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**A FRAMEWORK CONVENTION AGAINST POLITICAL
CORRUPTION**

James D. Cooper (Student, University of Melbourne)

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Abstract

The interaction between money and political parties – especially during election campaigns – raises serious issues for democracies around the world due to the occurrence of political corruption. This working paper advocates for the development of a Framework Convention Against Political Corruption (*FCAPC*), which should be negotiated and implemented by the United Nations.

I Introduction

Money and the funding of political parties and election campaigns is a necessary element of modern democracies in both developed and developing countries. However, the interaction between money and political parties – especially during election campaigns – raises serious issues for democracies due to the occurrence of political corruption. These issues are becoming increasingly problematic for democratic governments across the world. In the modern era, there are increasing costs to compete in democratic elections, and this increase in costs has coincided with a general decline in membership of political parties. This poses serious risks for democracy on a global scale as this combination of less money and growing costs can encourage political corruption, which in turn fundamentally undermines key democratic principles, and has grave implications for the viability of democratic governance.

To reduce the impact that money has on the democratic process, democratic countries implement political finance regimes to regulate the interaction between money, political parties and election campaigns. Political finance rules fundamentally affect governance, the power that political corruption can exert and the influence that money can buy. Ultimately, these rules can profoundly affect the governance and stability of countries. Even though the harms caused in this area are significant, implementing and reforming these regimes is a problematic undertaking for governments.

To assist democratic governments globally with this issue, this paper advocates for the development of a Framework Convention Against Political Corruption (*FCAPC*), which should be negotiated and implemented by the United Nations (*UN*). This paper begins with an analysis of what constitutes political corruption and the interaction between democratic principles and political corruption. The paper argues that a UN *FCAPC* has become necessary due to the combination of four factors: the harm caused by political corruption; the growing number of democracies globally and the increasing difficulties of funding political parties; the innate difficulty of implementing political finance reform; and that the current global anti-corruption agreements do not adequately assist or pressure democratic governments to develop or implement meaningful reform in the area of political financing. The paper then outlines the principles upon which such a convention should be based, namely, transparency, a robust regulatory body, an active civil society, mechanisms that encourage compliance, and powerful enforcement and accountability measures. Finally, the paper develops the framework for such a convention and discusses substantive content that should form the basis of this convention.

II Political Corruption, Democratic Principles, and a Framework Convention Against Political Corruption

Democratic states around the world come in a multitude of different variations with regards to how they operate their political systems. However, whilst the manner in which states operate their democratic political system vary, all democratic states share beliefs in certain values and norms. This section discusses how political corruption should be defined in a FCAPC, why money is a fundamental requirement of democracy and outlines the essential elements of modern democracies impacted upon by political corruption, and the implications of corruption on democratic states. In doing this, it forms the basis as to why a FCAPC is required globally.

Political Corruption

To develop a FCAPC, what constitutes political corruption must be defined. Corruption generally is universally considered to be reprehensible behaviour and is criminalised across the world.¹ In spite of this, as a concept, it is difficult to label² and there is no single definition of what it is.³ Even the idea of what behaviour constitutes political corruption or what behaviour should be classified as corrupt is complex.⁴ Heywood, for instance, states that it would be impossible to develop one generalizable and uncontested definition of political corruption.⁵ The difficulty in defining corruption can be seen in the historical struggle the Supreme Court of the USA had with defining political corruption. It has provided inconsistent decisions, dissenting judgements, and its definition remains deeply contested by the current justices.⁶ Thus, providing a definition of political corruption is difficult and will likely be disputed by the states negotiating any future FCAPC.

A future FCAPC could use the traditional and conventional definition of corruption. Conventionally, political corruption is defined as the abuse of public office for private gain.⁷ A definition used by the World Bank classifies corruption as ‘the use of public power for private benefit’.⁸ This definition is rooted in the idea that corruption amounts to an abuse or misuse of public power. Common forms of this type of corruption are graft, bribery, extortion and nepotism.⁹ Using such a conventional definition may seem like an easy solution to an issue that has vexed many in the past. The definition provides a clear meaning to political corruption, is easy to understand, and is clear as to what behaviours it covers.

¹ Ophelie Brunelle-Quraishi, “Assessing the Relevancy and Efficacy of the United Nations Convention Against

² Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures* (International Monetary Fund Working Paper, 1998), 9.

³ Peter J Henning, “Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law,” *Arizona Journal of International and Comparative Law* 18, no. 3 (2001): 793.

⁴ Gerald E Caiden, “A Cautionary Tale: Ten Major Flaws in Combating Corruption,” *Southwestern Journal of Law and Trade in the Americas* 10, no. 2 (2004): 276.

⁵ Paul Heywood, “Political Corruption: Problems and Perspectives,” *Political Studies* 45, no. 3 (1997): 422.

⁶ Yasmin Dawood, “Classifying Corruption,” *Duke Journal of Constitutional Law and Public Policy* 9, no. 1 (2014): 104.

⁷ Daniel Stockemer, Bernadette LaMontagne, and Lyle Scruggs, “Bribes and Ballots: The Impact of Corruption on Voter Turnout in Democracies,” *International Political Science Review* 34, no. 1 (2013): 75.

⁸ David Hess, “Fighting Corruption: A Principled Approach: The C Principles,” *Cornell International Law Journal* 33, no. 3 (2000): 595.

⁹ John McFarlane, “Corruption and the Financial Sector: The Strategic Impact,” *Dickinson Journal of International Law* 19, no. 1 (2000): 48.

However, the traditional and conventional definition is severely limiting. The definition is too blunt an instrument and no longer covers key issues that present themselves to modern democracies.¹⁰ Insisting that corruption involves direct and personal gain should be considered to be unacceptably restrictive.¹¹ Such a definition of corruption ignores other equally damaging forms of political corruption. For instance, it does not cover more modern forms of corruption such as undue influence. Undue influence occurs where large monetary contributions are made, which simply by virtue of the amount, secure political influence.¹² Unlike graft – a form of traditional corruption – undue influence may not result in any direct private gain, as invariably payments are provided to political parties in a legal manner.¹³ Further, there is no nexus between the contribution and a specific action, rather the effect donations have, is on ongoing behaviour and institutional practices.¹⁴ This behaviour is pervasive within democratic political systems and represents a systematic threat to democracy as it undermines democratic principles.¹⁵ As a consequence, the conventional form of what is classified as corruption is lacking and a FCAPC must use a modern definition if it is to be an effective tool at reducing political corruption globally.

A definition under a FCAPC should therefore be broad. The purpose of a FCAPC should not be to criminalise specific behaviour. Rather it should be designed to assist states recognise corrupting practices in their political systems, and provide assistance and solutions to those problems.

This paper proposes the following definition be used as a starting point for defining political corruption: '[Political] corruption includes all misconduct that harms the public or any conduct that works to the unfair advantage of the perpetrators'.¹⁶ This definition, as advanced by Caiden is very broad, and as Caiden notes has obvious difficulties including what constitutes misconduct, harm, and an unfair advantage.¹⁷ However, it provides an ideal starting point for states to begin thinking about what behaviours exist which pervert their political systems. One of the benefits of this definition is that it focuses on the consequences of behaviour rather than on specific actions. Moreover, in being broad, it ensures that damaging behaviour – such as undue influence – which have traditionally not been viewed as corrupt would now be covered. Thus, a FCAPC should use a broad definition of political corruption to ensure its relevancy.

Money and Modern Democracy

Money is essential to modern democracies, yet its role in funding political parties is closely entwined with the occurrence of political corruption. As stated in the *Global Corruption Report 2004* published by *Transparency International*, 'Money matters for democracy because much of democratic political activity simply could not occur without it'.¹⁸ In large

¹⁰ Mark Philip, "The Definition of Political Corruption," in *Routledge Handbook on Corruption*, ed. Paul M Heywood (Routledge, 2015), 45.

¹¹ Mark Philp, "Defining Political Corruption," *Political Studies* 45, no. 3 (1997): 439.

¹² Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (University of New South Wales Press, 2010), 75.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 76.

¹⁶ Caiden, "A Cautionary Tale: Ten Major Flaws in Combating Corruption," 276.

¹⁷ *Ibid.*

¹⁸ Marcin Walecki, "Political Money and Corruption," in *Global Corruption Report 2004* (Transparency International, 2004), 19.

modern societies, the running and functioning of democratic systems requires resources.¹⁹ These resources, principally money, allow political parties to exist and election campaigns to occur.²⁰ Money is a unique resource in that it can be converted into other political resources required.²¹ Political fundraising has been described aptly as a unique form of arms race, one in which the weapons are periodically discharged, and as a result, requires the constant flow of money to fund the system.²² Thus, without money, and the constant influx of money key aspects of modern democracies could not function.

However, the question of how to adequately fund democratic political systems and the role that money should play is a particularly vexed issue.²³ The funding of political parties and election campaigns can have both positive and negative consequences.²⁴ For instance, political contributions are generally viewed as legitimate from a democratic perspective.²⁵ If parties have sufficient funds, this allows them to effectively compete and to reach the public with their political messages.²⁶ Yet, due to its convertible and unique nature, money poses serious risks to democracy, as it allows political corruption to occur,²⁷ although it should be noted that money is certainly not the only means through which political corruption can occur. As such, a fundamental requirement of democratic political systems is to implement political finance regimes that regulate money in the political system to ensure that it is not used for corrupt purposes but allows it to be used for legitimate purposes.

Principles of Democracy Undermined by Political Corruption

At the heart of modern democracies, there are a number of principles that are indispensable for their healthy functioning, and which are influenced by money and political corruption. These principles are representative and accountable government that acts in the public interest, and equality and fairness. These are the core principles impacted on in particular by political corruption and do not represent a definitive list of essential elements of a democratic state.

Representative government is a cornerstone of democratic government. Two aspects of representative government are of particular importance to political corruption and political finance regimes. Firstly, governments are elected to act in the best interests of the public.²⁸ They are elected to serve society, not themselves.²⁹ What constitutes the best interest of the

¹⁹ K D Ewing and Samuel Issacharoff, "Introduction," in *Party Funding and Campaign Financing in International Perspective*, ed. K D Ewing and Samuel Issacharoff (Hart Publishing, 2006), 1.

²⁰ Fernando Casal Bertola et al., "The World Upside down: Delegitimising Political Finance Regulation," *International Political Science Review* 35, no. 3 (2014): 356.

²¹ Alexander Heard, *The Costs of Democracy* (University of North Carolina Press, 1960), 1.

²² K D Ewing, "Political Party Finance - Themes in International Context," in *Electoral Democracy: Australian Prospects*, ed. J-C Tham, B Costar, and G Orr (Melbourne University Press, 2011), 146.

²³ Gene Ward, "The Role of Disclosure in Combating Corruption in Political Finance," in *Global Corruption Report 2004* (Transparency International, 2004), 38.

²⁴ "Introduction," in *Political Finance Regulation: The Global Experience* (International Foundation for Electoral Systems, n.d.), 13.

²⁵ Tham, *Money and Politics: The Democracy We Can't Afford*, 77.

²⁶ "Introduction," 13.

²⁷ Tham, *Money and Politics: The Democracy We Can't Afford*, 2.

²⁸ *Ibid.*, 88.

²⁹ *Ibid.*, 7.

Quoting Kim Beazley Minister for Transport and Communications, – Commonwealth, house of Representatives (1991) *Parliamentary Debates*, 2nd reading speech to Political Broadcasts and Political Disclosures Bill 1991, 9 May 3477.

public is and always should be debated, however, it is central that elected officials make decisions on their merits in the public interest.³⁰ This quality of modern democracies is crucial to understanding and combating political corruption. Where political power and the exercise of that power can be bought and sold like any other commodity, this fundamentally corrupts representative government.³¹ Where political power and favours are bought and sold the exercise of political power is no longer being utilised in the public interest, but rather it is being utilised in the interest of those who can afford it, fundamentally undermining representative government.

Secondly, to be representative, democratic governments must be accountable to the people. This for instance occurs through electoral processes.³² Such processes theoretically ensure that governments are directly accountable to the people. However, to ensure that this process is effective, the public must be informed.³³ An uninformed public cannot hold to account elected representatives as they are missing vital information crucial to their political decision making.³⁴ Thus, any system designed to root out political corruption must be at its core work to promote accountability.

To be representative, democratic governments must also ensure equality and fairness within society. The idea of equality and fairness as principles of democracy is demonstrated through the democratic commitment to each citizen that they shall have equal political status in the political process, regardless of other factors such as material wealth or class.³⁵ This is expressed as a democratic principle in the voting process, whereby, each citizen has one vote, which is of roughly equal value to all other citizens. Under these principles of democracy, each individual should have equal opportunity to influence political decisions.³⁶ If this principle is not upheld, then governments are not capable of being representative.

It should be duly noted that equality and fairness go far beyond political expression, it is fundamental throughout democratic governance. Democratic institutions must deal with people in an impartial and fair manner with respect to decisions that affect citizens, and such decisions must be transparent and justified.³⁷ *Arendt* wrote that ‘the nation-state cannot exist once its principle of equality before the law has broken down. Without this legal equality...the nation dissolves into an archaic mass of over- and underprivileged individuals’.³⁸ Political corruption fundamentally undermines equality and fairness of democracy, replacing equality and fairness, with money and favours. Where political corruption occurs, people’s political status is not equal, those with money can buy power, those without cannot. This undermines fairness and equality of the democratic system.

³⁰ *Ibid.*, 4.

³¹ *Ibid.*, 90.

³² *Ibid.*, 4.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*, 88.

³⁶ Jacob Rowbottom, “Institutional Donations to Political Parties,” in *Funding of Political Parties*, ed. Keith Ewing, Jacob Rowbottom, and Joo-Cheong Tham (Routledge, 2012), 16.

³⁷ Mark Warren, “The Meaning of Corruption in Democracies,” in *Routledge Handbook on Corruption*, ed. Paul M Heywood (Routledge, 2015), 44.

³⁸ Hannah Arendt, *The Origins of Totalitarianism* (Harvest Books, 1968), 290.

Justifying a Framework Convention Against Political Corruption

Political corruption has grave consequences for democratic countries. At a most basic level, it undermines the foundation upon which democratic systems of government are built upon, which can result in significant instability.³⁹ Moreover, it also has severe social and economic costs. The damage caused by political corruption is especially important to review as in an increasingly modern and democratised world, democracies are facing serious issues regarding the funding of their political systems.

Political corruption is not a new phenomenon. Corruption is found in all states globally,⁴⁰ and its history is as old as the history of government.⁴¹ Moreover, many countries around the world have recognised political corruption to be a serious issue,⁴² and nearly all countries around the world have some regulations regarding money in politics.⁴³ However, it is an especially important issue for democratic countries as it erodes fundamental pillars of democratic government, attacking in particular, the representative nature of democracy, the equality of the citizenry and the principle of fairness that underpins democratic governance. The consequences of which, as will be discussed below, can lead to national instability which affects global peace and security. Thus, as it is an issue that affects democratic states globally, an international response should be considered to deal with political corruption.⁴⁴

Harm Caused by Political Corruption to Democratic States

Political corruption fundamentally undermines the foundations upon which democratic states are built. It does this in a number of ways, perhaps most glaringly through the buying of political power with money. Money is not equally shared in democratic countries.⁴⁵ This societal inequality undermines the political equality when regulations do not adequately control private funding of political parties, as the inequality allows the wealthy to buy influence and access.⁴⁶ This can result in political corruption capturing and buying the democratic processes.⁴⁷ The money or influence effectively drowns out the voices of the citizenry and undermines the value of each person's vote.⁴⁸ Whether this occurs as a result of graft, bribes or undue influence, such behaviour degrades the quality of government and disempowers the people whose interests are no longer represented. It undermines political equality and representative government.

Additionally, political corruption damages democratic regimes by undermining public confidence in them. Political corruption disempowers people politically, as they lose the

³⁹ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003), Forward.

⁴⁰ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003), Forward.

⁴¹ Patrick M Yingling, "Conventional and Unconventional Corruption," *Duquesne Law Review* 51, no. 2 (2013): 264.

⁴² Magnus Ohman, "Political Finance Regulations Around the World: An Overview of the International IDEA Database" (International Institute for Democracy and Electoral Assistance, 2012), 11.

⁴³ K D Ewing, "Corruption in Party Financing – The Case for Global Standards," in *Global Corruption Report 2001* (Transparency International, 2011), 187.

⁴⁴ *Ibid.*

⁴⁵ Tham, *Money and Politics: The Democracy We Can't Afford*, 2.

⁴⁶ Judith February and Hennie van Vuuren, "The Challenge of Achieving Political Equality in South Africa," in *Global Corruption Report 2004* (Transparency International, 2004), 21.

⁴⁷ Ewing, "Corruption in Party Financing – The Case for Global Standards," 186.

⁴⁸ February and van Vuuren, "The Challenge of Achieving Political Equality in South Africa," 21.

opportunity to participate meaningfully in the political process.⁴⁹ This disempowerment leads to the lack of confidence people can have in democratic government.⁵⁰ Democracy depends upon peoples' confidence in the systems and rules that regulate behaviour and conflict within society.⁵¹ When a lack of trust in the system persists, the people increasingly become discouraged from exercising their civil and political rights.⁵² This can encourage further corruption leading to a vicious downward spiral of a lack confidence and greater corruption.⁵³ Ultimately, loss of confidence can lead to people questioning the legitimacy of democratic states.⁵⁴ Accordingly, political corruption can strike at the very heart of people's beliefs in the legitimacy of government, undermining their faith in politicians, the democratic system and their belief in equality and fairness.

This lack of faith can destroy political parties, produce instability in individual governments or undermine the stability of the whole state more generally. A lack of confidence and equality of opportunity due to political corruption often leads to increased frustration and political instability.⁵⁵ For instance, in the 1980's the Italian Socialist Party was destroyed due to corruption involving party funding.⁵⁶ Moreover, in Vanuatu in 2015, 14 MP's were jailed for bribery and corruption offences, leading to a constitutional crisis and over half the governing party's MP's being imprisoned.⁵⁷ At its worst political corruption can result in the collapse of the democratic political system and lead to revolutions as happened in Georgia and the Ukraine in 2003 and 2004 respectively, which in turn affects global peace and security.⁵⁸ These examples demonstrate the negative impacts that political corruption can have on the stability of democratic governments globally. It can lead to the ruin of political parties, and even to revolt.

Political corruption stunts social development through undermining the capacity of the government to deliver services to the citizenry and implement effective regulations. Maladministration and privileged access distort government decision-making processes.⁵⁹ For instance, privileged access to decision makers and undue influence can distort tender processes,⁶⁰ and results more generally, in inefficient public spending as the spending is directed by private interests, not the public interest.⁶¹ An example of this is in the USA

⁴⁹ Dawood, "Classifying Corruption," 109.

⁵⁰ A Keith Thompson, "Does Anti-Corruption Legislation Work?," *World Customs Journal* 7, no. 2 (2013): 49; Stockemer, LaMontagne, and Scruggs, "Bribes and Ballots: The Impact of Corruption on Voter Turnout in Democracies," 76.

⁵¹ Warren, "The Meaning of Corruption in Democracies," 44.

⁵² Office of the United Nations High Commissioner for Human Rights, "Good Governance Practices for the Protection of Human Rights," 2007, 59.

⁵³ Philip B Heymann, "Democracy and Corruption," *Fordham International Law Journal* 20, no. 2 (1996): 329.

⁵⁴ Stockemer, LaMontagne, and Scruggs, "Bribes and Ballots: The Impact of Corruption on Voter Turnout in Democracies," 76; Mitchell A Seligson, "The Measurement and Impact of Corruption Victimization: Survey Evidence from Latin America," *World Development* 34, no. 2 (2006): 402.

⁵⁵ Pak Hung Mo, "Corruption and Economic Growth," *Journal of Comparative Economics* 29 (2001): 67.

⁵⁶ Ewing, "Political Party Finance - Themes in International Context," 144.

⁵⁷ Jenny Hayward-Jones, "Vanuatu: Bribery Scandal Might yet Improve Politics," *Lowy Interpreter*, October 23, 2015, <http://www.lowyinterpreter.org/post/2015/10/23/Vanuatu-Bribery-scandal-might-yet-improve-politics.aspx> <http://www.bbc.com/news/world-asia-34600561>.

⁵⁸ James H Anderson and Cheryl W Gray, *Anticorruption in Transition 3: Who Is Succeeding... And Why?* (The World Bank, 2006), 3.

⁵⁹ Donatella Della Porta and Alberto Vannucci, "The 'Perverse Effects' of Political Corruption," *Political Studies* 45, no. 3 (1997): 533.

⁶⁰ *Ibid.*

⁶¹ Anderson and Gray, *Anticorruption in Transition 3: Who Is Succeeding... And Why?*, 27; Patrick Fitzgerald, "Combating Corruption: Keynote Address" (University of Chicago Legal Forum, November 5, 2011), 3.

where, when implementing nutritional standards, instead of following the recommendations of the Institute of Medicine, the US Congress acted in the interests of the food industry who had spent millions lobbying and funding Members of Congress.⁶² Such political donations demonstrate how undue influence can result in decision-making that is not in the best interests of the public, but rather the wealthy that can afford to buy access to influence.

Political corruption can also have direct economic consequences. One of the principle manners in which political corruption causes economic harm is through distorted government decision making.⁶³ An example of such distortion is the awarding of government projects. Instead of projects being awarded as a result of a competitive and independent tender process, where political corruption occurs, the project will be granted due to other factors, for instance, the company who paid the largest bribe.⁶⁴ This results in higher costs for businesses seeking to invest,⁶⁵ and results in lower foreign investment.⁶⁶ Whilst, different reasons are given for lower foreign investment, one notable reason is that corruption acts as an unpredictable tax on investment.⁶⁷ *Wei*, for instance, concludes that if Singapore had the level of corruption that exists in Mexico, its marginal tax rate would be 20 percentage points higher.⁶⁸ It should be noted that the discussion related to the economic harm does not distinguish between various types of corruption and as such, political corruption itself is not the sole cause, although it is a contributing factor.

Modernisation and Democratisation

Political corruption is not a new phenomenon, but it has become worse in the modern era. Modernisation has made money more readily available to both people and organisations, and the capacity to spend this money has grown significantly.⁶⁹ Moreover, in terms of the political arms race, the costs of campaigning have grown and are continuing to grow dramatically globally.⁷⁰ It has been asserted that modern political parties can now never be satisfied with the amount of campaign money they have at their disposal.⁷¹ This is true not only in developed countries such as the USA, where in 2008 the average amount to run for re-election in the House of Representatives was 23 time greater than the average in 1974.⁷² This can also be seen in developing countries such as Kenya, where campaign contributions and correlating expenditure has risen 200 000% from 1964 to 2007.⁷³ This is an enormous increase in campaign spending and this increase is set to continue.⁷⁴ Thus, modern democratic politics is requiring ever greater funds to finance election campaigns and political parties.

⁶² Yingling, "Conventional and Unconventional Corruption," 288–289.

⁶³ Stockemer, LaMontagne, and Scruggs, "Bribes and Ballots: The Impact of Corruption on Voter Turnout in Democracies," 76.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Philip M Nicholas, "Regulating Transnational Bribery in Times of Globalization and Fragmentation," *Yale Journal of International Law* 24, no. 1 (1999): 275; Mo, "Corruption and Economic Growth," 67; Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 29.

⁶⁷ Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 29.

⁶⁸ *Ibid.*

⁶⁹ Ewing, "Political Party Finance - Themes in International Context," 146.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Yingling, "Conventional and Unconventional Corruption," 284.

⁷³ *Ibid.*, 316.

⁷⁴ Ward, "The Role of Disclosure in Combating Corruption in Political Finance," 48.

This need for greater funds has coincided with a deterioration in the health of political parties. Modern political parties have seen shrinking memberships, resulting in less financial support from their base.⁷⁵ Political parties, as a result, can become financially dependent on the interests of those who donate large sums of money, compelling them to barter away the public interest.⁷⁶ The result of an increasing need for money and diminishing health of political parties is a larger capacity for political corruption to distort and affect the system. It makes political parties and candidates for election easy prey for the powerful, for whom political parties offer opportunities.⁷⁷ Accordingly, modernisation has seen the demise of political parties funding, which has coincided with the exponential rise in campaign costs to compete at elections.

As a result, regulation of the financing of political parties and campaign spending has become a necessity. Historically, countries could adopt a *laissez fair* and self-regulatory approach.⁷⁸ However, this is no longer seen to be acceptable in any major jurisdiction,⁷⁹ and due to the prevailing rising costs of democracies and lower funds available from memberships to political parties, *laissez fair* and self-regulatory approaches should not be deemed acceptable for any democratic political finance system. As a result, states globally need to develop solutions as to how to deal with political corruption in the modern era.

Growth of Democratic Governments Globally

During the 20th and 21st centuries governments globally have become progressively more democratic.⁸⁰ For instance, in 2010 there were 87 countries considered to be democratic, this number evidences a rapid growth since 1981 when there were only 38.⁸¹ Yet, the legal regimes globally governing political finance are generally inadequate.⁸² *Transparency International* reported in 2004 that one in four countries did not have the most basic and uncontroversial political finance regulation in place and one in three countries had no overall system in place at all.⁸³ This is especially problematic as new democracies or restored democracies require assistance. One of the issues of political corruption as previously discussed is the damage political corruption causes to the stability of democratic countries. This is an issue that a FCAPC could assist in resolving. For instance, two of the measures proposed by this paper to be adopted by a FCAPC are the facilitation of technical assistance and support, and a Conference of Parties designed to provide ongoing support, assistance and pressure to encourage the development of better political finance regimes. Therefore, whilst political corruption can take varying forms in democratic countries, it is a global phenomenon which would benefit from a global response. Implementing a FCAPC could assist all democratic countries to work together cooperatively to tackle this issue that affects them all, allowing them to share experiences and develop solutions together.

⁷⁵ Ewing and Issacharoff, "Introduction," 5; Tham, *Money and Politics: The Democracy We Can't Afford*, 257.

⁷⁶ Brennan J, *Australian Capital Television Pty Ltd v Commonwealth*, 177 CLR 106, 159 (1992).

⁷⁷ Ewing and Issacharoff, "Introduction," 5.

⁷⁸ *Ibid.*, 2.

⁷⁹ *Ibid.*

⁸⁰ *Democracy Index 2014: Democracy and Its Distortions* (The Economist Intelligence Unit, 2015), 2.

⁸¹ Max Roser, "Democratisation," *OurWorldInData*, 2015, <http://ourworldindata.org/data/political-regimes/democratisation/>.

⁸² 'Executive Summary' in *Global Corruption Report 2004* (Transparency International, 2004) 1, 1.

⁸³ *Global Corruption Report 2004*, 1

Democratic Resistance

Politicians and political parties have an innate conflict of interest when implementing political finance reform and as a result, it is a difficult area in which to enact change. There are two specific issues associated with political finance that democratic countries face when enacting reform in this area. Firstly, expertise in relation to political finance is held by politicians who are required to implement laws and reform regarding political finance. Political finance laws seriously affect their capacity to be re-elected, both regarding inhibiting their ability to raise funds and potentially exposing themselves to criminal sanctions.⁸⁴ Thus, those implementing political finance reform are required to implement laws and regulations to regulate themselves but are conflicted when doing so, making reform difficult to achieve. Secondly, political finance reform can be enacted to the detriment of political parties and the democratic system more generally if enacted in a partisan manner. Equality, as discussed in this chapter, is integral to democratic political systems, and this principle is highly relevant to the funding of political parties. Democratic political systems need to be competitive systems, and this requires the political system regulating parties to be based on equality and operate in an unbiased manner.⁸⁵ Yet this principle, and the conflict of interest that all actors in this field have, presents serious issues for political finance reform. Reform that impedes political corruption may be resisted due to a conflict of interest or because it more severely affects certain political parties over their rivals. A FCAPC could assist in overcoming this issue through the provision of independent technical assistance and advice. Without such a convention, political finance will remain a difficult area of reform globally.

Current Anti-Corruption Agreements

Globally there are a number of anti-corruption agreements; these have not adequately covered the issue of political corruption. These agreements are either inadequate as they are regional in nature or because substantively they do not go far enough to assist in dealing with the issue of political corruption. This lack of suitable international agreements necessitates the development of a FCAPC to fill the void for such an important issue that affects governments globally.

At a regional and international organisational level, there are a number of agreements that cover at least in part, political corruption. Regional agreements include the Bangkok Declaration on Free and Fair Elections,⁸⁶ the Council of Europe Common Rules Against Corruption (*CECRAC*),⁸⁷ the Inter-American Convention Against Corruption,⁸⁸ and the African Union Convention on Preventing and Combating Corruption.⁸⁹ At an organisational level, there is the OECD Convention on Combating Bribery of Foreign Public Officials in

⁸⁴ Bruno Wilhelm Speck, *Money in Politics: Sound Political Competition and Trust in Government* (OECD, 2013), 36.

⁸⁵ *Ibid.*, 21; Karl-Heinz Nassmacher, "Introduction: Political Parties, Funding and Democracy," in *Funding of Political Parties and Election Campaigns*, ed. Reginald Austin and Maja Tjernstrom (International IDEA, 2003), 5.

⁸⁶ Asian Electoral Stakeholder Forum, *Bangkok Declaration on Free and Fair Elections* (endorsed 11 December 2012).

⁸⁷ Council of Europe Committee of Ministers, *Council of Europe Common Rules Against Corruption in the funding of political parties and electoral campaigns*, Recommendation Rec(2003)4 (adopted 8 April 2003).

⁸⁸ Organization of American States, *Inter-American Convention Against Corruption* (adopted 29 March 1996).

⁸⁹ African Union, *African Union Convention on Preventing and Combating Corruption* (adopted 11 July 2003).

International Business Transactions (*OECD Anti-Bribery Convention*).⁹⁰ However, these agreements are limited in either their geographic scope or membership. This limited scope can be beneficial to the nations covered by these agreements, as they can be better modelled to fit the regional or organisational requirements. However, at their core, these agreements are limited in their coverage, resulting in many countries not being part of such agreements. As discussed previously, political corruption is a global problem and one that seems to be becoming worse. To ensure the greatest coverage a FCAPC should be a global agreement.

At a global level, the United Nations has negotiated and implemented the United Nations Convention Against Corruption (UNCAC).⁹¹ This is a very broad agreement covering many aspects of corruption that occur globally and is overseen by the United Nations Office on Drugs and Crime.⁹² One of its drawbacks however, is that due to its breadth, important elements – such as political corruption in political finance – are not given the attention that they require.⁹³ For example, whilst it calls on the member states to enhance transparency, this is entirely discretionary, requiring states to merely ‘consider’ measures to enhance transparency.⁹⁴ Moreover, whilst the UNCAC covers a few issues of political party finance in relation to corruption, it is not extensive, and it provides member states ample discretion as to their methods of implementation.⁹⁵ A FCAPC authored by the UN could rectify these deficiencies by providing an in-depth convention dealing specifically with political corruption.

Another deficiency of the UNCAC is the capacity to monitor and enforce its provisions. The UNCAC monitoring system includes the use of a Conference of State Parties to the Convention and a ‘peer review mechanism’.⁹⁶ The peer review mechanism in particular is lacking, being described by Brunelle-Quraishi as ‘not independent or impartial’.⁹⁷ The mechanism is not transparent with country review reports remaining confidential, and does not include or utilise civil society.⁹⁸ This limits the capacity of such reports being used to pressure member states to implement change. Moreover, the ability to enforce sections is severely limited as many provisions – including the provisions related to political finance – are worded in such a way as to provide for significant leeway for states to avoid responsibility.⁹⁹ For instance, using the discretionary wording of ‘allowing members to “consider” taking measures’ in relation to political funding.¹⁰⁰ Thus, the review mechanism and the wording of the UNCAC undermine its efficacy.

⁹⁰ Organisation for Economic Co-Operation and Development, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (adopted 21 November 1997).

⁹¹ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003).

⁹² *Ibid.*

⁹³ Brunelle-Quraishi, “Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis,” 164.

⁹⁴ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003) art 7.3

⁹⁵ Brunelle-Quraishi, “Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis,” 108–109.

⁹⁶ *Ibid.*, 135–136.

United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003) art 63.

⁹⁷ *Ibid.*, 137.

⁹⁸ *Ibid.*, 138–139.

⁹⁹ *Ibid.*, 108.

¹⁰⁰ *Ibid.*

Although these agreements may not adequately provide for eliminating political corruption globally, they do provide an important starting point and many of their sections can be drawn upon to develop a convention on political corruption. These international agreements can all be learnt from and their issues overcome by a new global convention. This paper will use these agreements to assist in developing the key aspects of the architecture, framework and substantive elements for a FCAPC.

III Principles of a Framework Convention Against Political Corruption

There are a number of key elements and principles related to minimising and combating political corruption that should form the foundation of a FCAPC. A FCAPC should champion the following principles and assist countries in developing regulations that uphold these values, as they are essential elements of effective political finance regimes. To do this at its core, a FCAPC must contain a section on the general principles that the member states to the convention are obliged to implement.

Transparency

Transparency of political funding and campaign spending is critical for any effective regulation designed to minimise political corruption related to party finance and campaign spending. This is widely accepted in the literature related to political finance and campaign spending laws.¹⁰¹ Transparency is the bedrock and prerequisite from which the political finance and campaign spending laws must be built.¹⁰² Ideally, at a most basic level, transparency provides the public and enforcement agencies with a full and accurate picture of the interests and relationships involved in the funding of political parties and candidates.¹⁰³ This in turn allows the public and enforcement agencies to know not only who is providing funding, but also what they could potentially be receiving in return.¹⁰⁴ There are few justifications for anything aside from full and frank transparency of political funds.¹⁰⁵ Transparency promotes representative government and forms the basis upon which effective political finance regimes are built.

For transparency to be effective however, the information must be disclosed in a clear format and in a timely manner. A clear system of disclosure allows the public the opportunity to understand the context of political and policy messages.¹⁰⁶ If the information is not accessible in an intelligible and user-friendly manner, then the public will have an exceptionally

United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003) art 7.3.

¹⁰¹ Karl-Heinz Nassmacher, "Monitoring, Control and Enforcement of Political Finance Regulation," in *Funding of Political Parties and Election Campaigns*, ed. Reginald Austin and Maja Tjernstrom (International IDEA, 2003), 139.

¹⁰² Ewing, "Corruption in Party Financing – The Case for Global Standards," 191–193.

¹⁰³ New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency*, 2014, 25.

¹⁰⁴ Ewing, "Political Party Finance - Themes in International Context," 150–151.

¹⁰⁵ Robin Hodess, "Transparency International, Where Did the Money Go?," in *Global Corruption Report 2004* (Transparency International, 2004), 14.

¹⁰⁶ New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency*, 25.

difficult, if not impossible task, of decyphering it.¹⁰⁷ This would undermine transparency through preventing the public from understanding who is donating money. Moreover, if data is not available until after elections, relevant information that could have helped inform voters is no longer useful as the ballots have already been cast.¹⁰⁸ The public in democratic political systems are entitled to know who is funding political parties and candidates so that they may make an informed decision when they vote.¹⁰⁹ Yet, to be effective, this information must be understandable and provided in a timely manner.

Such transparency in and of itself can eliminate the worst forms of corruption. As per the adage that ‘sunlight is the best disinfectant’, so to is transparency one of the best anti-corruption mechanisms.¹¹⁰ When properly designed transparency regulation provides a natural incentive for candidates and political parties to act in a non-corrupt manner and to avoid the appearance of acting with impropriety, as they understand that such behaviour is being reported and they will be judged accordingly.¹¹¹ Effective transparency incentivises honesty of the candidates,¹¹² and serves as an effective preventative measure against political corruption.¹¹³

Furthermore, transparency in a political finance regulatory scheme provides a solid base for another essential element of political finance regimes; effective monitoring of political parties and candidates’ finances. There are two principal aims of effective oversight of political finance information: the first is to ensure that the public is adequately informed as to who is financing the political system so that this may be subject to public debate and the second is to hold to account political parties and candidates who breach the law.¹¹⁴ Transparency creates a situation in which monitoring tools can be effectively used to ensure political corruption is detected, through allowing enforcement agencies to see what has been donated to whom.¹¹⁵ Without transparency, there is no way in which to track and subsequently enforce donation limits and bans.¹¹⁶ Thus, transparency forms an integral foundation for political finance systems and establishing effective anti-corruption mechanisms. For this reason, the promotion of transparency in political funding should form the first guiding principle of a FCAPC.

In developing strong transparency mechanisms, the CECDRAC articles regarding the recording of donations and maintaining accounts should be adopted in full by the FCAPC. The measures outlined in Articles 5, 10, 11, 12 and 13 would place comprehensive obligations on future member states, which will assist in developing transparency and allow adequate monitoring to take place. Article 5.a provides that donations from legal entities to political parties should be registered in the books and accounts of the legal entities so that stakeholders or other individual members of the legal entity must be informed of the

¹⁰⁷ Speck, *Money in Politics: Sound Political Competition and Trust in Government*, 38.

¹⁰⁸ New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency*, 25.

¹⁰⁹ Ewing, “Corruption in Party Financing – The Case for Global Standards,” 191–193.

¹¹⁰ Ewing, “Political Party Finance - Themes in International Context,” 151.

¹¹¹ New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency*, 569.

¹¹² Michael Johnston, “Soft Money ‘reform’ in the United States: Has Anything Changed?,” in *Global Corruption Report 2004* (Transparency International, 2004), 27.

¹¹³ Ward, “The Role of Disclosure in Combating Corruption in Political Finance,” 39.

¹¹⁴ Nassmacher, “Monitoring, Control and Enforcement of Political Finance Regulation,” 529.

¹¹⁵ Ward, “The Role of Disclosure in Combating Corruption in Political Finance,” 39.

¹¹⁶ Ibid.

donations.¹¹⁷ This should be adopted as it provides an additional layer of transparency, as these records can be checked to ensure that they correspond to political party records. Moreover, it assists in guaranteeing that companies are acting in the interests of their shareholders and not making donations that they cannot justify to their stakeholders.

The remaining articles 10, 11, 12 and 13 relate to political parties and candidates' accounts and expenditure. These articles require that: records detailing all expenditure be kept in relation to electoral campaigns;¹¹⁸ proper books and accounts are kept and consolidated as appropriate;¹¹⁹ political parties accounts specify all donations received and the nature of each donation;¹²⁰ and political parties present their accounts regularly (at least once a year) to an independent authority and to the public.¹²¹ These requirements are essential to ensuring transparency in political finance regimes, as they guarantee that records of donations are kept and are monitored by the relevant regulatory body.

Article 10 should be amended to state that records of expenditure relating to electoral campaigns must be made public and provided to the relevant electoral body on a regular basis during an election. This information is vital to the voting public in making an informed decision regarding their elected representatives. Providing the public with this information is crucial to ensuring that they have the necessary information required to make informed choices when electing their representatives. One other minor addition that should be considered is the insertion of the word 'in a timely manner' into Article 13.b. This would assist the development of reporting and publication that would benefit the public by providing information on a timeline that is useful when evaluating political parties, especially during election periods. Additionally, without specialised personnel, monitoring will not be effective or efficient. Thus, CECRAC Articles 10, 11, 12, and 13, should be adopted in their entirety, as they are critical to effective political finance regimes.

Robust Regulatory Body

The establishment and maintenance of robust, adequately financed and independent regulatory bodies are essential to political finance regimes. Regulatory bodies must be independent, adequately funded and have strong powers to oversee political finance regulations and punish breaches of the law.¹²² These three elements formed one of the key recommendations of the *Global Corruption Report*.¹²³ Without these three prerequisites, regulatory bodies have little capacity to improve political finance and have little utility.¹²⁴

Independent, adequately funded, and strong powers enable these agencies to ensure a fair political system is maintained whilst overseeing multiple political parties, in democratic political systems. Partisan application of the law related to political finance can be highly

¹¹⁷ Council of Europe Committee of Ministers, *Council of Europe Common Rules Against Corruption in the Funding of Political parties and electoral campaigns*, Recommendation Rec(2003)4 (adopted 8 April 2003) art 5.a.

¹¹⁸ Ibid, art 10.

¹¹⁹ Ibid, art 11.

¹²⁰ Ibid, art 12.

¹²¹ Ibid, art 13.

¹²² Brunelle-Quraishi, "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis," 108.

¹²³ "Executive Summary," in *Global Corruption Report 2004* (Transparency International, 2004), 5.

¹²⁴ Ewing, "Corruption in Party Financing – The Case for Global Standards," 195.

damaging to democracy.¹²⁵ For example, if the regulatory body's staff are in fear of the government due to the possibility that they may be removed or demoted, the regulator will have little impact.¹²⁶ Alternatively, this pressure may distort the political finance regime by leading the regulator to only target certain political parties, thus reducing competition to the government.¹²⁷ Furthermore, if the body does not have adequate funding or strong powers, then they will have little impact, due to their structural inability to enforce the law. Thus, a well-resourced, independent regulatory body with strong powers, is essential to any political finance regime and, accordingly, must be promoted by a FCAPC.

The CECRAC should be drawn from in developing provisions for a FCAPC designed to support strong regulatory bodies. Article 14 and 15 of the CECRAC outline key standards necessary to ensure that regulatory bodies overseeing political finance regimes are capable of effectively carrying out their duties. Article 14 requires states to implement independent monitoring of the funding of political parties and electoral campaigns.¹²⁸ It also obliges states to publicise the accounts and expenses of political parties.¹²⁹ Article 15 promotes the specialisation of personnel to fight against illegal funding of political parties and electoral campaigns.¹³⁰ These articles are critical to the development of robust and effective regulatory bodies.

Additionally, the UNCAC should also be drawn from for the creation of a FCAPC. Article 6 of the UNCAC requires each state party to ensure the existence of a body that prevents corruption.¹³¹ Additionally, each state party is to grant this body the necessary independence to enable it to carry out its functions effectively and free from undue influence, and it is to be provided adequate resources and staff to carry out its function.¹³² This section should be modified in a FCAPC to be more specific. This would help ensure that member states regulatory bodies are adequately funded and independent of politics and political parties.

Active Civil Society

'In a similar vein to regulatory bodies, civil society participation is crucial to minimising political corruption. Global experience has demonstrated that regulation and monitoring by regulatory agencies, whilst important to overseeing a political finance regime, are insufficient in themselves.¹³³ An active civil society can assist in dissecting and analysing disclosed political finance data, looking for impropriety and breaches.¹³⁴ In effect civil society can fill the gaps of the official regulatory body, through providing assistance in the monitoring of

¹²⁵ Nassmacher, "Monitoring, Control and Enforcement of Political Finance Regulation," 143.

¹²⁶ Brunelle-Quraishi, "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis," 108.

¹²⁷ Nassmacher, "Monitoring, Control and Enforcement of Political Finance Regulation," 140.

¹²⁸ Council of Europe Committee of Ministers, *Council of Europe Common Rules Against Corruption in the Funding of Political parties and electoral campaigns*, Recommendation Rec(2003)4 (adopted 8 April 2003) art 14.a.

¹²⁹ *Ibid*, art 14.b.

¹³⁰ *Ibid*, art 15.

¹³¹ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003) art 6.1(a).

¹³² *Ibid*, art 6.1(b).

¹³³ "Introduction," 13.

¹³⁴ New South Wales Independent Commission Against Corruption, *Election Funding, Expenditure and Disclosure in NSW: Strengthening Accountability and Transparency*, 569–570.

political finance, to ensure that effective oversight of political finance is maintained.¹³⁵ In addition, civil society provides the public with another mechanism through which they can be involved in the democratic political system, and this empowerment in turn can assist in developing confidence in the democratic system.¹³⁶ Thus, the promotion of an active civil society is a principle that the FCAPC should foster as civil society is essential in ensuring effective oversight of political finance and can develop confidence in the system itself.

The UNCAC should be used to form the basis of encouraging an active civil society in a FCAPC. Article 13 of the UNCAC provides measures designed to facilitate the inclusion of civil society, NGO's and community-based organisations in the prevention and fight against corruption.¹³⁷ Specifically, it requires member states to enhance transparency and ensure that the public has effective access to information, engages in public education programmes, and to respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption.¹³⁸ Article 13 should be adopted with modifications to suit the purpose of the FCAPC to ensure full transparency and active participation of civil society in the political finance regime. This article fundamentally supports civil society participation and as a result should be adopted with modifications by a FCAPC.

Mechanisms that Encourage Compliance

As the primary purpose of political finance regimes and a FCAPC is to decrease the amount of political corruption, one of the simplest ways in which to do this is to encourage compliance with the law. There are a range of mechanisms which can be adopted and which should be considered when developing a FCAPC that would encourage compliance by candidates and political parties. Such measures include: ensuring parties have adequate legal sources of funding, so that they do not seek funds from illegal sources;¹³⁹ lowering the costs of political campaigns, through measures designed to break the current cycle of ever increasing election campaign spending;¹⁴⁰ education and training;¹⁴¹ promoting moral incentives which may result in increased public opinion or result in peer and party pressure;¹⁴² and providing material incentives such as subsidies or tax benefits, effectively rewarding those with money for acting correctly.¹⁴³ By encouraging compliance through a range of mechanisms, states can reduce political corruption and the burden of work faced by regulatory bodies, in turn allowing the regulatory authorities to focus on rooting out the most prolific and grave incidents of political corruption. Thus, a future FCAPC should promote the use of mechanisms that encourage compliance with political finance regimes.

¹³⁵ Ohman, "Political Finance Regulations Around the World: An Overview of the International IDEA Database," 13.

¹³⁶ Jeremy Bentham, *The Collected Works of Jeremy Bentham: Political Tactics*, ed. Michael James, Cyprian Blamires, and Catherine Pease-Watkin (Clarendon Press, 1999), 1.

¹³⁷ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003) art 13.

¹³⁸ *Ibid.*

¹³⁹ Ewing, "Political Party Finance - Themes in International Context," 147–148.

¹⁴⁰ *Ibid.*, 153.

¹⁴¹ Nassmacher, "Monitoring, Control and Enforcement of Political Finance Regulation," 147.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

Enforcement and Accountability

Political finance systems require strong legal foundations. Political finance, like other regulatory regimes, are only as strong as the legislation permits them to be.¹⁴⁴ For instance, loopholes, inefficiencies and structural issues all weaken the capacity of the law to prevent political corruption.¹⁴⁵ Additionally, sanctions against wrongdoing ideally act as a deterrent to wrongdoing, not as an end in themselves.¹⁴⁶ Regulatory bodies should have a range of sanctions available for them to prosecute. Lenient penalties are more effective as they deter wrongdoing and are easy to impose.¹⁴⁷ Serious criminal sanctions are also required in the event of serious misconduct to ensure both public confidence and that serious crimes are punished in accordance with their severity; however such penalties are difficult to prosecute.¹⁴⁸ Thus, a range of penalties should be available to punish varying degrees of wrongdoing.¹⁴⁹ A FCAPC should at its core promote democratic states to implement effective laws and regulations related to political finance regimes.

Ultimately, even in systems that have effective transparency and monitoring, robust regulatory regimes, an active civil society, and mechanisms that encourage compliance, there will always remain the need for strong enforcement and accountability apparatuses. As stated by *Nassmacher*, there needs to be constant vigilance.¹⁵⁰ Rules that are unenforced can be more detrimental than a lack of rules in political finance.¹⁵¹ For example, if a behaviour that has been legislated against is discovered and then there are no consequences for that behaviour, this lack of consequence is extremely damaging to the public's trust.¹⁵² Enforcement of regulatory regimes represents the linchpin of all successful political finance regimes.¹⁵³ Thus, a FCAPC must champion strong, enforceable regulatory measures and support states and their regulatory bodies in the enforcement of these measures.

IV Developing a Framework Convention Against Political Corruption

The Framework

Authorship

The authorship of a FCAPC will have a significant bearing upon the convention, its powers and how many countries sign and ratify the convention. There are a number of different organisations who could implement such an agreement. As discussed in the preceding section the current international agreements on corruption are either geographically limited or do not adequately deal with political corruption. To overcome these issues, the UN should negotiate

¹⁴⁴ *Ibid.*, 149.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, 139.

¹⁴⁷ *Ibid.*, 153; Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 18.

¹⁴⁸ Nassmacher, "Monitoring, Control and Enforcement of Political Finance Regulation," 153; Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 18.

¹⁴⁹ Nassmacher, "Monitoring, Control and Enforcement of Political Finance Regulation," 153.

¹⁵⁰ *Ibid.*, 140.

¹⁵¹ *Ibid.*, 151.

¹⁵² *Ibid.*, 140.

¹⁵³ Hodess, "Transparency International, Where Did the Money Go?," 14.

and implement a FCAPC. An agreement under the auspices of the UN would provide the global coverage that the issue of political corruption requires.

A UN authored FCAPC would also assist in supporting key articles of the UN Charter. Article 1.3 of the UN Charter provides that the purpose of the UN is '[t]o achieve international co-operation in solving international problems of economic, social, cultural or humanitarian character...'¹⁵⁴ Additionally, such a FCAPC would support Article 55 which establishes that the UN shall promote 'higher standards of living, full employment, and conditions of economic and social progress and development.'¹⁵⁵ Political corruption, as discussed previously, is a global problem and one that fundamentally affects democratic states. It undermines the social progress and development of countries, and it is economically damaging. As such, a FCAPC would support the UN Charter, which in turn would allow the UN to lend its moral and political legitimacy to the new convention, an important resource for global conventions.

Framework Convention

One of the issues that would likely be encountered by a FCAPC is reaching an agreement that is mutually agreeable to the parties involved. *Brunelle-Quraishin* notes that 'no existing multilateral instrument contains detailed provisions on the funding of political parties and that perhaps attempting to arrive at a global consensus on this sensitive issue was an unrealistic goal.'¹⁵⁶ This is a concise summary of the difficulty faced by a FCAPC.

Political finance regulations in democratic political systems vary considerably globally, as regulations must fit into the pre-existing political frameworks and are frequently constrained by nations constitutions, and by competing values and freedoms which are afforded differing levels of importance in different countries.¹⁵⁷ An example of such competing values is the conflict between equality and liberty. For instance, in the UK there is a blanket rule against political advertising on TV during an election campaign, in an effort to reduce the costs of political campaigns.¹⁵⁸ This is justified and was held to be legal as it promotes the principle of equality in the UK political system.¹⁵⁹ However, in the USA such a ban would be unthinkable due to the restriction it would impose on the first amendment guarantee of freedom of speech, as demonstrated in *Citizens United v Federal Election Commission*, which held that a government restriction on independent political expenditure was unconstitutional.¹⁶⁰ These differences make reforming campaign finance complex and difficult.¹⁶¹ In particular, they impose serious difficulties for developing a global framework to assist in the regulation of political finance and corruption.

Further, the broader the scope of a FCAPC, the harder it will be to gain agreement between the various parties. Whilst this is true for obtaining agreement to international agreements generally, it will be especially so for FCAPC, as political finance is an issue that can strike at

¹⁵⁴ *Charter of the United Nations*, art 1.3.

¹⁵⁵ *Charter of the United Nations*, art 55.a

¹⁵⁶ Brunelle-Quraishi, "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis," 146–147.

¹⁵⁷ Ewing, "Corruption in Party Financing – The Case for Global Standards," 190.

¹⁵⁸ *Communications Act 2003* (UK) c 21, s 321(2).

¹⁵⁹ *Animal Defenders International v The United Kingdom* (2013) 162 Eur Court HR.

¹⁶⁰ *Citizens United v Federal Election Commission*, 130 S Ct 876 (2010).

¹⁶¹ David A Strauss, "Corruption, Equality, and Campaign Finance Reform," *Columbia Law Review* 94, no. 4 (1994): 1379.

the heart of national political identities and values. Political finance is a difficult area in which to share experience due to the sheer number of factors that influence regulatory choices in relation to political finance, which results in many different regulatory choices globally.¹⁶² This presents a serious issue for the implementation of any international regime designed to assist reform in the area of political finance reform. It is unlikely that countries will accede to a regime that forces them to adopt measures that are unconstitutional or measures that are not seen to align with the fundamental principles of their legal system.

To counteract this issue, this paper suggests that a framework convention would be the most appropriate form of international agreement when dealing with political corruption. The framework model has a number of benefits that traditional conventions do not have. Framework conventions and agreements are relatively new in international law.¹⁶³ The use of framework conventions and agreements came about due to the difficulties in achieving international acceptance of conventions in a world that is politically divided.¹⁶⁴ Whilst there is no specific or set model for framework conventions or even a technical definition of what they are,¹⁶⁵ these conventions generally provide a core agreement for the general objectives, principles and institutions, and contain additional optional protocols that provide more specific and binding obligations.¹⁶⁶ This model provides the authors and contracting parties to such conventions with the capacity to adapt the agreement to their needs.¹⁶⁷ Such a model would ideally suit a convention related to political corruption relating to political finance.

A framework convention would allow member states to agree to a general set of principles relating to their respective political finance regimes and then develop optional protocols that promote more specific and binding rules, but need only be signed up to by countries if they are in line with their fundamental legal principles. Moreover, the framework convention format would allow for specific elements that may be controversial in certain countries to be sectioned off. This would ensure that if a country's constitution did not allow specific rules to be implemented, they would not be in breach of the FCAPC.

Additionally, regulation of campaign finance is a process and one that requires gradual and ongoing reform to ensure that nations' political systems remain free of political corruption.¹⁶⁸ Whilst technically all international conventions can be modified and added to, framework conventions can be designed specifically to meet such requirements.¹⁶⁹ Thus, a convention against political corruption should be designed using a framework convention model as it suits dealing with issues that are likely to arise in attempting to create such an international convention.

¹⁶² Brunelle-Quraishi, "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis," 145.

¹⁶³ Nele Matz-Luck, "Framework Conventions as a Regulatory Tool," *Goettingen Journal of International Law* 1, no. 3 (2009): 440.

¹⁶⁴ *Ibid.*, 444–445.

¹⁶⁵ Daniel Bodansky, "The Framework Convention/Protocol Approach," *Framework Convention on Tobacco Control Technical Briefing Series* 1 (1999): 15.

¹⁶⁶ Matz-Luck, "Framework Conventions as a Regulatory Tool," 445.

¹⁶⁷ *Ibid.*, 441.

¹⁶⁸ John Bray, "International Business Attitudes towards Corruption," in *Global Corruption Report 2004* (Transparency International, 2004), 318.

¹⁶⁹ Matz-Luck, "Framework Conventions as a Regulatory Tool," 445.

Substantive Content

Preamble

Developing a Preamble for a FCAPC is important, and the CECRAC and the UNCAC should be drawn upon in this process, as they provide for critical elements of what should formulate part of the FCAPC Preamble. Under the Vienna Convention on the Law of Treaties, treaties must be interpreted according to their context and in light of their objectives and purposes.¹⁷⁰ Moreover, it is specifically stated that the context includes the preamble.¹⁷¹ The FCAPC should adopt the following paragraphs to the CECRAC Preface:

Considering that political parties are a fundamental element of the democratic system of states and are an essential tool of expression of the political will of citizens...

Considering that political parties and electoral campaign funding in all states should be subject to standards in order to prevent and fight against the phenomenon of corruption...

Convinced that corruption represents a serious threat to the rule of law, democracy, human rights, equity and social justice, that it hinders economic development, endangers the stability of democratic institutions and undermines the moral foundations of society...¹⁷²

These three paragraphs provide a brief statement regarding three critical elements of political finance regimes. They underline the importance of political parties to the democratic political systems, that political finance regulation is integral to fighting corruption, and that corruption causes serious harm. This should be included in the preamble as it sets the scene and tone for the remainder of the convention.

Two key ideas within the UNCAC Preamble should be adopted by a FCAPC with modifications. The first is the paragraph that states that ‘corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.’¹⁷³ This, as previously discussed in the first chapter is one of the driving forces behind the need for a FCAPC. It should be amended however, to reflect the modern issues associated with political corruption. The second part of the preamble that should be adopted relates to the member states cooperating between each other and with civil society, and the provision of technical assistance to strengthen member states’ capacity to prevent corruption.¹⁷⁴ This will be critical to a FCAPC as one of the primary benefits of a FCAPC is the sharing of expertise and ensuring further involvement of civil society to reduce political corruption.

The preceding CECRAC and UNCAC Preamble sections outlined above represent fundamental elements to the FCAPC as envisaged by this paper. However, they are not a

¹⁷⁰ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.1.

¹⁷¹ *Ibid*, art 31.2

¹⁷² Council of Europe Committee of Ministers, *Council of Europe Common Rules Against Corruption in the Funding of Political parties and electoral campaigns*, Recommendation Rec(2003)4 (adopted 8 April 2003) Preamble.

¹⁷³ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003) Preamble.

¹⁷⁴ *Ibid*.

comprehensive list of what a Preamble to a FCAPC should contain. It is critical that a FCAPC contains a detailed Preamble, and should include for instance other statements relating to the guiding principles of the convention.

Enforcement and Monitoring

Whether the provisions of the FCAPC are enforceable or merely promotional will have a substantial impact on the effect of the convention. As stated previously, one of the criticisms of the UNCAC is that the measures are not adequately designed to obligate states to implement change and that the monitoring mechanism is deficient. One of the principle goals behind the development of a FCAPC is to assist and pressure countries to develop appropriate political finance regulations that combat political corruption. Ideally, the FCAPC should be enforceable and not merely promotional in nature, to ensure that it is not merely another ‘toothless’ international agreement that lacks the capacity to ensure change.¹⁷⁵ The method of enforceability would need to be considered carefully, and such an analysis is beyond the scope of this paper due to the substantial issues involved in such an analysis.¹⁷⁶

However, any enforcement mechanism requires an effective monitoring system. The design of such a system should be developed using the mechanism from the *OECD Anti-Bribery Convention*. The *OECD Anti-Bribery Convention* monitoring mechanism has a two-stage review process to determine whether national legislation is consistent with its requirements and subsequently, to review enforcement and the member state’s capacity to prevent, deter and sanction transnational bribery.¹⁷⁷ In order to encourage countries to implement and enforce the convention, the review provides specific recommendations and a mechanism for follow-up.¹⁷⁸ Moreover, the results of the review are made public; ensuring pressure is brought to bear on the members.¹⁷⁹ This is the same process by which the FCAPC should be monitored. It is an effective mechanism that will encourage compliance with the FCAPC. Additionally, it provides a process by which member states can be judged, putting pressure upon the member states politicians to implement change. In particular, such a mechanism may be effective at encouraging change, as reports and recommendations will come from an independent body and can be used by domestic civil societies to pressure political parties to implement meaningful political finance reform.

Definitions and Additional General Principles

There are a number of core definitions and additional general principles that should form the basis of a FCAPC. With regards to definitions, there are two key concepts that must be carefully defined. The first relates to the definition of political corruption, which has been previously discussed in the first chapter of this paper. The definition of political corruption is important as anything that is deemed to fall outside of its definition will not be covered by a FCAPC. The second definition of importance is what constitutes a donation. This is an important idea to define as donations are one of the principle means of engaging in political

¹⁷⁵ Brunelle-Quraishi, “Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis,” 145; Nicholas, “Regulating Transnational Bribery in Times of Globalization and Fragmentation,” 284.

¹⁷⁶ Brunelle-Quraishi, “Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis,” 140–142.

¹⁷⁷ *Ibid.*, 152.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, 153.

corruption. The definition of what constitutes a political donation should be adopted from the CECRAC. Article 2 of the CECRAC states that a '[d]onation means any deliberate act to bestow advantage, economic or otherwise, on a political party'.¹⁸⁰ This definition is effective as it does not seek to limit political corruption to money, ensuring that the definition is not unduly limited in scope.

Article 3 – General Principles of the CECRAC sets out a number of general principles that should be utilised in developing the general principles section of a FCAPC. States are specifically required to implement 'measures...governing donations to political parties...to: avoid conflicts of interests...secret donations and ensure the independence of political parties.'¹⁸¹ These principles are crucial to developing effective and fair political finance regimes, whilst ensuring that political finance laws are not introduced in a prejudiced manner. An additional principle that should be added to this is the idea that political parties must avoid relationships that give the perception that undue influence may be exerted upon the political party.

Article 3 provides three additional principles which should also be adopted. Namely that states should:

- i. provide that donations to political parties are made public, in particular, donations exceeding a fixed ceiling;
- ii. consider the possibility of introducing rules limiting the value of donations to political parties;
- iii. adopt measures to prevent the established ceilings from being circumvented'.

The first principle is an essential element of any truly transparent political finance regime and, therefore, critical to a FCAPC. The following two principles should be included in an optional protocol to the convention. Whilst such measures can be effective at preventing political corruption; they are not universally acceptable to national constitutions. However, if implemented in an optional protocol, states should be required to implement the measures and as such, the wording should be changed from 'consider' to 'should'.

Restricted/Prohibited Donations

The CECRAC provides important rules related to restricting or prohibiting donations which should be adopted by a FCAPC although in a modified form. These rules are contained primarily in Articles 5, and 7.¹⁸² Article 5.b requires states to take measures to limit, prohibit or strictly regulate donations from legal entities that provide goods or services for public administration, and 5.3 requires states to prohibit legal entities under the control of the state from making donations to political parties.¹⁸³ Such restrictions are entirely justified as these companies have a profound interest in exerting undue influence upon political parties to

¹⁸⁰ Council of Europe Committee of Ministers, *Council of Europe Common Rules Against Corruption in the Funding of Political parties and electoral campaigns*, Recommendation Rec(2003)4 (adopted 8 April 2003) art 2.

¹⁸¹ Ibid, art 3.a.

¹⁸² Council of Europe Committee of Ministers, *Council of Europe Common Rules Against Corruption in the Funding of Political parties and electoral campaigns*, Recommendation Rec(2003)4 (adopted 8 April 2003) art 5 and 7.

¹⁸³ Ibid, art 5.b.

ensure their own commercial interests. This section could also be expanded to cover other industries that represent a particularly high danger of engaging in political corruption.

Article 7 of the CECRAC requires states to specifically limit or prohibit or otherwise regulate donations from foreign donors.¹⁸⁴ There are few reasons that can justify foreign entities making donations, such donations; are made with the clear intention of exerting or seeking influence within a foreign political system. This strikes at the heart of the principle of representative government, in which a government should represent the interests of the people who elected it. As a result, Article 7 should be adopted but amended by the FCAPC to require states to prohibit all donations from foreign donors.¹⁸⁵ A FCAPC should use the CECRAC as a basis for restricting and prohibiting certain donations but should go further in its requirements.

Mutual Assistance and Conference of Parties

As discussed in the first chapter to this paper, political corruption is an issue that affects all democratic countries and is very damaging; at its worst leading to the collapse of democratic political systems. Moreover, the form it takes from country to country is very similar due to the manner in which democratic nations operate politically. Yet, different political system in different countries make specific universal rules an exceptionally difficult idea to implement,¹⁸⁶ developed democratic states need to do more to promote and assist new and restored democracies to consolidate and combat political corruption.¹⁸⁷ Currently, the legal regimes globally governing political finance are inadequate.¹⁸⁸ For instance, in a *Transparency International* report, it was determined that out of 118 countries surveyed reviewing disclosure laws ‘only 13% had high levels of disclosure, 22% medium, 25% low, 17% hidden and 23% had none’.¹⁸⁹ This weakness requires international assistance to remedy, especially, as those legislating to implement political finance reform have inherent conflicts of interest.

Article 60 and 63 of the UNCAC outline essential elements that would provide significant benefits to member states of a FCAPC, by providing training and technical assistance, and the development of a Conference of States to provide ongoing support and guidance. Article 60 requires states parties to afford one another the widest measure of technical assistance, strengthen efforts to maximise operation and training activities and consider assisting one another upon request.¹⁹⁰ Moreover, the establishment of a Conference of Parties as outlined in Article 63 could also contribute to improving the capacity and cooperation between the future state parties of a FCAPC, providing them with a mechanism through which they could work together to promote and review the implementation of the convention.¹⁹¹ Such measures would help ensure that political finance reform is ongoing and not a static idea in countries globally. This again is essential as political corruption is innovative and regulations must be flexible in order to be kept up to date to fight against it.

¹⁸⁴ Ibid, art 7.

¹⁸⁵ Ibid, art 7.

¹⁸⁶ Speck, *Money in Politics: Sound Political Competition and Trust in Government*, 12.

¹⁸⁷ Ewing, “Corruption in Party Financing – The Case for Global Standards,” 195.

¹⁸⁸ “Executive Summary,” 1.

¹⁸⁹ Ward, “The Role of Disclosure in Combating Corruption in Political Finance,” 46.

¹⁹⁰ United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, GA Res 58/4, (adopted 31 October 2003) art 60.

¹⁹¹ Ibid, art 63.

V Conclusion

There is a clear need for a sophisticated United Nations FCAPC, to assist democratic countries globally in dealing with the harm caused by political corruption. Political corruption has insidious consequences for democratic states. It distorts government policy, undermines core democratic values, and damages people's confidence in their governments and the democratic system. Globally, democratic states do not have the necessary political finance regulations in place.

A FCAPC would greatly assist member states in developing sound and effective political finance regulations that could assist in minimising the occurrence and harm caused by political corruption. The benefits of such a convention would be far-ranging and would assist more generally in fighting the global scourge of corruption by specifically targeting one important element.

It is important to note that in developing a FCAPC, additional articles should be adopted and modified, from the CECRAC, the UNCAC and other international corruption agreements. Moreover, further articles would need to be developed, specifically related to political finance regulations if an effective FCAPC is to be created to reduce the impact that political corruption has on democratic countries.

Developing and negotiating such a convention through the UN would be fraught with difficulty. Yet political corruption is an issue that presents itself to democratic governments worldwide, and accordingly, requires an effective global solution. Democratic countries need a specific international convention that can both assist and pressure their governments to develop and reform their political finance regimes, to ensure that political corruption does not undermine the pillars of democracy. Such a convention has the capacity to provide meaningful change, and potentially going forward develop international best practice standards so as to assist states minimise political corruption.