency may request a supervisory authority to rebut information indicating that a specified party has as a result of a transaction concluded by or with the specified party, received or is about to receive the proceeds of a financial offence.

(7) Information requested under subsection (6) shall be provided without a court order and within such time limits as may be prescribed.

419. The Botswana Police Services also has its functions outlined under section 6 of the Police Act and in particular some of its duties are stipulated as "to enforce all written laws" which would also include corruption.

Section 6, Police Act

Duties, functions and administration of Force

- (1) The Force shall be employed in and throughout Botswana to protect life and property, prevent and detect crime repress internal disturbances, maintain security and public tranquility, apprehend offenders, bring offenders to justice, duly enforce all written laws with which it is directly charged and generally maintain the peace.
- (2) For the performance of their duties under this Act police officers may carry arms.

Intelligence and Security Services Act CAP 23:02

PART II- Directorate of Intelligence and Security (ss 4-24)

Section 4. Establishment and composition of Directorate

- (1) There is established, under the Office of the President, a Directorate to be known as the Directorate of Intelligence and Security.
- (2) The Directorate shall comprise
 - (a) a Director General;
 - (b) a Deputy Director General;
 - (c) directors; and
 - (d) such other officers and support staff as are referred to in section 10.

Section 5. Functions of Directorate

- (1) Subject to subsection (3), the functions of the Directorate are to-
 - (a) investigate, gather, coordinate, evaluate, correlate, interpret, disseminate and store information, whether inside or outside Botswana, for the purposes of
 - (i) detecting and identifying any threat or potential threat to national security,
 - (ii) advising the President and the Government of any threat or potential threat to national security,
 - (iii) taking steps to protect the security interests of Botswana whether political, military or economic;
 - (b) gather ministerial intelligence at the request of any Government ministry, department or agency and, without delay, to evaluate and transmit as appropriate to that ministry, department or agency, such intelligence and any other intelligence at the disposal of the Directorate which constitutes ministerial intelligence;
 - (c) regulate, in cooperation with any Government ministry, department or agency entrusted with any aspect of the maintenance of national security, the flow of intelligence and security, and the coordination between the Directorate and that ministry, department or agency of functions relating to such intelligence;
 - (d) advise Government, public bodies and statutory bodies on the protection of vital installations and classified documents;
 - (e) carry out security vetting investigations for the security clearance of persons who have or may have access to any sensitive or classified information;
 - (f) make recommendations to the President in connection with
 - (i) policies concerning intelligence and security,
 - (ii) intelligence and security priorities, and
 - (iii) security measures in Government ministries, departments or agencies;
 - (h) subject to any other written law, perform such other duties and functions as may, from time to time, be determined by the President to be in the national interest.
- (2) The Directorate shall not, in the performance of its functions, be influenced by considerations not relevant to such functions and no act shall be performed that could give rise to any reasonable suspicion that the Directorate is concerned in furthering,

protecting or undermining the interests of any particular section of the population or of any political party or other organisation in Botswana.

420. Botswana provided the following information on how DCEC staff is selected and trained. Staff is selected on a competency basis and no other criteria is used. The DCEC has its own Training and Development wing, where an assessment of the training needs of the department is made and recommendations are made to the training Board. It is after approval of this Board, made up of senior DCEC employees, that individuals are selected for training.

421. The Police also have their own recruiting procedures and a training college. It should be noted, however, that recruitment procedures are the same across government allowing for transparency and recruitment on merit.

(b) Observations on the implementation of the article

422. Regarding the independence of the DCEC, it was explained during the country visit that the appointment of the DCEC Director-General is by the President. Although the DCEC is housed under the President's office, officials reported that there has been no control over the Directorate to date, for example if the President could bar the Directorate from accessing premises or documents for reasons of State security. To the contrary, it was explained that the DCEC has investigated the Head of Intelligence, which was considered potentially contrary to the interests of the President's office.

423. During the country visit, officials in the DCEC explained that plans were underway to delink DCEC from the Public Service and as such enhance its independence. However, the reviewers noted that Section 3(2) had not been repealed in the 2013 amendment of the Corruption and Economic Crime Act. Officials explained that the link to the Public Service was merely administrative in that it determined remuneration levels and conditions of recruitment, but that there was no possibility of the Public Service exercising any degree of control over the operations or independence of the Directorate. It was noted by the reviewers that the Director-General is presently considered a public officer and that dismissal of the Director-General was thus regulated under the Public Service Act.

424. Noting Section 5(2) of the Act, the reviewers recommend that Botswana take appropriate measures to strengthen the independence of the DCEC, including the appointment and dismissal of the Director-General, and to address independence from the Public Service. Botswana could further consider establishing a Constitutional anchor for the Directorate. These steps were welcomed by the DCEC officials during the country visit.

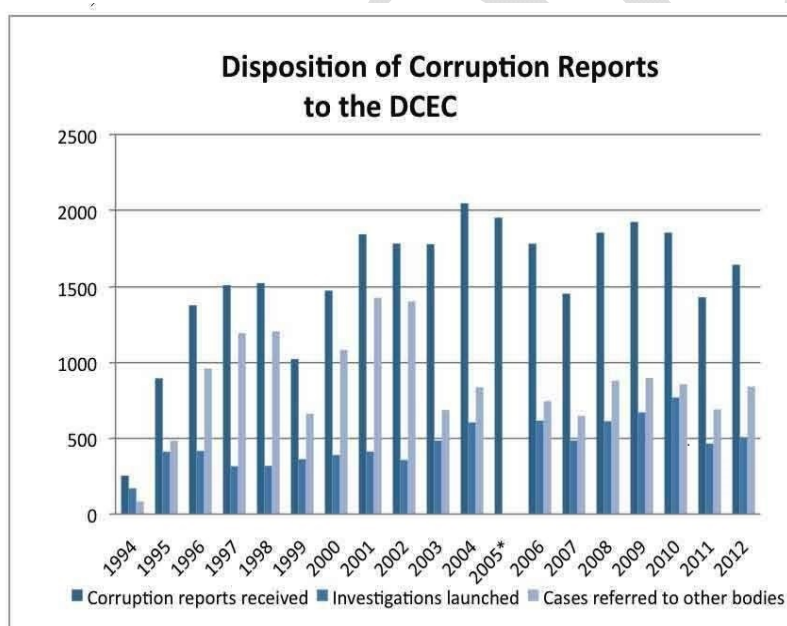
425. During the country visit, officials explained that the budget of DCEC is shared with other agencies in the Ministry. It is recommended that Botswana continue to dedicate, within existing means, sufficient resources for the operations of the agency. Botswana should also strengthen expertise and development of skilled personnel at the agency for the investigation and pursuit of corruption cases, especially complex matters. Relevant measures were welcomed by the DCEC.

426. Investigation and prosecution of the money laundering offences is shared between various investigative agencies equipped with the key investigation tools, thus

requiring sufficient coordination between these agencies. Investigations can be conducted by the Botswana Police Service (BPS), the DCEC, and the Botswana Unified Revenue Service (BURS). Prosecutions are led by the DPP.

427. Regarding the risk of overlap, given that DCEC and the police have a mandate to investigate certain corruption cases (described further below) and how activities are coordinated, it was explained by DCEC officials that there are service level agreements between the DCEC and the DPP as well as with the Botswana Police. DCEC officials further rely on the police for support in investigations, including the use of weapons to support arrests conducted by DCEC, as well as enforcement of restraint orders and for intelligence. The police authorities explained that corruption complaints received by the police, including in the provinces, are referred to the DCEC for further investigation. Further, DCEC investigators have been sent for long-term joint case investigations (2-3 months) to the police to work jointly on cases. The reviewers recommend that cooperation among the agencies continue to be strengthened and that the potential overlap in mandates be clarified.

428. The DCEC operates a 24/7 reporting hotline that also accepts anonymous complaints. Statistics on complaints and convictions obtained by the DCEC are included below¹ and under UNCAC article 39. In light of the statistics provided, the reviewers recommend that DCEC continue its awareness raising efforts on corruption and methods to report complaints to relevant authorities.



Source: DCEC

*Case disposition not provided for 2005

¹ Gabriel Kuris, "Managing Corruption Risks: Botswana Builds an Anti-Graft Agency, 1994-2012", (2013): http://www.princeton.edu/successfulsocieties/content/data/policy_note/PN_id233/Policy_Note_ID233.pdf



Source: DCEC

429. Regarding the resources and AML skills of the Financial Intelligence Agency (FIA), the following information and statistics were provided by the FIA during the country visit.

The FIA was established under the 2009 Financial Intelligence Act. The Director is appointed by the Minister of Finance but reports only administratively to the Ministry of Finance. It was explained that there is no control over the agency or its budget by the Ministry of Finance. Although the Financial Intelligence Act was in force at the time of the country visit, FIA's operations were not yet fully operational and it had not yet begun producing annual reports. In particular, the receipt of STRs only commenced in 2013. Previously, STRs had been received by the DCEC, all of which had been transferred to the FIA. It was reported that FIA currently has 22 STRs pending, including 17 STRs transferred from the DCEC and 5 new STRs received directly by FIA since 1 February 2014. The five new STRs were all pending analysis at the time of the review. It was explained that FIA will also apply for membership in the Egmont Group of Financial Intelligence Units.

FIA further explained that 15 national banks are included as reporting entities under schedules 1 and 2 of the Financial Intelligence Act 2009.

The analysis of reports by FIA is manual, although plans are underway for the agency to implement the anti-money laundering software Go-AML developed by the United Nations Office on Drugs and Crime. FIA is comprised of a Director, a Senior Director for Legal, a Director for IT and 2 analysts.

FIA provided the following information on trainings it has conducted.

FIA TRAINING WORKSHOPS FOR THE PERIOD JANUARY 2011 TO NOVEMBER 2012

Name/Title of course	Objective of the course	Targeted Audience	Date of the course	No. of participants	Technical support granted by
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Anti-Money Laundering Awareness “Train-the-Trainers”	To raise awareness among the FIA key stakeholders on AML issues and the FI Act, 2009 To build a pool of resource persons on AML/CFT issues	Law Enforcement Agencies	24 Jan. 2011	30	AUSTRAC
		Supervisory Authorities	25 Jan. 2011	30	
		Specified Parties	26 Jan. 2011	30	
		Law Enforcement Agencies	27 Jan. 2011	30	
AML Compliance for Non-Bank Financial Institutions	To sensitize the participants on AML compliance issues and their compliance obligations as per FI Act	Non-Bank Financial Institutions	18-21 April 2011	36	US Treasury Department-OTA
Financial Investigation Techniques I	To equip the participants with knowledge on financial forensic techniques for investigating money laundering crimes and other financial fraud cases	Law Enforcement Agencies	09-13 May 2011	30	ILEA
“Train the Trainers” Anti-Money Laundering Master Class	To impart knowledge on the basic money laundering concepts as well as investigation skills for the different money laundering typologies	Law Enforcement Agencies	20-23 June 2011	25	AUSTRAC
AML Compliance in the insurance Sector	To sensitize the participants about money laundering vulnerabilities in their industry and their obligations as per the FI Act	Insurance Industry	14-17 Nov. 2011	34	AUSTRAC
Suspicious Transaction Report form Development	To develop and design a Suspicious Transaction Report Form suitable for Botswana	Banking Sector	06 – 08 Feb. 2012	26	AUSTRAC
AML/CFT Awareness	To sensitize participants on the	Bureaux de Change	26 March 2012 –	47	AUSTRAC

	AML/CFT typologies relevant to their industry and their AML compliance obligations as per the FI Act	Sector	Gaborone 27 March 2012 – Francistown 28 March 2012 – Maun 29 March 2012 - Gaborone	17 6 37	
Financial Investigation Techniques II	To impart advanced skills on investigation of money laundering and other financial crimes	Law Enforcement Agencies	26-30 March 2012	38	ILEA
AML/CFT Compliance for the Bank Examiners	To enhance the participants' supervisory capacity on AML/CFT issues	Bank of Botswana examiners	18-24 July 2012	29	US Treasury Department-OTA
AML/CFT Compliance for the Bank Compliance Officers	To sensitize participants on ML red flags and AML/CFT compliance issues	Banking Sector	26-27 July 2012	25	US Treasury Department-OTA
AML/CFT Compliance for the Bank Compliance Officers (Bureau-de-change sector)	To enhance the participants' supervisory capacity on AML/CFT issues	Bank of Botswana examiners	29-30 Oct. 2012	18	US Treasury Department-OTA
AML/CFT Compliance for Bureau-de-Changes officers	To sensitize participants on ML red flags in their sector and AML compliance issues as required by the FI Act	Bureau-de-Changes Sector	31 Oct.-1 Nov. 2012	52	US Treasury Department-OTA

As noted above under article 23, the reviewers recommend that appropriate statistics on money laundering be collected and analyzed, and that annual reports by the FIA analyzing STRs, typology and money laundering trends be published on its website. FIA is encouraged to continue to strengthen measures to receive and refer STRs, and there is a need to ensure adequate resources and capacity building of AML skills for the agency.

430. There are also resource and capacity constraints in the DPP. During the country visit it was explained that a specialized prosecution team was created in 2012 in the DPP to handle corruption cases, but that the unit is largely comprised of junior officers. As of early 2013, the team had 10 prosecutors headed by an assistant director. The reviewers noted that a dedicated unit simplifies lines of responsibility between

DCEC investigators and DPP prosecutors and facilitates communication and joint training, but they underscored the need for additional support for the Office of the DPP. They also positively noted the exchange of personnel, including that 2 officers from DCEC had been temporarily attached to the DPP's office to work on specific cases. During the country visit, the DPP welcomed the provision of additional resources and capacity building on corruption and money laundering cases, as well as asset confiscation, asset recovery and international cooperation. An asset forfeiture unit was also created in the DPP's office with assistance from South Africa, which had two staff members at the time of the country visit.

431. Regarding the Police force, it was explained that there is no specialized unit to handle corruption and economic crime cases, but that the Serious Crime Squad is also tasked with handling corruption and money laundering cases. The police investigate all Penal Code matters, including forgery, obtaining by false pretences (Section 308, Penal Code), and official corruption (Section 99, Penal Code). It was explained that the DPP had delegated prosecution powers to the police, but that serious fraud and complex matters such as corruption continue to be prosecuted by the DPP. The Internal Affairs unit in the police handles disciplinary and other allegations involving misconduct by the police, and corruption incidents are referred to the DCEC for investigation. Background checks are conducted at the recruitment stage and a Code of Conduct is being developed. The police also have a zero tolerance against corruption. The reviewers considered that Botswana could consider adopting an integrity programme in the police, which was considered to be useful by the police officers the reviewers met with during the country visit. A need to strengthen the capacity of the police to handle corruption and economic crime, together with other relevant criminal justice institutions in Botswana, was noted by the reviewers.
432. As a general matter it is observed that more resources would be helpful to strengthen the capacity of the agencies to handle large and complex cases. Human and material resources across the enforcement agencies are limited and training opportunities not evenly distributed.
433. The creation in 2012 of a specialized court in the High court of Botswana to deal exclusively with corruption cases and serve as a court of appeal for corruption cases is positively noted as a way of reducing backlog and case turnaround times. The new judicial unit would further the development of jurisprudence relevant to corruption cases, thereby shaping future DCEC investigations.
434. Regarding the judiciary, it was explained by officials in the High Court that in October 2012, based on considerations of delay and the economic impact of corruption cases, the Chief Justice made provision for a specialized anti-corruption unit at the level of the High Court, which is manned by one High Court judge. In particular, 120 corruption cases had been pending at the time at the level of the magistracy. It was reported that the delay in finalizing corruption cases was due to the fact that defendants frequently raised Constitutional interventions (interlocutory orders), which required the case to be transferred to the High Court to determine the issue, and then back to the lower court for completion. High Court officials explained that at the time of the visit 11 cases were pending at the Corruption Court since its creation in 2012 (9 from 2013, 2 from 2012) with several due to be heard in the near future. Case files are transferred after trial at the magistrates court level, with no distinction between minor

and major cases. All DCEC cases, including corruption and money laundering, are accepted. Regarding the adequacy of having only one judge at the court to handle 120 cases, it was explained that the number was considered adequate based on current case levels and the fact that most judges have around 400-500 civil and criminal cases at a time. It was further explained that the judge could be rotated as the Chief Justice considered necessary in the future. High Court officials explained that, due to the recent creation of the specialized court it was too soon to see if the backlog was being effectively addressed.

435. It was also explained that the Anti-Corruption Court is a High Court, and that the Criminal Procedure and Evidence Act does not allow direct registration of cases to the High Court but only at the magistrates court level. At the time of the review, a recent amendment to the Criminal Procedure and Evidence Act would change this process. A copy of the 2014 Criminal Procedure and Evidence (Amendment) Act that had only recently been gazetted was provided to the reviewers, which amends Section 96 of the Act (Indictment by the Director of Public Prosecutions in certain cases) to allow the DPP to “immediately commit the accused person for trial before the High Court” in respect of offences specified in the notice. The reviewers were of the view that the amendment could significantly contribute to reducing turnaround times of corruption cases if fully implemented with respect to corruption cases.

436. Botswana’s steps to establish a specialized unit in the High Court and to address delays in the adjudication of corruption cases were positively noted by the reviewers. They were of the view that it could be useful to continue to monitor the need for specialized expertise at the level of the High Court and magistrates courts, to continue to address case backlog and turnaround times.

437. It was also reported during the country visit that the High Court had established an automatic records management system to address backlog and taken steps since 2005 to manage cases automatically. A judicial case management system was created in 2008 for all courts whereby cases were assigned to judges through a registration system that randomly selected judges at the time of case registration. This was being extended to the magistrates courts as well. At the time of the country visit, it was reported that there were 23 stations at the magistrates level throughout the country, 3 divisions of the High Court in Gaborone, Francistown and Lobatse, and one Court of Appeals in Gaborone. It was also explained that under the Constitution the appointment of, and disciplinary matters involving, judicial officers, including judges and magistrates, is done by a Judicial Services Committee consisting of judges and magistrates and that corruption cases are referred to the DCEC for further action. A code of conduct for judicial officers was also in place.

(c) Good practices

438. The following good practices were observed by the reviewers.

- Regional presence of DCEC through local offices in Gaborone, Francistown and Maun.
- The establishment and operation of the Commonwealth Africa Anti-Corruption Center, housed in the DCEC, as a regional center of excellence, learning and training on anti-corruption and to enhance the sharing of experiences among

participating countries. More information on the Center is included under UNCAC article 48 below.

- A specialized prosecution team in the DPP to handle corruption cases, thus simplifying lines of responsibility between DCEC investigators and DPP prosecutors and facilitating communication and joint training, although additional resources are needed.
- Effective cooperation, as witnessed during the country visit, among the DCEC and the Office of the DPP as well as the police, as necessary for the pursuit of corruption and money laundering cases, including through the exchange of personnel between DCEC, DPP and police to work on specific cases. The reviewers encourage continued cooperation among the DCEC, DPP, police, FIA and other relevant agencies, including the judiciary.
- The creation of a specialized judicial unit in the High Court of Botswana to handle corruption cases could serve as a way of reducing backlog and case turnaround times.

(d) Challenges, where applicable

439. Botswana has identified the following challenges in fully implementing the article under review:

1. Limited capacity
2. Limited resources for implementation

(e) Technical assistance needs

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

1. Development of an action plan for implementation

441. Botswana indicated that none of the forms of technical assistance mentioned have been previously provided.

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

442. Botswana cited the following measures.

443. As noted under UNCAC article 33 in this report, Botswana subscribes to common law principles, which provide that sources of information may not be disclosed. This practice has also resulted in judicial case law/jurisprudence.

Section 41 Corruption and Economic Crime Act, 1994. Evidence of an accomplice

Notwithstanding any rule of law or practice to the contrary, no witness shall, in any proceedings for an offence under Part IV, be regarded as an accomplice by reason only of any payment or delivery by him or on his behalf of any valuable consideration to the person accused or, as the case may be, by reason only of any payment or delivery of any valuable consideration by or on behalf of the person accused to him.

Section 45, Corruption and Economic Crime Act, 1994 (see citation above under article 33 of the Convention)

Section 51. Director of Public Prosecutions, Constitution of Botswana (Now amended to be Section 51 A (3). The name Attorney General has been replaced with the name Director of Public Prosecutions)

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

(2) The Director of Public Prosecutions shall be the principal legal adviser to the Government of Botswana.

(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable to do so

(a) to 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;

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

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions.

(5) The powers conferred on the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

**Criminal Procedure and Evidence Act
Evidence of Accomplices (ss 237-238)**

Section 237. Freedom from liability to prosecution of accomplices giving evidence

(1) Where 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 the public prosecutor and submits to be sworn as a witness, and fully answers to the satisfaction of the court or magistrate all such lawful questions as are put to him while under examination such person 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.

(2) The said court or magistrate shall thereupon cause such discharge to be duly entered on the record of the proceedings: Provided that such discharge shall be of no force and effect and the entry thereof on the record of the proceedings shall be deleted if, when called as a witness at a re-opening of the preparatory examination or at the trial of any person upon a charge of having committed such offence, the person in respect of whom the discharge was made fails to submit to be sworn as a witness or fully to answer, to the satisfaction of the magistrate holding the preparatory examination or of the court trying such charge, all such questions as are put to him while under examination as a witness.

(3) No such accomplice produced as a witness by and on behalf of any private prosecutor shall, in any case, be bound or legally compellable to answer any question whereby he may incriminate himself in respect of any offence alleged in the indictment or summons, or the subject of a preparatory examination, unless there is produced to him, and put on record, a writing under the hand of the officer who by law is entitled to prosecute at the public instance in such court or at the preparatory examination, discharging such accomplice from all liability to prosecution at the instance of the public prosecutor for such offence.

Section 238. Evidence of accomplice not to be used against him if he should thereafter be tried for the offence

Where any accomplice in any offence alleged in any indictment or summons, or the subject of a preparatory examination, has, as described in section 237, 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, it shall not be lawful to give in evidence against such accomplice, if he is thereafter tried for such offence, any part of the testimony which has been so given by him at the said trial or preparatory examination:

Provided that nothing contained in this section shall be construed as freeing or exempting any such accomplice who has been guilty of perjury while under examination as a witness in any such trial or preparatory examination from any penalties or forfeitures to which persons guilty of perjury are or shall be 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 perjury on his examination as a witness in any such trial or preparatory examination aforesaid.

444. In regard to the possibility of mitigating the punishment of cooperating defendants, Botswana indicated that, although no provision is made in Botswana's laws for this, courts usually temper justice with mercy when they sentence people who have been

helpful to the law enforcement authorities and to the court. The courts consider this a mitigating circumstance. The reason why this has not been put into law is because this would otherwise take away the independence of the judiciary in exercising discretion when passing judgment. Botswana also indicated that the judiciary uses its discretion in this regard and the system has served the country well.

445. Botswana provided the following case examples.

Disclosure of informants

Attorney General V Lebotse, 1987 BLR 462, where the court stated that generally disclosure of informers in court is not permissible. The only time it is permissible is when non-disclosure would occasion injustice

Botswana also referred to the following cases, although no case summaries were available.

Pandor v The State, 1985 BLR 177.

State v Zac Construction, 2001 (2) BLR 1 (HC).

Botswana indicated that although no statistics are readily available, such cases have come up in the past years, but not during the period under review. Some of the cases are the ones already cited .

Immunity from prosecution

The case of Central Medical Supplies (**The State v Patrick Cole and Others**) bears reference. In this case a person who was party to the offence and had assisted in generating false documents culminating in payments being made to the stated companies was used as an accomplice witness and thereafter granted immunity from prosecution.

The State v Gorerwang Mokgathi and Another (DOC/IF/2005/01 163)

In this case the Director of Public Prosecutions made an undertaking, in writing, to a Mauritian citizen who had participated in the commission of an offence but was willing to testify on behalf of the State. He had actually reported what was going on. The Declaration of Immunity under Section 51A(3) of the Constitution signed by the DPP on 10 June 2011 was provided to the reviewers.

446. Botswana indicated that statistics were not readily available, but cases of this nature where the above Section 237 applies are a common occurrence in its courts.

(b) Observations on the implementation of the article

447. The provisions cited by Botswana, including Sections 237 and 238 of the Criminal Procedure Act and Evidence Act, contain relevant elements that protect the perpetrators, witnesses and accomplices who provide information and evidence relevant to an investigation. The possibility of granting immunity to cooperating offenders is provided for by law.

448. In regard to the possibility of mitigating the punishment of accused defendants, the experts took note of the explanation that such decisions would be taken on a discretionary basis by the courts on a case by case basis. The authorities explained during the country visit that no provisions for plea bargaining existed in Botswana, but that such provisions might be helpful. Botswana may wish to consider adopting such measures.

449. The reviewing experts were satisfied with the explanations and examples and observe that Botswana has implemented the paragraphs under review.

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

450. Botswana provided the following information.

Section 123, Penal Code (see citation above under article 25 of the Convention)

Section 178 (4), Criminal Procedure and Evidence Act

"(4) The High Court may, whenever it thinks fit, and any magistrate's court, may, if it appears to that court to be in the interest of good or public morals or of the administration of justice, direct that a trial shall be held within closed doors; and the court may direct that all or any persons, not being members or officers of the court or parties to the case, their legal representatives, or persons otherwise directly concerned with the case, be excluded from the court during the trial.

451. Botswana provided the following examples.

The few available examples are the case of **The State v Gorerwang Mokgathi** cited earlier; and **the State v Zac Construction** where the proprietor was granted immunity in order to testify against other accused persons. In the Mokgathi case, the accused whom the State wanted to turn into an accomplice was in Mauritius and the Mauritian government wanted the DPP to assure him that their citizen would not be prosecuted in the event that he came to Botswana to testify. The DPP duly gave the assurance and the immunity in writing.

452. Botswana indicated that information on the protection of defendants/offenders who have received physical protection has been kept on an ad hoc basis.

(b) Observations on the implementation of the article

453. During the country visit it was explained that the provisions for the protection of witnesses, experts and victims referred to under article 32 of the Convention (such as hearings by videoconference or physical protection on a case-by-case basis) would also apply to cooperating offenders as “accomplice witnesses”.

454. The observations included under article 32 above are referred to.

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

455. Botswana provided the following information.

Section 237, Criminal Procedure and Evidence Act (see citation above)

Section 51, Constitution of Botswana. Director of Public Prosecutions (see citation above)

456. Botswana provided the following examples.

The case involving the Central Medical Supplies (**The State v Patrick Cole and Others**) bears reference. In this case a person who was party to the offence and had assisted in generating false documents culminating in payments being made to the stated companies was used as an accomplice witness and thereafter granted immunity from prosecution.

The State v Gorerwang Mokgathi and Another (DOC/IF/2005/01 163)

In this case the Director of Public Prosecutions made an undertaking, in writing, to a Mauritian citizen who had participated in the commission of an offence but was willing to testify on behalf of the State. He had actually reported what was going on. The Declaration of Immunity under Section 51A(3) of the Constitution signed by the DPP on 10 July 2011 was provided to the reviewers. The case is referred to under UNCAC article 37(3) above.

(b) Observations on the implementation of the article

457. The articles and examples cited by Botswana contain relevant elements that implement the paragraph in question. Moreover, the example of the Mauritian citizen evokes national cooperation between States in this area and evidences that Botswana has considered entering into agreements or arrangements, as provided in the provision under review. Botswana has implemented the provision under consideration.

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

458. Botswana provided the following information.

Section 7. Powers of Director, Corruption and Economic Crime Act

(1) For the performance of the functions of the Directorate, the Director may -

(a) authorise any officer of the Directorate to conduct an inquiry or investigation into any alleged or suspected offences under this Act;

(b) require any person in writing to produce, within a specified time, all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any public or private body;

(c) require any person, within a specified time, to provide any information or to answer any questions which the Director considers necessary in connection with any inquiry or investigation which the Director is empowered to conduct under this Act.

(2) Any person who fails -

(a) to produce any matter required under subsection (1) (b); or

(b) to provide any information, or to answer any questions, or willfully provides any false information or makes any false statement in answer to a question, under subsection (1) (c), shall be guilty of an offence and shall be liable to the penalty prescribed under section 18(2).

459. Public authorities also have Service Level Agreements with law enforcement agencies, whereby stakeholders meet to share information on ways of improving services between them. Challenges are discussed and plans made to improve services and share information.

460. Anti-corruption units have been established in every Ministry, which are a direct link between the public authorities and the corruption agency.

461. In every Ministry there also exists Corruption Prevention Committees, and the Ministry has to cascade the existence of such committees to their departments but all are accountable to the Permanent Secretary in that particular ministry. The DCEC Corruption Prevention Unit then assists them in terms of having corruption audits and risk assessments. Recommendations are thereafter made and the level of implementation monitored by the DCEC. The level of implementation partly determines the marks that a Ministry gets when it is assessed at the end of each quarter. As stipulated above, Ministries are assessed for compliance on legal, policy and implementation issues and this has helped all organizations comply in areas that were previously a challenge.

462. A Memorandum of Understanding (MOU) is in place between the DCEC, the Public Procurement and Asset Disposal Board (PPADB) and the Competition Authority. This has enhanced cooperation between the three offices.

463. There is a high level Consultative Committee on law enforcement, among other issues usually discussed at the forum.
464. The Justice Department also annually requests the attendance of all law enforcement organs at a Judicial Conference where the manner in which service delivery may be enhanced is discussed.
465. Liaison Officers have been established at the Banks for the Financial Intelligence Agency on money laundering issues.

Financial Intelligence Act CAP 08:07

PART III -National Coordinating Committee on Financial Intelligence

Section 6. (1) There is hereby established a National Coordinating Committee on Financial Intelligence.

(2) The Committee shall have members consisting of the Director and representatives of -

- (a) the Ministry of Finance and Development Planning who shall be chairperson;
- (b) the Directorate on Corruption and Economic Crime;
- (c) the Botswana Police Service;
- (d) the Attorney General's Chambers;
- (e) the Bank of Botswana;
- (f) the Botswana Unified Revenue Services;
- (g) the Ministry of Foreign Affairs and International Cooperation;
- (h) the Department of Immigration;
- (i) the Non-Bank Financial Institution Regulatory Authority;
- (j) Directorate of Public Prosecutions;
- (k) Directorate of Intelligence and Security; and
- (l) Ministry of Defence, Justice and Security.

(3) The Director shall be secretary to the Committee.

Section 7. The Committee shall -

- (a) assess the effectiveness of policies and measures to combat financial offences;
- (b) make recommendations to the Minister for legislative, administrative and policy reforms in respect to financial offences;
- (c) promote coordination among the Agency, investigatory authorities, supervisory authorities and other institutions with a view to improving the effectiveness of existing policies and measures to combat financial offences;
- (d) formulate policies to protect the international reputation of Botswana with regard to financial offences; and
- (e) generally advise the Minister in relation to such matters relating to financial offences, as the Minister may refer to the Committee.

8. (1) The Committee shall meet at least once per quarter for the transaction of business.

(2) Notwithstanding the provisions of subsection (1), the Committee shall meet when the Minister so directs.

(3) The Committee -

- (a) shall regulate its meetings and proceedings in such manner as it thinks fit;
- (b) may request advice or assistance from such persons as it considers necessary to assist it to perform its functions;

- (c) may appoint committees from amongst its members to assist it in the performance of its functions; and
- (d) may co-opt any person whether for a particular period or in relation to a particular matter to be dealt with by the Committee.

Intelligence and Security Service Act CAP 23:02

Part IV, National Intelligence Community (ss 27-28)

Section 27, Establishment and composition of Community

- (1) There is established a Community to be known as the National Intelligence Community which shall consist of
 - (a) the Director General who shall be the chairperson;
 - (b) the Deputy Director General;
 - (c) the head of the Crime Intelligence Bureau;
 - (d) the Assistant Chief of Staff of Military Intelligence;
 - (e) the Permanent Secretary in the ministry responsible for foreign affairs;
 - (f) the Assistant Director responsible for intelligence in the Directorate on Corruption and Economic Crime;
 - (g) the Chief Immigration Officer; and
 - (h) the Commissioner General of the Botswana Unified Revenue Service.
- (2) The Community shall be an advisory body to the Director General.
- (3) The Deputy Director General shall be the Secretary to the Community.

Section 28, Functions of Community

The functions of the Community shall be to

- (a) review and coordinate intelligence;
- (b) ensure that there is inter-agency exchange of intelligence; and
- (c) coordinate such activities as may be directed by the Director General

Central Intelligence Committee (ss 25-26)

Section 25, Establishment and composition of Committee

- (1) There is established a Committee to be known as the Central Intelligence Committee which shall consist of
 - (a) the President who shall be the chairperson;
 - (b) the Vice President;
 - (c) the Minister responsible for intelligence and security;
 - (d) the Minister for Foreign Affairs and International Cooperation;
 - (e) the Permanent Secretary to the President;
 - (f) the Attorney General;
 - (g) the Commander of the Botswana Defence Force;
 - (h) the Director General;
 - (i) the Deputy Director General;
 - (j) the Commissioner of Police;
 - (k) the Deputy Commander of the Botswana Defence Force;
 - (l) the Assistant Chief of Staff of Military Intelligence; and
 - (m) the Deputy Commissioner of Police.
- (2) A member of the Committee shall not be represented, on the Committee, by any other person in his or her absence.
- (3) The Deputy Director General shall be the secretary to the Committee.

Section 26, Intelligence and Security Services Act: Functions of Committee

- (1) The functions of the Committee shall be
- (a) to guide the Directorate generally on all matters relating to national security and intelligence interests;
 - (b) to approve intelligence and security assessments;
 - (c) to advise the President on appropriate action to be taken, or policies to be formulated, in the interest of national security; and
 - (d) to perform such other functions as are conferred on it by this Act or any other written law.
- (2) For the better carrying out of its functions under this Act, the Committee may establish such functional committees as it may consider appropriate.
- (3) The President may prescribe the manner of discharging the functions of the Committee under this section, including the procedure for meetings of the Committee.

466. Botswana provided the following examples.

Notices served under Section 7, Corruption and Economic Crime. The notices that were not complied with were ultimately complied with but after the stipulated period. Generally, there is a high level of compliance.

Section 7 Notices for the Year 2011

Number of Notices Served	Complied	Not Complied
218	214	4

Section 8 Notices

Number of Notices Served	Complied	Not Complied
401	395	6

(b) Observations on the implementation of the article

467. A comprehensive range of cooperation mechanisms is used, including service level agreements, anti-corruption units and corruption prevention committees in every Ministry to address aspects of efficient information sharing in regard to cases as well as the proactive prevention of corruption. Continuous efforts are also being made to strengthen these methods. The efforts of Botswana to continuously improve cooperation are positively noted by the reviewing experts.
468. The reviewing experts refer to the observations made under article 36 of the Convention as regards the potential risk of overlap in regard to investigation and prosecution of money laundering offences.
469. The DCEC, Police and the DPP, as key criminal justice institutions involved in the investigation and pursuit of corruption and money laundering offences, also cooperate closely. Alleged corruption cases received by the police are referred to DCEC for investigation and DCEC relies on the police for support in specific situations. The case of **Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others** is a good example of the successful cooperation of law enforcement agencies and also collaboration with other public authorities.

470. The reviewing experts recommend that Botswana continue its efforts to strengthen the cooperation between national authorities.

(c) Successes and good practices

471. The information provided shows that Botswana has initiated appropriate mechanisms to strengthen cooperation between the national authorities and therefore has adopted good practices to engage public actors to cooperate in the fight against corruption.

472. The existence of specialized anti-corruption units in specific government offices to conduct preliminary investigations and report possible wrongdoing to relevant institutions, such as the DCEC or the police, is also positively noted.

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

473. Botswana cited the following measures.

Section 7. Powers of Director, Corruption And Economic Crime Act

(1) For the performance of the functions of the Directorate, the Director may -

(a) authorise any officer of the Directorate to conduct an inquiry or investigation into any alleged or suspected offences under this Act;

(b) require any person in writing to produce, within a specified time, all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any public or private body;

(c) require any person, within a specified time, to provide any information or to answer any questions which the Director considers necessary in connection with any inquiry or investigation which the Director is empowered to conduct under this act. (2)

Any person who fails -

(a) to produce any matter required under subsection (1) (b); or

(b) to provide any information, or to answer any questions, or willfully provides any false information or makes any false statement in answer to a question, under subsection (1) (c), shall be guilty of an offence and shall be liable to the penalty prescribed under section 18(2).

Section 8. Power of Director to obtain information, Corruption and Economic Crime Act

(1) If, in the course of any investigation into any offence under Part IV, the Director is satisfied that it would assist or expedite such investigation, he may, by notice in writing, require -

(a) any suspected person to furnish a statement in writing - (i) enumerating all movable or immovable property belonging to or possessed by him in Botswana or elsewhere or

held in trust for him in Botswana or elsewhere, and specifying the date on which every such property was acquired and the consideration paid therefore, and explaining whether it was acquired by way of purchase, gift, bequest, inheritance or otherwise;

(ii) specifying any moneys or other property acquired in Botswana or elsewhere or sent out of Botswana by him or on his behalf during such period as may be specified in such notice;

(b) any other person with whom the Director believes that the suspected person had any financial transactions or other business dealing, relating to an offence under Part IV, to furnish a statement in writing enumerating all movable or immovable property acquired in Botswana and elsewhere or belonging to or possessed by such other person at the material time;

(c) any person to furnish, notwithstanding the provisions of any other enactment to the contrary, all information in his possession relating to the affairs of any suspected person and to produce or furnish any document or a certified true copy of any document relating to such suspected person, which is in the possession or under the control of the person required to furnish the information;

(d) the manager of any bank, in addition to furnishing any information specified in paragraph (c), to furnish any information or the originals, or certified true copies, of the accounts or the statements of account at the bank of any suspected person.

Financial Intelligence Act

Part V - Reporting Obligation and Cash Transactions

Section 17, Financial Intelligence Act.

(1) A specified party shall, within such period as may be prescribed, report a suspicious transaction to the Agency.

(2) Nothing in subsection (1) shall be construed as restricting an attorney from reporting a suspicious transaction of which he or she has acquired knowledge in privileged circumstances if it has been communicated to the attorney with a view to the furtherance of a criminal or fraudulent purpose.

(3) For purposes of this section, attorney has the same meaning assigned to it under the Legal Practitioners Act.

Section 16, Financial Intelligence Act.

(1) An examiner of the Agency or supervisory authority shall have access to any record kept in accordance with section 11 and may make extracts from or copies of any such records.

(2) The Agency or a supervisory authority, may at any time cause to be carried out on the business premises of a specified party an examination and an audit of its books and records to check whether the specified party is complying with the requirements of this Act, or any guidelines, instructions or recommendations issued under this Act.

(3) For the purposes of subsection (2), an examiner may -

(a) by request in writing or orally require the specified party or any other person whom the Agency or supervisory authority reasonably believes has in its possession or control a document or any other information that may be relevant to the examination to produce the document or furnish the information as specified in the request;

(b) examine, and make copies of or take extracts from, any document or thing that he considers may be relevant to the examination;

(c) retain any document it deems necessary; and

(d) orally or in writing, require a person who is or apparently is an officer or employee of the specified party to give information about any document that an examiner considers may be relevant to the examination.

(4) The specified party, its officers and employees shall give the examiner full and free access to the records and other documents of the specified party as may be reasonably required for the examination.

(5) Any person who -

(a) intentionally obstructs the examiner in the performance of any of his duties under this section; or

(b) fails, without reasonable excuse, to comply with a request of the examiner in the performance of the examiner's duties under this section, shall be guilty of an offence and liable to a fine not exceeding P100 000 or to imprisonment for a term not exceeding five years or to both.

(6) For the purposes of this section, an "examiner" means a person designated as such in writing by the Agency or the supervisory authority.

(7) Notwithstanding the provisions of subsections (1) to (6), an authorised officer of an investigatory authority may apply to court for a warrant to exercise powers set out under this section.

(8) The court shall issue a warrant under subsection (7) where it is satisfied, from information on oath or affirmation, that there are reasonable grounds to believe that the records may assist the investigatory authority to prove the commission of a financial offence.

474. Botswana provided the following example of implementation.

Notices have been issued under both Sections 7 and 8 of the Corruption and Economic Crime Act and compliance has been had. This evidences the cooperation between the private sector and national authorities.

475. Botswana indicated that over the past three years (2010-2012 and still ongoing), Botswana's national investigating or prosecuting authorities have collaborated with entities of the private sector in the following cases:

1. [CASE 1]

There was a need identified by both the DCEC and the private sector, through their confederation known as the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM), for a code of conduct for the private sector. The two parties then agreed to outsource the creation of the code to a consultant. The *Botswana Code of Conduct for the Private Sector* was launched in 2012, and both the DCEC and BOCCIM are raising awareness of the code and the need for all private sector organizations to implement it. Members of BOCCIM are signing up for the Code, which will enhance ethical conduct in the way they do business.

2. [CASE 2]

Between 2010 and 2012, the Directorate of Public Prosecutions entered into an agreement in which lawyers from government are trained on trial advocacy. This agreement was made with the Botswana Law Society, which is an independent and private body.

476. A private sector MOU between the DCEC and Botswana Confederation of Commerce, Industry and Manpower (BOCCIM) is in place.

477. Copies of invitations sent by the DCEC to the financial sector to attend training workshops held by the DCEC on conflicts of interest, ethics and insider trading were provided to the reviewers, together with related presentation materials. Examples of trainings conducted by DCEC with the Botswana Training Authority were also provided. Please see UNCAC article 36 for information on trainings conducted by Botswana's Financial Intelligence Agency (FIA).

(b) Observations and good practices in the implementation of the article

478. The reviewing experts acknowledge the efforts of Botswana in regard to cooperation between national authorities and the private sector. During the country visit, FIA also explained that the agency had organized multiple training events for financial institutions to familiarize them with the new Act and their responsibilities and duties. This initiative as well as the cooperation between the DCEC and BOCCIM, and the trainings conducted by the DCEC in the public and private sector, were noted positively by the reviewing experts. The reviewers recommend that Botswana continue these efforts and make sufficient resources available to facilitate training and cooperation with the private sector in the fight against corruption.

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

479. Botswana provided the following information.

Corruption and Economic Crime Act 1994

Part III, Functions of Directorate (ss 6-22)

Section 6. Functions of Directorate

The functions of the Directorate shall be

- (a) to receive and investigate any complaints alleging corruption in any public body;
- (b) to investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
- (c) to investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;
- (d) to investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;
- (e) to assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue;
- (f) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or

procedures which, in the opinion of the Director, may be conducive to corrupt practices;

(g) to instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;

(h) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;

(i) to educate the public against the evils of corruption; and

(j) to enlist and foster public support in combating corruption.

480. Botswana indicated that no incentives are offered to persons making reports and that there is no legal duty by the public to report corruption. It was explained that staff of the DCEC have a duty to report corruption incidents under the DCEC's Code of Conduct.

481. Botswana indicated that statistics of reports, including anonymous reports, received by the DCEC, as of 30 July 2013, appear below. There is no indication as to how many of the anonymous reports ultimately were sent for prosecution. All the report mechanisms are accounted for.

	Contact	Email	Informant	Letter	News	Person	Telephone	Total reported as anonymous	Total
No.	38	4	5	286	5	540	1173	528	2051
%	1.85	0.2	0.24	13.94	0.24	26.33	57.19	25.74	

DCEC

Case Statistics:

Source Type: Status Report 2010/01/01-2010/12/31

	Contact	Email	Letter	News	Person	Telephone	Total reported as anonymous	Total
No.	29	5	309	29	625	1016	435	2013
%	1.44	0.25	15.35	1.44	31.05	50.47	21.61%	

DCEC

Case Statistics:

Source Type: Status Report 2011/01/01-2011/12/31

	Contact	Email	Informant	Letter	News	Person	Telephone	Total reported as anonymous	Total
No.	10	10	1	174	5	436	934	263	1570
%	0.64	0.64	0.06	11.08	0.32	27.77	59.49	16.75	

DCEC

Case Statistics:

Source Type: Status Report 2012/01/01-2012/12/31

	Contact	Email	Informant	Letter	News	Person	Telephone	Total reported as anonymous	Total
No.	5	5	2	218	11	445	1078	331	1764
%	0.28	0.28	0.11	12.36	0.62	25.23	61.11	18.76	

482. Botswana provided the following examples of implementation.

Training has always been provided to the public through initiation by the DCEC or where some organizations, both private and public, write to the DCEC to request training (see above under paragraph 1).

483. Botswana indicated that when reports are received, they are not classified as to whether they are received through the DCEC hotline or not. The call gets to DCEC's office through the normal telephone line. The record then indicates that a report was received by telephone. Other ways of reporting are through e-mail, in person, by fax or letter.

(b) Observations on the implementation of the article

484. Botswana has implemented paragraph 2 of article 39 of the UNCAC.

485. During the country visit, the reviewing experts also met with representatives from the Botswana Council of Non-Governmental Organizations (BOCONGO), an umbrella organization for non-governmental organizations (NGOs) in Botswana with a voluntary membership basis. The discussion led to the conclusion that strengthened collaboration between the DCEC and non-governmental organizations, including through BOCONGO could be helpful to improve outreach and to encourage citizens and private sector entities to report and prevent corruption. Although representatives of BOCONGO acknowledged the efforts of the DCEC in regard to awareness raising, it was noted that some stakeholder groups might still lack sufficient knowledge of corruption and what measures could be taken. It was further highlighted that currently no NGO focused solely on the issue of anti-corruption, but that several organizations dealt with the subjects of human rights, access to information, governance or sector-specific topics. Possibilities for increased anti-corruption work might be explored in the future.

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

486. Botswana cited the following measures.

Section 43, Bank Act, 1995

(1) Subject to the provisions of this Act, no director, principal officer, officer, employee or agent of a bank or any other person who by virtue of his professional relationship with a bank has access to the records of the bank (each such person being jointly hereinafter referred to as a "banker") shall, during or after his relationship with the bank, directly or indirectly disclose any information he may acquire in the course of his duties as a banker concerning any customer's deposits, borrowings or transactions, or other personal, financial or business affairs, without the written and freely given permission of the customer concerned, or his personal representative.

(2) The duty of confidentiality imposed on a banker in accordance with subsection (1) shall not apply in the following circumstances—

(a) the customer is declared bankrupt in Botswana, or, if a company is being wound up, and the information is required in connection with bankruptcy or winding-up proceedings;

(b) civil or criminal proceedings arise involving the bank and the customer or his account;

(c) the bank has been served with a garnishee order attaching monies in the account of the customer;

(d) a banker is summoned to appear before a court of competent jurisdiction in Botswana and the court orders the disclosure of the information;

(e) the information is required by an officer in the employment of the same bank in Botswana, or by an auditor or legal representative of that same bank, who requires and is entitled to know the information in the course of his professional duties;

(f) the information is required by another bank for the purpose of assessing the credit-worthiness of a customer, and is being sought for commercial reasons only, and is of a general nature;

(g) the information is required by the Directorate on Corruption and Economic Crime in connection with an investigation carried out under the authority of the Director thereof in accordance with the provisions of section 7 of the Corruption and Economic Crime Act 1994.

(3) Notwithstanding the duty of confidentiality imposed under subsection (1), information may be disclosed—

(a) by an affiliate operating in Botswana to its parent bank concerning any transaction of the affiliate with another bank inside or outside Botswana;

(b) by a representative office established in Botswana in accordance with the provisions of section 4, to its head office concerning any transaction of that office with the bank in Botswana: Provided that—

(i) where the information relates to a transaction with a customer other than a bank, no information other than that concerning credit facilities granted to, or foreign exchange transactions with, the customer shall be disclosed;

(ii) no information relating to deposits taken from, or foreign exchange dealings with a central bank, or with any other entity, by whatever name called, which performs the functions of a central bank, shall be disclosed.

(4) An official of a foreign bank or an official of a foreign central bank, or any other entity or agency, by whatever name called, which performs the functions of a central bank, who has the responsibility of supervising that bank, who wishes to conduct an audit or examination or inspection of an affiliate of that bank in Botswana, shall not do so without obtaining the prior written authorization of the Central Bank, and in any event shall be subject to the duty of confidentiality imposed under subsection (1) and to any conditions that the Central bank may impose.

(5) (a) Where a police officer, other than an officer of the Directorate on Corruption and Economic Crime acting in accordance with the provisions of subsection (2)(g) or a duly authorized representative of the Commissioner of Taxes requires any information from a bank relating to the transactions and accounts of any person, he may apply to a court of competent jurisdiction for an order of disclosure of such transactions and accounts or such part thereof as may be necessary.

(b) The court shall not make an order of disclosure under this subsection unless it is satisfied that the applicant is acting in the discharge of his duties, that the information

is material to any civil or criminal proceedings, whether pending or contemplated in Botswana, and that the disclosure is necessary in all the circumstances.

(6) Notice of an application to the court made under subsection (5) shall be served on both the bank and the person in question.

(7) Subject to this Act, either the Central Bank nor any person conducting an examination for it under this Act shall reveal any information in relation to the affairs of a customer obtained in the course of such examination to any person, unless required by a court of competent jurisdiction to do so.

(8) Notwithstanding subsection (7), the Central Bank may disclose to the auditor of a bank any information received or for the purpose of this Act if it considers that disclosing such information would enable or assist it in the discharge of its supervisory responsibilities.

(9) The Central Bank may publish, in whole or in part, and at such times as it may determine, information or data furnished to it under this particular Act provided that in doing so it does not disclose the particular financial situation of any bank or customer, unless the consent of the bank or the customer, as the case may be, has been previously specifically obtained.

(10) Nothing in this section shall preclude the disclosure of information by the Central Bank, under conditions of confidentiality, to a central bank in a foreign country for the purpose of assisting it in exercising functions corresponding to those of the Central Bank under this Act.

(11) For the purpose of subsection (1), "professional relationship" includes a relationship between an bank and a computer bureau or a printer being a relationship that has been approved by the Central Bank.

(12) Any person who acts in breach of the provisions of subsection (1) shall be guilty of an offence and liable to a fine of P 10,000 and to imprisonment for three years.

Section 7. Powers of Director, Corruption and Economic Crime Act

(1) For the performance of the functions of the Directorate, the Director may -

(a) authorise any officer of the Directorate to conduct an inquiry or investigation into any alleged or suspected offences under this Act;

(b) require any person in writing to produce, within a specified time, all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any public or private body;

(c) require any person, within a specified time, to provide any information or to answer any questions which the Director considers necessary in connection with any inquiry or investigation which the Director is empowered to conduct under this Act.

(2) Any person who fails -

(a) to produce any matter required under subsection (1) (b); or

(b) to provide any information, or to answer any questions, or willfully provides any false information or makes any false statement in answer to a question, under subsection (1) (c), shall be guilty of an offence and shall be liable to the penalty prescribed under section 18(2).

Section 8. Power of Director to obtain information, Corruption and Economic Crime Act, 1994

(1) If, in the course of any investigation into any offence under Part IV, the Director is satisfied that it would assist or expedite such investigation, he may, by notice in writing, require—

(a) any suspected person to furnish a statement in writing

(i) enumerating all movable or immovable property belonging to or possessed by him in Botswana or elsewhere or held in trust for him in Botswana or elsewhere, and specifying the date on which every property was acquired and the consideration paid therefore, and explaining whether it was acquired by way of purchase, gift, bequest, inheritance or otherwise;

(ii) specifying any moneys or other property acquired in Botswana or elsewhere or sent out of Botswana by him or on his behalf during such period as may be specified in such notice;

(b) any other person with whom the Director believes that the suspected person had any financial transactions or other business dealing, relating to an offence under Part IV, to furnish a statement in writing enumerating all movable or immovable property acquired in Botswana and elsewhere or belonging to or possessed by such other person at the material time;

(c) any person to furnish, notwithstanding the provisions of any other enactment to the contrary, all information in his possession relating to the affairs of any suspected person and to produce or furnish any document or a certified true copy of any document relating to such suspected person, which is in the possession or under the control of the person required to furnish the information;

(d) the manager of any bank, in addition to furnishing any information specified in paragraph (c), to furnish any information or the originals of account at the bank of any suspected person.

(2) Every person on whom a notice is served by the Director under subsection (1) shall, notwithstanding any oath to secrecy, comply with the requirements of the notice within such time as may be specified therein, and any person who without reasonable excuse fails to so comply shall be guilty of an offence and shall be liable to the penalty prescribed under section 18(2).

(3) Where in any proceedings for an offence under Part IV, it is proved that the person charged with the offence refused to furnish a statement required under paragraph (a) of subsection (1) when requested to do so, his refusal shall, unless reasonable cause thereof is shown, be treated as supporting any evidence given on behalf of the prosecution, or as rebutting any evidence given on behalf of the defense as regards the manner of his acquisition of the properties mentioned in the said paragraph (a).

Section 248. Examined copies also admissible after due notice, Criminal Procedure and Evidence Act

No such bank shall be compelled to produce the ledgers, day-books, cash-books, or other account books of such bank in any criminal proceedings unless the court or the magistrate holding the preparatory examination specially orders that such ledgers, day-books, cash-books or other account books shall be produced.

Section 249. Bank not compelled to produce any books unless ordered by court or magistrate, Criminal Procedure and Evidence Act

(1) Where, on application made on oath by a policeman, a magistrate or a justice who is not a member of the Botswana Police Force is satisfied that the policeman believes there are reasonable grounds to suppose that the ledgers, day-books, cash-books or other account books or other accounting devices used by a bank (including a savings bank) may afford evidence as to the commission of any offence, the magistrate or justice may issue his warrant authorizing the policeman or policemen named therein

(a) to inspect all those ledgers, day-books, cash-books and other account books and other accounting devices carrying written records and make and retain in his or their possession copies or other record of any entries therein or extracted therefrom; and
(b) to have access to all those other accounting devices carrying unwritten records and retrieve therefrom any information and make and retain in his or their possession a written or other record of that information.

(2) Any person who resists or hinders or aids, incites or encourages any other person to resist or hinder a policeman in executing a warrant issued under this section shall be guilty of an offence and liable to a fine not exceeding P250

Section 38, Non-Banking Financial Institution Regulatory Act CAP 46:08: Secrecy

(1) In this section

"officer" means a person who is or has been a member or employee of the Regulatory Authority or a person engaged by the Regulatory Authority in terms of section 19 (b).

(2) An officer who discloses to any person any information (orally or in writing) relating to the affairs of any non-bank financial institution, or any other person, that the officer has acquired in the performance of his or her duties or the exercise of his or her functions as such commits an offence and on conviction is liable to a fine not exceeding P30,000 or to imprisonment for a term not exceeding three years, or to both.

(3) Subsection (2) does not prevent

(a) disclosure of a summary or collection of information that is prepared so that information relating to any particular person cannot be found out from it;

(b) disclosure of the name of a licensed non-bank financial institution;

(c) disclosure of the addresses at which licensed non-bank financial institutions carry on business;

(d) disclosure of any other information reasonably necessary to enable members of the public to contact non-bank financial institutions; or

(e) disclosure of information to the Commissioner General of Taxes.

(4) It is a defence to a charge in terms of subsection (2) that

(a) the disclosure was for the purposes and in the course of the exercise of the officer's duties or the performance of the officer's functions under a financial services law;

(b) the disclosure was made to or with the consent of the non-bank financial institution or the person concerned;

(c) the disclosure was made in accordance with a lawful requirement of a court of competent jurisdiction;

(d) the disclosure was authorised by a financial services law;

(e) the disclosure was required by another law; or

(f) the disclosure was authorised by regulations made for the purposes of this section.

(5) Every person appointed under or employed in carrying out the provisions of this Act, except the Minister, shall make an oath or declaration of secrecy in the manner and form prescribed.

Section 69, Non-Banking Financial Institutions Regulatory Act CAP 46:08: Disclosure of information

(1) The Minister may by regulations impose requirements with respect to disclosure of information to clients or other persons about financial services; and

(b) reports to be made to the Regulatory Authority about financial institutions or financial services.

(2) A person who contravenes regulations made for the purposes of subsection (1) commits an offence and on conviction is liable to a fine not exceeding P50,000 or to imprisonment for a period not exceeding five years, or to both.

Section 16, Financial Intelligence Act CAP 08:07

(1) An examiner of the Agency or supervisory authority shall have access to any record kept in accordance with section 11 and may make extracts from or copies of any such records.

(2) The Agency or a supervisory authority, may at any time cause to be carried out on the business premises of a specified party an examination and an audit of its books and records to check whether the specified party is complying with the requirements of this Act, or any guidelines, instructions or recommendations issued under this Act.

(3) For the purposes of subsection (2), an examiner may -

(a) by request in writing or orally require the specified party or any other person whom the Agency or supervisory authority reasonably believes has in its possession or control a document or any other information that may be relevant to the examination to produce the document or furnish the information as specified in the request;

(b) examine, and make copies of or take extracts from, any document or thing that he considers may be relevant to the examination;

(c) retain any document it deems necessary; and

(d) orally or in writing, require a person who is or apparently is an officer or employee of the specified party to give information about any document that an examiner considers may be relevant to the examination.

(4) The specified party, its officers and employees shall give the examiner full and free access to the records and other documents of the specified party as may be reasonably required for the examination.

(5) Any person who -

(a) intentionally obstructs the examiner in the performance of any of his duties under this section; or

(b) fails, without reasonable excuse, to comply with a request of the examiner in the performance of the examiner's duties under this section, shall be guilty of an offence and liable to a fine not exceeding P100 000 or to imprisonment for a term not exceeding five years or to both.

(6) For the purposes of this section, an "examiner" means a person designated as such in writing by the Agency or the supervisory authority.

(7) Notwithstanding the provisions of subsections (1) to (6), an authorised officer of an investigatory authority may apply to court for a warrant to exercise powers set out under this section.

(8) The court shall issue a warrant under subsection (7) where it is satisfied, from information on oath or affirmation, that there are reasonable grounds to believe that the records may assist the investigatory authority to prove the commission of a financial offence.

Section 17, Financial Intelligence Act.

PART V - Reporting Obligation and Cash Transactions

(1) A specified party shall, within such period as may be prescribed, report a suspicious transaction to the Agency.

(2) Nothing in subsection (1) shall be construed as restricting an attorney from reporting a suspicious transaction of which he or she has acquired knowledge in

privileged circumstances if it has been communicated to the attorney with a view to the furtherance of a criminal or fraudulent purpose.

(3) For purposes of this section, attorney has the same meaning assigned to it under the Legal Practitioners Act.

487. The Banking Amendment Bill 2013 also includes BURS (Botswana Unified Revenue Services) as being among the organs that may receive information from a bank regardless of bank secrecy laws. The reason for the amendment is that BURS was recently created by statute.

488. Botswana provided that examples of implementation are the notices that the Director of the DCEC has been issuing under the provisions of **Section 8 CECA**, and all these have been complied with. Despite the bank secrecy laws, the banks have always been obliged to provide the requested information to the DCEC. The police also use **Sections 248 and 249 of the Criminal Procedure and Evidence Act** to obtain orders from the courts to get statements from banks, and bank secrecy laws have never been used to refuse access to such records.

(b) Observations on the implementation of the article

489. Botswana has implemented article 40 of the UNCAC. Confidentiality is a general principle, but Section 43 (2) (b), (d), and (g) foresees that the duty of confidentiality shall not apply if (b) civil or criminal proceedings arise involving a bank and its customer or his account; (d) if a banker is summoned to appear before a court of competent jurisdiction in Botswana and the court orders the disclosure of the information; and (g) the information is required by DCEC in connection with an investigation carried out under the authority of the Director thereof in accordance with the provisions of Section 7 of the Corruption and Economic Crime Act 1994.

490. Section 43 (5) (a) reaffirms that officers working for DCEC and authorized officers of the Commissioner of Taxes or of the Botswana Unified Revenue Services do not need a court order to request information relating to the transactions and accounts of any person, whereas other police officers may apply to a court of competent jurisdiction for an order of disclosure of such transactions and accounts or such part thereof as may be necessary.

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

491. Botswana indicated that it has partially implemented the article and cited the following measures.

Section 283, Criminal Procedure and Evidence Act

It shall not be lawful in any indictment or summons against any person for any offence to allege that such person has been previously convicted of any offence whether in Botswana or elsewhere.

Section 284, Criminal Procedure and Evidence Act

Except in circumstances specifically described in this Act, it shall not be lawful to prove at the trial of any person for any offence that he has been previously convicted of any offence, whether within Botswana or elsewhere, or to ask any accused person, charged and called as a witness, whether he has been so convicted.

Section 285, Criminal Procedure and Evidence Act

When any person indicted before the High Court for any offence has been previously convicted of any offence, whether within Botswana or elsewhere, it shall be lawful for the prosecutor, if the accused has under section 80 admitted that he has been so previously convicted and his admission has also been subscribed by the magistrate in accordance with that section, and if further he has pleaded guilty to or been found guilty of the offence, and before sentence is pronounced, to tender the admission in proof of the previous conviction, and such admission shall be received by the court upon its mere production as proof of the previous conviction unless it is shown that the admission was not in fact duly made or that the signatures or marks thereto are not in fact the signatures or marks of the accused and the magistrate respectively:

Provided that if the accused made the admission under section 80 but refused to subscribe the same by signature or mark, a solemn declaration signed by the magistrate and attached to the document signed by him under section 80, stating that the accused did so make the admission but refused to subscribe the same shall, upon its mere production, be sufficient evidence that the accused admitted the previous conviction.

492. Botswana indicated that there are no examples of implementation. Although the law allows for consideration of a foreign conviction at sentencing, only previous convictions from the national bureau have been used, without resorting to foreign convictions.
493. The Criminal Record Bureau only provides previous data for local convictions. At no time have the courts considered convictions from other States, although the law seems to allow for such.

(b) Observations on the implementation of the article

494. During the country visit it was confirmed that the courts may consider foreign convictions during sentencing, but not to establish a defendant's criminal liability (Section 283, Criminal Procedure and Evidence Act).

Article 42 Jurisdiction

Subparagraph 1 (a) and (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:

(a) The offence is committed in the territory of that State Party; or

(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

495. Botswana cited the following measures.

Section 4, Penal Code

The jurisdiction of the courts of Botswana for the purposes of this Code extends to every place within Botswana.

Section 5, Penal Code

When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.

Section 61, Penal Code

(1) Any person who while in Botswana

(a) conspires with any other person to commit within a state or territory other than Botswana or to aid or procure the commission within such a state or territory of any act of violence

(i) the commission of which is an offence under the law of that state or territory; and

(ii) the commission of which in Botswana would be an offence under the law of Botswana; or

(b) incites, instigates, commands or procures any other person to commit within such a state or territory any such act,

shall be guilty of an offence and liable to a fine not exceeding P1000 or to imprisonment for a term not exceeding three years, or to both.

(2) Reference in this section to the commission of acts of violence includes reference to omissions done with the intention of causing violence.

(3) No prosecution for an offence under this section shall be brought without the consent in writing of the Director of Public Prosecutions.

496. Botswana referred to the following cases.

A bigamy case where a foreigner married a Motswana woman outside the country according to civil law is a case in point. The accused was married to a woman in his country of origin through the customary law of his tribe. He then married the Motswana woman outside Botswana through the civil law and the authorities in Botswana believed he had committed the offence of bigamy, which is punishable under Botswana laws. The court held that there was no jurisdiction and the accused had committed no offence.

State v Jacobs, 1974 (2) BLR 48

The High Court of Botswana was called upon to decide jurisdictional issues in a rape case. The accused had assaulted the victim within Botswana's borders and chased her

across the border to South Africa. He there raped her. The question was whether the Botswana courts could entertain the matter. It was held that, as the rape occurred across the border, the courts in Botswana did not have jurisdiction to handle the matter.

497. Botswana indicated that jurisdiction in Botswana is a territorial matter. Generally jurisdiction is territorial, but Section 46 of the CECA makes it an exception with regard to Part IV offences created in or under the CECA, for which jurisdiction may be extended to citizens even for conduct that occurred outside Botswana.

Section 46, Corruption and Economic Crime Act

The provisions of this Act shall have effect, in relation to citizens of Botswana, outside as well as within Botswana; and where an offence under Part IV is committed by a citizen of Botswana in any place outside Botswana, he may be dealt with in respect of such offence as if it had been committed within Botswana.

(b) Observations on the implementation of the article

498. The provisions cited by Botswana contain elements relevant to implementing subparagraph (a) of paragraph 1 of article 42. Moreover, the examples reflect Botswana's application of territorial jurisdiction in cases involving conduct that took place outside Botswana. Botswana has implemented the provision.

499. It was clarified during the country visit that Botswana has jurisdiction over offences committed on board vessels and aircraft as an extension of its territorial jurisdiction based on general legal principles of common law.

(c) Successes and good practices

500. Botswana extends its jurisdiction over corruption-related crimes committed by citizens even to conduct that occurred outside Botswana [Section 46 of CECA].

Article 42 Jurisdiction

Subparagraph 2 (a)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

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

501. Botswana indicated that it has not implemented the provision.

(b) Observations on the implementation of the article

502. Botswana could consider including in its legislation relevant provisions to implement this paragraph.

Article 42 Jurisdiction

Subparagraph 2 (b)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

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

503. Botswana indicated that it has partially implemented the provision and cited the following measure.

Section 46, Corruption and Economic Crime Act

The provisions of this Act shall have effect, in relation to citizens of Botswana, outside as well as within Botswana; and where an offence under Part IV is committed by a citizen of Botswana in any place outside Botswana, he may be dealt with in respect of such offence as if it had been committed within Botswana.

504. Botswana indicated that the provision is legislatively implemented, except that there are no cases to indicate enforcement.

(b) Observations on the implementation of the article

505. Section 46 of the Corruption and Economic Crime Act applies this paragraph to nationals of Botswana but does not mention stateless persons. Botswana may wish to consider including in its legislation relevant provisions to also cover stateless persons or to extend this principle to other offences except CECA offences.

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

506. Botswana indicated that it has not implemented the provision. Necessary steps would include advocating for legislation that covers this aspect.

(b) Observations on the implementation of the article

507. Botswana could consider including in its legislation relevant provisions to implement this paragraph.

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

508. Botswana indicated that it has partially implemented the provision and cited the following measures.

The Proceeds of Serious Crimes Act Section 14, Money Laundering

(1) For the purposes of this section, a person shall be deemed to engage in money laundering if he engages, directly or indirectly, in a transaction that involves money, or other property, that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, or if he receives, possesses, conceals, disposes of, or brings into Botswana, any money, or other property that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, and the person knows, or ought reasonably to know, that such money or other property is derived or realised, directly or indirectly, from some sort of unlawful activity.

(2) A person who engages in money laundering shall be guilty of an offence and shall be liable, if he is an individual to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then, every person who at the time of the commission of the offence was a director, manager or partner of such body shall be liable to a fine not exceeding P25 000.

509. Botswana indicated that there is no data available for the implementation of the provision.

(b) Observations on the implementation of the article

510. Although Section 14 of the Proceeds of Serious Crimes Act cited by Botswana implicitly evokes financial crime committed against the State in cases of money laundering, it could not be sufficiently clarified during the country visit if Botswana had jurisdiction in case of an offence committed abroad against the State of Botswana. Botswana may therefore wish to regulate such provision more clearly in the law.

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

511. Botswana indicated that it has not implemented the provision.

(b) Observations on the implementation of the article

512. Botswana could consider including in its legislation relevant provisions to implement this paragraph. The reviewing experts also refer to the observations made under paragraph 12 of article 44 of the Convention.

Article 42 Jurisdiction

Paragraph 4

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

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

513. Botswana indicated that it has not implemented the provision.

(b) Observations on the implementation of the article

514. Botswana could consider including in its legislation relevant provisions to implement this paragraph.

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

515. Botswana referred to the information included under article 48 of the Convention below regarding Joint Permanent Consultative Commissions (JPCCs).

(b) Observations on the implementation of the article

516. Based on the information provided and discussed during the country visit, Botswana has adequately implemented the paragraph in question.

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

517. Botswana indicated that it has not adopted any grounds of criminal jurisdiction other than those described above.

(b) Observations on the implementation of the article

518. Botswana has discussed the circumstances in which it exercises its criminal jurisdiction under its domestic law. The reviewers are satisfied with the information provided.

(c) Challenges, where applicable

519. Botswana has identified the following challenges in fully implementing the article under review:

1. Inadequacy of existing implementing normative measures: Laws are not in line with the Convention except in a few instances.
2. Limited resources for implementation.

(d) Technical assistance needs

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

1. Development of an action plan for implementation
2. Capacity-building programmes for investigative, prosecution or judicial authorities on cross-border cooperation and coordination mechanisms
3. Summary of good practices/lessons learned: Experience from countries or experts knowledgeable on these issues would be helpful.

521. Botswana indicated that there is none of the forms of technical assistance mentioned have been previously provided.

Chapter IV. International cooperation

Article 44 Extradition

Introduction

522. During the country visit, officials in the Directorate of Public Prosecution (DPP) provided the following information on the process and legal framework on extradition of Botswana.

523. The legal basis for extradition in Botswana is the Extradition Act. Extradition is subject to the existence of bilateral treaties between Botswana and treaty partner countries. It was explained that extradition on the basis of multilateral treaties such as the Southern African Development Community (SADC) Protocol on Extradition and the UNCAC is not possible since these agreements have not been fully incorporated into Botswana's national legislation. The process of domestication of international treaties, including UNCAC, is an ongoing process in Botswana, which hinders the application of such treaties in practice. It was also explained by the national authorities that extradition on the basis of provisions of an international treaty which had been domesticated (e.g., certain articles) would not be possible.

524. The condition that bilateral arrangements are in place for extradition and that requests have been refused on the basis of the absence of treaties was noted as a concern by the reviewers, as noted in the article below.

525. Botswana also subscribes to the Commonwealth (London) Scheme on Extradition, which provides a framework for extradition between Commonwealth countries.

526. During the country visit, officials in the Office of the DPP provided the reviewers with excerpts of Botswana's database on international cooperation requests and cases handled in the office. This database was instituted in the office in 2007. The reviewers noted that the existence of such an electronic system, whereby cases are classified by date and category of offence, was conducive to the timely, accurate and efficient execution and tracking of requests. This is borne out by the fact that the officials were able to provide statistics on requests handled by the office since 2007 when the electronic system was adopted.

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

527. Extradition is subject to dual criminality and the existence of bilateral arrangements or the designation of countries. Botswana cited the following measures.

Section 1(2), Extradition Act

(2) Subject to the provisions of section 3, for the purposes of this Act "extradition crime" means a crime which, if committed within the jurisdiction of Botswana would be an offence punishable with imprisonment for a term of not less than two years or other greater penalty, and includes an offence of purely fiscal character.

Section 3, Extradition Act

3. (1) Where an arrangement has been made with any country, with respect to the surrender to that country of any fugitive criminal, the Minister may, having regard to reciprocal provisions under the law of that country, by order published in the Gazette, direct that this Act shall apply in the case of that country subject to such conditions, exceptions and qualifications as may be specified in the order.

(2) An order made under subsection (1) shall recite or embody the terms of the arrangement and shall not remain in force for any longer period than the arrangement.

(3) Any order under subsection (1) may prescribe what crimes shall be deemed to be extradition crimes for the purposes of the order and this Act.

Section 5, Extradition Act

5. Where this Act applies in the case of any country, every fugitive criminal of that country who is in or suspected of being in Botswana shall be liable to be apprehended and surrendered in the manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the commencement of this Act or the application of this Act to that country, and whether there is or is not any concurrent jurisdiction in a court of Botswana over that crime.

528. Botswana also provided the following information.

List of Extradition Treaties:

Botswana has adopted bilateral treaties with the Republic of South Africa (1969) and Portugal (1970). These have been incorporated into national legislation as exhibits to the Extradition Act. Copies of the treaties were provided to the reviewers.

Designation of Countries:

Regarding multilateral treaties, Botswana has declared all Commonwealth countries as 'designated countries' in accordance with Section 4 of the Extradition Act which reads as follows:

Section 4, Extradition Act

Declaration of designated countries

(1) For the purposes of this Act, and notwithstanding the provisions of Section 3, the Minister may, by order published in the Gazette, declare any Commonwealth Country to be a designated country.

(2) An order made under subsection (1) may prescribe what crime shall be deemed to be crimes for the purposes of the order and of this Act, and may be made whether or not the designated country has made any provision for the extradition of any fugitive criminal from its territory to Botswana.

(3) The Minister may revoke any order made under this section, or remove any country from the list of designated countries where he considers that it would be in the interest of Botswana to do so.

529. The officials explained that in the case of treaty partners, Botswana applies both the Extradition Act and the treaty to incoming requests for extradition.

530. Botswana has also signed international agreements, including the SADC Protocol on Extradition, the UNCAC and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Botswana indicated that most of these agreements cannot be applied by Botswana since they have not been incorporated or domesticated into Botswana's laws.

531. Botswana provided the following cases.

EXTRADITION REQUESTS BY BOTSWANA FROM 2007-2012 TO SOUTH AFRICA (The requests were from Botswana to South Africa)

NAME OF ACCUSED	NATIONALITY	OFFENCE	STATUS
Irina L. Ramokate	Motswana	Possession of drugs	Extradited
Michael Tshepiso Morwe	Motswana	Murder	Extradited
Tebogo Augustinas Mafisa	South Africa	Armed Robbery	Extradited
Skhumbizo Ricardo Mlota	South Africa	Armed Robbery	Extradited
Hendrick Vacey Molohe	South Africa	Armed Robbery	Extradited
George Vingazo	Malawi	Theft of Motor Vehicle	Extradited
Mhlupheki Dlamini	South Africa	Armed Robbery	Extradited
Benson Keganne and two others	2 South Africans and 1 Motswana	Murder and robbery	Extradited
Michael Nzwinila and others (Bank of Baroda and Home Corporate)	Batswana	Armed robbery and store breaking and theft	Extradited (twice)
Nkosinathi Moyo	Zimbabwean	Theft motor vehicle	Extradited and consent to prosecute him for other offences was also subsequently granted
Thabo Lokwae	Motswana	Fraud	Handed himself over before arrest
Jabulani Johnson	Motswana	Fraud	Handed himself over before arrest
Emmanuel Tsebe	Motswana	Murder	Extradition was refused due to non-availability of an undertaking. Died in

			custody in South Africa
Motheo Monnaesi	Motswana	Armed robbery and escaping from lawful custody	Pending extradition
Jorge Lius Valenzela	Peruvian	Theft	Pending extradition
Enock Ndlovu Sibandanyana	Zimbabwean	Store breaking and theft	Arrest in Botswana
Jerry Phale	Motswana	Murder	Extradition was refused due to non-availability of an undertaking. Matter pending before Court
Sefelane Shoniwa and others	Two Batswana, 2 South Africans and 1 Zambian	Theft of motor vehicles	Extradited
Gaolekwe Rabana	Motswana	Corruption	Held extraditable matter pending appeal (very old)
Sipho Mogoaduba	South African	Two cases of Fraud	Pending arrest
Joyce Vumuhle Mogoaduba	South African	Fraud	Pending arrest
Rasenamolela Harold Mogotsi	South African	Fraud	Pending arrest
Nathasha Cia Maria Minnings Logan	South African	Fraud	Pending arrest
Johannes Magano	South African	Theft of Motor Vehicle	Before Court at Mafikeng
Paul Mthabela	South African	Fraud	Matter before Court. Extradition hearing will be held on the 29th November 2012
Reunart Mondira	Motswana	262 cases fraud	Pending arrest
Johannes Mosiwa	South African	Murder and armed robbery	Pending arrest old matter understanding was provided
Lawrence Tshaila	Motswana	Unlawful wounding	Pending arrest-old matter
Enock Ndlovu Sibanganyana	Zimbabwe	Theft	Extradition request suspended by Botswana-accused arrested in Botswana
Mmoloki Matshane, Aobakwe Moreeng, Ogoditse Phorotlho and Poloko Bafedile	Botswana and South African	Double Murder	Pending. No undertaking provided
Emmanuel Dzeveve	Zimbabwe	Murder	Pending submission. No understanding

Mothusi Katse	Motswana	Murder	Pending submission. No undertaking provided
Nqoabuthu Mbele@nkosinathi Sibanda Stanley Ndlovu@Khanyisele Siyabonga	Zimbabweans	Armed robbery	Held extraditable at matter pending repatriation
Mustafa Chilonga	Motswana	Obtaining by false pretences	Pending arrest
Edwin Samotse	Motswana	Murder	The accused volunteered to be extradited. Handing over is pending because no undertaking provided.
Antonio Samuels	South African	Fraud	Pending arrest

Extradition requests by Botswana to Zimbabwe (2007-2012)

No.	Subject	CR No. & Stations	Offences	Status
1	Eleanor Kuedza TEMBURE	Machipisa CR 339/6/2003 Zimbabwe	The subject wanted for murder and attempted murder charges	The subject is still held in custody at Francistown pending extradition hearing
2	Botho MPOFU	2 Tatitown CR 63/07/2006	The subject wanted for murder	Subject still at large
3	Mlungisi MOYO	Ramotswa CR 69/07/2008	Subject wanted for murder	Extradition documents
4	Mary NGWENYA	Ramotswa CR 69/07/2008	Murder	Their provisional request for extradition was sent on 19 January 2009. Subjects still at large.
5	Workmore MAPIRA	Ramotswa	Murder	Their provisional request for extradition was sent on 19 January 2009. Subjects still at large. Extradition documents drafted and sent to Zimbabwe.
6	William Munyaradzi MAPHORISA	Kutlwano CR 300/03/2007	Murder	Documents sent to Zimbabwe
7	Micho Sibangana	L17/15/29	Causing death by dangerous driving	Accused person died
8	Irvin D.	Naledi CR	Obtaining by	Extradition documents

	KHULULEKANI	677/09/2008	false pretences	submitted to Zimbabwe Fugitive still serving sentence in Zimbabwe
9	Brighton NDLOVU	Gerald CR 19/08/2009	Murder	Documents sent to Zimbabwe. Accused serving a 20 year jail sentence.

**EXTRADITION REQUESTS TO BOTSWANA FROM OTHER COUNTRIES
SINCE 2007 (List of Persons Extradited from Botswana to Other Countries)**

Name	Offence	Country	Status
Dennis Moyo	Murder	South Africa	Extradited
Johannes Van Der Merwe	Theft	Zambia	Matter pending Appeal before Newman J.
Thabo R. Hurndall	Drug trafficking	Namibia	Extradited
Crofton Hannibal	Attempted murder	Grenada	Extradited
Tony Mulenga	Possession of stolen property	Zambia	Withdrawal
Itumeleng Doctor	Possession of Drugs	Zimbabwe	Extradited
Boysa Ntoagae	i) House breaking with intent to steal; ii) Malicious damage to property	South Africa	Extradited
Bongani Moyo	Armed robbery	South Africa	Pending
Melusi Ndlovu	Murder	Zimbabwe	To be extradited on 27 March 2013
Edward Jani	Theft	Zambia	Extradited
Ackson Mbewe	Attempting to obtain by false claims	Zambia	Pending
Kabelo Lekang & 2 Others	Armed robbery	South Africa	Pending
Musekiwa Dziwire	Theft by servant	Malawi	Extradited
Frank Lange	Drugs	Germany	Extradited
Brian Mupaiki	Murder	Zimbabwe	Extradited
Alfred and Others	Murder	Namibia	Extradition Refused
Nomathemba Rosetta	Drug trafficking	Argentina	Withdrawal
Markovic Vukomir	Murder	Montenegro	Extradition Refused
Fazel Soliman Bhana	Cheating public funds	United Arab Emirates	Extradition Refused

532. Botswana indicated that it has only refused extradition in four cases to date:

1. Namibia: incoming request (murder) due to the political offence exception.
2. Argentina: incoming request (drugs) due to the absence of a treaty.

3. Montenegro: incoming request (murder) due to the absence of a treaty.
4. United Arab Emirates: incoming request (cheating public funds) due to the absence of a treaty.

533. Botswana indicated that it has proposed bilateral extradition treaties with the following countries with which it has Joint Permanent Consultative Commissions (JPCCs) (see UNCAC article 48 for details of the JPCCs):

1. Malawi
2. Ghana
3. Zimbabwe
4. Zambia
5. Namibia
6. Lesotho
7. Swaziland
8. Kenya
9. Mozambique
10. Nigeria
11. Turkey
12. Ethiopia
13. China

534. Officials further indicated that an amendment of the bilateral treaty with South Africa has been proposed in order to align it with the SADC Protocol.

(b) Observations on the implementation of the article

535. The reviewing experts note that according to Botswana's authorities, extradition shall be afforded only if the act constitutes a criminal offence under Botswana's legislation and the legislation of the requesting State and the offence is punishable by imprisonment for not less than two years or by more severe penalties, such as life imprisonment or the death penalty.

536. During the country visit, officials in the Office of the DPP (ODPP) explained that all Commonwealth countries are designated countries for the purpose of extradition (Section 4 of the Extradition Act) and that the Minister of Defence, Justice and Security is the competent Minister to establish reciprocity under Sections 3 and 4 of the Act. It was also clarified that orders by the Minister give the Courts jurisdiction to hear a matter.

537. Regarding the process for extradition in Botswana, officials in the ODPP explained that requests are received by the Ministry of Foreign Affairs and transmitted to the ODPP, which certifies cases to the Courts. An order by the Minister gives consent for the DPP to execute a request.

538. The reviewers note that, in light of the dual criminality requirement, extradition is limited to the extent that not all offences established under the Convention have been criminalized. Furthermore, as noted under paragraph 3 of this UNCAC article below, the minimum imprisonment term of at least two years for an

offence to be extraditable under the Extradition Act covers most but not all UNCAC offences. This restricts the framework for extradition of UNCAC offences in Botswana.

539. The reviewers recommend the full domestication of international treaties as a matter of priority for Botswana, given that three extradition requests have been denied due to the absence of a treaty. In this context, the officials stated that Botswana has been slow with domestication of the SADC Protocol due to the fact there have been other legal bases to extradite, and that it is now important that the protocol and other international treaties be domesticated. The reviewers welcome these indications.

540. Moreover, there may be some consideration of widening the scope of bilateral arrangements and countries designated for extradition purposes beyond Botswana's Commonwealth and bilateral treaty partners, Portugal and South Africa. Regarding the possibility of extradition in the absence of a treaty, officials in the ODPP explained that an amendment of the Extradition Act (Section 3) is needed, due to a problem of preemption. Given the alternative treaty requirement, the reviewers recommend that Botswana adopt a legislative amendment to address the issue. The officials whom the reviewers met with during the country visit expressed the need for such an amendment. They further indicated that they have made a proposal that Section 3 of the Extradition be amended to allow extradition in the absence of a treaty. The reviewers welcome the proposal to move away from the treaty requirement by amending the Act accordingly. In the absence of such an amendment, Botswana should consider taking measures, as necessary to allow it to respond to incoming extradition requests, in particular from its non-Commonwealth partners.

541. During the country visit, it was confirmed by officials in the DPP that Botswana has only refused extradition in four cases to date, as listed above, three of which were due to the absence of a treaty. While several of the incoming requests have related to money laundering or obtaining property by false pretences, none have involved corruption offences. Botswana cited only one matter that involved corruption, which was an outgoing request to South Africa that occurred before 2007 (Gaolekwe Rabana), involving the extradition of a Motswana from South Africa. The case was held extraditable in South Africa and was still pending appeal at the time of the country visit.

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

542. Botswana indicated that it did not implement the provision under review, and it indicated that extradition is subject to the dual criminality test.

(b) Observations on the implementation of the article

543. Dual criminality is always needed for extradition procedures, as extradition is allowed only for offences alleged as crimes in jurisdictions of both the requesting and requested States.

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

544. Botswana indicated that it did not implement the provision under review, and it indicated that extradition is subject to the dual criminality test. For an offence to be extraditable, the crime must, if committed in Botswana, be punishable with imprisonment for at least two years, according to the definition of "extradition crime" in Section 2(2) of the Extradition Act.

Section 2(2), Extradition Act

(2) Subject to the provisions of section 3, for the purposes of this Act "extradition crime" means a crime which, if committed within the jurisdiction of Botswana would be an offence punishable with imprisonment for a term of not less than two years or other greater penalty, and includes an offence of purely fiscal character.

545. Botswana's officials further explained that the 2-year imprisonment threshold under the Extradition Act is subject to the terms of existing treaties. Also, the provisions of international treaties like the SADC Protocol take precedent and prevail. Botswana's extradition treaties either provide for extradition in respect of crimes that are punishable in both States with a sentence above a particular imprisonment period or take a list approach identifying the crimes (see below). In the absence of a treaty, the Extradition Act is applicable to designated countries.

Article 2 of the Extradition Treaty between Botswana and South Africa (1969) provides for 12 months:

"Extradition shall be granted in respect of offences which are in terms of the laws of the requesting party subject to the jurisdiction of that party's highest court of appeal in criminal matters, provided that they are punishable, both under the laws of the requesting party and of the requested party, by imprisonment for a maximum period of at least twelve months or by some more severe penalty. Where a sentence has been imposed after conviction in respect of any such offence, extradition shall be granted irrespective of the nature or period of the punishment imposed."

Schedule II to the Extradition Treaty with Portugal (1970) takes a list-based approach:

“The crimes or offences for which the extradition is to be granted are the following-

1. Murder (including assassination, infanticide and poisoning), or attempt or conspiracy to murder
2. Manslaughter
3. Maliciously wounding or inflicting grievous bodily harm
4. Assault occasioning actual bodily harm
5. Counterfeiting or altering money, either metallic or of any other kind representing the first named, or uttering counterfeit or altered money of any of those kinds
6. Knowingly making any instrument, tool, or engine adapted and intended for counterfeiting coin
7. Forgery, counterfeiting or altering, or uttering what is forged or counterfeited or altered
8. Embezzlement or larceny
9. Malicious injury to property, if the offence be indictable
10. Obtaining money, goods, valuable security by false pretences
11. Receiving money, valuable security, or other property, knowing the same to have been stolen, embezzled or unlawfully obtained
12. Crimes against Bankruptcy Law
13. Fraud by a bailee, banker, agent, factor, trustee, or director or member, or public officer of any Company, made criminal by any law for the time being in force
14. Perjury or subornation of perjury
- ...

(b) Observations on the implementation of the article

546. The minimum imprisonment term of at least two years for an offence to be extraditable under the Extradition Act covers the majority of UNCAC offences, but not for example embezzlement or misappropriation under Section 102 of the Penal Code (UNCAC article 17), which carries a maximum one-year imprisonment term. Botswana indicated that the threshold is subject to the terms of existing treaties. It is noted in this context that one of its bilateral treaties (South Africa) has a lower threshold.

547. A one-year imprisonment term is also provided in international treaties like the SADC Protocol, Article 3 (“For the purpose of this Protocol, extraditable offence are offences that are punishable under the laws of both State Parties by imprisonment or other deprivation of liberty for a period of at least one year, or by a more severe penalty”).

548. It is recommended that Botswana revisit the minimum prison threshold under its Extradition Act and treaties and consider a harmonization in line with international standards, including UNCAC, to ensure all UNCAC offences are extraditable by reason of their period of imprisonment. Efforts by the ODPP to amend the legislation and existing treaties in this regard were welcome by the reviewers.

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

549. Botswana cited the following measures.

Sections 7(1) and (2), Extradition Act

7. (1) Subject to the provisions of subsection (2), the following provisions shall be observed with respect to the surrender of fugitive criminals, that is to say -

(a) a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political, character, or if it appears to a court or the Minister that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character;

(b) a fugitive criminal shall not be surrendered to any country if there is the likelihood that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his political opinions;

...

(2) An offence is not an offence of a political character -

(a) if it is an offence in accordance with the provisions of any international convention to which Botswana and the requesting country are parties and there is an obligation on each party to afford mutual assistance to surrender a fugitive criminal accused or convicted of the commission of the offence;

(b) if it is an offence against the life or person of a Head of State or a member of his immediate family, a Head of Government, or a Minister or if it is any related offence;

(c) if it is murder or any related offence.

550. Botswana indicated that there are no cases regarding this article. A sample of a draft extradition treaty was provided to the reviewers.

(b) Observations on the implementation of the article

551. Political offences and military offences as a matter of extradition law and practice are exempted from extradition under Section 7(2) of the Extradition Act and the treaty with South Africa, which recognizes the political offence exception in Article 3 and the military offence exception in Article 4. Officials in the ODPP indicated that Botswana and South Africa have incorporated this political offence exception in their domestic laws under their respective Extradition Acts. The matter is not addressed in the treaty with Portugal.

552. Officials in the ODPP indicated that Botswana has demonstrated observation of the political offence exemption when it refused an extradition request from Namibia on the grounds that the offence, for which the fugitives were requested was of a

political nature and there was a possibility that they would not receive a fair trial in Namibia. The case was refused due to the fact that it was surrounded by political issues, **Republic of Namibia v Alfred and Others 2004 (2) BLR 101 (CA)**. A summary of the case is included below under UNCAC article 44(15).

553. As noted above, not all UNCAC offences are extraditable under Botswana's law and treaties. Moreover, extradition is limited to the extent that not all UNCAC offences are criminalized. To address the obligations of the provision under review to include UNCAC offences as extraditable offences in every extradition treaty to be concluded in the future Botswana may wish to review its existing and draft bilateral treaties as noted above.

554. A sample of a draft treaty with Namibia was provided to the reviewers. This provides that extraditable offences are those that are punishable under the laws of both countries by imprisonment or other deprivation of liberty for at least one year or more. If the offence is of a political nature, this is a mandatory ground for refusal.

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

555. Botswana indicated that it has partially implemented the provision. Extradition is subject to the existence of bilateral arrangements or designation of countries. International conventions, once incorporated into domestic law, could also be applied. For Botswana to recognize the Convention as the basis for cooperation without a treaty having been signed, the Convention ought to have been incorporated in to the law of Botswana. Courts of Botswana allow for application of international law as persuasive authority.

(b) Observations on the implementation of the article

556. Botswana indicated that it partially considers this Convention as the legal basis for extradition in respect to any offence to which this article applies. Extradition is subject to the existence of bilateral arrangements or designation of countries. Once UNCAC has been incorporated in national law it could be directly applied by Botswana as the legal basis for extradition in respect of UNCAC offences in the absence of a treaty and the Extradition Act would apply. At present extradition is limited to the extent that not all UNCAC offences are criminalized.

557. Officials in the ODPP explained that Botswana is planning to domesticate the UNCAC. The legislation enactment procedure will have to be followed.

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

558. Botswana indicated that it partially implemented the provision. Extradition is subject to the existence of bilateral arrangements or designation of countries under the Extradition Act. International conventions, once incorporated into domestic law, could also be applied.

559. Botswana indicated that it partially considers this Convention as the legal basis for extradition in respect to any offence to which this article applies. UNCAC could serve as the legal basis for extradition in respect to UNCAC offences if the Convention is domesticated into national law.

560. Botswana indicated that it did not inform the Secretary-General of the United Nations as prescribed above, and the Office of International Cooperation will be asked to provide this.

561. With respect to UNTOC, a notification was made upon becoming party to the Palermo Convention that Botswana would not take UNTOC as the legal basis for cooperation on extradition with other States parties (see CTOC/COP/2005/7).

(b) Observations on the implementation of the article

562. As noted above, Botswana should conclude more bilateral treaties on extradition and amend the Act in respect of extradition in the absence of a treaty.

563. Botswana is encouraged to make the requisite notification to the United Nations.

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

564. Botswana provided that it did not implement the provision under review.

(b) Observations on the implementation of the article

565. Botswana reported non-compliance with this provision. Not all UNCAC offences are extraditable.

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

566. Botswana referred to the following measures.

Section 1(2), Extradition Act

(2) Subject to the provisions of section 3, for the purposes of this Act "extradition crime" means a crime which, if committed within the jurisdiction of Botswana would be an offence punishable with imprisonment for a term of not less than two years or other greater penalty, and includes an offence of purely fiscal character.

Section 7, Extradition Act

(1) Subject to the provisions of subsection (2), the following provisions shall be observed with respect to the surrender of fugitive criminals, that is to say -

(a) a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if it appears to a court or the Minister that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character;

(b) a fugitive criminal shall not be surrendered to any country if there is the likelihood that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his political opinions;

(c) a fugitive criminal shall not be surrendered to any country if the offence in respect of which his surrender is demanded is punishable by death in that country and if under the laws of Botswana such an offence is not punishable by death if committed in Botswana unless provision is made by an arrangement with that country for securing that he will not be punished by death in respect of that offence;

(d) a fugitive criminal who has been accused of some offence within the jurisdiction of Botswana, not being the offence for which his surrender is asked, or who is undergoing sentence under any conviction in Botswana, shall not, unless the President otherwise directs, be surrendered until after he has been discharged, whether by acquittal or on the expiration of his sentence or otherwise;

(e) a fugitive criminal shall not be surrendered if such surrender would be contrary to the terms of any arrangement as recited or embodied in any order made under the provisions of section 3;

(f) a fugitive criminal shall not be surrendered if final judgment has been passed by any court in Botswana upon him in respect of the offence for which his surrender is sought.

- (g) a fugitive criminal shall not be surrendered if the offence is an offence only under military law or a law relating to military obligations;
- (h) a fugitive criminal shall not be surrendered if the facts on which the request is made do not constitute an offence under the laws of Botswana;
- (i) a fugitive criminal who is a citizen of Botswana and is not also a citizen or national of the requesting country shall not be surrendered unless provision is made by the law of that country, or by arrangement, that fugitive criminals who are citizens of that country may be surrendered to Botswana on being requested;
- (j) a fugitive criminal shall not be surrendered to any country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Botswana, be detained or tried in that country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded;
- (k) a fugitive criminal shall not be surrendered until the expiration of 15 days from the date of being committed to prison, to await his surrender;
- (2) An offence is not an offence of a political character -
 - (a) if it is an offence in accordance with the provisions of any international convention to which Botswana and the requesting country are parties and there is an obligation on each party to afford mutual assistance to surrender a fugitive criminal accused or convicted of the commission of the offence;
 - (b) if it is an offence against the life or person of a Head of State or a member of his immediate family, a Head of Government, or a Minister or if it is any related offence;
 - (c) if it is murder or any related offence.

Section 8, Extradition Act

- (1) A requisition for the surrender of a fugitive criminal of any country, who is or suspected of being in Botswana, shall be made to the Minister by a diplomatic representative or consular officer of that country.
- (2) The requisition shall be accompanied by a warrant for the arrest of the fugitive criminal issued in that country with the request that the warrant be endorsed for the arrest of the fugitive criminal.
- (3) The Minister may transmit the warrant to a magistrate to endorse it for the apprehension of the fugitive criminal.

Section 9, Extradition Act

- (1) Where the surrender of a fugitive criminal is sought under this Act, and it appears to a magistrate that by reason of the trivial nature of the case, or by reason of the application for the surrender of the fugitive criminal not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to surrender the fugitive criminal whether at all or until the expiration of a certain period, the magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be surrendered until after the expiration of the period named in the order, or may make such order in the matter as the magistrate thinks proper.
- (2) Any order or refusal to make an order of discharge under this section shall be subject to appeal.

567. Botswana indicated that cases of extradition follow under Article 44(10).

568. Botswana provided the following information on conditions and grounds upon which extradition requests were refused.

1. 12/12/2012 at 14:00 hours - A South African national Nomathemba Rosetta DLAMINI was arrested at SSKA through a passport check. She was wanted in Argentina for drug related offences. She was subsequently released because Botswana does not have an extradition treaty with Argentina.

(b) Observations on the implementation of the article

569. Observations regarding the minimum penalty requirement have been made above. Regarding the refusal of extradition, as noted above officials in the ODPP confirmed that Botswana has only refused extradition in four cases to date, three of which were due to the absence of a treaty. Botswana recognizes grounds for refusal in line with the Convention.

Article 44 Extradition

Paragraph 9

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

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

570. Botswana provided the following information.

Article 5(3), Constitution of Botswana

(3) Any person who is arrested or detained

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana, and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

Section 11, Extradition Act

(1) A magistrate, before the endorsement in pursuance of section 10 of a warrant for the apprehension of any person, may issue a provisional warrant for his apprehension, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which that person is accused were an offence punishable by the law of Botswana.

(2) A person arrested under a provisional warrant shall be discharged unless the original is produced and endorsed within such a time as the magistrate thinks reasonable in the circumstances.

Section 12, Extradition Act

A fugitive criminal when apprehended on a warrant endorsed under section 10 or on a provisional warrant issued under section 11 shall be brought before a magistrate within 48 hours of his apprehension and the magistrate may issue a warrant for his further detention.

Section 13, Extradition Act

(1) When a fugitive criminal is brought before a magistrate, the magistrate shall hold an inquiry with a view to the surrender of such person to the foreign country which has requested his surrender.

(2) Subject to the provisions of this Act, the magistrate 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 Botswana 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 he 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 fugitive criminal, or any record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof, may be received in evidence at any such inquiry if authenticated to enable them to be produced in any court in Botswana or in the manner provided for in the extradition agreement concerned.

(4) The magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is not an extradition crime or is an offence for which the prisoner may not be surrendered.

Section 14, Extradition Act

(1) Subject to the provision of section 7, in the case of a fugitive criminal accused an extradition crime, if the foreign warrant authorising the arrest of the criminal is duly authenticated, and such evidence is produced as, subject to the provisions of this Act, would, according to the law of Botswana, justify the committal for trial of the prisoner if the crime of which he is accused was committed in Botswana, the magistrate shall commit him to prison.

(2) Subject to the provisions of section 7, in the case of a fugitive criminal alleged to have been convicted of an extradition crime if such evidence is produced as, subject to the provisions of this Act, would, according to the law of Botswana, prove that the prisoner was convicted of such crime, the magistrate shall commit him to prison.

(3) Where the magistrate is not satisfied with the evidence mentioned in subsections (1) and (2), he shall order the prisoner to be discharged.

Section 15, Extradition Act

(1) Notwithstanding the provisions of section 14 where a special arrangement has been made with country to which this Act applies with regard to committal proceedings for the surrender of fugitive criminals to that country, the Minister may by order published in the Gazette direct that committal of fugitive criminals from that country shall be conducted in accordance with the provisions of this section.

.....

Section 16, Extradition Act

Where a fugitive criminal is committed to prison to await his surrender under section 14 or 15, the magistrate shall forthwith send to the Minister notice of the committal

together with any report on the case as he may think fit, and the fugitive criminal shall be so committed to await the warrant of the Minister for his surrender.

Section 17, Extradition Act

Any person aggrieved by a decision of the magistrate in committal proceedings may, within 15 days of such decision, appeal to the High Court.

571. Simplified extradition arrangements are also available under the London Scheme for extradition.

572. Botswana indicated that the cases cited earlier are relevant here. As and when the fugitive criminals appear before the court the evidentiary requirements are simplified as required by law.

(b) Observations on the implementation of the article

573. Regarding the average duration of extradition procedures in the country, Botswana indicated that at most a case of extradition would take a month to complete.

574. The channels used for the transmission of extradition requests are diplomatic channels.

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

575. Botswana provided the following information.

Section 10, Extradition Act

(1) Where in a country to which this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that country and he is or is suspected of being in or on the way to Botswana, a magistrate to whom the warrant has been directed by the Minister under section 8, if satisfied that the warrant was issued by a person having lawful authority to issue it, may, endorse the warrant in accordance with subsection (3), and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and bring him before the endorsing magistrate or some other magistrate.

(2) This Act shall apply whatever the date of the warrant and whether the offence is alleged to have been committed before or after the commencement of this Act or the application of this Act to that country.

(3) An endorsement of a warrant shall be signed by the magistrate and shall authorize all or any of the persons named in the endorsement, and of the persons to

whom the warrant was originally directed, and every police officer, to execute the warrant by apprehending the person named in it and bringing him before the magistrate or any other magistrate.

(4) Where a warrant for arrest has been endorsed in terms of subsection (1), any magistrate may issue a warrant empowering a police officer to search for and seize any property-

- (a) which may be required as evidence at the trial of the fugitive criminal; or
- (b) which has been acquired as a result of the extradition crime.

Section 22, Extradition Act

(1) Any person entering or passing through Botswana in custody by virtue of any warrant or order lawfully issued in any country to which this Act applies shall, during his passage through Botswana, be deemed to be in lawful custody if the Minister, at the request of the country in which the warrant or order was issued, authorised such passage in custody.

(2) A certificate by the Minister that such warrant or order was lawfully issued shall be conclusive proof of that fact.

576. Botswana referred to the case examples under paragraph 1 of article 44.

577. Botswana indicated that the measures put in place to ensure that a person being sought is present at the extradition proceedings have always been to remand that individual into custody. These people are treated in the same manner as detainees awaiting trial.

(b) Observations on the implementation of the article

578. The reviewing experts note that the Botswana's legislation is in compliance with the requirements of the provision under review.

579. Although outside the strict scope of the review, it was explained by officials in the ODPP that the issue of assurances in murder cases for outgoing extradition requests has come up, specifically regarding the death penalty (see article 44(14) below). It was explained that this was the main reason why a large number of outgoing requests remain not executed.

Article 44 Extradition

Paragraph 11

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

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

580. Botswana indicated that it will extradite its nationals if reciprocal arrangements or laws are in place in the requesting State.

Section 7(1), Extradition Act ...

(i) a fugitive criminal who is a citizen of Botswana and is not also a citizen or national of the requesting country shall not be surrendered unless provision is made by the law of that country, or by arrangement, that fugitive criminals who are citizens of that country may be surrendered to Botswana on being requested;

581. Botswana indicated that its laws do not have provision for prosecuting its nationals in the event that Botswana refuses extradition to another State. The main issue for consideration under Botswana law is whether the commission of the offence would have been within or without its borders. Those that occur outside its borders would not be prosecuted in Botswana except for offences such as treason and any other offence under section 46 of the Corruption and Economic Crime Act where offences under Part IV are committed by a citizen whilst outside Botswana.

582. Botswana referred to the case examples under paragraph 1 of article 44.

(b) Observations on the implementation of the article

583. The *aut dedere aut judicare* obligation (extradite or prosecute) is not addressed in the legislation of Botswana. This was confirmed by officials during the country visit.

584. According to the information provided, nationality of the requested person is a mandatory ground for refusal of extradition in Botswana in the absence of reciprocity. Botswana's nationals can be extradited only if reciprocal arrangements or laws are in place in the requesting State.

585. During the country visit, officials in the ODPP confirmed that Botswana has never refused the extradition of a national.

586. Botswana should adopt measures to ensure that the obligation to prosecute nationals where extradition is refused is addressed.

Article 44 Extradition

Paragraph 12

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

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

587. Botswana will extradite its nationals if reciprocal arrangements or laws are in place in the requesting State. Botswana does not recognize the conditional extradition of nationals.

(b) Observations on the implementation of the article

588. During the country visit it was confirmed that Botswana does not condition the extradition of its nationals on their return to Botswana to serve the remainder of their sentence.

Article 44 Extradition

Paragraph 13

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

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

589. Botswana indicated that it did not implement the provision. Botswana will extradite its nationals if reciprocal arrangements or laws are in place in the requesting State. Botswana would not consider enforcing the remainder of a sentence imposed by the requesting State against its nationals.

(b) Observations on the implementation of the article

590. During the country visit, it was confirmed that Botswana currently does not consider the enforcement of foreign sentences, as described in the provision under review. Officials indicated that Botswana will have to amend its Prisons Act to recognize a foreign sentence imposed against a citizen of Botswana. At the current situation Botswana is unable to enter into the exchange of prisoners with other countries due to non-availability of legislation. Botswana is encouraged to consider adopting relevant legislation in line with this non-mandatory provision.

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

591. Botswana provided the following information.

Article 5(1)(i), Constitution of Botswana

Protection of right to personal liberty

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say

- (a) in execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he has been convicted;
- (b) in execution of the order of a court of record punishing him for contempt of that or another court;
- (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
- (d) for the purpose of bringing him before a court in execution of the order of a court;
- (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana;
- (f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years;
- (g) for the purpose of preventing the spread of an infectious or contagious disease;
- (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;
- (i) for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he is being conveyed through Botswana in the course of his extradition or removal as a convicted prisoner from one country to another;
- (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Botswana or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Botswana in which, in consequence of any such order, his presence would otherwise be unlawful; or
- (k) for the purpose of ensuring the safety of aircraft in flight.

Section 7, Extradition Act

(1) Subject to the provisions of subsection (2), the following provisions shall be observed with respect to the surrender of fugitive criminals, that is to say -

- (a) a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if it appears to a court or the Minister that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character;
- (b) a fugitive criminal shall not be surrendered to any country if there is the likelihood that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his political opinions;
- (c) a fugitive criminal shall not be surrendered to any country if the offence in respect of which his surrender is demanded is punishable by death in that country and if under the laws of Botswana such an offence is not punishable by death if committed in Botswana unless provision is made by an arrangement with that country for securing that he will not be punished by death in respect of that offence;
- (d) a fugitive criminal who has been accused of some offence within the jurisdiction of Botswana, not being the offence for which his surrender is asked, or who is undergoing sentence under any conviction in Botswana, shall not, unless the

President otherwise directs, be surrendered until after he has been discharged, whether by acquittal or on the expiration of his sentence or otherwise;

(e) a fugitive criminal shall not be surrendered if such surrender would be contrary to the terms of any arrangement as recited or embodied in any order made under the provisions of section 3;

(f) a fugitive criminal shall not be surrendered if final judgment has been passed by any court in Botswana upon him in respect of the offence for which his surrender is sought.

(g) a fugitive criminal shall not be surrendered if the offence is an offence only under military law or a law relating to military obligations;

(h) a fugitive criminal shall not be surrendered if the facts on which the request is made do not constitute an offence under the laws of Botswana;

(i) a fugitive criminal who is a citizen of Botswana and is not also a citizen or national of the requesting country shall not be surrendered unless provision is made by the law of that country, or by arrangement, that fugitive criminals who are citizens of that country may be surrendered to Botswana on being requested;

(j) a fugitive criminal shall not be surrendered to any country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Botswana, be detained or tried in that country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded;

(k) a fugitive criminal shall not be surrendered until the expiration of 15 days from the date of being committed to prison, to await his surrender;

(2) An offence is not an offence of a political character -

(a) if it is an offence in accordance with the provisions of any international convention to which Botswana and the requesting country are parties and there is an obligation on each party to afford mutual assistance to surrender a fugitive criminal accused or convicted of the commission of the offence;

(b) if it is an offence against the life or person of a Head of State or a member of his immediate family, a Head of Government, or a Minister or if it is any related offence;

(c) if it is murder or any related offence.

Section 9, Extradition Act

(1) Where the surrender of a fugitive criminal is sought under this Act, and it appears to a magistrate that by reason of the trivial nature of the case, or by reason of the application for the surrender of the fugitive criminal not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to surrender the fugitive criminal whether at all or until the expiration of a certain period, the magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be surrendered until after the expiration of the period named in the order, or may make such order in the matter as the magistrate thinks proper.

(2) Any order or refusal to make an order of discharge under this section shall be subject to appeal.

Section 17, Extradition Act

Any person aggrieved by a decision of the magistrate in committal proceedings may, within 15 days of such decision, appeal to the High Court.

Section 24, Extradition Act

Where in pursuance of an arrangement with another country any person accused or convicted of any offence committed in Botswana is surrendered by that country, that person shall not, unless the arrangement provides to the contrary, until he has been restored or afforded a reasonable opportunity of leaving Botswana, be triable or tried for any offence committed prior to his surrender to Botswana other than for an offence proved by the facts on which his surrender is grounded.

592. Botswana provided the following case examples of outgoing extradition requests not involving corruption.

Reference is made to two recent cases, Emmanuel Tsebe and Jerry Phale, who were both accused of murder in Botswana and were arrested after they fled to South Africa. Botswana sought the extradition of both men, but refused South Africa's request to provide guarantees against the death penalty.

Finding a real risk that the fugitives would face the death penalty upon their return and noting that "imposition of the death sentence on those convicted of murder in Botswana" is "mandatory where there are no extenuating circumstances", the Constitutional Court of South Africa upheld the High Court's ruling that the two men could not be removed from South Africa "without the written assurance from the Government of Botswana that the applicant will not face the death penalty there under any circumstance" and further required "not only that the South African Government seek assurance, but also obtain that assurance" in all cases.

593. Botswana indicated that the government of Botswana has always found it difficult to guarantee other countries that people extradited from those countries will not be sentenced to death. This is so as the Courts have the mandate to pass the sentences they deem fit without interference from any other person or body. Botswana indicated that, for people accused of murder this does not mean they are not afforded fair treatment. The death penalty remains part of the law and as long as people have been tried fairly and there is evidence pointing to the fact that the accused committed the offence and without any extenuating circumstances then it would be applied in line with Botswana's judicial system.

(b) Observations on the implementation of the article

594. Botswana explained that it guarantees fair treatment to any person whose extradition is sought. The Extradition Act provides for such fair treatment. A fugitive has a right to legal representation at his own cost. The rules of the right to a fair hearing are applied and extradition is heard in open court.

595. It was explained by officials in the ODPP during the country visit that the issue of fair treatment has not been invoked by a defendant in an extradition hearing.

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

596. Botswana provided the following information.

Section 15, Constitution of Botswana

15. Protection from discrimination on the grounds of race, etc.

..

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Section 7, Extradition Act

(1) Subject to the provisions of subsection (2), the following provisions shall be observed with respect to the surrender of fugitive criminals, that is to say –

(a) a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if it appears to a court or the Minister that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character;

(b) a fugitive criminal shall not be surrendered to any country if there is the likelihood that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his political opinions;

(c) a fugitive criminal shall not be surrendered to any country if the offence in respect of which his surrender is demanded is punishable by death in that country and if under the laws of Botswana such an offence is not punishable by death if committed in Botswana unless provision is made by an arrangement with that country for securing that he will not be punished by death in respect of that offence;

(d) a fugitive criminal who has been accused of some offence within the jurisdiction of Botswana, not being the offence for which his surrender is asked, or who is undergoing sentence under any conviction in Botswana, shall not, unless the President otherwise directs, be surrendered until after he has been discharged, whether by acquittal or on the expiration of his sentence or otherwise;

(e) a fugitive criminal shall not be surrendered if such surrender would be contrary to the terms of any arrangement as recited or embodied in any order made under the provisions of section 3;

(f) a fugitive criminal shall not be surrendered if final judgment has been passed by any court in Botswana upon him in respect of the offence for which his surrender is sought.

- (g) a fugitive criminal shall not be surrendered if the offence is an offence only under military law or a law relating to military obligations;
- (h) a fugitive criminal shall not be surrendered if the facts on which the request is made do not constitute an offence under the laws of Botswana;
- (i) a fugitive criminal who is a citizen of Botswana and is not also a citizen or national of the requesting country shall not be surrendered unless provision is made by the law of that country, or by arrangement, that fugitive criminals who are citizens of that country may be surrendered to Botswana on being requested;
- (j) a fugitive criminal shall not be surrendered to any country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Botswana, be detained or tried in that country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded;
- (k) a fugitive criminal shall not be surrendered until the expiration of 15 days from the date of being committed to prison, to await his surrender;
- (2) An offence is not an offence of a political character -
 - (a) if it is an offence in accordance with the provisions of any international convention to which Botswana and the requesting country are parties and there is an obligation on each party to afford mutual assistance to surrender a fugitive criminal accused or convicted of the commission of the offence;
 - (b) if it is an offence against the life or person of a Head of State or a member of his immediate family, a Head of Government, or a Minister or if it is any related offence;
 - (c) if it is murder or any related offence.

Section 9, Extradition Act

- (1) Where the surrender of a fugitive criminal is sought under this Act, and it appears to a magistrate that by reason of the trivial nature of the case, or by reason of the application for the surrender of the fugitive criminal not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to surrender the fugitive criminal whether at all or until the expiration of a certain period, the magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be surrendered until after the expiration of the period named in the order, or may make such order in the matter as the magistrate thinks proper.
- (2) Any order or refusal to make an order of discharge under this section shall be subject to appeal.

Section 17, Extradition Act

Any person aggrieved by a decision of the magistrate in committal proceedings may, within 15 days of such decision, appeal to the High Court.

597. Botswana referred to the case of **Republic of Namibia v Alfred and Others 2004 (2) BLR 101 (CA)**.

There was a request to extradite Namibian nationals who were part of a cessationist plot in the Caprivi Strip. The Botswana courts refused to extradite as the accused persons were to be tried because of their political opinions or beliefs. This was in or about 2003. The accused persons were ultimately granted refugee status and most of

them voluntarily went back to the Caprivi Strip when the Namibian Government made an undertaking that they shall no longer be prosecuted.

(b) Observations on the implementation of the article

598. The reviewers noted that the cited legal provisions do not seem to provide protections from discrimination on the grounds of religion. Apart from the political offence exception, there have been no cases invoking the protections described in the provision under review. Botswana is encouraged to take measures to ensure the full implementation of the provision in its law and extradition practice.

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

599. Botswana cited the following measure.

Section 1(2), Extradition Act

(2) Subject to the provisions of section 3, for the purposes of this Act "extradition crime" means a crime which, if committed within the jurisdiction of Botswana would be an offence punishable with imprisonment for a term of not less than two years or other greater penalty, and includes an offence of purely fiscal character.

(b) Observations on the implementation of the article

600. The governmental experts note that Botswana's legislation is in compliance with the requirements of the provision under review. It was explained during the country visit that there have been no cases involving offences of a fiscal nature.

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

601. Botswana indicated that consultations are done prior to making an order for refusal. As for an order to extradite the requesting State is consulted and a date for repatriation of the fugitive is discussed and agreed upon. Before a request of extradition is sought consultation is also done to establish what documents should be provided to enable successful extradition.

602. Botswana provided the following information.

Section 9, Extradition Act

(1) Where the surrender of a fugitive criminal is sought under this Act, and it appears to a magistrate that by reason of the trivial nature of the case, or by reason of the application for the surrender of the fugitive criminal not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to surrender the fugitive criminal whether at all or until the expiration of a certain period, the magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be surrendered until after the expiration of the period named in the order, or may make such order in the matter as the magistrate thinks proper.

(2) Any order or refusal to make an order of discharge under this section shall be subject to appeal.

603. Botswana indicated that before a request is brought to court there are extensive negotiations with the requesting party. The two countries' responsible Ministries of Foreign Affairs and International Cooperation are engaged through their legal representatives.

604. Botswana indicated that in terms of the relevant exchanges between it and other States, exchanges are in the form of requests.

(b) Observations on the implementation of the article

605. It was confirmed during the country visit that there is no legal provision that regulates that consultations be held before extradition is refused. It was also explained during the country visit that the matter is not addressed in any internal regulations in the ODPP. Botswana is encouraged to adopt relevant measures to provide that consultations be held at the stage before extradition is refused.

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

606. Botswana referred to the list of its bilateral and multilateral treaties and arrangements as well as draft treaties described under paragraph 1 of the UNCAC article above.

607. Botswana provided the following examples of implementation.

(b) Observations on the implementation of the article

608. As noted above, the scope of bilateral arrangements and countries designated for extradition purposes may not be broad enough, as it does not include Botswana's non-Commonwealth partners with the exception of Portugal and South Africa. The reviewers reiterate the observations made under paragraph 1 of the article above.

(c) Successes and good practices

609. The observations made in the introduction to this chapter regarding Botswana's electronic database on international cooperation requests in the Office of the Director of Public Prosecutions are referred to.

(d) Challenges, where applicable

610. Botswana has identified the following challenges and issues in fully implementing the article under review:

1. Inter-agency co-ordination: Coordination to make signing and use of the agreements easy and overcome diplomatic hurdles.
2. Inadequacy of existing normative measures.
3. Specificities in its legal system.

(e) Technical assistance needs

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

1. Legal advice
2. Capacity-building programmes for authorities responsible for international cooperation in criminal matters
3. Summary of good practices/lessons learned.

612. Botswana indicated that there is no form of technical assistance previously mentioned already provided.

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

613. Botswana indicated that it did not implement the article, as it does not have any arrangements or law whereby a sentenced person may be transferred to another country to complete the sentence.

614. Through the Joint Permanent Commissions on Cooperation (JPCCs) negotiations on agreements pertaining to transfer of prisoners are currently ongoing.

615. The Ministry of Justice Defence and Security is working on amending the country's Prisons Act to allow for the transfer of prisoners outside the country to complete sentence.

(b) Observations on the implementation of the article

616. It was explained during the country visit that the negotiations with JPCC countries on transfer of prisoner agreements are currently halted due to the absence of national legislation.

617. The reviewers welcome steps being taken by the Ministry of Justice Defence and Security to establish a prisoner transfer law.

(c) Challenges, where applicable

618. Botswana has identified the following challenges and issues in fully implementing the article under review:

1. Inter-agency coordination
2. Limited resources for implementation

(d) Technical assistance needs

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

1. Development of an action plan for implementation
2. Summary of good practices/lessons learned
3. Model treaties
4. On-site assistance by a relevant expert
5. Capacity-building programmes for authorities responsible for international cooperation in criminal matters.

620. Botswana indicated that it has not received any form of technical assistance previously mentioned.

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

621. Botswana indicated that it has partially implemented the provision and provided the following information.

622. Botswana does not have any bilateral mutual legal assistance (MLA) agreements with any country.

623. Botswana has proposed bilateral MLA agreements with the following countries with which it has Joint Permanent Consultative Commissions (JPCCs) (see UNCAC article 48 for details of the JPCCs):

1. Malawi
2. Ghana
3. Zimbabwe
4. Zambia
5. Namibia
6. Lesotho
7. Swaziland
8. Kenya
9. Mozambique
10. Nigeria
11. Turkey
12. Ethiopia
13. China

624. Botswana is a party to multilateral agreements, such as the SADC Protocol on Mutual Legal Assistance, but cannot use these agreements unless they are incorporated into its laws.

625. Botswana's Mutual Assistance Act is very broad in allowing Botswana to render assistance to any country.

Section 3, Mutual Assistance in Criminal Matters Act

(1) Where an arrangement has been made with a foreign country for mutual assistance in criminal matters, the Minister may by statutory instrument make regulations that this Act shall apply to that country.

(2) Regulations made under subsection (1) may provide that the application of this Act to a foreign country shall be subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to an arrangement made between Botswana and that country.

626. Botswana also subscribes to the Commonwealth (Harare) Scheme on Mutual Legal Assistance, a voluntary scheme which provides a framework for cooperation between Commonwealth countries.

627. Botswana provided the following examples of implementation.

Mutual Legal Assistance requests received by Botswana since 2007 from the following countries (not related to corruption or money laundering unless noted):

- i. Namibia
- ii. South Africa - ongoing
- iii. Zambia - money laundering offence, request for bank records, ongoing
- iv. Netherlands - completed
- v. Switzerland - corruption offence, request for bank records, completed.
- vi. United Kingdom - Evidence through video conferencing, completed
- vii. United States of America - money laundering offence, completed

viii. Swaziland - money laundering offence, ongoing

Mutual Legal Assistance requested by Botswana since 2007

- i. State vs Gwenhamo Holdings (Pty) Ltd Ernest Effort Mutangi, Batandara Sanity Rute, Sani Ehee Rute and Boyce Motshegetsi Gabanakgang over 1 million fraud case- South Africa.
- ii. Walter Anderson: stealing by servant - million pula- Cyprus
- iii. Finepak Packaging (Pty) Ltd USD\$ 67 890 fraud case China
- iv. Botswana Stock Exchange Stock Scam- South Africa
- v. Zurich Insurance Fraud case- South Africa
- vi. State vs Vincent Thina Seretse Paul Paledi, Serala (Pty) Ltd - South Africa
- vii. Lodisa Trading (Pty) Ltd- South Africa
- viii. BTC Fraud Case- South Africa, Liechtenstein and Barbados
- ix. Botswana Development Corporation and Shanghai Fengyue Glass co. Ltd Investigation
- x. Gaonyadiwe Mmatli and others- Arv theft-South Africa
- xi. Repatriation of Exhibits in State vs Elisabeth Dimakatso Surtee and others- South Africa
- xii. Discovery Copper (Botswana) (Pty) Ltd 6 million pula fraud case.

628. Botswana indicated that it has not refused assistance in any cases to date. The one corruption-related request from Switzerland was fully completed by Botswana.

(b) Observations on the implementation of the article

629. The legal basis for MLA in Botswana is the Mutual Assistance in Criminal Matters Act. Mutual legal assistance is subject to dual criminality and the existence of bilateral arrangements (of which there are currently none) or the consent of the Director of Public Prosecutions. Specifically, officials in the Office of the DPP (ODPP) explained that under Section 3 of the Act, the DPP may consent to apply the Act to any country, including outside the Commonwealth, and such consent has been issued previously in the case of an incoming request from Switzerland.

630. During the country visit it was confirmed that Botswana does not have any bilateral treaties on mutual legal assistance in place, but that the Act is very broad in allowing the DPP to apply the Act to any country (Section 3). It was confirmed that the DPP has issued such consent in the past, including for countries outside the Commonwealth (Switzerland, Netherlands and others).

631. It was explained that MLA on the basis of multilateral treaties such as the Southern African Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters and the UNCAC is not possible since these agreements have not been fully incorporated into Botswana's national legislation. The process of domestication of international treaties, including UNCAC, is an ongoing process in Botswana, which hinders the application of such treaties in practice.

632. The officials in the ODPP explained that Botswana applies both the Mutual Assistance in Criminal Matters Act and other legislation, such as the Criminal Procedure and Evidence Act, CECA or the Penal Code, in executing requests for assistance.

633. Regarding the process for MLA in Botswana, officials in the ODPP explained that requests are received through diplomatic channels by the Ministry of Foreign Affairs and transmitted to the ODPP, which assesses compliance of a request with the Act. The DPP is the central authority where all requests are lodged. If the DPP consents, a signed consent order is sent with the request to the various domestic authorities for execution. This could include the DCEC, the police, tax or other authorities. Once the requested information is obtained and has been authenticated, it is sent back through diplomatic channels, although transmission by email may be possible in some cases. It was explained that the average timeframe to execute a request is 1-2 months.
634. The condition that bilateral arrangements are in place is less of a concern for MLA than for extradition because of the relatively broad provision (Section 3) allowing the DPP to apply the Act to any country.
635. Nonetheless, and although it is noted that under the current legislation the DPP has some flexibility to exercise his consent to apply the Act to any country, the reviewers recommend the full domestication of international treaties as a matter of priority for Botswana and welcome indications that steps are underway in this regard. There may also be some consideration of entering into bilateral treaties, and the steps in this direction under the JPCCs should be continued.
636. The reviewers note that, in light of the dual criminality requirement, the provision of mutual legal assistance is limited to the extent that not all offences established under the Convention have been criminalized.
637. It was explained during the country visit that the DPP is currently drafting regulations to guide its MLA practice and provide further detail regarding procedures to be followed. The reviewers welcome the proposed regulations and encourage their implementation in practice.
638. It is positively noted that since 2007 Botswana has not refused any request for mutual legal assistance in criminal matters.

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

639. The liability of companies in Botswana law is both civil, administrative and criminal. Companies are legal persons and they also appear on indictments with their directors. Sentences have been passed on companies as a way of punishing these for criminal wrongdoing. Botswana referred to the following measure:

Section 2, Penal Code CAP 08:01

"person" and "owner" and other like terms when used with reference to property include corporations of all kinds and any other association of persons capable of owning

property, and also when so used include the State and any local authority;

"person employed in the public service" means any person holding

640. There have been no impediments so far to MLA where legal persons are involved.

641. Botswana also provided examples of cases where assistance involving legal persons was rendered by the requested state (listed below). The officials also referred to the case of **State v Cole and Others** (cited under UNCAC article 23 above), where Botswana successfully recovered funds through mutual legal assistance from South Africa. The case involved theft and money laundering and the defendants included companies. Regarding incoming requests, Botswana referred to a request for bank records from the USA where the defendants included both companies and their controlling persons as co-accused persons. Botswana executed the request.

Mutual Assistance requested by Botswana

- i. State vs Gwenhamo Holdings (Pty) Ltd Ernest Effort Mutangi, Batandara Sanity Rute, Sani Ehee Rute and Boyce Motshegetsi Gabanakgang over 1 million fraud case- South Africa.
- ii. Finepak Packaging (Pty) Ltd USD\$ 67 890 fraud case China
- iii. Botswana Stock Exchange Stock Scam- South Africa
- iv. Zurich Insurance Fraud case- South Africa
- v. State vs Vincent Thina Seretse Paul Paledi, Serala (Pty) Ltd - South Africa
- vi. Lodisa Trading (Pty) Ltd- South Africa
- vii. BTC Fraud Case- South Africa, Liechtenstein and Barbados
- ix. Botswana Development Corporation and Shanghai Fengyue Glass co. Ltd Investigation
- x. Gaonyadiwe Mmatli and others- Arv theft-South Africa
- xi. Repatriation of Exhibits in State vs Elisabeth Dimakatso Surtee and others- South Africa
- xii. Discovery Copper (Botswana) (Pty) Ltd 6 million pula fraud case.

(b) Observations on the implementation of the article

642. The provision under review is implemented.

Article 46 Mutual legal assistance

Subparagraph 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

643. Botswana cited the following measures.

Section 4, Mutual Assistance in Criminal Matters Act

The object of this Act is to facilitate the provision and obtaining by Botswana of international assistance in criminal matters, including -

- (a) the obtaining of evidence, documents or other articles;
- (b) the provision of documents and other records;
- (c) the location and identification of witnesses or suspects;
- (d) the execution of requests for search and seizure;
- (e) the making of arrangements for persons to give evidence or assist investigations;
- (f) the confiscation of property in respect of offences;
- (g) the recovery of pecuniary penalties in respect of offences;
- (h) the restraining of dealings in property, or the freezing of assets, that may be confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences;
- (i) the location of property that may be confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences; and
- (j) the service of documents.

Section 33, Mutual Assistance in Criminal Matters Act

(1) Where a foreign country requests the Director of Public Prosecutions to arrange for the service in Botswana of a process relating to a criminal matter in the foreign country, the Director of Public Prosecutions may arrange for the service of the process.

(2) Without limiting the manner in which the service of a document in a foreign country may be proved in Botswana, service of such a document may be proved by affidavit of the person who served the document.

644. Botswana referred to the list of requests under paragraph 1.

(b) Observations on the implementation of the article

645. Based on the information provided, Botswana is able to provide various types of assistance in line with the provision under review.

Article 46 Mutual legal assistance

Subparagraph 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

646. Botswana indicated that it can afford the forms of mutual legal assistance listed in the provision above and provided the following information.

Section 19, Proceeds of Serious Crime Act

(1) Where, in any country to which the Mutual Assistance in Criminal Matters Act, 1990, applies, an order similar to a confiscation order or a restraining order is made against any person, in respect of an offence that is the equivalent of a serious offence as defined in this Act, and the order is registered by the High Court in accordance with the said Act, the provisions of this Act shall have effect as if the order were made under this Act, subject to such modifications as may be prescribed, as it has effect to a confiscation order or a restraining order, as the case may be.

(2) Where a request for assistance in identifying, locating or assessing the value of the proceeds of a serious offence is transmitted under the terms of the Mutual Assistance in Criminal Matters Act, 1990, and the request is not refused under that Act, the provisions of this Act

(a) in relation to production orders and their enforcement shall have effect, subject to such modifications as may be prescribed, as they have effect in the circumstances described in section 17(1); and

(b) in relation to search warrants and their enforcement shall have effect, subject to such modifications as may be prescribed, as they have effect in the circumstances described in section 20.

Section 4, Mutual Assistance in Criminal Matters Act

The object of this Act is to facilitate the provision and obtaining by Botswana of international assistance in criminal matters, including -

(a) the obtaining of evidence, documents or other articles;

(b) the provision of documents and other records;

(c) the location and identification of witnesses or suspects;

(d) the execution of requests for search and seizure;

(e) the making of arrangements for persons to give evidence or assist investigations;

(f) the confiscation of property in respect of offences;

(g) the recovery of pecuniary penalties in respect of offences;

- (h) the restraining of dealings in property, or the freezing of assets, that may be confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences;
- (i) the location of property that may be confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences; and
- (j) the service of documents.

Section 11, Mutual Assistance in Criminal Matters Act

- (1) This section shall apply to a proceeding or investigation relating to a criminal matter involving a serious offence against the laws of Botswana if there are reasonable grounds to believe that a thing relevant to the proceeding or investigation may be located in a foreign country to which this Act applies.
- (2) Where this section applies to a proceeding or investigation, the Director of Public Prosecutions may request an appropriate authority of the foreign country to obtain a warrant or other instrument authorising a search for a thing relevant to the proceeding or investigation and, if such a thing, or any other thing that is or may be relevant to the proceeding or investigation, as the case may be, is found pursuant to such a search, authorising the seizure of that thing.
- (3) A request shall be accompanied by an affidavit by a person verifying the grounds on which the request is made.

Section 12, Mutual Assistance in Criminal Matters Act

- (1) Where -
 - (a) a proceeding or investigation relating to a criminal matter involving a serious offence has commenced in a foreign country;
 - (b) there are reasonable grounds to believe that a thing relevant to the investigation or proceeding is located in Botswana; and
 - (c) the foreign country requests the Director of Public Prosecutions to arrange for the issue of a search warrant under this section in relation to that thing, the Director of Public Prosecutions may authorise a police officer, in writing, to apply to a magistrate in the district in which that thing is believed to be located for the search warrant requested by the foreign country.
- (2) Where a police officer authorised under subsection (1) has reason to believe that the thing to which the request relates is, or will, at a specified time, be -
 - (a) on a person;
 - (b) in the clothing that is being worn by a person; or
 - (c) otherwise in a person's immediate control, the police officer may -
 - (i) lay before a magistrate an information on oath setting out the grounds for that belief, and
 - (ii) apply for the issue of a warrant under this section to search the person for that thing.
- (3) Where an application is made under subsection (2), the magistrate may, subject to subsection (6), issue a warrant authorising a police officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable -
 - (a) to search the person for the thing; and
 - (b) to seize any thing found in the course of the search that the police officer believes, on reasonable grounds, to be relevant to the proceeding or investigation.
- (4) Where a police officer authorised under subsection (1) has reason to believe that the thing to which the request relates is, or will, at a specified time, be, upon any land, or upon or in any premises, the police

officer may –

(a) lay before a magistrate an information on oath setting out the grounds for that belief; and

(b) apply for the issue of a warrant under this section to search the land or premises for that thing.

(5) Where an application is made under subsection (4), the magistrate may, subject to subsection (6), issue a warrant authorising a police officer (whether or not named in the warrant), with such assistance, and by such force, as is necessary and reasonable –

(a) to enter upon the land, or upon or into the premises;

(b) to search the land or premises for the thing; and

(c) to seize any thing found in the course of the search that the police officer believes, on reasonable grounds, to be relevant to the proceeding or investigation.

(6) A magistrate shall not issue a warrant under this section unless

(a) the informant or some other person has given to him either orally or by affidavit, such further information, if any, as he requires concerning the grounds on which the issue of the warrant is sought; and

(b) he is satisfied that there are reasonable grounds for issuing the warrant.

(7) There shall be stated in a warrant issued under this section –

(a) the purpose for which the warrant is issued, including a reference to the nature of the criminal matter in relation to which the search is authorised;

(b) whether the search is authorised at any time of the day or night or during specified hours of the day or night;

(c) a description of the kind of things authorised to be seized; and

(d) a day, not being later than one month after the issue of the warrant, on which the warrant ceases to have effect.

(8) If, in the course of searching, under a warrant issued under this section, for a thing of a kind specified in the warrant, the police officer finds another thing that he believes on reasonable grounds –

(a) to be relevant to the proceeding or investigation in the foreign country or to afford evidence as to the commission of a criminal offence; and

(b) is likely to be concealed, lost or destroyed if it is not seized, the warrant shall be deemed to authorise him to seize the other thing.

(9) Where a police officer finds, as a result of a search in accordance with a warrant issued under this section, a thing which he seizes wholly or partly because he believes the thing on reasonable grounds to be

relevant to the proceeding or investigation in the foreign country, he shall deliver the thing into the custody and control of the Commissioner of Police.

(10) Where a thing is delivered into the custody and control of the Commissioner of Police under subsection (9), the Commissioner shall arrange for the thing to be kept for a period not exceeding one month from

the day on which the thing was seized pending a direction in writing from the Director of Public Prosecutions as to the manner in which the thing is to be dealt with (which may include a direction that the thing be sent to an authority of a foreign country).

(11) A police officer who executes a search warrant issued under subsection (3) or (5) shall, as soon as practicable after the execution of the warrant, give to the person, or give to the owner or occupier of the land

or premises or leave in a prominent position on the land or at the premises, as the case requires, a notice setting out

(a) the name and rank of the police officer,

- (b) the name of the magistrate who issued the warrant and the day on which it was issued; and
 - (c) a description of any things seized and removed in accordance with the warrant.
- (12) A police officer acting in accordance with a warrant issued under subsection (3) may remove, or require a person to remove, any of the clothing that the person is wearing but only if the removal of the clothing is necessary and reasonable for an effective search of the person under the warrant
- (13) A person shall not be searched under a warrant issued under subsection (3) except by a person of the same sex.
- (14) Where a police officer is authorised, under a warrant issued under subsection (3), to search a person, the police officer may also search
- (a) the clothing that is being worn by the person; and
 - (b) any property in, or apparently in, the person's immediate control.

647. See also PART VI, Proceeds of Crime, Mutual Assistance in Criminal Matters Act.

648. In terms of the examples of implementation, Botswana referred to the list of requests under paragraph 1.

(b) Observations on the implementation of the article

649. Botswana's legislation is in compliance with the requirements of the provision under review.

650. As noted under the paragraph 2 of the article, Botswana has had experience with asset recovery at the international level where assistance was requested from South Africa. There have been no cases involving asset recovery where Botswana was the requested country.

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

651. Botswana indicated that it is possible for it to transmit information spontaneously under SARPCCO, INTERPOL and ARINSA without prior request. The constitutions of these organs are relevant.
652. Botswana provided the following examples of implementation.
1. 24/10/2012 at 13:00 hours a Toyota Fortuner VIN AHTZZ69G005026670 was intercepted at Ramokgwebana Border gate after it produced a positive hit. South Africa was informed and the vehicle was subsequently repatriated to RSA.
 2. 25/10/2012 at 17:32 hours - Zimbabwean male Learnmore SIBANDA was arrested at Ramokgwebana Border through a nominal search and handed to Plumtree Police. He was wanted in Zimbabwe for armed robbery.
 3. 12/12/2012 at 14:00 hours - A South Africa national Nomathemba Rosetta DLAMINI was arrested at SSKA through a passport check. She was wanted in Argentina for drug related offences. She was subsequently released because Botswana does not have an extradition treaty with Argentina.
 4. 24/06/20 13 at 09:12 hours - A Zimbabwean passport No. AN4073 10 was intercepted through SLTD. Matter referred to NCB Harare for further investigations.
 5. 03/07/20 13 at 09:00 hours - A Kenyan male Wilfred Osoro OROO was arrested at Kazungula Ferry trying to leave Botswana. Subject was put on a red notice by Botswana for child abduction. Matter is pending; the court has ordered the child to be brought back to Botswana.
 6. 28/04/20 13 at 16:48 hours - A Zimbabwean male Musekiwa DZIWIWE was arrested through a nominal search at Ramokgwebana Border Gate entering Botswana from Zimbabwe. He subsequently opted to surrender himself to Malawian authorities to answer for theft by servant charges.
653. Botswana indicated that the spontaneous transmission of information is always for intelligence purposes and the requesting State has to conduct further investigation and request that information be provided in the formal channels before it can be used in court.

(b) Observations on the implementation of the article

654. Botswana reports that it relies on its cooperation through SARPCCO, INTERPOL and ARINSA to share pre-mutual legal assistance information. Officials explained that police-to-police enquiries, known sometimes as mutual administrative assistance, can be used to initiate enquiries abroad to trace assets suspected of being in other jurisdictions. Such contacts, together with enquiries through INTERPOL enable a Botswana to discover whether it will need to use mutual legal assistance to further the investigation or recovery of assets.
655. During the country visit it was explained that information is considered confidential when shared through SARPCCO, INTERPOL and ARINSA channels. It was explained that Botswana requests confidentiality undertakings from its counterparts in these cases, which impose a confidentiality obligation on them. Moreover, Botswana respects such undertakings from its counterparts as a matter of course, although it would consider the disclosure of information that is exculpatory to an accused person as required by its domestic law.
656. It was further explained by officials in the ODPF that public servants, including those who handle information, are subject to confidentiality obligations as a condition of service.

The 1996 Consolidated Botswana Public Service General Orders establish confidentiality obligations in General Order Number 37.

1996 Consolidated Botswana Public Service General Orders

CONFIDENTIALITY: GENERAL ORDER NUMBER 37

37.1 An Officer will be required on first appointment to sign a declaration in the form DPSM 3 Rev. 94 (Annexure 7) as an acknowledgement of his obligations of confidentiality under the Public Service Act Cap. 26:01.

37.2 It is the duty of the Permanent Secretary to ensure that the Declaration is signed, and that a copy thereof is forwarded to the Director.

37.3 The provisions of the Public Service Act in this and other regards must be complied with by all Officers whether or not a Declaration was signed.

37.4 Officers are further reminded that it is a serious offence under the National Security Act Cap. 23:01 to impart confidential information gained as a Public Officer to any unauthorised person either during service or after leaving the Public Service. This is particularly applicable to breaches of national security, but also covers all breaches of confidentiality in the Public Service.

37.5 Officers are not permitted at any time without the authority of the Permanent Secretary to make communications either of a formal or of an informal nature to any member of the press or to any information-gathering or publicity agency on questions of Government policy or business or on matters relating to the Public Service.

37.6 The prior approval of the Permanent Secretary must similarly be obtained before an Officer gives a lecture, participates in a panel discussion, makes a broadcast, or takes part in any similar formal dissemination of information or opinion on any aspect of Government policy, Government business, or public administration.

37.7 An Officer making any public statement, giving any public lecture, or contributing to any publication is expected and required to present and explain prevailing Government policy on the subject under discussion.

37.8 An Officer shall not disclose or use for private Purposes any information or document which comes to his knowledge in the course of his duties or in his official capacity otherwise than in the proper discharge of his duties, and as authorised by law or by competent authority.

37.9 Subject to G.O.37.6, an Officer with expert knowledge of a subject of general interest may lecture or give a talk on that subject if requested to do so.

37.10 Officers with appropriate qualifications are permitted outside of normal working hours to lecture on or teach subjects of an academic or technical nature at nearby training institutions, provided that the Permanent Secretary is informed, and that such pursuits do not interfere with the proper performance of their duty as Public Officers. The receipt of remuneration for such services shall not be a contravention of G.O. 39 relating to private interests and employment.

37.11 An Officer may publish in his own name original works of fiction, or books, articles or papers of a scientific, technical or general nature, but may not without the permission of the Permanent Secretary, publish any book, article or paper dealing directly or indirectly with his official duties or those of other Public Officers. The receipt of royalties for original works published by an Officer shall not be a contravention of G.O.39.

37.12 Unpublished official documents produced by Public Officers remain the property of Government, and may not be reproduced or otherwise used outside of Government by the authors without the permission of the Permanent Secretary.

37.13 Nothing in this General Order shall be construed as authorising any Officer to undertake paid consultancy work of any nature, whether he is on duty or on paid leave.

657. The Financial Intelligence Act Section 31(3)-(6) is also considered relevant in this regard.

Section 31, Financial Intelligence Act CAP 08:07

31. (1) The Agency shall be the only body in Botswana which may seek recognition by the Egmont Group or comparable body to exchange financial intelligence information on the basis of reciprocity and mutual agreement.

(2) Where the Agency is granted recognition in accordance with subsection (1), the Agency may exchange financial information with other members of the Egmont Group or comparable body in accordance with the conditions for such exchanges established by the Egmont Group.

(3) Without prejudice to subsections (1) and (2), where the Agency becomes aware of any information which may be relevant to the functions of a comparable body, it may disclose the information to the comparable body under conditions of confidentiality.

(4) Subject to subsection (5), where a request for information is received from a comparable body, the Agency shall disclose any relevant information in its possession to the comparable body, on such terms of confidentiality as may be agreed between the Agency and the comparable body.

(5) Where a request referred to in subsection (4) concerns information which has been provided to the Agency by a supervisory authority, an investigatory authority, a statutory body or government agency, the information shall not be disclosed without the consent of the appropriate supervisory authority, investigatory authority, statutory body or government agency.

(6) The Agency shall maintain a record in such form as may be prescribed, of statistics on the number of information disclosed to a comparable body and the number of requests of financial information from a comparable body.

658. The provision is adequately implemented.

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

659. Bank documents are obtained through a Court order in Botswana after evidence is adduced to the fact that evidence was properly requested. At the national level, the provisions on bank secrecy are summarized in article 40 of the Convention above. In application of the general principles of MLA, bank and financial records may be provided through the law enforcement authorities to the central authority upon request. Moreover,

bank secrecy is not a ground for refusal under Section 5, Mutual Assistance in Criminal Matters Act.

660. Botswana provided the following information.

Section 2(1), Mutual Assistance in Criminal Matters Act

"criminal matter" includes

- (a) a criminal matter relating to taxation, customs duties or other revenue matter or relating to foreign exchange control;
 - (b) a matter relating to the forfeiture or confiscation of property in respect of an offence; and
 - (c) a matter relating to the restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated in respect of an offence, whether arising under the laws of Botswana or a law of a foreign country;
- "offence" includes an offence against a law relating to taxation, customs duties or other revenue matters or relating to foreign exchange control;

(b) Observations on the implementation of the article

661. According to Botswana's officials, bank documents are obtained through a Court order after evidence is adduced to the fact that evidence was properly requested. No practical challenges in sharing financial or banking records through MLA were reported.

662. Bank secrecy is not regarded as a ground for refusal of MLA under the Mutual Assistance in Criminal Matters Act. Botswana's legislation is in compliance with the requirements of the provision under review.

663. Regarding examples of implementation it was provided that Botswana recently rendered assistance to the United States of America where bank documents were requested.

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

664. Botswana indicated that mutual legal assistance is subject to dual criminality under Section 5 of the Mutual Assistance in Criminal Matters Act.

Section 5, Mutual Assistance in Criminal Matters Act

(1) A request by a foreign country for assistance under this Act shall be refused if, in the opinion of the Director of Public Prosecutions -

...

- (d) the request relates to the prosecution or punishment of a person in respect of an act or omission that if it had occurred in Botswana, would have constituted an offence

under the military law of Botswana but not also under the ordinary criminal law of Botswana;

(e) the granting of the request would prejudice the sovereignty, security or national interest of Botswana;

(f) the request relates to the prosecution of a person for an offence in a case where he has been acquitted or pardoned by a competent tribunal or authority in the foreign country, or has undergone the punishment provided by the law of that country, in respect of that offence or of another offence constituted by the same act or omission as that offence; or

(g) except in the case of a request under section 10, the foreign country is not a country to which this Act applies.

(2) A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Director of Public Prosecutions -

(a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Botswana, would not have constituted an offence against the laws of Botswana;

(b) the request relates to the prosecution or punishment of a person in respect of an act or omission that occurred, or is alleged to have occurred, outside the foreign country and a similar act or omission occurring outside Botswana in similar circumstances would not have constituted an offence against the laws of Botswana;

...

665. However, it has always been the DPP's discretion on how to assist the requesting party.

(b) Observations on the implementation of the article

666. It was explained by Botswana's authorities that dual criminality is a requirement for mutual legal assistance. No refusals on that ground were reported. During the country visit, officials in the ODPP explained that Botswana considers the elements or underlying conduct of an offence when reviewing incoming requests for MLA, rather than the strict wording of the offence. By way of example, Botswana referred to a request from the USA involving the offence of stealing by agents, which is not recognized in Botswana. Botswana considered the US legal provision and the underlying conduct and rendered the requested assistance notwithstanding the dual criminality requirement.

667. The reviewers are satisfied with the information provided.

Article 46 Mutual legal assistance

Subparagraph 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

668. Botswana provided the following information.

Mutual legal assistance is subject to dual criminality under Section 5 of the Mutual Assistance in Criminal Matters Act.

Section 2, Proceeds of Serious Crime Act 1990

(1) In this Act, unless the context otherwise requires -

"serious offence" means an offence the maximum penalty for which is death, or imprisonment for not less than two years.

669. In terms of examples of implementation, Botswana referred to the list of requests under paragraph 1. Botswana indicated that no cases have been registered in recent years where Botswana has refused mutual legal assistance for any reason, including on the ground of absence of dual criminality.

(b) Observations on the implementation of the article

670. As explained by Botswana, the dual criminality requirement for mutual legal assistance is applied in a flexible manner. It was reported that no outgoing or incoming MLA requests have been refused because of lack of dual criminality.

671. However, no examples of assistance that does not involve coercive action were given; no relevant legal provisions were cited either. It was confirmed during the country visit that the element of non-coercive assistance is not addressed in Botswana's legislation. Botswana should adopt relevant measures in this regard.

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

672. Botswana referred to the following measures.

Section 13, Mutual Assistance in Criminal Matters Act

(1) Where

(a) a proceeding relating to a criminal matter has commenced in Botswana; and

(b) the Director of Public Prosecutions is of the opinion that a person who is in a foreign country to which this Act applies

(i) is a foreign prisoner,

- (ii) is capable of giving evidence relevant to the proceeding, and
- (iii) has given his consent to being removed to Botswana for the purpose of giving evidence in the proceeding,

the Director of Public Prosecutions may request the foreign country to authorise the attendance of the person at a hearing in connection with the proceeding.

(2) Where

- (a) an investigation relating to a criminal matter has commenced in Botswana; and
- (b) the Director of Public Prosecutions is of the opinion that a person who is in a foreign country to which this Act applies

- (i) is a foreign prisoner,

- (ii) is capable of giving assistance in relation to the investigation, and

- (iii) has given his consent to being removed to Botswana for the purposes of giving assistance in relation to the investigation,

the Director of Public Prosecutions may request the foreign country to authorise the removal of the person to Botswana for the purpose of giving assistance in relation to the investigation.

(3) Where the Director of Public Prosecutions makes a request under subsection (1) or (2), he may make arrangements with an appropriate authority of the foreign country for the purposes of

- (a) the removal of the person to Botswana;
- (b) the custody of the person while in Botswana;
- (c) the return of the person to the foreign country; and
- (d) other relevant matters.

Section 21, Mutual Assistance in Criminal Matters Act

(1) Where

- (a) a proceeding relating to a criminal matter has commenced in a foreign country;
- (b) the foreign country requests the attendance at a hearing in connection with the proceeding of a prisoner who is in Botswana (whether or not in custody);

- (c) there are reasonable grounds to believe that the prisoner is capable of giving evidence relevant to the proceeding; and

- (d) the Director of Public Prosecutions is satisfied that -

- (i) the prisoner has consented to giving evidence in the foreign country, and

- (ii) the foreign country has given adequate undertakings in respect of the matters referred to in subsection (3), the President may direct that the prisoner be released from prison for the purpose of travelling to the foreign country in the custody of a police officer or prison officer appointed by the Director of Public Prosecutions to give evidence at the proceeding.

(2) Where -

- (a) a proceeding relating to a criminal matter has commenced in a foreign country;
- (b) the foreign country requests the attendance at a hearing in connection with the proceeding of a person who is in Botswana;

- (c) there are reasonable grounds to believe that the person is capable of giving evidence relevant to the proceeding; and

- (d) the Director of Public Prosecutions is satisfied that -

- (i) the person has consented to giving evidence in the foreign country, and

- (ii) that country has given adequate undertakings in respect of the matters referred to in subsection (3),

the Director of Public Prosecutions may make arrangements for the travel of the person to the foreign country.

(3) The matters in relation to which undertakings are to be given by a foreign country for the purpose of a request that a person give evidence in the foreign country are -

(a) that he shall not -

(i) be detained, prosecuted or punished for any offence against the law of the foreign country that is alleged to have been committed, or that was committed, before his departure from Botswana,

(ii) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before his departure from Botswana, or (iii) be required to give evidence in any proceeding in the foreign country other than the proceeding to which the request relates,

unless he has left the foreign country and returned voluntarily; or he has had the opportunity of leaving the foreign country and has voluntarily remained in that country otherwise than for the purpose of giving evidence in the proceeding to which the request relates;

(b) that any evidence given by him in the proceeding to which the request relates will be inadmissible or otherwise disqualified from use in the prosecution of him for an offence against a law of the foreign country other than the offence of perjury in relation to the giving of that evidence;

(c) that he will be returned to Botswana in accordance with arrangements agreed by the Director of Public Prosecutions;

(d) in a case where he is being held in custody in Botswana and the Director of Public Prosecutions requests the foreign country to make arrangements for his keeping him in custody while he is in the foreign country -

(i) the making of appropriate arrangements for that purpose,

(ii) that he will not be released from custody in the foreign country unless the Director of Public Prosecutions notifies an appropriate authority of the foreign country that he is entitled to be released from custody under the laws of Botswana, and

(iii) if he is released in the foreign country as mentioned in subparagraph (ii), that his accommodation and expenses pending the completion of the proceeding to which the request relates will be paid for by the foreign country; and

(e) such other matters, if any, as the Director of Public Prosecutions thinks appropriate.

Section 22, Mutual Assistance in Criminal Matters Act

(1) Where

(a) an investigation relating to a criminal matter has commenced in a foreign country;

(b) the foreign country requests the removal of a prisoner who is in Botswana (whether or not in custody) to the foreign country for the purpose of giving assistance in relation to the investigation;

(c) there are reasonable grounds to believe that the prisoner is capable of giving assistance in relation to the investigation; and

(d) the Director of Public Prosecutions is satisfied that

(i) the prisoner has consented to being removed to the foreign country for the purpose of giving assistance in relation to the investigation; and

(ii) the foreign country has given adequate undertakings in respect of the matters referred to in subsection (3),

the President may direct that the prisoner be released from prison for the purpose of travelling to the foreign country in the custody of a police officer or prison officer appointed by the Director of Public Prosecutions to give assistance in relation to the investigation.

(2) Where

- (a) an investigation relating to a criminal matter has commenced in a foreign country;
- (b) the foreign country requests that a person who is in Botswana travel to the foreign country to give assistance in relation to the investigation;
- (c) there are reasonable grounds to believe that he is capable of giving assistance in relation to the investigation; and
- (d) the Director of Public Prosecutions is satisfied that
 - (i) he has consented to travel to the foreign country for the purpose of giving assistance in relation to the investigation; and
 - (ii) the foreign country has given adequate undertaking in respect of the matters referred to in subsection (3),

the Director of Public Prosecutions may make arrangements for him to travel to the foreign country.

(3) The matters in relation to which undertakings are to be given by a foreign country for the purpose of a request that a person be removed to, or travel to, the foreign country for the purpose of giving assistance in relation to an investigation are

- (a) that he shall not
 - (i) be detained, prosecuted or punished for any offence against the law of the foreign country that is alleged to have been committed, or that was committed, before the person's departure from Botswana;
 - (ii) be subjected to any civil suit in respect of any act or omission of his that is alleged to have occurred, or that occurred, before his departure from Botswana; or
 - (iii) be required to give evidence in any proceeding in the foreign country, unless he has left the foreign country, and returned voluntarily or he has had the opportunity of leaving the foreign country and has voluntarily remained in that country otherwise than for the purpose of giving assistance in relation to the investigation to which the request relates;
- (b) that he will be returned to Botswana in accordance with arrangements agreed by the Director of Public Prosecutions;
- (c) in a case where he is being held in custody in Botswana and the Director of Public Prosecutions requests the foreign country to make arrangements for keeping him in custody while he is in the foreign country
 - (i) the making of appropriate arrangements for that purpose;
 - (ii) that he will not be released from custody in the foreign country unless the Director of Public Prosecutions notifies an appropriate authority of the foreign country that he is entitled to be released from custody under the laws of Botswana; and
 - (iii) if he is released in the foreign country as mentioned in subparagraph (ii), that his accommodation and expenses pending the completion of the investigation to which the request relates will be paid for by the foreign country; and
- (d) such other matters, if any, as the Director of Public Prosecutions thinks appropriate.

673. Botswana has never had a case where a prisoner was transferred in accordance with the Mutual Assistance in Criminal Matters Act.

(b) Observations on the implementation of the article

674. The temporary transfer of detained and convicted persons to another State is subject to regulation under the provisions of Sections 21 and 22 of the Mutual Assistance in

Criminal Matters Act. There has been no experience with the transfer of prisoners to give testimony or provide evidence. Botswana has legislatively implemented the provision.

Article 46 Mutual legal assistance

Paragraph 11

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.

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

675. Botswana referred to the following measures.

Section 13(3), Mutual Assistance in Criminal Matters Act

...

(3) Where the Director of Public Prosecutions makes a request under subsection (1) or (2), he may make arrangements with an appropriate authority of the foreign country for the purposes of

- (a) the removal of the person to Botswana;
- (b) the custody of the person while in Botswana;
- (c) the return of the person to the foreign country; and
- (d) other relevant matters.

Section 14, Mutual Assistance in Criminal Matters Act

(1) Where

(a) a person is to be brought to Botswana from a foreign country pursuant to a request under section 13; and

(b) the foreign country requests that the person be kept in custody while he is in Botswana,
the person shall, while he is in Botswana or travelling to or from Botswana pursuant to the request, be kept in such custody as the Director of Public Prosecutions directs in writing.

Section 16, Mutual Assistance in Criminal Matters Act

(1) Where a person has come to Botswana pursuant to a request by Botswana under section 13 he shall be taken, for the purposes of this Act, to be in Botswana

pursuant to the request during any period during which he remains in Botswana for the purpose of being tried for a criminal offence under the laws of Botswana that he is alleged to have committed after his departure from the foreign country.

(2) Without limiting the generality of subsection (1), the person shall be kept in such custody as the Director of Public Prosecutions directs under section 14.

Section 18, Mutual Assistance in Criminal Matters Act

Where

(a) a person is being held in custody in accordance with a direction of the Director of Public Prosecutions under section 14; and

(b) the foreign country from which he has been brought requests his release from custody, the Director of Public Prosecutions shall direct that he be released from custody.

Section 20, Mutual Assistance in Criminal Matters Act

(1) Any police officer may, without warrant, arrest a person, if he has reasonable grounds to believe that the person

(a) has been brought to Botswana pursuant to a request under section 13; and

(b) has escaped from lawful custody while in Botswana pursuant to the request.

(2) A person who has been arrested pursuant to subsection (1) shall be returned to custody in accordance with this Act.

Section 21(3), Mutual Assistance in Criminal Matters Act

...

(3) The matters in relation to which undertakings are to be given by a foreign country for the purpose of a request that a person give evidence in the foreign country are –

(a) that he shall not –

(i) be detained, prosecuted or punished for any offence against the law of the foreign country that is alleged to have been committed, or that was committed, before his departure from Botswana,

(ii) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before his departure from Botswana, or (iii) be required to give evidence in any proceeding in the foreign country other than the proceeding to which the request relates,

unless he has left the foreign country and returned voluntarily; or he has had the opportunity of leaving the foreign country and has voluntarily remained in that country otherwise than for the purpose of giving evidence in the proceeding to which the request relates;

(b) that any evidence given by him in the proceeding to which the request relates will be inadmissible or otherwise disqualified from use in the prosecution of him for an offence against a law of the foreign country other than the offence of perjury in relation to the giving of that evidence;

(c) that he will be returned to Botswana in accordance with arrangements agreed by the Director of Public Prosecutions;

(d) in a case where he is being held in custody in Botswana and the Director of Public Prosecutions requests the foreign country to make arrangements for his keeping him in custody while he is in the foreign country –

(i) the making of appropriate arrangements for that purpose,

- (ii) that he will not be released from custody in the foreign country unless the Director of Public Prosecutions notifies an appropriate authority of the foreign country that he is entitled to be released from custody under the laws of Botswana; and
- (iii) if he is released in the foreign country as mentioned in subparagraph (ii), that his accommodation and expenses pending the completion of the proceeding to which the request relates will be paid for by the foreign country; and
- (e) such other matters, if any, as the Director of Public Prosecutions thinks appropriate.

Section 22(3), Mutual Assistance in Criminal Matters Act

...

(3) The matters in relation to which undertakings are to be given by a foreign country for the purpose of a request that a person be removed to, or travel to, the foreign country for the purpose of giving assistance in relation to an investigation are

- (a) that he shall not
 - (i) be detained, prosecuted or punished for any offence against the law of the foreign country that is alleged to have been committed, or that was committed, before the person's departure from Botswana;
 - (ii) be subjected to any civil suit in respect of any act or omission of his that is alleged to have occurred, or that occurred, before his departure from Botswana; or
 - (iii) be required to give evidence in any proceeding in the foreign country, unless he has left the foreign country, and returned voluntarily or he has had the opportunity of leaving the foreign country and has voluntarily remained in that country otherwise than for the purpose of giving assistance in relation to the investigation to which the request relates;
- (b) that he will be returned to Botswana in accordance with arrangements agreed by the Director of Public Prosecutions;
- (c) in a case where he is being held in custody in Botswana and the Director of Public Prosecutions requests the foreign country to make arrangements for keeping him in custody while he is in the foreign country
 - (i) the making of appropriate arrangements for that purpose;
 - (ii) that he will not be released from custody in the foreign country unless the Director of Public Prosecutions notifies an appropriate authority of the foreign country that he is entitled to be released from custody under the laws of Botswana; and
 - (iii) if he is released in the foreign country as mentioned in subparagraph (ii), that his accommodation and expenses pending the completion of the investigation to which the request relates will be paid for by the foreign country; and
- (d) such other matters, if any, as the Director of Public Prosecutions thinks appropriate.

Section 23, Mutual Assistance in Criminal Matters Act

Where a prisoner who is serving a term of imprisonment for an offence against a law in Botswana is released from a prison pursuant to a request by a foreign country under section 21 or 22, the prisoner shall, while in custody in connection with the request (including custody outside Botswana), be deemed to be continuing to serve that term of imprisonment.

Section 24, Mutual Assistance in Criminal Matters Act

- (1) Where

- (a) a person is to be transported in custody from a foreign country through Botswana to another foreign country for the purpose of giving evidence in a proceeding, or giving assistance in relation to an investigation, relating to a criminal matter in the other foreign country; and
- (b) at least one of those foreign countries is a foreign country to which this Act applies, the person
 - (i) may be transported through Botswana in the custody of another person; and
 - (ii) if an aircraft by which the person is being transported lands at a place in Botswana, shall be kept in such custody as the Director of Public Prosecutions directs in writing until his transportation is continued.
- (2) Where a person who is being held in custody pursuant to a direction under subsection (1) and his transportation is not, in the opinion of the Director of Public Prosecutions, continued within a reasonable time, the Director of Public Prosecutions may direct that he be transported in custody to the foreign country from which the person was first transported.

Section 25, Mutual Assistance in Criminal Matters Act

Any person who being a person being kept in custody pursuant to a direction under section 24(1), escapes from such custody, shall be guilty of an offence and liable to imprisonment for a term not exceeding two years.

Section 26, Mutual Assistance in Criminal Matters Act

- (1) Any police officer may, without warrant, arrest a person if the police officer has reasonable grounds to believe that the person was being kept in custody pursuant to a direction under section 24(1) and has escaped from that custody.
- (2) A person who has been arrested pursuant to subsection (1) shall be returned to custody in accordance with this Act.

676. Botswana indicated that there have been no examples of implementation.

(b) Observations on the implementation of the article

677. The temporary transfer of detained and convicted persons to another State is subject to regulation under the provisions of the Mutual Assistance in Criminal Matters Act. The provisions contain a set of rules when Botswana is either a requesting or a requested State, which in general are in compliance with the requirements of UNCAC. The cited provisions, however, do not seem to address the obligations under subparagraphs (c) and (d) of paragraph 11. In this context it was explained that the matter in subparagraph (c) would usually be satisfied by an undertaking between the States that extradition proceedings are not required to secure the return of the prisoner. Furthermore, subparagraph (d) is addressed through the provision in Section 23 (quoted above) that a prisoner who is released from prison pursuant to a foreign request “shall, while in custody in connection with the request (including custody outside Botswana), be deemed to be continuing to serve that term of imprisonment”. The officials explained that this means that the prisoner will also receive credit for the time spent abroad. While the reviewers acknowledge the explanation, Botswana may nonetheless wish to address the issue explicitly in its legislation.

Article 46 Mutual legal assistance

Paragraph 12

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

678. Botswana indicated that it has partially implemented the provision, and referred to the following measures.

Section 15, Mutual Assistance in Criminal Matters Act

(1) Where a person is in Botswana

- (a) pursuant to a request under section 13; or
- (b) to give evidence in a proceeding, or to give assistance in relation to an investigation, pursuant to a request made by or on behalf of the Director of Public Prosecutions (not being a request under section 13) for international assistance in a criminal matter, the person, subject to subsection (2), shall not
 - (i) be detained, prosecuted or punished in Botswana for any offence that is alleged to have been committed, or that was committed, before his departure from the foreign country pursuant to the request;
 - (ii) be subjected to any civil suit in respect of any act or omission of his that is alleged to have occurred, or that occurred, before the person's departure from the foreign country pursuant to the request; or
 - (iii) be required to give evidence in any proceeding in Botswana other than the proceeding to which the request relates, if any.

(2) Subsection (1) shall cease to apply to a person if

- (a) he has left Botswana; or
- (b) he has had the opportunity of leaving Botswana and has remained in Botswana otherwise than for
 - (i) the purpose to which the request relates;
 - (ii) the purpose of giving evidence in a proceeding in Botswana certified by the Director of Public Prosecutions, in writing, to be a proceeding in which it is desirable that he gives evidence; or
 - (iii) the purpose of giving assistance in relation to an investigation in Botswana certified by the Director of Public Prosecutions, in writing, to be an investigation in relation to which it is desirable that he gives assistance.

(3) A certificate given by the Director of Public Prosecutions for the purposes of subsection (2)(b)(ii) or

(iii) has effect from the day specified in the certificate (which may be a day before the day on which the certificate is given).

(4) This section binds the State.

Section 16, Mutual Assistance in Criminal Matters Act

(1) Where a person has come to Botswana pursuant to a request by Botswana under section 13 he shall be taken, for the purposes of this Act, to be in Botswana pursuant to the request during any period during which he remains in Botswana for the

purpose of being tried for a criminal offence under the laws of Botswana that he is alleged to have committed after his departure from the foreign country.

(2) Without limiting the generality of subsection (1), the person shall be kept in such custody as the Director of Public Prosecutions directs under section 14.

Section 17, Mutual Assistance in Criminal Matters Act

(1) Where

(a) a person is in Botswana

(i) pursuant to a request under section 13; or

(ii) to give evidence in a proceeding, or to give assistance in relation to an investigation, pursuant to a request made by or on behalf of the Director of Public Prosecutions (not being a request under section 13) for international assistance in a criminal matter; and

(b) he has given evidence in the proceeding to which the request related or in a proceeding certified by the Director of Public Prosecutions under section 15(2)(b)(ii) in relation to him, that evidence shall not be admitted or otherwise used in any prosecution of him for an offence against the laws of Botswana, other than the offence of perjury in relation to the giving of that evidence.

(2) This section binds the State.

Section 21(3), Mutual Assistance in Criminal Matters Act

(quoted above)

Section 22(3), Mutual Assistance in Criminal Matters Act

(quoted above)

679. Botswana indicated that the legal provisions are in place but there have been no cases relating to the above.

(b) Observations on the implementation of the article

680. The governmental experts note that the Botswana's legislation is in compliance with the requirements of the article under review.

681. No cases were reported, which hampers the assessment of the practical application of the cited provisions.

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

682. Botswana indicated that the Directorate of Public Prosecutions of Botswana is the central authority to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution.

683. The required notification has only been made for the Palermo Convention, not for UNCAC.

(b) Observations on the implementation of the article

684. Botswana confirmed that the Directorate of the Public Prosecutions has been designated as the central authority for MLA.

685. Regarding the transmission of requests, officials explained that the proper transmission is via diplomatic channels but an authenticated e-mail can do or, in urgent cases a telephone call between DPPs followed imminently by receipt of the request in writing. In urgent cases a request can also be sent through INTERPOL.

686. Regarding the timely execution of requests, officials explained that turnaround times in the ODPP are in place that apply once a DPP officer receives a case as follows:

- 4 weeks to analyze the request and submit it to the DPP for consideration;
- 5 weeks in case the request involves a fraud matter ;
- 6 weeks if the case involves an order by the High Court.

687. As noted under paragraph 1 of the article above, the reviewers welcome the adoption by the DPP of regulations on MLA to ensure the speedy and proper execution or transmission of incoming MLA requests in practice. The existence of case turnaround times is positively noted in this context.

688. The officials explained that MLA is paper-intensive. A request for assistance must include all the information required by domestic law as well as any applicable treaty, and must be made by the requesting State's Central Authority. The request is transmitted to the other State's Central Authority who assesses the request and refers it to the police or prosecuting body in the relevant locality.

689. Depending on the nature of the request, executing the request may require:

1. the issuing of search warrants
2. location of witnesses
3. or other time-consuming processes.

Once the material is obtained, it must once again be transmitted back through the Central Authorities. While this level of formality is time consuming, it is part of the

rationale underpinning MLA. Conducting the process through a formal government-to-government channel is intended to give all parties some level of comfort that the information has been obtained through appropriate means and that the continuity of the chain of evidence has not been broken.

690. Botswana is encouraged to make the relevant notification of its central authority to the United Nations by sending 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 a copy 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).

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

691. Botswana indicated that it has partially implemented the provision and stated that all requests are to be in writing, but that Botswana can accept a verbal request on a reciprocal basis. Botswana further indicated that the request should be in English.

692. Botswana indicated that it did not notify the Secretary-General of the United Nations as prescribed above. The required notification has only been made for the Palermo Convention, not for UNCAC.

(b) Observations on the implementation of the article

693. Botswana is encouraged to make the relevant notification to the United Nations by sending 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 a copy 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).

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

694. Botswana referred to the following measures.

Section 7, Mutual Assistance in Criminal Matters Act

Requests by Botswana for international assistance in criminal matters may be made by the Director of Public Prosecutions.

Section 8, Mutual Assistance in Criminal Matters Act

- (1) A request by a foreign country for international assistance in a criminal matter may be made to the Director of Public Prosecutions or a person authorised by the Director of Public Prosecutions, in writing, to receive requests by foreign countries under this Act;
- (2) A request made under subsection (1) shall be accompanied by
 - (a) the name of the authority concerned with the criminal matter to which the request relates;
 - (b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;
 - (c) a description of the purpose of the request and of the nature of the assistance being sought;
 - (d) details of the procedure that the foreign country wishes to be followed by Botswana in giving effect to the request, including details of the manner and form in which any information, document or thing is to be supplied to the foreign country pursuant to the request;
 - (e) a statement setting out the wishes of the foreign country concerning the confidentiality of the request and the reasons for those wishes;
 - (f) details of the period within which the foreign country wishes the request be complied with;
 - (g) if the request involves a person travelling from Botswana to the foreign country, details of allowances to which the person will be entitled, and of the arrangements for accommodation for the person, while the person is in the foreign country pursuant to the request;
 - (h) any other information required to be included with the request under an arrangement between Botswana and the foreign country; and
 - (i) any other information that may assist in giving effect to the request; but failure to comply with this subsection is not a ground for refusing the request
- (3) Where a request by a foreign country is made to a person authorised under subsection (1), the request shall be taken, for the purposes of this Act, to have been made to the Director of Public Prosecutions.

695. Botswana indicated that in terms of the examples of implementation the MLA requests cited earlier are relevant. A sample MLA request was provided to the reviewers.

(b) Observations on the implementation of the article

696. Botswana's authorities cited the provisions of Section 8 of the Mutual Assistance in Criminal Matters Act, which sets forth obligations with regard to the format and content of incoming MLA requests to Botswana. The provision under review is adequately implemented.

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

697. Botswana referred to the following measures.

Section 6, Mutual Assistance in Criminal Matters Act

Assistance under this Act may be provided to a foreign country subject to such conditions as the Director of Public Prosecutions may determine.

Section 8, Mutual Assistance in Criminal Matters Act

(quoted above)

698. Botswana indicated that the examples of requests indicated earlier are relevant here. All the requests are always executed in line with the laws currently existing in Botswana.

(b) Observations on the implementation of the article

699. It was explained during the county visit that requests are executed in accordance with requested procedures as a matter of practice. By way of example, confidentiality requests have always been honoured and requested deadlines have been met or exceeded. Even in the transmission of requests to other authorities for execution, confidentiality is ensured by marking a document as confidential or disclosing only non-confidential information.

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

700. Botswana referred to the following measures.

Section 9, Mutual Assistance in Criminal Matters Act

The Director of Public Prosecutions may in writing request an appropriate authority of a foreign country to arrange for -

- (a) evidence to be taken in the foreign country; or
 - (b) documents or other articles in the foreign country to be produced,
- for the purposes of a proceeding in relation to a criminal matter in Botswana.

Section 10, Mutual Assistance in Criminal Matters Act

(1) Where a request is made by a foreign country that

- (a) evidence be taken in Botswana; or
 - (b) documents or other articles in Botswana be produced,
- for the purposes of a proceeding in relation to a criminal matter in the foreign country, the Director of Public Prosecutions may by writing in accordance with the approved form, authorise the taking of the evidence or the production of the documents or other articles, and the transmission of the evidence, documents or other articles to the foreign country.

(2) Where the Director of Public Prosecutions authorises the taking of evidence or the production of documents or other articles under subsection (1) -

(a) in the case of taking evidence, a magistrate may take the evidence on oath of each witness appearing before him to give evidence in relation to the matter, and a magistrate who takes any such evidence shall -

- (i) cause the evidence to be put in writing and certify that the evidence was taken by him, and
 - (ii) cause the writing so certified to be sent to the Director of Public Prosecutions; or
- (b) in the case of the production of documents or other articles, a magistrate may require the production of the documents or other articles and, where the documents or other articles are produced, he shall send the documents, or copies of the documents certified by him to be true copies, or the other articles, to the Director of Public Prosecutions.

(3) The evidence of such a witness may be taken in the presence or absence of the person to whom the proceeding in the foreign country relates or of his legal representative, if any.

(4) The magistrate conducting a proceeding under subsection (2) may permit

- (a) the person to whom the proceeding in the foreign country relates;
- (b) any other person giving evidence or producing documents or other articles at the proceeding before the magistrate; and
- (c) the relevant authority of the foreign country, to have legal representation at the proceeding before him.

(5) The certificate by the magistrate under subsection (2) shall state whether, when the evidence was taken or the documents or other articles were produced, any of the following persons were present

- (a) the person to whom the proceeding in the foreign country relates or his legal representative, if any;
- (b) any other person giving evidence or producing documents or other articles or his legal representative, if any.

(6) For the purposes of this section, the person to whom the proceeding in the foreign country relates is competent but not compellable to give evidence.

Order 45 Rule 2 sub-rule 3 of the Rules of the Magistrates Court (“Case Management: Allocation of Cases and Case Management Conferences”) allows for attending court through information technology. It reads:

(3) Where the parties have agreed, then the magistrate may order that the conference be held by means of information communication technology.

701. Botswana further referred to provisions in the Criminal Procedure and Evidence Act on taking evidence on commission.

B. EVIDENCE ON COMMISSION (ss 210-213)

210. Taking evidence on commission

(1) Whenever in the course of a trial, preparatory examination or any other criminal proceedings it appears to a court that the examination of a witness is necessary for the ends of justice and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience, which under the circumstances of the case would be unreasonable, such court may dispense with such attendance and may issue a commission to any magistrate or, where the witness is resident outside Botswana, to any person authorized by such court to take evidence on commission in civil cases outside Botswana, within the local limits of whose jurisdiction such witness resides:

Provided that -

(i) in any such application, the specific fact or facts with regard to which the evidence of the witness is required shall be set out, and the court may by its order confine the examination of the witness to those facts, and

(ii) when the application is on behalf of the State, the court may, if it thinks fit to do so, direct as a condition of such order that the expense necessary to the representation of the accused by attorney or counsel at the examination shall be paid by the State.

(2) The magistrate or other person to whom the commission is issued shall proceed to the place where the witness is or shall summon the witness before him, and shall take down his evidence in the same manner as in the case of an ordinary preparatory examination taken before himself or, where the commission is executed outside Botswana, in the same manner as a commission to take evidence in civil cases is executed.

211. Parties may examine witnesses

(1) Any party to any criminal proceedings in which a commission is issued may transmit any interrogatories in writing which the court directing the commission may think relevant to the issue, and the magistrate or other person to whom the commission is directed shall examine the witness upon such interrogatories.

(2) Any such party may appear before such magistrate or other person by counsel or attorney or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

212. Return of commission

(1) After a commission under section 210 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the court which issued it; and the commission, the return thereto, and the deposition shall be open at all reasonable times to the inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party and shall form part of the record.

(2) Any deposition so taken may also be received in evidence at any subsequent stage of the case before another court.

213. Adjournment of inquiry or trial

In every case in which a commission is issued under section 210 the trial, preparatory examination, or other criminal proceeding may be adjourned for a specified time, reasonably sufficient for the execution and return of the commission.

702. Botswana provided the following case example.

In executing the MLA request from the Netherlands, a Dutch judge came to Botswana and took evidence from a witness. The witness was called and interviewed, and Botswana then provided the translated evidence to the Dutch authorities through formal mutual legal assistance.

(b) Observations on the implementation of the article

703. According to Section 10 of the Mutual Assistance in Criminal Matters Act, Botswana can render MLA for taking evidence and its transmission to a requesting country. Witness or expert hearings shall be conducted by the relevant authorities of Botswana in the presence of the foreign magistrate or other relevant authorities of the requesting country.

704. Botswana referred to a relevant case example where evidence was taken in the presence of a foreign judicial authority.

705. Botswana indicated that evidence obtained through video conferencing is admissible in Botswana. It has been used before the Courts.

706. Botswana has fully implemented the provision under review. The cited case is a good illustration of the relevant measures in practice.

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

707. Botswana indicated that it has not implemented the provision. A general limitation on use clause is not included in the Mutual Assistance in Criminal Matters Act.

(b) Observations on the implementation of the article

708. It was confirmed during the discussions in the country visit that the law does not contain a limitation on use clause designed to guarantee that information or evidence

obtained through MLA shall not be transmitted or used for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Botswana is encouraged to adopt a relevant provision in its law.

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

709. Botswana indicated that it has partially implemented the provision and referred to the following measure.

Section 8, Mutual Assistance in Criminal Matters Act

(1) A request by a foreign country for international assistance in a criminal matter may be made to the Director of Public Prosecutions or a person authorised by the Director of Public Prosecutions, in writing, to receive requests by foreign countries under this Act;

(2) A request made under subsection (1) shall be accompanied by

...

(e) a statement setting out the wishes of the foreign country concerning the confidentiality of the request and the reasons for those wishes;

710. The case of **State v Cole and Others** (described above) was referred to as an example where Botswana respected the confidentiality of information upon request by the South African authorities. .

(b) Observations on the implementation of the article

711. Botswana indicated that it has always honoured requests for confidentiality as a matter of practice. The information and observations included under paragraph 5 of the article above on obligations of confidentiality are also referred to.

712. However, the second part of the provision is not addressed, and Botswana is encouraged to adopt relevant provisions or procedures ensuring that the requested State is promptly notified if a request for confidentiality cannot be met.

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

713. Botswana referred to the following measure.

Section 5, Mutual Assistance in Criminal Matters Act

(1) A request by a foreign country for assistance under this Act shall be refused if, in the opinion of the Director of Public Prosecutions -

(a) the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character;

(b) subject to subsection (3), there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character;

(c) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of his race, sex, religion, nationality or political opinions;

(d) the request relates to the prosecution or punishment of a person in respect of an act or omission that if it had occurred in Botswana, would have constituted an offence under the military law of Botswana but not also under the ordinary criminal law of Botswana;

(e) the granting of the request would prejudice the sovereignty, security or national interest of Botswana;

(f) the request relates to the prosecution of a person for an offence in a case where he has been acquitted or pardoned by a competent tribunal or authority in the foreign country, or has undergone the punishment provided by the law of that country, in respect of that offence or of another offence constituted by the same act or omission as that offence; or

(g) except in the case of a request under section 10, the foreign country is not a country to which this Act applies.

(2) A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Director of Public Prosecutions -

(a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Botswana, would not have constituted an offence against the laws of Botswana;

(b) the request relates to the prosecution or punishment of a person in respect of an act or omission that occurred, or is alleged to have occurred, outside the foreign country and a similar act or omission occurring outside Botswana in similar circumstances would not have constituted an offence against the laws of Botswana;

(c) the request relates to the prosecution or punishment of a person in respect of an act or omission where, if it had occurred in Botswana at the same time and had constituted an offence against the laws of Botswana, the person responsible could no longer be prosecuted by reason of lapse of time or any other reason;

(d) the provision of the assistance could prejudice an investigation or proceeding in relation to a criminal matter in Botswana;

(e) the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in or outside Botswana); or

(f) the provision of the assistance would impose an excessive burden on the resources of the State.

(3) An offence is not an offence of a political character-

(a) if it is an offence in accordance with the provisions of any international convention to which Botswana and the foreign country to which this Act applies are parties and there is an obligation on each party to afford mutual assistance in investigation and prosecution of such offence;

(b) if it is an offence against the life or person of a Head of State or a member of his immediate family, a Head of Government, or a Minister or any related offence;

(c) if it is murder or any related offence.

(4) For the purposes of subsection (3)(b) and (c), "related offence" means aiding and abetting, counselling or procuring the commission of, being an accessory before or after the fact to, or attempting or conspiring to commit that offence.

714. Botswana indicated that it has never refused a request for MLA.

(b) Observations on the implementation of the article

715. Botswana's legislation recognizes grounds for refusal in line with the Convention. No requests have been refused to date.

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

716. Botswana provided the following information.

Section 2(1), Mutual Assistance in Criminal Matters Act

"criminal matter" includes

(a) a criminal matter relating to taxation, customs duties or other revenue matter or relating to foreign exchange control;

(b) a matter relating to the forfeiture or confiscation of property in respect of an offence; and

(c) a matter relating to the restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated in respect of an offence, whether arising under the laws of Botswana or a law of a foreign country;

"offence" includes an offence against a law relating to taxation, customs duties or other revenue matters or relating to foreign exchange control;

717. Botswana indicated that the cases cited under MLA also involve offences that are purely of a fiscal nature, including the request from the USA.

(b) Observations on the implementation of the article

718. The governmental experts note that the legislation of Botswana is in compliance with the requirements of the paragraph under review.

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

719. Botswana indicated that it did not implement the provision. Botswana indicated that this obligation is not addressed in the Mutual Assistance in Criminal Matters Act.

720. In terms of the steps or actions that domestic or other authorities needed to implement the provision, Botswana indicated that consultations and proposals for inclusion of this aspect in the country's Mutual Assistance in Criminal Matters Act would be needed.

(b) Observations on the implementation of the article

721. The governmental experts note that the legislation of Botswana is non-compliant with the provision under review. It is recommended that Botswana adopt a relevant legal provision to implement the paragraph under review.

Article 46 Mutual legal assistance

Paragraph 24

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

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

722. Botswana indicated that it has partially implemented the provision and referred to the following measure.

Section 8, Mutual Assistance in Criminal Matters Act

- (1) A request by a foreign country for international assistance in a criminal matter may be made to the Director of Public Prosecutions or a person authorised by the Director of Public Prosecutions, in writing, to receive requests by foreign countries under this Act;
- (2) A request made under subsection (1) shall be accompanied by

...

(f) details of the period within which the foreign country wishes the request be complied with;

723. In terms of examples of implementation, Botswana referred to the list of requests under paragraph 1.

724. Botswana indicated that the customary length of time between receiving requests for mutual legal assistance and responding to them is one month.

725. The information on case turnaround times included under paragraph 13 above is also referred to.

(b) Observations on the implementation of the article

726. Botswana stated that normally it takes one month to execute MLA requests. Some requests have even been executed more rapidly, as noted under paragraph 13 above. The officials reported that Botswana has always complied with the requested deadlines.

727. The officials stated that status updates are provided as a matter of course and there has been no experience in this regard.

Article 46 Mutual legal assistance

Paragraph 25

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

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

728. Botswana referred to the following measure.

Section 5, Mutual Assistance in Criminal Matters Act

...

(2) A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Director of Public Prosecutions -

...

(d) the provision of the assistance could prejudice an investigation or proceeding in relation to a criminal matter in Botswana;

..

729. Botswana indicated that so far there has been no case in which it postponed the provision of mutual legal assistance on the ground that it interfered with an ongoing investigation, prosecution or judicial proceeding.

(b) Observations on the implementation of the article

730. Paragraph 25 of this article permits the requested State to postpone, rather than refuse, assistance where immediate action on the request would be prejudicial to an ongoing

investigation, prosecution or judicial proceeding in the requested State. For example, where the requesting State has sought to obtain evidence or witness testimony for purposes of an investigation or trial, and the same evidence or witness is needed for use at a trial that is about to commence in the requested State, the requested State would be justified in postponing the providing of assistance.

731. The postponing of assistance for the above-stated reasons is not addressed in Botswana's legislation, which provides for the refusal of assistance on such grounds. Botswana may wish to revisit the matter in the context of its ongoing legal reforms.

Article 46 Mutual legal assistance

Paragraph 26

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

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

732. Botswana indicated that it has partially implemented the provision. It indicated that the obligation to consult is not addressed in the legislation but is done as a matter of practice.
733. There have been no examples of implementation, as Botswana has never refused or postponed a request for assistance.
734. To fully implement the provision, Botswana indicated that there will be a need for consultation among domestic authorities to bring its legal rules in line with the Convention.

(b) Observations on the implementation of the article

735. Botswana is encouraged to adopt a relevant legal provision providing for a duty to consult before assistance is refused or postponed.

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

736. Botswana referred to the following measure.

Section 15, Mutual Assistance in Criminal Matters Act

(1) Where a person is in Botswana

(a) pursuant to a request under section 13; or

(b) to give evidence in a proceeding, or to give assistance in relation to an investigation, pursuant to a request made by or on behalf of the Director of Public Prosecutions (not being a request under section 13) for international assistance in a criminal matter, the person, subject to subsection (2), shall not

(i) be detained, prosecuted or punished in Botswana for any offence that is alleged to have been committed, or that was committed, before his departure from the foreign country pursuant to the request;

(ii) be subjected to any civil suit in respect of any act or omission of his that is alleged to have occurred, or that occurred, before the person's departure from the foreign country pursuant to the request; or

(iii) be required to give evidence in any proceeding in Botswana other than the proceeding to which the request relates, if any.

(2) Subsection (1) shall cease to apply to a person if

(a) he has left Botswana; or

(b) he has had the opportunity of leaving Botswana and has remained in Botswana otherwise than for

(i) the purpose to which the request relates;

(ii) the purpose of giving evidence in a proceeding in Botswana certified by the Director of Public Prosecutions, in writing, to be a proceeding in which it is desirable that he gives evidence; or

(iii) the purpose of giving assistance in relation to an investigation in Botswana certified by the Director of Public Prosecutions, in writing, to be an investigation in relation to which it is desirable that he gives assistance.

(3) A certificate given by the Director of Public Prosecutions for the purposes of subsection (2)(b)(ii) or

(iii) has effect from the day specified in the certificate (which may be a day before the day on which the certificate is given).

(4) This section binds the State.

Section 16, Mutual Assistance in Criminal Matters Act

(1) Where a person has come to Botswana pursuant to a request by Botswana under section 13 he shall be taken, for the purposes of this Act, to be in Botswana pursuant to the request during any period during which he remains in Botswana for the purpose of being tried for a criminal offence under the laws of Botswana that he is alleged to have committed after his departure from the foreign country.

(2) Without limiting the generality of subsection (1), the person shall be kept in such custody as the Director of Public Prosecutions directs under section 14.

Section 17, Mutual Assistance in Criminal Matters Act

(1) Where

(a) a person is in Botswana

- (i) pursuant to a request under section 13; or
 - (ii) to give evidence in a proceeding, or to give assistance in relation to an investigation, pursuant to a request made by or on behalf of the Director of Public Prosecutions (not being a request under section 13) for international assistance in a criminal matter; and
 - (b) he has given evidence in the proceeding to which the request related or in a proceeding certified by the Director of Public Prosecutions under section 15(2)(b)(ii) in relation to him, that evidence shall not be admitted or otherwise used in any prosecution of him for an offence against the laws of Botswana, other than the offence of perjury in relation to the giving of that evidence.
- (2) This section binds the State.

Section 21(3), Mutual Assistance in Criminal Matters Act
(quoted above)

Section 23, Mutual Assistance in Criminal Matters Act

Where a prisoner who is serving a term of imprisonment for an offence against a law in Botswana is released from a prison pursuant to a request by a foreign country under section 21 or 22, the prisoner shall, while in custody in connection with the request (including custody outside Botswana), be deemed to be continuing to serve that term of imprisonment.

737. Botswana provided the following case.

The case of **The State v Gorerwang Mokgathi** cited earlier bears reference. In this case a person in Mauritius was sought for the offence of obtaining by false pretences and was not willing to come to Botswana to testify because of other offences for which he was wanted. The DPP's consent not to prosecute was given and the person was convicted of the offence.

(b) Observations on the implementation of the article

738. The governmental experts note that the legislation of Botswana is in compliance with the requirements of the provision under review.

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

739. Botswana indicated that it has partially implemented the provision and referred to the following measure.

Section 8, Mutual Assistance in Criminal Matters Act

...

(2) A request made under subsection (1) shall be accompanied by

...

(g) if the request involves a person travelling from Botswana to the foreign country, details of allowances to which the person will be entitled, and of the arrangements for accommodation for the person, while the person is in the foreign country pursuant to the request;

...

740. Botswana indicated that in terms of the examples of arrangements related to such costs, the issue is not directly addressed in the Mutual Assistance in Criminal Matters Act. Botswana has, however, been offering such assistance and expenses would be borne by Botswana for travel and other issues whilst the person concerned is still within its borders.

(b) Observations on the implementation of the article

741. According to the information provided, Botswana bears the costs incurred solely on its territory.

742. Regarding extraordinary costs that may arise in the course of rendering mutual assistance, the authorities explained that they would hold consultations with the requesting State. This approach is in line with the Convention.

Article 46 Mutual legal assistance

Subparagraph 29 (a)

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

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

743. Botswana referred to the following measure.

Section 10(1), Mutual Assistance in Criminal Matters Act

(1) Where a request is made by a foreign country that

(a) evidence be taken in Botswana; or

(b) documents or other articles in Botswana be produced,

for the purposes of a proceeding in relation to a criminal matter in the foreign country, the Director of Public Prosecutions may by writing in accordance with the approved form, authorise the taking of the evidence or the production of the documents or other articles, and the transmission of the evidence, documents or other articles to the foreign country.

744. In terms of how such records, documents or information can be obtained and how they were provided to the requesting State Party, Botswana indicated that these will be requested and provided under the laws governing such production in Botswana. The documents would also be authenticated before leaving the country by the prescribed

authority and through Interpol, before the documents would be handed over to officers from the requesting State.

(b) Observations on the implementation of the article

745. The provision of publicly available Government documents or information to a requesting State seems to fall upon service of documents or information in general and, therefore, be covered by Section 10 of the Mutual Assistance in Criminal Matters Act.

746. No concrete cases have been cited, although the officials explained that there are no obstacles to providing publicly available Government records.

Article 46 Mutual legal assistance

Subparagraph 29 (b)

29. The requested State Party:

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

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

747. Botswana indicated that it has partially implemented the provision and provided the following information.

748. The provision of non-public Government records depends on the purpose for which the record is sought. For example, such information could be provided for purposes of sentencing in another country or to evidence that a person was at a specific location at a given time. There has been no experience with the provision of non-public Government records through MLA, although information relating to past convictions is relevant on sentencing and that is given at all times, sometimes through INTERPOL.

(b) Observations on the implementation of the article

749. The reviewers are satisfied with the information provided.

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

750. Botswana indicated that it has partially implemented the provision and indicated that bilateral agreements have been drafted with several countries (see paragraph 1 of UNCAC

article 46). Botswana is also party to multilateral agreements, such as the SADC Protocol on Mutual Legal Assistance, but cannot use these agreements unless they are incorporated into its laws. The information under paragraph 1 of the article is referred to.

(b) Observations on the implementation of the article

751. The observations under paragraph 1 are repeated. In particular, the reviewers recommend the full domestication of international treaties as a matter of priority for Botswana, in light of the dual criminality requirement and the fact that not all offences established under the Convention have been criminalized, as well as consideration of entering into bilateral treaties.

(c) Challenges, where applicable

752. Botswana has identified the following challenges and issues in fully implementing the article under review:

1. Inter-agency co-ordination
2. Specificities in our legal system
3. Limited capacity
4. Inadequacy of existing normative measures
5. Limited resources for implementation

(c) Successes and good practices

753. It is positively noted that since 2007 Botswana has not refused any request for mutual legal assistance in criminal matters.

(d) Technical assistance needs

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

1. Model agreement(s)/arrangement(s)
2. Capacity-building programmes for authorities responsible for international cooperation in criminal matters
3. Legal advice
4. Summary of good practices/lessons learned

755. Botswana indicated that there is none of the forms of technical assistance previously mentioned have been provided.

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

756. Botswana indicated that it did not implement the provision.

(b) Observations on the implementation of the article

757. Botswana indicated that it has not implemented the article under review. During the discussions with the ODPP during the country visit, the officials explained that there is no law or practice on the issue, but that proceedings could be transferred in the early stages of a criminal proceeding, before evidence has been heard. After the hearing stage, a transfer would not be possible. While there was some uncertainty around the issue, it appears that the judicial authorities in Botswana could transfer criminal proceedings, for example where evidence is located in another jurisdiction. There was no evidence, however, that Botswana has formally considered the issue in law or practice.

(c) Challenges, where applicable

758. Botswana has identified the following challenges and issues in fully implementing the article under review:

1. Inadequacy of existing normative measures: Laws have not been drafted to cater for this Article.

(d) Technical assistance needs

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

1. Development of an action plan for implementation: This would assist in having the country plan and put in place a timeframe for when the issue would have to be addressed.

760. Botswana has indicated that none of the forms of technical assistance previously mentioned have been provided.

Article 48 Law enforcement cooperation

Paragraph 1

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.

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

761. Botswana provided the following information.

Botswana is a member of the Eastern and South African Anti Money Laundering Group (ESAAMLG).

Botswana law enforcement authorities cooperate through the Southern African Regional Police Chiefs Cooperation Organization (SARPCCO) and through INTERPOL. Botswana is also a member of the Southern African Development Community (SADC) and the Asset Recovery Inter-Agency Network of Southern Africa (ARINSA).

The DCEC is a member of the Southern African Forum against Corruption (SAFAC), the International Association of Anti-Corruption Authorities (IAACA), and the African Association of Anti-Corruption Authorities (AAACA).

762. Botswana indicated that it can use INTERPOL's Global Communication System known as the I-24/7 which consists of databases in the likes of DNA, Fingerprints, Stolen/Lost Travel Documents, Stolen Motor Vehicles, Stolen Works of Art, Wanted persons, Missing Persons etc. The Regional Organised Counter Crime Information Sharing System which is used to share criminal intelligence is a tool or service within the I-24/7.

763. Botswana's Financial Intelligence Agency has entered into Memoranda of Understanding with the Financial Intelligence Centre of South Africa and the Financial Intelligence Centre of Namibia for purposes of sharing intelligence with respect to the movement of proceeds of crime and other instrumentalities used or intended for use in the commission of corruption-related offences.

764. By way of example of law enforcement cooperation through INTERPOL, Botswana indicated that it requested the extradition of persons suspected to have swindled government of millions of pula from South Africa after exchange of information by INTERPOL on their whereabouts. This involved the country's **Central Medical Stores case (The State v Cole and Others)** (cited under articles 23 and 46 above) where certain individuals pretended to have supplied medical equipment and or medicines to the facility

whilst nothing of the sort had happened. Through the help of INTERPOL, the funds were traced to a bank account in South Africa. The accused persons were convicted and some of the money recovered. Botswana further indicated that there are many other cases as appear on the statistics below where law enforcement assistance from individual States was sought.

765. Botswana indicated that in terms of examples of implementation, the following are requests and responses from INTERPOL:

INTERPOL STATISTICS FROM 2010 TO 2012

Year	No. of requests made by Botswana through INTERPOL	No. of responses through INTERPOL where request was external
2010	383	385
2011	532	537
2012	349	234

Matters:

- Investigation of Financial and High Tech Crimes
- Service of Subpoena
- Wanted persons
- Vetting
- Extradition
- Motor Vehicle theft Investigation
- Human trafficking
- Offences Against Children
- Drugs and Related Offences

Please note that where the numbers of requests are lower than the responses then some matters would have been carried over from past years.

766. Botswana also referred to the Joint Permanent Consultative Commissions (JPCCs) it has with other countries. JPCCs are meetings between countries regarding a broad range of issues, including security and extradition. This is where issues are discussed and a plan to enhance cooperation between countries is planned. For example, minutes of a recent meeting with Nigeria were provided to the reviewers, which covered law enforcement cooperation, especially the exchange of information on corruption prevention initiatives and related money laundering activities. An example of an agenda between Botswana and the Malawi JPCC was also provided.

767. Botswana indicated that, although it is facing challenges in terms of extraditing fugitive criminals involved in murder cases, the assistance on their whereabouts and exact location is not a challenge.

768. Botswana also indicated that, as stated earlier, the country has enjoyed good working relationships with other countries in Africa through INTERPOL and other regional organizations. Through local investigative agencies of the respective countries, Botswana has shared information and items for analysis.

769. Though not an example of direct law enforcement cooperation in the investigation of corruption-related offences, Botswana indicated that relations with law enforcement

counterparts are good. For example, the Asset Forfeiture Unit in South Africa helped Botswana establish an asset forfeiture unit in the DPP's office. Similarly, upon the formation of Botswana's Financial Intelligence Agency (FIA), the United States of America sent a technical officer to help set up the FIA.

770. Regarding subparagraph (e) of the article, Botswana provided the following information.

The Botswana National Central Bureau of INTERPOL has seconded two of its officers to the Regional Bureau of INTERPOL in Harare as Regional Specialised Officers. One officer is seconded to the INTERPOL Secretariat General in Lyon, France as Assistant Director, National Central Bureau and Regional Police Services. The officers are of the rank of Assistant Superintendent. Botswana police have also received liaison officers from other countries.

771. Regarding subparagraph (f), Botswana provided the following examples of implementation.

Meetings of Regional Police Chiefs where information is shared
Joint operations of the SARPCCO member countries
ESAAMLG meetings
Joint Permanent Commissions where bilateral agreements are signed.

(b) Observations on the implementation of the article

772. Based on the information provided, Botswana's law enforcement authorities cooperate with their counterparts mainly through regional and international networks. It was explained that INTERPOL channels have been used in the investigation of corruption matters and that SADC and ARINSA networks have helped especially in motor vehicle theft cases. Botswana has also executed requests received through ARINSA to trace property in Botswana. Through the JPCCs, officials from Botswana have travelled to Kenya to discuss issues of joint cooperation and SARPCCO meetings are held annually. Moreover, direct police contacts with neighbouring countries Namibia and South Africa were described as effective. Based on the information provided and discussions during the country visit, Botswana is encouraged to continue such direct law enforcement cooperation efforts, including through its regional networks, which seem to be working well in practice.

773. During the country visit, a case example was described where investigators from Botswana's DCEC went to the United Kingdom to interview suspects in a corruption case in November 2013. The reviewers were of the view that the example illustrates effective cooperation in the investigation of corruption cases by Botswana's law enforcement and anti-corruption authorities also beyond the region.

Article 48 Law enforcement cooperation

Paragraph 2

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law

enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

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

774. Botswana indicated that it has partially implemented the provision and provided the following information. Botswana has signed agreements on Joint Permanent Commissions with 13 countries, as noted above. Memoranda of Agreements also continue to be signed.

775. In terms of law enforcement cooperation provided or received making use of bilateral or multilateral agreements or arrangements, Botswana referred to cross-border operations with the South African Police under the auspices of SARPCCO.

776. Botswana indicated that it partially considers UNCAC as the basis for mutual law enforcement cooperation in respect of UNCAC offences. Botswana indicated that there has been direct law enforcement cooperation through Interpol, SARPCCO and other bilateral arrangements, but that there has been no experience of cooperation on the basis of the Convention. However, such cooperation could be possible if a request were received on the basis of UNCAC.

777. Botswana courts have also continually stipulated that although some Conventions are not ratified, they will apply Conventions as a source of International Law. See the State v Unity Dow 1992 BLR 243.

(b) Observations on the implementation of the article

778. During the country visit it was confirmed that there has been no experience of law enforcement cooperation on the basis of the Convention, but that nothing would preclude Botswana's authorities from engaging in law enforcement cooperation on the basis of the UNCAC if such a request were received.

Article 48 Law enforcement cooperation

Paragraph 3

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

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

779. Botswana referred to the Cybercrime Act.

Cybercrime Act

VOLUME: II

CYBERCRIME AND COMPUTER RELATED CRIMES

Part ID: I Preliminary (ss 1-3)

CHAPTER: 08:06 An Act to combat cybercrime and computer related crimes, to repress criminal activities perpetrated through computer [Date of commencement: 28th December, 2007]

780. Botswana provided the following case.

The **Blaze** case in the Magistrates courts in Francistown. He was charged and whilst the case was pending he committed other offences culminating in his deportation to his country of birth, Zimbabwe. His modus operandi had been that he would scheme automated teller machine cards for different accounts in banks and swindle the owners of the money in those accounts. He was arrested several times and charged for offences under the Cyber Crime Act and Money Laundering under the Proceeds of Serious Crimes Act.

(b) Observations on the implementation of the article

781. The reviewing experts commend Botswana for the presence of cybercrime legislation. Based on the discussions during the country visit, the reviewers were satisfied with Botswana's efforts to implement the provision under review.

(c) Successes and good practices

782. Although not an example of direct law enforcement cooperation in the investigation of corruption-related offences, the reviewers positively noted the establishment of the Commonwealth Africa Anti-Corruption Centre (CAACC) in the DCEC by agreement between the Government of Botswana and the Commonwealth Secretariat signed in Gaborone on 25 February 2013 to address common challenges faced by African anti-corruption agencies in implementing their anti-corruption mandate. The mandate and terms of reference of the Centre were provided to the reviewers, which provide for the Centre's role in strengthening the capacity of anti-corruption agencies in 19 Commonwealth African countries. The Centre provides one-stop-shop for training and capacity-building initiatives for the agencies through the following:

- Training and development in investigations, prosecution, professional ethics, corruption prevention and management, public awareness and monitoring and evaluation;
- Peer reviews;
- Twinning and other exchanges;
- Research;
- Monitoring and evaluation, including rudimentary baseline and annual surveys;
- An annual review meeting; and
- Communications, including: newsletters, an award for innovation, and providing solidarity and mutual support among Association members

(d) Challenges, where applicable

783. Botswana has identified the following challenges and issues in fully implementing the article under review:

1. Inter-agency co-ordination: Coordination of efforts between several agencies within and without the country.
2. Competing priorities

(e) Technical assistance needs

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

1. Capacity-building programmes for authorities responsible for cross-border law enforcement cooperation
2. Technological assistance: Currently INTERPOL databases are available but those of other organs seem to be lagging behind.
3. Development of an action plan for implementation

785. Botswana indicated that none of the forms of technical assistance previously mentioned have been provided.

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

786. Botswana provided the following information.

787. In terms of the applicable bilateral or multilateral agreements or arrangements, Botswana mentioned the SARPCCO agreement, as well as cooperation through INTERPOL. There are no other official agreements between other countries on how they should conduct joint investigations.

788. Botswana referred to a joint investigation involving money laundering in the following case.

The State v Patrick Cole and Others (Central Medical Stores)

As noted under UNCAC article 31, the case involved the predicate crime of theft in Botswana. Money that was laundered in South Africa by deposits in South African banks was recovered through the MLA process, following a joint investigation and direct law enforcement cooperation with South African authorities in the investigation. Botswana indicated that it cooperated extensively in the investigation, which proved helpful in that a large portion of the proceeds were recovered.

789. Botswana indicated that in terms of joint investigation and joint investigative bodies, the South African Police, through INTERPOL has accommodated investigations in matters not related to corruption by joining their Botswana counterparts within South

Africa. This was important as Botswana officers would not have jurisdiction to unilaterally carry out investigations in South Africa.

(b) Observations on the implementation of the article

790. During the country visit, it was explained that Botswana conducts joint investigations through police-to-police arrangements. The Police have also entered into a Memorandum of Understanding with the police in Zimbabwe, though no other MOUs were described.

791. It was explained that there have been no joint investigations in corruption cases, but in money laundering cases as described above.

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

792. Botswana indicated that it has partially implemented the provision and provided the following information. The country subscribes to Roman-Dutch law, whereby electronic evidence is admissible, however with checks on its admissibility.

793. Currently, Botswana has proposed legislation in this area. The Electronic Evidence Bill is doing rounds in stakeholder departments as a form of consultation.

794. The DCEC's investigative powers are set out in Section 7, Corruption and Economic Crime Act.

Corruption and Economic Crime Act

7. (1) For the performance of the functions of the Directorate, the Director may -

- (a) authorise any officer of the Directorate to conduct an inquiry or investigation into any alleged or suspected offences under this Act;
- (b) require any person in writing to produce, within a specified time, all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any public or private body;
- (c) require any person, within a specified time, to provide any information or to answer any questions which the Director considers necessary in connection with any inquiry or investigation which the Director is empowered to conduct under this Act.

795. Wiretapping is not lawful in Botswana. However, evidence derived from other covert means, such as physical and technical surveillance, is admissible. The use of covert equipment is strictly controlled. Evidence obtained in this manner has, however, always been accepted Botswana's court as long as it was obtained procedurally.
796. Botswana also referred to SARPPCO arrangements and INTERPOL as possible channels for special investigations at the international level.
797. Botswana provided the following examples of implementation and statistics.

In the **State v Bathusi Moarabi** case the court did not definitively say that evidence from special investigative techniques is not admissible. The court only pointed out that there was no law governing its admissibility. The practice, however, has always been to admit if presented properly. In the case, the accused was arrested, having solicited a bribe from a member of the public. Technical officers were involved in the recording of the evidence, which was obtained in a sting operation.

798. Botswana indicated that almost 50 percent of the DCEC's cases are solved through sting operations and, as such, more often than not the evidence would include video and audio recordings.

The State v Bose Africa Senome. In this case there were video and audio recordings that were produced during the sting operation and used in the case at the domestic level.

799. In terms of the steps or action (and related time frame) that domestic or other authorities would need to fully implement the provision, Botswana indicated that consultation on the proposed law on electronic evidence is needed. The process has already started. The legal amendment would be an extended consultation process covering various stakeholders both internally and outside.

(b) Observations on the implementation of the article

800. The use of special investigative techniques is not comprehensively regulated by law in Botswana. However, it was explained during the country visit that the use of special investigative techniques and firearms is regulated by standing orders (Directives) by Botswana's Commissioner of Police and is also addressed in the DCEC's investigation manual.
801. It was further explained that law enforcement authorities in Botswana can use controlled delivery or undercover operations in domestic investigations as long as it does not amount to set-up. Moreover, the use of special investigative techniques in the context

of international cooperation can be done on a case-by-case basis, on special arrangements in consultation with the other State.

802. No statistics on cases where special investigative techniques were used has been collected.

803. Regarding the admissibility of evidence derived from special investigative techniques, it was confirmed during the country visit that the Criminal Procedure and Evidence Act is silent on electronic evidence. The reviewers welcome the proposed law on electronic evidence, which would provide greater legal certainty surrounding the admissibility of evidence derived from such techniques.

(c) Challenges, where applicable

804. Botswana has identified the following challenges and issues in fully implementing the article under review:

1. Inter-agency co-ordination
2. Specificities in our legal system
3. Limited awareness of state-of-the-art agreements or arrangements
4. Limited awareness of state-of-the-art special investigative techniques

(d) Technical assistance needs

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

1. Capacity-building programmes for authorities responsible for international cooperation in criminal/investigative matters
2. Capacity-building programmes for authorities responsible for designing and managing the use of special investigative techniques
3. Model agreement(s)/arrangement(s)
4. Summary of good practices/lessons learned

806. Botswana indicated that none of the forms of technical assistance previously mentioned have been provided.