



# UNODC

United Nations Office on Drugs and Crime

## United Nations Convention against Corruption

Self-assessment Name: UNCAC Review

Country: Botswana

Date of creation: 25/09/2012

Assessor: Directorate on Corruption and Economic Crime

Assessor Position: Director

Comments:

Completed self-assessment checklists should be sent to:

Corruption and Economic Crime Section  
Division for Treaty Affairs  
United Nations Office on Drugs and Crime  
Vienna International Centre  
PO Box 500  
1400 Vienna, Austria

Attn: PAPANIMITRIOU Panagiotis

Telephone: + (43) (1) 26060-4293  
Telefax: + (43) (1) 26060-74293  
E-mail: [uncacselfassessment@unodc.org](mailto:uncacselfassessment@unodc.org)

## A. General information

### A. General information

#### 1. General information

**Please briefly describe the legal, institutional and political system of your country.**

Adopted by Botswana at independence in 1966, the Constitution established a non racial democracy, maintaining freedom of speech, of the press and of association, and affording all citizens equal rights. The Constitution also provides for a republican form of Government headed by the President with three main administrative organs: the Executive, a unicameral Legislature and the Judiciary. Each of these organs is independent from other organs.

The Executive branch of government consists of the Cabinet headed by the President and is responsible for initiating and directing national policies through government ministries and departments. There are 16 Ministries each headed by a Cabinet Minister. Each ministry is divided into departments and divisions with different areas of responsibility.

The Legislative branch comprises of the National Assembly and the President. The National Assembly is the supreme law making authority in the country and it acts in consultation with the House of Chiefs on tribal matters. The House of Chiefs advises on matters affecting customs and tradition. This long lasting democratic “*Kgotla*” system, passed on from generation to generation has provided a strong base on which to build, with free political debate encouraged at all levels.

The Constitution provides that the National Assembly is made up of fifty-seven (57) directly elected members and four (4) Specially Elected members and a Speaker of the National Assembly.

Since independence Botswana has held peaceful, free and fair elections in 1965, 1969, 1974, 1979, 1984, 1989, 1994, 1999, 2004 and 2009. The next general election is in 2014. The ruling Botswana Democratic Party (BDP) has so far won every election, with four changes of President since independence in 1966. There is a “first past the post” system.

There are 11 Opposition Parties registered with the Independent Electoral Commission (IEC) in Botswana. In the 2004 general elections, there were 552,849 registered voters. Out of this number, 421,272 voted, representing 76.2 per cent of the people that voted. The Opposition got 23 per cent of parliamentary seats, which was an increase from 16 per cent obtained in the 1999 general elections, and equivalent to 40 per cent of the popular vote.

The third organ of government is the Judiciary which is presided over by the Chief Justice and consists of the Court of Appeal, the High Court and

Magistrate Courts. Independent of the Executive and the Legislature organs, the Judiciary interprets and administers the law.

The power to appoint judges and magistrates vests in the President acting in accordance with the advice of the Judicial Service Commission.

There is also the Industrial Court whose judges are appointed by the President in terms of the Trade Dispute Act.

In addition to the above structures, there is also the Office of the Ombudsman and the Land Tribunal.

The Ombudsman is mandated in terms of the Ombudsman Act to investigate complaints of injustice or maladministration in the Public Service. The Ombudsman's jurisdiction extends to the investigation of alleged violations of constitutionally enshrined fundamental rights and freedoms. In the event of non-compliance with the recommendation the Ombudsman is obliged to make a special report to the National Assembly.

Disputes relating to land are referred to the Land Tribunal for settlement and all decisions of the Land Tribunal are appealable to the High Court and Court of Appeal.

There are other quasi judicial bodies such as the Tax Board and Licensing Board which deal with quasi judicial matters.

### **Legal system**

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.

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.

The common law is made up of statute and precedents, which are cases upon which the High Court and Court of Appeal have ruled.

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.

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.

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.

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.

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.

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.

### **The Local Currency**

The local currency is the Pula and Thebe. Pula is a Setswana word meaning "rain" and the "thebe" is a lower denomination meaning "shield." A pula is therefore subdivided into 100 thebe. The currency is so named the pula as rain or water is a scarce commodity in the country as it is covered mostly by the Kalahari Desert. Pula or rain is therefore a valuable commodity thus the name. Rain is also considered a blessing. The Pula was introduced in 1976 replacing the South African Rand. Despite being devalued in May 2005, the pula remains one of the

strongest currencies in Africa. **One (1) USD is equivalent to P8-54. (18th July 2013 Exchange rate)**

**Have you ever assessed the effectiveness of anti-corruption measures taken by your country? If available, please attach any relevant documents (e.g. gap analysis, reports of other international and regional review mechanisms, policy studies).**

- Review was also done internally by involving a consultant. (See the De Speville Report attached otherwise known as the Review of Botswana's National Anticorruption Strategy and its Implementation by a delegation of the European Commission)
- Botswana is a member of the Eastern and South African Anti Money Laundering Group (ESAAMLG). The most recent mutual evaluation report (11 February 2008) can be found at <http://www.esaamlg.org/reports/view>.
- 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 (AACAA).

**If applicable, please attach relevant draft bills, policies and/or other measures that you want to be taken into account in the present review**

A whistleblower protection law is being drafted.

**Proceeds and Instruments of Crime Bill**

**Corruption and Economic Crime Act amendment Bill ( this bill has since become law and is just awaiting publication in the government gazette.)**

**Anti Human Trafficking Bill**

**Botswana Public Service Anti Corruption Strategy**

**Please provide general information on the ratification and status of UNCAC in your country (use the "Use template answer" button in the answer field to see a generic text)**

Ratification of the Convention

Botswana acceded to the Convention on 27 June 2011 (C.N.424.2011.TREATIES-33). The Convention entered into force for Botswana on 27 July 2011.

### III. Criminalization and law enforcement

#### 15. Bribery of national public officials

##### 63. Subparagraph (a) of article 15

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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 1, Corruption and Economic Crime Act

"public officer" includes any person holding an office by election or appointment under any enactment or under powers conferred by any enactment, or in a company in which 51 per cent or more of the equity shares are owned by the Government of Botswana;

Section 2, Penal Code

"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;

Section 23, 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 un-conditional, of any valuable consideration within the meaning of the provisions of any of the preceding paragraphs.

Section 24(2), 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(2), 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, Corruption and Economic Crime Act, 1994

If, after a public officer has done any act as such officer, any other 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(2), 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 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;

Please provide examples of cases and attach case law if available.

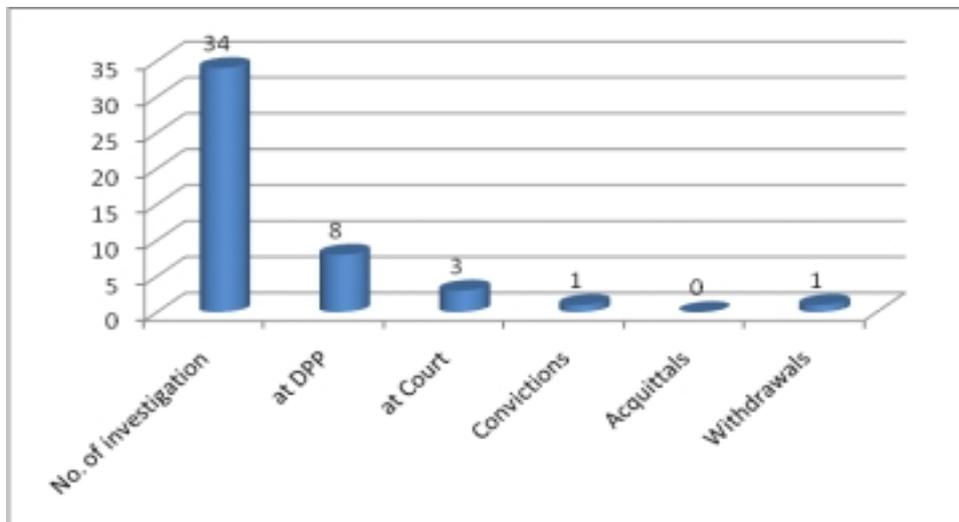
**The State v Xiaoming Wang and Another MCHLB 000193/11.**

The matter as cited earlier 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.

If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.

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

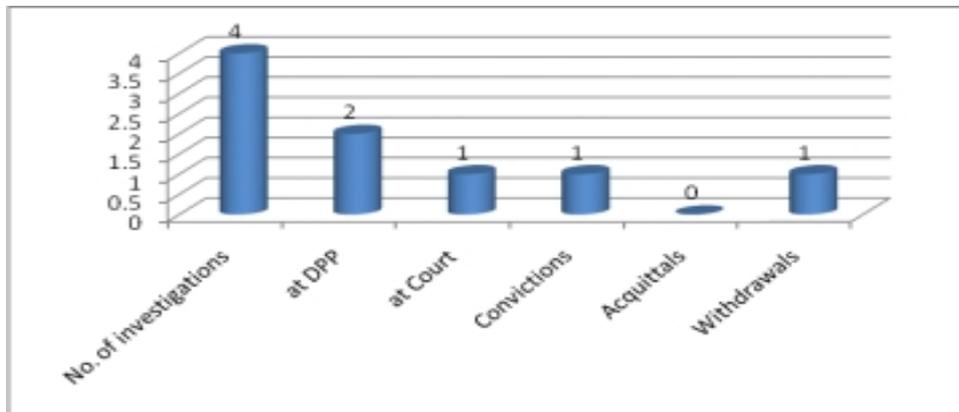
No. of investigation at DPP at Court Convictions Acquittals Withdrawals 34 8 3 1 0 1



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) convictions and no acquittals.

**Section 25(2)**

No. of investigations at DPP at Court Convictions Acquittals Withdrawals 4 2 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. Botswana's peculiarity is that she had the laws in place even before she ratified the Convention and therefore cases would appear from as far back as before the implementation of the Convention.

#### 64. Subparagraph (b) of article 15

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 23, 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 un-conditional, of any valuable consideration within the meaning of the provisions of any of the preceding paragraphs.

Section 24(1), 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(1), 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, 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(1), 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.

Please provide examples of cases and attach case law if available.

**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 case of soliciting and offering to accept a bribe by a public officer. The Police detective here had solicited and accepted an amount of P5000-00 (P1.00 is equivalent to from an accused who had acquired a drivers licence fraudulently. 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 licenced and that all the bye laws were adhered to. He entered a bar which had an expired licence. The accused then requested the bar tender 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.

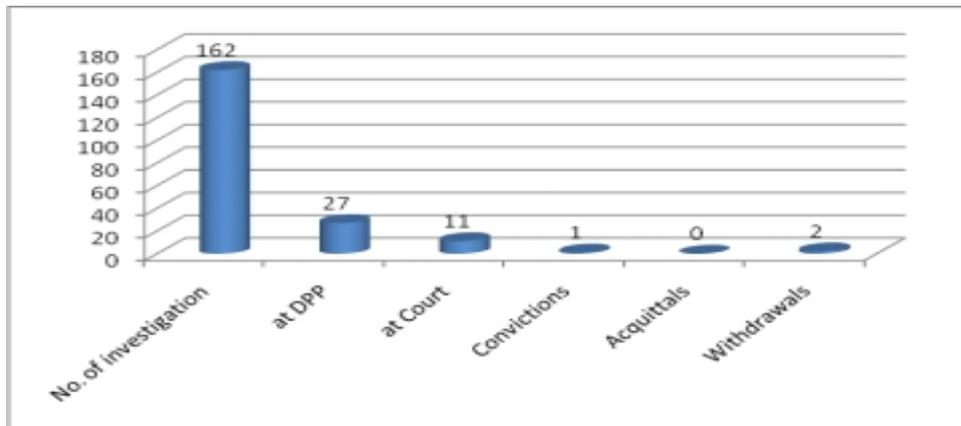
**The State v Tebogo Mokoko 000004/10**

The accused person was a police officer who when on patrol realised 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.

If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.

**Section 24(1)**

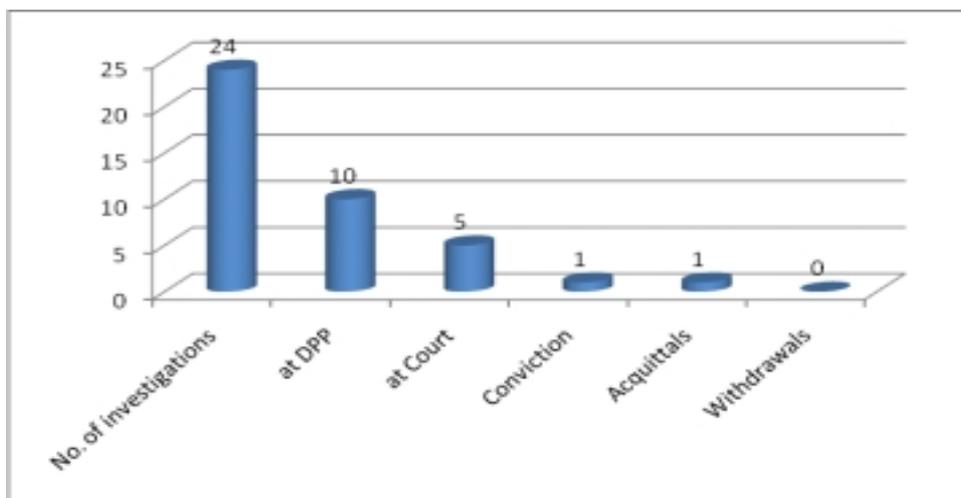
No. of investigations at DPP at Court Convictions Acquittals Withdrawals 162 27 11 1 0 2



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 conviction while 2 (two) were withdrawn.

**Section 25(1)**

No. of investigations at DPP at Court Conviction 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 for consideration. 5 at courts and it secured conviction, and ten (10) cases out of thirty four were sent for prosecution consideration. There was 1 (one) convictions and 1 (one) acquittal.

**65. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

**(Y) Yes**

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.

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

**(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)**

Limited human Resources at the DPP.

**(LICAP) Limited capacity (e.g. human/technological/institution/other; please specify)**

Capacity building for both investigators, DPP officers and members of the judiciary.

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

**(PLAN) Development of an action plan for implementation**

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

**(P) Yes, in part**

**Who provides such assistance?**

The Australian and the New Zealand governments provided experts who are currently providing technical assistance but are limited only to the DCEC personnel. The Australian expert's contract ends in December whilst that of the New Zealand ends in September 2014.

**If such assistance is provided in the context of a programme or project, please provide a description and attach the relevant document(s).**

The New Zealand expert is the current Deputy Director Training and Development. The Australian expert is dealing with issues of capacity building

*Would the extension and/or expansion of such assistance help your country adopt the measure(s) described in the article under review? (Check one answer)*

**(P) Yes, in part**

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

### **66. Paragraph 1 of article 16**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 2(1), 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-

- (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(b), 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.

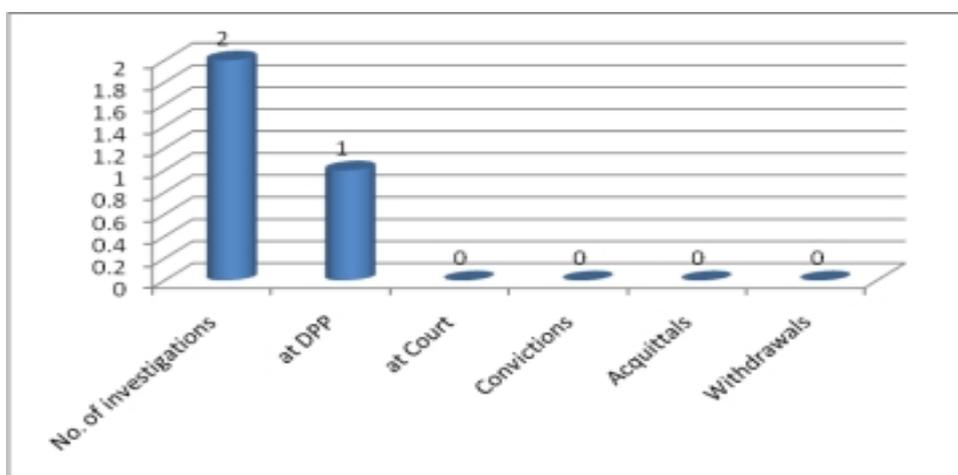
**Please provide examples of cases and attach case law if available.**

There has been no case handled relating to this Article. Section 4 of the Diplomatic Privileges and Immunities Act (and the Schedule thereat) provides that employees and other staff of international organizations are immune from prosecution as and 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.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

**Section 99**

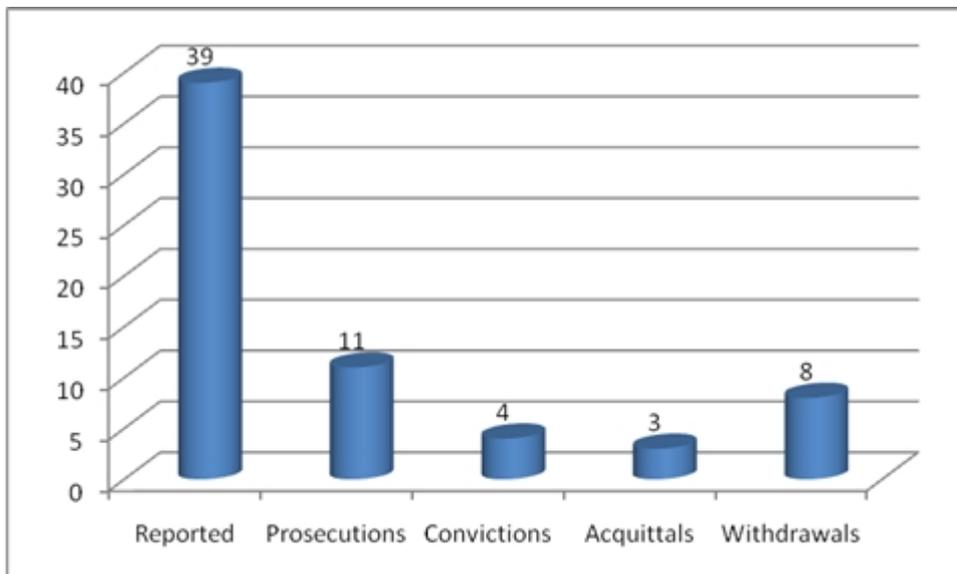
No. of investigations at DPP at Court Convictions Acquittals Withdrawals 210000



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

**Section 99 (b)**

No. of Cases report	Prosecutions	Convictions	Acquittals
Withdrawals	3911438		



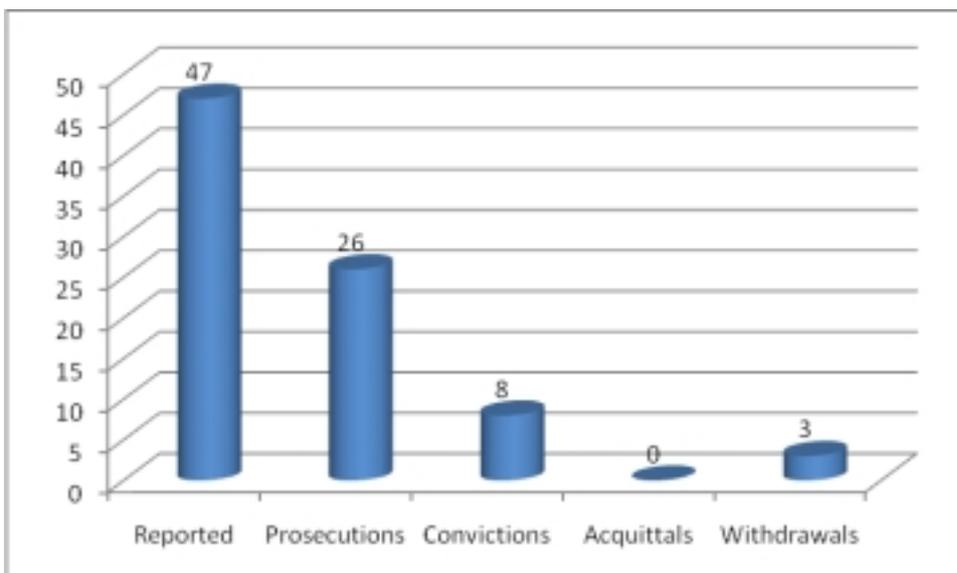
Thirty nine cases were reported and charged under Section 99(b) of the Penal Code. 11 cases were sent to the DPP for prosecution consideration, and 4 of the cases secured convictions while 3 were acquitted and 8 withdrawn.

N.B. All these cases were not related to international accused persons but these were local people. They further did not relate to International Organizations as Botswana law enforcement have always looked.

The Police have as well dealt with this section more as it directly falls under their mandate. The statistics are as follows;

**Section 99(a)**

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 Codes 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.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana has the law but is not in full compliance since matters involving members or employees of international organizations have always been treated in this country with diplomacy. The Diplomatic Immunities and Privileges Act has a schedule where the list of individuals in international organizations who qualify for immunity is shown. If there is to be full compliance then the law relating to such immunities has to be amended. It is however submitted that this is highly unlikely since the Diplomatic Immunities and Privileges Act is aligned to the Vienna Convention on Diplomatic Privileges.

## **67. Paragraph 2 of article 16**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

Laws have been promulgated to cater for charges under this Article, viz section 2(1) and section 99 (b) of the Penal Code.

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 2(1), 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(a), 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.

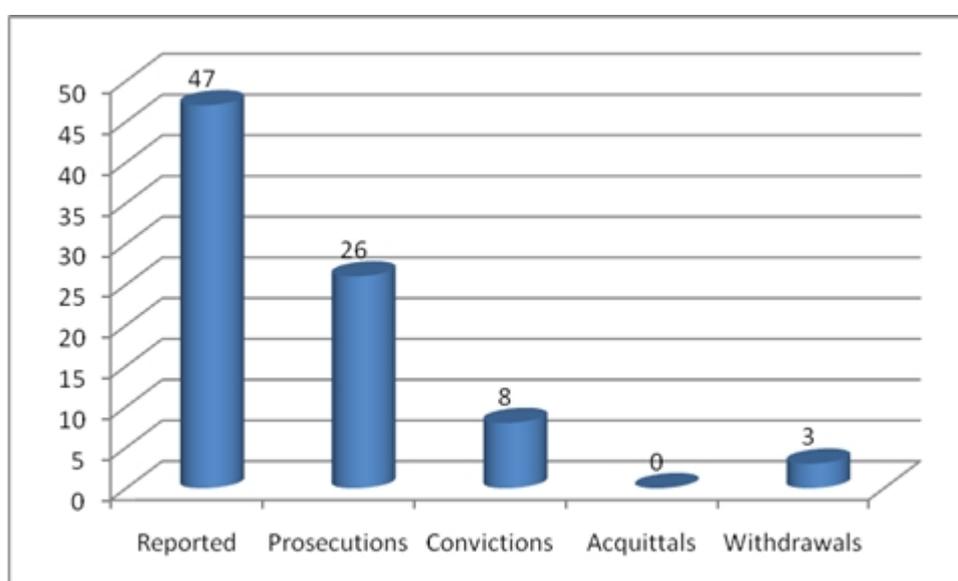
**Please provide examples of cases and attach case law if available.**

There is no case law on this matter

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

**Section 99(a) (For the years 2010-2011)**

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



There were 47 cases registered in different Police Stations in accordance with section 12 of the Corruption and Economic Crime Act between the period 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 we depend 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 as a charge register number.**

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

The Diplomatic Immunities and Privileges Act CAP 39:01 section 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 we then can not fully comply with the Article.

## **68. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

**(Y) Yes**

The assistance needed here would relate to training and funds to facilitate the training on how such issues relating to employees of International Organizations should be handled.

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

**(LICAP) Limited capacity (e.g. human/technological/institution/other; please specify)**

Limitations in skills

**(COMPRI) Competing priorities**

**(MYSYS) Specificities in our legal system**

**(INAD) Inadequacy of existing normative measures (constitution, laws, regulations, etc.)**

The law limits law enforcement agencies from fully complying with the article.

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

**(BEST) Summary of good practices/lessons learned**

**(MOLEG) Model legislation**

**(DRAFT) Legislative drafting**

**(SITE) 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 novel to the country and there is need to train people on issues such as Financial Investigations, Tracing of Proceeds of Crime, Computer Forensics and Cyber Crime.

**(PLAN) Development of an action plan for implementation**

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

**(N) No**

## **17. Embezzlement, misappropriation or other diversion of property by a public official**

## 69. Article 17

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 102, 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, 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;

### 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 ) t he 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) m akes, or is privy to making, any false entry in any such book, document, or account, or

( iii) o mits 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.

**Please provide examples of cases and attach case law if available.**

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 **The State v Tourism Development Consortium and others.**

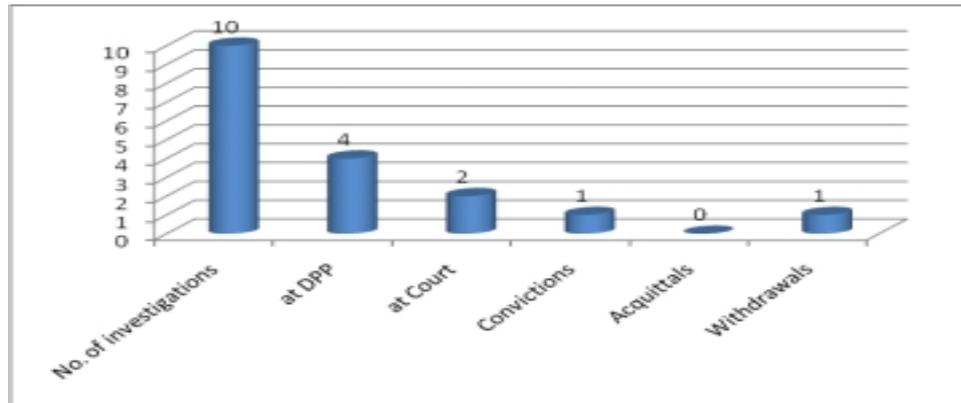
In this case a certain Louis Goodwill Nchindo had acquired a plot from the Debswana mining company. He was required by law to pay transfer duty to the government. Instead of paying the transfer duty the accused person just caused the property to be transferred to his company. He was duly charged for, among others, Cheating the public revenue under section 33 of the Corruption and Economic Crime Act. 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 Corruption and Economic Crime Act. See Appeal judgement **CLHLB 000143/10** in the case of the same name.

Other examples include a case of stealing by public service  
**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

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

**Section 33**

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

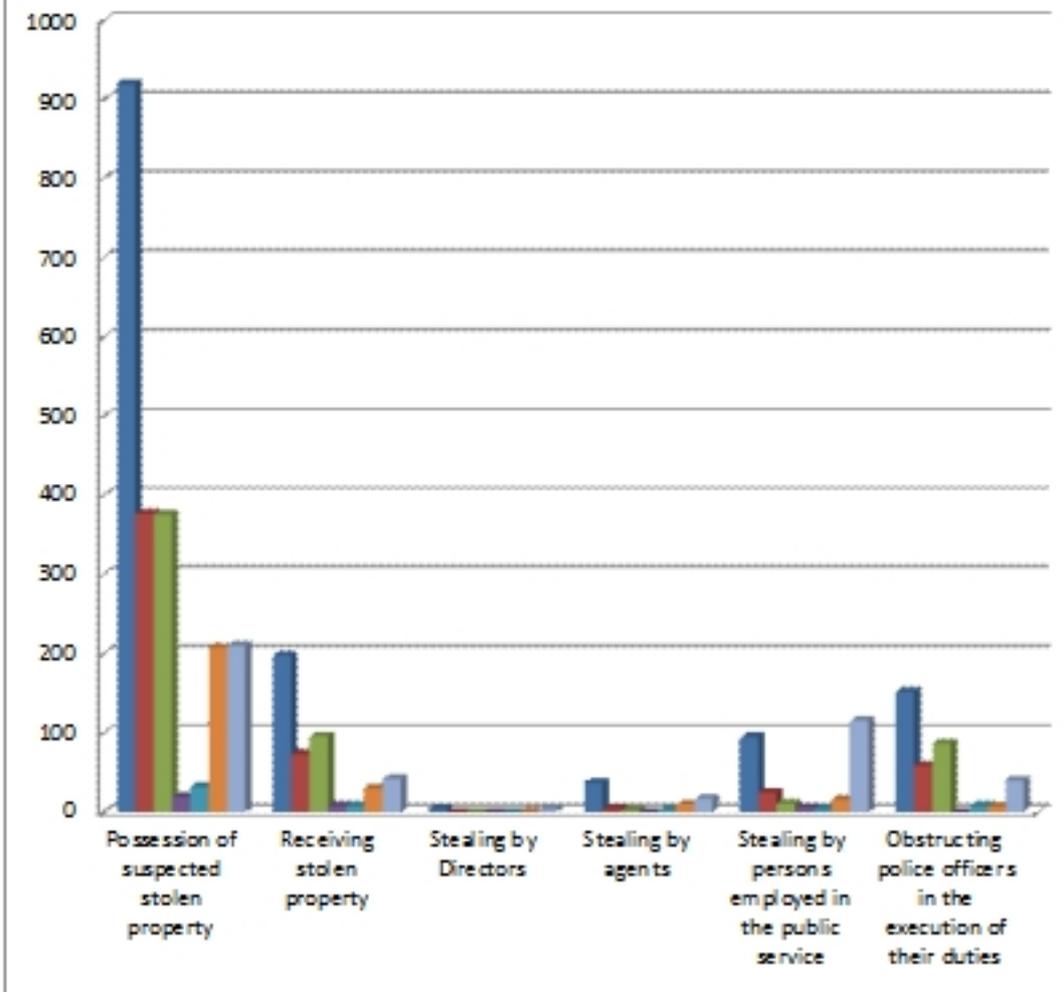


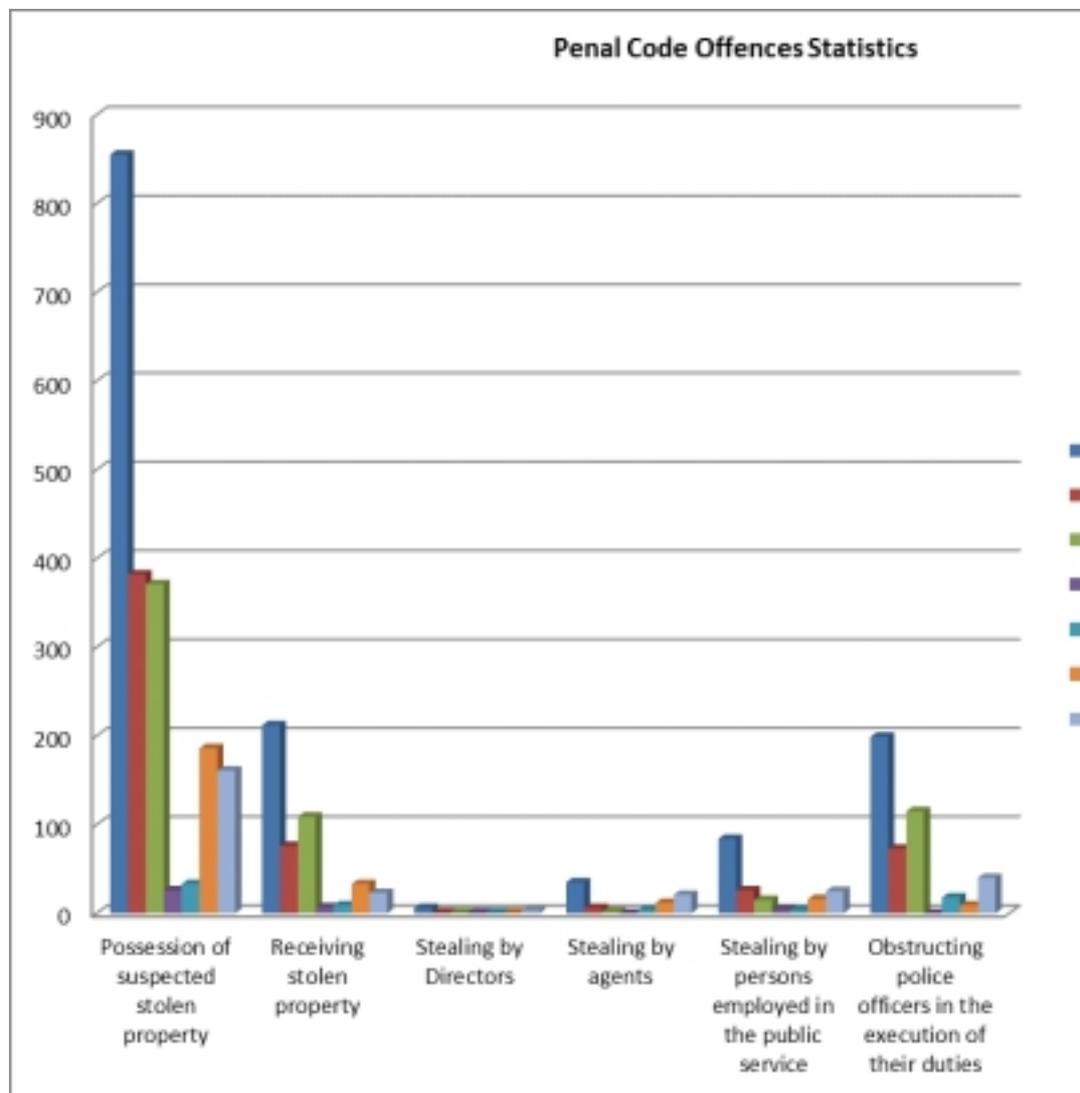
There were 10 investigation cases charged under Section 33 of CECA in 2010 and 2011, and 4 (four) cases were sent to the DPP. There were 2 (two) cases at court and 1 (one) case secured conviction while there was 1 (one) withdrawal and no acquittal.

Under this section we have cases that have been prosecuted but fall under a different period to the one under study. Several cases have been prosecuted since the promulgation of the Act.

Statistics on section 103, 269,276,277, 278,279.322.323, 324 and 325 of the Penal Code relating to this Article:

STATISTICS 2011





The bottom chart represents the 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 carried forward matters from the previous years not necessarily those under study.

## 70. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## 18. Trading in influence

### 71. Subparagraph (a) of article 18

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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 29(2), Corruption and Economic Crime Act

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(b) and (c), 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.

The Corruption and Economic Crime Amendment Act introduces a new section 25A which establishes the offence of Trading in Influence (See attached Amendment Act.)

The section reads;

section 25A-

(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.

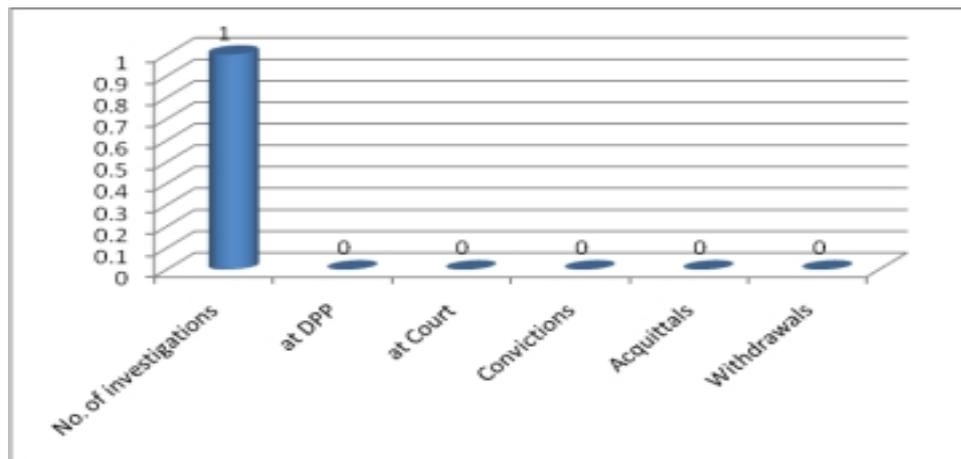
**Please provide examples of cases and attach case law if available.**

The only case available is that which is pending prosecution before the courts. One such case relates to section 384 of the Penal Code. This is a case where the investigation centred around 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.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

**Section 384**

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.

***Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.***

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

The Corruption and Economic Crime Bill has gone through Parliament and been approved. In this Act offences such as Traiding in Influence have been clearly outlined in the law. The Act is scheduled to be gazzetted soon after the Presidential assent. A request has been made to the Attorney General for the publication to be made extraordinary so that it becomes immediately operative on the day of the publication rather than wait for some future period after the publication.

## **72. Subparagraph (b) of article 18**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 101, 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(1), 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(a), 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.

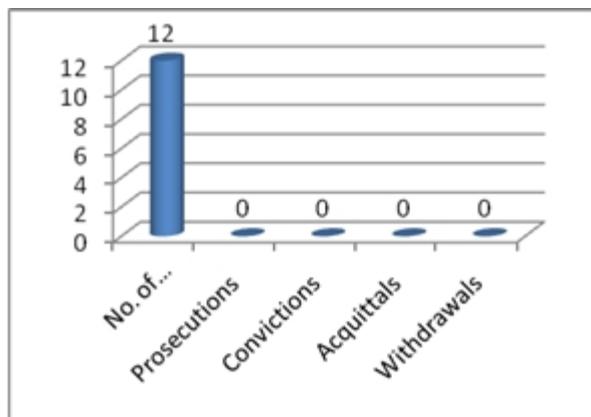
**Please provide examples of cases and attach case law if available.**

As stipulated elsewhere the charges that are currently pending prosecution relate to section 384 (a) of the Penal Code.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

**Section 29(1)**

No. of invests Prosecutions Convictions Acquittals Withdrawals 120000



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 brought forward from the previous years currently not under assesment.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

As stipulated earlier, the amendment to the Corruption and Economic Crime Act brings the country into full compliance. There is however no case to evidence implementation since the amendment is recent.

### 73. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## 19. Abuse of functions

### 74. Article 19

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 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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 104, 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, 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.

*The Amendment to the Corruption and Economic Crime Act brings in a new offence of Abuse of Office which is broader than the Penal Code offence (See attached Amendment Act).*

Section 24 A (1), Corruption and Economic Crime Amendment Act - 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.

**Please provide examples of cases and attach case law if available.**

Examples of cases:

This 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 22/05/2008, 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 is not readily available to the public. Source complains that this has disadvantaged other applicants from the public as evidently shown 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 for further tests at the Central Transport Organization. She then invited another personal friend to come as well but the driver latter person had never been part of the interviews. When another interview passed prior to her preferred candidate she refused to collect this other person's results and only went to collect those of the preferred candidate. The whole idea being that the preferred candidate be appointed. This was despite the fact that the Administrative Officer's preferred candidate had never gone through interviews as is procedural. 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. This is a public body and also a body corporate. An entity called the Okavango Community Trust applied for permission to use land for some purpose and this did not meet the favour of the Board. Mr Pitse then used his position as the Board Secretary to write the

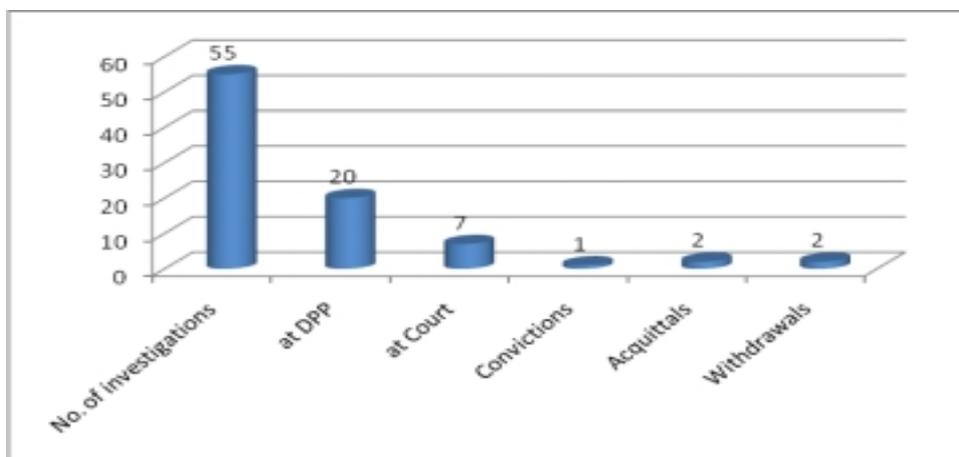
Trust a letter and state that their request had been approved. It was suspected that he had been given some valuable consideration in line with section 24(1) of the Corruption and Economic Crime Act but no evidence was found to exist to support this. He was therefore charged with abuse of office under section 104 of the Penal Code and the case is currently awaiting judgment.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

Statistical data is as enunciated on the tables below:

**Section 104**

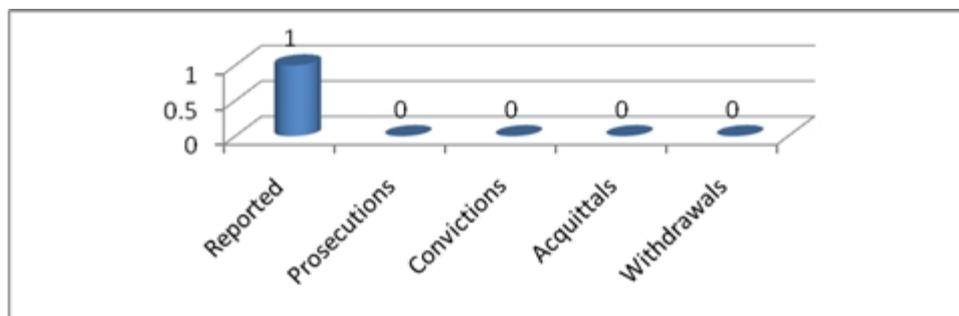
No. of investigations at DPP at Court Convictions Acquittals Withdrawals 55 20 7 1 2 2



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 as well are that not all the investigated cases were sent to DPP, not all were prosecuted as some are ultimately closed in-house without recourse to the DPP.

**Section 100**

No. of Cases reported Prosecutions Convictions Acquittals Withdrawals 10 0 0 0 0



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

## 75. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)

The latest amendment of the Corruption and Economic Crime Act would require raising awareness on the Act to the relevant stakeholders and even the public. This therefore means there will be need for resources in terms of finances and technical support.

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(PLAN) Development of an action plan for implementation

The Amendments need to be implemented and therefore the need for an action plan on the new provisions.

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## 20. Illicit enrichment

### 76. Article 20

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

There is compliance in terms of having put the legislation in place. The challenge faced by Botswana relates to staffing constraints where there is no dearth of experience in Financial investigations and tracing assets and their acquisition.

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 34, 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

**Please provide examples of cases and attach case law if available.**

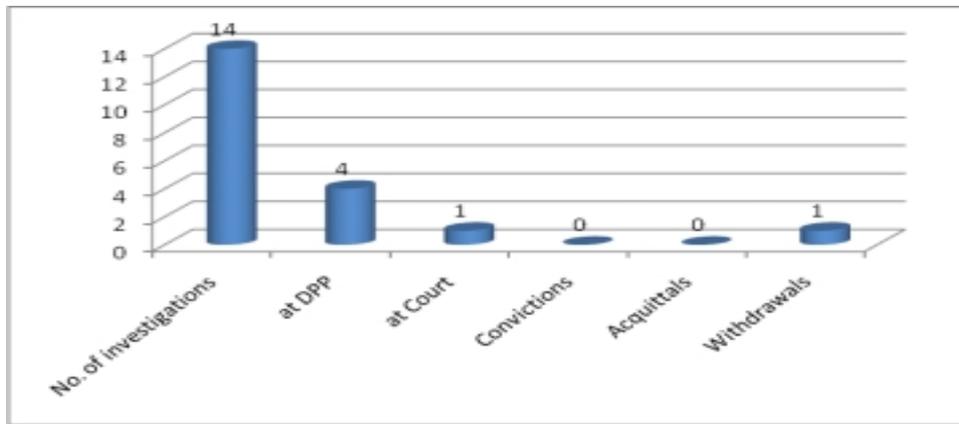
**Examples: The State v William**

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

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

**Section 34**

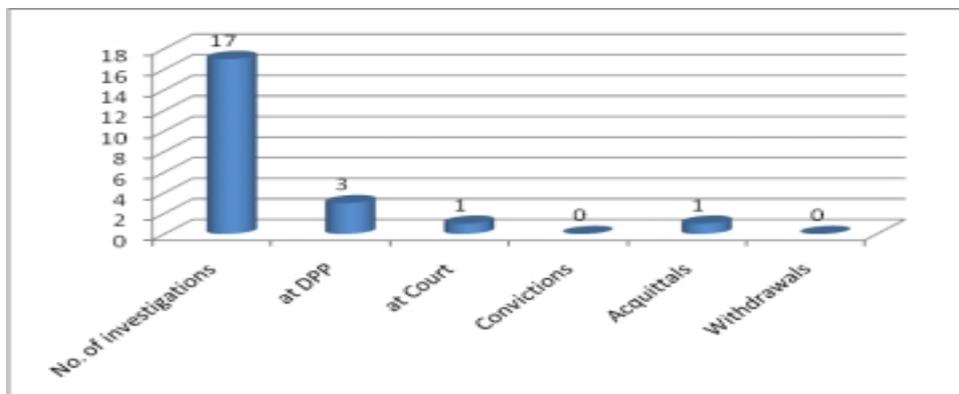
No. of investigationsat DPPat CourtConvictionsAcquittalsWithdrawals1441001



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

**Section 34(1)**

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

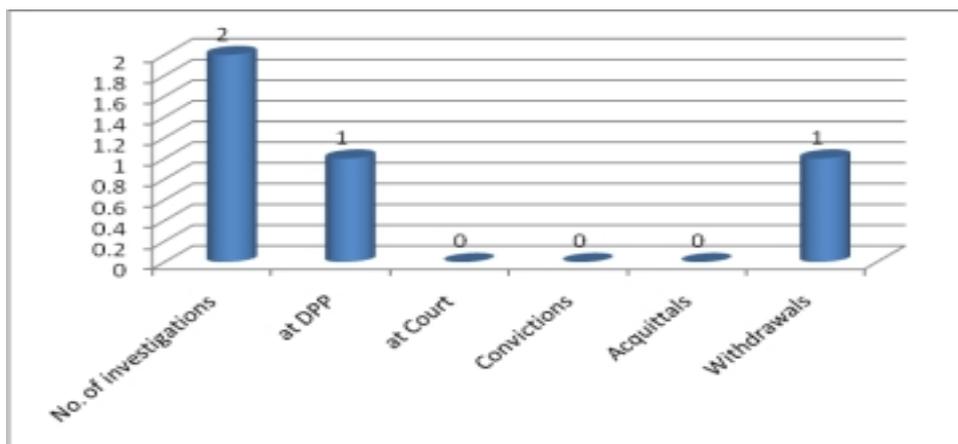


There were 17 investigation cases under Section 34(1) of the Corruption and Economic Crime. Three

(3) cases were sent to DPP. There was 1 (one) at court and 1 acquittal. There were no convictions and withdrawals. This means that the rest have either been closed as undetected or are still **investigations.**

**Section 34(2)**

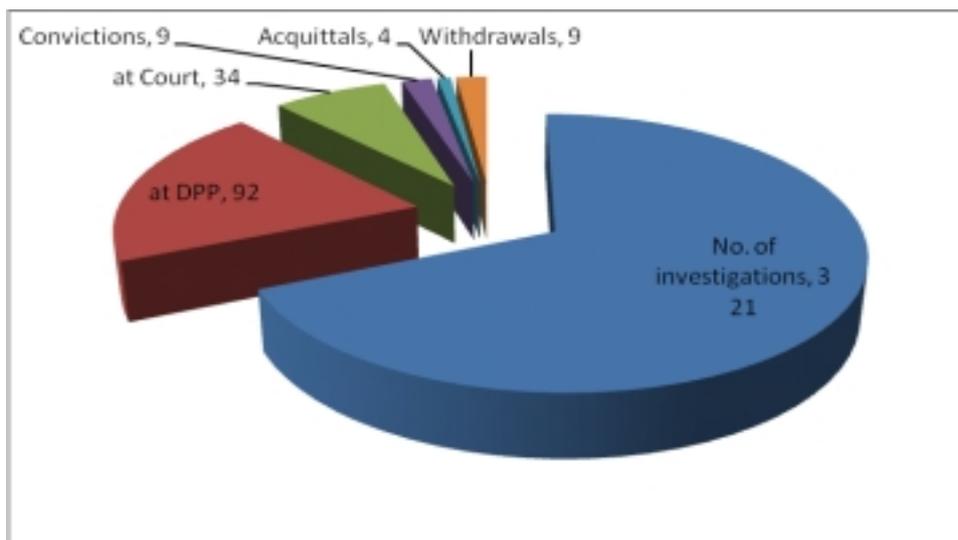
No. of investigations at DPP at Court Convictions Acquittals Withdrawals 2 1 0 0 0 1



Two investigation cases were charged 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.

**Overall - Corruption and Economic Crime Act Sections**

No. of investigations at DPP at Court Convictions Acquittals Withdrawals 32 19 23 4 9



Looking at the overall investigation cases charged under the Corruption and Economic Crime Act in 2010 and 2011, it shows a total of 321 matters for investigations, and out of 321, 92 cases were sent to Directorate of Public Prosecutions 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. Backlog of cases at the DPP causes concern as it takes time for cases to be resolved.

There are other investigation cases charged under other sections of the Corruption and Economic Crime Act (CECA), Penal Code and Proceeds of Serious Crime (POSCA) that are not incorporated in the UNCAC Self Assessment tool.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana is partly compliant but there need to be an improvement on the capacity of the officers tasked with investigation of matters falling under this Article.

## **77. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

**(Y) Yes**

The assistance would relate to training and sharing of experiences.

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

**(LICAP) Limited capacity (e.g. human/technological/institution/other; please specify)**

Officers are not fully conversant with investigation of offences under this Article.

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

**(BEST) Summary of good practices/lessons learned**

This will help in the best way to approach investigations of this nature and therefore equipping officers of the DCEC

**(SITE) 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.

**(PLAN) Development of an action plan for implementation**

As above

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

**(P) Yes, in part**

**If such assistance is provided in the context of a programme or project, please provide a description and attach the relevant document(s).**

See the scanned agenda of training from the Financial Intelligence Agency.

**Who provides such assistance?**

The US Treasury has been offering training assistance through the Financial Intelligence Agency where all stakeholders in the DCEC, the police and Reporting authorities were trained. Training was also through AUSTRAC, the Australian agency which ran workshops for concerned parties.

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

In 2013, the US Department of Justice through the Financial Intelligence Agency offered technical Assistance on the area of "Financial Investigative Skills for Intellectual Property and Other White Collar Crimes". The workshop was held in Capetown, South Africa and was attended by other countries in Africa. (Soft copy of the program is attached)

*Would the extension and/or expansion of such assistance help your country adopt the measure(s) described in the article under review? (Check one answer)*

**(Y) Yes**

## **21. Bribery in the private sector**

### **78. Subparagraph (a) of article 21**

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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 383, 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(b) and (c), 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(2), 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 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 or 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;

**Please provide examples of cases and attach case law if available.**

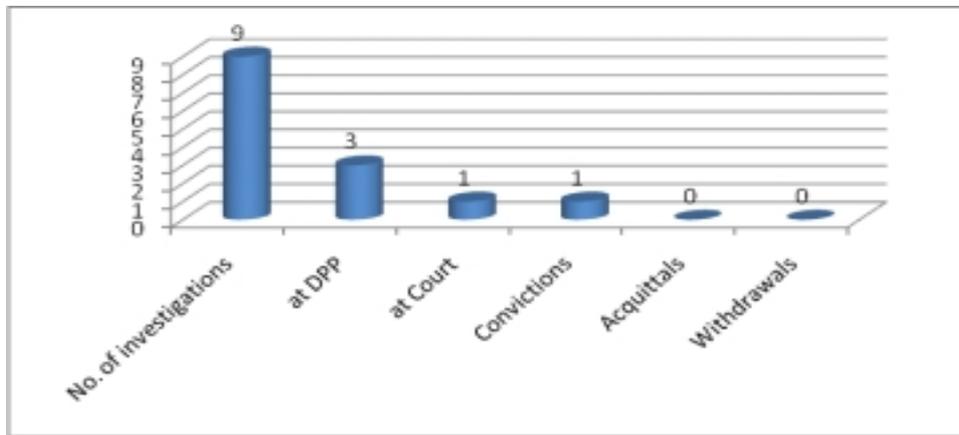
**The State v Mopoloki Kalasi CMMVL 000146/12**

The accused person was a clerk with a local University, Limkokwing University of Creative Technology. He solicited and accepted bribes from students who had failed their examinations and thereafter altered the results to purport that those students had passed. He was arrested and charged under section 28 (1) whilst the students were also charged for offering a bribe to a private sector employee so that he act in the manner he did. The students were ultimately used as accomplice witnesses.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

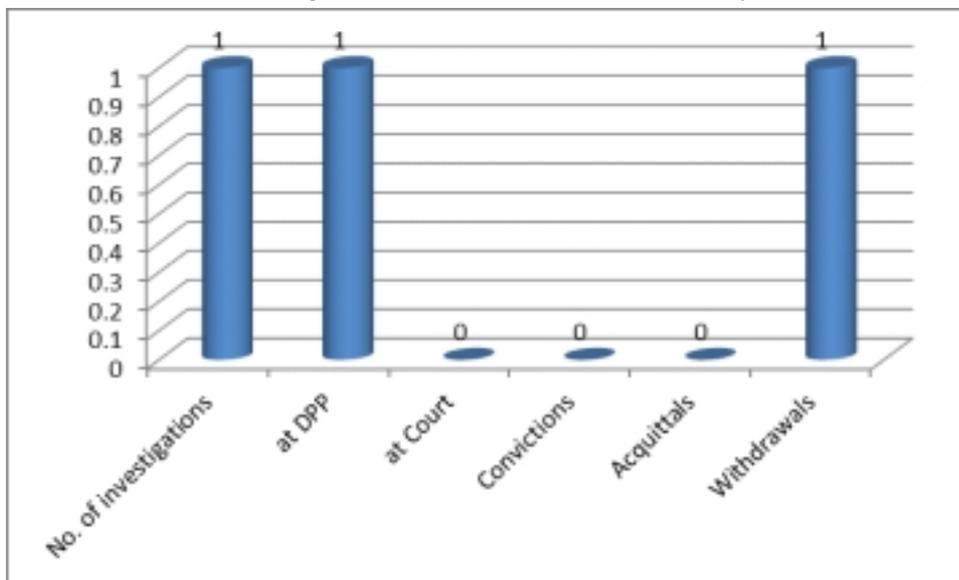
**Section 28(2)**

No. of investigations at DPP at Court Convictions Acquittals Withdrawals 931100

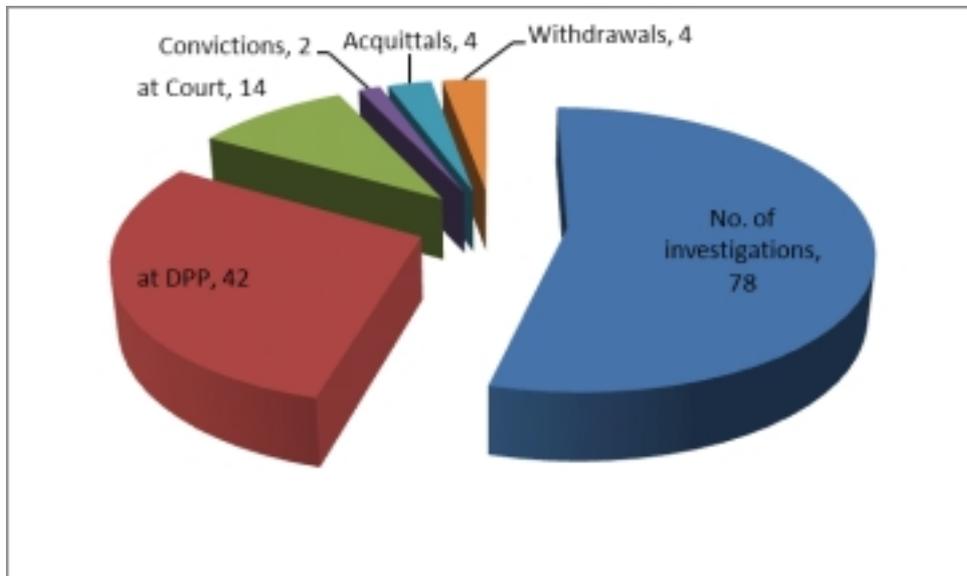


Nine investigation cases were charged under Section 28 (2) of the Corruption and Economic Crime Act. Three cases were sent to the DPP for prosecution consideration and one case secured conviction. There were no acquittal and withdrawals. The remainder are still either pending closure inhouse or closed without being referred to the DPP.

Section 384  
 No. of investigations at DPP at Court Convictions Acquittals Withdrawals 1 0 0 1 0 0 1



Overall - Sections  
 No. of investigations at DPP at Court Convictions Acquittals Withdrawals 7 8 4 2 1 4 2 4 4



The above statistics indicate that there were 78 investigation cases charged under the stipulated Penal Code sections. Thirteen cases were sent to DPP for advise and there was one conviction.

## 79. Subparagraph (b) of article 21

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

Legislation has been promulgated to comply with this Article

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 383, 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(a), 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(1), 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 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.

Please provide examples of cases and attach case law if available.

Examples of cases:

**The State v Mompoloki Kalasi CMMVL 000146/12**

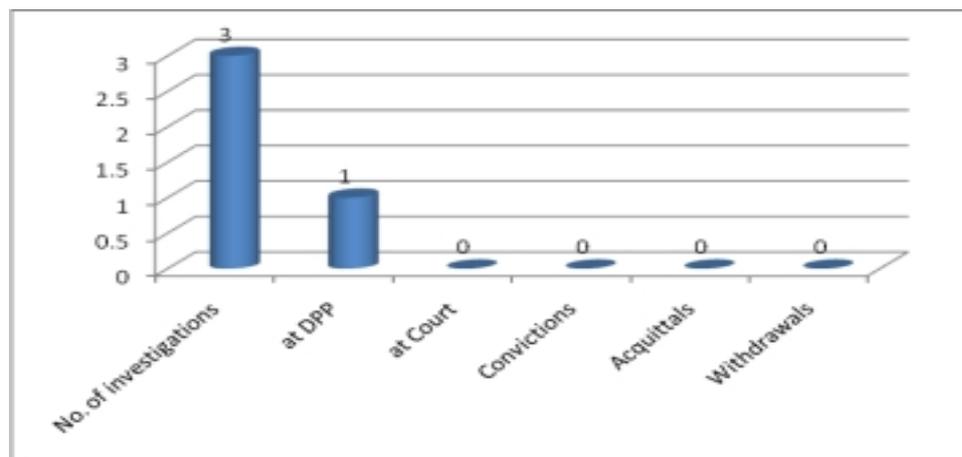
The accused person here was an employee of an institution of higher learning, the Limkokwing Colledge of Creative technology which is a private institution. He was employed as registry clerk. He solicited and got paid by students of the institution who had failed their examinations so that in return he altered records to pass the students. He had at the time of arrest recieved 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.

If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.

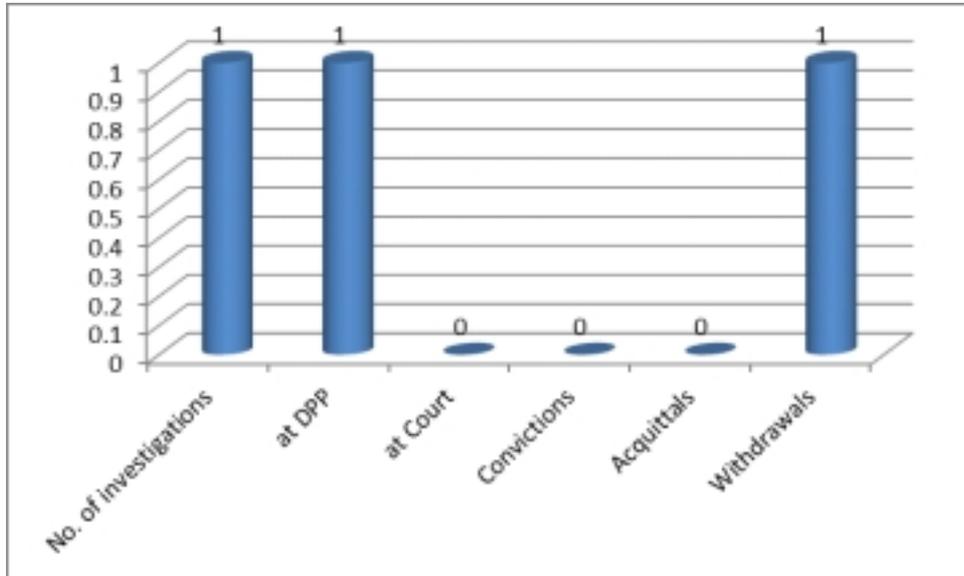
See the tables hereunder:

**Section 28(1)**

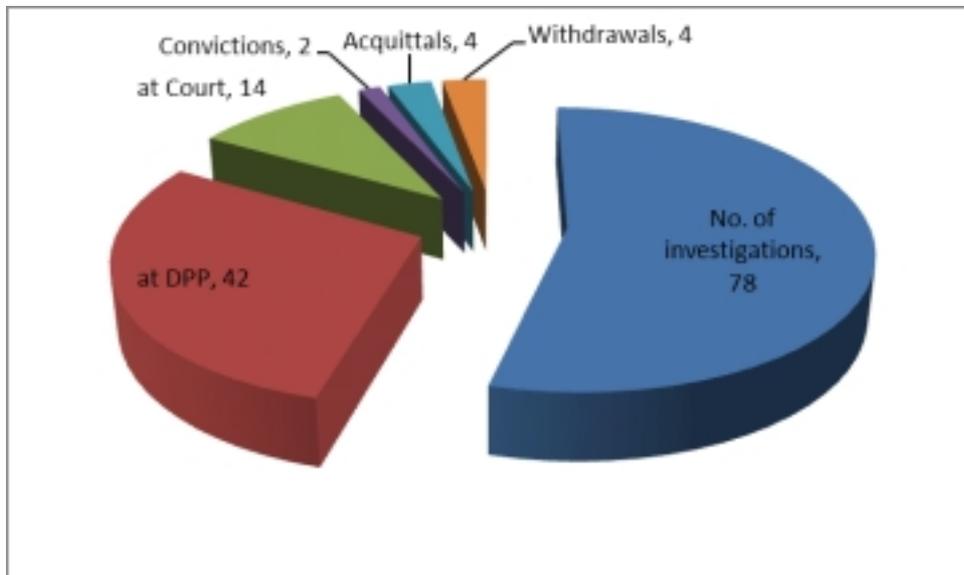
No. of investigations at DPP at Court Convictions Acquittals Withdrawals 3 1 0 0 0 0



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



Overall - SectionsNo. of investigationsat DPPat CourtConvictionsAcquittalsWithdrawals784214244



The above statistics indicate that there were 78 investigation cases charged under the stipulated Penal Code sections. Thirteen cases were sent to DPP for advise and there was one conviction.

### 80. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## 22. Embezzlement of property in the private sector

### 81. Article 22

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

The country is in compliance since laws have been promulgated.

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 322, Penal Code

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.

Further relevant provisions are as hereunder listed;

#### 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.

The collaboration between the private sector through the Botswana Confederation of Commerce Industry and Manpower on the one hand and the DCEC has helped come up with 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.

**Please provide examples of cases and attach case law if available.**

Examples of cases:

1. Under section 277 of the Penal Code there are several cases that have been investigated and prosecuted but 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 receipt 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.

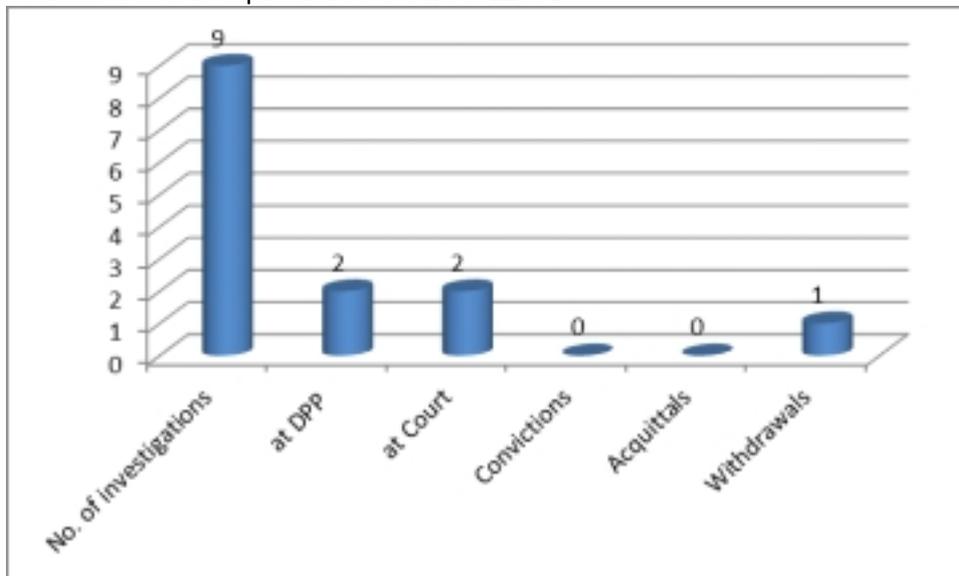
2. Another example under section 279 of the Penal Code is where on 06/10/10, a victim reported that she engaged an agent to facilitate the sale of her four (4) plots. The suspect sold them all to the amount of P832 500 but gave the victim a cheque amounting to P210-000 with a difference of P628 500. He promised to pay the complainant the remaining balance but never fulfilled his promise.

The matter was ultimately reported to the police.

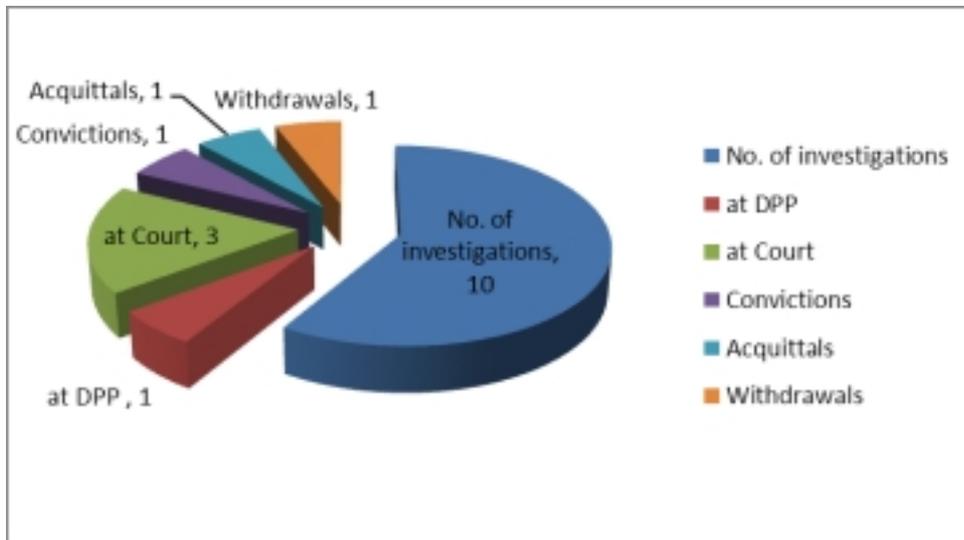
3. Under section 278 of the Penal Code on 15/04/09, a Director reported that his Co-Director withdrew the sum of P25 000-00 from the company account without his knowledge. The suspect connived with the former Director who resigned from the company without cancelling his signing powers at the Bank. Both suspects used company cheque book to withdraw the money. The matter was reported to the police and handled accordingly.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

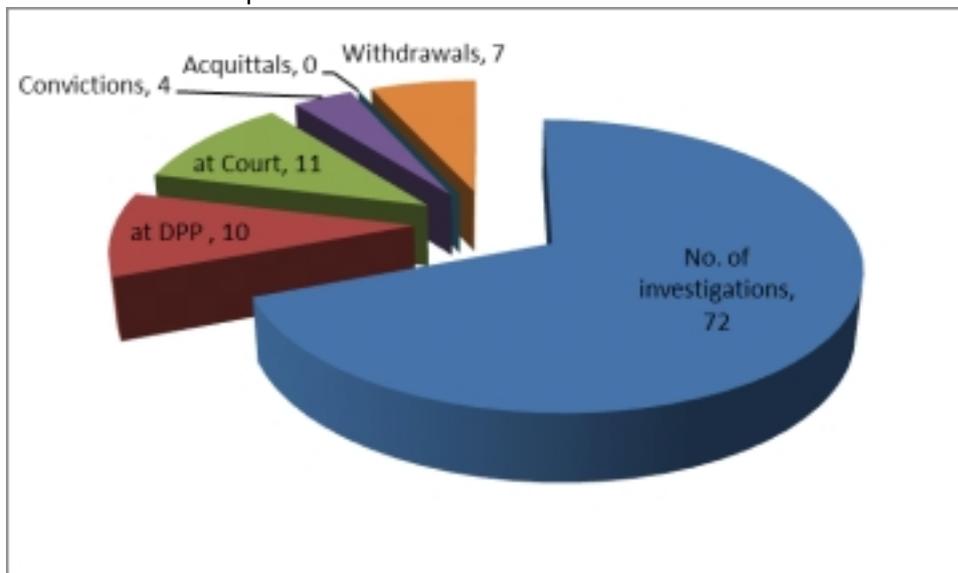
Section 277, Penal Code  
No. of investigations at DPP at Court  
Convictions Acquittals Withdrawals 922001



Section 278  
No. of investigations at DPP at Court  
Convictions Acquittals Withdrawals 1013111



Section 279, Penal Code  
 No. of investigations at DPP at Court  
 Convictions Acquittals Withdrawals  
 7 2 1 0 1 4 0 7



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

## 82. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## 23. Laundering of proceeds of crime

### 83. Subparagraph 1 (a) (i) of article 23

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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

The laws have been promulgated and enforcement is being effected.

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

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."

**Please provide examples of cases and attach case law if available.**

**The case of The State v Gabriel Kanjabanga**

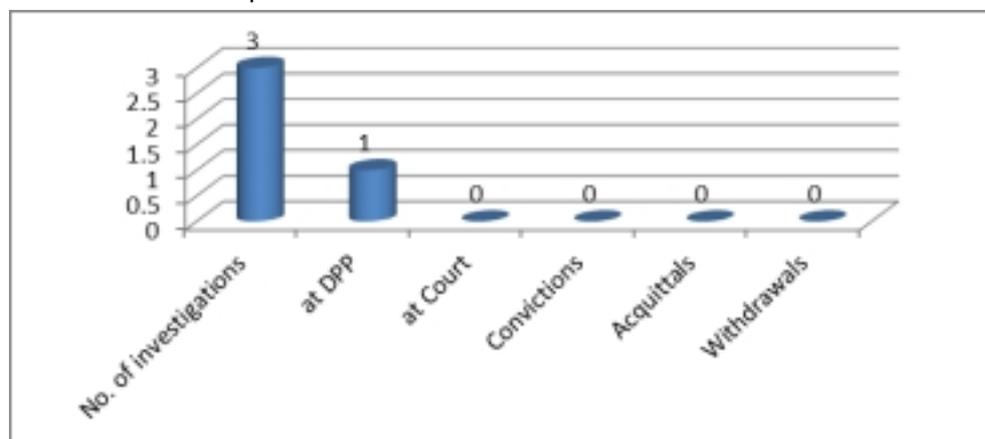
In this case the accused person is a practicing attorney. He stole money from a municipality by forging cheques which were ultimately drawn at a local bank. The attorney was ultimately arrested and investigated. Prior to the matter being registered in court the attorney approached the complainants and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

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

For statistical data see the table below. Note well though that the number of cases might not tally with the number of reported and tried cases owing to the fact that some cases are carried over from years that are not under assesment. Further, the number of reported and tried cases might be lower than the actual number as the Prosecutors in the country have most of the time relied on section 319 of the Criminal Procedure and Evidence Act to take proceeds of crime from offenders after the completion of the trial.

There were three investigation cases charged under Section 14 of the Penal Codes. There were no cases sent to the DPP for advice.

**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

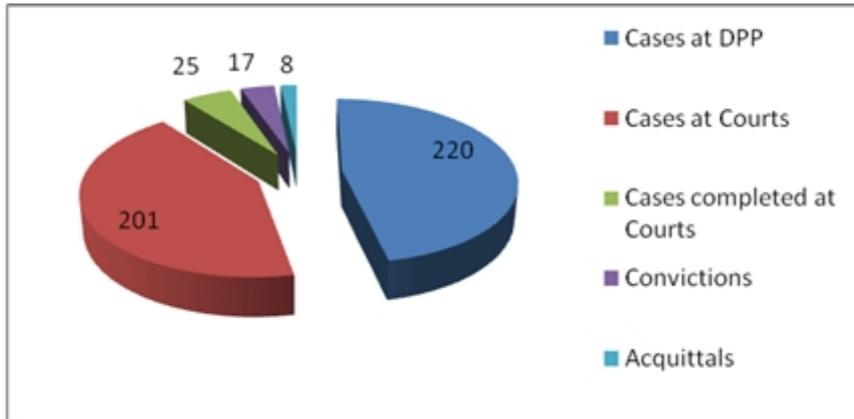


Only three investigation cases were charged under Section 14 of the Proceeds of Serious Crime

Act in 2010 and 2011. There were no cases sent for prosecution the DPP.

**2010 AND 2011 ANNUAL REPORTS STATISTICS (This is for all cases held without aligning them to any particular section of the law.)**

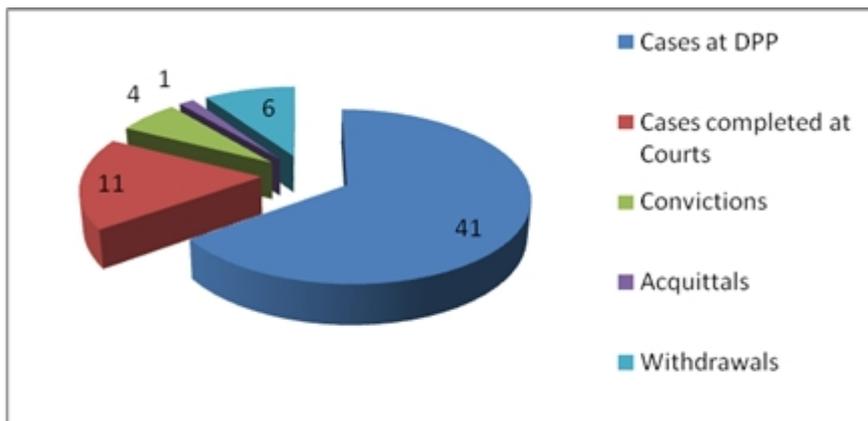
Cases at DPP Cases at Courts Cases completed at Courts Convictions Acquittals 220 201 25 17 8



Looking at the above statistics, it shows 220 cases sent to the DPP in 2010 and 2011. 201 cases were at courts and 25 cases completed at courts. 17 cases secured conviction and 8 cases acquitted. The above information is derived from 2010 and 2011 annual reports, and the information comprises of all cases charged from sections of CECA, Penal Code and Proceeds of Serious Crime but not only sections in the UNCAC Self Assessment tool.

**OVERALL CASES FROM SECTIONS IN THE UNCAC SELF ASSESSMENT TOOL 2010 AND 2011**

Cases at DPP Cases completed at Courts Convictions Acquittals Withdrawals 41 11 4 1 6



The above statistics indicates 41 investigation cases sent to the DPP in 2010 and 2011. It shows that 11 cases were completed at courts in the same period, and 4 cases secured convictions. There was one case acquitted and 6 cases withdrawn. The above information refers only to the cases charged under selected sections of the CECA, Penal Codes and POSCA in the UNCAC Self Assessment tool.

**84. Subparagraph 1 (a) (ii) of article 23**

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:

...

(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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

Laws have been promulgated and enforcement is in place.

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

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 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."

**Please provide examples of cases and attach case law if available.**

**The State v Lyndon Mothusi and Others**

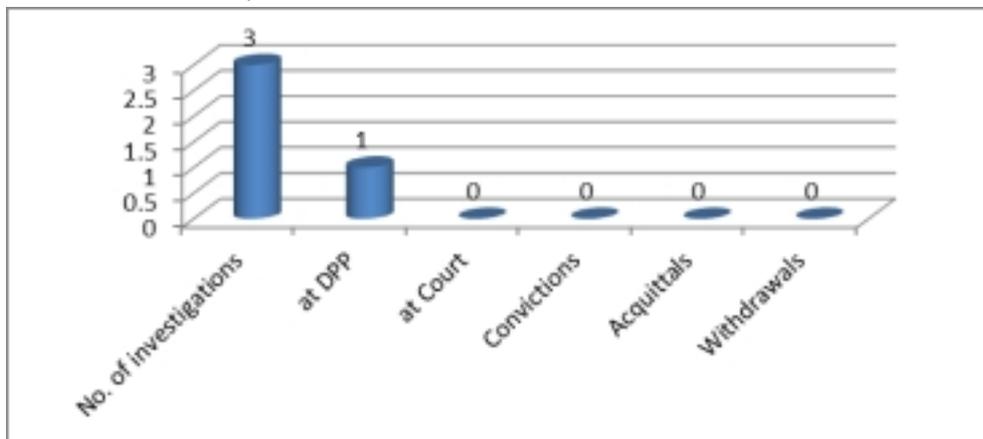
The accused person, including his law firm, was an admitted attorney who forged cheques drawn on several banks and ultimately put the money on his Law Firm's trust account. This money was ultimately removed from the trust account on the pretention that services had been offered. Even on the trust account 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, convicted at the lower court but discharged at the High Court. This owed 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.

If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.

Statistical data is as follows;

**SECTIONS UNDER PROCEEDS OF SERIOUS CRIME ACT - 2010 & 2011**

**Number of Cases under POSCA 2010/2011**  
 Section 14  
 No. of investigations at DPP  
 Court  
 Convictions  
 Acquittals  
 Withdrawals  
 3  
 1  
 0  
 0  
 0  
 0



Only

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 the DPP.

NB: We would like to note that the country's Directorate of Public Prosecutions has always used the Criminal Procedure and Evidence Act to recover or have forfeited to the State all proceeds of crime after a conviction had been secured. This therefore means that the statistics are not a true reflection of the many instances where proceeds and instruments of crime have been forfeited to the state. There is however an improvement in the use of the Proceeds of Serious Crime Act by prosecutors.

The underlisted section of the Penal Code and those of the Criminal Procedure and Evidence Act have been the main bases for the repossession of instruments and proceeds of crime from accused for restitution to rightful owners or to be forfeited to the state:

### 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.

## 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

### 85. Subparagraph 1 (b) (i) of article 23

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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

Laws have been promulgated and there is enforcement

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

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)

##### 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.

**Please provide examples of cases and attach case law if available.**

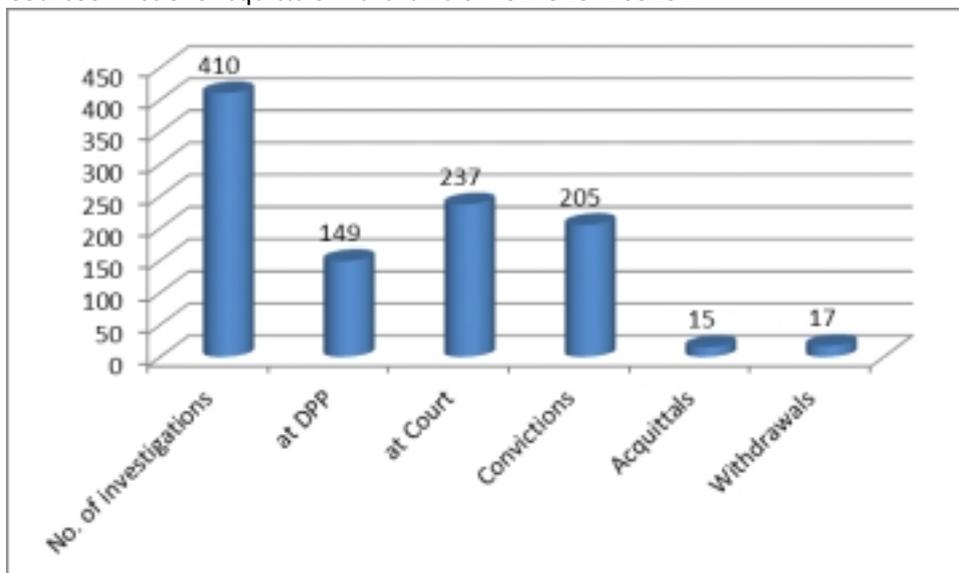
#### **The State v Cole and Others**

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.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

The statistics on Money Laundering has already been provided in the preceding Articles. The underlisted statistics are for relevant Penal Code Sections;

Section 317 No. of investigations at DPP at Court  
Convictions Acquittals Withdrawals 410 149 237 205 15 17



Section 318, Penal Code No. of investigations at DPP at Court  
Convictions Acquittals Withdrawals 177 57 59 85 77 4 7 4 5 6 5

### 86. Subparagraph 1 (b) (ii) of article 23

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

Laws have been promulgated and are being enforced

**Please provide examples of cases and attach case law if available.**

**The applicable laws are:**

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.

**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 warder 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 warder was to have him steal a prisoner

docket. They obviously conspired to commit the offence before the actual commission. After the theft of the docket it was doctored 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.

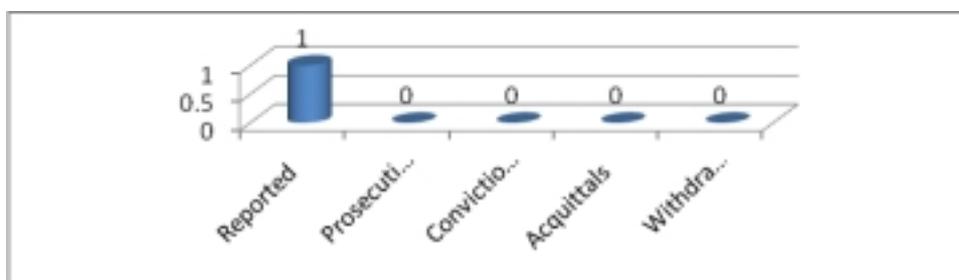
**The State v Frank Molaletsi and others CMMVL 000205/2008**

In this case the municipal employees were charged, inter alia, with having conspired to defraud the municipality an amount of P21 000 000-00.

If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.

**Section 389**

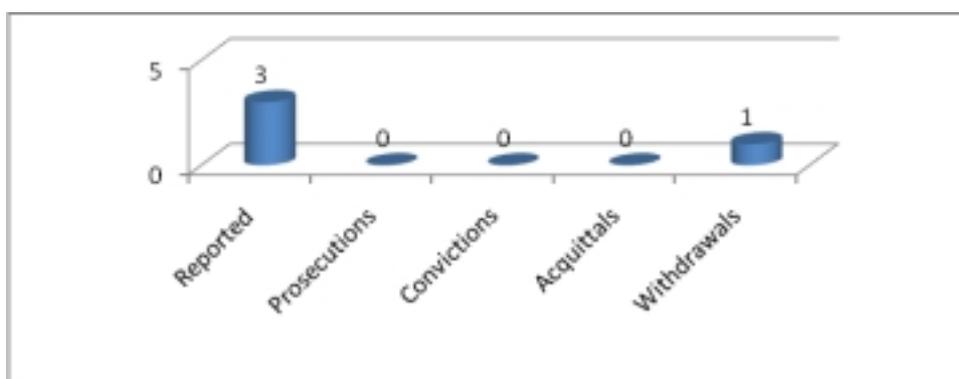
No of cases reprtd Prosecutions Convictions Acquittals Withdrawals 10000



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

**Section 392**

No. of Cases reprtd Prosecutions Convictions Acquittals Withdrawals 30001



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

## 87. Subparagraphs 2 (a) and 2 (b) of article 23

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;

*Has your country adopted and implemented the measures described above? (Check one answer)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

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.

N.B. There has currently been a bill that is at consultation stage where Parliament is to promulgate the Proceeds and Instruments of crime. The definition of a serious offence has been made to include all offences.

**Please provide examples of cases and attach case law if available.**

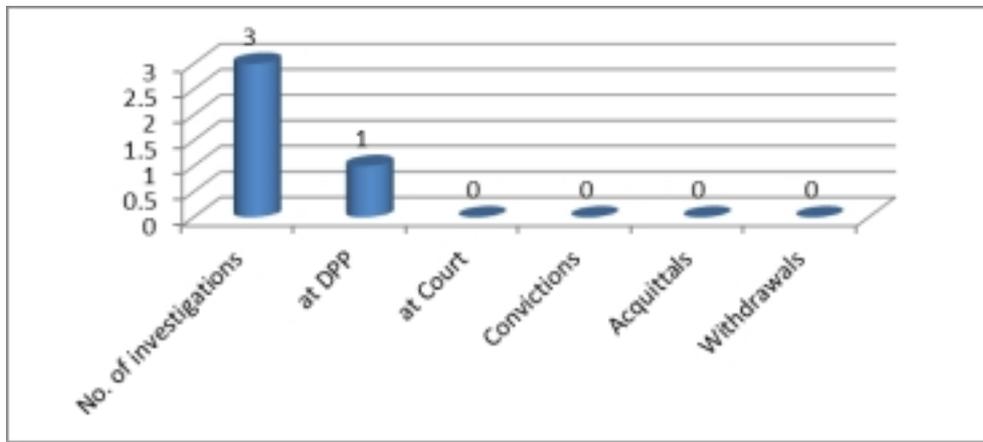
**State v Frank Molaletsi, Daisy Loo and others, State v Lyndon Mothusi and Others** are relevant. In all the cases because these were regarded as serious offences proceeds of crime were recovered and forfeited to the state amounting to P24 000 000 (twenty four million pula) in the first case and amounts worth about P1000 000 (one million pula) and some property worth around P500 000-00 in the other case.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

Statistical data is as follows

**SECTIONS UNDER PROCEEDS OF SERIOUS CRIME ACT - 2010 & 2011**

Section 14 No. of investigations at DPP at Court 310

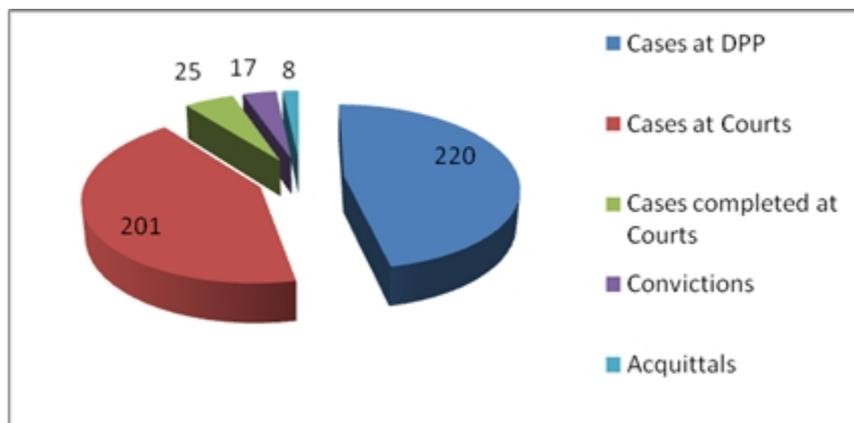


Only

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 the DPP..

### 2010 AND 2011 ANNUAL REPORTS STATISTICS

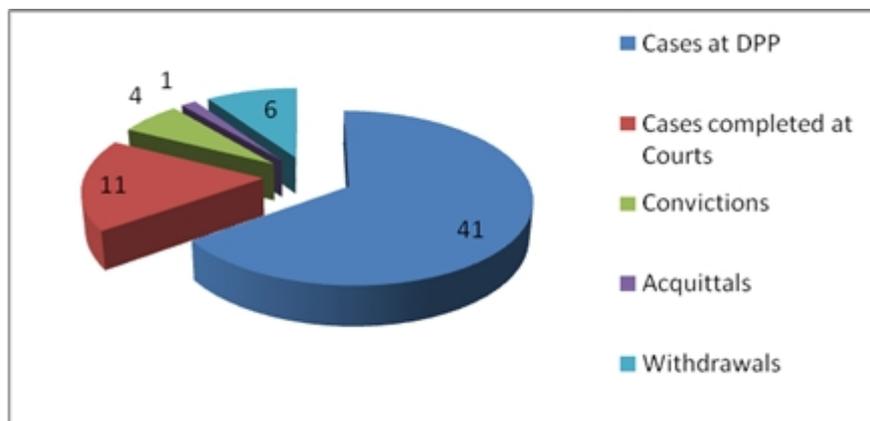
Cases at DPP Cases at Courts Cases completed at Courts Convictions Acquittals 220 201 25 17 8



Looking at the above statistics, it shows 220 cases sent to the DPP in 2010 and 2011. 201 cases were at courts and 25 cases completed at courts. 17 cases secured conviction and 8 cases acquitted. The above information is derived from 2010 and 2011 annual reports, and the information comprises of all cases charged from sections of CECA, Penal Codes and Proceeds of Serious Crime but not only sections in the UNCAC Self Assessment tool.

### OVERALL CASES FROM SECTIONS IN THE UNCAC SELF ASSESSMENT TOOL 2010 AND 2011

Cases at DPP Cases completed at Courts Convictions Acquittals Withdrawals 411 14 16



The above statistics indicates 41 investigation cases were sent to the DPP in 2010 and 2011. It shows that 11 cases were completed at courts in the same period, and 4 cases secured convictions. There was one case acquitted and 6 cases withdrawn. The above information refers only to the cases charged under selected sections of the CECA, Penal Code and POSCA in the UNCAC Self Assessment tool.

NB: The case statistics shown here are all serious crimes. The relevant sections attract sentences of two years or more. Even the minor cases not regarded as serious have instruments and proceeds forfeited under various legislation for instance the **Drugs and Related substances Act and the Criminal Procedure and Evidence Act.**

### 88. Subparagraph 2 (c) of article 23

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;

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

Laws have been promulgated

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

Please cite the text(s)

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.

Please provide examples of cases and attach case law if available.

**The State v Cole and Others (Central Medical Stores)** case involved accused persons who swindled government of millions of pula and the proceeds of the crime were deposited in South Africa for companies registered there by the accused person. The money that was involved and that had not yet been used was recovered despite the fact that some of it was now outside the country. The concealment of the money was outside the jurisdiction of the country although the commission of the offence had been in Botswana.

NB: There is no clear case where the commission of the offence was outside the jurisdiction of Botswana and the proceeds were handled here. The practice has always been to assist the relevant country through the extradition process where both the proceeds and the accused would be repatriated to the country concerned.

If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.

There is no case relating to this provision during the period under assessment. The example mentioned is a case that occurred a few years prior to 2010. Moreover, this is a case where the commission of the offence started locally but there were some other aspects of the case that occurred in South Africa. This related to funds or

proceeds of the crime that were deposited into bank accounts in South Africa for companies that are registered there.

### 89. Subparagraph 2 (d) of article 23

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;

*Has your country furnished copies of its laws to the Secretary-General of the United Nations as prescribed above? (Check one answer)*

(N) No

Copies will be forwarded immediately after completion of this report.

*Please attach the text(s)*

Please attach the text(s)

Texts attached

The Secretary-General would be grateful if Governments would send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (uncac.cop@unodc.org).

### 90. Subparagraph 2 (e) of article 23

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.

*Does your country's domestic system contain fundamental principles as referred to in the provision above? (Check one answer).*

(N) No

An individual charged with the predicate offence may also be charged with money laundering. **See the State v Frank Molaletsi and Daisy Loo Pty Ltd (CMMVL 000205/08** case where the accused person had been charged for 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 the money. The accused persons were charged for both the predicate offence and the money laundering.

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

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 would have committed the predicate offence and ultimately handles the money or proceeds in such a manner as to be said to have laundered them.

**Please provide examples of cases and attach case law if available.**

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

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

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

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

## **91. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

Tracing of proceeds in Financial Investigations still a challenge in terms of capacity

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(LICAP) Limited capacity (e.g. human/technological/institution/other; please specify)

Capacity constraints in investigation. Magistrates need training as well as some consider charging with a predicate offence and the money laundering charge as being duplicitous.

(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)

Resources are also limited

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

**(BEST) Summary of good practices/lessons learned**

Sharing from people with experience/experts

**(SITE) On-site assistance by an anti-corruption expert**

This would lead to additions on the limited expertise the officers have.

**(PLAN) Development of an action plan for implementation**

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

**(N) No**

## 24. Concealment

### 92. Article 24

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

Laws have been promulgated

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

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."

Further relevant provisions are as hereunder listed;

[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.

Please provide examples of cases and attach case law if available.

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

In these cases those 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 for receiving the stolen register. In the second case the plot that was the subject matter of the trial was forfeited to the state.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

There is no statistical data available except for the cases listed. What has been happening is that no charges have been consistently preferred against accused persons under the relevant Proceeds of Serious Crime Act provisions. What would happen is that the prosecutors would charge with the predicate offence and thereafter, at the conclusion of the trial and upon conviction of the accused person, the prosecutor would apply that the proceeds be forfeited or restored to the legitimate owner under the Criminal Procedure and Evidence Act section 319. The cases cited as well were also carried forward from previous years.

### **93. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(LICAP) Limited capacity (e.g. human/technological/institution/other; please specify)

There is need for capacity building for investigators and the office of the DPP

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(BEST) Summary of good practices/lessons learned

(SITE) On-site assistance by an anti-corruption expert

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## **25. Obstruction of justice**

### **94. Subparagraph (a) of article 25**

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;

***Has your country adopted measure(s) to implement the provision under review? (Check one answer.)***

**(Y) Yes**

***Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).***

**Please cite the text(s)**

Section 120, Penal Code

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, 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.

**Please provide examples of cases and attach case law if available.**

For the period under study there has been no case handled.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

No statistical data available.

## **95. Subparagraph (b) of article 25**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 18, 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 P10,000, or to both.

Section 109, 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.

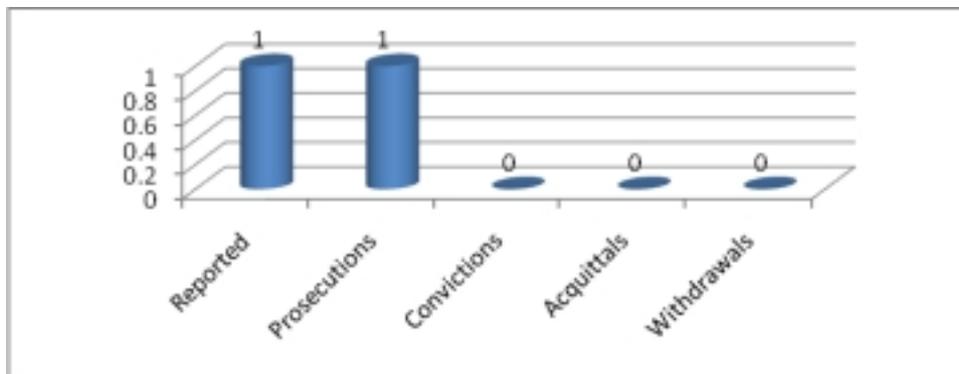
**Please provide examples of cases and attach case law if available.**

The only example of the case indicated below 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.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

### **Section 109**

No. of Cases reported Prosecutions Convictions Acquittals Withdrawals 11000



There was one cases charged under Section 109 of the Penal Codes and was sent to the DPP for advice.

## **96. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

**(N) No**

## **26. Liability of legal persons**

### **97. Paragraphs 1 and 2 of article 26**

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.

***Has your country established one or more of the forms of liability referred to in the provision above?  
(Check one answer)***

(Y) Yes

***Please cite and attach the applicable measure(s)***

**Please cite the text(s)**

Section 2, 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**

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**

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**

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.

***If available, please provide information on cases involving the participation of legal persons in offences established by this Convention (statistics, types of cases, outcome). Please provide per annum figures, as available.***

**Please provide examples of implementation**

Cases cited below are examples of implementation

**If available, please provide information on cases involving the participation of legal persons in offences established by this Convention (statistics, types of cases, outcome). Please provide per**

annum figures, as available.

The **State v Tourism Development Consortium and Others** In this case, a copy of the judgment of which is attached, companies (who are Legal persons) were charged alongside natural persons in several counts such as Obtaining by False Pretences, Corruption and Cheating the Public Revenue. In this case two legal persons were charged being the Tourism Development Consortium (Pty) Ltd and another called Golconda Holdings (Pty) Ltd. The Land here was forfeited to the state after the conviction.

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

The 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 also charged alongside the natural persons. This is a case that is pending before the High Court (Corruption Court).

**98. Paragraph 3 of article 26**

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

*Has your country established one or more of the forms of liability referred to in the provision above?  
(Check one answer)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

Please cite the text(s)

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, 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.

**Please provide examples of implementation, including recent cases where both natural and legal persons were liable**

**The State v Tourism Development Consortium.**

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

**Please provide any available statistics of such cases. Please provide per annum figures as available**

The examples given above are the only statistics available.

## **99. Paragraph 4 of article 26**

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

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

The judicial system has been such that even legal persons who 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 case** 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.

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Punishment Matrix;

### **BOTSWANA PUNISHMENT MATRIX FOR THE REVIEW ARTICLES**

<b>Article heading</b>	<b>Relevant Domestic Law</b>	<b>Punishment section</b>	<b>Remarks</b>	<b>Article 15</b>
<b>Subparagraph A</b>	Bribery of national public officials	Section 1, 23, 24(2),25(2),27,29(2),	all of the Corruption and Economic Crime Act,1994 Section 94 Republic of Botswana Electoral	

Act Sections 24(2), 25(2), 27 and 29(2), Corruption and Economic Crime Act are punishable under section 36 of the same Act: imprisonment for a term not exceeding 10yrs or to a fine not exceeding P500 000-00 or to both. 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)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 official Section 23, 24(1), 25(1), 26, 29(1) of the Corruption and Economic Crime Act 1994 Section 94(f) Republic of Botswana Electoral Act Under the Corruption and Economic Crime Act punishments for all the offences are under section 36 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 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 19 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. Section 33 of the Corruption and Economic Crime Act 102 is punishable under the same provision of the Penal Code (a prison term not exceeding one year) 33 is punishable under section 36 Corruption and Economic Crime Act (10years or a fine not exceeding P500 000, or to both)

**Article 18 Subparagraph A** Trading in influence Section 29(2) of the Corruption and Economic Act Section 384(b) & (c) of the Penal Code 29 is punishable under section 36 Corruption and Economic Crime Act (10 years or a fine not exceeding P500 00, or to both) whilst the punishment under section 384 (b) and (c) is prescribed under section 33 of the Penal Code.

**Article 18 Subparagraph B** Section 101, 384(a) of the Penal Code Section 29(1) of CECA 101 is punishable within the same Section( imprisonment for a term not exceeding six months)

**Article 19** Abuse of Functions Section 100 of the Penal Code Section 104 of the Penal Code 100 creating both offence and punishment (imprisonment for a term not more than three years) 104 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 Private Sector Section 28(2) of CECA Section 383, 384(b) & (c) of the Penal Code Section 94 of Electoral Act 28(2) is punishable under section 36 of the same Act (10 years prison term or a fine of P500 000, or both) 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 Section 28(1) of CECA Section 94(f) of Electoral Act 28(1) is punishable under section 36 of the same Act (10 years prison term or a fine of P500 000, or both) 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 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 15 of the Proceeds of Serious Crime Act Section 2(a) Proceeds of Serious Crimes (Amendment) Act Section 14 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 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 Section 14 of Proceeds of Serious CrimeSection 14 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 25000)Article 23 Subparagraph 1 (b)(i)Section 2(5) of Proceeds of Serious Crime Section 14 of Proceeds of Serious Crime Section 15 of Proceeds of Serious Crime14 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 25000)Article 23 Subparagraph 2(a) & 2(b)Section 2(1) of Proceeds of Serious CrimeArticle 23 Subparagraph 2(c)Section 2 Proceeds of Serious Crime Section 14 Proceeds of Serious Crime14 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 25000)Article 24ConcealmentSection 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 AObstruction of JusticeSections 120 and 123 of the Penal Code 120 Punishable under the same section (a prison term not exceeding five years) 123 Punishable under the same section (a prison term not exceeding three years) Article 25 Subparagraph BSection 18 of the Corruption and Economic Crime Act Section 109, Penal CodePunishable under the same section (a ten year prison term or a fine not exceeding P500 000, or to both Section 109 has no prescribed penalty as such section 33 of the Penal Code would apply.Article 26 Paragraph 1 & 2Liability of legal personsSection 2, Penal Code Section 308 of the Penal Code 308 Punishable under the same section (imprisonment for a term not exceeding seven years)Article 26 Paragraph 3Section 3(24), Proceeds of Serious Crime (Amendment) Act Section 332, Criminal Procedure and Evidence Act Section 24, Penal CodeNo punishment prescribed under section 24 as such section 33 of the Penal Code is applicableArticle 27 Paragraph 1Participation and attemptsSection 21, Penal Code N/AArticle 27 Paragraph 2Section 388 (1), Penal Code Section 389 and 390, Penal CodePunishable under section 390 of the Penal Code (imprisonment for a term not exceeding seven years) same as section 389.Article 27 Paragraph 3Section 392, Penal Code Section 388, Penal Code Punishable under the same section (imprisonment for a term not exceeding seven years) whilst section 388 is punishable under section 390.Article 28 Article 29Statute of LimitationsSection 26 of the Criminal Procedure and Evidence ActThese are not offence creating sections.Article 30 Paragraph 1Prosecution, Adjudication and SanctionsSection 32 of the Penal CodeArticle 30 Paragraph 2Section 41, Constitution Section 14, Penal Code Section 21, CECA Section 27,28 and 29, Local Government (District Councils) ActN/A N/A N/A Article 30 Paragraph 3Section 51, Constitution Section 20, Penal Code Section 7 and 10 Criminal Procedure and Evidence At Section 39,CECAN/A Not offence creating sectionsArticle 30 Paragraph 4Section 109, Criminal Procedure and Evidence At Article 30 Paragraph 5Section 85,Prisons ActN/AArticle 30 Paragraph 6Section 35, Public Service Act Section 22, Public Service ActArticle 30 Paragraph 7 (a)Section 18, Public Service ActArticle 30 Paragraph 7 (b)Section 1, Public Service Act Section 127, ConstitutionArticle 30 Paragraph 8Section 35(4), Public Service Act Article 31 Subparagraph 1(a)Freezing, Seizure and ConfiscationSections 3, 4 and 5 of the Proceeds of Serious Crime Act Section 37 of the Corruption and Economic Crime ActN/A N/AArticle 31 Paragraph 2Section 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 2, of the  
 Criminal Procedure and Evidence Act Section 123 is punishable under the same section  
 (imprisonment for a period not exceeding three years.) Article 33 Protection of reporting  
 persons Section 45, CECA N/A Article 34 Consequences of acts of Corruption Section 316  
 and 318 of Criminal Procedure and Evidence Act N/A Article 35 Compensation for  
 damage Section 12,14, and 16 of the Criminal Procedure and Evidence Act Section 316(1)  
 of the Criminal Procedure and Evidence Act N/A N/A Article 36 Specialized  
 Authorities Section 3 and 6, CECA N/A Article 37 Paragraph 1 Cooperation with Law  
 enforcement authorities Section 6(e) of the Corruption and Economic Crime Act Section  
 45, CECA N/A 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 Section 7, CECA N/A Article 39 Paragraph 1 Cooperation between  
 Authorities and the private sector Section 6(e) of the Corruption and Economic Crime Act  
 Section 7 and 8, CECA N/A 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 248, Criminal Procedure and Evidence Act Section 249, Criminal  
 Procedure and Evidence Act For section 8 see submission above. Article 41 Criminal  
 Record Section 283, 284 and 285 of the Criminal Procedure and Evidence Act N/A Article 42  
 Subparagraph 1(a) Jurisdiction Section 5 and 61 of the Criminal Procedure and Evidence  
 Act N/A Article 42 Subparagraph 2(b) Section 46, CECA N/A Article 43 Article 44 Paragraph  
 1 Extradition Section 1(2), 3 and 5 of the Extradition Act N/A Article 44 Paragraph 4  
 Section 7(1) and (2) of the Extradition Act N/A Article 44 Paragraph 8 Section 1(2),  
 Extradition Act Section 7, Extradition Act Section 8, Extradition Act Section 9,  
 Extradition Act N/A 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, N/A Article 44 Paragraph 10  
 Section 10, Extradition Act Section 22, Extradition Act N/A Article 44 Paragraph 11  
 Section 7(1) Article 44 Paragraph 12 Article 45 Transfer of sentenced persons N/A  
 N/A Article 46 Mutual legal assistance Section 3 of the same Act N/A Article 47  
 Transfer of criminal record proceedings N/A N/A Article 48 Law enforcement  
 cooperation Section 6 of the Corruption and Economic Crime Act N/A Article 49  
 Joint Investigations Section 6 of the Corruption and Economic Crime Act N/A Article  
 50 Special Investigative Techniques Section 7 of the Corruption and Economic Crime Act  
 N/A

Please provide examples of cases and attach case law if available.

**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.

If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.

The courts have usually been giving 1-3years 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.

## 100. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## 27. Participation and attempt

### 101. Paragraph 1 of article 27

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

Please cite the text(s)

Section 21, Penal Code

(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.

**Please provide examples of cases and attach case law if available.**

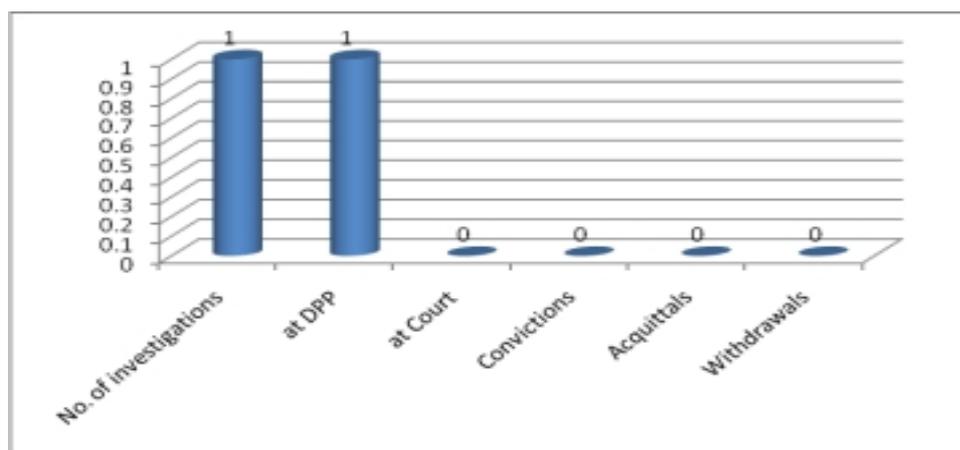
The case of **The State v Lyndon Mothusi and Others** is a case in point. The accused person planned to steal a prisoner docket at a prison. He connived with a prison warder who became their accomplice. The accused Lyndon Mothusi was therefore the instigator of the offence. Although the attorney for 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.

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

**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 and withdrawals.

## 102. Paragraph 2 of article 27

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 388 (i), 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, Penal Code

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

Section 390, 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.

**Please provide examples of cases and attach case law if available.**

An example is one for a charge of attempting to obtain money by false pretences;

- ❖ An allegation from an individual that he applied for a Botswana citizenship and that it was rejected on grounds that he is not fluent in Setswana. Source alleges that he appealed and was told his application is now on assessment but that someone calling himself Kgopong (undisclosed surname) who purports to be an immigration officer told him that he is the one assessing his application. It is alleged that Kgopong now wants the reporter to bring P1200 and two passport size photos for him to approve the application. Source

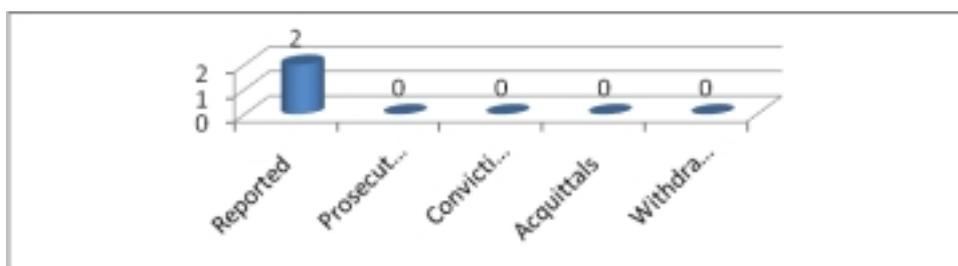
states that Kgopong is calling him to check if he still wants to go ahead with the deal.

#### ❖ Case before court

If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.

##### Section 388

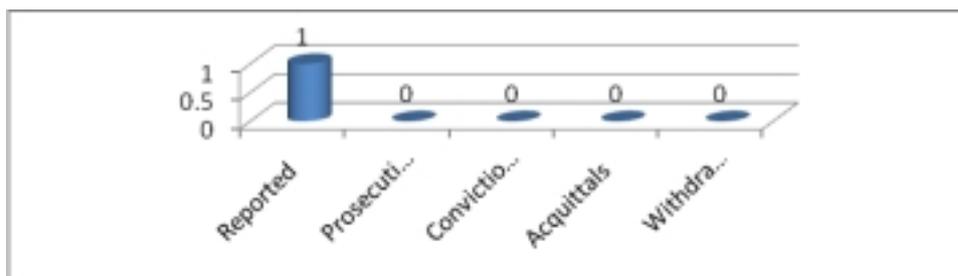
No. of Cases reported Prosecutions Convictions Acquittals Withdrawals 2 0 0 0 0



Two cases were charged under Section 388 of the Penal Codes 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.

### 103. Paragraph 3 of article 27

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 392, 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, 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.

**Please provide examples of cases and attach case law if available.**

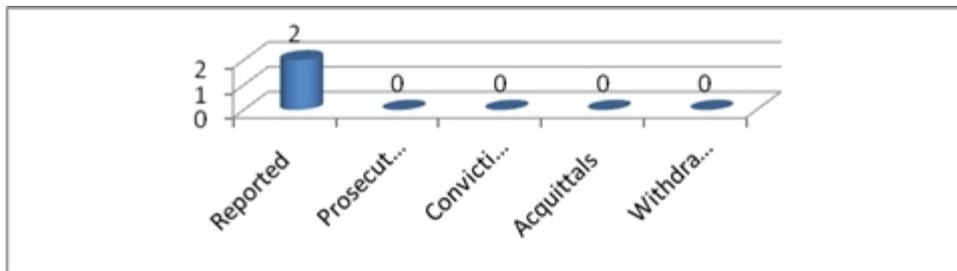
The case of **The State v Lyndon Mothusi and Others** is relevant here in that the prison officer who assisted the accused persons to steal a prison register was also charged with conspiring to steal said register and the theft of the register. As stipulated earlier, the attorney for the accused persons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

**If available, please provide related statistical data on the number of investigations, prosecutions, convictions and acquittals. If available, please provide figures for each year.**

tatistical data follows

**Section 388**

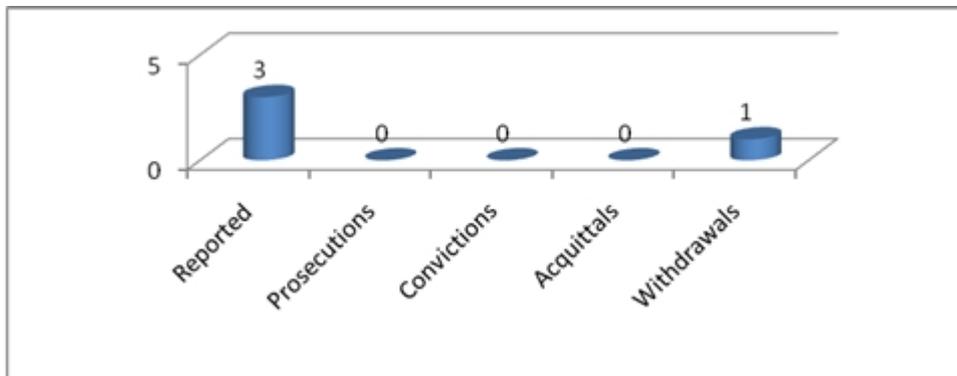
No. of cases reprtdProsecutionsConvictionsAcquittalsWithdrawals20000



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

### Section 392

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



There were three cases charged under Section 392 of the Penal Codes, there were no cases sent for prosecution and one cases was withdrawn

### 104. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

**(N) No**

Botswana is fully compliant

## 29. Statute of limitations

### 107. Article 29

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

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.

**Please provide examples of implementation**

Although the statute limits 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 00481/95** a former Botswana Housing Corporation Chief Executive Officer. The accused person has since about 18 years absconded and stayed in neighbouring South Africa. Extradition process has been on going but with no sight in end.

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 permanent stay of prosecution.

The High Court did not however agree with him as it held that the nature of the investigation necessitated the delay.

The oft-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 intertain a prosecution of a case that has taken an unreasonably long time before the prosecution is commenced at no fault of the accused person.

**If available, please provide information (statistics, types of cases, outcome) on related court or other cases related to instances when you established a longer statute of limitations period or suspended the statute of limitations where an alleged offender had evaded the administration of justice. Please provide per annum figures, as available.**

The only case that is pending extradition of the accused person from South Africa is the one relating to the Botswana Housing Corporation Chief Executive Officer who was charged for corruption but has since the early 90's left the jurisdiction of the courts in Botswana for South Africa.(The State v Rabana cited earlier). Extradition proceedings have since been pending and the court in South Africa is still to make a decision on the matter whether to extradite or not. The case is as we speak just over 19 years old but as the accused has been a fugitive all this while then the clock has not started ticking against the State. If we consider the period the accused is alleged to have committed the offence then it makes it more than 20years. The other cases mentioned are those that were decided prior to the years being considered. This however is a case that is brought forward from other years.

## **108. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## **30. Prosecution, adjudication and sanctions**

### **109. Paragraph 1 of article 30**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the text regarding applicable sanction(s) or other measure(s)*

**Please cite the text(s)**

Section 32, 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 27(4) 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.

**Please provide examples of implementation**

For the issue regarding guidelines see the submissions below;

*Sentencing Guidelines*

The Corruption and Economic Crime Act together with the other statutes that criminalise corruption, prescribe the sentences applicable to the various offences they create. Over and above that section 33 of the Penal Code provides that when in the 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.

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-recognised in this jurisdiction that sentence is primarily a matter for the discretion of the trial court. 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.

(S 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.

The table following hereunder depicts the types of punishment for the several offences we have under our Codes:

**If available, please provide information on criminal and non-imposed 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 s. 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 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 -

- (i) the serious offence or offences in respect of which the application is made;
- (ii) that he has a reasonable belief that -
  - (i) the defendant committed the offence or offences; and
  - (ii) that 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.

**Where applicable, please provide information on the execution of sentences (e.g. time served, amount of money collection, etc.)**

The courts issue out committal warrants for convicted prisoners and payment of money is also to the Administration of Justice. A few of the committal warrants are attached and evidence of the amounts of money collected is also attached for a few instances.

## **110. Paragraph 2 of article 30**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s) or rules*

**Please cite the text(s)**

Section 41, 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 mentioned in

subsection (1) of this section may be brought against that person.

#### Section 14, 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.

#### Section 21, Corruption and Economic Crime Act

No action shall be brought against the Director or any other officer of the Directorate (or any other person authorised by the Director to perform any act under this Act), in respect of any act or thing done or omitted to be done in good faith in the exercise of his duties under this Act

#### Section 27, Local Government (District Councils) Act

A member of a council is not liable to arrest-

- (a) for any civil debt whilst going to, attending at, or returning from, a meeting of the council or any committee thereof; or
- (b) within the precincts of the council while the council or a committee thereof is sitting, for any criminal offence without the consent of the chairman.

#### Section 28, Local Government (Districts Councils) Act

No process issued by any court in the exercise of its jurisdiction shall be served or executed on a member of a council within the precincts of the council while the council is sitting.

#### Section 29, Local Governments (District Councils) Act

In this Part-

"precincts of the council" means the chamber and offices of a council and any gallery or place provided for the use or accommodation of members of the public, and includes, while the council is sitting, the entire building in which the chamber of the council is situated, and any forecourt, yard, garden, enclosure or open space adjoining or appertaining to such building and used or provided for the purposes of the council.

Further relevant provisions are as follows;

#### Section 24, Intelligence and Security Services Act CAP 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 124, Administration of Estates Act.

No act or omission of the Master or any other officer employed in the Master's office , and no act or omission, in relation to any property transaction within the purview of this Act, of the Registrar of Deeds or of any officer employed in the Deeds Registry shall subject the Government, the Master, the Registrar of Deeds or any such officer as aforementioned to any liability for any damage sustained by any person in consequence of such act or omission:

Provided that if such act or omission is mala fide or if the Master, the Registrar of Deeds or any such officer aforementioned has, in connection with such act or omission in the course of his duties or functions, not exercised reasonable care and diligence, the government shall be liable for the damage aforesaid.

#### Section 95, Deeds Registry Act

No act or omission of the Registrar or of any officer employed in the Deeds Registry shall render the government or such Registrar or such officer liable for damage sustained by any person in consequence of such act or omission:

Provided that-

(i) if such act or omission is mala fide or if such Registrar or officer has not exercised reasonable care and diligence in carrying out his duties in connection with such act or omission, government shall be liable for the damage aforesaid;

(ii) the Registrar or officer guilty of such act or omission shall be liable to make good any loss or damage resulting therefrom to the government if such act or omission was mala fide.

#### Section 36, Financial Intelligence Act, 2009

(1) No matter or thing done or omitted to be done by the Director or other officer of the Agency shall, if the matter or thing is done or omitted to be done bona fide in the course of the operations of the Agency, render the Director or other officer personally liable to an action, claim or demand.

(2) The Director or officer of the Agency who receives a report under this Act shall not incur liability for any breach of confidentiality or any disclosure made in compliance with this Act.

**Have there been concrete instances where the issue of immunities and/or jurisdictional or other privileges accorded to public officials has arisen and addressed in official documents?**

The issue has arisen several times in relation to the Directorate of Intelligence and Security Services where the Intelligence and Security Services Act (CAP 23:02) at section 24 was analysed before the courts. In one matter a foreign national (Somalian) who sued an Intelligence officer at the High Court lost their case on the sole ground that the officer was immune to prosecution. The courts have however consistently pointed out that immunity will be availed only where the officer was in bona fide execution of their duties.

**If there have been any relevant official inquiries or reports, please cite, summarize or attach relevant documents**

The cases cited above are relevant.

**Please provide examples of implementation**

**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 that whilst the president holds office, he can neither be sued in his private nor personal capacity. The case is attached for ease of reference.

The case involving a Directorate of Intelligence and Security Services officer who was sued before the High Court by a Somali national for conduct that related to his duties is also a case in point. 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 immunity.

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.

### **111. Paragraph 3 of article 30**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Section 51, Constitution

- (1) There shall be an Attorney-General whose office shall be a public office.
- (2) The Attorney-General shall be the principal legal adviser to the Government of Botswana.
- (3) The Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General shall not be subject to the direction or control of any other person or authority.

#### Section 20, 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, Criminal Procedure and Evidence Act

The Attorney-General 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, 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, 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 Attorney-General for his decision.

(2) No prosecution for an offence under Part IV shall be instituted except by or with the written consent of the Attorney-General.

### 104. A buse of office

( 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. See attached version.**

### **Please provide examples of implementation**

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. The law enforcement offices also 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 case which is newly registered the defence objected for the matter to be 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 person and the choice of court was also his prerogative. It was noted that the High Court having inherent jurisdiction it could entertain all matters regardless of gravity.

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

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 came. There is however several cases 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.

## **112. Paragraph 4 of article 30**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Section 109, Criminal Procedure and Evidence Act

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.

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

(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)

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 gaol 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 gaol 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 gaol 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 gaol 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.

#### **Please provide examples of implementation**

Refer to the cases submitted in the next answer.

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

The 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**. The relevant documents are attached for ease of reference.

**The State v Tourism Development Consortium** is also a case in point when it came to issues relating to bail. The accused person who had been incarcerated due to the sentence by the court applied for bail pending his appeal to the High Court. The court still used its discretion whether to

grant bail or not and bail was ultimately granted.

### 113. Paragraph 5 of article 30

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation**

Examples of implementation may be gleaned from the statistics in the next answer provided by the Department of Prisons and Rehabilitation.

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

### PAROLE STATISTICS

**Year of submission** Number of applications submitted to the Minister **Offences Released on Parole** **Remarks**  
20094 • Stealing stock • Defilement of an imbecile • Rape • Murder with extenuating circumstances2 • One was sentenced to 8 years. 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 20105 • Murder • Robbery and car theft • Armed robbery • Defilement of persons under the age of 16 years1 • He 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 Prisons Act 20113 • Murder • Murder with extenuating circumstances • Robbery and theft of motor vehicles1 • Submitted to the Minister for consideration201232 • Rape • Defilement murder • Robbery • Store breaking and theft • Armed robbery • Stealing of motor vehicle • Housing breaking and theft Still pending

**NB. The statistics have been availed from the office of the Commissioner of Prisons and Rehabilitation.**

## 114. Paragraph 6 of article 30

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.

*Has your country established the procedures described above? (Check one answer)*

(Y) Yes

*Please cite and attach the applicable procedure(s) or other measure(s)*

**Please cite the text(s)**

Section 35, Public Service Act

35. Suspension

(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.

Section 22, Public Service Act

## 22. Interdiction

(1) If the Permanent Secretary becomes aware that criminal proceedings have been or are about to be instituted against a public officer, or considers that disciplinary proceedings should be instituted against a public officer, and is of the opinion that such officer should be interdicted from the performance of his duties pending the taking of proceedings against him, he shall report the matter to the responsible officer recommending the interdiction of such officer:

Provided that where the Permanent Secretary is the responsible officer, he shall proceed to take such action as may be taken by a responsible officer in accordance with subsections (2) and (3) and section 23.

(2) On receipt of a report under subsection (1) the responsible officer shall decide whether the public officer should be interdicted and, if so, the amount of salary (being not less than one-half) that should be paid to such officer during the period of his interdiction.

(3) If as a result of the proceedings the public officer is awarded a punishment less than dismissal the responsible officer shall decide what proportion of the emoluments withheld, if any, shall be paid to such officer:

Provided that if no punishment is awarded the whole of the emoluments withheld shall be paid to such officer.

(4) Disciplinary proceedings may be brought and concluded against an officer notwithstanding that criminal proceedings arising out of the same facts are being investigated or are pending against that officer:

Provided that no statement made or evidence given by the officer in the disciplinary proceedings shall be used against him in any criminal proceedings arising from the same facts.

Section 13 (2) of the Botswana Police Act deals with interdiction.

An officer may be interdicted pending the outcome of a criminal or administrative hearing on his conduct.

The Prisons and also the Botswana Defence Force Act has like provision

### **Please provide examples of implementation**

Interdiction of public officials have 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 the General Orders which enunciated the processes and procedures for suspension of officers.

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

Statistics are as follows;

The total number of officers on interdiction and or suspension is 32.

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

### **115. Subparagraph 7 (a) of article 30**

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;

*Has your country established the procedures described above? (Check one answer)*

**(Y) Yes**

*Please cite and attach the applicable procedure(s) or other measure(s)*

**Please cite the text(s)**

Section 18, 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.

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

The case mentioned above is a case in point. There are however no clear and certain statistics to show how many of such cases the country has had.

**Please provide examples of implementation**

An example here is the case where an attorney was employed in one of the municipal authorities 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 the any administrative action to be taken when the anomaly was realised he

voluntarily left the employ of the public service.

### **116. Subparagraph 7 (b) of article 30**

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.

*Has your country established the procedures described above? (Check one answer)*

(Y) Yes

*Please cite and attach the applicable procedure(s) or other measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation**

1. 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 were a fit and proper person to hold office as a judicial officer. This is indicative of the fact that procedures are in place.

2. Several Police officers were also 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 like

that of **The State v Tebogo Mokoko; The State v Chemelani Muzila; and The State v Odirile Moeng** cited earlier are cases in point.

If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.

See response above. There is however no record on like matters.

### 117. Paragraph 8 of article 30

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

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Section 35(4) of the Public Service Act which allows for administrative action to be taken against an offending officer where the criminal side of things is still pending.

**Please provide examples of implementation and related disciplinary cases**

The **State v Chemelani Christopher Muzila**. (case 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.

### 118. Paragraph 10 of article 30

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

*Is your country in compliance with this provision? (Check one answer.)*

(N) No

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

There have been efforts to formulate policy and the draft is still at consultation stage.

**Please outline the steps or action (and related time frame) that domestic or other authorities would**

need to take to ensure the implementation of the provision under review.

Policy formulation has already started and a draft of the policy has already been done 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.

### 119. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)

Setting up structures would require training of personnel to man the structure and finances to set up the required structure.

(INAD) Inadequacy of existing normative measures (constitution, laws, regulations, etc. )

Laws and structures should be set to allow for reintegration

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(MOLEG) Model legislation

There is currently no law on reintegration

(PLAN) Development of an action plan for implementation

The assistance of the relevant authorities to implement adequately the envisaged policy

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## 31. Freezing, seizure and confiscation

### 120. Subparagraph 1 (a) of article 31

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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Section 3, Proceeds of Serious Crime Act, 1990

(1) Where a person has been convicted of a serious offence, the Attorney-General 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 Attorney-General 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.

Section 316 of the Criminal Procedure and Evidence Act CAP 08:02 also provides for restitution and or compensation at the conclusion of a criminal trial.

#### 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

If available, please provide information on the amount of proceeds of offences established in accordance with this Convention confiscated. Please provide per annum figures, as available.

In the **Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd 2009 (1) BLR 24** case 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 the money 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 and the Land stood to be retrieved through some other means other than the criminal process.

Please provide examples of implementation

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 P21000 000 plus interest that had accrued whilst the proceeds were in the receiver's possession. The receiver being the Accountant General who had been appointed by the court to keep the funds in an interest bearing account with a local bank.

If available, please provide information on the number and types of cases in which proceeds were

confiscated. Please provide per annum figures, as available.

Severak cases have passed through the courts and are listed below.

## 121. Subparagraph 1 (b) of article 31

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y)** Yes

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Forfeiture of instrumentalities is usually done by court order which at the end of the trial will make a consideration whether to forfeit some instrumentality of crime or not.

**Section 18(3) of the Drugs and Related Substances Act CAP 63:04** also allows for forfeiture to the State 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.

**Please provide examples of implementation**

Examples of cases where instrumentalities were confiscated

### **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.

The last example is 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 assessment.**

**If available, please provide information on the amount/types of property, equipment or other instrumentalities confiscated**

Usually what is confiscated would be firearms possessed illegally or those possessed legally but used for an unlawful purpose; vehicles; money and other movable or immovable property which to the court appears to have been illegally obtained or used in an unlawful manner.

**If available, please provide information on recent cases in which such confiscations took place**

See cases at implementation

## **122. Paragraph 2 of article 31**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Section 17, Proceeds of Serious Crime Act, 1990

(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 Attorney-General 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 P10,000, or both.

#### Section 20, Proceeds of Serious Crime Act, 1990

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 Attorney-General 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 Attorney-General 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.

#### **Please provide 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 s. 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 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 -

- (i) the serious offence or offences in respect of which the

- application is made;
- (ii) that he has a reasonable belief that -
    - (i) the defendant committed the offence or offences; and
    - (ii) that 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 the P21 000 000 cheque that had been issued to Daisy Loo company was traced, seized and freezed 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.

**If available, please provide information on the cases and amount of money/value of property frozen or seized. Please provide per annum figures, as available**

P24 000 000 in total was confiscated from the Daisy Loo Company. The amount has since accumulated to P34 000 000-00 as having been in an interest bearing account.

In the Lyndon Mothusi Case about P3 000 000 in money and property were involved.

### **123. Paragraph 3 of article 31**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

Section 9, Proceeds of Serious Crime Act

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.

**Please provide 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 s. 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 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.

**Please provide any reports or assessments of the administration of frozen, seized or confiscated property**

## 124. Paragraph 4 of article 31

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Section 3, Proceeds of Serious Crime Act, 1990

(1) Where a person has been convicted of a serious offence, the Attorney-General 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 Attorney-General 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.

**Please provide examples of implementation**

In *Director of Public Prosecutions v Daisy Loo Botswana (Pty) Ltd and Others 2009 (1) BLR 24 (CA)* it was also stated that the accused persons had obtained money from the municipal authority by fraudulent means. The accused company was entitled to a certain amount far much less than which had been paid to them. The proceeds were confiscated but that which they had been initially entitled to was paid to them.

In the Lyndon Mothusi case mentioned supra the court held that the Range Rover vehicle was a conversion of the proceeds of crime (the money) and thus ordered its confiscation.

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

Cases shown as examples are the statistics.

## **125. Paragraph 5 of article 31**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Section 3, Proceeds of Serious Crime Act, 1990

(1) Where a person has been convicted of a serious offence, the Attorney-General 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 Attorney-General 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.

#### **Please provide examples of implementation**

No readily available statistics

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

No readily available statistics

### **126. Paragraph 6 of article 31**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Section 3, Proceeds of Serious Crime Act, 1990

(1) Where a person has been convicted of a serious offence, the Attorney-General 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 Attorney-General 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.

#### **Please provide examples of implementation**

There are no examples of cases of intermingled property.

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

No statistics available as there is no case dealing with such

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

No case of this nature has ever been available to check implementation but where cases of intermingling of property occurs the country does not have a challenge as to enforcement

### **127. Paragraph 7 of article 31**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

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.

**Note that the above section 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.**

**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.

### **Please provide examples of implementation**

A few notices issued pursuant to section 8 and 7 of the Corruption and Economic Crime Act evidencing implementation are scanned and attached here.

### **NUMBER OF NOTICES SERVED: 2010 - 2011**

<b>Year</b>	<b>No of Notices served</b>	<b>No complied with</b>	<b>No not complied with</b>
2010	4	10	Nil
2011	4	66	66 Nil
<b>Total</b>	<b>8</b>	<b>76</b>	<b>76 Nil</b>

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 but not necessarily those related to the review process. Even then, not all

cases would have notices issued.

**If available, please provide information (statistics, types of cases, outcome) on related cases or other processes. Please provide per annum figures, as available.**

Statistics on notices. All the issued notices have been complied with. See attachment on previous answer.

## **128. Paragraph 8 of article 31**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation**

Although no case have been presented to the courts as yet, the Directorate has been investigating and still receives a large number of cases for investigations relating to this section.

**If available, please provide 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.

## 129. Paragraph 9 of article 31

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

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Section 12, Proceeds of Serious Crime Act, 1990

(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

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 Attorney-General against the refusal of a court to issue a confiscation order, a restraining order or a search warrant.

The other relevant sections are as outlined below;

**Part:XIX Costs, Compensation and Restitution (ss 316-320) PART XIX Costs, Compensation and Restitution (ss 316-320) 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 restituendo* 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.

**Please provide examples of implementation and, if available, information on recent cases where bona fide third parties were involved and their rights were protected**

Currently there are cases pending before the High Court where an innocent purchaser has sort an order of court for property that he acquired after it had been illegally obtained by the seller. Innocent purchasers as well do have the courts come to their rescue at the end of the trial when the court, after an application made through 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 later reversed the decision of the lower courts partly because there were people who had purchased the plot and were regarded as innocent buyers.

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.

### **130. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

**(Y) Yes**

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

**(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)**

**(INAD) Inadequacy of existing normative measures (constitution, laws, regulations, etc. )**

The country's asset forfeiture regime is solely conviction based. There is need to widen scope to civil forfeiture as well

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

**(CAPPRO) Capacity-building programmes for authorities responsible for identifying and tracing such property or instrumentalities**

**(CAPADM) Capacity-building programmes for authorities responsible for the establishment and management of systems for the administration of frozen, seized or confiscated property**

**(BEST) Summary of good practices/lessons learned**

**(MOLEG) Model legislation**

**(PLAN) Development of an action plan for implementation**

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

**(N) No**

## **32. Protection of witnesses, experts and victims**

### **131. Paragraph 1 of article 32**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Section 123, 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, 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.

**If available, please provide information on the number of witnesses or experts and their relatives or other persons close to them who have required protection and how long they needed it. Please provide per annum figures since, as available.**

N/A

**If you have a witness protection programme, how many witnesses or experts and their relatives or persons close to them have entered it? Please provide per annum figures, as available.**

The country currently does not have a witness protection programme but this might be included in the envisaged Whistle Blower Legislation.

**Do you have an estimated cost per protected person ?**

Not applicable

**Please provide examples of implementation**

An example of such a case is the one where a magistrate was attacked by an accused person and he was charged and ultimately brought to book. 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.

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 are that trial in open court might prejudice the interests of justice; in interlocutory proceedings; in the interest of defence, 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.

**MACHOKOTO v THE STATE 2007 (1) BLR 741 (HC)**

Citation: 2007 (1) BLR 741 (HC)

Court: High Court, Francistown

Case No: Misc 157 of 2006

Judge: Chinhengo J

Judgement Date: April 18, 2007

Counsel: Siziba for the applicant. T C Mulalu for the respondent.

Flynote

Criminal procedure - Appeal - Leave to appeal - Condonation - When granted - Failure of advising unrepresented C

accused of time for leave to appeal -Appropriate to grant condonation

Headnote

The applicant made application, out of time, for leave to appeal to the High Court against his conviction and sentence in the magistrate's court. The applicant was unrepresented at his trial and the magistrate did not inform him of the time period within which he was required to seek leave to appeal. Counsel for the respondent conceded that (i) the failure by the

magistrate to advise the applicant of the relevant time limit constituted good and sufficient reasons for the late filing of his application; and (ii) the applicant had reasonable prospects of success on appeal.

Held:

(1) For the reasons conceded, the order was granted as sought.

#### Case Information

Application, out of time, for leave to appeal against conviction and sentence in magistrate's court. The facts are sufficiently stated in the judgment.

Siziba

for the applicant.

T C Mulalu for the respondent.

Judgement

CHINHENGO

J: F

This is an application for leave to appeal out of time to this court from a decision of a senior magistrate at Francistown Magistrates' Court in terms of which the applicant was convicted of the offence of defilement contrary to s 147(1) of the Penal Code (Cap 08:01) as amended. The particulars of the offence are that on 23 January 2006 at Somerset East

location in Francistown, the applicant unlawfully had carnal knowledge of Tapiwa Chaloba, a girl aged 11 years. It appears that the applicant was convicted and sentenced on or about 14 August 2006. According to counsel for both the applicant and the respondent the magistrate did not inform the applicant about the time within which he would have to note his appeal to the High Court. He was unrepresented at the trial and may not have been aware of the requirement to note his appeal within six weeks of his conviction and sentence. The applicant gave reasons for failing to note his appeal in time such as that the trial was held in camera because it involved a complainant who was a minor and that as a result his (the applicant's) relatives who would have assisted him in instructing counsel to note an appeal did not immediately become aware of his conviction and 2007 (1) BLR p742 CHINHENGO J sentence. He

said that there was breakdown of communication between him and his relatives. A Mr Mulalu conceded that the failure by the magistrate to advise the applicant as to the time within which he would have to note his appeal was a misdirection on the basis of which the applicant understandably would have reasonably failed to note his appeal in time. Mr Mulalu was satisfied that the applicant had proffered good and sufficient reasons for his failure to note his appeal in time. Mr Mulalu was also in agreement with Mr Siziba that the applicant had satisfied the second requirement in matters of this nature, that is, the need for the applicant to show reasonable prospects of success on appeal. He conceded that, whereas, the particulars of the offence alleged that the offence was committed on 23 January 2006, there was no evidence to prove or establish the commission of the offence on that date. The evidence led during the trial showed that sexual intercourse took place between the applicant and the complainant over a period preceding the date on which the offence is alleged to have been committed. A perusal of the record also shows that at no stage were the particulars of the charge amended. While it may be the case that the applicant may have had consensual sexual intercourse with the complainant prior to the 23 January 2006, there was no evidence to support the charge as framed and as put to the applicant. Mr Siziba pointed out a number of discrepancies in the evidence of the prosecution witnesses. Some of those discrepancies may exist while others may not really have a bearing on the fundamental question as to whether there might have been a miscarriage of justice such as to warrant the setting aside of the conviction. Be that as it may, the common ground between counsel for the applicant and the respondent is that the evidence led did not establish the offence as charged in respect of the date of its commission. In my view the concessions made by Mr Mulalu and Mr Siziba both point in the direction that the applicant might succeed in his appeal. It is for these reasons that I would grant the relief sought. I order that the applicant be and is hereby granted leave to file his notice of appeal against conviction in case number CCMFT-77-06 out of time and that he shall file that notice of appeal with the

assistant registrar of the High Court in Francistown within 14 days of this order.

Application granted.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

There is need to promulgate laws that will cater for witness protection as the current laws are not adequate. It is a lengthy process involving consultation and even that Parliament also has its own callender which will therefore occassion a lot of delay. There is therefore need for some time which can not readily be stated here as this will involve multitudes of stakeholders.

### **132. Subparagraph 2 (a) of article 32**

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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(N) No

No

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

N/A

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

N/A

### **133. Subparagraph 2 (b) of article 32**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

The country has relied more on the Common Law system where the country's history allows for the application of common law rules (See the brief back ground of the country). 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 the amendment to the Rules of the Magistrate Courts, see Statutory Instrument No 13 of 2011 allows for evidence to be lead electronically or through video conferencing. Order 45 Rule 2 sub-rule 3.

*Please cite and attach the applicable rule(s), policy(ies) or other measure(s)*

**Please cite the text(s)**

The **State v Robert Masitara** case. Consider also the extradition matter from the United Kingdom cited earlier where evidence was taken through video conferencing.

**Please provide examples of implementation**

The State v Robert Masitara case where vedio conferencing was permitted by the court.

**If applicable and available, please provide information on recent cases in which witnesses or experts have given testimony using video or other communications technology**

State v Robert Masitara

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana is in compliance

### **134. Paragraph 3 of article 32**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

N/A

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

N/A

### 135. Paragraph 4 of article 32

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

*In your domestic legal system, do the provisions of this article also apply to victims insofar as they are witnesses? (Check one answer)*

**(P) Yes, in part**

*Please cite and attach the applicable policy(ies), arrangement(s), agreement(s) or other measure(s)*

**Please cite the text(s)**

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 defence, public safety, public order, public morality, or the welfare of persons under the age of 18.

Section 123, 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 178 (4) 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.

**Please provide examples of implementation**

N/A

**If you have a protection programme, how many victims have been protected by it and in how many different cases? Please provide per annum figures, as available.**

N/A

**If applicable and available, please provide information on the number of victims who have received physical protection. Please provide per annum figures, as available.**

N/A

**If applicable and available, please provide information on the number of victims who have been permitted to give testimony in a manner that ensures their safety, such as video or other communications technology. Please provide per annum figures, as available.**

N/A

**If applicable and available, please provide information on the number of victims that have been relocated to other States through arrangements or agreements. Please provide per annum figures, as available.**

None have been relocated and there are no agreements to such with other states.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

At the moment the common law is working well for the country.  
There is therefore no urgent need for promulgating laws that cater for this provision.

### **136. Paragraph 5 of article 32**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Section 319 of the Criminal Procedure and Evidence Act is applicable here. Relates to restitution of property to the lawful owner or victim. 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.

1. 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.

#### **Please provide examples of implementation**

No readily available statistics but applications for compensation are an every day occurrence where property has been stolen, lost because of the accused person's conduct.

**If available, please provide information on the number of victims who have presented their views and concerns at any stage of criminal justice proceedings against offenders. Please provide per annum figures, as available.**

N/A

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

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.

### **137. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(INAD) Inadequacy of existing implementing normative measures (laws, regulations, etc. )

The law currently as is is not broadened to cover other aspects of witness protection.

*Which of the following forms of technical assistance, if available, would assist your country in adopting or better implementing the article under review? (Check all the answers that apply)*

(BEST) Summary of good practices/lessons learned

The country would do well to learn from those with experience in this particular field.

(ADV) Legal advice

(MOLEG) Model legislation

Need to promulgate laws catering for all aspects of the witness protection regime

(CAPWP) Capacity-building programmes for authorities responsible for establishing and managing witness and expert protection programmes

There will also be need to the thereafter train people to capacitate them in all these areas.

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## **33. Protection of reporting persons**

### **138. Article 33**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 of the Corruption and Economic Crime Amendment Act

Came into force on the 26th day of July 2013 introduces a new section 45A which makes it an offence to intimidate reporting persons or informers. (Please refer to the attached amendment.)

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.

The Whistleblower Act that is still a draft is also going to provide for 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.

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.

**Please provide examples of implementation**

The courts have always supported any law enforcement agent where they would testify and refuse 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 had 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. 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 can not be disclosed except where lack of disclosure shall occasion a miscarriage of justice.

### **139. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(LICAP) Limited capacity (e.g. human/technological/institution/other; please specify)

When the Whistle Blower legislation is enacted there would be need for capacity building for officers

(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)

(ISSUE) Other issues (please specify)

The law governing protection of sources of information is not adequate as it only

looks at punishing the offender but not much is said on witness protection. Its actually a proactive approach to witness protection.

*Which of the following forms of technical assistance, if available, would assist your country in adopting or better implementing the article under review? (Check all the answers that apply)*

**(BEST) Summary of good practices/lessons learned**

**(MOLEG) Model legislation**

**(PLAN) Development of an action plan for implementation**

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

**(N) No**

### **34. Consequences of acts of corruption**

#### **140. Article 34**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy (or policies), law(s) and/or other measure(s).*

**Please cite the text(s)**

1. 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.

#### PART XII-Public Procurement and Asset Disposal Board Act Registration of Contractors (ss 116-127)

##### 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. 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. 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. 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.

The Corruption and Economic Crime Amendment Act

Became law on the 26th day of July 2013, at section 9 thereof, introduces a new section 42 A where companies and individuals convicted of offences under section 28 and 29 of the Corruption and Economic Crime Act will have the convictions 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. This therefore means the further consequence of the acts of corruption by body corporates or persons directing the affairs of such body corporates will be for them to be delisted or suspended from acquiring projects.

#### **Please provide examples of implementation**

Examples are The Tourism Development Consortium and The State v Daisy Loo and Others cases cited earlier.

### **141. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(ISSUE) Other issues (please specify)

Best practices from countries that have been there before us.

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(PLAN) Development of an action plan for implementation

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## **35. Compensation for damage**

### **142. Article 35**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation and, if available, information on recent cases, including amount and type of compensation emanating from legal proceedings initiated by a victim against those responsible for a damage resulting from an act of corruption**

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.

### **143. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## **36. Specialized authorities**

### **144. Article 36**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies), institutional arrangements, law(s) or other measure(s):*

**Please cite the text(s)**

### 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.....

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.

To cater for the establishment of the Corruption Court the Directorate of Public Prosecutions also established a fully fledged Corruption Prosecution Unit to only prosecute corruption matters at the above stipulated court.

The Financial Intelligence Agency is established under the provisions of section 3 of the Financial Intelligence Act. Its duties and functions are also outlined under section 4 of the same Act. It is a specialized agency for combating corruption.

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

6 (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 tranquillity, 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.

#### PART II- Intelligence and Security Services Act CAP 23:02

##### 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.

**Please provide examples of implementation**

From the DCEC Website:

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 organisations such as INTERPOL.

**Please provide information on the measures adopted to ensure the independence of the specialized body**

Legislation establishing DCEC(Amendment 2013), the DPP under the Constitution has independence as well and the Attorney General. The DCEC in receiving reports of corruption 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.

With the Amendment to the Corruption and Economic Crime Act the DCEC will be delinking from the Public Service and as such there will be more independence.

**If available, please provide information on how staff is selected and trained**

Staff is selected on competency basis and no other criteria is used. The DCEC has its own Training and Development wing where an assesment of the training needs of the department is made and recommendations made to the training Board. It is after aproval of this Board made up of senior DCEC employees that individuals are taken for training. The Police as well have their own recruiting procedures and also a training college. It should be noted however that recruitment procedures are the same across government allowing for transparency and recruitment on merit.

#### **145. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(LICAP) Limited capacity (e.g. human/technological/institution/other; please specify)

(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)

*Which of the following forms of technical assistance, if available, would assist your country in (fully)*

*implementing the article under review? (Check all the answers that apply)*

(PLAN) Development of an action plan for implementation

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

### **37. Cooperation with law enforcement authorities**

#### **146. Paragraph 1 of article 37**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

[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

(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.

#### EVIDENCE OF ACCOMPLICES (ss 237-238) Criminal Procedure and Evidence Act

##### 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, Criminal Procedure and Evidence. 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.

As noted elsewhere in this document, the country also subscribes to common law principles and these also provide that sources of information may not be disclosed. This practice has also resulted in judicial case law/jurisprudence.

**Please provide examples of implementation**

See the cases attached which are judgments from the High Court.

**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

**Pandor v The State 1985 BLR 177** is also a case in point.

### **State v Zac Construction**

If available, please provide information on the number and nature of such cases that have contributed to depriving offenders of the proceeds of crime and to recovering such proceeds. Please provide per annum figures, as available.

Although no information is readily available, Such cases have come up in the past years but not during the period under assesment. Some of the cases are the ones already cited.

### **147. Paragraph 2 of article 37**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(N) No

Although no provision is made in our 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 as a mitigatory 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 judgement.

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

No efforts have been made so far

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

The State has the Judiciary take care of this aspect through using their own discretion and the system has served the country well.

### **148. Paragraph 3 of article 37**

3. Each State Party shall consider providing for the possibility, in accordance with the 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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Section 237, Criminal Procedure and Evidence Act

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.

Section 51, Constitution of Botswana. Attorney-General (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 an Attorney-General whose office shall be a public office.

(2) The Attorney-General shall be the principal legal adviser to the Government of Botswana.

(3) The Attorney-General 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 Attorney-General 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 Attorney-General 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.

**Please provide examples of implementation**

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 the stated companies was used as an accomplice witness and thereafter granted immunity from prosecution.

**The State v Gorerwang Mokgathi and Another (DOC/IF/2005/01163)**

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 signed by the DPP on the 10th day of July 2011 is attached.

**If available, please provide information (statistics, types of cases, outcome) on legal (civil, administrative or criminal) cases or other process related to instances where immunity from prosecution was granted to persons who had provided substantial cooperation. Please provide per annum figures.**

No information readily available but cases of this nature where the above section applies are a common occurrence in our courts.

**149. Paragraph 4 of article 37**

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

Section 123, 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 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.

**Please provide examples of implementation**

The few available examples are the case of *The State v Gorerwang Mokgathi* cited earlier; 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 them that their citizen would not be prosecuted in the event that they came to Botswana to testify. The DPP duly gave the assurance and the immunity in writing.

**If applicable and available, please provide information on the number of cooperating defendants/offenders who have been relocated to other States through arrangements or agreements. Please provide per annum figures, as available.**

N/A

**If available, please provide information on the number of cooperating defendants/offenders who have received physical protection, how long they required protection, type of protection received and cost. Please provide per annum figures, as available.**

Information has been kept on an adhoc basis

**If you have a defendant/offender protection programme, how many cooperating defendants/offenders have entered it? Please provide per annum figures, as available.**

N/A

**If applicable and available, please provide information on the number of cases where cooperating defendants/offenders have been permitted to give testimony using video or other communications technology. Please provide per annum figures, as available.**

N/A

## **150. Paragraph 5 of article 37**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable agreement(s), arrangement(s) or other measure(s)*

**Please cite the text(s)**

Section 237, Criminal Procedure and Evidence Act

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.

Section 51, Constitution of Botswana. Attorney-General (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 an Attorney-General whose office shall be a public office.

(2) The Attorney-General shall be the principal legal adviser to the Government of Botswana.

(3) The Attorney-General 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 Attorney-General 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 Attorney-General 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.

**Please provide examples of implementation**

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 the stated companies was used as an accomplice witness and thereafter granted immunity from prosecution.

**The State v Gorerwang Mokgathi and Another  
(DOC/IF/2005/01163)**

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 signed by the DPP on the 10th day of July 2011 is attached.

**151. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

**38. Cooperation between national authorities**

**152. Article 38**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

Please cite the text(s)

Section 7, 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).

Public Authorities also have between them and the law enforcement agencies what is known as Service Level Agreements where stakeholders meet to share on ways of improving service between them. Challenges are also discussed and plans made to better service and share information.

Within every Ministry there has been established Anti-Corruption Units which are a direct link between the Public Authorities and the Corruption agency.

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 they are assessed at the end of each quarter.

As stipulated above, Ministries get assessed for compliance on legal, policy and implementation issues and this has helped have all organizations comply in many areas that were previously a challenge.

Memorandum of Understanding between DCEC, Public Procurement and Asset Disposal Board (PPADB) and the

Competition Authority. This has enhanced cooperation between the three offices.

Private Sector Memorandum of Understanding between the DCEC and Botswana Confederation of Commerce, Industry and Manpower (BOCCIM)

There is a High Level Consultative Committee on law enforcement, among other issues usually discussed at the forum.

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.

Liaison Officers for the Financial Intelligence Agency on Money Laundering issues at the Banks.

PART III -Financial Intelligence Act CAP 08:07: 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.

PART IV, Intelligence and Security Service Act CAP 23:02  
National Intelligence Community (ss 27-28)

Section 27, Intelligence and Security Act: 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, Intelligence and Security Act, 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, Intelligence and Security Act: 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.

**Please provide examples of implementation**

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 Number of Notices Served Complied Not Complied 2182144

**If available, please provide information on the number of times and cases in which such information has been shared. Please provide per annum figures, as available.**

See the examples of notices attached above.

### **153. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## **39. Cooperation between national authorities and the private sector**

### **154. Paragraph 1 of article 39**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Section 7, 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, 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.

## PART V Financial Intelligence Act - 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.

**Please provide examples of implementation**

Notices have been issued both under section 7 and 8 of the Corruption and Economic Crime Act and compliance has been had. This evidences the cooperation between both the private and national authorities.

**If available, please provide information on recent cases in which entities of the private sector have collaborated with national investigating or prosecuting authorities**

Over the past three years [2010-2012 and the liason is 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 identified a need by both the DCEC and the private sector through their confederation known as the Botswana Confederation of Commerce, Industry and Manpower. The need was for a code of conduct. The two parties then agreed to outsource the creation of the conduct to a consultant and at the moment the code is out and it is known as the Botswana Code of Conduct for the Private Sector. It was launched in 2012 and both the DCEC

and BOCCIM are creating awareness for the code and that all private sector organizations implement it. Members of BOCCIM are signing up for the Code which will better ethical conduct in the way they do business.

## 2. [CASE 2]

During this period as well 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.

### 155. Paragraph 2 of article 39

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

#### PART III

#### Functions of Directorate (ss 6-22)

#### 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**

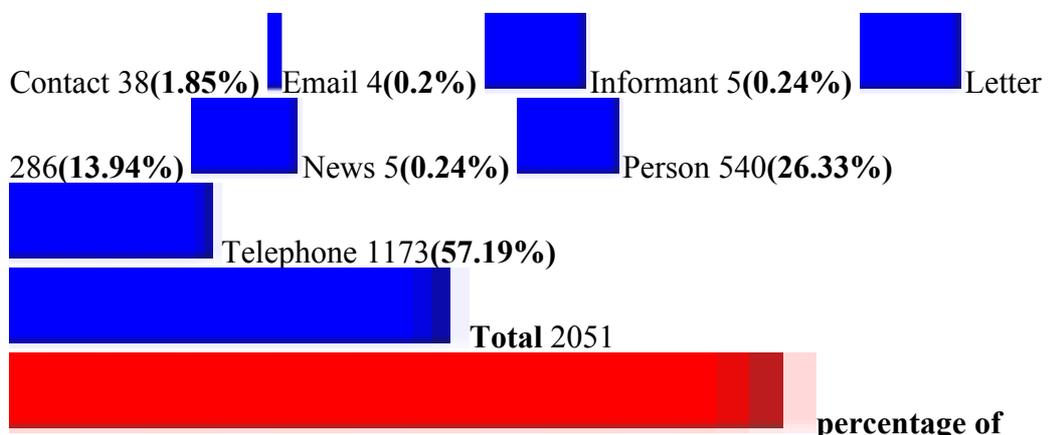
**( j) to enlist and foster public support in combating corruption.**

**If financial incentives are offered to encourage such reports, please provide details, available reports and relevant statistics**

No incentives are offered to persons making reports but that it is a national duty to report. Patriotism is placed higher above everything else.

**If anonymous reports are given due consideration by appropriate authorities, how many of the reports received have contributed to the investigation or prosecution of an offence established in accordance with the Convention? Please provide per annum figures, as available.**

Statistics are available as appear on the attached document but there is no indication as to how many of the anonymous reports ultimately were sent for prosecution. All the report mechanisms are accounted for.



Total reported as Annonymous 528(25.74%)



Case Statistics

Source Type	Status Report	2010/01/1-2010/12/31	Contact	Percentage
5	(0.25%)	Letter	309	(15.35%)
625	(31.05%)	Telephone	1016	(50.47%)
29	(1.44%)	News	29	(1.44%)
29	(1.44%)	Person	29	(1.44%)
29	(1.44%)	Email	29	(1.44%)

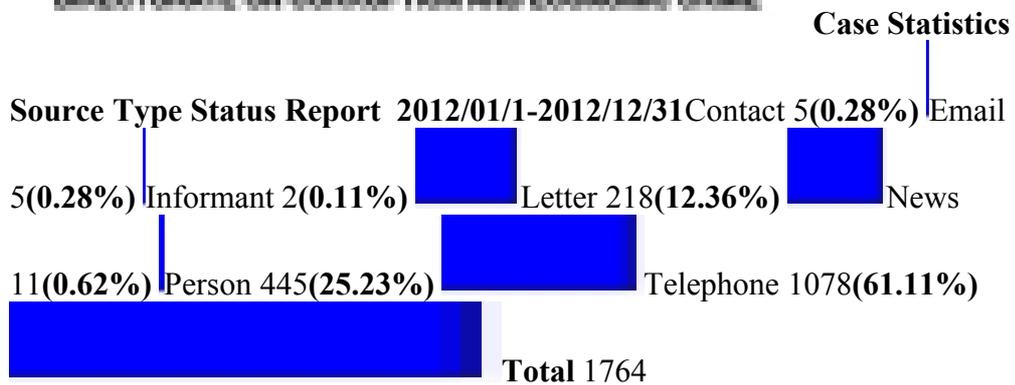
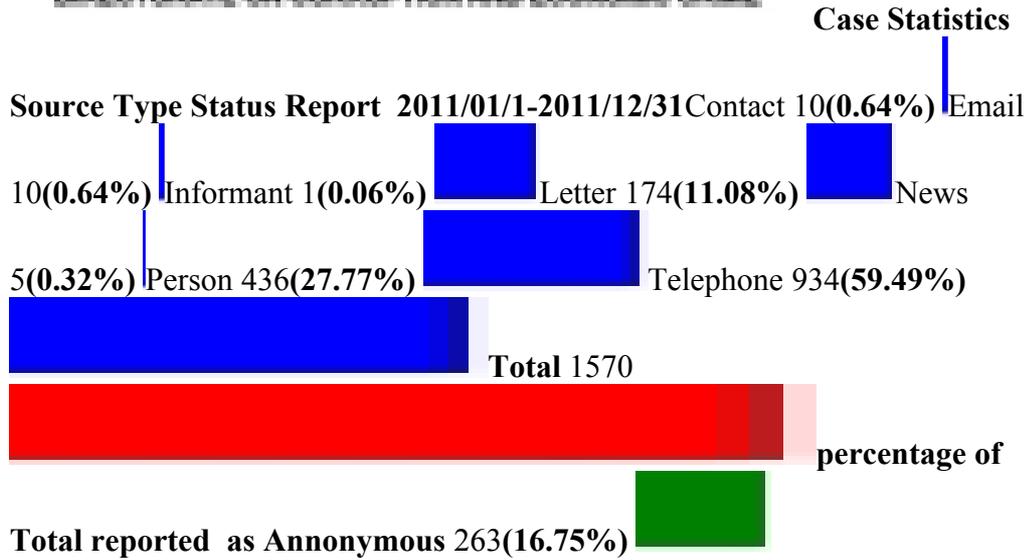
Total 2013



percentage of

Total reported as Annonymous 435(21.61%)







**Total reported as Annonymous 331(18.76%)** Compiled on 30 July, 2013 by Keddy N

**Please provide examples of implementation**

Training has always been provided to the public through own initiation by the DCEC or where some organizations, both private and public, write to the DCEC to request training. Some requests are attached and even one training that was requested on issues of Conflict of interest is attached.

**If you have hotlines or other mechanisms for offences to be reported, how many reports have you received? Please provide per annum figures, as available.**

When reports are received they are not classified as to whether they are through our hotline or not. The call would get to our office through the normal telephone line. The record would then indicate just that a report was received through the telephone. Other ways of reporting are through e-mail, in person, fax, letter.

### **156. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## **40. Bank secrecy**

### **157. Article 40**

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.

*Has your country adopted the mechanisms described above? (Check one answer)*

(Y) Yes

*Please cite and attach the applicable mechanism(s):*

**Please cite the text(s)**

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 a 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 P10,000 and to imprisonment for three years.

#### Section 8, 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, 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, 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

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.

#### *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.

The Banking Amendment Bill 2013 also includes BURS (Botswana Unified Revenue Services) as being among the organs that may be given information by a bank irregardless of Bank Secrecy Laws. The reason for the amendment is that BURS is a new creature of Statute having not been there initially.

##### **Please provide examples of implementation**

Examples of implementation are the Notices that the Director of the DCEC has been issuing and all these have been complied with. These notices are under the provisions of section 8 and despite the Bank secrecy laws the banks have always been obliged to provide such information to the DCEC. The Police also use section 248 and 249 of the Criminal Procedure and Evidence Act to obtain orders from the courts to get statements from the banks and bank secrecy laws have never been used to refuse access to such records.

### **158. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## 41. Criminal record

### 159. Article 41

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(P) Yes, in part

*Please cite and attach the applicable law(s), policy(ies), or other measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation**

Not Applicable. Although the law allows for such only the previous convictions from the national bureau have always been used without resorting to the foreign convictions.

**Please provide information on recent cases where you took an alleged offender's previous conviction(s) in another State into consideration for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention**

Information not available for the period under discussion. The Criminal Record Bureau only provides previous convictions for the local convictions and at no time have the courts considered convictions from member states although the law seems to allow for such.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

N/A

## **160. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## **42. Jurisdiction**

### **161. Subparagraph 1 (a) of article 42**

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

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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.

#### **Please provide examples of implementation, including related court or other cases**

The bigamy case where a foreigner married a Motswana outside the country according to civil law is a case in point. The accused was married to one 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 here beleived 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 the Republic of Botswana was called upon to decide jurisdictional issues in a rape case. The accused had assaulted the victim within Botswana borders and chased her across the border with South Africa. He thereat raped her. The question was then whether the Botswana courts could intertain the

matter. It was held that as the rape occurred across the border then the courts in Botswana did not have jurisdiction to handle the matter. Jurisdiction in Botswana is a territorial matter.

## 162. Subparagraph 1 (b) of article 42

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

...

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

PENAL CODE CHAPTER: 08:01 **Part:II Crimes (ss 34-399) DIVISION I OFFENCES AGAINST PUBLIC ORDER (ss 34-98) Treason and other Offences against the State's Authority (ss 34-59)**34. Treason (1) A person is guilty of treason and shall, subject to section 40, be sentenced to death who- (a) prepares or endeavours to overthrow by unlawful means the Government as established by law; (b) prepares or endeavours to procure by force any alteration of the law or the policies of the Government; (c) prepares or endeavours to carry out by force any enterprise which usurps the executive power of the State in any matter of both a public and a general nature; (d) in time of war and with intent to give assistance to the enemy, does any act which is likely to give such assistance; or (e) gives assistance to any person who threatens the security or sovereignty of Botswana. (2) In paragraphs (b) and (c) of subsection (1) "by force" means either- (a) by force used in such a manner as, whether by reason of the number of persons involved or the means used or both, to imperil or be likely to imperil the safety of the State or to cause or be likely to cause death or grievous harm or serious damage to property; or (b) by a show of force to arouse reasonable apprehension that force will be used in such a manner as is described in paragraph (a). (3) A person who is not a citizen of Botswana shall not be punishable under this section for anything done outside Botswana, but a citizen of Botswana may be tried and punished for an offence under this section as if it had been committed within the jurisdiction of the court. 35. Instigating invasion Any person who instigates any foreigner to invade Botswana with an armed force is guilty of treason and shall, subject to section 40, be sentenced to death. 36. Concealment of treason Any person who- (a) becomes an accessory after the fact to treason; or (b) knowing that any person intends to commit treason, does not give information thereof with all reasonable despatch to the President or a police officer, or use other reasonable endeavours to prevent the commission of the offence, is guilty of the offence termed misprision of treason and is liable to imprisonment for not less than 15

years nor more than 25 years. 37. Treasonable offences Any person who forms an intention to effect any of the following purposes, that is to say- (a) prepares or endeavours to procure by unlawful means any alteration of the law or the policies of the Government; (b) prepares or endeavours to carry out by unlawful means any enterprise which usurps the executive powers of the State in any matter of both a public and general nature; (c) threatens the security of Botswana; or (d) prepares or endeavours to give assistance to any person who threatens the security of Botswana, and manifests such intention by an overt act, or by publishing any printing or writing, is guilty of an offence and is liable to imprisonment for not less than 15 years nor more than 25 years. 38. Promoting war or warlike undertaking Any person who, without lawful authority, carries on, or makes preparation for carrying on, or aids in or advises the carrying on of, or preparation for, any war or warlike undertaking with, for, by, or against any person or group of persons within Botswana, is guilty of an offence and is liable to imprisonment for not less than 15 years nor more than 25 years. 39. Certain persons deemed to threaten security or sovereignty of Botswana (1) For the purposes of sections 34 and 37 a person shall be deemed to threaten the security or sovereignty of Botswana if- (a) without lawful authority he is found in possession of or wearing the uniform of the armed forces of any foreign country; (b) without lawful authority, he is found in possession of any arms or ammunition prohibited under section 23 of the Arms and Ammunition Act, or of any explosive or bomb; (c) without lawful authority, he is found in company with any person specified in paragraph (a) or (b). (2) A person shall not be prosecuted for an offence under this section without the written consent of the Director of Public Prosecutions. 40. Extenuating circumstances in treason and similar offences Where a court in convicting a person of an offence contrary to section 34 or 35 is of the opinion that there are extenuating circumstances, the court may, instead of imposing the death sentence, impose a sentence of imprisonment of not less than 15 years nor more than 25 years. 41. Limitations as to trial for treason, etc. (1) A person shall not be tried for treason, or for any of the offences defined in sections 36, 37 and 38, unless the prosecution is commenced within two years after the offence is committed. (2) No person charged with treason, or with any of such offences, may be convicted, except on his own plea of guilty, or on the evidence in open court of two witnesses at the least to one overt act of the kind of treason or offence alleged, or the evidence of one witness to one overt act and one other witness to another overt act of the same kind of treason or offence.

## 62. Piracy

(1) A person commits an act of piracy if being-

(a) the owner or master of a ship, he sails the seas in her without authorization from the government of any country with the object of committing depredations upon property or acts of violence against persons or if, from or by means of the ship, he commits any such act of depredation or violence;

(b) a member of the crew or a passenger of a ship, he conspires with any other person to rise against her master and officers or to seize the ship or if, in common with any other person, he engages in any act of hostility against her master and officers.

(2) A master or seaman commits an act of piracy if he betrays his trust, runs away with his ship or goods belonging to her or yields them up voluntarily to any person contrary to his duty or conspires or combines with or attempts to corrupt any master, officer or seaman to yield up or run away with any ship or goods or makes or endeavours to make a revolt in the ship.

(3) A person belonging to a ship commits an act of piracy if, upon meeting a ship at sea or in any port, harbour or haven, he forcibly boards or enters her and, though he does not seize or carry off the ship, throws overboard or destroys any part of the goods belonging to her.

#### 63. Punishment of piracy

(1) A person who commits an act of piracy shall be guilty of an offence and shall be liable to imprisonment for life or any lesser term.

(2) A person who, with intent to commit or at the time of or immediately before or immediately after committing an act of piracy in respect of any ship, assaults, with intent to murder, any person being on board, or belonging to, the ship or injures any such person or unlawfully does any act by which the life of any such person may be endangered shall be guilty of an offence and shall be liable to suffer death.

#### 64. Jurisdiction over piracy

(1) The High Court has jurisdiction to try-

(a) an act of piracy wherever committed, if committed on board a Botswana ship;

(b) an act of piracy committed within the territorial waters of the Republic;

(c) an act of piracy committed by a citizen of Botswana on the high seas or in a foreign port or harbour or in foreign territorial tidal waters.

(2) For the purpose of establishing jurisdiction an act of piracy may be regarded as having been committed where any part of the act was committed.

#### 65. Hijacking and related offences

(1) Any person commits an offence who, whether in or out of Botswana, unlawfully or intentionally-

(a) performs or threatens to perform an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft;

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight;

(d) destroys or damages air navigation facilities or interferes with their operation if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering

the safety of an aircraft in flight.

(2) Any person also commits an offence if he-

(a) attempts to commit any of the offences mentioned in subsection (1); or

(b) is an accomplice of a person who commits or attempts to commit any such offence.

(3) Any person who commits any offence specified in subsections (1) and (2) shall be liable to imprisonment for life

The proposed Anti-Terrorism Act which is currently in the form of a Bill before Cabinet envisages a section 14 that will establish territorial and extra-territorial jurisdiction in relation to certain matters. This cannot be attached yet as it is a work in progress.

**Please provide examples of implementation, including related court or other cases**

There are no cases that have gone to the courts on these sections.

### **163. Subparagraph 2 (a) of article 42**

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

*Has your country adopted measures to establish its jurisdiction as described above? (Check one answer)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

N/A

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

N/A

### **164. Subparagraph 2 (b) of article 42**

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

*Has your country adopted measures to establish its jurisdiction as described above? (Check one answer)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation, including related court or other cases**

No case has been had relating to this Article.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

The article is being complied with, except that there are no cases to indicate enforcement

## **165. Subparagraph 2 (c) of article 42**

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 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

*Has your country adopted measures to establish its jurisdiction as described above? (Check one answer)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

N/A

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

Steps would include advocating for legislation that covers this aspect.

## **166. Subparagraph 2 (d) of article 42**

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.

*Has your country adopted measures to establish its jurisdiction as described above? (Check one answer)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

The Proceeds of Serious Crimes Act at 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.

**Please provide examples of implementation, including related court or other cases**

No data available

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

N/A

### 167. Paragraph 3 of article 42

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.

*Is your country in compliance with this provision? (Check one answer)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

Not applicable

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

Not applicable

### 168. Paragraph 4 of article 42

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

Not applicable

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

Not applicable

### 169. Paragraph 5 of article 42

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

The following bilateral agreements with the listed countries have been concluded and are relevant here;

Joint Permanent Commission with Malawi, Lesotho

There are further proposals for JPCCs with Jamaica, South Sudan

Botswana is also signatory to the Interpol Constitution.

**Please provide examples of implementation and details on factors facilitating such collaboration and coordination**

### **170. Paragraph 6 of article 42**

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.

*Has your country adopted any grounds of criminal jurisdiction other than those described above? (Check one answer)*

(N) No

### **171. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(INAD) Inadequacy of existing implementing normative measures (laws, regulations, etc. )

Laws are not in line with the convention except in a few instances

(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)

*Which of the following forms of technical assistance, if available, would assist your country in adopting or better implementing the article under review? (Check all the answers that apply)*

(PLAN) Development of an action plan for implementation

(CAPCRO) Capacity-building programmes for investigative, prosecution or judicial authorities on cross-border cooperation and coordination mechanisms

(BEST) Summary of good practices/lessons learned

Countries or experts knowledgeable on these issues would suffice.

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## IV. International cooperation

### 44. Extradition

#### 172. Paragraph 1 of article 44

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s), including your policy on dual criminality*

**Please cite the text(s)**

Extradition is subject to dual criminality and the existence of bilateral arrangements or designation of countries.

[Botswana: please provide list of extradition treaties.]

[Botswana: please provide number of extradition requests made/received/refused (incoming and outgoing).]

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.

List of Extradition Treaties:

Botswana has a bilateral treaty with the Republic of South Africa and Portugal. On

multilateral treaties, it had declared all commonwealth countries as Designated Countries in accordance with Section 4 of the Extradition Act which reads as follows:

**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.**

Botswana has also signed a multiple of international agreements e.g. SADC Protocol in Extradition, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances etc. Most of these agreements are useful when it comes to legal base in extradition but they are deficient because they have not been incorporated and or domesticated into Botswana's laws.

Please provide examples of implementation, including cases where dual criminality issues were raised and resolved

**EXTRADITION REQUESTS BY BOTSWANA UPDATE SINCE 2007-2012 BOTSWANA AND SOUTH AFRICA**

<b>NAME</b>	<b>OF</b>	<b>ACCUSED</b>	<b>NATIONALITY</b>	<b>OFFENCE</b>	<b>STATUS</b>
1. Irina L. Ramokate	Motswana	Possession of drugs		Extradited	2.
Michael Tshepiso	Motswana	Murder		Extradited	3.
Tebogo Augustinas Mafisa	South Africa	Armed Robbery		Extradited	4.
4. Skhumbizo Ricardo Mlota	South Africa	Armed Robbery		Extradited	5.
Hendrick Vacey Molope	South Africa	Armed Robbery		Extradited	6.
George Vingazo	Malawi	Theft of M/V		Extradited	7.
Mhlupheki Dlamini	South Africa	Armed Robbery		Extradited	8.
Benson Keganne and two others	2 S/African and 1 Motswana	Murder and robbery		Extradited	9.
Michael Nzwinila and others (Bank of Baroda and Home Corporate)	Batswana	Armed robbery and store breaking and theft		Extradited (twice)	10.
Nkosinathi Moyo	Zimbabwean	Theft motor vehicle		Extradited and consent to prosecute him for other offences was also subsequently granted	11.
Thabo Lokwae	Motswana	Fraud		Handed himself over before arrest	12.
Jabulani Johnson	Motswana	Fraud		Handed himself over before arrest	13.
Emmanuel Tsebe	Motswana	Murder		Extradition was refused due to non-availability of an undertaking. Died in custody in South Africa	14.
Motheo Monnaesi	Motswana	Armed robbery and escaping from lawful custody		Pending extradition	15.
Jorge Lius Valenzela	Peruan	Theft		Pending extradition	16.
Enock Ndlovu Sibandanyana	Zimbabwean	Store breaking and theft		Arrest in Botswana	17.
Jerry Phale	Motswana	Murder		Extradition was refused due to non-availability of an undertaking. Matter pending before Court	18.
Sefelane Shoniwa and others	Two Batswana, 2 South Africans and 1 Zambian	Theft of motor vehicles		Extradited	19.
Gaolekwe Rabana	Motswana	Corruption		Held extraditable matter pending appeal (very old)	20.
Sipho					

MogoadubaSouth AfricanTwo cases of FraudPending arrest21. Joyce Vumuhle MogoadubaSouth AfricanFraudPending arrest22. Rasenamolela Harold MogotsiSouth AfricanFraudPending arrest23. Nathasha Cia Maria Minnings LoganSouth AfricanFraudPending arrest24. Johannes MaganoSouth AfricanTheft of Motor VehicleBefore Court at Mafikeng25. Paul MthabelaSouth AfricanFraudMatter before Court. Extradition hearing will be held on the 29<sup>th</sup> November 201226. Reunart MondiraMotswana2 cases fraudPending arrest27. Johannes MosiwaSouth AfricanMurder and armed robberyPending arrest old matter understanding was provided28. Lawrence TshailaMotswanaUnlawful woundingPending arrest-old matter 29. Mr Enock Ndlovu SibanganyanaZimbabweTheftExtradition request suspended by Botswana-accused arrested in Botswana30. Mmoloki Matshane, Aobakwe Moreeng, Ogoditse Phorotlho and Poloko BafedileBotswana and South AfricanDouble MurderPending. No undertaking provided31. Emmanuel DzeveveMurderPending submission. No understanding32. Mothusi KatseMotswanaMurderPending submission. No undertaking provided33. Nqoabuthu Mbele@nkosinathi Sibanda Stanley Ndlovu@Khanyisele SiyabongaZimbabweansArmed robberyHeld extraditable at matter pending repatriation.34. Mr Mustafa ChilongaMotswanaObtaining by false pretencesPending arrest.35. Edwin SamotseMotswanaMurderThe accused volunteered to be extradited. Handing over is pending because no undertaking provided36. Antonio SamuelsSouth AfricanFraudPending arrest

### **Extradition requests to Zimbabwe (just to mention a few).**

**No:SubjectCR No. & StationsOffencesStatus** 1.Eleanor Kuedza TEMBUREMachipisa CR 339/6/2003 ZimbabweThe subject wanted for murder and attempted murder chargesThe subject is still held in custody at Francistown pending extradition hearing2.Botho MPOFUTatitown CR 63/07/2006The subject wanted for murderSubject still at large3.Mlungisi MOYORamotswa CR 69/07/2008Subject wanted for murderExtradition documents4.Mary NGWENYARamotswa CR 69/07/2008MurderTheir provisional request for extradition was sent on the 19<sup>th</sup> January 2009. Subjects still at large.5.Workmore MAPIRARamotswa CRMurderTheir provisional request for extradition was sent on the 19<sup>th</sup> January 2009. Subjects still at large. Extradition documents drafted and sent to Zimbabwe.6.William Munyaradzi MAPHORISAKutlwano CR 300/03/2007MurderDocuments sent to Zimbabwe7. Irvin D. KHULULEKANINaledi CR 677/09/2008Obtaining by false pretencesExtradition documents submitted to Zimbabwe Fugitive still serving sentence in Zimbabwe.8.Brighton NDLOVUGerald CR 19/08/2009MurderDocuments sent to Zimbabwe. Accused serving a 20 year jail sentence.

### **Extradited from the Republic of Botswana and Other Countries (just to mention a few)**

**NameOffenceCountryStatus** 1. Dennis MoyoMurderSouth AfricaExtradited2. Johannes Van Der MerweTheftZambiaMatter pending Appeal before Newman J.3. Itumeleng DoctorPossession of DrugsZimbabweExtradited4. Edward Hamanesu JaniTheftZambiaExtradited5. 5. Crofton HannibalAttempted murderGrenadaExtradited6. Thabo R. HurndallDrug traffickingNamibiaExtradited7. Melusi NdlovuMurderZimbabweTo be extradited on the 27<sup>th</sup> March, 2013

### 173. Paragraph 2 of article 44

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.

*Has your country adopted and implemented the measures described above? (Check one answer)*

(N) No

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

Extradition is subject to the dual criminality test.

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

The country has not initiated anything that is contrary to the dual criminality test.

### 174. Paragraph 3 of article 44

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.

*Has your country adopted and implemented the measures described above? (Check one answer)*

(N) No

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

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.

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

N/A

### 175. Paragraph 4 of article 44

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation, including related court or other cases**

There are no cases regarding this article.

**Please provide a sample of relevant extradition treaties**

Sample of Extradition Treaties attached.

## **176. Paragraph 5 of article 44**

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.

*Does your country make extradition conditional on the existence of a treaty? (Check one answer)*

**(P) Yes, in part**

Extradition is subject to the existence of bilateral arrangements or designation of countries. Botswana will extradite its nationals if reciprocal arrangements or laws are in place in the requesting State. There is no evidence that Botswana would consider enforcing the remainder of a sentence imposed by the requesting State against its nationals. For Botswana to recognise 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.

Our courts allow for application of international law as persuasive authority

*Does your country consider this Convention as the legal basis for extradition in respect to any offence to which the article under review applies?*

**(X) Information not available**

As appears in the previous answer, signing of the convention by itself will not suffice but there is need for the convention to be domesticated.

With respect to UNTOC, in a notification made upon becoming party to the Palermo Convention Botswana stated that it would not take UNTOC as the legal basis for cooperation on extradition with other States parties (see CTOC/COP/2005/7).

#### **177. Paragraph 6 of article 44**

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.

*Does your country make extradition conditional on the existence of a treaty? (Check one answer)*

**(P) Yes, in part**

Extradition is subject to the existence of bilateral arrangements or designation of countries under the Mutual Legal Assistance Act.

*Does your country consider this Convention as the legal basis for extradition in respect to any offence to which this article applies? (Check one answer)*

**(P) Yes, in part**

*Has your country informed the Secretary-General of the United Nations as prescribed above? (Check one answer)*

(N) No

Office of International Cooperation will be asked to provide.

*The Secretary-General would be grateful if Governments would send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria ([uncac.cop@unodc.org](mailto:uncac.cop@unodc.org)).*

**The Secretary-General would be grateful if Governments would send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria ([uncac.cop@unodc.org](mailto:uncac.cop@unodc.org)).**

Botswana is encouraged to make the requisite notification. The only depositary notification provided is Botswana's instrument of accession (<http://treaties.un.org/doc/Publication/CN/2011/CN.424.2011-Eng.pdf>):

The screenshot shows the United Nations Treaty Collection website. The header includes the UN logo and the text "UNITED NATIONS TREATY COLLECTION". Below the header is a navigation bar with links: HOME, OVERVIEW, DATABASES, PUBLICATIONS, TRAINING, and TRI. The main content area is titled "DATABASES" and includes a search sidebar on the left with options like "Full text Search", "Advanced Search", "Basic Search", "MTDSG", "Status of Treaties", "Depository Notifications", "Certified True Copies", "Opening for Signature", "UN Journal", "Photographs", "Reference-Links", "Titles and Recent Texts", "UNTS", "MS", and "Automated Subscription Services". The main search results area shows "Depository Notifications (CNs) by the Secretary-Gen" with a search form containing fields for "Year of treaty action/formality:" (set to "-- Select All Years --"), "Participant:" (set to "Botswana"), and "Treaty Reference:" (set to "XVIII-14"). Below the search form is a "Results per Page:" dropdown set to "10". The search results table has the following data:

Date of Issuance	CN Number	Participant	Action
01/07/2011	424	Botswana	Accession

**178. Paragraph 7 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(N) No

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

Not applicable

**Please provide an account of your country's efforts to date to implement the provision under review.**

Not applicable

## **179. Paragraph 8 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s), including relevant domestic law(s) and conditions*

**Please cite the text(s)**

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.

#### **Please provide examples of implementation**

Cases of extradition follow under Article 44(9)

#### **Please provide information on conditions and grounds upon which extradition requests were refused**

1. 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.

#### **180. Paragraph 9 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

*Please cite the text(s)*

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.

**Please provide examples of implementation**

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.

**181. Paragraph 10 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

**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.

Please provide examples of implementation

**EXTRADITION REQUESTS UPDATE SINCE 2007-2012 BOTSWANA AND SOUTH AFRICA (The requests were from Botswana to South Africa)**

NAME	OF	ACCUSED	NATIONALITY	OFFENCE	STATUS
1. Irina L. Ramokate	Motswana	Possession of drugs	Extradited		
2. Michael Tshepiso Morwe	Motswana	Murder	Extradited		
3. Tebogo Augustinas Mafisa	South Africa	Armed Robbery	Extradited		
4. 4. Skhumbizo Ricardo Mlota	South Africa	Armed Robbery	Extradited		
5. Hendrick Vicey Molope	South Africa	Armed Robbery	Extradited		
6. George Vingazo	Malawi	Theft of Motor Vehicle	Extradited		
7. Mhlupheki Dlamini	South Africa	Armed Robbery	Extradited		
8. Benson Keganne and two others	Two South African and one Motswana	Murder and robbery	Extradited		
9. Michael Nzwinila and others (Bank of Baroda and Home Corporate	Batswana	Armed robbery and store breaking and theft	Extradited (twice)		
10. Nkosinathi Moyo	Zimbabwean	Theft motor vehicle	Extradited and consent to prosecute him for other offences was also subsequently granted		
11. Thabo Lokwae	Motswana	Fraud	Handed himself over before arrest		
12. Jabulani Johnson	Motswana	Fraud	Handed himself over before arrest		
13. Emmanuel Tsebe	Motswana	Murder	Extradition was refused due to non-availability of an undertaking. Died in custody in South Africa		
14. Motheo Monnaesi	Motswana	Armed robbery and escaping from lawful custody	Pending extradition		
15. Jorge Lius Valenzela	Peruan	Theft	Pending extradition		
16. Enock Ndlovu Sibandanyana	Zimbabwean	Store breaking and theft	Arrest in Botswana		
17. Jerry Phale	Motswana	Murder	Extradition was refused due to non-availability of an undertaking. Matter pending before Court		
18. Sefelane Shoniwa and others	Two Batswana, 2 South Africans and 1 Zambian	Theft of motor vehicles	Extracted		
19. Gaolekwe Rabana	Motswana	Corruption	Held extraditable matter pending appeal (very old)		
20. Siphogoaduba	South African	Two cases of Fraud	Pending arrest		
21. Joyce Vumuhle Mogoaduba	South African	Fraud	Pending arrest		
22. Rasenamolela Harold Mogotsi	South African	Fraud	Pending arrest		
23. Nathasha Cia Maria Minnings Logan	South African	Fraud	Pending arrest		
24. Johannes Magano	South African	Theft of Motor Vehicle	Before Court at Mafikeng		
25. Paul Mthabela	South African	Fraud	Matter before Court. Extradition hearing will be held on the 29 <sup>th</sup> November 2012		
26. Reunart Mondira	Motswana	2 cases fraud	Pending arrest		
27. Johannes Mosiwa	South African	Murder and armed robbery	Pending arrest old matter understanding was provided		
28. Lawrence Tshaila	Motswana	Unlawful wounding	Pending arrest-old matter		
29. Mr Enock Ndlovu Sibanganyana	Zimbabwe	Theft	Extradition request suspended by Botswana-accused arrested in Botswana		
30. Mmoloki Matshane, Aobakwe Moreeng, Ogoditse Phorotlho and Poloko Bafedile	Botswana and South African	Double Murder	Pending. No undertaking provided		
31. Emmanuel Dzeveve	Murder	Pending submission. No understanding			
32. Mothusi Katse	Motswana	Murder	Pending submission. No undertaking provided		
33. Nqoabuthu Mbele@nkosinathi Sibanda Stanley Ndlovu@Khanyisele Siyabonga	Zimbabweans	Armed robbery	Held extraditable at matter pending repatriation.		
34. Mr Mustafa Chilonga	Motswana	Obtaining by false pretences	Pending arrest.		
35. Edwin Samotse	Motswana	Murder	The accused volunteered to be extradited. Handing over is pending because no undertaking provided		
36. Antonio Samuels	South African	Fraud	Pending arrest		

### **Extradition requests to Zimbabwe (just to mention a few).**

**No:SubjectCR No. & StationsOffencesStatus** 1.Eleanor Kuedza TEMBUREMachipisa CR 339/6/2003 ZimbabweThe subject wanted for murder and attempted murder chargesThe subject is still held in custody at Francistown pending extradition hearing2.Botho MPOFUTatitown CR 63/07/2006The subject wanted for murderSubject still at large3.Mlungisi MOYORamotswa CR 69/07/2008Subject wanted for murderExtradition documents4.Mary NGWENYARamotswa CR 69/07/2008MurderTheir provisional request for extradition was sent on the 19<sup>th</sup> January 2009. Subjects still at large.5.Workmore MAPIRARamotswa CRMurderTheir provisional request for extradition was sent on the 19<sup>th</sup> January 2009. Subjects still at large. Extradition documents drafted and sent to Zimbabwe.6.William Munyaradzi MAPHORISAKutlwano CR 300/03/2007MurderDocuments sent to Zimbabwe7. Irvin D. KHULULEKANINaledi CR 677/09/2008Obtaining by false pretencesExtradition documents submitted to Zimbabwe Fugitive still serving sentence in Zimbabwe.8.Brighton NDLOVUGerald CR 19/08/2009MurderDocuments sent to Zimbabwe. Accused serving a 20 year jail sentence.

### **Extradited from the Republic of Botswana and Other Countries (just to mention a few)**

**NameOffenceCountryStatus** 1. Dennis MoyoMurderSouth AfricaExtradited2. Johannes Van Der MerweTheftZambiaMatter pending Appeal before Newman J.3. Itumeleng DoctorPossession of DrugsZimbabweExtradited4. Edward Hamanesu JaniTheftZimbriaExtradited5. 5. Crofton HannibalAttempted matterGrenadaExtradited6. Thabo R. HurndallDrug traffickingNamibiaExtradited7. Melusi NdlovuMurderZimbabweTo be extradited on the 27<sup>th</sup> March, 2013

N.B. More often than not suspects awaiting the finalization of the extradition proceedings are remanded in custody. This is where Botswana would have been requested by another state to extradite a fugitive criminal within its territory.

**If applicable and available, please provide information on recent court or other cases in which a person whose extradition was sought and who was present in your territory has been taken into custody and cases in which other appropriate measures were taken to ensure his or her presence at extradition proceedings (please describe those measures)**

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 awaiting trial detainees. Examples of cases are as follows;

### **EXTRADITION REQUESTS UPDATE SINCE 2007-2012 BOTSWANA AND SOUTH AFRICA**

<b>NAME</b>	<b>OF</b>	<b>ACCUSED</b>	<b>NATIONALITY</b>	<b>OFFENCE</b>	<b>STATUS</b>
1. Irina L. Ramokate	Motswana	Possession of drugs		Extradited	
2. Michael Tshepiso Morwe	Motswana	Murder		Extradited	
3. Tebogo Augustinas Mafisa	South Africa	Armed Robbery		Extradited	
4. Skhumbizo Ricardo Mlota	South Africa	Armed Robbery		Extradited	
5. Hendrick Vacey Molope	South Africa	Armed Robbery		Extradited	
6. George Vingazo	Malawi	Theft of Moto Vehicle		Extradited	
7. Mhlupheki Dlamini	South Africa	Armed Robbery		Extradited	
8. Benson Keganne and two others	Two SAs + Motswana	Murder and			

robberyExtradited9. Michael Nzwinila and others (Bank of Baroda Home CorpBatswanaArmed robbery and store breaking and theftExtradited (twice)10. Nkosinathi MoyoZimbabweanTheft motor vehicleExtradited and consent to prosecute him for other offences was also subsequently granted11. Thabo LokwaeMotswanaFraudHanded himself over before arrest12. Jabulani JohnsonMotswanaFraudHanded himself over before arrest13. Emmanuel TsebeMotswana MurderExtradition was refused due to non-availability of an undertaking. Died in custody in South Africa14. Motheo MonnaesiMotswanaArmed robbery and escaping from lawful custody Pending extradition15. Jorge Lius ValenzelaPeruanTheftPending extradition16. Enock Ndlovu SibandanyanaZimbabweanStore breaking and theftArrest in Botswana17. Jerry PhaleMotswana MurderExtradition was refused due to non-availability of an undertaking. Matter pending before Court18. Sefelane Shoniwa and others Two Batswana, 2 South Africans and 1 ZambianTheft of motor vehiclesExtracted19. Gaolekwe RabanaMotswana Corruption Held extraditable matter pending appeal (very old) 20. Siph Mogo adubaSouth AfricanTwo cases of FraudPending arrest21. Joyce Vumuhle Mogo adubaSouth AfricanFraudPending arrest22. Rasenamolela Harold MogotsiSouth AfricanFraudPending arrest23. Nathasha Cia Maria Minnings LoganSouth AfricanFraudPending arrest24. Johannes MaganoSouth AfricanTheft of Motor VehicleBefore Court at Mafikeng25. Paul MthabelaSouth AfricanFraudMatter before Court. Extradition hearing will be held on the 29<sup>th</sup> November 201226. Reunart MondiraMotswana2 cases fraudPending arrest27. Johannes MosiwaSouth AfricanMurder and armed robberyPending arrest old matter understanding was provided28. Lawrence TshailaMotswanaUnlawful woundingPending arrest-old matter 29. Mr Enock Ndlovu SibanganyanaZimbabweTheftExtradition request suspended by Botswana-accused arrested in Botswana30. Mmoloki Matshane, Aobakwe Moreeng, Ogoditse Phorotlho and Poloko BafedileBotswana and South AfricanDouble MurderPending. No undertaking provided31. Emmanuel DzeveveMurderPending submission. No understanding32. Mothusi KatseMotswanaMurderPending submission. No undertaking provided33. Nqoabuthu Mbele@nkosinathi Sibanda Stanley Ndlovu@Khanyisele SiyabongaZimbabweansArmed robberyHeld extraditable at matter pending repatriation.34. Mr Mustafa ChilongaMotswanaObtaining by false pretencesPending arrest.35. Edwin SamotseMotswanaMurderThe accused volunteered to be extradited. Handing over is pending because no undertaking provided36. Antonio SamuelsSouth AfricanFraudPending arrest

### **Extradition requests to Zimbabwe (just to mention a few).**

**No:SubjectCR No. & StationsOffencesStatus** 1.Eleanor Kuedza TEMBUREMachipisa CR 339/6/2003 ZimbabweThe subject wanted for murder and attempted murder chargesThe subject is still held in custody at Francistown pending extradition hearing2.Botho MPOFUTatitown CR 63/07/2006The subject wanted for murderSubject still at large3.Mlungisi MOYORamotswa CR 69/07/2008Subject wanted for murderExtradition documents4.Mary NGWENYARamotswa CR 69/07/2008MurderTheir provisional request for extradition was sent on the 19<sup>th</sup> January 2009. Subjects still at large.5.Workmore MAPIRARamotswa CRMurderTheir provisional request for extradition was sent on the 19<sup>th</sup> January 2009. Subjects still at large. Extradition documents drafted and sent to Zimbabwe.6.William Munyaradzi MAPHORISAKutlwano CR 300/03/2007MurderDocuments sent to Zimbabwe7. Irvin D. KHULULEKANINaledi CR 677/09/2008Obtaining by false pretencesExtradition documents submitted to Zimbabwe Fugitive still serving sentence in Zimbabwe.8.Brighton NDLOVUGerald CR 19/08/2009MurderDocuments sent to Zimbabwe. Accused serving a 20 year jail sentence.

**Extradited from the Republic of Botswana and Other Countries (just to mention a few)**

**Name** **Offence** **Country** **Status** 1. Dennis Moyo Murder South Africa Extradited 2. Johannes Van Der Merwe Theft Zambia Matter pending Appeal before Newman J. 3. Itumeleng Doctor Possession of Drugs Zimbabwe Extradited 4. Edward Hamanesu Jani Theft Zambia Extradited 5. 5. Crofton Hannibal Attempted matter Grenada Extradited 6. Thabo R. Hurndall Drug trafficking Namibia Extradited 7. Melusi Ndlovu Murder Zimbabwe To be extradited on the 27<sup>th</sup> March, 2013

**182. Paragraph 11 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite, summarize and attach the applicable practice(s) or measure(s)*

**Please cite the text(s)**

Botswana 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;

The aut dedere at iudicare obligation (extradite or prosecute) does not appear to be addressed in the legislation of Botswana.

**Please provide examples of implementation**

Refere to the extradition cases shown earlier.

**If available, please provide information on recent court or other cases submitted for prosecution by your authorities (statistics, types of cases, outcomes). Please provide per annum figures, as available**

Botswana's laws do not have provision for prosecuting its nationals

in the event that they refuse extraditing to another state party. 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.

### **183. Paragraph 12 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

Not applicable since the country does not have the laws in place.  
**Please provide an account of your country's efforts to date to implement the provision under review.**

The Prisons and Rehabilitation Department is spearheading the signing of Joint Permanent Consultative Commissions with several countries. The drafts have already been made and the expectation is that agreements will be entered into soon.

### **184. Paragraph 13 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under**

review.

Not applicable

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

Not applicable

### **185. Paragraph 14 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy(ies) or measure(s):*

**Please cite the text(s)**

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.

**Please provide examples of implementation, including related court or other cases**

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.

NB: The government of the Republic 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 has the mandate to pass the sentence it deems fit without interference from any other person or body. For government to say a certain sentence will be meted out would be an interference with Judicial independence. For people accused of murder it does not mean they are not afforded fair treatment. The above scenario and case is therefore considered an unfair assesment of the legal position in Botswana. 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 should not be held as an indictment on Botswana's judicial system.

**186. Paragraph 15 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies), practice(s), or measure(s)*

**Please cite the text(s)**

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

**Please provide examples of implementation**

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 and 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.

*Mma Israel to assist with citation of case*

**If applicable and available, please provide information on recent court or other cases where extradition was refused on such grounds**

The case cited above bears reference.

**187. Paragraph 16 of article 44**

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

*Is your country in compliance with this provision? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy(ies) or measure(s):*

**Please cite the text(s)**

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.

**Please provide examples of implementation**

The cases cited as those involving the extradition of people to or from other countries has always been done on the basis that the offence complained of is an extraditable offence. This would be an offence of a serious nature requiring that a convicted person be sentenced to 2 years or more in the event of a conviction.

**Please provide information on recent cases in which extradition involving fiscal matters was not refused**

See the list of cases attached.

**188. Paragraph 17 of article 44**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

Consultations are done prior to making an Order for the refusal. As for an order to extradite the other state is consulted and a date for repatriation of fugitive is discussed and agreed upon. Before a request of extradition is sought consultation is done to establish what documents should be provided to enable successful extradition.

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation**

Before a request is brought to court there are extensive negotiations with the requesting party. The two country's responsible Ministry of Foreign Affairs and International Cooperation are engaged through their legal representatives.

**Please provide information on recent court or other cases and illustrations of relevant exchanges between your country and other States**

Exchanges are in the form of a requests.

## **189. Paragraph 18 of article 44**

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach any other bilateral or multilateral agreement(s) or arrangement(s) related to*

*extradition that have not already been attached in previous answers related to this article*

**Please cite the text(s)**

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 trade and financial partners.

Botswana does not have any bilateral agreement with any Country but we have drafted agreements and sent to the under listed countries (these are countries she holds Joint Permanent Commission of Cooperation with) and we are awaiting their responses.

a) South Africa

b) Zambia

c) Zimbabwe

d) Rwanda

e) Kenya

f) Namibia

g) Nigeria

h) Lesotho

i) Ghana

j) Mozambique

Botswana is a party to many multilateral agreements e.g. The UNODC, the SADC Protocol on Mutual Legal Assistance etc. We cannot use these agreements unless there are incorporated into our laws. However our Mutual Assistance Act is very generous that it renders assistance to any country.

**Please provide examples of implementation**

All the countries with which Botswana has signed agreements have been reciprocating when there is need to extradite an individual. Likewise Botswana has been extraditing as well. Examples of implementation are the cases that we have had since promulgation of the relevant legislation;

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 Andorson: 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.

We received request from the following countries:

- i. Namibia
- ii. ii) South Africa
- iii. iii) Zambia
- iv.iv) Netherlands
- v. v) Switzerland
- vi.vi) United Kingdom - Evidence through video conferencing

## **190. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(INTACO) Inter-agency co-ordination

Coordination to make signing and use of the agreements easy. How to get over the Diplomatic hurdles.

(INAD) Inadequacy of existing normative measures (constitution, laws, regulations, etc.)

(MYSYS) Specificities in our legal system

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(ADV) Legal advice

(CAPICM) Capacity-building programmes for authorities responsible for international cooperation in criminal matters

(OTHER) Other assistance (please specify)

[Botswana: please consider what technical assistance, if any, on extradition is needed.]

(BEST) Summary of good practices/lessons learned

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## 45. Transfer of sentenced persons

### 191. Article 45

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.

*Is your country in compliance with this provision? (Check one answer.)*

(N) No

In Botswana we do not have arrangement or Law whereat an individual sentenced locally maybe transferred to country of origin to complete sentence. Through Joint Permanent Commission on Cooperation there is currently a negotiation ongoing of entering into agreements pertaining to transfer of prisoners. Botswana has drafted and sent an agreement to Zambia which is awaiting response. On the other side the Ministry of Justice Defence and Security is working on amending the countries' Prisons Act to allow for transfer of prisoners outside the country to complete sentence.

*Please provide an account of your country's efforts to date to implement the provision under review.*

Please provide an account of your country's efforts to date to implement the provision under review.

In Botswana we do not have arrangement or Law whereat an individual sentenced locally maybe transferred to country of origin to complete sentence. Through Joint Permanent Commission on Cooperation there is currently a negotiation ongoing of entering into agreements pertaining to transfer of prisoners. Botswana has drafted and sent an agreement to Zambia which is awaiting response. On the other side the Ministry of Justice Defence and Security is working on amending the countries' Prisons Act to allow for transfer of prisoners outside the country to complete sentence.

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

Not applicable

## **192. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(INTACO) Inter-agency co-ordination

(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(PLAN) Development of an action plan for implementation

(BEST) Summary of good practices/lessons learned

(MOT) Model treaty(ies)

(EXREL) On-site assistance by a relevant expert

(CAPICM) Capacity-building programmes for authorities responsible for international cooperation in criminal matters

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## **46. Mutual legal assistance**

### **193. Paragraph 1 of article 46**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

Botswana does not have any bilateral Mutual Legal Assistance agreement with any Country but agreements have been drafted and sent to the under listed countries (this are countries that we hold Joint Permanent Commission of Cooperation with) and we are awaiting their responses.

a) South Africa

b) Zambia

c) Zimbabwe

d) Rwanda

e) Kenya

f) Namibia

g) Nigeria

h) Lesotho

i) Ghana

j) Mozambique

Botswana is a party to many multilateral agreements e.g. The UNODC, the SADC Protocol on Mutual Legal Assistance etc. We cannot use these agreements unless there are incorporated into our laws. However our Mutual Assistance Act is very generous that it renders assistance to any country.

**Mma Israel to assist**

*Please summarize applicable mutual legal assistance laws and arrangements, including existing bilateral or multilateral agreement(s).*

**Please provide the summary.**

Mutual legal assistance is subject to dual criminality and the existence of bilateral arrangements [or designation of countries TBC]. The condition that bilateral arrangements are in place to provide mutual legal assistance is a concern.

### 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.

List of requests for mutual legal assistance by and to Botswana are as follows;

#### 1. Mutual Assistance requested by Botswana

i. State vs Gwenhamo Holdings (Pty) Ltd Ernest Effort Mutangi, Batandara Sanity Rute, Sani Ehee Rute and Boyce Motshegetsu 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.

We received request from the following countries:

i. Namibia

ii. South Africa

iii. Zambia

iv. Netherlands

v. Switzerland

vi. United Kingdom - Evidence through video conferencing

**Please provide examples of implementation**

These are as indicated in the previous answer.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

N/A

**194. Paragraph 2 of article 46**

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.

*Is your country in compliance with this provision? (Check one answer)*

**(Y) Yes**

1. 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.

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

xii. Discovery Copper (Botswana) (Pty) Ltd 6 million pula fraud case.

We received request from the following countries:

- i. Namibia
- ii. ii) South Africa
- iii. iii) Zambia
- iv. iv) Netherlands
- v. v) Switzerland
- vi. vi) United Kingdom - Evidence through video conferencing.

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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.

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

**Please provide examples of implementation and related court or other cases, whether you were a requesting or a requested State**

There are no impediments so far to MLA where legal persons are involved. The underlisted are cases where legal persons were involved and the assistance was rendered by the requested state;

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.

Cite legislation

### 195. Subparagraphs 3 (a) to 3 (i) of article 46

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;

*Can your country afford the forms of mutual legal assistance listed in the provision above? (Check one answer)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General to arrange for the service in Botswana of a process relating to a criminal matter in the foreign country, the Attorney-General 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.

**Please provide examples of implementation of these measures, including court or other cases in which you have made or received a request for forms of mutual legal assistance listed in the provision under review.**

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. 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.

We received request from the following countries:

i. Namibia

ii. ii) South Africa

iii. iii) Zambia

iv. iv) Netherlands

v. v) Switzerland

vi. vi) United Kingdom - Evidence through video conferencing

### **196. Subparagraphs 3 (j) and 3 (k) of article 46**

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.

*Can your country afford the forms of mutual legal assistance listed in the provision above? (Check one answer)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General 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 Attorney-General to arrange for the issue of a search warrant under this section in relation to that thing,
- the Attorney-General 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 Attorney-General 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.

See also PART VI, Proceeds of Crime, Mutual Assistance in Criminal Matters Act

**Please provide examples of implementation of these measures, including court or other cases in which you have made or received a request for forms of mutual legal assistance listed in the provision under review.**

Refer to information under Article 46 (3) (a) to 3 (i).

**Police to provide information on examples**

**Mma Israel from the DPP may assist**

### **197. Paragraph 4 of article 46**

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 to this Convention.

*Is it possible for your country to transmit information as described above?*

(Y) Yes

*Please cite and attach the applicable policy(ies) or measure(s):*

**Please cite the text(s)**

It is possible under SARPCCO, INTERPOL and ARINSA to transmit such information without prior request. The constitution of these organs are relevant.

**Please provide examples of implementation and related mutual legal assistance and other cases.**

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. 24/06/2013 at 09:12 hours - A Zimbabwean passport No. AN407310 was intercepted through SLTD. Matter referred to NCB Harare for further investigations.
5. 03/07/2013 at 09:00 hours - A Kenyan male Wilfred Ooro 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. 28/04/2013 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.

#### **198. Paragraph 5 of article 46**

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 restriction 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 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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies) or measure(s):*

**Please cite the text(s)**

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 Attorney-General or a person authorised by the Attorney-General, 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;

**Section 50, Bank of Botswana Act; Disclosure of information**

The Bank may, under conditions of confidentiality, disclose information to regulatory authorities in foreign jurisdictions for the purpose of assisting them to exercise functions corresponding to those of the Bank under this Part.

Please provide examples of implementation and related mutual legal assistance and other cases.

The transmission of information under this Article 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.

### 199. Paragraph 8 of article 46

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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;

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 or 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 a 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 P10,000 and to imprisonment for three years.

#### **Section 50, Banking Act; Disclosure of information**

The Bank may, under conditions of confidentiality, disclose information to regulatory authorities in foreign jurisdictions for the purpose of assisting them to exercise functions corresponding to those of the Bank under this Part.

#### **Section 8, 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, 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, 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

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.

#### *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.

The Banking Amendment Bill 2013 also includes BURS (Botswana Unified Revenue Services) as being among the organs that may be given information by a bank irregardless of Bank Secrecy Laws. The reason for the amendment is that BURS is a new creature of Statute having not been there initially

Please provide examples of implementation, including recent cases in which bank secrecy rules or issues did not impede effective mutual legal assistance

The information on Notices under section 8 of the Corruption and Economic Crime Act is relevant. The fact that the police also use section 249 of the Criminal Procedure and Evidence Act is also information that is relevant here.

## 200. Subparagraph 9 (a) of article 46

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;

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable policy(ies), practice(s), or other measure(s)*

**Please cite the text(s)**

Mutual legal assistance is subject to dual criminality under Section 5 of the Mutual Assistance in Criminal Matters Act. The Office of the Director of Public Prosecution in particular has used its discretion to implement with flexibility the dual criminality test for mutual legal assistance.

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 Attorney-General -

...

(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 Attorney-General -

(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;

...

Please provide examples of implementation and related mutual legal assistance and other recent cases

No case of that nature recorded.

Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.

Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.

As already stated the Director of Public Prosecution is the depository where all requests are lodged. In some instances it has always been the DPP's discretion on how to assist the requesting party.

## 201. Subparagraph 9 (b) of article 46

(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;

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable policy(ies), practice(s) or other measure(s)*

Please cite the text(s)

Mutual legal assistance is subject to dual criminality under Section 5 of the Mutual Assistance in Criminal Matters Act. The Office of the Director of Public Prosecution in particular has used its discretion to implement with flexibility the dual criminality test for mutual legal assistance.

Please explain what measures you consider to be coercive; please attach any available definitions or relevant legal texts

Where the accused persons would be extradited outside of the court structures and involuntarily.

Please explain what matters you consider to be of a de minimis nature; please attach any available definitions or relevant legal texts

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.

Section 2 (2), Extradition Act.

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

**Please provide examples of implementation and related mutual legal assistance and other cases**

See cases submitted earlier on extradition and Mutual Legal Assistance.

**Please provide information on the types of non-coercive actions taken when rendering assistance in the absence of dual criminality**

N/A

**Please provide information on recent cases in which your country refused mutual legal assistance on the ground of absence of dual criminality**

No cases registered in recent years.

**Please provide information on recent cases in which your request for mutual legal assistance was refused on the ground of absence of dual criminality**

No cases registered.

## **202. Subparagraph 9 (c) of article 46**

(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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy(ies), practice(s), or other measure(s)*

**Please cite the text(s)**

Mutual legal assistance is subject to dual criminality under Section 5 of the Mutual Assistance in Criminal Matters Act. The Office of the Director of Public Prosecution in particular has used its discretion to implement with flexibility the dual criminality test for mutual legal assistance.

Assistance is at times sort from other states through Letters Rogatory

Informal requests are also made through ARINSA

**Please provide examples of implementation, including related court or other cases**

Refer to examples made earlier on MLA.

## 203. Paragraph 10 of article 46

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General;
  - (d) in a case where he is being held in custody in Botswana and the Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General;
  - (c) in a case where he is being held in custody in Botswana and the Attorney-General 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 Attorney-General 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 Attorney-General thinks appropriate.

**Please provide examples of implementation, including related court or other cases**

Examples of implementation are the relevant legal provisions stated.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana compliant.

## **204. Paragraph 11 of article 46**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Section 13(3), Mutual Assistance in Criminal Matters Act

...

(3) Where the Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General under section 14; and
  - (b) the foreign country from which he has been brought requests his release from custody,
- the Attorney-General 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 Attorney-General;
- (d) in a case where he is being held in custody in Botswana and the Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General;
  - (c) in a case where he is being held in custody in Botswana and the Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General, continued within a reasonable time, the Attorney-General 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.

**Please provide examples of implementation, including related court or other cases**

Legal provisions enacted but there are no related cases for the period under study.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana is compliant.

## **205. Paragraph 12 of article 46**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable policy(ies) or measure(s):*

**Please cite the text(s)**

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 Attorney-General (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 Attorney-General, 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 Attorney-General, in writing, to be an investigation in relation to which it is desirable that he gives assistance.

(3) A certificate given by the Attorney-General 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 Attorney-General (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 Attorney-General 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

...

- (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 Attorney-General;
  - (d) in a case where he is being held in custody in Botswana and the Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General;
  - (c) in a case where he is being held in custody in Botswana and the Attorney-General 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 Attorney-General 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 Attorney-General thinks appropriate.

**Please provide examples of implementation, including related court or other cases**

The legal provisions are in place but no cases have been had relating to the above.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana is compliant as the law is in place.

## **206. Paragraph 13 of article 46**

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.

*Has your country established a central authority(ies) as described above? (Check one answer)*

**(Y) Yes**

*Please cite and attach the applicable arrangement(s) or measure(s)*

**Please cite the text(s)**

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.

**Please provide examples of implementation**

Botswana is encouraged to make the required notification 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).

The required notification has only been made for the Palermo Convention, not for UNCAC ([http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en))

**If applicable and available, please provide recent court or other cases**

Refer to answer under Article 46 (3) (a) to (3) (i).

## 207. Paragraph 14 of article 46

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.

*Is your country in compliance with this provision with regard to the communication of requests for mutual legal assistance? (Check one answer)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s) and language(s)*

**Please cite the text(s)**

All requests are to be in writing.

**Please provide examples of implementation**

The examples cited earlier on requests for mutual assistance or extradition are relevant here.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Consultation with all relevant stakeholders.

*Has your country notified the Secretary-General of the United Nations as prescribed above? (Check one answer)*

**(N) No**

*The Secretary-General would be grateful if Governments would send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria ([uncac.cop@unodc.org](mailto:uncac.cop@unodc.org)).*

**The Secretary-General would be grateful if Governments would send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria ([uncac.cop@unodc.org](mailto:uncac.cop@unodc.org)).**

The required notification has only been made for the Palermo Convention, not for UNCAC ([http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en))

## 208. Paragraphs 15 and 16 of article 46

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s) and types of additional information you may need*

**Please cite the text(s)**

Section 7, Mutual Assistance in Criminal Matters Act  
Requests by Botswana for international assistance in criminal matters may be made by the Attorney-General.

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 Attorney-General or a person authorised by the Attorney-General, 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

Attorney-General.

**Please provide examples of implementation and related cases**

The extradition cases cited earlier as having been requests to other state parties are relevant.

**209. Paragraph 17 of article 46**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

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 Attorney-General may determine.

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 Attorney-General or a person authorised by the Attorney-General, 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 Attorney-General.

**Please provide examples of implementation**

The examples of requests indicated earlier are relevant here.

**Please provide information on requests executed in ways specified in the request other than those envisaged in your domestic law**

All the requests made are always executed in line with the legal provisions currently existing in the country to where the request is made.

**210. Paragraph 18 of article 46**

18. Whenever 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.

*Does your country permit hearings of individuals mentioned above to take place by video conference as described above? (Check one answer)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Section 9, Mutual Assistance in Criminal Matters Act

The Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General; 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 Attorney-General.

(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 Mm.
- (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 (where requests for extradition are intertained) allows for attending court through information technology. It reads; The Clerk of Court shall-  
Where the parties have agreed, then the magistrate may order that the conference be held by means of information communication technology.

**Please provide examples of implementation, including related court or other cases**

The rape case in **State v Masitara** where evidence was taken through vedio conferencing for a witness who was outside the country. There is also an extradition case where evidence was submitted to the United Kingdom through the same manner. The Magistrates Court rules also allow for information communication technology to be used in court.

## **211. Paragraph 19 of article 46**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General (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 Attorney-General 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.

**Please provide examples of implementation, including related court or other cases**

Consider the list submitted about requests by other states.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

The country is in compliance

## 212. Paragraph 20 of article 46

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General or a person authorised by the Attorney-General, 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;

**Please provide examples of implementation and cases in which it was not possible to comply with the requirement of confidentiality**

Refer to previous examples on requests by Botswana and other states.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana is in compliance

## 213. Paragraph 21 of article 46

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.

**If applicable and available, please provide information on court or other cases in which you refused mutual legal assistance**

A request was made for the extradition of Jerry Phale for murder from South Africa but the latter refused as Botswana could not make an undertaking that he will not be sentenced to death. South Africa does not subscribe to the death penalty.

12/12/2012 at 14:00 hours - A South Africa national Nomathemba Rosetta DLAMINI was arrested at Sir Seretse Khama International Airport 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. There had been no request but the police acted on an alert by Interpol that she was wanted. When the requests were subsequently sent the court threw out the application as the country did not have a treaty with Argentina.

**If applicable and available, please provide information on other cases in which you were refused mutual legal assistance**

Refer to above

## **214. Paragraph 22 of article 46**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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;

**Please provide examples of implementation**

The cases cited under MLA also involve offences that are purely of a fiscal nature.

## **215. Paragraph 23 of article 46**

23. Reasons shall be given for any refusal of mutual legal assistance.

*Is your country in compliance with this provision? (Check one answer)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

This obligation is not addressed in the Mutual Assistance in Criminal Matters Act. The courts would however upon refusal state reasons in their judgments as to why the request was not granted.

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

Consultation and proposals for inclusion of this aspect in the country's Extradition Act

## **216. Paragraph 24 of article 46**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General or a person authorised by the Attorney-General, 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;

**Please provide examples of implementation and related cases**

See the legal provisions cited above

**Please provide information on the customary length of time between receiving requests for mutual legal assistance and responding to them**

One month. The length of time is seriously reduced where the accused is remanded in custody.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

There will be need for consultation with other stakeholders.

## 217. Paragraph 25 of article 46

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.

*Is your country in compliance with this provision? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General -

...

(d) the provision of the assistance could prejudice an investigation or proceeding in relation to a criminal matter in Botswana;

..

**Please provide information on cases in which you postponed the provision of mutual legal assistance on the ground that it interfered with an ongoing investigation, prosecution or judicial proceeding**

There has been none so far

## 218. Paragraph 26 of article 46

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

The obligation to consult is not addressed in the legislation but is a matter of practice.

**Please provide examples of implementation, related cases, and ways in which they were handled**

Refer to citations on MLA requests.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

There will be a need for consultaion to bring our legal rules into line with the Convention.

## **219. Paragraph 27 of article 46**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General (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 Attorney-General, 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 Attorney-General, in writing, to be an investigation in relation to which it is desirable that he gives assistance.
- (3) A certificate given by the Attorney-General 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 Attorney-General (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 Attorney-General 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

- ...
- (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 Attorney-General;

(d) in a case where he is being held in custody in Botswana and the Attorney-General 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 Attorney-General 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 Attorney-General 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 Attorney-General;

(c) in a case where he is being held in custody in Botswana and the Attorney-General 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 Attorney-General 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 Attorney-General 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.

#### **Please provide examples of implementation, including related court or other cases**

The case of *The State v Gorerwang Mokgathi* cited earlier bears reference.

## 220. Paragraph 28 of article 46

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable policy(ies) or other measure(s)*

**Please cite the text(s)**

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;

...

**Please provide 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 her for travel and other issues whilst the person concerned is still within its borders.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

N/A

## 221. Subparagraph 29 (a) of article 46

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;

*Is your country in compliance with this provision? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 Attorney-General 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.

**Please provide examples of implementation**

Refer to MLA requests cited earlier

**If available, please provide information on how such records, documents or information can be obtained and how they were provided to the requesting State Party**

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, the officers from the requesting state would be handed over the documents.

**222. Subparagraph 29 (b) of article 46**

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.

*Is your country in compliance with this provision? (Check one answer.)*

(N) No

Documents that are not available for public consumption are those that might relate to national security and as such the country would not agree to share such documents as even within our courts such documents may not be shared. Investigation of such cases is also limited.

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

N/A

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

N/A

**223. Paragraph 30 of article 46**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable bilateral or multilateral agreement(s) or arrangement(s) or other measure(s)*

**Please cite the text(s)**

Although there is no law providing for such the country has entered into several bilateral agreements to enforce this Article. Please further refer to the submissions on MLA requests.

**Please provide examples of implementation**

See answer above

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.

N/A

## **224. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

**(Y) Yes**

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

**(INTACO) Inter-agency co-ordination**

**(MYSYS) Specificities in our legal system**

**(LICAP) Limited capacity (e.g. human/technological/institution/other; please specify)**

**(INAD) Inadequacy of existing normative measures (constitution, laws, regulations, etc.)**

**(LIRIM) Limited resources for implementation (e.g. human/financial/other; please specify)**

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

**(MOARR) Model agreement(s)/arrangement(s)**

**(OTHER) Other assistance (please specify)**

[Botswana: please consider what technical assistance, if any, on mutual legal assistance is needed.]

**(CAPICM) Capacity-building programmes for authorities responsible for international cooperation in criminal matters**

**(ADV) Legal advice**

**(BEST) Summary of good practices/lessons learned**

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

**(N) No**

## 47. Transfer of criminal proceedings

### 225. Article 47

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(N) No

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

In Botswana the question of Jurisdiction plays a major role in determining whether to prosecute or to transfer proceedings.

The reading of article 47 shows that transferring of proceedings can be possible even at the moment where the Convention is not yet incorporated into our laws. It will depend to the circumstances of each case when proceedings are to be transferred to Botswana, because the issue of extra-territorial jurisdictions is not yet in place in Botswana except in matters relating to piracy and mutiny. The only area where extra-territorial jurisdiction is allowed in Botswana is where a citizen is involved in corrupt conduct whilst outside Botswana. The law then provides that this is an instance where jurisdiction can be had over matters committed outside of Botswana. (See section 46 of the Corruption and Economic Crime Act.)

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

The state party will have to consult with relevant stakeholders and put in place certain structures in terms of legislation and the relevant office to monitor implementation.

### 226. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(INAD) Inadequacy of existing normative measures (constitution, laws, regulations, etc. )

Laws have not been drafted to cater for compliance to this Article.

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(PLAN) Development of an action plan for implementation

This would assist in having the country plan and put a time frame to when all these would have been covered.

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## 48. Law enforcement cooperation

### 227. Subparagraph 1 (a) of article 48

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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

Please cite the text(s)

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 (AACAA).

### **Article 31 of INTERPOL Constitution**

In order to further its aims, the Organisation needs the constant and active Co-operation of its members, who should do all within their power which is compatible with the legislations of their countries to participate diligently in its activities.

**Do you have a database through which information can be shared?**

Botswana can confirm that INTERPOL uses an INTERPOL 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

**If available, please provide examples of recent cases in which your law enforcement authorities have exchanged information with those of other State Parties for offences covered by this Convention (please describe the aspects of such offences covered by information exchanges)**

Botswana 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 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, even the funds were traced to an account in a bank in South Africa. The accused persons were convicted and some of the money recovered. There are many other cases as appear on the statistics where law enforcement assistance from individual states was sought.

**If applicable, please provide information on exchange of information for recent cases involving other criminal activities**

The cases that appear on the list of MLA and extradition recent cases is also relevant here.

**Please provide examples of implementation**

See attachments of requests and responses from Interpol

**INTERPOL STATISTICS FROM 2010 TO 2012**

**YearNo of requests No of responses where request was external201038338520115325372012349234**

**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.

### **228. Subparagraph 1 (b) of article 48**

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

...

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana is in full compliance with this article. Although she 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.

### **229. Subparagraph 1 (c) of article 48**

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

...

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

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 the country has shared information and items for analysis.

**Please provide examples of implementation**

The CMS case (The State v Cole and Others cited earlier) and the Interpol database information attached bears reference.

### **230. Subparagraph 1 (d) of article 48**

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:

...

(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;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Mutual Legal Assistance in criminal matters

Cooperation through SARPCO and other regional organizations like ARINSA

The INTERPOL Global Communication System known as the I-24/7 is useful.

**Please provide examples of implementation and related analyses, reports or typologies related to means and methods used to commit offences established in accordance with the Convention**

Arinsa, Interpol and SARPCO membership

### **231. Subparagraph 1 (e) of article 48**

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

...

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(Y) Yes

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Upon the formation of the Financial Intelligence Agency the United States of America sent a Technical officer to help set up the FIA. With his expertise he was able to assist with getting the Unit off the ground.

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.

**Please provide examples of implementation**

Officers at Regional Bureau of Interpol office, One in Lyon, France and the US Technical expert at the FIA.

**If applicable, please identify/describe the liaison officer positions within your law enforcement authorities**

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.

Within the Botswana legal system, the two officers are Assistant Superintendent.

### **232. Subparagraph 1 (f) of article 48**

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

...

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the

purpose of early identification of the offences covered by this Convention.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

**ARINSA**

**IACA**

**Interpol**

**SARPCO**

**ESAAMLG**

**Please provide examples of implementation**

Meetings of Regional Police Chiefs where information is shared

Joint operations of the SARPCO member countries

ESAAMLG meetings

Joint Permanent Commissions where bilateral agreements are signed.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Botswana is in compliance with the above.

## **233. Paragraph 2 of article 48**

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.

*Has your country entered into bilateral or multilateral agreements or arrangements on direct cooperation with law enforcement agencies of other States parties? (Check one answer.)*

**(P) Yes, in part**

*Please cite and attach the applicable bilateral or multilateral agreement(s) or arrangement(s) or other measure(s)*

**Please cite the text(s)**

Botswana has signed agreements on Joint Permanent Commissions with Malawi and other countries. Memorandum of Agreements also continue to be signed.

**If applicable and available, please provide information on law enforcement cooperation provided or received making use of bilateral or multilateral agreements or arrangements, including international or regional organizations**

Cross Border operations with the South African Police under the auspices of SARPCO

*Does your country consider this Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention? (Check one answer)*

**(P) Yes, in part**

**If applicable and available, please provide information on law enforcement cooperation provided or received using this Convention as the legal basis**

Although there has been some cooperation it was before the ratification of this Convention but the cooperation was in line of this convention.

This has been through Interpol, SARPCO and other Bilateral arrangements. 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**

### **234. Paragraph 3 of article 48**

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.

*Is your country in compliance with this provision? (Check one answer.)*

**(Y) Yes**

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

Cybercrime Act is relevant here.

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]

**Please provide examples of implementation**

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.

### **235. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(INTACO) Inter-agency co-ordination

Coordinatination of efforts between several agencies within and without the country

(COMPRI) Competing priorities

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(CAPCLEC) Capacity-building programmes for authorities responsible for cross-border law enforcement cooperation

(TECDB) Technological assistance (e.g. set-up and management of databases/information-sharing systems)

Currently data bases available are those of Interpol but other organs seem to be lagging behind.

(PLAN) Development of an action plan for implementation

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## 49. Joint investigations

### 236. Article 49

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.

*Has your country adopted and implemented the measures described above? (Check one answer)*

(P) Yes, in part

Botswana has cooperated extensively in the investigation of the Central Medical Stores case where most of the funds had been deposited in South African banks. This proved helpful in that a huge chunk of the proceeds were recovered.

Except the SARpc agreement, there is no official agreement between the member countries on how they should assist one another.

*Please cite and attach the applicable bilateral or multilateral agreement(s) or arrangement(s) or other measure(s)*

Please cite the text(s)

SARPCO agreement. **The State v Patrick Cole and Others** case

**Please provide examples of implementation**

Refer to above submission

**If available, please provide information on all joint investigations and joint investigative bodies**

The South African Police, through Interpol accommodated investigations by joining their Botswana counterparts within South Africa. This was important as well as Botswana officers would not have jurisdiction to unilaterally carry out investigations in South Africa.

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Consultation with the concerned countries and entering into bilateral agreements

## **237. Technical Assistance**

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(N) No

## **50. Special investigative techniques**

### **238. Paragraph 1 of article 50**

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.

*Has your country adopted measure(s) to implement the provision under review? (Check one answer.)*

(P) Yes, in part

The country subscribes to the Roman-Dutch Law where electronic evidence is admissible however with checks on its admissibility.

Currently Botswana has proposed legislation in this area and the Electronic Evidence Bill is doing rounds in stakeholder departments as a form of consultation.

*Please cite and attach the applicable measure(s)*

**Please cite the text(s)**

DCEC investigative powers are set out in Section 7, 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.

Wiretapping is not lawful in Botswana. However, evidence derived from othe 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 in court as long as it was obtained procedurally.

**Please provide examples of implementation, including related court or other cases**

In the **State v Bathusi Moarabi** case the court did not come out clear to say this type of evidence 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.

**If available, please provide related statistical data on number of investigations, prosecutions and convictions/acquittals. Please provide per annum figures, as available.**

The State v Bathusi Moarabi. The accused here 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.

NB: Note that almost 50 % of the cases at the DCEC are solved through sting operations and as such more often than not the evidence would include video and audio recordings.

**If available, please provide information on recent cases in which controlled delivery or other special investigative techniques have been used and admitted in court**

The State v Bose Africa Senome. In this case there were vedio and audio recordings that were produced during the sting operation.

***Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.***

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

Consultation on the proposed law on Electronic Evidence. The process has already started.

## **239. Paragraph 2 of article 50**

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.

***Is your country in compliance with this provision? (Check one answer.)***

**(P) Yes, in part**

***Please cite and attach the applicable bilateral or multilateral agreement(s) or arrangement(s) or other measure(s)***

**Please cite the text(s)**

**N/A**

**Please provide examples of implementation**

N/A

**If available, please provide information on recent cases in which bilateral or multilateral agreements or arrangements have facilitated the use of special investigative techniques**

N/A

*Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.*

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure full compliance with the provision under review.**

This would be an extended consultation process covering various stakeholders both internally and outside.

## **240. Paragraph 3 of article 50**

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.

*Has your country adopted and implemented the measures described above? (Check one answer)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

Efforts have been through SARPCO arrangements for assistance and the Interpol

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

There is need to promulgate legislation on this aspect.

## **241. Paragraph 4 of article 50**

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.

*Has your country adopted and implemented the measures described above? (Check one answer)*

**(N) No**

*Please provide an account of your country's efforts to date to implement the provision under review.*

**Please provide an account of your country's efforts to date to implement the provision under review.**

N/A

**Please outline the steps or action (and related time frame) that domestic or other authorities would need to take to ensure the implementation of the provision under review.**

N/A

## 242. Technical Assistance

The following questions on technical assistance relate to the article under review in its entirety.

*Do you require technical assistance for the (full) implementation of the article under review? (Check one answer)*

(Y) Yes

*Which challenges are you facing in (fully) adopting/implementing the article under review? (Check all the answers that apply and provide an explanation in the "Comments" field)*

(INTACO) Inter-agency co-ordination

(MYSYS) Specificities in our legal system

(LIAAA) Limited awareness of state-of-the-art agreements or arrangements

(LISPT) Limited awareness of state-of-the-art special investigative techniques

*Which of the following forms of technical assistance, if available, would assist your country in (fully) implementing the article under review? (Check all the answers that apply)*

(CAPINT) Capacity-building programmes for authorities responsible for international cooperation in criminal/investigative matters

(CAPSPT) Capacity-building programmes for authorities responsible for designing and managing the use of special investigative techniques

(MOARR) Model agreement(s)/arrangement(s)

(BEST) Summary of good practices/lessons learned

*Are any of the forms of technical assistance previously mentioned already provided? (Check one answer)*

(N) No

## B. Other information

### B. Other information

#### 289. Other information

Please provide any other information you believe is important for the Conference of the States Parties to the United Nations Convention against Corruption to consider at this stage regarding aspects of, or difficulties in, implementing the Convention other than those mentioned above.

**Please provide any other information you believe is important for the Conference of the States Parties to the United Nations Convention against Corruption to consider at this stage regarding aspects of or difficulties in implementing the Convention other than those mentioned above**