

# 1. Introduction

## Contextual background

With the realization of the impossibility to prevent and combat corruption without international cooperation and technical assistance, United Nations Convention against Corruption (UNCAC), came into force on 14 December 2005 and the Government of Nepal ratified it on 23<sup>th</sup> February 2011, it became binding on Nepal on 31<sup>st</sup> March 2011 thereby to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery; and to promote integrity, accountability and proper management of public affairs and public property.

The legislative ratification of UNCAC, indeed, represents a milestone in the evolution of Nepal's struggle against public and private sector corruption. It is reckoned as a key to achieve political and socio-economic stability, development, security, and the rule of law. With ratification of UNCAC, Nepal has a unique opportunity to bolster its national efforts with greater international support, and align its strategies with successful global efforts that recognize the importance of both preventive and punitive measures.

## Definition: Corruption at a Glance

Corruption is a global phenomenon, with multiple dimensions including political and social. It is defined as an act of any state official or a fiduciary in violation of his duty, which results in private gain (Venugopal 2000: 111). In the words of S. S. Gill, "corruption is not a static phenomenon. It feeds on itself and, like cancer; it keeps spreading and eating into the vitals of the system" (Gill 1998: 269 cited at Naseem 2000: 119). Corruption in the public service is a grave social evil which is difficult to detect for the reason that those who indulge in it will take pains to cover their tracks in order to avoid being brought to light and to justice before the established courts of the country (Abeyhuriya 2000: 132).

Stapenhurst and Sedigh (1999) define corruption is, in its simplest terms, the abuse of power, most often for personal gain or for the benefit of a group to which one owes allegiance. It can be motivated by greed, by the desire to retain or increase one's power, or, perversely enough, by the belief in a supposed greater good (p-1). In broad terms, corruption is the abuse of public office for private gain. It encompasses unilateral abuses by government officials such as embezzlement and nepotism, as well as abuses linking public and private actors such as bribery, extortion, influence peddling, and fraud. Corruption arises in both political and bureaucratic offices and can be petty or grand, organized or unorganized (A Handbook on Fighting Corruption 1999:5).

Corruption takes many forms. These include: acceptance of money and other rewards for awarding contracts, violation of procedures to advance personal interests, kickbacks from developmental programs or multi-national corporations, pay-off for legislative support, diversion of public resources for private use, overlooking illegal activities intervening in the justice process, nepotism, common theft, over pricing, establishing non-existing projects and fraud in tax collection and tax assessment (UN 1990; cited at Hasan 2000: 151-152 ).

Similarly, corruption includes abuse of authority, bribery, favoritism, extortion, fraud, patronage, theft, deceit, malfeasance and illegality. Likewise, in a broader sense, it refers to the use of one's official position for personal and group gain and that includes unethical actions; like bribery, nepotism, patronage, conflicting interest, divided loyalty, influence-peddling, moonlighting, misusing or stealing government property, selling of favors, receiving kickbacks, embezzlement, fraud, extortion, misappropriation, under or over invoicing, court tampering, phony travel and administrative documents and use of regulation as bureaucratic capital. In addition, the political corruption includes the behavior of (elected) public officials which diverges from the formal components - the duties and powers, rights and obligations - of a public role to seek private gain, while the administrative corruption is the institutionalized personal abuses of public resources by civil servants (Gould 1991; cited at Hasan 2000: 150).

In the political realm, corruption undermines democracy and good governance by subverting formal processes. Corruption in elections and in legislative bodies reduces accountability and representation in policymaking; corruption in the judiciary suspends the rule of law; and corruption in public administration results in the unequal provision of services. At the same time, corruption undermines the legitimacy of government and democratic values as trust and tolerance of the people (A Handbook on Fighting Corruption 1999:5). In the private sector, corruption increases the cost of business through the price of illicit payments themselves, the management cost of negotiating with officials, and the risk of breached agreements or detection (*ibid*, p-5). Therefore, corruption hampers economic growth, stifles entrepreneurial spirit, misuses scarce national resources, weakens administrative capacity, contributes to serious political decay and undermines stability, democracy and national integration (Theobald, 1990; cited at Hasan 2000: 152).

It is observed that corruption becomes institutionalized, as a result of the support provided by the bureaucratic elite, politician, business person, and white-collar workers (Hasan 2000: 152). Continuance of corruption in a country leads to economic malaise and squandering of public resources, lowers governmental performance, adversely affects general morale in public service, jeopardizes administrative reform efforts and accountability measures and perpetuates social and economic inequalities (UN, 1990; cited at Hasan 2000: 152).

## Overview of UNCAC

UNCAC was adopted by the General Assembly of the United Nations, on 31 October 2003 at United Nations Headquarters in New York. The Convention is the first universal anti-corruption instrument of its kind and obliges State Parties to implement a wide range of anti-corruption measures that affect national laws, institutions and everyday practice. The Convention calls upon State Parties to “prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.” Equally, civil society is called upon to create anti-corruption awareness through public information and education programmes that promote transparency, integrity and zero tolerance of corruption.

The Convention is divided into eight chapters: Chapter I General Provisions includes Articles 1 - 4, Chapter II Preventive measures Articles 5 - 14, Chapter III - Criminalization and law enforcement Articles 15 - 42, Chapter IV International Cooperation Articles 43 - 50, Chapter V Asset recovery Articles 51 - 59, Chapter VI Technical assistance and information exchange Articles 60 - 62, Chapter VII Mechanism for implementation Articles 63 - 64 and Chapter VIII Final Provisions Articles 65 - 71.

According to Article 1, the Convention has three basic purposes. These are: to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and promote integrity, accountability and proper management of public affairs and public property. It means the provisions of the Convention should be implemented in line of these purposes. Likewise, article 2 of the Convention has defined the basic terms that have been used in the Convention. Basically, the Convention has stated the meaning/ definition of public official, foreign public official, official of a public international organization, property, proceeds of crime, freezing, confiscation, predicate offence and controlled delivery. Firstly, the definition covers public official, that means appointed or elected, permanent or temporary, paid or unpaid who hold position/s under the state authorities; or the person who perform public functions or delivery service; and any other person defined as a “public official” in the domestic law of a State Party. Secondly, the Convention defines the term foreign public official as any person who holds any position under the foreign nation's agency by election or appointment and who discharge his/her duty as public responsibility. Likewise, it has defined official of a public international organization as the person who is authorized by such an organization to act on behalf of that organization.

Article 3 provides that the provisions of the Convention are applied in the case of the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention. The article further mentions that the provisions of the Convention can be applied even in domestic laws have not been made sufficiently or not prohibited the activities as crime that can be considered as crime under the Convention. Article 4 of the Convention requires the state party to carry out their obligation in a manner consistent with the principles of sovereign equality and territorial integrity of States and also requires non-intervention in the domestic affairs of other States. The same article further mentions that every state has a duty to respect domestic jurisdiction of the concerned state.

Therefore, it is important to note that many of UNCAC's provisions are mandatory, while others

are either 'strongly encouraged' or optional. The provisions which are either mandatory or "Shall Endeavor" are presented below, whereas the rest of the provisions are "shall consider" which means "optional" are not included in the table:

### Checklist of Key Actions Required of States Parties to UNCAC

Article		Provision	Mandatory (M)/ Shall Endeavour (SE)
Preventive Measures	Article 6	Ensure the existence of a body or bodies to prevent corruption (through knowledge dissemination, and overseeing/coordinating preventative policies)	M
	Article 7	Establish a merit system for its civil service	SE
	Article 8	Promulgate a code of conduct for all public officials and endeavour to require officials to disclose outside activities, employment, investments, assets, gifts that may reflect a conflict of interest, etc.	SE
		Require public officials to make asset declaration	SE
	Article 9	Create a public procurement system based on transparency, competition, and objective selection criteria with legal recourse for violations	M
	Article 10	Enhance transparency in public administration by such measures as publishing information and simplifying procedures for attaining access to such information	M
	Article 11	Prevent corruption among members of the judiciary through measures such as rules of conduct	M
	Article 12	Take measures to enhance accounting and auditing standards in the private sector	M
	Article 13	Promote participation of civil society in fight against corruption through, for example, ensuring effective access to information	M
	Article 14	Institute a comprehensive regulatory scheme to prevent money laundering and consider creating financial intelligence unit to receive, analyze, and disseminate reports of suspicious transactions	M
Criminalization and Law Enforcement	Article 15	Outlaw the offering or soliciting of a bribe by a national public official	M
	Article 16	Outlaw the promise, offering or giving of a bribe to a foreign public official	M
	Article 17	Outlaw embezzlement	M
	Article 23	Outlaw money laundering (when proceeds of a crime are transferred intentionally for the purpose of concealing or disguising their illicit origin)	M
	Article 25 and 27	Ensure the obstruction of corruption investigations, and attempts to commit corrupt acts are criminal offenses	M

Gap Analysis of United Nations Convention Against Corruption (UNCAC) and Its Implementation in Nepal

Article		Provision	Mandatory (M)/ Shall Endeavour (SE)
Criminalization and Law Enforcement	Article 29	Provide a long statute of limitations for bribery and other corrupt acts and provide for its suspension when an offender has evaded prosecution	M
	Article 30	Make sure the penalties for corrupt acts reflect the gravity of the offense, that immunities for public officials are not overbroad, and that if there is discretion to prosecute it is exercised with due regard for the need to deter corruption	M
	Article 32	Take measures to ensure protection for whistleblowers	M
	Article 31 and Article 35	Establish procedures to freeze, seize, and confiscate the proceeds of corrupt acts and permit those injured by corrupt acts to initiate an action for damages	M
	Article 40	Remove any obstacles posed by bank secrecy laws to investigating corruption	M
International Cooperation	Article 46	Cooperate with other governments on anticorruption investigations, prosecutions and judicial proceedings in relation to Convention offences	M
	Article 48	Enhance the effectiveness of communication between law enforcement bodies to facilitate secure and rapid exchange of information	M
Asset Recovery	Article 52	Require financial institutions to conduct enhanced scrutiny of accounts maintained by or on behalf of prominent public officials	M
	Article 55 and 57	Ensure that the proceeds of corrupt acts committed in other states can be confiscated and returned	M
Technical Assistance	Article 60	Implement training programmes for personnel responsible for preventing and combating corruption	SE
	Article 62	Make concrete efforts to enhance financial, material and technical assistance to support developing countries' efforts to implement the Convention	M

Source: UNCAC in a Nutshell: [Uttp://www.cmi.no/publications/file/3769-uncac-in-a-nutshell.pdf](http://www.cmi.no/publications/file/3769-uncac-in-a-nutshell.pdf). Last visited on October 27, 2011

In addition, most provisions of the Convention make some reference to working within the principles of a State's domestic law, which allows significant room for different interpretations of the Convention's requirements in any given country.

In reference to 'UNCAC in a nutshell' (<http://www.cmi.no/publications/file/3769-uncac-in-a-nutshell.pdf>), UNCAC can do the following things:

- UNCAC provides not only an international legal basis for cooperation, but also a political tool for dialogue between countries and between governments and their citizens
- UNCAC provides universally agreed concepts of corruption and ways to address it within one framework, thus offering an opportunity to overcome hitherto fragmented and often piecemeal efforts.

- UNCAC can foster international exchange of expertise, good practices and lessons learned, and it can be instrumental in coordinating international assistance.

Likewise, UNCAC cannot do the following:

- UNCAC is not a blueprint for anti-corruption reform; it is a mere compilation of important measures, which, however, lacks any prioritization or sequencing. Reform must be designed as to address country-specific forms, manifestations and dynamics of corruption and to fit into the country's institutional arrangements and procedures.
- Ratification of UNCAC does not constitute political will in itself. Even the potential of the Convention to create peer pressure is limited where commitment to address corruption is absent. UNCAC may be used as a "fig leaf"--some states may ratify just to deflect criticism from donors or political opponents. Alternatively, governments may create an overambitious implementation agenda that quickly deflates after its first failures.
- UNCAC is not an end in itself: UNCAC assessments and implementation efforts may be perceived as a stand-alone exercise, through which legal compliance with an international agreement is sought. For local reformers, as well as development actors, however, it is best employed additionally as political and technical tool, a means to achieve and support better governance by safeguarding resources aimed at poverty reduction, a valuable asset in the pursuit of development.

More importantly, UNCAC is only a Convention which allows the state party to back from the Convention by written notification to the Secretary General of the United Nations. According to Article 70, such request of state party shall become effective one year after the date of receipt of the notification by the Secretary General and also a regional economic integration organization shall cease to be a Party to this Convention when all of its member States have denounced it. This provision is considered as a new trend in human rights conventions.

After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment. The amended provisions shall be applicable to the State Parties who accept the amendments. Those state parties who do not accept the amendment shall be governed by the original provisions. A State Party may back from this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

## Nepal and UNCAC: Way Ahead

Nepal, like most under-developed countries, has been suffering from political flux that has affected corruption control, public accountability and good governance adversely, and amplified the level of corruption in the nation, particularly as a consequence of abuse of discretionary power vested in the officials - both elected and appointed. Thus, what is required is the repeal of many laws so as to make Anti-Corruption laws simpler and then work for an honest, fair and impartial enforcement thereof (Gill 1998: 269; cited at Naseem 2000: 122). At the same time, it is necessary to take note of Nepal's post conflict situation and address the specific needs in order to materialize the agenda of anti corruption.

After ratification of the UNCAC by Nepal, it is obligated to make compatible laws to deal with the issues of various forms of corruption including taking measures prescribed by the Convention and formulating necessary policies. In this light, the prime task of the Government of Nepal is to make

laws compatible with the UNCAC including amending existing laws thereby bridging gaps between the UNCAC and existing Nepalese laws. Therefore, this research report has been presented with the aim to shed light on the gaps thereof and provide recommendations to the concerned authorities.

## Objective of the Study

The principal objective of this study is to find gaps between ratification of UNCAC and its implementation. Other specific objectives are the following:

- To conduct a gap analysis in matters relating to UNCAC implementation with respect to existing policy and legal framework.
- To conduct a cursory review of all prevalent laws which have a direct bearing on corruption and to execution of the principle of good governance for efficient and effective implementation of UNCAC
- To identify key institutions for implementing the strategic policies for anti corruption.
- To recommend institutional reform for implementing UNCAC.
- To provide recommendations to governmental and non-governmental institutions for effective and efficient implementation of UNCAC.

## Rational of the study

The efforts of many institutions working to mitigate rampant corruption: the Special Investigation Department, the Judicial Council, the Crime Investigation Department of Nepal Police and the Commission for Investigation of Abuses of Authority and civil society organizations, are important. However, there is a need to study and analyze the gaps between UNCAC and existing Nepalese laws to implement UNCAC effectively. Therefore, the research is of crucial importance and very useful for framing policy in relation to the UNCAC.

## Approach and Methodology

The study has been carried out by applying a mixed approach i.e. theoretical and empirical method. Additionally, unstructured interviews and observations were used in the course of the study to ensure public participation and verify the findings of the research. Likewise, the study is based on primary and secondary data. The secondary data are collected from Nepalese laws/policies and been reviewed. Consultations with experts and individuals have been undertaken as far as possible. On the findings of research, conclusions and recommendations have been proposed.

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## 2. Preventive Measures

UNCAC emphasizes the need for anti-corruption measures which reduce opportunities for corruption as well as enhance transparency and strengthen integrity. States Parties are obliged to adopt coordinated policies that prevent corruption and designate a 'body or bodies' to coordinate and oversee their implementation. The preventive policies covered by the Convention include measures for both the public and private sectors in relation to transparent procurement and sound financial management, a merit-based civil service including clear conflict of interest regimes, effective access to public information, auditing and other standards for private companies, an independent judiciary, active involvement of civil society in efforts to prevent and combat corruption, and measures to prevent money-laundering.

In this light, Nepalese laws are analyzed to see how far these laws envisage preventive measures and mechanisms to check corruption in reference to UNCAC obligations.

### **Anti-corruption policies, measures and mechanism**

#### **Article 5: Preventive anti-corruption policies and practices**

Article 5 of the Convention requires the state party to confirm, develop and implement or maintain effective, coordinated anti-corruption policies to promote the participation of society that reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability in its legal system (sub-article 1). For preventing of corruption, state has a duty to establish and promote effective practice in order to combat corruption (sub-article 2). As per provision of the Convention, each state party has a duty to endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption (sub-article 3). Furthermore, it also requires international collaboration

in the case of preventing corruption for promoting and developing the measures referred to in this article (sub-article 4).

This requirement of the Convention are somehow or to some extent met by prevailing laws such as *the Prevention of Corruption Act, 2002, Commission for the Investigation of Abuse of Authority Act, 1991 and also Muluki Ain (National Code), 1963*. Basically, the Prevention of Corruption Act has many provisions to prevent corruption. In addition, *Commission for the Investigation of Abuse of Authority Act, 1991* ensures the provisions related to this mandate.

## Article - 6: Preventive anti-corruption body or bodies

Article 6 of UNCAC requires States Parties to have an anti-corruption body or bodies in charge of preventive measures and policies (article 6.1). The state party must also ensure the independence of the institution to be established under sub article 1. It means the body or bodies to be established under this provision should have adequate powers, sufficient resources and specialized staff to carry out its or their functions effectively and free from any undue influence.

In Nepal, the Interim Constitution of Nepal, 2007 provides a Commission for the Investigation of Abuse of Authority, consisting of the Chief Commissioner and such number of other Commissioners as may be required to investigate cases related to corruption and abuses of power/authority as the constitutional body (article 119.1). To maintain impartiality in the appointment process, the Constitution further provides certain provisions of appointment. As a provision of article 119 (2) of the Constitution, the Chief Commissioner and other Commissioners will be appointed by the President on the recommendation of the Constitutional Council<sup>1</sup> for 6 years tenure of office from the date of appointment (article 119.3). Independence of the institution is of prime concern to combat corruption, thus, the Constitution further ensures that The Chief Commissioner or a Commissioner may be removed from his or her office on the same grounds and in the same manners as has been set forth for the removal of a judge of the Supreme Court (article 119.3.b). To check capability of the chief and other Commissioners, the Constitution has mentioned the qualification (article 119.5) and also prohibits the Chief Commissioner or Commissioner to be eligible for appointment in any other government service (article 119.7).

The Constitution further mentions that the Commission for the Investigation of Abuse of Authority may, in accordance with law, conduct or cause to conduct inquiries into, and investigations of, improper conduct or corruption by a person holding any public office. However, this provision has certain limitations that this clause shall not be applicable to any official in relation to whom this Constitution itself separately provides for such action, and to any officials with regard to whom other law has separately made special provision (article 120.1). To implement the provision of the Constitution, the Commission for the Investigation of Abuse of Authority Act, 1991 has also provisioned that the Commission, in accordance with this Act or other prevailing laws, may conduct investigations, file a

<sup>1</sup> Constitutional Council is a council to be formed under the article 149 of the Interim Constitution, 2007 for making recommendations in accordance with this Constitution for appointment of officials to Constitutional Bodies. The Council is formed with chairmanship of Prime Minister. Other members of Council are Chief Justice, Speaker of Legislative Parliament, three ministers designated by the Prime Minister representing three different political parties in the Council of Ministers and leader of the opposition party in the Legislature- Parliament.

case or take any action against any person holding a public post for an abuse of authority (section 4). But conditional provision of the section mentions that the Commission, pursuant to the Act, shall not take any action in matters relating to any business or decisions taken at meetings of any House of Parliament or Constituent Assembly or of any committee or anything said or done by any member at such meetings, or any policy decisions taken by the Council of Ministers or any committee thereof or judicial actions of a court of law (section 4b).

Likewise, a Special Court can be formed thereby publishing notice in Nepal Gazette. The special court will consist of the chairperson having qualification equal to the judge of the Appellate Court and three members in pursuant to Section 3 of the Special Court Act, 2059. In accordance to Section 4, the jurisdiction of the court can be amended and the cases under the *Commission for the Investigation of Abuse of Authority Act, 1991* can be preceded in the special court (Nepal Gazette of 2059-05-06).

Regarding Staff and employees, the Government of Nepal shall make arrangements, as *per* the approved posts, for the functional operation of the Commission (section 21a). Same provision is provided in the Special Court as well. While conducting investigations and inquires or initiating other actions thereto pursuant to this Act and other prevailing law, the Commission, may avail the services of any expert or the specialized agency as so requires (section 21).

A constitutional body and special court are important bodies for preventing and implementing policies and measures. However, the question is whether the performances of these bodies are satisfactory in combating corruption in Nepal.

## Public Sector Integrity

### Article - 7: Public sector

The UNCAC requires States Parties to endeavor to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion, and retirement of civil servants, based on principles of efficiency and transparency, using objective criteria such as merit, equity and aptitude (article 7.1). Further, it also requires regular training and rotation of staff and also provides sufficient adequate remuneration and equitable pay scales and strength capacity of staff to increase their work performance (article 7.1). In addition, the Convention determines the duty of state party to adopt appropriate legislative and administrative measures to prescribe criteria concerning candidature for election to public office (article 7.2) as well as to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties with the fundamental principles of its domestic law (article 7.3).

In this regard, the Interim Constitution of Nepal has assigned to Public Service Commission (PSC) to conduct examinations for the selection of suitable candidates to be appointed to Civil Service posts (article 126.1). An explanation provision of this article also states that except Army officers or soldiers and the service and positions of Armed Police or Police personnel, and such other services and positions as are excluded from the Civil Service or positions by Act, all services and positions in the Government of Nepal shall be considered as Civil Service. The government of Nepal must consult with PSC to appoint any permanent position. Furthermore, the Constitution has ensured that the

Government should consult to the PSC on civil service related matters. However, the Government of Nepal has not been able to display a clear view on salary and remuneration and the reports presented by the administrative reform commission and remuneration determination commission have not been effectively implemented. Likewise, there is no clear provision of officer and personnel of Nepal Police. The Section 3(2) of Nepal Police Act reads: The salary and other terms and conditions of service of the officers and personnel of the Police Force shall be as determined by the Government of Nepal from time to time.

Additionally, there is a provision to constitute Nepal Special Service under the Nepal Special Service Act (NSSA) 1985 that is called National Investigation Department to be established under the Ministry of Home Affairs to operate service related functions (NSSA section 4.1). The Government of Nepal may cause the National Investigation Department to investigate the matters which it deems necessary (NSSA section 5a.1). If any irregularity is found through the investigation carried out by National Investigation Department the Government of Nepal can prosecute against concerned person in accordance with the prevailing law (NSSA section 5a.3). The Act further ensures that "no employee of Service shall abuse his/her office nor shall any person depute in the function of the Service act in contravention of his/her duty (NSSA section 8.1)." For this purpose, the Act has provisions for appointment, transfer, promotion removal from the Service and other conditions of service of employee of the Service on the basis of prescribed laws (NSSA section 6).

On the other hand, implementation of these provisions has been considered to be to some extent or to a larger extent very problematic. To date, most appointments except that of Public Service Commission have been political and always controversial. Likewise, in the elected post, there have been some problems, such as, many laws are not amended as per the need of time. For instance, the Constituent Assembly Election Act 2008 provides the qualification of the Constituent Assembly members that are as follows:

In order to be a member of Constituent Assembly a person must:

- (a) be a Nepali citizen,
- (b) have attained at least twenty-five years of age,
- (c) not have been punished for any criminal offence involving moral turpitude,
- (d) not be ineligible under any law
- (e) not be holding an office of profit.

The Political Parties Act 2002 and Election Commission Act have made provisions regarding the income and expenditures of the political party. In accordance with Article 142(2)(c) of the Interim Constitution of Nepal 2007, the political party shall, along with its constitution, manifesto and rules, clarify the details and the sources of funds of the political party. Moreover, section 4 of the Political Parties Act 2002 provides that the Statute of a party shall contain the provisions on party fund and its audit. The section 11 reads that each political party registered pursuant to this Act shall maintain its account in the format as referred to in the prevailing law and the accounts of the party shall be audited by an auditor recognized by the Auditor General. The section 12(1) provides that each political party registered pursuant to this Act shall submit annual report of its income and expenditure to the Commission within Six months from the ending of each fiscal year and the section 13 reads

that the Commission shall evaluate the annual reports received pursuant to Section 12 and publish a comprehensive report thereof.

In accordance to the section 30 of the Election Commission Act, 2007, the commission shall publish the notice in Nepal Gazette to limit the expenditure of the political party or candidate and the punishment in pursuant to the section 31 shall be imposed if any party or candidate violates it.

### **Article - 8: Code of conduct for public officials**

The Article 8 of the UNCAC requires States Parties to promote integrity, honesty and responsibility among public officials and calls for codes or standards of conduct for the correct, honorable and proper performance of public functions. Likewise, states Parties are required to take note of relevant initiatives of regional, inter-regional and multilateral organizations, such as the UN International Code of Conduct for Public Officials (General Assembly Resolution 51/59 of 12 December 1996), to ensure compatibility with it. Further, states Parties are bound by the UNCAC to establish measures and systems that facilitate public officials reporting acts of corruption to appropriate authorities.

The Article 153 of the Interim Constitution of Nepal 2007 reads: "The Government of Nepal may, in order to run the administration of the country, constitute the Civil Service and other government services as required. The constitution, operation, and terms and conditions for such services shall be as determined by an Act."

There are Civil Service Act, 1993 and Civil Service Regulation, in place to make necessary provisions for civil services. The Chapter 7 (Sections 41-55a) of the Civil Service Act, 1993 states conduct of civil Service Officials in detail. It covers basically punctuality and regularity in service in section 41, discipline and obedience in performing duties with honesty and readiness in section 42, not using political or undue influence in section 43, not involving in politics in section 44, not criticizing government directly or indirectly in section 45, not publishing news relating to governmental business in section 46, not receiving gift, present, donation etc. and borrowing in section 47, not establishing and operating a company and carrying on trade or profession in the section 48, not taking part in election specially in political posts in section 49, not involving in agitation and strike in section 50, not staging strike, detention and *Gherao* in section 51, submission of the statement of property in section 54 and not involving in torture to others in section 54(a). The Act also mentions other conduct of Civil Service Officials. It covers treatment and well manners to others, maintain impartiality, honest, fair efficient and in a prompt manner; not use or consume any government property for domestic use, not depute any government employee for individual purpose; decent treatment to stakeholders related with his/her works and to keep conduct compatible with own service and post.

On the other hand, various Acts including Civil Service Regulation, Code of Conduct for Civil Service Official Regulation, 2065, Public Service Commission Act, Judicial Service Commission Act, Prevention of Corruption Act and Country Code 2020 have made similar provisions in this regard. These legal provisions are more or less adequate to promote integrity, honesty and responsibility among public officials and calls for codes or standards of conduct for the correct, honorable and proper performance of public functions. However, the problem lies in implementation.

## Public Procurement

### Article 9.1: Appropriate systems of procurement

State Party must take necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption with appropriate threshold values in their application, shall address, inter alia:

- a. Public distribution of information to: procurement procedures and contracts, information on invitations to tender, information on the award of contracts and sufficient time to prepare and submit their tenders.
- b. Advance conditions for participation - selection and award criteria - tendering rules, and their publication;
- c. Objective and predetermined criteria for public procurement decisions.
- d. An effective system of domestic review - an effective system of appeal, to ensure legal recourse and remedies covered by this paragraph
- e. Personnel responsible for procurement - such as declaration of interest in particular public procurements, screening procedures and training requirements.

In Nepal, most public procurement are carried out under the Public Procurement Act, 2063 (2007) that has tried to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.

Section 14 of the Act has stated about invitation to bid. It has ensured the public notification of invitation to bids or prequalification proposals to be published in a daily newspaper of national circulation and, in the case of an international bid in any international communication media and also post in the website. Furthermore, sub-section 4 of the section has mentioned that at least 30 days shall be given for invitation of national and at least forty five days for international level bidding or prequalification proposals. Chapter 7 of the Act has also mentioned about procurement contract in details.

The Act has also made some specific provisions regarding opening of bid (section 22), examination of bids (section 23), evaluation of bids (section 25) and acceptance of bid and procurement contract (section 27). Likewise, the Section 25 of the Procurement Act has mentioned about evaluation of the bid.

Chapter 6 of the Procurement Act has mentioned about provision relating to review of procurement proceedings or decision that includes application for reviewing the decision (section 47), review committee (section 48) and method of review (section 50).

Chapter 8 (section 61 of the Procurement Act) states about conduct of the official involved in public procurement proceedings, in the line of the Convention. The section mentions that the authority involved in the procurement proceeding should not commit an act of conflict of interest with the procurement from his/her work or conduct or behavior. Furthermore, as mentioned above, the Act

also mentions about screening procedures of the bids.

## Management of Public Finances

### Article 9.2: Management of public finances

The UNCAC requires that the State Party should take appropriate measures to promote transparency and accountability in the management of public finances. Such measures encompass:

- a. Procedures for the adoption of the national budget;
- b. Timely reporting on revenue and expenditure;
- c. A system of accounting and auditing standards and related oversight;
- d. Effective and efficient systems of risk management and internal control; and
- e. Corrective action in the case of failure to comply with the requirements established in this paragraph.

It is agreed that public finance should be managed properly and transparently. And for this purpose, the procedures of adopting national budget should be clear and concise. In this regard, the Constitutional provisions and provisions of the Financial Procedure Act, 1999, Financial Procedure Regulation, Audit Act 1991 and Social Organization Registration Act 2034 can be referred.

Article 93(1) of the Interim Constitution 2007 reads: "The Finance Minister shall, with respect to every fiscal year, present before the Legislature-Parliament annual estimates including the following matters

- (a) an estimate of revenues,
- (b) the money required to meet the charges on the Consolidated Fund; and
- (c) the money required to meet the expenditure to be provided for by an Appropriation Act."

Likewise, article 93(2) reads:" The annual estimate to be presented pursuant to clause (1) shall be accompanied by a statement of the expenses allocated to each Ministry in the previous financial year and particulars of whether the objectives of the expenses have been achieved."

The Audit Act 1991 has a provision that the Auditor General may conduct final audit of the financial activities and other activities relating to government offices, corporate body wholly owned by Government of Nepal and corporate body substantially owned by Government of Nepal. This Act has further the criteria and procedures for auditing. The Act is also applicable in the Office of Auditor General as well because the staff of the Office of Auditor General is recruited under the Civil Service provisions and the Auditor General is head of the constitutional body.

Section 9 of the Social Organization Registration Act 2034 provides that organizations registered under the Act should conduct the audit of the financial activities and other activities and submit the report to the local authority and section 10 allows the local authority to inspect the audit of any organization if deemed necessary.

Nepal Chartered Accountant Act 1997 has provisions to bring uniformity and maintain professionalism

in auditing and also, punishment if the Act is violated. Therefore, the Act has worked as a regulatory law to manage chartered accountants and auditors while they perform their duty.

## Participation and Access to Information

### Article -10: Public reporting

State party has duty to take measures to enhance transparency in its public administration, including its organization, functioning and decision making processes. Apart from this, it covers:

- a) Adopting procedures or regulations allowing members of the general public to obtain information on the organization, functioning and decision-making processes of its public administration that concern members of the public.
- b) Simplifying administrative procedures in order to facilitate public access to the competent decision-making authorities.
- c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

In this regard, Right to Information Act 2007, Good Governance (Management and Operation) Act, 2008 can be referred. To enhance transparency in public administration, including organization, functioning and decision making processes, Nepal has legislated Right to Information Act, 2007 and Good Governance (Management and Operation) Act, 2008.

Section 3 of the Right to Information Act has accepted the right of the people to access and get information from public bodies. In addition, section 4 has mentioned about duty of public official to provide information as provision of the Act. Furthermore, the Act has included the provisions on updating and publication of information (section 5), information officer (section 6), procedures of acquiring information (section 7), National Information Commission (Chapter 3); and punishment and compensation (Chapter 5) Furthermore, section 5 of the Right to Information Act prescribes that a public body should keep its updated information at least twenty years old information from the commencement of this Act. For this purpose, such body should update almost all information related to the office/body.

Good Governance (Management and Operation) Act, 2008 states that Government of Nepal shall carry out administrative function at central, regional, zonal, district, and local level to maintain good governance within the country. The Act further ensures that the basis for executing administrative functions will be rule of law, transparency, objectivity, accountability and honesty; economic (financial) discipline, corruption-free, lean (smart) and people-oriented administration; impartiality and neutrality of administrative mechanism; and access of people to administrative mechanism and its decision (section 6). The Act has determined responsibility of the person/s that hold the public post either by elected or appointed. Chapter 4 of the Act also prescribes the procedures to be adopted while carrying out administrative functions that cover: certain procedures to be followed (section 14); decision to be made within certain time (section 15) transparency to be maintained while making decision (section 16) basis and reason to be mentioned in the decision (section 17) decision not to be made in conflict of interest (section 18) responsibility not to be set evaded (section 21) and citizen's



charter covering nature, procedures and estimated time to receive service (section 25).

### **Article -13: Participation of society**

UNCAC requires States Parties to promote the active participation of individuals and groups outside the public sector, such as civil society, NGOs, and community based organizations, for the purposes of preventing and combating corruption and to raise public awareness regarding the existence, causes, gravity, and threat posed by corruption (article 13.1). It emphasizes the significance of measures that ensure public access to the anti-corruption bodies of the State Party for any kind of reporting or inquiry (article 13.2).

Section 20 of the Good Governance (Management and Operation) Act, 2008 mentions that the Government of Nepal may make necessary consultation with stakeholder and civil society as per necessity before the implementation of any matter of public concern and also give due attention to suggestions received from consultations with stakeholders while executing the subjects of public concern. For this purpose, matter of public concern means any subject establishing/introducing a fundamentally new system or fundamentally repealing the existing system, or subject relating to execution of any development programme or project of public concern, or other subject as prescribed.

Section 30 of the same Act has provisions for public hearing and mentions that different levels of government bodies should conduct public hearing as prescribed, with the purpose of making the activities of the office fair, transparent, and objective and addressing the lawful concerns of people and stakeholders with participation of an expert of the related subject, stakeholder, and representatives of civil society and officials of local bodies.

In addition, section 31 has stated about grievance management and mentions about complaint box to be maintained at the visible place of every ministry, department, and government agency and office for the management of grievance relating to quality, effectiveness of the work carried out by such ministry, department and agency or office and possible irregularities in them and also mentions as the duty of government authority to inform about action to be taken on such grievance.

Regarding reporting facility anonymously, section 23(1) of the Commission for the Investigation of Abuse of Authority Act, 1991 has stated that any notice or information obtained in the course of inquiries and investigations into abuse of authority under this Act, and evidence received or collected by the Commission, will not be disclosed to the public, or the communication media. On the other hand, section 52(1) of the Prevention of Corruption Act, 2002 mentions that no notice, information or evidence received to, collected by, the investigating authority in connection with investigation and inquiry in an offence of corruption shall be publicly notified before filing of case. In addition, section 60 of the Act has ensured that the name or address of an informer providing information that an offence under this Act has been committed or going to be committed shall be kept confidential in case he/she so requests. However, it is felt that protection of whistle blower is not adequate in Nepal.

## Measures relating to judiciary and prosecution services

### Article -11: Measures relating to the judiciary and prosecution services

UNCAC obligates that State party has a duty to take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. This provision is also applicable to the prosecutor who is not a part of the judiciary but enjoys independence similar to that of the judicial service.

In this regard, Judicial Council Act 1991 can be referred. Judicial Council Act, 1991 has made various provisions to maintain fair judicial service and also obligates the judicial officials to perform the duty of prevent corruption among member of judiciary. Section 4(a) has stated some fundamental provisions that relates to basis for assessment of competence or conduct of a Judge. It covers basically, performance of responsibilities. This Act covers detailed provisions like, initial inquiry against accused judge (section 5), formation of an inquiry committee (section 6), and authority to initiate case into the offence of corruption (section 7) and *ipso facto* suspension if the case is filed (section 10). On the other hand, the government prosecutor has to follow prescribed standards while delivering their duty.

## Private Sector

### Article -12: Private sector

UNCAC obligates that each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures. Further, in order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

- (a) The establishment of off-the-books accounts;
- (b) The making of off-the-books or inadequately identified transactions;
- (c) The recording of non-existent expenditure;
- (d) The entry of liabilities with incorrect identification of their objects;
- (e) The use of false documents; and
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by law.

Each State Party shall disallow tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

In this regard, section 12 of the Income Tax Act, 2002 can be referred too. The Act allows deducting the amount donated to any organizations such as Trust, Company, political parties, local bodies, Nepal Bank, the Government of Nepal that receives or provides tax free certificate. However, such donation does not include bribes and facilitation charges.

## Measures to prevent money laundering

### Article -14: Measures to prevent money-laundering

UNCAC requires State Party to establish/institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value. Further, administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering. Likewise, the State Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders.

In Nepal, a Money Laundering Act 2008 has been enacted quite recently. This Act is not so comprehensive, but some provisions are notable. Likewise, some provisions of Foreign Exchange (Regulation) Act 2062 are also related with it.

Section 8(1) of the Money Laundering Act, 2008 has provision to form a Coordination Committee to coordinate inter-related entities and to provide essential suggestions to the Government of Nepal in regard to the prevention of assets laundering. Section 9(1) has a provision to form a Financial Information Unit in Rastra Bank for collection and analysis of information relating to assets laundering. Section 11(1) contains a provision related to establish an Asset Laundering Prevention Department by the Government to make investigation and inquiry of offences under this Act. Likewise, section 6 mentions that any bank, financial institution or nonfinancial institutions should maintain clear identity of a person while establishing any kind of business relationship with him/her or transacting the amount more than the limit at one or several transactions as prescribed by Rastra Bank (a Central Bank) from time to time by publishing notice.

Section 3 of the Foreign Exchange (Regulation) Act 2062 provides that the permission of Nepal Rastra Bank is mandatory while making any kind of transaction of foreign currency by any person, firm, company or organization. The government of Nepal can make necessary provisions in this regard by publishing a notice in Nepal Gazette.

□□□



### 3. Criminalization and Law Enforcement

Chapter III of UNCAC provides a comprehensive and multidisciplinary approach to prevent and eradicate corruption thereby obligating States Parties to criminalize a wide range of acts of corruption and to establish a series of procedural measures and mechanisms that support such criminalization. Some articles of this chapter are mandatory while some are persuasive and that state parties should consider.

States Parties must criminalize bribery, both the giving of an undue advantage to a national, international or foreign public official and the acceptance of an undue advantage by a national public official, as well as embezzlement of public funds. Other offences that States Parties are required to criminalize include obstruction of justice and the concealment, conversion or transfer of criminal proceeds. Sanctions extend to those who participate in or attempt to commit corruption offences.

Acts that states are encouraged but are not of mandatory nature includes acceptance of bribes by foreign and international public officials, trading in influence, abuse of function, illicit enrichment, bribery and embezzlement within the private sector, money laundering and the concealment of illicit assets. Chapter III also covers other issues related to enforcement and prosecution, including protection of whistleblowers and witnesses in corruption cases, as well as remedies for corruption, such as freezing assets and compensating victims.

In this light, Nepalese laws are analyzed to see how far these laws envisages preventive measures and mechanisms relating to criminalizing corruption in reference to the UNCAC obligations along with law enforcement relating thereto.

#### Criminalization of Offences

**Article 15 Bribery of national public officials, Article 16 Bribery of foreign public officials and officials of public international organizations and Article 21 Bribery**

## in the private sector

Article 15, 16 and 21 of UNCAC are related with bribery of national public officials, bribery of foreign public official and officials of public international organization and bribery in the private sector respectively. UNCAC obligates the State Party to criminalize certain acts of bribery through adopting legislative and other measures to establish as criminal offences, when committed intentionally in relation to public official, an official of a public international organization:

*the promise, offering or giving, directly or indirectly, of an undue advantage, for himself or herself or another person or entity, in order that the act or refrain from acting in the exercise of his or her duties; the solicitation or acceptance, directly or indirectly, of an undue advantage, for himself or herself or another person or entity, in order that the act or refrain from acting in the exercise of his or her duties.*

In case of private sector, these acts should not be done while conducting economic, financial and commercial activities by an individual business person.

In Nepal, there are adequate laws such as the Prevention of Corruption Act(PCA), 2002, *Muluki Ain*, 1963 and Code of Conduct of Civil Servant, 2008 to establish criminal offence in case of making any promise, offering and giving an undue advantage to public officials. Particularly, sections 3, 4, 5 and 6 of Prevention of Corruption Act, 2002; sections 14,15 and 16 of Punishment Chapter of *Muluki Ain* and Rule 8(2) of Code of Conduct of Civil Servants, 2008 prohibits to make any kind of promise, offer and to receive any kind of undue advantage. Moreover, the Prevention of Corruption Act, 2002 has extensive provisions to meet this requirement made by the Convention. The Act has declared the act of giving and receiving any kind of graft by public officials or person as crime in section 3. Additionally, the Act prohibits taking any kind of goods or service free of cost or at lower prices as per section 4, gift, present, award or donation in section 5 and commission in section 6.

Section 14 of the Punishment Chapter of the Country Code (*Muluki Ain*) also prohibits receiving and offering any kind of bribery, section 15 makes the act of bribery punishable and in accordance with section 16, if any bribe is taken forcefully there will be additional punishment. Likewise, the Code of Conduct of Civil Servants states that any official having public duty should not involve in any kind behavior or to accept any kind of gift and donation from any person or entity, having affect on one's duty.

The preamble of the Prevention of Corruption Act, 2002 can be referred while considering Article 16 of UNCAC. The preamble articulates that this Act has been promulgated to maintain peace, convenience, financial discipline, morality and good conduct among general public. Additionally, section 14 of Punishment Chapter of the *Muluki Ain* prohibits to receive and offer any kind of bribe to any government official or/and any person who bears responsibility of public duty.

There are gaps between Nepalese provisions and UNCAC provisions. The convention has provision not to involve any entity to make any kind of promise, offering or giving undue advantage to public officials. But the Prevention of Corruption Act, 2002 and *Muluki Ain*, 1963 does not specify about the involvement of entity. Only the Code of Conduct of Civil Servant has declared any entity not to be involved in any behavior or to receive and offer any kind of undue advantages. Thus, this provision

is applicable only to Civil Servant which means all public officials other than Civil Servant are not covered by this provision. On the other hand, although the Prevention of Corruption Act, 2002 and the Punishment Chapter of *Muluki Ain*, 1963 contain some provisions to control corruption, but there is clearly a lack of specific Act to regulate corruption regarding foreign public officials and officials of public international organization.

### **Article 17 Embezzlement, misappropriation or other diversion of property by a public official and Article 22 Embezzlement of property in the private sector**

Article 17 of the convention requires that 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. It is more like a mandatory provision. Likewise, Article 22 of the convention is related with embezzlement of property in the private sector.

This Convention provision can be equated with many municipal provisions, inter alia, the Prevention of Corruption Act, 2002, *Muluki Ain*, 1963 and Code of Conduct of Civil Servant, 2008 that establish criminal offences in case of committed intentionally such as corruption, embezzlement, misappropriation or other diversion by a public official. Sections 17 of Prevention of Corruption Act and Rule 6 of Code of Conduct of Civil Servants prohibit embezzlement, misappropriation or other diversion of any property by the public officials.

The Prevention of Corruption Act, 2002 meets more or less the requirement as made by the Convention. The Act declares any kind of embezzlement, misappropriation or other diversion of public fund by a public official as crime (Section 17). Additionally, the Code of Conduct of Civil Servants states that, any officials having public duty should not indulge in any kind of embezzlement, misappropriation and use any public machinery, vehicle, equipment and other facilities for personal purpose.

While the Convention has made provision not to embezzle, misappropriate or other diversion of any private fund, securities and other things of value entrusted, the Prevention of Corruption Act, 2002 and Code of Conduct of Civil Servant have not covered about embezzlement, misappropriation or diversion of any private fund, securities or other things of value entrusted. Therefore, there is a significant gap between existing laws and the Convention provision. An amendment on the Prevention of Corruption Act or formulate a special Act can be done in order to address these issues.

### **Article 18 Trading in influence**

UNCAC prescribes that States Parties consider criminalization of active as well as passive trading in influence through adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, both receiving and giving the things that falls under corruption.

This provision of the Convention should be considered along with Article 15 and 21 as they are related

with one another. There are many provisions that address the requirement set forth by Article 15 or Article 21 but not any that particularly address Article 18 in Nepal. Moreover, it is a persuasive provision.

### Article 19 Abuse of functions

Article 19 of the Convention reads that each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

In Nepal, the Prevention of Corruption Act, 2002 can be referred in this regard as it has made some provisions relating to public servant who commits any acts with mala-fide intention of getting illegal benefit from any other person or causing loss to Nepal Government or public institution, should be liable to bear punishment; and also bear fine as per provision of law. For this purpose, Chapter two of the Act has listed certain activities that have been prohibited by the Act.

In case of the Convention, it has provision for failure to perform own duty in case of both *bona-fide* and *mala-fide* intention but the provisions of the Act applies in case of performing own duty of public officials with bad intention i.e. *mala-fide*.

### Article 20 Illicit enrichment

Article 20 of the Convention is made subject to State Party's constitution and the fundamental principles of its legal system. It reads that 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.

It is always noted that it is hard to track down actual transaction of corruption. However, the unnatural increment in the property and social status can indicate illicit enrichment. In Nepal, sections 20 and 50 of Prevention of Corruption Act, 2002, and Section 31a of Commission for the Investigation of Abuse of Authority Act (CIAA), 1991 reflect the notion of this provision of this Convention. Section 50 of Prevention of Corruption Act, 2002 and Section 31a of Commission for the Investigation of Abuse of Authority Act, 1991 directs to submit property details to public officials. According to section 20 of Prevention of Corruption Act, 2002, if there is found incompatible or unnatural or in case he /she maintains an incompatible or unsuitable lifestyle or it is proved that he/she has given someone a donation, gift, grant, present or has lent money beyond his/her capacity, he/she shall prove the sources from which he/she has acquired such property and if he fails to do so, such property shall be deemed to have been acquired in an illegal manner and to be liable for punishment of imprisonment and a fine according to the amount of property and the illegal property acquired in such a manner shall also be confiscated.

In case of any public official who has duty to submit the statement of property under the section 50



of PCA, fails to submit such statement of property should be liable to a fine or official may investigate having suspected that there is illegal property in his/her name and his/her family member's names. However, this legal provision is not being complied by many public officials and high profile persons who have a duty to comply with it under the law.

### **Article 23 Laundering of proceeds of crime**

Article 23 of UNCAC obligates States Parties to criminalize “laundering of proceeds of crime” through legislative and other measures. This UNCAC offence includes the act of conversion or transfer for the purpose of concealing or disguising the illicit origin of any proceeds of crime, the act of concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to any such property and the act of acquisition, possession or use of any such property.

In reference to this provision, Money Laundering Prevention Act (MLPA), 2008 can be referred that has declared any kind of act of money laundering as criminal offence. The MLPA, 2008 was the first penal law dealing with the offence of money laundering.

The Act defines: "Assets shall be supposed to have laundered in case anyone, directly or indirectly, earns from tax evasion or terrorist activities or invests in such activities or acquires, holds, possesses or utilizes assets by committing any or all offences and in case assets acquired, held or accumulated from investment of such assets is possessed, held or used, utilized or consumed or committed any other act so as to present such assets as legally acquired or earned assets or conceals sources of origin of such assets or assists any one to transform, conceal or transfer such assets with an objective of avoiding legal actions to the person having such assets" are covered by section 4. Similarly, section 5 of the Act clearly mentions that no one should attempt, support or provoke others to commit offences mentioned above, however this provision does not say about aiding, abetting, facilitating and counseling for making money laundering.

Additionally, section 28 of the Act mentions that, in case assets of a person sued for an offence under this Act is found to be unnatural in comparison to the income source or financial condition or one is living a life unnaturally high in standard or proved to have donated, granted, gifted, provided loans, contribution or endowment more than his/her capacity, he/she is required to prove the source of earnings and in case he/she fails to prove so he/she shall be deemed to have earned such assets by committing offences under the Act.

Chapter 7 (sections 30-34) has provisions about punishment for committing acts on assets laundering. Section 30 mentions that anyone committing offence under Section 3 of the Act (assets laundering or cause to launder assets) shall be punished as follows, in accordance with the degree of offence committed:

Fine equal to the amount involved in the offence or imprisonment from one year to four years or both punishments to any person or staff of a bank, financial institution or nonfinancial institution who has committed offence or in case such staff is not identified for the person working as a chief at the time of committal.

In case an office bearer, chief or staff of a bank, financial institution or non-financial institution or

public servant has committed offence, ten percent more than the punishment mentioned as above. Likewise, the person assisting or provoking to commit or causing to commit an offence under this Act shall be punished half of the punishment to be done to the offender. Section 31 is related with imposing fines and section 32 is related to punishment for concealing or destroying evidences and section 33 about punishment for creating obstacles.

Section 34 mentions about the asset to be confiscated under the Act. This provision covers that any assets obtained from an offence under this Act and assets accumulated thereof and assets utilized for committing such offence shall be confiscated (sub-section 1). In case entitlement to assets pursuant to sub-section (1) has been transferred to someone else and an amount has been quoted in such act of transfer, the amount shall be dealt as per the deed with security (*Kapali-document related to debt*) (sub section 2).

There is a significant gap between the municipal (national) provisions and the Convention. The provision of section 5(a) of MLPA, 2008 will be applied in Nepal only on such a situation when the act committed by any person is to be equally declared as crime by the foreign country.

### **Article 24 Concealment**

Article 24 requires that States Parties consider criminalization of intentional concealment or continued retention of property with the knowledge that such property is the result of any offence established in accordance with UNCAC, but without having any participation in any such offence. In this regard, the sections 3, 4 and 28 of MLPA, 2008 can be referred.

### **Article 25 Obstruction of justice**

Article 25 of UNCAC requires the establishment of two offences relating to obstruction of justice. One is related to the use of physical force, intimidation, or the promise and offering of an undue advantage to obtain false testimony in proceedings concerning UNCAC offences. Another provision relates to the use of physical force or intimidation to interfere with the exercise of official duties by a justice or law enforcement official. In this regard, the Sections 18 and 51 of PCA, 2002, the section 33 of MLPA, 2008, the section 24 CIAA, 1991 and customary court practices of Nepalese Legal System can be referred.

Section 18 of PCA has mentioned that, either a public servant or any other person, compels any public servant or any other person to commit any offence punishable under this Act by exercise of fear or threat of under, kidnapping, taking away of property, of causing adverse impact on prestige or by exerting any other type of illegal pressure, shall be liable to a punishment of imprisonment. Section 24 of CIAA, 1991 also states in this line. Section 33 of MLPA, 2008 has mentioned that, if any person creates obstacles in the proceedings of investigation and inquiry undertaken under this Act, the adjudicating officer may punish him/her with an imprisonment up to six months or a fine up to five thousand rupees or both based on the report of investigation Officer.

## Article 26 Liability of legal persons

Article 26 of UNCAC requires the establishment of criminal, civil or administrative liability for legal entities for the UNCAC offences. This obligation is mandatory, to the extent that it is consistent with domestic legal principles.

In the context of Nepal, legal person covers company, corporation, and state-owned authorities. There are some general and specific laws to manage and regulate the legal persons. For instance, the PCA, 2002 has mentioned that, in case any firm, company or corporate body commits any act that is deemed to be an offence under this Act. Likewise, section 108(1) of the Companies Act, 2063 has made mandatory provision to maintain its accounts in the Nepali or the English language. As per the provision made by section 110 of the Companies Act, every company should appoint an auditor under this Act to have its accounts audited.

Additionally, in case the offences under this chapter have been committed by an office bearer of a constitutional organ or body to be nominated or appointed by an officer belonging to the special class of Government of Nepal or officers of equivalent rank; Head, General Manager or officer of a public institution of equivalent rank, such person shall be liable to the punishment of imprisonment for a term of three years in addition to the punishment prescribed for such offence.

There is a significant gap between the national provisions and the UNCAC. The existing laws have not prescribed separately the criminal, civil and administrative liability. At the same time, the Banking and Financial Institutions Act, 2006 has made provision about the action against banking institution to be taken by the Nepal Rastra Bank in case of non maintaining financial governance.

## Article 27 Participation and attempt

Article 27 of UNCAC obligates States Parties to establish as criminal offence, the participation in any capacity as an accomplice, assistant or instigator in the commissions of any UNCAC offence. This obligation is mandatory. In addition, States Parties may wish to consider the criminalization of attempts to commit an offence or the preparation of any such offence.

In this regard, provisions of PCA, 2002 can be referred. Section 21 of the PCA 2002 provides that except otherwise provided for in the PCA 2002, the Act has declared a crime whoever attempts to commit an offense punishable under this Act. Furthermore, section 22 of the PCA provides that the accomplices to any offense under the PCA are also punishable. The section further clarifies that the accomplice who has given cash or kind or made available any other type of benefit to the public servant or any other person committing an offence or who has taken such benefit is also equally punishable to the person committing the offence.

The Convention has addressed basically accomplice, assistant or instigator, attempt to commit and preparation for an offence related to corruption. The PCA has prohibited accomplish and attempt to commit an offence under the PCA, however, the Act has not directly covered the issues related to assistant of instigator and preparation for an offence. Thus, it should also be covered.

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

Article 28 provides that knowledge, intent or purpose required for the commission of an UNCAC offence be inferred by courts in judicial proceedings from objective factual circumstances. This provision calls for evidentiary provisions in domestic laws.

In this regard, there is no sufficient municipal law in Nepal. Crime related to corruption is considered as offence having strict liability under the legal philosophy. In crime investigation having strict liability does not compulsorily require intention, and sometime act to be done as certain offence may be sufficient to be declared a crime. Jurisprudential views and practice are different.

## Article 29 Statute of limitations

Article 29 requires that States Parties establish a long period of limitations for the UNCAC offences and suspension of such statute or establishment of a longer statute of limitations for alleged offenders evading administration of justice.

Basically, the Convention requires sufficient time to investigate crime related to corruption. In this regard, both general laws such as *Muluki Ain* and specific laws such as MLP Act, 2008 and CIAA Act can be referred.

Section 36 of the Court Procedure of the *Muluki Ain* provides that on any matter in respect of which limitation is not specified by law, a suit on such a matter may lie any time. As specific laws, section 23 of the MLP Act, 2008 provides that there shall be no limitation to file a case relating to the offence under this Act. On the other hand, section 13.2 of the CIAA Act provides that there shall be no limitation to file a case if corruption is committed by misappropriation of government or public property or the property an institution owned by Government of Nepal. Section 8.3 of the CIAA Act further mentions on matters having an adverse impact on public interest or concern, the complaint may be filed any time and with regard to matters other than this, complaints shall be filed within 35 days after the complainant comes to know of it.

## Article 30 Prosecution, adjudication and sanctions

Article 30 provides for mandatory and non-mandatory obligations relating to prosecution, adjudication and sanctions. States Parties should take into account the gravity of the offence while prescribing punitive measures (article 30.1). Such measures do not preclude any disciplinary action taken by competent authorities against civil servants (article 30.8). They are also required to establish or maintain an appropriate balance between any immunities or privileges accorded to their public officials and the possibility of effectively investigating, prosecuting and adjudicating UNCAC offences (article 30.2). States Parties must take appropriate measures to ensure the presence of any defendant released during trial at subsequent criminal proceedings (article 30.4) and to take into account the gravity of the offences concerned when considering early release or parole of persons convicted of UNCAC offences (article 30.5). They should also endeavor to ensure that discretionary powers relating to prosecution are exercised to maximize the effectiveness of law enforcement measures (article 30.3) and to consider establishing mechanisms through which a public official accused of an UNCAC

offence may be removed, suspended or reassigned (article 30.6). States Parties should also consider establishing procedures for the disqualification from public office of persons convicted of an UNCAC offence (article 30.7).

In this regard, the provisions of the Interim Constitution of Nepal 2007, the PCA, the CIAA, 1963 the *Muluki Ain*, Prison Act, Local Self Governance Act, 1999, Constituent Assembly Member Election Act, 2008, the Civil Service Act, 1993 and the Banking and Financial Institution Act, 2006 can be referred.

In Nepal, in cases of corruption with misusing authority, as per the degree and gravity of the crime there has been punished as per the PCA. The related laws have provisions for punishment to the chief of concerned bodies in case of failure to fulfill their duty. Section 41 of the PCA, 2002 provides that, in case an action has been taken against any person under this Act, the investigating authority may, on the basis of the gravity of the offence, the condition and circumstances in which the accused committed the offence, the degree of the offence and the punishment in case of conviction of the offence, issue an order to any accused not to leave any place or not to go to any particular place without the approval of the investigating authority. Section 49 of PCA has provision of punishment to those who make false complaint. Section 54 provides that notwithstanding anything contained in the prevailing laws, the person having been punished by a court with a term of imprisonment shall be subjected only to imprisonment. Likewise, the section 63 of the PCA provides that, nothing in this Act shall be deemed to have hindered any authority or officer to exercise powers under other prevailing laws with regard to investigation, inquires, other actions and filing or cases relating to corruption. Moreover, section 37 of PCA has made provision to establish a National Vigilance Center as the corruption intelligent body to combat and control corruption in public institutions.

Commission for Investigation of Abuse of Authority has been established to investigate on corrupt ion case and a Special Court to hear charge sheet in regard to such cases. Section 16, Section 17, Section 18, Section 19 and Section 35 are important from the point of the Convention provision.

Section 17 of the CIAA Act 1991 provides that in case, any person holding a public post being is detained by the Commission under Section 16 or Sub-section (4) of Section 19, such person shall be deemed to have been *ipso facto* suspended from his/her post for a period of such detention, and if, the case has been filed against him/her in the Court under Section 18, he/she shall be deemed to have been so suspended until the case is disposed off. The person so suspended shall be deemed unfit for any post in the government offices or public institution or any other post which may cause financial burden to the loan or grant received by the Government of Nepal. Section 19.2 of the CIAA Act 1991 provides that upon receiving clarification, or recording statements of the person against whom charges of abuse of authority have been made, Commission may release him/her after making him/her sign a bond stipulating that he/she will appear before the Commission as required, or keep him/her on date and section 19.4 provides that in case there exist reasonable ground to believe that the person against whom action has been initiated on charges of corruption may abscond and disappear, or in case any property appears to have been damaged, the Commission may demand security in cash or collateral from him/ her pursuant to the prevailing law and in case such security in cash or collateral is not provided, keep him/her in detention. Furthermore, the Act further mentions that the person against whom action has been initiated on charges of corruption may conceal or destroy evidence against him/her, or hamper or obstruct inquiry and investigations if he/she is allowed to continue in his/her post, the Commission may write to the Government of Nepal or concerned institution, as the case

may be to suspend him/her from the post. Likewise, the section 35(a) of the CIAA provides reasonable reward to such person who cooperates in the investigation process.

Section 10(c) of Prison Act, 1963 provides that notwithstanding anything contained in Sections no person held to be offender of the corruption case shall be sent for community service or open Prison.

The Interim Constitution of Nepal has accepted basic rights of accused person who is under judicial trial. Article 24 of the Constitution provides that every person has right to know about accused charge, consult with lawyer, fair hearing in the competent court, rule of law, assumed to be an offender until proven guilty, not prosecuted or punished for the same offence in a court of law more than once, not compelled to be a witness against himself/herself, right to be informed about the proceedings of the trial. Likewise, article 65 of the Constitution reads that a person who has been punished for any criminal offence involving moral turpitude is disqualified to be a member of the Constituent Assembly. As per provision of Nepalese legal system, punishment in the case of corruption is considered as a case related to moral turpitude. In addition, the person who wants to be appointed as a member of constitutional bodies should have high morality.

Section 19 of the Constituent Assembly Member Election Act, 2008 has mentioned that a person who is punished in the case of corruption or financially black listed is disqualified to be a candidate for election of the Constituent Assembly.

The Banking and Financial Institution Act, 2006 provides that, a person who is convicted by a court of an offense involving moral turpitude and sentenced in respect thereof, and a period of five years has not elapsed from the expiry of the sentence or convicted by a court of an offense of corruption or cheating; is disqualified to be a Director of the Bank (Section 18).

Section 10 of the Civil Service Act, 1993 provides that a person convicted by the court of a criminal offence involving moral turpitude is disqualified for being candidate for civil service.

The Local Self Governance Act 1999 provides that the person having been punished for any criminal charge involving moral turpitude, having passed three years after serving such punishment, is disqualified to be a candidate in election for local bodies (Sections 10, 17, 78,85, 174 and 181).

There are significant gaps between the municipal laws and the Convention. However, the exercise of discretionary power in relation to the prosecution and investigation should be reduced and the code of conduct has been made in this regard.

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

As per Article 31 of the UNCAC, freezing, seizure and confiscation could be one of the most important ways to prevent offenders from profiting from their acts of corruption. Therefore, it is important to ensure that States have strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property. It prescribes measures for confiscation.

While considering UNCAC provision relating to freezing, seizure and confiscation, the CIAA Act and PCA can be referred. The section 29b of CIAA allows confiscating property earned through corruption but that has to be proved. However, a loan without any collateral (as good as *Kapali*) is not considered as corruption. Section 47 of the PCA has made a similar provision.

It is noteworthy to mention that the Interim Constitution of Nepal 2007 has made provisions relating to CIAA as a constitutional body in order to combat corruption and abuse of authority. On one hand, the PCA has stated a provision related to establish National Vigilance Centre under the direct supervision of Prime Minister. Furthermore, special security force as well as Money Laundering Investigation Department have also been established and operates to combat corruption.

The Money Laundering Act has determined certain activities as laundering the assets, especially section 3. On the other hand, Nepal Rastra Bank Act and Banking and Financial Act require updating about their costumers and their transactions.

In accordance with Nepalese law, any court or competent body can demand banking, financial or other commercial information for the purpose of investigation. Generally nobody has the power to deny such information that is needed for authority to complete the investigation process. These provisions may not be exhaustive but provide a framework relating to freezing, seizure and confiscation. On the other, the constitutional provisions have ensured the rights of accused person as well.

### **Article 32 Protection of witnesses, experts and victims and Article 33 Protection of reporting persons**

Articles 32 and 33 make the provision for protection of witness, experts and victims as well as protection of reporting persons. The arrangement for protection of witnesses, experts, and victims is mandatory, that of reporting persons is non-mandatory. UNCAC obligates that States Parties require to take appropriate measures against potential retaliation or intimidation of witnesses, victims and experts as well as they are also encouraged to provide procedural and evidentiary rules for strengthening these protective measures as well as extending similar protection to reporting persons.

In Nepal, there is no specific law that deals with witness protection as well as the protection of reporting persons. "Witness Protection Bill, 2011", has been drafted which is under consideration of legislature-parliament. The proposed Bill includes many provisions including relocation of witness in secured place (section 5), demand body-guard (section 8), other service and logistic support (sections 6-14), compensation (section 16), interim protection service (section 17), secrecy of identification (section 29), use of symbolic name (section 30), rehabilitation of witness (section 38), access to document (section 45), and no action against witness (section 55).

Interim Constitution of Nepal and other existing laws have provisioned directly or indirectly to respect dignity of accused person as well as victim and other concerned person and authority. Furthermore, Nepalese laws envisage free and fair hearing of cases and free and fair environment to tell what they want to say.

Section 52 PCA, 2002 and section 23 of the CIAA Act, 1992 include the provisions relating to confidentiality of information, according to which no notice, information or evidence received to, collected by, the investigating authority in connection with investigation and inquiry in an offence of corruption shall be publicly notified before filing of case. Few Acts encourage the whistle blowers as well.

Since Nepal has not enacted the Witness Protection Act, Nepalese laws cover just confidentiality of documents or proof to be provided by informants but remain silent about the protection of witness

and reporting persons.

### **Article 34 Consequences of acts of corruption**

Article 34 of the UNCAC provides a general obligation for States Parties to take measures, with due regard to the rights of third parties acquired in good faith and in accordance with the fundamental principles of the domestic law, to address the consequences of corruption. In this context, it is suggested that States Parties may wish to consider corruption as a relevant factor in legal proceedings to: (a) annul or rescind a contract; (b) withdraw a concession or other similar instrument; or (c) take any other remedial action.

There is no such Nepalese legal provision to be referred in this regard. It can be considered as a principle to implement the provision of the Convention.

### **Article 35 Compensation for damage**

Article 35 of UNCAC requires that States Parties take such measures as may be necessary, to ensure that victims of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation. This provision does not require that victims be guaranteed compensation or restitution, but that legislative or other measures are provided, whereby such compensation can be sought or claimed. There is no municipal legal provision that is compatible with the Article 35 of UNCAC.

### **Article 36 Specialized authorities**

Article 36 of the Convention requires that States Parties establish a body or bodies specialized in combating corruption through law enforcement. Such a body or bodies must be granted the necessary independence to be able to carry out their functions effectively, without any undue influence, and should have the appropriate training and resources to carry out their tasks.

Regarding specialized authorities, Commission for Investigation of Abuses of Authorities, National Vigilance Centre and Special Court can be referred. The Interim Constitution of Nepal, 2007 has made a provision in relation to an independent body named Commission for Investigation of Abuses of Authorities. In order to implement the constitutional provision, the Commission for the Investigation of Abuse of Authority Act, 2048 (1991) was enacted. Furthermore, the Prevention of Corruption Act, 2002 has made a provision related to establishment of National Vigilance Centre under the direct supervision of the Prime Minister and Council of Ministers. Likewise, the Special Court under the Special Court Act has been established. These laws have also prescribed about personnel of the bodies and special training in order to perform these responsibilities.

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

States Parties are required to take appropriate measures to encourage persons taking part in the commission of an UNCAC offence (a) to supply information to competent authorities for investigative



and evidentiary purposes; and (b) to provide specific facts to help authorities. This obligation is mandatory. Additionally, States Parties are required to consider the options of immunity from prosecution and mitigation of sentences for such persons who have assisted in providing information relevant to the case. However, this obligation is non-mandatory.

The requirement set forth by the Article 37 is neglected in Nepal. Normally, the leverage of cooperating with law enforcement authorities is not much in Nepal. However, section 55 of Prevention of Corruption Act, 2002 reads that the investigating authority may give complete or partial remission in the claim of punishment with regard to the accused who assists in the process of investigation carried out under this Act having him/herself presented as a witness on its behalf. However, the Act further mentions that in case other evidences do not prove his assistance or in case he becomes hostile later on, the case may be filed against him again notwithstanding anything contained in this Act or in other prevailing laws. Therefore, it is important to give leverage to the person cooperating with law enforcement authorities in one or other way.

### **Article 38 Cooperation between national authorities**

According to article 38 of UNCAC, a State Party is required to take necessary measures to encourage, in accordance with its domestic law, cooperation between its public authorities as well as its public officials and its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include: informing the latter authorities, on their own initiative, when there are reasonable grounds to believe that offences of “bribery of national public officials,” “bribery in the private sector” or “laundering of proceeds of crime” has been committed (article 38(a); or providing, upon request, to the latter authorities all necessary information (article 38(b)).

In a majority of cases, municipal standards do not, in general, provide obligations for public authorities to inform *suo motu* the investigating or prosecuting authorities. However, the CIAA has the mandate to investigate the corruption charges *suo motu*. Section 32 and Section 34 of the PCA and Section 21 of CIAA Act can be referred in this regard.

Section 32 of PCA reads: The investigating authority may, in course of investigations and inquiries into offenses punishable under this Act, ask any government body or public institution or any person for cooperation as may be necessary and it shall be the duty of such body, institution or person to cooperate as and when required. Similarly, the investigating authority may, in course of conducting investigation and inquiries into offenses of corruption under this Act, take the help of police force as well. While engaging police personnel in the work, the order issued by the investigating authority shall, with regard to the police, be equivalent to the order of the concerned Inspector General of Police. The investigating officer may ask the police officer or police personnel subordinate to him/her for help. It shall be the duty of the concerned police officer or personnel to assist him/her in case the investigation officer requires such assistance.

Further, in case the investigating authority deems it fit that because of the very nature of the offence under investigation and inquiry, it is necessary to consult an expert engaged in any agency to be involved in such investigation and inquiry; the investigating authority may ask the concerned body to make such expert available on a temporary assignment for a specific period of time, and in case such a demand is made, such body shall, notwithstanding anything contained in the prevailing laws, make

available the concerned.

Section 34 of PCA reads: The investigating authority may, while conducting investigation, inquiries and taking any other actions relating thereto, require services of experts of the concerned subject or of specialized agencies. The investigating authority shall, in order to get the services referred to in sub-section (1), appoint the concerned expert or specialized agency and while appointing as such, the investigating authority shall have to enter into an agreement having stated the functions to be carried out by such expert or specialized agency, the powers that may be exercised, the terms and conditions to be fulfilled, the procedures and remuneration and other benefits which such expert or specialized agency is entitled to.

Furthermore, in case the investigating authority is in need of the service of employees of Government of Nepal or of a specialized agency, notwithstanding anything contained in the prevailing laws, such employees shall be deputed for a period required by the investigating authority.

Section 21 of CIAA relating to Services may be availed includes the following aspects:

- While conducting investigations and inquires or initiating other actions thereto pursuant to this Act and other prevailing law, the Commission, may avail the services of any expert or the specialized agency as so requires.
- In order to avail of service under Sub-Section (1), the Commission shall appoint the concerned expert or specialized agency and shall conclude an agreement detailing the functions, to be performed by such expert or specialized agency, powers may be exercised the terms and conditions to be followed, procedures, and the remunerations and other facilities they are entitled to enjoy.
- In case, the Commission requires the service of employee and Government of Nepal or of a specialized agency, notwithstanding anything contained in the prevailing laws, such employee shall be assigned on deputation for a period of time as requested by the Commission.

### **Article 39 Cooperation between national authorities and the private sector**

Article 39 of UNCAC requires States Parties to take necessary measures to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, particularly financial institutions, relating to matters involving the commission of UNCAC offences (article 39.1). Beside this mandatory obligation, States Parties should consider encouraging their nationals and other persons with a habitual residence in their territory to report to the national investigating and prosecuting authorities the commission of an UNCAC offence (article 39.2).

In this light, the CIAA Act and PCA can be referred. Section 35(b) of the CIAA Act provides that the Commission may maintain necessary coordination with the national or international institutions established with the objective of controlling or preventing corruption or enhance relation or mutual cooperation with such institutions. It further mentions, if deemed necessary may carry out research and develop processes to prevent corruption or improper conduct through promotional activities with a view to promoting information on such matters. The Act has further mentioned that the Commission may offer some suggestions to the appropriate office, office holder or institution on the basis of facts which come into its knowledge in the course of action taken by it in order to control corruption. The

PCA has similar provision.

Section 23(a) of the CIAA Act 1992 also mentions that, anything contained in the prevailing laws, in case, in course of the investigation into charges of corruption, any person is learnt, from any source, to have been involved in transactions or have operated an account in banks or financial institutions within the country or abroad, the Commission may order freezing of such transaction or account. As ordered by the Commission, the concerned bank or financial institution must freeze such transactions or account. Provided that, as regards freezing of transactions or bank accounts in foreign countries, such transaction or bank account shall be caused to be frozen through diplomatic channels. The Commission may impose a maximum fine of fifty thousand Rupees to the Chief of the concerned bank or financial institution based in Nepal for its failure to freeze transaction or account pursuant to Sub-Section (1). Similar provision is made by the section 39 of the PCA, 2002.

Section 8, Section 23.1 and Section 24(c) are near to Article 39.2. Section 8.1 provides that in case anyone commits improper conduct having an adverse effect on matters of public interests or concern, anyone may file a complaint with the Commission and in case of matters other than this; a person who is adversely affected by the improper conduct may lodge a complaint. So far as concerning to time limitation, section 8.3 provides that while filing a complaint pursuant Sub-Section (1) on matters having an adverse impact on public interest or concern, the complaint may be filed any time and with regard to matters other than this, complaints shall be filed within 35 days after the complainant comes to know of it. To make secure the informant, section 23.1 provides that any notice or information obtained in the course of inquiries and investigations into abuse of authority under this Act, and evidence received or collected by the Commission, shall not be disclosed to the public, or the communication media. But the Act has restricted to file a false case and mentioned that, in case any person without any reasonable ground lodges a false complaint against any public servant or a person holding public post or a person with a mala fide intention of causing injury, the Commission may fine up to five thousand Rupees to such person if so proved. This provision is made by section 24(c).

### **Article 40 Bank secrecy**

Article 40 of the UNCAC provides that 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.

It is noted that bank secrecy laws may operate as a hurdle in the investigation and prosecution of serious crimes with financial aspects. Therefore, UNCAC requires that, in cases of domestic investigation of UNCAC offences, States Parties have appropriate mechanisms available within their domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws. However, there are no Nepalese laws that are similar to article 40 of the Convention.

### **Article 41 Criminal record**

Article 41 of UNCAC suggests that States Parties may wish to consider adopting such legislative or other measures as may be necessary to take into consideration any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings related

to an UNCAC offence. However, taking such measures is non mandatory.

MLPA 2008 has been amended to expand its jurisdiction and the offences under the Act commissioned in another state or foreign state are covered by the Act, especially section, 3, 4, 4a or 4b. It is a positive aspect of the Act having extra territorial jurisdiction.

## Article 42 Jurisdiction

Article 42 of the UNCAC requires that States Parties establish jurisdiction with respect to UNCAC offences committed in their territory or on board aircraft and vessels registered under their laws (article 42.1). States Parties are also required to establish jurisdiction in cases where they cannot extradite a person on the grounds of nationality (article 42.3), or for any other reasons (article 42.4). In addition, States Parties are invited to consider establishing jurisdiction in cases where their nationals are victimized, where the offence is committed by a national or stateless person residing in their territory, where the offence is linked to money laundering planned to be committed in their territory, or the offence is committed against the State (article 42.2).

In this regard, CIAA Act and PCA can be referred. The Article 42(1)(a) is somehow similar with the provisions of Nepalese Legal system, especially CIAA Act and PCA. However, no separate laws have been made related to Article 42(1)(b). There is one possibility that it can be implemented on the basis of traditional international laws/treaties. Therefore, article 42 can be implemented through existing legal system, principles and international laws.

Regarding extradition provision under Article 42, Nepal has enacted Extradition Act 1988. But Nepal has not concluded extradition treaty with any foreign country. Therefore, extradition is somehow difficult in Nepal due to legal formalities.

While talking about Extradition Act, 1988, it contains some specific provisions. Section 8.3 of the Act provides that if Government of Nepal finds it reasonable to punish than extradite any accused or offender on the basis of the report submitted by the court pursuant to Section 7, it may order the court initiate the proceedings for punishment. Section 9.1 of the Act also further states that while initiating proceedings for punishment by not extraditing the accused or offender pursuant to Section 8, such proceedings shall be initiated under the prevailing Nepal law deeming as if the accused or offender has committed the offence within Nepal.

Regarding extra territorial jurisdiction, the first amendment in Money Laundering Act has added Section 5(a) which expands the jurisdiction of this Act. At the present context, notwithstanding anything written in Section 3, 4, 4a, or 4b, the offences committed in foreign country can be prosecuted under this Act. In this light, extradition and extra territorial jurisdiction of law should be seriously analyzed and made compatible with the obligation of UNCAC.

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## 4. International Cooperation

To combat corruption, international cooperation is essential to prevent, investigate, prosecute, punish, recover and return illicit gains. States Parties are obliged to assist each other in cross-border criminal matters. This includes, for example, gathering and transferring evidence of corruption for use in court. The requirement of dual criminality (that the alleged crime for which mutual legal assistance is sought must be criminal in both the requesting and requested countries), which has traditionally hindered cooperation, is loosened. Cooperation in criminal matters is mandatory. In civil and administrative matters, it must be considered.

In this light, Nepalese laws are analyzed to see how far Nepalese laws have envisaged international cooperation to fight corruption in reference to UNCAC obligations along with law enforcement relating thereto.

### International Cooperation

#### Article 43: International Cooperation

Article 43(1) reads that States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption. Likewise Article 43(2) reads that in matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

In Nepal, extra territorial jurisdiction of Muluki Ain is debatable at many instances but Seventh Amendment of the Muluki Ain 2020 (On Court Proceedings, Number 34) has stated that where it is

required to issue a summons, process (*Italayanama*), notice of time-limit or letter rogatory on any case to any person staying or residing abroad or to enquire such a person into any matter the following provisions shall apply:

- *If it is expedient to issue a summons, process, notice of time-limit or rogatory to a person residing outside Nepal, it shall be issued and served in accordance with the provisions contained in the rules framed by the Government of Nepal in this respect. A failure to serve the summons so issued and to inquire the relevant person into the matter shall not preclude the office from trying and adjudging the case in accordance with law.....1*
- *In serving a summons, process, notice of time-limit or letter rogatory issued by a court outside Nepal, it shall be served only on the basis of reciprocity in accordance with the provisions contained in the rules framed by the Government of Nepal in this respect .....2*

However, no such provisions have been made to ensure international cooperation while dealing with criminal offences. Therefore, Nepal has partly complied with the requirements of article 43 of UNCAC.

## Extradition

### Article 44: Extradition

Article 44(1) reads that 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.

In this regard, the following provisions can be referred:

The existing Extradition Act of Nepal, 1988 addresses this provision in the context of Nepal, however, provisions included in the Act are not adequate to meet the provision of the Convention. Thus, Nepal has proceeded to draft a Bill to formulate a new extradition law. The proposed Bill has included the corruption and money laundering as a matter of extradition (Section 5.2a and 2k).

The Bill requires agreeing to a Bilateral Treaty. For that, article III (12 and 16) of Nepal India Extradition Treaty (Kathmandu, 2 October 1953) has mentioned that, "Apart from other crimes, the Extradition Treaty has not mentioned the word "corruption" as extradited crime, however, granted to extradite to the person/s involving in crime related to embezzlement by public officers and receiving of illegal gratification by a public servant. "

Article 44(2) reads that 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.

This provision is just a recommendatory provision for State Party. The Draft Bill of the "Extradition Act, 2011" has proposed that if Nepal has agreed to extradite on the basis of mutual cooperation, that can also be applied (Section 3.2b).

Article 44(3) reads that 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. In this regard, the proposed bill of Extradition Act has mentioned that there should be at least one year imprisonment to be a matter of extradition. (section 4a and 4b)

Article 44(4) reads that 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.

Nepal has just concluded a bilateral treaty on Extradition with India. Furthermore, other countries have shown interest to conclude such agreement with Nepal. The Treaty concluded between Nepal and India has mentioned to extradite to the person/s involving in crime related to embezzlement by public officers and receiving of illegal gratification by a public servant. So far as concerns to Nepalese existing provisions, The Extradition Act, 1988 has mentioned not to allow the cases related to SAARC Regional Convention on Suppression on Terrorism as political matters (section 14), however the new draft bill of Extradition has clearly mentioned not for taking the cases related to corruption and money laundering as political matters. (Section 5.2)

Article 44(5) reads: 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.

The Extradition Act, 1988 has defined the term “Foreign Country” means a country which has concluded a treaty with the Government of Nepal relating to the extradition of accused or offender concerning with any offence or the member country of a Convention relating to such extraditions to which Nepal is a party (Section 2.3). The Act further mentioned that Foreign Country may ask for Extradition or Punishment (Section 3). On this basis, Nepal can demand or extradite those persons who committed crimes under this Convention, because, Nepal is a party to this Convention. But Nepal has put reservation in the matter of sub article 6 of this article and mentioned not to take this convention as sole legal ground to extradite.

Article 44(6) reads: 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.

In this regard, it is important to take note that Nepal has informed the Secretary General of UNOs for not taking this part of convention as state responsibility.

Article 44(7) reads: 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.

In accordance with Nepalese law on extradition, it requires bilateral or multilateral treaty/convention to extradite any person who is under the subject of extradition. This provision is just a recommendatory provision for Nepal.

Article 44(8) reads: 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.

Nepal has its own laws on Extradition. The Extradition Act, 1988 has mentioned that, if Government of Nepal finds it reasonable to extradite any accused or offender on the basis of the report submitted by the court, it shall put the accused or offender in custody for extradition and issue an order specifying the place where the extradition is to take place and the name of the person who is to receive such extradited accused or offender. Provided that, Government of Nepal shall not extradite but order the court to initiate the proceedings for punishment if such accused or offender is a Nepalese citizen. (Section 8.1)

Article 44(9) reads: 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.

In this regard, it is a noteworthy to mention that Nepal is preparing new laws by submitting a new bill on Extradition that covers many provisions of the Convention.

Article 44(10) reads: 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.

Nepal has made some provisions in this regards. As provisions of the Act, Nepal can demand to extradite or may also extradite any person either under the Bi-lateral Treaty or Multilateral Conventions.

Article 44(11) reads: 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.

In the context of Nepal, the Extradition Act, 1988 has made some specific provisions in this regard. As per provisions made under the Act, Government of Nepal shall not extradite but order the court to initiate the proceedings for punishment if such accused or offender is a Nepalese citizen (Section 8.1). If Government of Nepal finds it reasonable to punish than extradite any accused or offender on the basis of the report submitted by the court it may order the court initiate the proceedings for punishment (Section 8.3). The Act further mentions that while initiating proceedings for punishment by not extraditing the accused or offender pursuant to Section 8, such proceedings shall be initiated under the prevailing Nepal law deeming as if the accused or offender has committed the offence within Nepal (Section 9.1).

Article 44(12) reads: 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. In the context of Nepal, no clear laws have been made in this regard.

Article 44(13) reads: 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. In the context of Nepal, no clear laws have been made in this regard.

Article 44(14) reads: 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.

In this regard, it is important to mention fundamental rights enshrined in Interim Constitution of Nepal 2007. The Interim Constitution of Nepal, 2007 ensures this right of accused person whose case is under hearing.

Article 44(15) reads: 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.

This is just a normative interpretation of the Convention. It is not a matter of mentioning it in the laws. States can consider this provision at the time of implementing and interpreting the provisions of the Convention as well as existing laws.

Article 44(16) reads: States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters. In Nepal, No Nepalese laws have been made against this provision of the Convention.

Article 44(17) reads: 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.

This provision is a description of the procedural part of extradition. It is ensured by Nepalese laws as well.

Article 44(18) reads: States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Nepal is very serious to make corruption a matter of crime. For that, many laws have been made to combat corruption. Nepal has been working to conclude bilateral treaty in extradition. The Extradition Act, 1988 itself mentions that "Notwithstanding anything written elsewhere in this Act, if any country has not made legal provision for fulfilling the requirement of the treaty concluded with Nepal or Convention to which Nepal is a party, the provisions of this Act shall not be applicable in regard to such country (Section 18).

In this light, it can be rightly said that Nepal is committed to formulate laws on extradition. *Nagarik news* of March 3 2011 reported that 7 countries want an extradition treaty with Nepal ([http://archives.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=28807](http://archives.myrepublica.com/portal/index.php?action=news_details&news_id=28807) (accessed on 13 November 2011)). However, Nepal has not been able to initiate any negotiations with these countries due to the reluctance of political parties to expedite a new extradition bill through parliament. The seven countries include: Russia, France, Israel, USA, Pakistan, China and Thailand. While talking about extradition treaty, the fact that Nepal does not provide capital punishment should be kept in consideration. At the same time, the proposed bill does not allow the government to extradite Nepali citizens to another country or extradite a foreign national who is being tried in Nepal or a foreign national in whose case the verdict has already been given by a court. More importantly, the new bill stipulates that the government seek the approval of a court before extraditing any foreign national. The accused will have to be extradited within 30 days of the court's approval. Likewise, those charged under military law in a foreign country or who are charged with crimes that result in less-than-a-year imprisonment cannot be extradited.

According to the bill, those charged with corruption, murder, financial crimes, rape, illegal possession of weapons, ethnic cleansing, kidnapping, human trafficking, drug smuggling, physical assault, production and transaction of arms and explosives, money-laundering or extra-judicial killing will be extradited unless they face the death penalty in the country to which they are to be extradited. If extradition is sought for the same person by two or more countries, the accused will be extradited to the country that asked first. Developed countries like the USA, UK and Canada have even inked the treaty, paving the way for extraditing their criminal nationals to other countries.

Currently Extradition Act 1998 is prevailing.

Section 2(2) of the Act has defined offence as the offence as stipulated in the Extradition Treaty concluded with any foreign country for extraditing the accused or offender and this word shall also

include the offence as stipulated in the Convention relating to the extradition of accused or offender to which Nepal is a party.

The Act includes various provisions, inter alia, foreign country may ask for extradition or punishment (section 3), order may be given for enquiry (section 4), issue of warrant (section 5), inquiry and proceedings (section 6) and to extradite or punish the accused or offender (section 8).

Section 11 provides that in case request for extradition is made from more than one country in regard to the same accused or offender, Government of Nepal may, on considering the nature of the offence, extradite such accused or offender to the foreign country it deems proper.

Section 12 is related to restriction on extradition. According to it, Government of Nepal shall not extradite the requisitioned accused or offender on the following conditions :

1. In case such accused or offender is a political offender or if the offence committed by him/her is seemed to be of political offence on the basis of the evidence received from the country making the request for extradition or on the basis of the evidence produced by the accused or offender in connection with the enquiry made by the court or if it is found that the accused or offender is being demanded for punishment for political offence.
2. If it is found that the request for extradition has been made after the expiry of the period of limitation for initiating proceedings against the accused or offender in pursuance of the law of such country.
3. In case the accused or offender is undergoing a punishment or a proceeding is going on against such accused offender in pursuance of the prevailing Nepal law for the offence committed within Nepal, till the punishment or the proceeding is completed.

According to section 16, notwithstanding anything written in the prevailing Nepal Law the evidence, proofs and documents received from the foreign country in connection with the case whose proceeding have been initiated under this Act may be admitted as evidence by the court. It is called special provision.

Likewise, the Government of Nepal can ask for extradition. According to section 17.1, if any person, having committed an offence within Nepal, has absconded and is residing at any place within the jurisdiction of any foreign country, Government of Nepal shall request the government of such foreign country to extradite or punish such accused or offender.

More importantly, if any country has not made legal provision for fulfilling the requirement of the treaty concluded with Nepal or Convention to which Nepal is a party, the provisions of this Act shall not be applicable in regard to such country.

It is more or less clear that extradition includes both substantial and procedural requirements.

## Transfer of sentenced persons

### Article 45: Transfer of sentenced persons

Article 45 reads: 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.

Nepal had concluded a bilateral treaty related of extradition with India on 2 October 1953. The Bilateral Treaty has included the embezzlement by public officers and receiving of illegal gratification by a public servant as matters of extradition. However, in this regard, no detail provisions have been made except Nepal India Treaty on Extradition.

## Mutual Legal Assistance (MLA)

### Article 46: Mutual Legal Assistance

Article 46 of UNCAC requires States Parties to ensure the widest measure of mutual legal assistance (MLA) in investigations, prosecutions, judicial proceedings, and asset confiscation and recovery in relation to corruption offences.

Article 46(3) provides: Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
- (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

Furthermore, states Parties may provide information on criminal matters to other States Parties

without prior request, where they believe that this can assist in inquiries, criminal proceedings or the formulation of a formal request from that State Party (article 46 paragraphs 4 and 5).

States Parties may decline to render assistance on the ground of absence of dual criminality; however, a State Party may offer assistance in the absence of dual criminality through non-coercive measures (article 46.9(b)).

States Parties are also required to notify the Secretary-General of the United Nations of their central authority designated for the purpose of article 46, as well as of the language(s) acceptable to them in this regard (article 46 paragraphs 13 and 14). MLA may be refused if such a request is likely to prejudice the requested country's sovereignty (article 46.21(b)). However, UNCAC makes it clear that assistance cannot be refused on the grounds of bank secrecy (article 46.8) or for offences involving fiscal matters (article 46.22). Additionally, UNCAC requires States Parties to apply paragraphs 9 to 29 of article 46 to govern the modalities of MLA in the absence of a mutual legal assistance treaty with another State Party (article 46 paragraphs 7 and 9-29). Finally, States Parties shall consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance MLA (article 46.30).

In Nepalese context, the ratification of UNCAC has very significant meaning. After ratification of this Convention, Nepal has taken this issue seriously and submitted a Draft Bill on "Mutual Legal Assistance" in the Legislative Parliament under the Interim Constitution of Nepal, 2007.

To date, no law on MLA has been formulated but the fact that new draft Bill on Mutual Legal Assistant has tried to address the issues of MLA is very promising. The bill has mentioned about subject/issue of mutual legal assistant (Section 3.1) and its limitations (Section 3.2).

Likewise, the proposed draft Bill has stated about request for mutual assistant (Section 6), request for receiving evidences (Section 7), request for presence of person (Section 8), process to obtain documents and goods (Section 9), request for search and possession (Section 10), witness examination and related matters (Section 13), request for implementing order of seizing property (Section 14), implementing verdict given by court (Section 15). At the same time, the draft bill has mentioned that Banking, finance or commercial documents and related documents may also be collected and provided under the Mutual Legal Assistance (Section 3j).

Regarding Article 46(13)'s requirement, Nepal has accepted this provision and the Government of Nepal has decided the Office of the Prime Minister and Council of Ministers as Central Authority to discharge 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. It has also been notified to the Secretary-General of the United Nations about the central authority designated for this purpose at the time of ratification or acceptance or approval of or accession to this Convention.

Regarding Article 46(14)'s requirement, for the purpose of Mutual Legal Assistance and requesting related matters, Nepal has decided to use English or Nepali language, which has also informed the Secretary General of United Nations Organization.

Regarding Article 46(15)'s provision, the draft bill has made some provisions that cover subject of MLA (Section 3), provisions related to acquire Mutual Legal Assistance including Central Authority (Sections

4 and 5), request for acquiring Mutual Legal Assistance that includes many extensive provisions (Section 6), requesting for evidence (Section 7) and presence of person (Section 8) as well as acquiring documents and goods (Section 9).

Regarding Article 46(21), the draft bill has tried to address the issue of declining MLA. As provision of the draft Bill, there are certain conditions in which Government of Nepal can refuse to provide Mutual Legal Assistant. These conditions are (Section 3.2):

- If there is no bilateral treaty concluded between requesting and requested state,
- If this will violate public order in the case of providing Mutual Legal Assistant,
- If the case is related to civil liability of less than hundred thousand rupees,
- If the case is related criminal liability of less than one year imprisonment.

Furthermore, section 20 of the proposed draft bill has mentioned that requested state can also reject the request of the requesting party in certain conditions.

Regarding Article 46(28) provision, the draft bill has mentioned that if any charge needed to pay in the process of acquiring and examining witness and evidence, it will be liability of requested state party (Section 31). In case state party need any document from another state party (Nepal), such state party can make a request by addressing to the Government of Nepal by mentioning relevance and confidentiality of the document (Section 24).

As extradition is based on bilateral or multilateral treaty, Nepal is also taking initiation to conclude multi-lateral as well as bilateral treaty to implement the Convention effectively. Moreover, it is equally true that Nepal needs to put much effort to develop mechanism of MLA. Nepalese laws are not adequate to deal with the wide range of MLA.

## Transfer of Criminal Proceedings

### Article 47: Transfer of criminal proceedings

Article 47 reads: 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.

Nepal has concluded a bilateral treaty related to extradition with India on 2 October 1953. The Bilateral Treaty has included the embezzlement by public officers and Receiving of illegal gratification by a public servant as matters of extradition. Some provisions of the Extradition Act of Nepal have also tried to address these issues. However, there is no such clear provision in this regard. So the necessity of such a provision is very high.

## Law Enforcement Cooperation

### Article 48: Law enforcement cooperation

UNCAC obligates States Parties to cooperate closely with one another to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

- (a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;
- (b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:
  - (i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
  - (ii) The movement of proceeds of crime or property derived from the commission of such offences;
  - (iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;
- (c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;
- (d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;
- (e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;
- (f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

Furthermore, States Parties shall consider entering into bilateral agreements on direct cooperation between their law enforcement agencies, and in the absence of any such agreement, may consider the UNCAC as a basis for MLA. Additionally, States Parties shall cooperate to respond to UNCAC offences committed through the use of modern technology.

In Nepalese context, no clear and separate laws have been made. The Money Laundering Act, 2002, and Nepal Rastra bank Act has tried to address this provision, however, such provision are not sufficient to cover the provision mentioned by the Convention.

Regarding receiving assistance from other states, membership in INTERPOL allows indirect law enforcement assistance from other states. The Government uses such assistance to identify and locate offenders. Furthermore, Nepal has ratified many treaties and conventions to control crime within the country. The provision forwarded by Article 47(3) can be considered as a guideline to improve cooperation among the state parties.

## Joint Investigations

### Article 49: Joint Investigations

Article 49 provides that the States Parties shall consider bilateral or multilateral agreements or arrangements regarding the establishment of joint investigative bodies to conduct joint investigations, prosecutions and proceedings in more than one state. Furthermore, in absence of such agreements, States Parties may consider undertaking joint investigations on a case by case basis.

In Nepal, there is no such provision in domestic laws for forming a Joint investigation body.

## Special Investigative Techniques

### Article 50: Special investigative techniques

Article 50 requires that a State Party must establish controlled delivery as an investigative technique available at the domestic and international level, if permitted by the basic principles of its domestic legal system (article 50.1); have the legal ability to provide on a case by case basis international cooperation with respect to controlled deliveries, where not contrary to the basic principles of its domestic legal system (article 50.3); and where appropriate, establish electronic surveillance and undercover operations as investigative techniques available at the domestic and international level (article 50.1).

Nepal Treaty Act, 1990 has mentioned about State's responsibilities to domesticate/localize any Convention or Treaty that Nepal is party to such instruments. The Act has mentioned that, in case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification, accession, acceptance or approval by the Parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws (Section 9.1). The Act further states that, any treaty which has not been ratified, acceded to, accepted or approved by the Parliament, though to which Nepal or Government of Nepal is a party, imposes any additional obligation or burden upon Nepal, or Government of Nepal, and in case legal arrangements need to be made for its enforcement; Government of Nepal shall initiate action as soon as possible to enact laws for its enforcement (Section 9.2). However, in Nepalese context, no laws prevails which meet the requirements forwarded by Article 40 of UNCAC.

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## 5. Asset Recovery

A ‘fundamental principle’ of the Convention, and one of its main innovations, is the right to recovery of stolen public assets. It is widely witnessed that the transfer of assets obtained illegally and disguised as such constitutes the bulk of corrupt activities and amounts to disguising public wealth for personal gain. Such activities are harmful to the country as well as the world. Such activities do not only reduce the country’s gross domestic product through leakages of its earnings but also the proceeds of such illegal activities can be used to finance activities like terrorism nationally and globally. Therefore, UNCAC aims to recover such assets.

Asset recovery is considered as the chief “selling point” of the Convention, and one of the main reasons behind the ratification by many developing countries. The UNCAC provisions layout a framework for countries to adopt both in their civil and criminal law in order to facilitate tracing, freezing, forfeiting, and returning funds obtained through corrupt activities. The requesting state will in most cases receive the recovered funds as long as it can prove ownership. In some cases the funds may be returned directly to individual victims. Therefore, perspectives and prospective of asset recovery are very important.

### General Provision

#### Article 51: General provision

According to Article 51, the return of assets is a fundamental principle of the Convention, and Article 51 requires States Parties to provide the widest measure of cooperation and assistance for the recovery of assets to another State Party.

It is yet to be seen how asset recovery is possible in Nepal or how Nepal will contribute in the return of assets. For now, it seems to be only a principle in the Nepalese context.

## Prevention and Detection of Transfers of Proceeds of Crime

### Article 52: Prevention and detection of transfers of proceeds of crime

The UNCAC requires financial institutions of a State Party to verify the identity of customers or beneficial owners of high-value accounts, and to conduct enhanced scrutiny of accounts sought or maintained by public officials, their family members, and close associates (article 52.1). In addition, it requires public officials having foreign accounts to report their existence to the relevant authority (article 52.2(b)). States Parties must also ensure that their financial institutions (FIs) maintain transaction records of such persons for an appropriate period (article 52.3). States Parties are obligated to use their regulatory and oversight bodies to prevent the establishment of banks that have no physical presence or that are not affiliated with a regulated financial group (article 52.4). Additionally, States Parties are required to establish effective financial disclosure systems and provide appropriate sanctions for non-compliance, and to share that information with other States Parties when necessary to investigate, claim and recover proceeds of UNCAC offences (article 52.5). Moreover, States Parties must also consider taking necessary measures to require appropriate public officials having an interest in or authority over a financial account in a foreign country to report that relationship to the relevant authorities and to maintain proper records related to such accounts (article 52.6). In this regard, the following provisions can be referred.

Money Laundering Prevention Act, 2008 has provision that any bank, financial institution or non-financial institutions should maintain clear identity of a person while establishing any kind of business relationship with him/her or transacting the amount more than the limit at one or several transactions as prescribed by Rastra Bank from time to time by publishing notice (Section 6.1). Furthermore, the Act further mentions that bank, financial institution or non-financial institution, while verifying identification of the customer as per Sub-Section (1), should require the person establishing business relationship or having transactions with it to submit the documents, like: in case of a natural person his/her name, family surname, copy of citizenship or passport including other necessary documents evidencing his/her permanent residential address and profession or business, or in case of the person or firm except provided in Clause (a), copy of the document certifying incorporation, establishment or registration of the institution, documents presenting name, surname, address, profession, business of board of directors and executive director or proprietor of firm or partners of partnership firm, or in case of business relation or transactions to be established or made on behalf of someone else, documents relating to principal's identity, address including power of attorney clarifying his/her business; name, surname, address of close relative, person or institution benefiting from the transaction of the business relationship, or in case of transactions made through negotiable instruments, name, surname and address of the issuer and payee of or from such instrument, and other documents as prescribed by the Financial Information Unit from time to time (Section 6.2). For that bank, financial institution or non-financial institution should keep a separate record of documents and transactions of each customer, pursuant to Sub-Section (2), including date and nature of transactions, type of account if any and symbol number (Section 6.3). For this purpose, any bank, financial or non-financial institutions has a duty to maintain records of amount transacted beyond the limit prescribed by Rastra Bank at a single or in a series of transactions by a person (Section 7.1 of MLPA), investigate and inquire any transactions which seem to be doubtful or transacted with the motive of assets laundering or so laundered or there are reasonable grounds for getting into suspicion (Section 7.2 of MLPA) and inform

financial information Unit if found above mentioned acts (Section 7.3 of MLPA)

Section 10 of the Act has also prescribed many duties and power of Financial Information Unit established under the Nepal Rastra Bank. Sub section 1d of section 10 of the Act has mentioned that major function of the FIU is to send notice, details and documents regarding assets laundering to the Financial Information Units of other countries and international organizations, institutions reciprocally and receive such notice from concerned country and international organization and institution (Section 10.1d).

Bank and Financial Institutions Act, 2006 has provisioned that no one other than a bank or financial institution can do financial transactions referred to in this Act (Section 28). The Act Further mentions that the Rastra Bank may prescribe necessary conditions, in view of the condition of the existing banks and financial institutions, healthy operation of the financial transactions and the interests of depositors (Section 55.1). Furthermore, If any foreign bank or financial institution intends to open its office in the State of Nepal, they must make an application to the Rastra Bank.

As per provisions of Nepal Rastra Bank Act, no bank can be established without taking permission from Nepal Rastra Bank. Likewise no entity either natural or institutional can do banking transaction under the Nepalese laws. For that Nepal Rastra Bank can issue certain guideline to regulate and control such irregular activities.

The Prevention of Corruption Act 2002 has mentioned that whoever joins a public office should, within sixty days from the date of joining the public office, and whoever is engaged in a public office on the date of commencement of this Section should, within sixty days from the date of commencement of this Act, and thereafter within sixty days from the date of completion of each fiscal year, submit the up dated statement of property in his/her name or in the name of his/her family members along with the sources or evidence thereof to the body or authority prescribed by Government of Nepal having published a notification in the Nepal Gazette (Section 50.1). The person assuming a public office who does not submit the statement of property within the time limit even extended should be liable to a fine of five thousand rupees and the concerned body or official may investigate having suspected that there is illegal property in his/her and his/her family member's names (Section 50.3). For this purpose, The Act has prescribed to incorporate National Vigilance Center (Section 37 of the Act) under the direct control and supervision of the Prime Minister in order to effectively control corruption-oriented acts and to promote people's awareness against corruption having powers to monitor the statement of property and income given by persons holding a public post as per the prevailing laws and also make necessary provision for regular surveillance, surprise checks and investigation in corruption prone places or works (Section 38c and d).

As per information received from Nepal Rastra Bank, Government Officials can open account in foreign territory, but it requires recommendation from the Ministry of Finance and the Ministry of Foreign Affairs. However, in practice, there has been problem in keeping proper records of the accounts of government officials and their relatives.

## Measures for Direct Recovery of Property

### Article 53: Measures for direct recovery of property

Article 53 requires that Each State Party shall, in accordance with its domestic law:

- (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
- (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and
- (c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

In Nepalese context, there is no such prevailing laws that meet the requirement mentioned by this Article. The Draft Bill of Mutual Legal Assistance has accepted the task to recover asset is a matter of legal assistance (Section 3.1e).

## Mechanisms for recovery of property through international cooperation in confiscation

### Article 54: Mechanisms for recovery of property through international cooperation in confiscation

The UNCAC obligates a State Party, to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention:

- (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;
- (b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and
- (c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Likewise, each State Party may take various necessary measures including permit its competent authorities to freeze or seize property upon a freeze or seizure order issued by a court or competent authority of a requesting State Party. In Nepal, no laws prevail that ensure the mechanisms for recovery

of property by confiscation through international cooperation.

The draft bill relating to Mutual Legal Assistance has prescribed the procedure for requesting for confiscation of property. Section 25 provides that the requesting country should submit a petition in District Court through District Government Attorney's Office to freeze or seize property. Such property will be frozen or seized after receiving a freezing or seizure order by the court.

## International Cooperation for purposes of confiscation

### Article 55: International cooperation for purposes of confiscation

Article 55 mandates States Parties to provide assistance to a wide extent to another State Party for confiscation of the proceeds of crime. A State Party is required to: submit requests for confiscation of proceeds of crime to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it (article 55.1(a)); present to its competent authorities an order of confiscation issued by a court with a view to giving it effect (article 55.1(b)); take measures to identify, trace, freeze or seize proceeds of crime, property, equipment or other instrumentalities (article 55.2); not construe the provisions of the article as prejudicial to the right of a bona fide third party (article 55.9); and furnish copies of their laws and regulations that give effect to the article and of any subsequent changes of such laws to the Secretary-General of the United Nations (article 55.5). If a State Party makes the existence of a treaty a condition to taking such steps, it shall consider the Convention as sufficient for a treaty basis (article 55.6). However, a State Party is free to respond to confiscation requests in accordance with the provisions of its domestic laws or any bilateral or multilateral agreements with the requesting State (article 55.4). In addition, a State Party may refuse such requests or lift provisional measures on the basis that it did not receive sufficient and timely evidence or that the property is of a *de minimis* value (article 55.7). In case of refusal or lifting of provisional measures, the requested State Party shall give the requesting State Party an opportunity to present the reasons in favor of continuing the measures (article 55.8). Furthermore, paragraph 3 of the article 55 provides procedural requirements to be followed when a request is made pursuant to this article.

In Nepalese context, there is no law prevailing related with international cooperation for confiscating property. Draft Bill on Mutual Legal Assistance has tried to incorporate this provision. Section 25 of the Bill has included this provision. However, it is not yet approved by the legislature-parliament.

## Special Cooperation

### Article 56: Special cooperation

Article 56 reads: Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial

proceedings or might lead to a request by that State Party under this chapter of the Convention. There is no law prevailing that can be referred in this context.

## **Return and disposal of assets**

### **Article 57: Return and disposal of assets**

The Convention obligates cooperation among States Parties with respect to returning confiscated property to its prior legitimate owners (article 57.1) and to take measures to enable its competent authorities to return the confiscated property by taking into account the rights of bona fide third parties (article 57.2). States Parties may deduct reasonable expenses incurred for the confiscation process (article 57.4) and may also consider the conclusion of agreements or arrangements for the final disposition of assets on a case by case basis (article 57.5). Furthermore, the requested State Party should return the confiscated property to a requesting State Party, prior legitimate owners, or victims of the crime as compensation, depending on the circumstances (article 57.3).

In this regard, the provisions of the MLA Bill can be referred. Section 25 provides that the requesting country should submit a petition in District Court through District Government Attorney's Office to to freeze or seize property. Such property will be freezed or seized after receiving a freezing or seizure order by the court along with necessary evidence and documents.

As a matter of fact, Nepal has yet to make necessary laws to meet the requirement of these provisions.

## **Financial Intelligence Unit**

### **Article 58: Financial intelligence unit**

Article 58 reads: States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analyzing and disseminating to the competent authorities reports of suspicious financial transactions.

To fulfill the provisions of the Convention as well as other related provisions of the Convention, Government of Nepal has established Financial Information Unit (as a Unit of Nepal Rastra Bank) under the Money Laundering Prevention Act, 2008. The Act has mentioned that there shall be a Financial Information Unit (FIU) in Rastra Bank for collection and analysis of information relating to assets laundering (Section 9). The Act has also prescribed certain duties and powers of the Unit (Section 10). The Money Laundering and Prevention Act, 2008 has also mentioned that major function of the FIU is to send notice, details and documents regarding assets laundered to the Financial Information Units of other country and international organization, institutions reciprocally and receive such notice from concerned country and international organization and institution (Section 10.1d).

As per information given by Director of Nepal Rastra Bank, additional power should be given to the

Unit to work effectively. To work internationally, the Unit should agree to sign MoU with the Unit of other Countries. Till now, the Unit has signed in MoU with eight Countries<sup>2</sup> and all countries are located in the Asian Region.

## **Bilateral and Multilateral Agreements and Arrangements**

### **Article 59: Bilateral and multilateral agreements and arrangements**

Article 59 provides that States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

This provision can be taken as a formal provision of the Convention which is not needed to address under the laws but should be heeded while implementing the provisions and requirements of the Convention.



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<sup>2</sup> These are: Bangladesh, Sri Lanka, India, Thailand, Malaysia, Mongolia, South Korea and Taipei.





## 6. Technical Assistance and Information Exchange

In the Convention, technical assistance refers generally to support aimed at helping countries comply with the UNCAC's provisions. And it is a part of a multifaceted approach to combat corruption effectively. The UNCAC includes provisions on training, material and human resources, research, and information sharing. It is true that technical assistance must be available to the relevant public and private bodies in order to increase their capacity to take efficient measures. The UNCAC encourages the provision of training on topics such as investigative methods, planning and developing strategic anti-corruption policies, preparing requests for mutual legal assistance, public financial management, and methods used to protect victims and witness in criminal cases. States Parties should also consider helping each other conduct evaluations and studies on the forms, causes and costs of corruption in specific contexts, with a view to developing better policies for combating the problem. Otherwise, it will be impossible to fight corruption.

In this light, Nepalese laws are analyzed to see how far Nepalese laws have envisaged preventive technical assistance and information exchange to fight corruption in reference to the UNCAC obligations along with law enforcement relating thereto.

### Training and Technical Assistance

#### Article 60: Training and technical assistance

Article 60 of UNCAC reads that each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption. The following areas are suggested for training programs:

- (a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;

- (b) Building capacity in the development and planning of strategic anticorruption policy;
- (c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;
- (d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;
- (e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;
- (f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;
- (g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;
- (h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;
- (i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and
- (j) Training in national and international regulations and in languages.

Although there is a general mandate for States Parties to help one another with regard to technical assistance, specific encouragement is given to providing such assistance to developing countries' efforts to fight corruption (article 60.2). This technical assistance includes material support, training as prescribed in paragraph 1 of article 60, and exchange of relevant experience and specialized knowledge, which is intended to promote international cooperation in the areas of extradition and mutual legal assistance. Furthermore, States Parties are required to strengthen, as needed, efforts to boost operational and training activities in both international and regional organizations and in the framework of bilateral and multilateral agreements (article 60.3). Additionally, Article 60 contains a number of non-mandatory provisions encouraging international cooperation efforts related to research and evaluation, expert recommendations, regional and international conferences, and development funds.

In the context of Nepal, the provisions of the Article 60 have yet to be implemented and for now they are just principles forwarded by UNCAC. The Government of Nepal has plans for training government officials and for this purpose, the Government of Nepal established and operated Staff College. However, it is really hard to assess how far government officials received training and orientation programmes to enhance capacity of the government officials and personnel. However, the Government of Nepal has never planned for sector wise or thematic training for government and staff for combating corruption.

In a visit to the CIAA, it was found that CIAA has been arranging many training as far as possible that will help in combating corruption.

Additionally, different laws like Civil Service Act, Procurement Act, Nepal Rastra Bank Act, Money laundering Act have also stated directly and indirectly about training that enhance the capacity of staff to combat against corruption.

In Nepal, provision of training is to some extent followed but sharing information and international cooperation are not done. Therefore, Nepal should follow and implement the provision of sharing information and international cooperation.

## Collection, Exchange and Analysis of Information on Corruption

### Article 61: Collection, exchange and analysis of information on corruption

Article 61 stresses on the importance of both gathering and sharing information to combat corruption. The UNCAC requires that States Parties consider analyzing trends in corruption, along with the circumstances relating to corruption offences (article 61.1). States Parties are also obligated to contemplate sharing statistics, analytical expertise, and information, for the purposes of building common definitions, standards, methodologies, and an understanding of best practices (article 61.2). Additionally, States Parties are required to consider monitoring their policies and practices, along with evaluating their effectiveness and efficiency (article 61.3).

In this regard, Nepal has prepared different plans and policies to control corruption. The Government of Nepal has issued institutionally at each Ministerial level Action Plan 2011 under the Strategy and Plan of Action against Corruption 2009. Furthermore, Nepal has joined the ADB/OECD Anti-Corruption Initiative for Asia-Pacific in November 2001 and is represented in the Initiative's Steering Group through the Commission for the Investigation of Abuse and Authority (CIAA). In addition, Nepal's current priorities for reform under the Anti-Corruption Action Plan concern Capacity Building at the CIAA.

Currently, Nepal has been working to share and develop new ideas and strategies to control corruption.

## Other Measures

### Article 62: Other measures: implementation of the convention through economic development and technical assistance

Article 62 reads that States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of corruption on society in general, in particular on sustainable development (article 62.1). Furthermore, in coordination with other States Parties and international and regional organizations, States Parties are obligated to increase their cooperation with developing states to improve their capacity to fight corruption (article 62.2.a), to enhance material and financial assistance to developing countries to bolster their anti-corruption efforts (article 62.2.b), to provide technical assistance to developing countries to aid them in implementing the Convention (article 62.2.c), and to encourage and persuade other States Parties and financial institutions to assist in the aforementioned efforts (article 62.2.d). If possible, these efforts should be without prejudice to existing foreign assistance commitments or financial arrangements at the bilateral, regional or international level (article 62.3).

After ratifying the UNCAC, Nepal has been working to implement the provision of the Convention.

Laws are in the process of being formulated and amended. However, fulfilling the provisions of the UNCAC depends upon the capacity of the country. Therefore, Nepal assess its capacity and formulate a plan and policy in line with plan and policy of developed State Parties.

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## 7. Conclusion and Recommendations

### Conclusion

International cooperation and coordination plays a vital role to combat and control corruption that the world faces at present. Considering this fact, the international community, with painstaking effort, concluded the UN Convention against Corruption on 31 October 2003. The Convention has been signed by more than 150 countries, while Nepal signed the Convention on 10 December 2003, which was ratified on 23 February 2011. As rampant corruption has posed a serious threat to the national wealth as well as to the whole edifice of democracy, the convention can be regarded as an expression of the global effort against corruption.

Fundamental objectives of UNCAC are to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and promote integrity, accountability and proper management of public affairs and public property. For this purpose, the Convention has basically covered the provisions related to preventive measures, criminalization and law enforcement, international cooperation, assets recovery and technical assistance and information exchange in detail, and the Convention has also assigned to the State parties to formulate and implement the laws to meet requirements prescribed by the Convention. This Convention is slightly different than other Conventions. As per provision made by this Convention, every state party must ratify every amendment if it is made to amend the Convention, state party will be bound to apply original provisions of the Convention.

In the context of Nepal, there are many challenges to implement the provisions of the Convention. Obviously, formulation and implementation of new laws in line of the Convention, raising awareness among the people, information, and evidence exchange between State parties are really challenging. Furthermore, policy formulation, legal reform, development of infra-structure, increasing expertise and knowledge, complex coordination among the national bodies working in the field of combating

corruption, political instability, extended provisions of the Convention are also challenging for Nepal.

In the case of Nepal, transparency in public sector decision making is absent that contributes to corruption directly and indirectly. In some cases, public servants hesitate to provide sufficient information by showing technical problems. There is lack of an integrated code of conduct for public officials and for political leaders as well as other elected and appointed persons. Furthermore, Nepal has not made any transparent policy to recruit temporary as well as contract based staff in public institutions. The Prevention of the Corruption Act, 2002, Money Laundering Preventive Act 2008 and Public Procurement Act, 2007 has covered many provisions of the Convention, however, bribery of foreign public officials and officials of public international organizations and corruption practiced in the private sector are missing in Nepalese legal regime. There are weak laws to manage private sector financial system and projects of donor agencies. Furthermore, there are lack of effective laws to control embezzlement, misappropriation or other diversion of property by a public official and trading in influence, abuse of functions, illicit enrichment has not also been properly addressed. In the context of Nepal, effective law to control embezzlement in the private sector is missing and prosecution process is very complex and lengthy. No effective laws have been made to protect witnesses, experts, informants and victims. There are no laws regarding compensation to victims of corruption.

No effective policy/guideline has been formulated to manage cooperation among domestic law enforcement authorities. Furthermore, except traditional provision of National Code (*Muluki Ain*), no law has been made to manage International cooperation in order to combat corruption. The Extradition Act, 1988 has not covered many issues that need to be addressed in domestic laws. For that, Nepal has proposed a new Extradition Bill; however, nobody can say when the Bill will become an Act.

In the context of Nepal, there is no available laws on transfer of sentenced persons and criminal proceedings and mutual legal assistance law that create a great challenge to international cooperation as well as to form joint investigation team to combat corruption. There is a total gap on recovering assets that cross national border.

There is no clear legal provision for freezing and seizing assets earned through corruption that have already crossed the border. On the other hand, Drugs related to the Vienna Convention, 1988; Suppression of Organized Crime Convention, 2000; Terrorist Financing related Convention 1999; UN Security Council Resolutions 1267 and 1372; and United Nations Convention against Corruption, 2003 has stated the duty of the State party to establish FIU to combat asset laundering and investment in corruption and terrorism. For this purpose, G-20 has felt to establish "Financial Action Task Force (FATF) in 1989 and also established the body, which issued 40 recommendations related to money laundering and 9 recommendations related to financing terrorism, which are called 40 plus 9 recommendations.

The recommendation number 26 has prescribed to State party to form Financial Intelligence Unit as central level mechanism that has the responsibility to find financial irregularity in national and international level. In the case of Nepal, a body has been established named "Financial Information Unit" that oversees financial transactions done by corruption and other irregular works. It has also responsibility to convey information to the CIAA, Police, Revenue Investigation Department and Department of Money Laundering; however, Nepal has to fulfill many of the requirements prescribed by the recommendations.

## Recommendations

1. **Formulation and implementation of Laws:** Nepal should formulate laws relating to anti-corruption for both the private and public sector; protection of witness, informants, victims and experts; Mutual Legal Assistance; civil, criminal and administrative accountability of legal persons; assets recovery; political party accountability (financial as well as election); bribery of foreign public officials and officials of public international organizations; joint investigation and implementing the verdict and order issued by foreign courts and authorities should be made and implemented effectively as soon as possible to implement the provisions of the Convention.
2. **Amendment of existing laws:** Existing laws related to anti corruption should be amended immediately. Basically Prevention of Corruption Act, the Extradition Act, Laws related to financial institutions, insurance, company (private and public), laws related to financial governance and procedures, laws related to local bodies, laws related to election, facilities of government officials and personnel are needed to be amended in line with the Convention promptly. For instance, The Prevention of Corruption has covered many preventive and criminalization provisions of the Convention but this Act has not incorporated many provisions of the Convention, like corruption and bribery in the private sector, bribery of foreign public officials and officials of public international organizations. These issues should be included in the Act.
3. **Increment in severity of Punishment:** To combat corruption, there should be relatively severe punishment and sanction. Therefore, the provision of severe punishment including relatively long jail sentence and confiscation of assets and properties should be instituted for those persons who are involved in corruption directly or indirectly.
4. **Structural and institutional reform and capacity building:** Many institutional bodies like Financial Information Unit, Department of Money Laundering Investigation, CIAA have been playing significant role to combat corruption; however, they have not been working properly due to some lack of authority and institutional expertise as well as logistic and technical support. Financial Information Unit should be substituted by Financial Intelligence Unit with concrete powers and well equipped as a provision of the Convention. Policy of staff transfer should be transparent and reasonable. CIAA has been working in many ways to combat corruption, but sometimes CIAA is a circle of doubt. Tasks performed by the CIAA should be transparent and accountable. Capacity building should be a priority of the government. Official posts working in anti corruption should not be left vacant. But unfortunately, the post of Auditor General and Chief Commissioners of the CIAA are vacant since 2007. Thus, such officials should be appointed as soon as possible and such a provision should be incorporated in the Constitution.

Moreover, to enhance capacity of the authorities working in the field of anti-corruption, clear plan and policy should be formulated and reviewed from time to time. In this, the state should encourage to the civil society to participate in training as well as awareness raising programs. For that, the government should allocate sufficient resources. In Nepal, many national and international organizations working in this field should be integrated to fight corruption collectively. The causes and impacts of corruption should be analyzed from time to time and it should be included as an agenda of raising awareness and capacity

building.

5. **Commitment from Political Parties:** In Nepal, the political parties are not obeying laws relating to them. Therefore, in order to make political parties accountable and hence discourage corruption, necessary laws should be enacted as well as the prevailing laws should be applied properly, for instance Audit Report of the party, hold national conference to elect executive leaders in different levels of its structures and to ratify plan and policy of the party.
6. **One window policy to combat corruption:** In reference to policy makers, it is found that they are unaware on rampant corruption prevailing within society. The National Vigilance Centre (NVC); therefore has been working to create awareness against corruption and activities related to the preventive side against corruption, which has been established under the direct supervision and control of the Prime Minister. Likewise, Judicial Council, Office of the Attorney General, Special Court should also be active and for that, such bodies should also be well equipped. At the same time, the policy on training, hiring and recruiting of government officials should be effective and be reviewed from time to time. Additionally, a Code of conduct for civil servant should be formulated and implemented in line with International Code of Conduct for Public Officials. In addition, such a code of conduct should also be formulated and implemented for elected as well as for appointed persons.
7. **Room for public and private partnership:** There should be a proper body to reconcile government's efforts and public participation through public private partnership. Some promotional activities related to anti corruption should be planned and implemented nationwide to make public institutions accountable. It may encourage people to participate in public campaign against corruption. At the government level, a National Integrity Strategy should be developed and implemented.
8. **Criminalization of certain acts:** Nepal has yet to criminalize certain provisions of the UNCAC, like bribery of foreign public officials and officials of public international organizations, and bribery in the private sector that affect to combat corruption. Thus, these activities should also be criminalized as soon as possible.

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## Schedule 1

### Individuals/persons Contacted

SN	Name	Office	Designation
1	Trilochan Upreti	Office of Prime Minister	Secretary
2	Kedar Prasad Poudel	Office of Prime Minister	Joint Secretary
3	Kedar Khadka	Pro-Public	Executive Director
4	Koshal Chandra Subedi	Ministry of Law and Justice	Under Secretary (Law)
5	Hari Kumar Nepal	Nepal Rastra Bank	Assistant Director
6	Bishwa Prakash Subedi	Department of Money Laundering Investigation	Director
7	Surya Raj Dahal	Department of Money Laundering Investigation	Under Secretary (Law)
8	Bimala Subedi	Office of the Auditor General, Nepal	Deputy Auditor General
9	Ishwori Prasad Paudyal	Commission for the Investigation of Abuse of Authority	Joint Secretary and Spokesperson
10	Dharmaraj Sapkota	Nepal Rastra Bank	Director, FIU



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Nepal Rastra Bank Act, 2002  
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