GLOBAL TAX REGULATION AND DEVELOPING COUNTRIES

by

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ABSTRACT

This thesis will argue that international law - especially as it relates to taxation- has been utilised by some dominant western states to perpetuate their interests at the expense of other countries categorised as developing or less developed. Although inclusiveness is said to lie at the heart of legitimacy and effectiveness, the voices of developing countries have been largely excluded from the formulation of global tax regulations. In taxation context, international taxation is largely determined by the Organization for Economic Cooperation and Development (the OECD), an organization severely criticised as the international network of the world's wealthiest countries - big boys' club whose membership does not include developing countries. Drawing on third world approaches to international law (TWAIL), this thesis argues that international tax law represents the perspectives of developed nations. By focusing on the OECD, it contends that international tax favours Western powers. Neither the composition of the OECD, nor its tax regulation, pays any heed to the preferences and realities of developing nations. In this, international tax, although it professes to represent the interests of the global community, is merely tool for the powerful to oppress the powerless.

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DEDICATION

This research is ultimately dedicated to God, my dearest husband, Damilare, our beautiful children, Ariel O., & Uriel O., my mentors – Prof. Mary Michelle Gallant, Prof. A.O. Sanni, Prof. A.O Yussuf, & Prof. Odunsi, thank you.

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CHAPTER ONE

INTRODUCTION TO INTERNATIONAL TAX LAW AND "TWAIL"

1.0 Introduction

Third World Approaches to International Law (TWAIL) refers to one of the critical schools of legal scholarship that views international law as a tool which allows the ongoing exploitation of Third World countries by Western countries. While the concept of International tax law refers to the governance of taxation matters between states, the application of TWAIL to international tax law suggests that international tax privileges the interests of developed states at the expense of the third world.

The intersection of taxation, TWAIL, and international law makes for a complex area of study. To most, tax is not historically part of international law. This is because most of international law is about theories while international tax is more about economics. While international law has a robust lengthy pedigree and, while, in a non-tax context, TWAIL has positioned itself as a powerful critique of international governance, the integration of tax, international law and the perspectives of third world countries have only begun to ripen. To even begin to frame any legitimate investigation requires some familiarity with the relationships between international law and international taxation as well as an understanding of TWAIL. For within the realms of more classic matters of international order – the rules of global conflict, for instance – concepts and theories – including critical approaches - are more fully mined than they are in the narrower context of international taxation.

In setting the stage for this LLM inquiry, this chapter sets out the more salient themes of international tax as they relate to international law. The next section introduces TWAIL and

the historical grand narrative of international law. The final section sets out how this thesis proceeds to demonstrate that international tax policy marginalizes the Third World.

PART I: International Law and International Tax Law

International law consists principally of the law that governs relationships between states. In the context of taxation, this chiefly involves the determination of questions related to the right of an individual state to tax activity that engages some international element. Tax lawyers tend to regard themselves as excluded from the conclave of international law because of their involvement in "cross border transactions."[1] This is only a partial portrait as both international tax and international law are about matters that cross borders. This Part begins by discussing the general relationship between international law and international tax and then focuses on matters of international law peculiarly important to international tax. Because much of what passes as international tax policy concerns global 'customs', norms not readily formally consented to by individual states, this requires a discussion of customary international law. And because much of what transpires as international tax happens through the Organization of Economic Cooperation and Development (OECD), a non-state actor, a discussion of non-state actors and the overarching role of the OECD is also essential.

1.1 International Law and International Tax Law

Very few scholars discuss international taxation within the ambit of international law. To a significant degree, international tax is relegated to its own peculiar domain, with its

[1] Cross-border transactions may include both outbound and inbound transfers of property, stock, or financial and commercial obligations between related entities resident or operating in different tax jurisdictions. Online: <ruchelaw.com/cross-border-transactions/>.

contents, formation, and regulations, seen as that which has little to do with the study of international law. Avi-Yonah, a renowned expert in tax law, is one of a few to explicitly ask whether international tax is part of the order of international law.[2] He contends that it is. Avi-Yonah focuses on state jurisdiction, and reflects on the differences between international law's classic understandings of jurisdiction and distinctions made in the tax context.

In international law, the main grounds for state jurisdiction (its right to govern matters having an international element) are nationality and territory. International tax law has arguably modified conventional international concepts to "fit" its needs. One way it has done this is by expanding the scope of nationality jurisdiction.[3] International law acknowledges the right to govern 'nationals', a term often understood as equivalent to citizenship. In a tax context, countries rarely assert rights to tax their citizens on foreign sources of income when citizens permanently reside in some other country.[4] However, in a tax setting, citizenship-based, or nationally-based jurisdiction yields to the concept of 'residency'. Jurisdiction to tax is based principally on the 'residency' of a particular taxable entity.

In international law, "the basis of the central notion of 'territorial sovereignty' establishes (sic) the exclusive competence over legal and factual measures within that territory."[5] The inference can be draw that tax jurisdiction is an attribute of state sovereignty under international law. In this, international law acknowledges the rights of a state to impose taxes on everything within its territory.[6]

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[2] Reuven S Avi-Yonah, "International Tax as International Law" (2004) 4:4 SSRN Electron J 483, online: <ssrn.com/abstract=516382>; <repository.law.umich.edu/cgi/viewcontent.cgi?article=1006&context=law_econ_archive>.
[3] *Ibid.*
[4] *Ibid*. But, it should also be noted that the United States of America is an exception to this general principle.
[5] Peter Malanczuk, *Akehurst's Modern introduction to International Law*, 7th ed (New York: Routledge, 1997) at 76.
[6] S Van Weeghel, "Thoughts on territoriality in relation to Dutch corporate tax reform" (2006) in Bruylant, *Liber Amicorum Jacques Malherbe,* at 1132.

Within the rubric of international tax, territorial jurisdiction has become coterminous with residence and with the 'source' principle. Consistent with international law, albeit modified to suit the exigencies of taxation, the territoriality principle means that a state may choose to solely tax income generated within its territory, or 'sourced' within its boundaries. Under this principle, both residents and non-residents may be taxed when earnings are 'sourced' within a state's physical territorial boundaries.[7]

In an international tax context, the concept of residency captures "mere physical presence in the country for a minimum number of days"[8]. The "physical presence" test is often accompanied by a "fiscal domicile" test which includes factors such as the place (country) of the main residence and family ties.[9] Both the "physical presence" test and the "fiscal domicile" test are incorporated into tax treaties, the principal organizational organs for tax matters.[10]

In this respect, the basic principle of international law, the attaching of jurisdiction to nationality, manifests itself within the tax context although it has been expanded. That expansion, or deviation from the general order of international law, aims to mitigate the relative ease with which taxation might otherwise be avoided in an international taxation setting. In this, the concept of "residence" refers:

> to the place in which the taxpayer resides generally in the case of individual taxpayers (who are not international athletes or rock stars), generally somewhat artificial in the case of business

[7] *Supra* note 2 at 484. See also the obiter dictum of ECJ C-270/83, *European Commission vs French Republic*, *Gilly,* at para 24: "The Member States are competent to determine the criteria for taxation on income and wealth with a view to eliminate double taxation [...]").The idea of 'residency' as a jurisdictional basis is not exclusive to the international sphere. It is a governing feature of jurisdictions bifurcated into 'state', 'regional' or 'provincial' taxation spheres.
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*

> entities, who may be incorporated in one place, managed in another, and doing business in still others.[11]

As Avi –Yonah explains:

> The reason is easy to see if one considers the implications of the relative ease of acquiring a tax haven nationality. If tax law followed the general international law rule and imposed world-wide taxation only on citizens, then a lot of (subjects) would acquire citizenship in some (other countries) tax haven jurisdiction and thereby avoid taxation on their foreign source income while living permanently in their country of origin.[12]

The residency rule is accepted, widespread and incorporated into a large number of instruments attentive to international taxation. Many consider this rule as part of customary international law, a piece of the general order of international law not necessarily explicitly ascribed to by individual states but binding, or authoritative, because of its general acceptance by the community of nations.[13]

Classically, the main subjects of international law are states. In speaking of the relationship between international law and international tax, Avi-Yonah considers the matter of corporations and international tax. In regulating global tax matters, corporations are the

[11] Duke-Geneva Institute in Transnational Law, "Opinio Juris in International Tax: Notes for Geneva Conference on Opinio Juris" (12 July 2013), online: <law.duke.edu/cicl/pdf/opiniojuris/panel_4-schmalbeck-opinio_juris_in_international_tax.pdf>.

[12] *Supra* note 2 at 485.

[13] *Ibid*.

singularly most important actors.[14] Many other arenas of international interest struggle with the integration of the regulation of these entities in a global environment. With respect to corporations, international laws' recognition of jurisdiction based on 'nationality' has equally arguably been modified to suit taxation. The taxation of a corporation is usually based on residency. However, corporate residence is intertwined with the assumption that "a taxable entity is separate from its shareholders".[15] There are residual controversies within international taxation about the proper test for determining corporate residency.[16] In general, corporations are considered nationals based on the country in which they are incorporated (the U.S. approach), or based on the country from which corporations are effectively managed and controlled (the U.K. approach), or some combination of these approaches. Both approaches have advantages and disadvantages.[17] It is important to note that "The interesting aspect of nationality jurisdiction for corporations in tax law is the gradual adoption of a rule that permits countries to tax "controlled foreign corporations" (CFCs), i.e., corporations controlled by nationals, as if they were nationals themselves."[18] In essence, this claim that nationality jurisdiction applies to foreign corporations because they are controlled by nationals is in

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[14] Fleur Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory" (1994) 19 Melb U L Rev 893 (Corporations have been referred to as "'the most powerful agent for the internationalization of human society.").

[15] Brian J Arnold, "A Tax Policy Perspective on Corporate Residence" (2003) 51:4 Canadian Tax Journal 1560, online: <ctf.ca/ctfweb/Documents/PDF/2003ctj/2003ctj4_arnold.pdf>; Robert Couzin, "Corporate Residence and International Taxation" (2002) Amsterdam: International Bureau of Fiscal Documentation, at 8-10.

[16] *Ibid.* Another question is whether the term "corporate residency" ought to be determined by a central managing and controlling authority, or by geographic region: see Natalie Augustin, *Factors to be considered when establishing the place of effective management in a digital economy,*(MSc. Taxation, University of Cape Town (2015). See also the landmark case of *Laerstate BV v HMRC* in which the English court departed from the popular test for determining corporate residency. It expanded the central management and control test to look at the key decision makers on a corporation's management board: *Laerstate BV v HMRC,* [2009] UKFTT 209 (TC).

[17] *Supra* note 2.

[18] *Ibid.*

agreement with the rules of international law which acknowledge the exclusive rights of states to impose taxes on everything within its territory.[19]

The initial source of global taxation rules was the League of Nations, the precursor to the United Nations. In 1923, the League of Nations adopted rules governing nationality jurisdiction. According to this rule, "the source (territorial) jurisdiction has the primary right to tax income arising within it, and the residence (nationality) jurisdiction is obligated to prevent double taxation by granting an exemption or a credit."[20]

In canvassing an enquiry into the relationship between international law and international taxation, it is pertinent to specify that the principal derivation of global tax rules are bilateral tax treaties and model tax conventions. By far, the bulk of regulation that governs global tax matters is set forth in bilateral treaties (concluded between two state actors) and multilateral treaties (concluded between more than two sovereign state actors). International treaties are classic instruments of international law. The Vienna Convention on the Law of Treaties serves as the principal tool that governs the interpretation of treaties. Article 2 of this convention specifies that its governance covers tax treaties.[21]

The grounding of international tax in the international sphere has a long pedigree. Some trace the origins of international tax treaties to the early work of the International Chambers of Commerce (ICC), an organization which self-identifies as "the merchant of peace".[22]

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[19] *Ibid*.
[20] *Ibid*.
[21] *Convention on the Law of Treaties*, Vienna (23 May 1969). Generally, conventions are accords reached between member states of the OECD that serve as a guideline for establishing tax agreements. OECD convention ingredients consist of articles, commentaries, position statements and special reports on evolving tax issues. One primary application of OECD works is to guide the negotiation of bilateral treaties between two or more countries.
[22] International Chamber of Commerce, "History", online: <iccwbo.org/about-us/who-we-are/history/>.

It is interesting to note that the ICC is described as an organization comprising of "international business leaders and bankers" and referred to as "an economic consultant for the League of Nations between the periods of 1920-1927."[23] Its formation was solely to address the issue of international double taxation.[24] In 1921, in the spirit of ensuring free trade, the ICC convened a committee at a conference in Brussels (referred to as the 1921 ICC Proceedings) and considered the issue of double taxation amongst other topics. Unfortunately, there was no resolution on what constitutes double taxation and therefore no accord on how to deal with it.[25]To worsen matters, the ICC apparently had a rather narrow perspective on free trade. According to an academic writer, "Free trade was reserved for those countries deemed economically, politically and culturally capable and urbane; to those nation states and peoples whom it deemed civilised." [26] Arguably, from the very inception of ideas about international taxation, discussions were biased towards only certain nations.

Incidences of double-taxation, the taxation of the same resources by two or more jurisdictions, besieged the business community after the First World War. The ICC sought to alleviate double taxation but lacked any particular authority under international law. In international law, the authority to conclude international rules lies within the exclusive purview of states.

Seminal work on global tax regulation is traceable to the League of Nations', which, like the ICC, sought to tackle double taxation.[27] The first tax treaty models popularly referred

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[23] Shane R. Tomashot, Selling Peace: The History of the International Chamber of Commerce, 1919-1925, (PhD., Georgia State University (2015) p.3.
[24] Sol Picciotto, "International Business Taxation: A Study in the Internationalization of Business Regulation" (1992) p. 1-392, online: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.364.9035&rep=rep1&type=pdf, p.18.
[25] *Ibid.*
[26] *Supra* note 23 p.78
[27] See generally Reuven S Avi-Yonah, "The Structure of International Taxation: A Proposal for Simplification" (1996) 72 Texas Law Review 1301-1360.

to as the Geneva Models were recorded to have been published in the 1920 through the League of Nations after the First World War. Later, the United Nations developed the 1979 UN Guideline for the Negotiation of Bilateral Treaties between a Developing Country and a Developed Country.[28] By then, the Organization of Economic Cooperation and Development had become active in global taxation and had crafted a Model Convention. Notably, the UN instrument was welcomed by developing nations more than any previous work because it "grants more taxation rights to the source state or capital-importing country than the OECD Model."[29] International taxation originating with the ICC, and, as discussed latterly, the OECD, reflects the interests of dominant, developed, nations.

Although works related to international tax emanate from different international origins, the bulk of international governance presently happens through the Organisation for Economic Co-operation and Development.[30] As earlier noted the ICC was like an economic advisory body to the League of Nations. In the 1960s, the task of tackling double taxation fell to the OECD, a specialized international body charged with promoting and ensuring some measure of economic stability. Taxation naturally gravitated to this body. In 1963, an OECD Model Tax Convention was aptly described by an author as: "the OECD Model was developed in response to the needs of the developed nations to have a firm and solid treaty base to use in negotiations".[31]

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[28] UN. Doc. ST/ESA/94 (1979).
[29] *Ibid.*
[30] James E. Vaughn, "Twenty-first Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM Countries of their tax and economic policy", (2002) 34:1, Miami Inter- Am Rev., online:< https://repository.law.miami.edu/umialr/vol34/iss1/2/>. At note1, Vaughn notes that "The OECD is a Paris-based organization with representatives from thirty of the world's richest countries. The current members of the organization are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.
[31] *Supra* note 23

A lot of what passes as 'international tax law' is the product of the work of the OECD, a non-state actor. United Nations based taxation arguably reflects, to some degree, international consensus. United Nations membership is open to all states. In the truest sense of 'international', work through the UN is the most legitimately 'international'. OECD tax cannot be said to represent a 'global' consensus. It represents the voice of a privileged group. From a third world perspective, any centering of any international taxation around the OECD is troublesome.

To date, the only instrument applicable to taxation to emanate from the United Nations remains the United Nations Model Double Taxation Convention between Developed and Developing Countries (the United Nations Model Convention). Given its global remit, treaties orchestrated through this venue are the most representative of any fully inclusive international ordering of taxation.

In the present day, the bulk of which is understood to constitute 'international' legal tax ordering occurs through multilateral tax treaties. Multilateral tax treaties connote agreements concluded between more than two sovereign states. Multilateral treaties are more responsive to changes with respect to state practices regarding matters of business and any tax implications.[32]A number of states are signatories to multilateral conventions dealing "with administrative tax issues, such as exchange of information, assistance in the collection of taxes and dispute resolution."[33] In the forging of multilateral conventions, the OECD has become the

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[32] Online: <oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>. Also, online:<www.un.org>.

[33] Nathalie Bravo, "The Multilateral Tax Instrument and Its Relationship with Tax Treaties" (2017) October 2016 World Tax J 279. For examples of some multilateral tax treaties see generally online:< http://www.internationaltaxreview.com/Article/3500941/BEPS-implementation-The-role-of-a-multilateral-instrument.html: (i) the Agreement to Avoid Double Taxation between the Member Countries of the Andean Community of Nations, (ii) the Nordic Multilateral Double Taxation Convention, (iii) the Double Taxation Agreement of the Caribbean Community (CARICOM), (iv) Convention for the avoidance of double taxation and mutual assistance agreement with respect of taxes on income between the states of the Arab Maghreb Union, (v)

principal organ of organization. Multi-lateral arrangements are built around OECD model taxation instruments. Rather than the United Nations, as a whole, attend to the constant shifting of circumstances relevant to taxation, the OECD has assumed carriage of these developments. For instance, by June 2017 over 100 countries had signed the latest OECD multilateral tax instrument- The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).[34] The fact that over 100 countries had signed does not mean that over 100 countries influenced its content. It is merely indicative of the weighty presence of OECD-derived work within the realm of international taxation.

No doubt the OECD has eclipsed the United Nations as the source of international taxation governance. While, as Avi-Yonah maintains, concepts of international law have been modified to suit the particular exigencies of taxation, there is no doubt that the OECD has become the main architect of 'international' taxation. Notably the OECD has been depicted as an organization "moving full-speed ahead with an initiative that will drastically change the international tax landscape.[35] This thesis that the OECD is renowned for its "close ties with the Group of 8, a rapidly developing relationship with emerging powers, historically accumulated expertise and distinct working methods", an affiliation that gives it a pride of place among international institutions especially in taxation.[36]

International tax is not principally something derived from United Nations Conventions, conventions which the global collective negotiates which are then specifically signed and endorsed by individual states. It is chiefly the product of norms crafted and

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the SAARC (Asian Association for Regional Cooperation), (vi) Limited Multilateral Agreement on Avoidance of Double Taxation and Mutual Administrative Assistance in Tax Matters, (vii) the West African Economic and Monetary Union Income, Capital and Inheritance Tax Treaty.

[34] Paul Lankhorst en Harmen van Dam, "Post-BEPS Tax Advisory and Tax Structuring from a Tax Practitioner's View", (2017) 1 Erasmus Law Review.

[35] Itai Grinberg , "The New International Tax Diplomacy ", (2016) 104 Geo. L.J. 1137-1196 , p.1140.

[36] Dries Lesage & Thijs Van de Graaf, "Global Governance: A Review of Multilateralism and International Organizations", 19:1 (2013), 83-92.

promulgated by the OECD. These origins implicate customary international law because customary international law, regardless of its particular origins, binds states regardless of whether they have specifically agreed to be bound. They are bound by custom.

1.2 Customary International Tax Law

In linking international tax to international law, the concept of customary international tax law elicits inquiry. In light of treaties and adherence to OECD model conventions, there is room to suggest that certain customs related to taxation constitute, under customary international law principles, customary international tax laws. In the context of a critique based on the perspective of the third world, of developing nations, this dimension can be important. Customary norms bind states whether or not a state specifically agrees to be bound by certain international legal rules. It matters because developing nations may not be parties to multi-national treaties or have participated in their negotiation. Under international law, states are primarily bound to comply when they sign, accept and ratify international agreements. If customary tax norms exist, developing nations would be bound by customs forged by 'others', bound by rules they have not formally agreed to. In international law, states are usually only bound by rules that they accept, rules that, as sovereign entities, they consent to. Customary international law binds states in the absence of formal consent. It is binding despite the absence of any explicit sovereign consent to be bound by certain global rules.

Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."[37] Customary international law may be seen as "evidence of a general practice accepted as law."[38] It is drawn from the behaviour of states.

[37] *Supra* note 15.
[38] *Supra* note 2 at 39.

It is not rules put into place through written agreements among states. Rather, it is the law that derives from their consistent practices.

Certain practices regarding taxation are widely and universally followed. In this context, Salehifar notes:

> Whereas currently the OECD's Model Tax Convention, Commentaries and Guidelines are being broadly practised by many countries, there is no legal certainty regarding the extent to which they can constitute part of international tax law. To make it clear, even many non-OECD countries are applying the OECD's Model Tax Convention, Commentaries and Guidelines regularly. […] This raises the question of whether the OECD's Model Tax Convention, Commentaries and Guidelines may have a legitimising effect and to what extent they should be binding. It might be argued that despite the widespread practice of both the OECD Member states and non-member states to conform to the OECD's Model Tax Convention, Commentaries and Guidelines, the opinio juris is still difficult to prove. This means that the legal status of the OECD's Model Tax Convention, Commentaries and Guidelines have not necessarily evolved into binding customary international law.[39]

Moreover, Salehifar continues:

> However, if, due to the lack of opinio juris, we fail to prove that the OECD's Model Tax Convention, Commentaries and Guidelines have

[39] Alireza Salehifar, "The Role of the OECD in the Current International Tax Law: Voluntary or "Obligatory?", (2015) 10:1 ATTA Journal, online: <business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/Abstract_Alireza_Salehifar_Role_of_OECD_in_Intl_Tax_Law.pdf>.

> the status of customary international law, this absence might be remedied by recourse to some other principles of international law. To put it another way, this widespread practice by both the OECD Member states and non-member states might still have a legitimising effect if we consider the issue from different perspectives.[40]

To the third world and to developing nations' perspectives on international law, the crucial aspect of any implications of customary international taxation norms is that they may arise without any explicit attention to the interests of developing nations. Arguably, to the extent that international customary tax law binds all states, that custom does not reflect their perspectives with regard to taxation. If custom*, a priori*, originates in the prerogatives of developed nations, and is considered binding on developing nations, it is illegitimate. They have not participated in its formation. They have not been sufficiently present, included in OECD dialogues and in the forging of customary international tax norms. Simply stated, if a customary tax regime exists, it is not a regime orchestrated by developing nations. It may be a 'custom' but it is not a 'custom' forged by developing nations.

1.3 International Tax Law & Non- State Actors

Traditionally, individual states are the main subjects of international law: 'Since the law of nations is based on the common consent of individual states and not of individual human beings, states solely and exclusively are subjects of international law."[41]

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[40] *Ibid.*
[41] L. Oppenheim, *International Law, a Treatise*, 2nd ed, 1912, vol 1 (Peace), online: <opil.ouplaw.com/view/10.1093/law/9780199228423.001.0001/law-9780199228423-chapter-1>.

Equally, states are the principle creators of international norms. State sovereignty mitigates any submission to the rules of an international order without the agreement, tacit or otherwise, of a particular state. Customary international law stands as an exception. It binds states whether they have formally submitted themselves to some international rule or not.

As evinced earlier, the OECD has assumed considerable recognition in the tax arena. It is not a state. In international terminology, it is a non-state actor. Generally, non-state actor refers to an "…individual or organization that has significant political influence but is not allied to any particular country."[42] Non-state actors are 'entities different from states.'[43] Some define non-state actors by their roles and interaction with international law.[44] Others classify these actors on the basis of their "goals, origin, and scope of participation […]."[45] Non-state actors can be international organizations, sub-state actors,[46] or transnational actors.[47] In the context of international law, Janis reports that:

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[42] Online: <en.oxforddictionaries.com/definition/non-state_actor>.

[43] Andrew Clapham, "Non-state Actors" in Vincent Chetail, ed, *Post-Conflict Peacebuilding: A Lexicon* (2009) at 200–212. New York: Oxford University Press, online: <oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0085.xml>.

[44] *Ibid*. Op. Cit Schachter, Oscar "The Decline of the Nation-State and Its Implications for International Law." (1997) Columbia Journal of Transnational Law 36, at 7-23.

[45] *Ibid*. See also Reinalda, Bob, Bas Arts, and Math Noortmann. "Non-state Actors in International Relations: Do They Matter?" In *Non-state Actors in International Relations*, (2001), Aldershot, UK: Ashgate.

[46]Sub-state actors are groups of people or individuals with similar interests within states that influence a state's foreign policy. They are also known as domestic actors. Examples of sub-state actors are the automobile industry and the tobacco industry in America. These industries have unmistakable interests in the American foreign economic policy so they have interests in selling cars or cigarettes abroad and have interests in reducing imports of competing foreign products. They are politically organized and influence policy through lobbying, donating to political candidates or parties, and swaying public opinion through different means. Trade unions, for instance, are sub-state actors. Trade union is an organization of workers who have banded together to achieve common goals such as protecting the integrity of its trade, achieving higher pay, increasing the number of employees an employer hires, and better working conditions. As domestic sub-state actors, they able to influence policy making.

[47] Aw Joey, "The Role of Non-state Actors in International Relations", online:< https://www.academia.edu/5124220/The_Role_of_Nonstate_Actors_in_International_Relations?auto=download>. Joey describes transnational actors as "actors that function below the state level but function across the state borders". He categorized these actors into transnational corporations (TNCs) or multinational corporations (MNCs) and the nongovernmental organizations (NGOs). He further explained that msultinational corporations (MNCs) are companies that have headquarters in one state but invest and operate extensively in others. NGOs on the other hand are private international actors whose members are not states, but are volunteers from populations of 2 or more states who have formed organizations to promote their shared interests and ideals in order to influence the policies of state governments and intergovernmental organizations (IGOs).

> ...non-state actors are older in international law than state actors. The individual, religious institutions and commercial enterprises have all been around for a very long time, while the state as we know it is a creation of the past two or three hundred years, these old non-state actors never really went away. What is missing now is, of course, an answer to the question about the role non-state actors ought to play in international affairs.[48]

While international law is conventionally the terrain of individual states, non-state actors, are important in international law. Their importance includes "their abilities to contribute to the provision of public goods, discuss several relevant issues, including those related to their responsibility, regulation, activity, legitimacy, advantages, or influence."[49] International organizations may be "neither equivalent nor superior to states but, within the scope of their charters, can act as both law makers and law subjects."[50] Non-state actors are recognized as having immeasurable roles in shaping the content of global rules and in influencing compliance with those rules. For instance, over two hundred international organizations are involved in "high-profile issues of war and peace and more prosaic 'technocratic' matters". Two score of these organizations are preoccupied with resolving

[48] American Society et al, "Wrap-Up : Non-State Actors and their Influence on International Law Author(s): (2017) ASIL (JSTOR), online: <htttp://www.jstor.org/stable/">380.

[49] *Ibid*. Op.Cit Calame, Pierre "Non-state Actors and World Governance" (2008), Forum for a New World, Governance Discussion Paper.

[50] *Ibid*. International organizations, individuals and companies have acquired some degree of international legal personality although the concept of legal personality is controversial. The Restatement (Third), Vol. 1, part II, 70, dealing with 'persons in international law' rejects the term 'subjects' because it may have more limited implications meaning that such entities have only rights and duties, and not also, to varying extents, legal status and personality under international law. See further Harris CMIL, 126–38; H. Mosler, Subjects of International Law, EPIL 7 (1984), 442– 59; P.K. Menon, The Subjects of Modern International Law, (1990) 3 Hague YIL 30–86;See also, Benedict Kingsbury & Megan Donaldson, From Bilateralism to Publicness in International Law, NELLCO Legal Scholarship Repository (New York, 2011):. Ian Brownlie, Principles of Public International Law, 4th edn 1990, 58 et seq.; Conference on Changing Notions of Sovereignty and the Role of Private Actors in International Law, AUJILP 9 (1993–4), 1–213.

almost every human dispute, "including matters once regarded as exclusively subject to national law [...]."[51] Even the notorious normative principle of common but differentiated responsibilities in environmental law sphere and "duties to warn" or "consult" in war and peace owe their popularity to the actions of international organizations'.[52]

The OECD is a non-state actor influential in shaping international taxation. Most of global work attentive to matters of tax is conducted by this organization. Thus, unlike the conventional order of international law, the bulk of the 'international' tax rules, or 'customs', or 'practices' are the products of OECD's intervention. In this, any critique of international taxation law that integrates the perspective of developing nations, the TWAIL approach, involves consideration not only of the norms promulgated directly by developed nations – the classic subjects and creators of international law – but also the influence of this non-state actor and an exploration of the underlying interests it might represent.

PART II: TWAIL, International Law, and Tax

1.4 Third World Approaches to International Law

Third world approaches to international law (TWAIL) center on developing nations. Generally, TWAIL seeks to challenge the legitimacy of the existing legal order, to unpack it from the perspective of developing nations. By centering analysis on developing nations, it aspires to reveal the exclusion or marginalization of the voices of developing nations from

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[51] *Supra* note 47. According to Joey, International Governmental Organizations (IGOs) are the creations of states with membership in more than one nation with the sole aim of resolving common problems and having legitimacy to decide on global agenda. A popular categorization is an organization of global or nearly universal membership e.g. the United Nations United Nations (UN), World Trade Organization (WTO), International Monetary Fund (IMF) and one with regional membership e.g. the Association of Southeast Asian Nations (ASEAN), European Union (EU), The African Union (AU). See also Evans, Graham, & Jeffrey Newnham, *The Penguin Dictionary of International Relations*, (London: Penguin Books, 1998) online:< http://rezadelavari.com/files/filebank/penguin_dictionary.pdf> for a list of some international organization.

[52] Frederic L. Kirgis Jr., "Prior Consultation In International Law: A Study Of State Practice" (1983); Christopher D. Stone, Common but Differentiated Responsibilities in International law.

international law. To the extent that TWAIL informs international tax, its presence within that discourse is extremely modest. Arguably, it has only begun to penetrate the conventional international legal discourse, let alone the tax discourse.

To an extent, the concerns of TWAIL are captured by a critique of the 'grand narrative of international law'.

1.5.1 The Grand Narrative of International Law

It is impossible to craft an account of international legal history without including what Europeans have done, of how they have imagined Europe, and its expansion.[53] International lawyers conventionally trace the genesis of international law to the sixteenth and seventeenth centuries when states as understood today evolved as a form of socio- political organization bound by laws to facilitate relations between them. However, as Immanuel Kant reasoned a historical understanding of the European Enlightenment presupposes that the "universal history" of humankind has a cosmopolitan outlook.[54] In other words, international legal history should encompass the experiences of various peoples and countries of the world and not just Europe. 'Universal' ought to mean something beyond the European experience.

Historians tend to narrate international law from the perspective of Europe. A renowned historian narrated international law from European antiquity: Greece, Rome, and the middle Ages, through the Renaissance and the Reformation, to the Enlightenment and the

[53] Martti Koskenniemi, "Histories Of International Law: Significance And Problems For A Critical View" (2014), online: <https://www.temple.edu/law/ticlj/fall2013/Koskenniemi_HistoriesofInternationalLaw.pdf>.
[54] Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose* (1784), reprinted in *Kant: Political Writings* (Cambridge University Press, 1991), Hans Reiss, ed, in H.B. Immanuel Kant defines "enlightenment" as humankind's release from its self-incurred immaturity; "immaturity is the inability to use one's own understanding without the guidance of another." Accordingly, enlightenment is the process of undertaking to think for oneself, to employ and rely on one's own intellectual capacities in determining what to believe and how to act. See generally Bristow William, "Enlightenment", The Stanford Encyclopedia of Philosophy (2011), online: <https://plato.stanford.edu/archives/sum2011/entries/enlightenment/>.

Great War.[55] This historian belonged to the class of the idealist historians who view the development of international law from the early Enlightenment to the present as a tussle between universalization of principles such as "international community", "empire", "and sovereignty". The thematic preoccupation of this school is an understanding of what was important in European history.[56]

Others, equally predisposed to a Euro-centric focus, narrate the history of international law through the lens of the succession of great empires. In this school of thought, international law was the instrument for the policies of the period's dominating powers. At its core lay states, war and diplomacy (violence or its threat), strategy, and, above all, military might. One popular historian, Wilhelm G. Grewe, strongly asserts that imperial power is a causal determinant of law that flows from its rich imperial history. Imperial history, therefore, is what the emperor commands. To these historians, law is a servant of power and the history and development of international law embodies the reign of diverse imperial powers. Landmark succession epochs span from the Spanish, French, British, to what Grewe coined as the "Anglo-American condominium."[57]

Accordingly, international law at its inception was shaped by a Eurocentric outlook. Its evolution principally reflected, and reflects, the perspectives of those who organized and

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[55] Robert Rebslob, Histoire *Des Grands Principes Du Droit Des Gens Depuis L'antiquité Jusqu'à La Veille De La Grande Guerre* (1923) at 2, online <https://www.jstor.org/stable/43846929>. Having read through over 2000 years of Western legal thought, he identified as *pacta sunt servanda* the four principles of: the binding force of treaties; the freedom of the state; the equality of states; and international solidarity. As an idealist, Redslob convinced the reader that treaties were binding, states were free, and their relations were governed by equality and solidarity; a proper utopian picture. This stems from the fact that he writes from the familiar understanding of what was important in European history.

[56] *Ibid.*

[57] Wilhelm G. Grewe, The Epochs of International Law, (1984), rev. ed. 2000, page 576. One of the political consequences of the First World War was the erosion of the monopoly of Britain's position of world dominance by the United States. Prior to the War, Britain was a force to be reckoned with, a great colonializing power. The war weakened Britain. The United States strategically gained economic leads engendered by its policy of neutrality between 1914- 1917. This bred a certain equality between Britain and the United States, yielded decolonization of the overseas world, and transformed the British Empire into a loose arrangement of Commonwealth of Nations. This, Grewe refers to as the "Anglo-American Condominium."

crafted its historiography. Ideas what about constitutes 'sovereignty', or 'civilized nations', and the very legitimizing of colonialism, bear the clear imprint of European interests. It is this Eurocentric idea of international law that a converse, TWAIL-oriented narrative challenges.

1.5.2 Critiquing the Grand Narrative.

The grand narrative of the history of international law is about how European men and women ruled Europe and by extension, humanity. Emerging discontent, organized through the lens of TWAIL and other critical perspectives, demonstrates how international legal norms have facilitated the subjection of non-Europeans to European perspectives on law. This is done through a deconstruction of the colonial legacies of international law and rapt attention to matters which are deemed inconsequential to classic historiographical accounts of international law. Crusaders who challenge Euro-centric accounts are commonly identified with post colonial theorists and with an adoption of a third world approach. As scholars, they are described as:

> […] solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order.[58]

Given that Europeans were the 'colonizers', not the 'colonized', its goes without saying that "colonialism was central to the development of international law".[59] There is a certain polarity in classifying the world into European and non-European camps. However, this kind of division laid the foundation which justified and legitimized colonization. While Europe

[58] C. Obiora Okafor, "Critical Third World Approaches to International Law: Theory, Methodology or Both?" (2008) Int Community Law Rev 9.
[59] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law,* (Cambridge University Press, New York, 2004) at 268.

perceived yawning gulfs of cultural differences between its societies and the non-European societies, the success of any civilizing mission depended upon healing this divide. Non-European societies were primitive and backward. Many doctrines of international law, including the idea of 'sovereignty' were creatures of European understandings of law.[60]

In particular, one of the avenues for "ruling humanity" was colonialism under the guise of civilization. Again, this accounts for inherited history of international law, a history replete with the narratives about Europeans and their relationships to other societies. Many argue that the Eurocentric perception was warped by the ambition to incorporate a universal civilization for all non- European peoples as the latter were viewed as brutish, uncivilized, undeveloped, violent, aberrant and oppressed. Heinhard writes:

> [...] A state was classed as a legal and political body governing a people, principally according to the new though unclear concept of the national state, in a defined territory, under a sovereign state power. This could only refer to a *civilized state*. Political bodies that were not considered civilized according to the aforementioned description were not members of the international legal system. Those states belonging to this circle, without question or examination, were those that in the previous epoch (until 1815) had already arisen to the status of the Sovereign European states, as well as the USA.[61]

[60] *Ibid.*
[61] Heinhard Steiger, *The Right to a Humane Environment* (1973) Berlin: Schmidt, at 185.

Arguably, European states only recognized the 'civilized' 'sovereign' nature of certain societies after their policies of imperialism had wrung them dry.[62] Notably, at the inception of international law, there was no recognition of "Third World States."[63]

As colonialist practices matured, many African nations clearly appeared to enjoy sovereignty in their own rights, whether acknowledged by Europe or not. The recorded history of Ghana was from 300-1087 A.D. reveals a period of successful trade with Morocco. Egyptians recognised and acknowledged the Kings of Mali as "Kings of Tekur". Mali's subsequent fame as the most powerful kingdom in the Western Sudan was traceable to its vast wealth obtained from conquests of goldfields. It was 'sovereign'. Moreover, African society transformed, or 'evolved', from traders' tents to huts and permanent buildings of sun dried bricks as far back as 1300 A.D.[64] African relationships acknowledged the 'sovereignty' of discrete communities.

But international arrangements did not acknowledge, or admit, the existence of any 'sovereign' African entities. Pockets of the African continent were parcelled out by European actors as far back as 1850, with the Gold Coast, and in 1961, Lagos. European colonialism of Africa was formally cemented by the Berlin conference of 1884-1885.[65] Perhaps to atone for its past, Britain started a campaign to suppress the slave trade by severing a prosperous arm of European trade – the supply of African slaves to the trans-Atlantic economy.[66] This attempt only birthed a bigger conundrum- the frenzied scramble for the appropriation of the African

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[62]T.O.Elias, *Africa and the Development of International Law,* 2d ed by Richard Akinjide, (Martinus Nijhoff Publishers, 1988).

[63] The term *Third World* was originally coined in times of the Cold War to distinguish those nations that were neither aligned with the West (NATO) nor with the East, the Communist bloc. Today the term is often used to describe the developing countries of Africa, Asia, Latin America and Oceania. Many poorer nations adopted the term to describe themselves. Third world states are sometimes categorized using the following indices: political rights and liberties, gross national income (GNI), human development, poverty and freedom of the press.

[64] *Supra* note 62 at 6.

[65] *Ibid.*

[66] *Ibid.*

continent. The Berlin Conference was a necessary evil to prevent European powers taking up arms against one another over title to colonial territories.

It is noteworthy that many African countries entered into treatise and agreements with European countries to protect their rights and sovereignty without knowing that the European intent was to annex or cede the former's sovereignty through clauses inserted into the treatise and agreements. Ironically, some of these treaties were not entered into freely. Force, coercion and threats were employed. Various attempts to resist colonialism were suppressed by the superior military power of the European States.[67] Non- Europeans were governed by the regimes resultant from unfair or biased 'negotiation'. Even the doyen of colonial administrators, Lord Lugard, admits the hypocrisy surrounding treatises made by European colonial masters. He wrote that "[...] It shocked the moral content of a civilization content to accept the naked deception of "treaty-making," or to shut its ears and thank God for the results."[68]

The sovereignties of these African countries were "substituted and exchanged for a European sovereignty and by implication, colonial masters or governments make "economic and technical co-operation agreements" and decisions 'over the heads of the leaders of the African country.[69] African states and kingdoms had their sovereignty swallowed up by external relations under colonialism. They become bystanders in their own domain. African colonies were spectators, at best, in the creation of international governance norms.[70]

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[67] *Ibid*.
[68] *Ibid* note 62 p. 74.
[69] *Ibid.*
[70]*Ibid*. The development of customary international law developed, in part, as a result of the constant morphing of the continent. For example, Tangier, an African nation had a Committee on the Control of International Zone of Tangier and the signatories to the agreement which populated the Committee were the Governments of The United Kingdom, The United States, Italy, Netherland, Portugal, Spain, France, Belgium, and Morocco. Also, the Berlin Treaty which established the regime of the Rivers Niger and Congo had no single representative from

The dictum of Chief Justice Marshall of the Supreme Court of the United States, while examining issues in *The Antelope's* case of 1825, is instructive. In that case, a slave ship named "Antelope", jointly owned by Spain and Portugal was confisticated while conveying over 300 African captives for slave trade to the U.S. It stood accused of violating a number of U.S. federal statutes. While Spain and Portugal claimed that the slaves were their citizen's properties, the U.S. kept the African captives in custody and awaited a court's decision on whether to declare the captives as free or enslaved. The Supreme Court held that the United States was obliged to recognize the rights of other nations to participate in slave trade as no nation can prescribe a rule for other nations. Therefore, the slave trade remained lawful to those whose governments that had not forbidden it. Consequently, a foreign vessel engaged in the African slave trade and captured on the high seas in time of peace by an American ship must be restored to its rightful foreign owner.

Marshall recognized the inclusion of "non-European states as part of the law of nations":

> The parties to the modern law of nations do not propagate their principles by force, and Africa has not yet adopted them [the modern principles relating to the abolition of slavery]. Throughout the whole of that immense continent, so far as we know, its history, it is still the law of nations that prisoners are slaves.[71]

Buttressing this assertion, Angie puts it thus:

> ...All nations have some sort of 'international law', which governs their relations with their neighbours: thus 'even the Iroquois, who eat

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Africa while China, an Asian state, was fully represented: see generally, T.O Elias, "The Berlin Treaty and the River Niger Commission", (1963) AJIL Vol 51, No 4 at 873.

[71] *Ibid.*

their prisoners, have one. They send and receive ambassadors; they know the laws of war and peace; the evil is that their law of nations is not founded upon true principles.[72]

It is important to point out that the same way the doctrine of sovereignty is recognised by the European society, the practices of some non-European societies acknowledge the existence of sovereignty. It is thus wrong to assume that any society which practices sovereignty in a fashion that is not European-like is unworthy of recognition. Centuries of interactions between European and non-European societies were conducted on the basis of agreements.[73] International law is defined as that body of rules governing sovereign states. At the same time, international law denied the recognition of the sovereign status of others. Arguably, international law legitimized, condoned and justified colonial exploitation by refusing to acknowledge the 'sovereignty' of the colonized. From the perspective of the third world, the International Court of Justice (ICJ) can be accused of bias for supporting the distinction between civilized and uncivilized states. The ICJ held that "the court shall apply the general principles of law recognized by civilized nations" at a point in history when civilization was measured with a European yardstick. One may ask how many third world countries were viewed as civilised at the time the ICJ statute was enacted in 1946, a point in history when third world countries like Africa were being enslaved.[74] TWAIL advocates might point to the futility of hoping for an international law that recognised the plight of the Third World peoples.

[72] *Ibid.*
[73] See generally Alexandrowicz, H. Charles, *The European--African Confrontation: A Study in Policy Making* (Leiden: A.W. Sijthoff, 1973). Also see Ian Brownlie, *Principles of Public International Law*, 4th ed Oxford: Oxford University Press, 1990).
[74] Article 38 (1) (c) United Nations Statute of the International Court of Justice, 1946

In contrast, T.J Lawrence promisingly states that a civilised state exists when "[...] a political community, the members of which are bound together by the tie of common subjection to some central authority, whose commands the bulk of them habitually obey."[75] If the ICJ had adopted Lawrence's definition, many Africa countries would have readily qualified for statehood.

This exposition of the grand narrative indicates precisely the promise afforded by third world approaches to international law. TWAIL contends the international norms need to attend to the realities of developing nations. Any putatively authoritative, legitimate global tax governance must embody, and reflect, the perspectives of the third world, of developing nations. To the extent that it does not, it is arguably but a new form of colonization.

Conclusion: Linking TWAIL and International Tax

The implication of TWAIL to conventional international legal orderings is profound. It suggests that the entire order need to be interrogated. For if that ordering reflects the perspectives of only certain states, certain historically dominant states, it is not legitimate.

In the context of international law and tax, the most palpable intersection with TWAIL involves the OECD. Given that international tax policy tends to emanate from the OECD, it is legitimate to ask the extent to which this non-state actor represents the global order. Decolonization ushered an exodus of exploitative colonial practices. It would be tragic were global tax governance to continue to entrap the Third World. While Akhurst argues that "the accusation that international law is biased against the interests of Third World states is, on the

[75] Lawrence, J. Thomas, *The Principles of International Law* (London: Macmillan, 1910).

whole, no longer true," in the context of international taxation, such assertion is arguably grossly premature.[76]

In applying the third world approach to international law to global taxation, this thesis asks whether global rules reflect the perspectives of developing nations. Admittedly, the global taxation world is complex. A focus on the OECD is, given the complexities, manageable.

This LLM project applies a TWAIL critique to international tax law. It draws on international materials and academic literature. Few authors fully engage with TWAIL in a tax context. At best, hues of TWAIL animate the works of Diane Ring, Allison Christians and a few others. Although there is some bridging of international law and tax, it is not strongly influenced by a TWAIL perspective. This project attempts this fusion.

To ground this study, chapter 2 examines the emergence of TWAIL. Chapter 3 traces the historical development of international taxation governance. Through the lens of TWAIL, Chapter 4 critiques the taxation works of the OECD. The final segment summarizes the main tenets of this work and offers recommendations on the creation of global tax governance attentive to developing nations.

[76] *Ibid* at 30.

CHAPTER TWO

THE CONFLUENCE OF INTERNATIONAL LAW AND THE TWAIL CRITIQUE

2.0 Introduction

TWAIL forms one of the many approaches to international law. This chapter surveys approaches to international law and identifies TWAIL as part of the emerging critiques of international law. It then speaks specifically of TWAIL in a theoretical non-tax setting. It concludes by suggesting that the TWAIL approach needs to be incorporated into international taxation law.

2.1 Theoretical Approaches to International Law

There are various theoretical approaches to international law. Slaughter states that the origins of these theories differ based on various factors.[77] Some approaches emerge from the discipline of law. Others are imported from other disciplines (economics, sociology, etc.). Most of these theories are highly contested. It would be wrong to perceive these theories as rivals battling for truth in seeking to explain international matters. They rest on different assumptions and have different goals and purposes. None may be considered as absolutely *right or wrong*.

Although no single theoretical orthodoxy explains the complexity of international phenomena, each sheds a bit of light. [78] As Walt states, "competition between theories helps reveal their strengths and weaknesses and spurs subsequent refinements, while revealing flaws

[77] Anne-Marie Slaughter, "International Relations, Principal Theories" (2011) Am J Intl Law 7 at 1.
[78] *Ibid*.

in conventional wisdom."[79] It is may be safe to posit that heterogeneity of scholarship is an advantage rather than a disadvantage. Walt continues "the study of international affairs can best be understood as a competition between several different traditions - the realist, liberal, and radical tradition."[80]

At least one approach argues that the theoretical basis of law can be understood as an eternal struggle between main philosophies of law. To this end, Kessler notes that legal philosophy is always considered in terms of the struggle between natural law and positivism:

> The believer in natural law, though admitting that his creed has sometimes been in eclipse, is nevertheless convinced of its ultimate and complete triumph. The positivist is equally sure that final victory is his; natural law is nothing but metaphysics which will be abandoned gradually as we reach intellectual maturity […] Natural law theories have often been used to legitimize the established order, but not less frequently to support claims for political and social changes. Positivism similarly has gone through a process of change: Elements of empiricism, of normativism, and of realism have in turn predominated. Each way of thinking about law has deeply influenced the other. [81]

Loosely, theoretical approaches to international law can be divided into at least two categories – conventional (or classical) and critical emergent perspectives. The former embraces international relations, natural law, and positivism along with realism, liberalism,

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[79] *Ibid.*
[80] *Ibid.*
[81] Friedrich Kessler "Theoretic Bases of Law" (1941) 9 UCL Rev 98 at para 4, online: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11660&context=journal_articles>

institutionalism and constructivism. Critical emergent perspectives - sometimes referred to as policy-oriented approaches - include critical legal studies, feminist legal theory, and third world approach to international law.

2.1.1 International Relations Approach

Realism explains the international system as anarchic, a state of disorder due to the absence of a central authority. States have their own sovereignty and are therefore autonomous. States are bound "only by forcible coercion or their own consent."[82] In an anarchic system, power is the main variable of interest. States can defend themselves from an attack and continue their existence only through force. Realism sees this power in different ways - militarily power, economic power, or diplomatic power for example. It points to the "distribution of coercive material..." as the main determinant of international politics.[83]

Liberalism generally sees states as the central players in international affairs. In the context of international relations, liberalism acknowledges that all states have essentially the same goal - economic wealth and survival.[84] Institutionalism, the study of the roles that institutions play in the determination of social and political outcomes, equally acknowledges the importance of wealth in international relations.[85] Institutions are influential participants in international relations. Along with realism, institutionalism assumes that the international

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[82] *Supra* note 77 at para 3.

[83] *Ibid*. It should be noted that classical realism aims to explain international relations as a mere struggle for power between the states without proposing an answer to the question of whether the conflicts can be eliminated. Classical realists, including Morgenthau and Niebuhr, two major figures in the study of international politics in the 20th Century, considered that states, just like human beings, have an irresistible desire to fight, rule, and especially dominate others. If human beings are perceived as beings with an unquenchable desire for domination and conflict, and state entities are composed of human beings, this acquiescence has the basis in practice. However, this trait, the desire for domination and conflict, has never been scientifically identified as the dominant human trait. Morgenthau also emphasized the importance of the classic, multipolar balance of power system.

[84] *Ibid.*

[85] Peter A Hall & Rosemary C R Taylor, "Political Science and the Three New Institutionalisms"(1996), MPIFG Discussion Paper 6, at 5, para 2, online: <http://www.mpifg.de/pu/mpifg_dp/dp96-6.pdf>.

system "is anarchic" and that states are "self-interested and rational actors."[86] The main objective of states in international affairs is survival and the consolidation of wealth.

Constructivism is more of ontology – "a set of assumptions about the world and human motivation and agency" than a theory.[87] Constructivism's counterpart is rationalism. In the constructivist's account, the variables of interest to scholars - e.g. military power, trade relations, international institutions, or domestic preferences – are not important because there are objective facts about the world. These facts have certain social meanings which are drawn from "a complex and specific mix of history, ideas, norms, and beliefs which scholars must understand if they are to explain State behavior."[88] Constructivism puts the main focus on the social context in which international relations happen. This leads the constructivist scholars to emphasize issues such as identity and belief. Due to their interest in ideology and beliefs, constructivists point out the role of non-state actors, more so than any other approach.[89]

2.2 Classical Approaches to International Law

2.2.1 Natural law

Natural law theory developed from the Greek and Roman philosophers. Natural law approaches have one main belief in common - that something external, framed as divine, orders human society. This belief establishes all the fundamental principles regarding justice. As Kessler notes:

[86] *Supra* note 77 at 2, para 5.
[87] *Ibid* at 4, para 3.
[88] *Ibid.*
[89] *Ibid.*

> The great natural law systems have expressed this belief in different formulae. Religious (scholastic) natural law-the legal philosophy of the church-teaches that due to God's providence man participates in divine reason and is thus able to distinguish between good and evil and to grasp the fundamental principles of natural law. Natural law is the participation of eternal law in the rational creature (*Lex naturalis est participatio legisaeternae in rationali creatura*).[90]

Any denial of natural law is equivalent to being injurious or "doing violence to" oneself."[91] Natural laws are in themselves manifest and clear, "almost as evident as are those things which we perceive by the natural senses."[92]According to Alford, natural law has three main purposes.[93] First, natural law can be used to identify and define the *jus cogens* norms.[94] Second, natural law can be used to "identify and define crimes that justify national court assertion of universal jurisdiction"[95]. Third, natural law can be used to increase the arguments that are in favour of the establishment of positive international law.[96]

2.2.2 Positivism

While natural law implies that law has its origin in some higher source, legal positivism, by contrast, claims that authority is what makes law law. Some of the most revered

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[90] *Supra* note 81 at para 7.
[91] *Ibid.*
[92] *Ibid.*
[93] Roger Alford, "The Role of Natural Law as a Source for International Law" *Opinio Juris* Blog Archive (30 May 30 2016), *Opinio Juris*, online: http://opiniojuris.org/2008/11/19/the-role-of-natural-law-as-a-source-for-international-law/.
[94] Jus cogens is Latin for "compelling law" which is a fundamental principle that no derogation is permitted from a pre-emptory norm if it is widely recognized and accepted by the international community. This is statutorily flavored in Article 53 of the Vienna Convention on the Law of Treaties, (VCLT); see Malanczuk, *supra* note 5 at 57-58.
[95] *Ibid.*
[96] *Ibid.*

legal positivist philosophers - John Austin, Jeremy Bentham and H.L.A. Hart – were in part reacting to the natural law, and to a degree, seeking to supplant its dominance. To many positivists, the emphasis is the need for those who rely on statutes and 'the binding force of precedents" to have their legal expectations met by law. [97] Bentham is renowned for this positivist stance. To the extent that law is a command of state, according to Bentham statutes should be unambiguously devoid of "arbitrary interpretation and the sneaking in of personal predilections."[98] In this, positivists appreciate a distinction between the real world and the world of values.[99]

2.3 Policy Oriented Perspectives/Critical Emerging Perspective.

Policy oriented perspectives, or critical emerging perspectives, tend to capture feminist legal theory, third world approaches and other critical approaches to law.[100] Critical legal studies, or 'critical approaches' to international law, is a term used to describe a "bundle of loosely related approaches including the 'new approaches to international law' (NAIL) or 'new stream', the 'Third World Approaches to International Law' (TWAIL) and the 'feminist approaches'."[101] The object of this critical engagement is to identify the "underlying structures and fundamental shortcomings of international law."[102]

[97] *Ibid* at 107.
[98] *Ibid.*
[99] *Ibid.*
[100] Other examples are the Central case approach, the New Haven Approach, The LGBT Legal Theory etc. These and more are the "new approaches to international law" whose scholars which cannot be "put" within traditional classifications of international law. Therefore, such approaches represents the "new age" and "new perspective".
[101] Tilmann Altwicker & Oliver Diggelmann, "What Should Remain of the Critical Approaches to International Law? International Law as Critique" (2014) SZIER 1:1 69 at 69.
[102] *Ibid.*

2.3.1 The Feminist Approach to International Law

Fighting at the same time for women's rights and equality, feminist approaches to international law had an impact on the basic postulates of international law, effectively representing the 20th century migration of feminist theory into international affairs. Feminist approaches can historically be divided into three eras. First, the early 20th century "struggle" that ran side by side with existing international law principles. The next phase was the mid-80s attaching of feminist theories to international law. The third phrase came in the 1990s under the rubric of Third World Feminism.[103]

In the early period, women's international peace organizations were established to provide peaceful solutions to international problems. This effort was manifested mainly in the protection of civilians in armed conflict, in anti-human trafficking treaties, and in concerns regarding women and work. In this period the female approach considered international law to be a "hopeful site for feminist engagement; as providing a means for the improvement of women's lives as well as enabling a permanent peace."[104]

By the mid-1980s a more critical feminist approach emerged. This approach indicated that international law had no concern for women's rights. International law began to be unmasked for its failure to accord women any status or recognition. In applying a feminist lens acutely to international law, it "examined its normative and institutional structures, finding them deeply committed to masculinity and imperial power and therefore in need of significant reconstruction."[105]

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[103] See generally Cecillia Bailliet, "Feminist and Third World Approaches to International Law", online: <http://www.uio.no/studier/emner/jus/jus/JUS5540/h13/undervisningsmateriale/feminist-and-third-world-approaches-to-international-law.pdf>.

[104] See generally Dianne Otto, "Feminist Approaches to International Law" (2012), online: <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0055.xml>.

[105] *Ibid.*

The final era began in the 1990s. The feminist engagement fully applied itself to international law. For instance, it challenged international law's basic assumption of equality between states. It revealed "the pervasiveness of gendered assumptions".[106] The approach argued that the international legal principle of "non-intervention in the internal affairs of states" creates ample space for discrimination and abuse. Women were vulnerable, and in an international context, discrete states, particularly less powerful states, would similiarly be 'vulnerable' to abuse.[107]

Hillary Charlesworth, a contemporary scholar, contends that that feminism seeks to both deconstruct and to reconstruct international law:

> Deconstruction of the explicit and implicit values of the international legal system means challenging their claim to objectivity and rationality because of the limited base on which they are built. All tools and categories of international legal analysis become problematic when we understand the exclusion of women from their construction.[108]

In this, arguably, reconstruction is the more ambitious project. Reconstruction anticipates not just critiquing the international order but building a better one.

2.3.2 Third World Approach to International Law (TWAIL)

Similar to feminism, third world approaches to international law (TWAIL) argue that international law represents a regime of domination and subordination. The approach was not

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[106] Hilary Charlesworth, "Feminists Critiques of International Law and Their Critics" (1995) 13:1 TWLS, online: <https://scholar.valpo.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1033&context=twls> at 1.
[107] *Ibid.*
[108] *Ibid* at 3.

inspired by feminism in particular but by post-World War II decolonization. A decade after the World War II, a 1955 conference convened in Bandung, Indonesia, sought to bring together third world countries. It is considered to be the first generation of the TWAIL movement. From this, further TWAIL movements formed in universities, particularly a Harvard movement that urged for the establishment of third world approaches to international law. Akinkugbe elaborates the origins of TWAIL:

> The early origins of TWAIL have been traced to the Bandung Conference of Third World states in the late 1950s, while the contemporary resurgence has been traced to the late 1990s. So one could say that there is both a 'first' and 'second' generation of critical Third World scholars in which James Thuo Gathii found two opposing views of early African international law scholars. One strand argues that Africa is a contributor and shaper of international law, whereas the other argues that the colonial encounter limited Africa's participation in developing international law. Contemporary critical Third World scholars have and continue to ask questions of the TWAIL movement in order to deepen its contribution to scholarship and our understanding of the world around us with a particular view to improving conditions for those who live in the Third World.[109]

At present, TWAIL is an established presence in international discourse. In locating TWAIL in policy-orientated critical perspectives, some ask whether TWAIL is really a theory or a methodology. Okafor concludes that TWAIL is both a theory and a methodology when he

[109] Sonya Nigam, "Third world approaches to international law". Human Rights . . . Here & There (16 July 2012), online: <http://www.canadianlawyermag.com/author/sonya-nigam/third-world-approaches-to-international-law-1672/>.

says that TWAIL scholarship depends for its very sustenance on its logical reasoning, and on the testability of the propositions that it makes.[110] For a theory, he claims that TWAIL fits in the "working definition of a system of ideas that explains something as well as a "logically self-consistent model or framework for describing the behavior of a related set of natural or social phenomena" and that TWAIL is "predictive, logical, and testable."[111] It is also a methodology, and as such (a theory and a methodology) "offers both theories of, and methodologies for, analyzing international law and institutions."[112] According to Bailliet, Third World Approaches to International Law scholars are:

> engaging in an interdisciplinary examination of the extralegal effects of international law on the South; using historical evidence from the colonial and post-colonial periods to demonstrate the contingent nature of international law doctrines as well as using localized cultural evidence to challenge the universality of the theoretical underpinnings of international law.[113]

Generally, third world approaches to international law represent a critical school of international legal scholarship as well as a movement. This approach sees international law as a tool which allows ongoing exploitation of the Third World countries through subordination to Western countries.

Nigam argues that "all organizational systems are established in order to protect the organization's interests". In support of Nigam, Mutua's refection is quite apt:

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[110] Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 ICLR 374.
[111] *Ibid.*
[112] *Ibid.*
[113] *Supra* note 109.

> The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination. Historically, the Third World has generally viewed international law as a regime and discourse of domination and subordination, not resistance and liberation. This broad dialectic of opposition to international law is defined here and referred to here as . . . TWAIL.[114]

Furthermore, Mutua argues that international law represents "a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West."[115] Okafor's perspective is, again, instructive:

> TWAIL scholars (or 'TWAILers') are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order . . . a commitment to centre the rest rather than merely the west, thereby taking the lives and experiences of those who have self-

[114] *Ibid*.
[115] John D. Haskell, "TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law" (2014) XXVII: 2 CJLJ.

> identified as Third World much more seriously than has generally been the case.[116]

TWAIL has gradually accumulated recognition. Importantly, TWAIL has something to say about international taxation. When the approach is applied to international taxation, it demonstrates that existent norms reflect the prerogatives of first world countries.

Conclusion

TWAIL is not the end, or the culmination, of any international legal theory. Rather, it is a part of a critical response to some of the classic theories that is drawn from developing nations. As critical legal studies and feminism reveal, there are other positions for which international law has not fully accounted. TWAIL analysis indicates that certain selfish, state-centric, or group-state centric, interests are reproduced on the international level. According to TWAIL, the entire system is unjust, or, at the very least, heavily reflective merely of the interests of one group of actors - developed nations.

This chapter has appraised some approaches to international law with specific attention on TWAIL as part of the emerging critiques of international law. The next chapter chronicles the evolution of international taxation.

[116] *Supra* note 109.

CHAPTER THREE

HISTORICAL DEVELOPMENT OF THE INTERNATIONAL TAX SYSTEM

3.0 Introduction

No author has authoritatively determined when international tax began. Hugh J. Ault is of the mind that the conceptual basis for modern tax treaties developed in the period between the First and Second World Wars.[117] As international economic development boomed, conflicting tax claims hindered cross border business. There were real tax issues which necessitated a framework to guard against double taxation – the idea that the same income would be taxed in more than one jurisdiction. A committee, whose duty was resolve the evils of double taxation, was formed by the International Chamber of Commerce (ICC) in 1919.[118] Later, the ICC and the League of Nation ceded global taxation to the OECD. The OECD is currently regarded as the principal setter of international tax norms.

3.1 The International Chamber of Commerce (ICC)

The International Chamber of Commerce's major task was to propose solutions to the problem of double taxation. The Chamber included members from the United States, Great Britain, France, Belgium, Italy and the Netherlands. Its chief contribution was to advocate that all tax payers irrespective of whether they reside in the country in question or identify as a foreigner or citizen, should be treated similarly on tax matters.[119] The ICC placed the issue of double taxation on the international agenda. However, since the ICC was created to represent

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[117] Hugh J. Ault, "Reflections on the Role of the OECD in Developing International Tax Norms" (2009) 34:3 Brook J Int'l L at 757-781.

[118] Andrew P. Morrisss & Lotta Moberg, "Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition" (2012) 4:1 C JTL p. 1-64, online: <https://taxlawjournal.columbia.edu/article/cartelizing-taxes-understanding-the-oecds-campaign-against-harmful-tax-competition/>.

[119] *Ibid.*

the business community, and had no authority over the global community, the issue of double taxation sought succor in the League of Nations. In this, the ICC was advisory only. It had no status or authority under international law. It was not a state. Nor, as a non-state actor, did it achieve significant presence within the realm of international tax.

3.2 The League of Nations

Basically, the rules and principles that govern double taxation today were formulated by the League of Nations. As explained in chapter 1, the first tax model treaties - popularly referred to as the Geneva Models - were published in the 1920s under the auspices of the League of Nations. After the First World War, the League sought to reduce impediments to international trade so to encourage economic development. A uniform approach to taxation was thought essential.[120] The League of Nations authorised expert reports and convened several conferences geared towards resolving the incidences of double taxation. This effort lead to the first global instruments focused on the mitigation of double taxation. Some twenty years later, a draft instrument attentive to tax controversies raised by some less developed nations, known at the 1943 Mexico Model, (Mexico draft) was crafted.[121] A few years later, another draft, the one more reflective of the tax posture of developed nations, surfaced. This one was referred to as the London Model of 1946 (London draft).[122]

After the Second World War, with the demise of the League of Nations, the United Nations inherited the budding international tax mandate. Its reign in the tax world was short-lived. While it ushered in the 1979 UN Guideline for the Negotiation of Bilateral Treaties

[120] Donald. R. Whittaker, "An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy", (2016) 8 N.C. J. Int'l L. & Com. Reg. 39, 39-60.
[121] *Ibid* p.43.
[122] *Ibid.*

Between a Developing Country and a Developed Country and while it was the authority in international law for state-relationships, it quickly appreciated that matters of taxation required expertise and specialization not entirely suitable to negotiation through this forum. To the extent that the United Nations remains, in terms of taxation and other matters, the most inclusive forum for international negotiations – its work remains arguably the most attentive, given its global constitution, to the interests of all nations, developing and developed alike. But it quickly became imperative that the peculiarities of taxation did not sit easily within this forum.

In the 1960s, the Organization of Economic Cooperation and Development (OECD) began to assume the mantle of international tax governance. There was no formal surrender of tax governance to the OECD by the United Nations. Rather, the OECD became the *de facto* center of governance. It was forged, in its early animation, as the Organization for European Cooperation and Development to help re-structure European economies devastated by the war. It expanded to include non-European members and then become the OECD. With economics at its center, taxation governance was a natural arena of focus. It was not forged to attend to international taxation matters but it became the natural center for such matters.

Importantly, in canvassing international taxation governance, this surrender of any tax governance to this non-state actor, to the OECD, is, from a TWAIL perspective, troubling. Governance through the United Nations, through United Nations negotiations and United Nations sponsored conventions, appeals to a sense of globalism. United Nations membership is open to all states. It includes all states. It aspires to give a voice to all states. The shift to the OECD diminishes the sense that international tax is truly global, truly inclusive of the interests of all nations. In this, the OECD originated in Europe, expressly devoted to

reconstructing the economies of Europe. In embracing economies beyond Europe, it continues to have a narrower membership than the United Nations. Not a single developing nation or 'third world' state participated in its creation. That non-inclusive membership continues to this day. Any troubling TWAIL perspective, a perspective that emanates from the sense of non-inclusiveness in the formation of international tax norms, arguably derives considerable authenticity from the fact that the OECD was not, from its inception, an entity devoted to 'international' interests in tax fairness.

3.3 The Organisation for Economic Cooperation and Development (OECD).

From its entry into the arena of international taxation right through to the present, the OECD has been more active any other organization in attending to international taxation. According to Ault, the OECD is the appropriate forum to which to turn for solutions to tax problems even though it lacks the political breadth of the United Nations. The OECD plays a prominent in tax governance by providing the medium for discussion between countries as well as opportunity for political compromises for the interest of the countries involved. [123]

To a degree, that lack of breadth shapes the TWAIL critic of international tax. The OECD is the rich countries' club. It does not include developing nations. It sets the standards of governance. At the very least, it cannot be said to give equal weight to the perspectives of developing nations on taxation.[124]

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[123] Supra note 117.
[124] See generally Thomas Rixen, "Tax Competition and Inequality: The Case for Global Governance" (2011) 18:2, Rev Int'l Pol Eco 197.

3.4 An Overview of the OECD

The OECD has been acclaimed as "the quintessential host of trans-governmental regulatory networks."[125] This influential international organization is referred to as:

> an important forum for the development and promotion of transnational class consciousness among capitalists and the promotion of neo-liberal hegemony in the interests of this class as it defines standards of appropriate behavior for states which seek to identify themselves as modern, liberal, market-friendly, and efficient.[126]

It contributes to the construction of a common western liberal identity with clear political consequences, particularly in encouraging the adoption of policies that reflect a distinct ideological perspective and the interests of distinct groups in society.[127]

At inception, under the rubric of the OEEC (Organization for European Economic Cooperation), membership consisted of 16 European countries.[128] Canada and the United States joined a few years later.[129] The Organisation for European Economic Cooperation (OEEC) was birthed by an agreement between the counties that signed the Marshall plan, the plan designed to enable European post-war recovery. The OEEC enjoyed the status of world organisation, an early non-state actor influential in international affairs. In 1948, the OEEC negotiated a

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[125] Anne- Marie Slaughter, *A New World Order* (New Jersey: Princeton University Press, 2004) at 46. A cursory look at one of the popular works of the OECD- Harmful Tax Competition- which has been elaborated upon in the previous paragraphs, indicates that the primary goal of the OECD was to battle with the any form of tax competition employed by one country that would occasion harm to another country. Ordinarily, governments encounter difficulties in adequately taxing transnational actors; reliance was thus placed on international cooperation among state. Unfortunately, the OECD in its bid to define a boundary between legitimate and illegitimate forms of tax competition received certain arguments put forward by some TNCs with respect to their contributions and influence on global economic growth. Eventually the OECD whittled its grand Harmful Tax Competition plan by focusing more on recognizing the legitimacy of international tax planning and legal tax avoidance. This is an example of the extraordinary influence of non-state actors in the field of international law.

[126] Tony Porter & Michael Webb, "The Role of the OECD in the Orchestration of Global Knowledge Networks" (2007), 3 at para 1, online:<https://www.cpsa-acsp.ca/papers-2007/Porter-Webb.pdf>.

[127] *Ibid* at 2.

[128] Diane M. Ring, "International Tax Relations: Theory and Implications", (2007) 60 TLRev., 83-154, p.121.

[129] For members and partners of the OECD, see online: <http://www.oecd.org/about/membersandpartners/>.

multilateral agreement on intra-European payments. In 1949, it forged a trade liberalisation scheme. From July 1950 to December 1958, the European Payments Union (EPU) restored the convertibility of European currencies and removed inter-regional trade restrictions. The OEEC also promoted economic productivity in Europe and proved important to creating a united Europe. In 1960, the OEEC mutated into the Organisation for Economic Cooperation and Development (OECD), an organization whose remit exceeded Europe.

Some describe the OECD as an organization that has morphed "from a facilitator of economic competition to a cartel enforcer'.[130] By the end of the 1970s, the OECD Model Double Taxation convention was "practically the infrastructure of the current bilateral treaty-based system."[131] The OECD became the most important arena for international tax negotiations. Notably, too, the OECD is entirely funded by its members.[132]

According to Wolfe, "the OECD can be seen as a paradigmatic example of an identity-defining international organization. Its primary impact comes through efforts to develop and promote international norms for social and economic policy"[133] Similarly, Marcussen sees the OECD's role as an "ideational artist" and an "ideational arbitrator."[134] While he acknowledges a qualitative difference between 'hard law', the subject of international conventions, and 'soft law', the non-binding edicts issued by non-state actors such as the OECD, he concedes that 'soft law' is a critical ingredient of international standards.[135]

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[130] *Supra* note 118 at p. 4.
[131] *Ibid* at p.20
[132] *Supra* note 117. At p.759 "Funding for the OECD is provided by the Member States. A portion of the budget is funded by contributions based on relative GDP and another portion based on individual country contributions. In 2008, the United States provided nearly 25% of the budget of EUR 303 million, and Japan contributed 14%. Iceland contributed 0.1%."
[133] *Supra* note 126, p.3.
[134] *Ibid. Op. Cit* Martin Marcussen, *The Organization for Economic Cooperation and Development as ideational artist and arbitrator: Reality or dream?* (London: Routledge, 2004) at 90-106.
[135] *Ibid.*

Some classify the OECD as "[…] simply a highly technical research organization with little significance for world politics."[136] However, the OECD should be viewed as influential in developing "policy prescriptions."[137] The OECD is a non-state actor lacking authority under conventional international law to create norms that are binding upon states. Despite its lack of formal authority under international law, the OECD is a catalyst for the "reproduction and development of practices that shape an increasingly harmonized global political and economic system."[138]

3.5 THE OECD's WORK ON TAXATION:

Apart from the early work of the United Nations regarding double taxation, it is the OECD that has been the most active with respect to matters of international taxation. Drawing on its 'economic' mandate, into which matters of taxation naturally fall, it has singularly authored, or been the singular forum for deliberations attentive to, international tax governance. Its work and influence can be loosely catalogued into three time frames.

3.5.1 1963–1983 - Double Taxation

During the period of the 1960s through to the 1980s, the OECD's tax preoccupation was, in the context of economic development, double taxation. It sought to reduce the cost of transacting business in settings that involved different tax systems. In 1963 the OECD Draft Model Convention on Income and Capital was made.[139] As the primary multilateral forum for international tax policy, it attempted to create flexible frameworks for resolving tax issues

[136] *Ibid* at 1. This is because a great deal of the OECD's work provides a setting for reflection and discussion based on policy research and analysis that helps governments figure out what policies to pursue.
[137] *Ibid.*
[138] *Ibid.*
[139] Supra note 118.

between developed countries' national systems.[140] Its 1963 model was "practically the infrastructure of the current bilateral treaty-based system" by the end of the 1970s.[141] Hence, the basis for most states bilateral treaties are OECD models. The thematic preoccupation of the 1963 OECD Convention on Income and Capital (1963 OECD Draft) is the elimination of double taxation either by exempting foreign sourced income from domestic taxation or by the domestic recognition of foreign tax credit. The choice between the two options is the responsibility of individual countries.[142] The corollary is that "the source country will considerably limit both the extent of its jurisdiction to tax income as it arises at the source and also the rate of tax which is ultimately imposed where jurisdiction is retained."[143] In 1977, the 1963 OECD Draft was revised to the OECD's Model Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital (1977 OECD Model). Whatever name it is to be called, the OECD Models of 1963 and 1977 were drafted by and for the developed countries. No thought was given to the interests of non-OECD members, to developing countries that are predominantly capital importing countries or to the challenges faced by these countries.[144]

3.5.2 1981–1998: Tackling Tax Havens

From the 1980s onwards, the OECD became preoccupied with the avoidance of taxation. As globalization increased, human ingenuity revealed its capacity to circumvent the reach of domestic tax exigencies, particularly through reliance on 'tax havens'. One of the earliest cases of 'cash flight' to a tax haven is said to be the 1934 case of Harry Oakes, a

[140] *Ibid* p.3
[141] *Ibid* p.20
[142] *Supra* note 120 p.*45*
[143] *Ibid.*
[144] *Ibid.*

Canadian mining millionaire, who moved to the Bahamas to escape Canada's high tax rates.[145] Oakes complained that eighty-five percent of his income was taxed away under Canadian law. By moving to the Bahamas, any Canadian tax liability 'flew' to the Bahamas. Under Bahamian law, an alleged 'tax haven', any tax liability on his mining income became negligible.

In this, international taxation governance had previously been preoccupied with double taxation, the fact that the same income, chiefly business income, was, within an international context, taxed at least twice. The ICC, the League of Nations and the United Nations, had all been concerned with the problem of 'double taxation'. These entities, and the OECD, were, in a post-World War II world, principally tasked with alleviating the problem of a global business universe subjecting the same income to taxation under different domestic legal orders. At some point, the preoccupation with 'double taxation' changed into concern that globalization facilitated the complete avoidance of taxation or permitted the reduction of tax liability to negligible amounts.

The most vocal victim of any international tax attrition was the United States. By 1981, the United States expressed serious concern that international financial structuring – the organization of tax matters within a global context to secure the best tax advantages – resulted in the avoidance of its domestic tax laws.[146] It admitted that 'tax havens' were depleting its domestic treasury and acknowledged that unilateral action was not sufficient to attend to problem.[147] Research proves that about this time, some economic giants, particularly Europe and the United States, were suspicious of the fact that there was insufficient information on transactions taking place in offshore jurisdictions. This lack of information inadvertently

[145] *Supra* note 118 p.23.
[146] *Ibid*.
[147] *Ibid.*

encouraged tax evasion and fostered competition regarding domestic tax rates.[148] The United States and Europe frowned on any competition emanating from offshore jurisdictions – often developing nations. They literally declared war on these jurisdictions, labelling them tax havens and havens of criminal activity.[149] In the opinion of Douglas Barnard, Subcommittee Chairman of the Committee on US Government's Tax Operations:

> Offshore tax evasion schemes—which appear to have reached epidemic proportions—result in the loss to our Treasury of hundreds of millions and very likely billions of dollars annually. They also threaten the integrity of our tax system, increase the tax burden on the vast majority of hard-pressed Americans who are honest taxpayers, and even undermine the Nation's efforts to get at the profits of organized crimes, drug trafficking, and other criminal activities).[150]

Shortly after declaration of war on tax havens, in 1996 the OECD was 'advised' to "analyse and develop measures to counter the distorting effects of 'harmful tax competition' on investment and financing decisions, and the consequences for national tax bases."[151] Very few member countries of the OECD opposed the idea that "harmful tax competition" distorted trade and investment. The G7, another organization principally representative of the voices of developed nations, "strongly urge[d] the OECD to vigorously pursue its work in this field."[152]

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[148] *Ibid* at p.38.
[149] *Ibid.*
[150] *Ibid.*
[151] *Ibid*.
[152] *Ibid* at 41.

In 1998, the OECD issued a report entitled "Harmful Tax Competition: An Emerging Global Issue" (the "Report").[153] According to the report:

> ..the effect of tax havens and harmful tax competition is to erode other national tax bases; cause a shifting of the structure of taxation (from the mobile capital to immobile capital and from income tax to consumption taxes); to weaken the ability of individual nations to apply progressive income tax rates.[154]

Tackling tax havens or harmful tax competition became the focus of the OECD. Tax havens are sometimes referred to as "jurisdictions perceived as having a significant and increasingly negative impact on the revenues available to other countries."[155] There is no internationally agreed definition of tax haven. However, the OECD associated tax havens with:

> small islands in the Caribbean and the Pacific Ocean while countries with a potentially harmful preferential tax regime consists mostly of OECD member countries with no or only nominal taxes, they have secrecy rules, they lack transparency in their legal and administrative provisions and they encourage investments with no substantial business activity.[156]

At the same time, the OECD described harmful preferential tax regimes as jurisdictions with:

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[153] Mark Blumberg, **"**The OECD'S Report on Harmful Tax Competition: Is 'Harmful Tax Competition' Actually Harmful?" (2001) Osgoode Hall Law School International Taxation, at 3.
[154] *Ibid* at 5.
[155] William Gilmore, "The OECD Harmful tax competition and tax havens: Towards an understanding of the international legal context", (2001), 27:1, C Wealth L Bull 548-571, online: <https://www.tandfonline.com/doi/abs/10.1080/03050718.2001.9986591?journalCode=rclb20>
[156] *Supra* note 157 at 4.

> either low taxes or no taxes on only certain income and the regime is non-transparent and does not exchange information. In the same vein, another difference between a tax haven and an Harmful Preferential Tax Regime is that the tax haven would impose no or only nominal tax on mobile financial and service activities, whereas the Harmful Preferential Tax regime collects substantial revenue from such activities in its tax system but allows for some mobile financial and service activities to be subject to little or no taxation.[157]

To a certain extent, the 'Harmful Tax Competition' campaign became a narrative that demonized any nation that sought to attract foreign investments by reducing taxation liability. This attraction was deemed unhealthy, harmful competition. The OECD took no account of the perspectives of jurisdictions seeking to attract foreign investment. To these, often developing nations, the attraction of resources on the basis of tax privileges were nothing less, nor more, than the practice of free enterprise in a competitive international economy.[158] Despite this, the OECD work began a campaign of 'black-listing'.[159] It listed and shunned jurisdictions that, in its view, exhibited 'harmful' tax practices.

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[157] *Ibid* at 5.

[158] James E. Vaughn, "Twenty-first Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM Countries of their tax and economic policy", (2002) 34:1 Miami Inter Am Rev, online:<https://repository.law.miami.edu/umialr/vol34/iss1/2/>.

[159] J.C. Sharman, *Havens in a Storm: The Struggle for Global Tax Regulation,* (Ithaca, NY Cornell University Press, 2006), p. 45-56 where the author described the double standard approach of the OECD in penalizing its members and non OECD members. OECD members found culpable of practicing harmful preferential tax regime will "enjoy" a collaborative approach within a peer review and pressure to eliminate the practice, while non-OECD members will be slammed with international sanctions and their names published as engaging in harmful preferential tax regime, aka blacklisting.

3.5.3 THE OECD 2000 Report[160]

In June 2000, the OECD was instructed to "include automatically on the OECD List of Uncooperative Tax Havens any jurisdiction identified in the 2000 Report as meeting the tax haven criteria, if the jurisdiction does not by July 2001 commit to eliminate harmful tax practices.[161] The 2000 Report was endorsed by the OECD Council and by the G7 group of nations.[162] By 2006, the OECD's focus was "on monitoring any continuing and newly introduced preferential tax regimes identified by member countries."[163]

Notably, the reference to 'member countries' connotes countries that are part of the OECD. In this, whether non-OECD states rejected the OECD definitions, and the practice of 'black-listing', did not part of form part of any OECD considerations. Arguably, as tax governance 'club', this 'international' governance center was only interested in the views of its constituent members. Developing nations and nations that pursued tax incentives as policies of economic development, played little role any discussions about tax havens and the OECD initiatives.

3.5.4 Transfer Pricing

In a modern setting, part of that which enables tax flight are Multi National Enterprises (MNEs). As their namesake indicates, MNEs are global corporate actors whose activities extend into multiple jurisdictions. That reach permits certain flexibility in organizing taxation liability. Since they manage global operations, they are able to mobilize the tax moment, to

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160 The OECD, Towards Global Tax Co-operation: Report to the 2000 Ministerial Council meeting and Recommendations to the Committee of Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices (2000) [hereinafter "2000 Report"].

161 *Ibid.*

162 *Ibid*.

163 *Ibid*.

structure their global activities so minimize their exposure to taxation liability. The impact of the actions of some MNEs proved so profoundly negative as to press at least two tax matters onto the OECD's agenda, transfer pricing policy and base-erosion and profit-shifting (BEPS).

Transfer pricing occurs where a transnational or multinational company reduces its tax burden and maximizes profit by "setting prices at which transactions occur involving the transfer of property or services between associated enterprises, forming part of an MNE group."[164] "Transfer pricing is the general term for the pricing of cross-border, intra-firm transactions between related parties".[165] Originally, transfer pricing was used to reduce the tax liability of firms operating in more than one territory. However, transfer pricing became a menacing economic tool used by MNEs. In 1995, the OECD introduced international tax guidelines "...on cross-border services, intangibles, costs contribution arrangements and advance pricing arrangements." [166]

Most of the OECD member countries are actively involved in developing transfer pricing rules because of their rich business history and somewhat developed economic systems.[167] Transfer pricing is classified as one of the technical tax rules with little or no relevance to developing countries. In part, this is because developing countries often lack a certain sophistication in technical tax matters. In the context of Multi National Enterprises, the problem relates to the fact that MNEs are synonymous with developed countries. It is not developing countries that house or control MNEs but developed countries. MNEs are corporate beings of developed countries. The problem to which the 1995 guidelines attend –

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[164] United Nations, "United Nations Practical Manual on Transfer Pricing for Developing Countries", (2017) United Nations New York, at para B.1.1.6, online: <http://www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf?>.

[165] *Ibid* p.24.

[166] Jane G. Gravelle, "Base Erosion and Profit Shifting (BEPS): OECD Tax Proposals" (2017), Congressional Research Service, 1-30, online: <https://fas.org/sgp/crs/misc/R44900.pdf>.

[167] *Ibid* at 7.10.

the arbitrary setting of prices between related entities – is fundamentally a problem born of corporate actors of developed country origins.

In the 2014 OECD's Double Taxation Convention on Income and Capital, Article 9 provides that the arm's length principle is the appropriate yardstick for assessing the taxable profits of MNEs.[168] This is popularly referred to as 'Arms Length System (ALS). In terms of tax policy generally, and, more specifically, transfer pricing policy, 'arms' length' effectively means that related companies must, in determining their taxation liability, rely on price considerations that would apply were they not related. They cannot 'buy' goods from a related company for higher or lower values than the prices that would obtain between completely unrelated companies and use those values to determine taxation liability. They must determine liability on the basis of the 'arms' length principle', determine their liability on the basis of 'prices' that would obtain between companies that were not related.

According to a British report by Her Majesty's Revenue & Customs (HMRC), more than 50 nations adopted some form of transfer pricing rule based on the 'arm's length' system.[169] Clearly, the OECD governance with respect transfer pricing has become, or is fast becoming, a standard feature of international tax.

The concept of base erosion and profit shifting (BEPS) classically connotes an MNEs use of financial structures to shift profits from places with higher tax rates to places with lower rates.[170] The consequence is that the base profit of the higher taxing jurisdiction is eroded. Like transfer pricing mechanisms, the base erosion and profit shifting is a tool employed by MNEs. It is akin to an improved form of tax avoidance.

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[168] The OECD, Model Tax Convention on Income and on Capital 2014 (OECD Publishing, Paris, 2015).
[169] Economics Online, online: <http://www.economicsonline.co.uk/Business_economics/Transfer_pricing>.
[170] Katlyn Twomey, The Gordian Knot: How the United States, the European Union, and Organization for Economic Cooperation and Development took action against corporate tax avoidance (2017), [unpublished, archived at The Honors Program Senior Capstone Project].

The OECD's Base Erosion and Profit Shifting (BEPS) initiative was formulated with the intent to develop a "Multilateral Instrument to Modify Bilateral Tax Treaties." [171] It was warmly received by the leaders of the G20 and became known as 'The 2014 Report.' [172] It symbolises the bridging of the gap "in international taxation for companies that allegedly avoid taxation or reduce tax burden in their home country by engaging in tax inversions (moving operations) or by migrating intangibles to lower tax jurisdictions."[173] The OECD has issued 15 action items to address the main areas in which companies have been most aggressively shifting profits —including the digital economy, treaty abuse, and transfer pricing documentation.[174] Succinctly, the scope of the OECD model is to:

> Analyse the tax and public international law issues related to the development of a multilateral instrument to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties. On the basis of this analysis, interested Parties will develop a multilateral instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution.[175]

[171] OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (OECD).
[172] *Ibid.*
[173] *Ibid* at 45.
[174] *Ibid* at 46.
[175] *Ibid.*

Conclusion

This chapter has traced the historical development of international tax from the ICC to the OECD. The OECD has made mammoth and impactful contributions to international taxation. It is undoubtedly the acknowledged center of international taxation governance. Developing countries have not been part of this governance project. They have suffered from this exclusion. The next chapter examines international taxation developments through the lens of third world countries.

CHAPTER FOUR

TWAILING INTERNATIONAL TAX

4.0 Introduction

There is a dearth of literature specifically connecting TWAIL and international tax. Only a handful of authors discuss this relationship.[176] On the one hand, this may be attributable to the fact that tax issues are classified as state-managed and rarities on international agenda.[177] On the other, the few credible contributions made by the Third World to this arena arguably fail to receive the respect they deserve from some of their Western counterparts.

This Chapter is divided into three parts. The first part, adopting a third-world approach, explores international taxation from the perspective of developing nations. To illustrate the implications of TWAIL, the second part tentatively appraises aspects of tax governance from the perspective of the developing country of Nigeria. Given that TWAIL aspires to improve upon, or reorient, international norms, the third part contemplates what a TWAIL-informed tax world might look like.

4.1 A TWAIL-based Exploration of International Taxation

Much of international tax governance does not come from the United Nations, the organization whose membership includes all sovereign nations. Rather, international tax comes through the OECD. It is reported that the OECD model tax conventions are premised largely on the concept of reciprocity between the contracting states, meaning economically

[176] Christians Allison did a great job in pointing out the presence of exclusivity in the making of global tax norm but not as intensely as it is done in the sphere of TWAIL and International Law. James Thuo Gathii is renowned for his writing on Twailing International Law but not International Tax.

[177] Jalia Kangave, "Taxing Twail: A Prelimnary Inquiry inTo TWAIL's Application to the Taxation of Foreign Direct Investment." (2008) 10:1 Int Community Law Rev 389.

powerful states with comparable bargaining power.[178] *"Economically powerful states"* precludes developing countries. Clearly, if developing nations are not powerful, and therefore are not at the bargaining table, the rules forged cannot reflect their interests. Arguably, the tax governance rules of the OECD embody the perspectives of chiefly 'developed', economically powerful states, rather than those of 'developing', less powerful, states. This makes it illegitimate, or simply wrong, to foist governance created by some onto others. Conceptually, it derogates from any sense that international governance is, in its content, reflective of the interests of a globally inclusive community.

As discussed earlier, states are only bound, under international law, to agreements to which they consent to be bound. The exception to this is customary international law. Customary norms are binding despite individual states having not specifically agreed to be bound. The OECD's role in international tax is so prominent that its rules arguably constitute customary international law. To developing nations, this obviously means that they are subjected to tax rules heavily shaped, at least in their inception, by developed nations. The 1963 OECD model convention is a good example of this. It was formed by the closed narrow group of OECD member countries. An "ad hoc group of experts" from developing countries did clamor, urging the model was unacceptable to developing countries.[179] In response to this clamoring, the United Nation created an alternative model to address tax issues between developed and developing countries.[180] OECD rules are not formed by an inclusive actor.

[178] Jalia Kangave, "The Dominant Voices in Double Taxation Agreements: A Critical Analysis of the 'Dividend' Article in the Agreement between Uganda and the Netherlands" (2009) 11:4 Int Community Law Rev 387, online: <http://booksandjournals.brillonline.com/content/journals/10.1163/187197409x12525781476123>.
[179] Diane M Ring, "Who is Making International Tax Policy? International Organizations as Power Players in a High Stakes World" (2010) 33:3 Fordham Int Law J 649, online: <http://lawdigitalcommons.bc.edu/lsfp>.
[180] *Ibid.*

They are forged by one voice- the developed countries. It is therefore the 'customs' of these states that become customary international law.

The ICC was the first non-state actor to grapple with international taxation. The constitution of this organisation was not a reflection of any struggling nation.[181] For that matter, neither could any imperial power legitimately claim, as a participant in the ICC, to represent the interests of any colonies. Such representation would be 'imperialistic', an incident of colonialism.

When the League of Nations took over from the ICC, it was much larger, and much more inclusive, international body. So was its successor, the United Nations. After playing their modest roles in international tax law, the OECD entered the fray. This returned participation to a narrow constituency. To an extent, norm formation shifted from non-inclusion (the ICC), to inclusion (the League of the Nations and the United Nations) and then reverted back to exclusivity (the OECD). Governance passed from an organization which did not represent the interest of developing countries (the ICC) to a more representative one (the League of Nations) and back to a less representative organ (the OECD). TWAIL bemoans the fact that the making of international tax norms has not reflected any progressive effort to include developing countries.

Christians, one of the few to contemplate the developed versus developing country angle, holds that globalized tax policies are consensually forged by world's wealthiest countries based on "mutually agreeable norms."[182] The OECD is an example of "a

[181] See Dominic Kelly "The Business of Diplomacy: The International Chamber of Commerce meets the United Nations" (2001), 74:01 CSGR Working Paper, p.10. The ICC was formed by influential industrialists and traders from Belgium, France, Italy, the UK and the United States.

[182] Allison Christians, "Global Trends and Constraints on Tax Policy in the Least Developed Countries" (2010), 42:2:1 239.

transnational institution used by nations for international tax networks to share expertise and experience, emulate each other, and pressure each other to achieve common tax goals"[183] The concept of "nation", is not representative of all nations of the world. There is a distinction between developed nations and less developed nations. Various scholars have written that the rules of international law and international tax law favour the west against 'others".[184] The first Secretary- General of the OECD made an instructive remark when he said:

> The industrial countries with market economies have a definite mission in the world during the present phase of history. They have been the forerunners in economic development; and they will remain for a long time the pioneers in a number of fields because their structures are more refined and their national economies more interwoven ... They can, therefore, develop certain techniques of economic policy-making that can later be transferred to other parts of the world ... that are less highly developed.[185]

The flavour of this 'western' distortion is evident in the OECD works related to harmful tax competition. Rather than inclusive deliberations, the member countries of the OECD solely determined the recommendations and immediately deemed many "less developed" small islands to be tax havens.[186] The President of Nauru, a small island nation of considerable prominence in international finance, raised a pertinent question during a deliberation on harmful tax competition. He cogently asked who was being harmed. In answering his own

[183] *Ibid.*
[184] *Ibid.*
[185] *Supra* note 126 at 3.
[186] *Ibid.*

question, he provided: "I put it to you that the fact that many small island countries choose not to levy taxes on their people does not harm the people of that [sic] country."[187]

In international tax forums, not all voices are equally heard. As mentioned previously, the OECD harmful tax competition, or tax haven, undertakings responded to the perceived evil of using tax incentives to attract foreign investment. The trend of using tax incentives, tax holidays and tax-free zones is traceable to the mid-1980s when the US government decided to forgo 'tax on portfolio interest earned by an individual."[188] The United Sates acknowledged that a country ought not to tax interest income "because individuals have the option of investing their capital in countries that allow [them] tax-free investment."[189] This opened the floodgates for other developed nations - the UK, Netherlands, Belgium, France, Germany, Denmark and Spain - to follow the US precedent. No one objected to the United States' use of tax incentives to solicit investment. Incentives arguably only became problematic when used by 'other' nations. Developing countries used incentives to pull resources from higher- taxing jurisdictions, largely OECD member countries. It is these actions that elicited the OECD reprisals. Developing countries' became 'tax havens', their blossoming economies identified as 'harmful tax practices all because they view the non-taxation of foreign investment as effectively required to compete internationally, rather than an independent domestic policy decision.'[190]

When the US decided to forgo domestic taxation on portfolio interest, it was seeking to encourage foreign investment. Domestic taxation of interest would have fettered its attractiveness as a destination. Nigeria has recently put in place policies to attract foreign

[187] Javier G. Salinas, "The OECD Tax Competition Initiative: A Critique of its Merits in the Global Marketplace" (2003), 25:3 Houst J Int'l Law 31.
[188] *Ibid*.
[189] *Ibid.*
[190] *Ibid.*

investment. It guarantees certain tax-related benefits to companies that locate their operations within Nigeria. This includes complete exemption from all federal, state and local government taxes, rates, customs duties and levies, tax-free import of goods and capital, tax free repatriation of profits, and a tax subsidy in the form of rent-free land for the first six months of operation to any company that locates its operations in any of Nigeria's sixteen free zones.[191]

Nigeria, a developing nation, has not, as yet, been chastened for any pairing of tax incentives with domestic economic development. Conceptually, there is no appreciable difference between Nigeria and the US with respect to their use of tax incentives to further their own domestic economic agenda. However, if the status of the actor is relevant, as the general order of international tax suggests, such chastening may very well loom on the horizon. Nigeria is not the United States. Its voice is not quite as influential. Developing nations are not heard.

Moreover, arguably the OECD has not been particularly attentive in scrutinizing the compliance of its members. It is true that some non-western states bid for investment through concessionary fiscal arrangements. These tend is to be blacklisted by the OECD. There are referred to 'uncooperative tax havens.[192] In sharp contrast, some OECD members, and other developed nations, actively engage in preferential tax regimes yet are not subject to sanction.[193] Contrary to popular belief, tax havens are not always found in developing countries. Numerous works point out that developed countries such as the United States, the UK, the Netherlands,

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[191] *Ibid* at 16, n 52.

[192] The thirty-five jurisdictions blacklisted were: Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Commonwealth of Dominica, Gibraltar, Grenada, Guernsey/ Sark/Alderney, Isle of Man, Jersey, Liberia, Principality of Liechtenstein, Republic of the Maldives, Republic of the Marshall Islands, Principality of Monaco, Montserrat, Republic of Nauru, Netherlands Antilles, Niue, Panama, Samoa, Republic of the Seychelles, St. Lucia, Federation of St. Kitts and Nevis, St. Vincent and the Grenadines, Tonga, Turks and Caicos Islands, United States Virgin Islands, and Republic of Vanuatu.

[193] See the Business and Industry Advisory Committee's response, reprinted in "A Business View of Tax Competition: Business and Industry Advisory Committee to the OECD", (1999) Tax Notes Int'l, vol 19, No 3 at 281-287.

Denmark, Hungary, Iceland, Israel, Portugal, and Canada share the characteristics of tax havens.[194] In the United States, states such as Wyoming, Delaware and Nevada have many 'tax haven' traits. These include the "absence of reporting requirements and the failure to tax interest and other exempt passive income paid to foreign entities including tax fraud."[195] International condemnation rarely settles on the United States. Developing nations are, by far, the most common recipients of condemnation.

Through the lens of TWAIL, the BEPS and related transfer-pricing global governance initiatives are equally suspect for embodying the prerogatives of developed nations. Obviously, the formation of such governance through a body that does fully represent the interests of all members of the global community retains its cogency. Admittedly, the OECD has slightly broadened its participatory remit.[196] Increasing complements of jurisdictions are formal members although not developing countries.[197]

BEPS became an issue when the leaders of the G-20 countries realized that Multi National Enterprises (MNEs) were exploiting tax regimes which allowed them "to shift income to low-tax or no-tax jurisdictions and expenses to high-tax jurisdictions, thereby eroding the corporate income tax base of higher tax, often larger market economies."[198] This action was seen as a threat to the economic growth of the G-20 countries. In response, the G-20 demanded that the OECD design rules to curb this erosion. As earlier explained, the arms' length principle was introduced to "prevent MNCs from using transfer pricing to create tax advantages for themselves because they operate in group form rather than conducting business

[194] Australian Federal Parliament, "International Tax Agreements Amendment", Bills Digest No 22 2014–15, online: <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1415a/15bd022>.
[195] Jane G. Gravelle, "Tax havens: International tax avoidance and evasion" (2015) Corp Int Tax Anal Reforms 89.
[196] At present, 36 countries are formal members: http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm.
[197] The OECD more readily acknowledges, or speaks of, the interests of developing nations.
[198] *Supra* note 35, p.1145.

as independent enterprises transacting with one another across borders, and as a result can dictate the pricing of inter-firm cross-border transactions."[199]

Suffice to say MNEs have a penchant for using national borders to lessen their tax burden. In a rather twisted, sarcastic statement, a Director and Senior adviser with the OECD quipped that "taxes are paid by the naive. MNEs stand accused of dodging taxes all around the world and in particular developing countries where tax revenue is critical to foster long-term development."[200]

It is true that the OECD BEPS project are progressive, intended to curb the MNEs unscrupulous practices given the "rather weak domestic legislation of developing countries."[201] However, the tax bases of developing countries continue to shrink under the influence of MNEs.[202] Moreover, most aspects of global tax law pay significant credence to the idea that entitlement to tax ought to reside within the jurisdiction within which significant economic activity takes place. Many developing nations have achieved significant prosperity by becoming international financial centers, places which, amongst other attributes, tend to have low, to non-existence, tax rates. In framing the concept of the location of economic activity, smaller, developing nations stand accused of hosting no 'economic activity' of significance:

> [...] Places that economic activities "should not" be include the Cayman Islands. Strictly speaking, it does not make economic sense for the Cayman Islands to serve as the world's fifth largest financial centre. It does not make sense for the Marshall Islands, Vanuatu or

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[199] *Ibid* at p. 1160.
[200] Pascal Saint- Amans & Raffaele Russo, "What the BEPS are we talking about?, (2018 OECD Forum 2018) online: <http://www.oecd.org/forum/what-the-beps-are-we-talking-about.htm>.
[201] Gokul Chaudhri, New architecture for international taxation, (2015 October 8) online: <https://www.livemint.com/Opinion/LqDUtn4pMEDh34k4mcnb9O/New-architecture-for-international-taxation.html.>.
[202] *Supra* note 124, p.10.

> Liberia to be the world's giant shipping nations. There is no obvious economic reasons why small Pacific islands are at the fore front of the telecommunications revolution, nor Guyana and Niue are the central routing areas for internet porn...[203]

4.2 International Tax Governance and the Developing Country of Nigeria.

Taxation in what is now known as Nigeria predates 1914 - long before the discrete communities that constitute modern Nigeria were amalgamated, and long before Lord Lugard, the representative of the British colonizers named the country Nigeria. Taxes levied on transactions or labor engendered traditional communal development, the moneys invested in the essential infrastructure such as roads, places of worship, and town halls. Administration of the public tithing system was rather informal, fashioned around the peculiarities of discrete communities. Later, in Northern Nigeria, North African Arabs introduced an elaborate tax system based on Islamic law. [204] Adherence to an Islamic ethos made for effective compliance with tax exigencies.

When the discrete communities of modern Nigeria were politically amalgamated into a federated entity in 1914, the British Colonialists introduced the concept of community tax and land revenue proclamation tax. This led to the assertion that modern income taxation in Nigeria is attributable to the British, even if all the British did was change the tax nomenclature. Taxation was a piece of the Nigerian world. Britain did introduce something new.

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[203] Ronen Palan, "Offshore and the Structural Enablement of Sovereignty in Offshore Centres and Tax Havens: The Rise of Global Capital" (1999), Mark Hamptons & Jason Abbott, eds, at 35. Niue is a small island nation in the South Pacific Ocean.
[204] *Ibid.*

Present-day Nigeria is a federal democracy with three tiers of government -federal, state, and local - empowered under the Federal Constitution to levy and enforce taxation. Despite this orderly division, the Nigerian tax system is riddled with problems: multiplicity of taxes, inequitable laws, ineffective enforcement and maladministration.[205] Recently, to address these issues in a "rapidly changing business climate," the Nigerian Federal Executive Council approved a national tax policy to:

> [...] guide the operation and review of the tax system; provide the basis for future tax legislation and administration; serve as a point of reference for all stakeholders on taxation; provide benchmark on which stakeholders shall be held accountable; and provide clarity on the roles and responsibilities of stakeholders in the tax system.[206]

Nigeria is regarded as the biggest economy in Africa and the 28th largest in the world.[207] Nigerian tax treaties are principally tailored to the OECD Model Conventions. Nigeria signed treaties based on the understanding that the treaties would be mutually beneficial. More than 12 comprehensive tax treaties have been signed by Nigeria.[208]

As the 28th largest economy in the world, it might readily be anticipated that Nigeria ought to be a participant in matters of international taxation. It is not, from the perspective of pure economics, a small player, an insignificant region. It is the largest of what are commonly classified as developing nations. Yet it is not part of the OECD. The size of its economy does

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[205] *Ibid*.
[206].Federal Ministry of Finance, *National Tax Policy* (Abuja, 2017), online: <http://pwcnigeria.typepad.com/files/fec-approved-ntp---feb-1-2017.pdf>.
[207] World Atlas, "The Biggest Economies in Africa", online: <https://www.worldatlas.com/articles/the-biggest-economies-in-africa.html>.
[208] Newsletters, Tax Section, WTA, online: <http://newsletters.usdbriefs.com/2015/Tax/WTA/150424_1.html>.

not give it a place at the global tax governance table. And despite her acceptance of rule forged in her absence, OECD tax governance has little relevance to Nigerian domestic realities.

In 2012, the transfer-pricing initiatives discussed in the previous chapter were introduced in Nigeria. Accordingly, where connected parties enter into a transaction, the profit so made must be determined by reference to the principle of 'arm's length'.[209] Recall that this principle aims to prevent connected parties, chiefly multi-national enterprises (MNE) operating in multiple jurisdictions, from transferring profits between jurisdictions. Transfer-pricing rules are meant to curb egregious practices by MNEs. They attend to the OECD concern that MNEs exploit their relatedness by moving taxable earnings to favourable taxation climes.

Despite acceding to the edicts of the international tax regime, the entire engagement with transfer-pricing is grossly inapplicable to the realities of Nigeria in the arena of tax. Nigeria lacks the proper capacity to monitor any putative transfer pricing.[210] Administratively, it is a mess. It is lacking even in the bedrock ingredients of transfer-pricing regulation, trained professionals capable of engaging with, understanding, and monitoring taxation activity. [211]

Although Nigeria took steps towards adopting the global transfer-pricing rules, it is an open secret that the internal tax issues in Nigeria need first to be addressed. Any dividends born of transfer-pricing regulation stand far back in the line of domestic priorities. Notably, Nigeria was not one of the countries that formulated the transfer-pricing policy. If Nigeria had been at the table when the policies were being formulated, it might have pressed for technical blueprints on how to build a sustainable transfer-pricing regime and urged the need to assist

[209] *Ibid*.
[210] *Ibid.*
[211] *Ibid.*

developing countries in creating the institutional capacity to make that happen.[212] In this, in terms of global regulation, Nigeria's tax interest lies more fully in capacity building. Helping developing countries to manage and administer taxation has never figures on the international tax agenda. African States repeatedly face issues such as lack of effective intellectual property laws (a significant piece of global tax structuring), an inability to tax intangibles, insufficient financial databases for processing transfer-pricing compliance and trained professionals to manage domestic, let alone, international taxation.[213]

Similar themes shape Nigeria's perspective on base-erosion and profit shifting. As explained previously, the ability of tax payers, corporate entities in particular, to avoid domestic tax burdens by migrating taxability to lower tax jurisdictions precipitated the OECD BEPS initiative.[214] It aims to prevent treaty shopping and the shifting of profits by multinationals.[215] In 2017, Nigeria signed two Multilateral Conventions, including the Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, popularly known as the BEPS.[216] Although Nigeria has incorporated the BEPS strategy into tax law, the incessant problem of untrained professionals- auditors, lawyers, economists and accountants - remains. While it undoubtedly has an overarching interest in ensuring that its domestic taxation base is not eroded by profit shifting, Nigeria lacks the domestic capacity to effectively attend to that

[212] Pricewaterhousecoopers, "Spotlight on Africa's Transfer Pricing Landscape" (2012), online: <https://www.pwc.com/gx/en/tax/transfer-pricing/management-strategy/assets/pwc-transfer-pricing-africa-pdf>.
[213] *Ibid.*
[214] *Ibid*.
[215] The key objective of the OECD BEPS project of the OECD's was to provide "governments/ tax administrators with clear international solutions for fighting aggressive corporate tax planning strategies that artificially shift profits to locations" where the tax system is more favourable: Tax Newsletter, "Changing international tax landscape What is the local impact of Base Erosion and Profit Shifting (BEPS) anti-tax avoidance initiatives ?" (2015) September 2014.
[216] OECD, "Nigeria Signs Multilateral BEPS Convention and CRS Multilateral Competent Authority Agreement to Tackle International Tax Avoidance and Evasion", online: <http://www.oecd.org/tax/nigeria-signs-multilateral-beps-convention-and-crs-multilateral-competent-authority-agreement-to-tackle-international-tax-avoidance-and-evasion.htm>.

problem. Again, had this developing country been the author of international tax rules, it would likely have made capacity-building a centerpiece.

4.3 TWAIL-Informed International Tax Governance

As noted in chapter three, TWAIL offers a different perspective on international law. It is a voice of the marginalized, of the dominated. It challenges the legitimacy of international law. By incorporating the perspectives of developing nations, it suggests that international law has birthed structures that ostracize and isolate the people of the third world. TWAIL aims to "transform international law from being a language of oppression to a language of emancipation-a body of rules and practices that reflect and embody the struggles and aspirations of Third World peoples and which, thereby, promotes truly global justice."[217] It does not necessarily seek to fully displace or undermine existent international law. Rather, it seeks to ensure that global strategies attend to the very real problems that third world countries face. As Eslava and Pahuja explain: "TWAIL scholarship is more interested in overcoming international law's problems while still remaining committed to the idea of an international normative regime largely based on existing institutional structures."[218] TWAIL seeks out "possibilities for egalitarian change in a broad variety of areas in the fields of public international law and international economic law;" it seeks to address problems related to "society, politics, identity and economics- with an underlying commitment to democratic values and concerns in relations within and between the Third World and developed

[217] Christians, *supra* note 185.
[218] *Ibid.*

countries."[219] Yet since its first appearance in early 1990s, TWAIL has arguably yielded criticism without offering any solutions to the existing problems.[220]

Drawing upon the foregoing discussion of developing countries and international tax governance, it is possible to tentatively suggest certain ways of moving forward. First, it is important that the legitimacy of the TWAIL critique be acknowledged. Whether within the context of the broader framework of international law, or within the narrower remit of international taxation, TWAIL brings something important. Perspectives, experiences and interests shape law. In the international realm, the perspectives, experiences and interests have principally been those of the powerful, of the developed nations. Along with other critical, nascent, approaches to international law, TWAIL is legitimate in its own right. Although the experiences, perspectives and interests of developing nations are not necessary always harmonious, TWAIL permits some exposure of the latent bias embedded in international law.

Second, from the initial work by the ICC through to OECD intervention, it is clear that international tax governance has not been forged through global participation. It reflects the prerogatives of its participants precisely because these have been its chief architects. To revisit the President of Nauru's comment with regard to who is 'harmed' by 'harmful tax competition' and tax havens: "I put it to you that the fact that many small island countries choose not to levy taxes on their people does not harm the people of that [sic] country."[221] Had those 'small island' countries participated in the creation of global governance, they might have crafted an edifice devoid of any preoccupation with 'harmful' global taxation practices.

TWAIL underscores that it is crucial that developing nations, or some more inclusive vision of global affairs, shape any development of international tax governance. With respect

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[219] *Ibid.*
[220] *Ibid.*
[221] *Supra* note 190.

to the OECD, this might merely assume the form of a collective voice – representative perhaps of African countries, former colonies and interested smaller nations – or the direct expansion of its remit to formally include the 30 most economically significantly states. At the very least, this would give Nigeria a chair at the negotiation table. Likewise, it might be advantageous for developing countries to formally unit and forge their own unique vision of global governance. While it is unlikely that such an organization would threaten the authority of the OECD, it might force better attention to the views of developing nations.

A third way to begin to venture towards a more global order more reflective of TWAIL might to be to place the issue of jurisdictional capacity onto the OECD's agenda. The Nigerian experience with international taxation indicates the abyss between international governance and domestic capacity. To an extent, in signing onto OECD initiatives, the actions of Nigeria are formal, not substantive. If Nigeria lacks the institutional capacity – the financial experts and the technological expertise – to realize any internal substantive compliance with global norms, then its signing onto global regulation is practically meaningless. If, indeed, institutional capacity is a problem shared by developing nations, it would improve upon the content of international governance to have that governance specifically attend to this problem.

Conclusion

This chapter has demonstrated that the principal organ of tax governance, the OECD, does not include developing countries. It has shown the tendency of that exclusion to create laws that favour its members. It has used Nigeria to point out some of the problems that inhabit the current regime of global governance. It has suggested, at the very least, that the system needs to be adjusted in a manner consistent with the interests of developing nations.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Summary

This thesis examined aspects of international tax governance from the perspective of developing nations. It began by surveying the main intersections between international law and international tax given that taxation is not always identified as part of the conventional world of international law. It identified the principal source of international governance as a non-state actor and discussed various aspects of international law relevant to governance structure. In introducing third world approaches to international law (TWAIL), approaches that have yet to fully mined in a tax setting, it offered a critical glimpse of a historical legal international narrative that failed to acknowledge developing nations.

Against this backdrop, it then proceeded to locate TWAIL within international legal traditions. It identified TWAIL with a nascent emerging critical landscape. Along with feminism and policy-oriented approaches, it discussed third world analysis as proceeding from a different starting point, a starting point centered on developing nations. Along with other critical investigations of international law, the work emphasized that TWAIL did not seek to replace the existing legal order but merely to refine or adjust it to suit the exigencies, or to reflect the interests of, developing nations.

With a sense of international taxation established, the next part of the thesis canvassed the evolution of the governance of international taxation. It explored the contributions of the International Chamber of Commerce, the League of Nations, the United Nations and the Organization of Economic Cooperation and Development (OECD). In rehearsing that evolution, it gently exposed the inherent developing country bias. From the initial

concentration on double taxation to tax havens and harmful tax practices through to transfer-pricing and base-erosion profit-shifting, the thesis drew out the penchant of tax governance to center on the prerogatives of developed nations.

Critically, and admittedly tentatively, the thesis then sought to interrogate international tax governance through a developing country lens. It strongly suggested that international tax ordering reflects the interests of developing nations. It showed that the OECD, the most influential organ in global tax, does not represent a truly 'global' community. The rules it promulgated, its exercises in the condemnation of tax havens and harmful tax practices, showed no consideration of the perspectives of developing nations. To more fully illustrate this pronounced ignorance of the interests of developing nations, it demonstrated that while the developing country of Nigeria has acceded to the mandates of international tax governance, that accession is inconsistent with the realities of the country.

5.1 RECOMMENDATIONS AND CONCLUSION

This thesis does not castigate the achievements of the OECD in terms of tax governance. It does not hold the OECD responsible for failing to create a perfect tax climate, a climate that accommodates the preferences of all nations. One state, or many states, interests in a particular type of international ordering may very well collide. Tax is a source of revenue. Individual states will naturally prefer a global model that advances, or protects, their entitlements to revenues.

However, it is equally clear that existent international taxation norms embody the interests of developing nations. Only a fool would anticipate that a developed country would advocate a tax posture that favours a developing country at the expense of its own domestic

revenue concerns. In this, in moving forward, the overarching recommendation can only be that developing nations formally participate in the construction of international tax governance. That recommendation might, to a degree, be accommodated by the formal reconstruction of the OECD with respect to taxation governance. That reconstruction might include some balance between developed and developing countries. It might be reconstructed through formal attention, in tax matters, to groups that represent developing nations. Notably, developing nations are not a cohesive set. The taxation interests of discrete marginalized nations may very well not cohere. Yet it would be a step in a TWAIL direction to begin to re-think the constitution of the central source of international tax governance.

Political realities likely preclude any such ambitious reconstitution. Therefore, a second tentative recommendation would be that developing nations align and forge their own united position on international tax ordering. While the admission of an economically significant nation such as Nigeria to the international tax discourse might remedy some of tendency of the OECD to privilege the voices of developed countries, it would remain a sole voice of discontent. Collective resistant, the collective forging of a vision of international governance, might be more influential.

Finally, it is lucidly clear that, apart from any practical solutions to the exclusive international tax ordering, more work is needed in integrating TWAIL with taxation. Slim are the works that speak of the intersection of international law and international tax. Slimmer are those that offer a TWAIL-based analysis. At the very least, a little more study of relationships between international tax and developing nations is in order.

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