

Taxation and the Realisation of Socioeconomic Rights in Africa: What Is the Role of International Cooperation?

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Abstract

Socioeconomic rights (SR) aim to address people's essential material needs, hence their realisation is central towards addressing extreme poverty. Unfortunately, the realisation of these rights is excruciatingly lacking in most African states. A common argument advanced for this non-realisation is that African states cannot fulfil these rights owing to resource constraints. Several scholars have highlighted the essentialness of an effective state tax revenue assessment and collection system towards addressing these resource constraints. Some scholars argue that African states should be accountable for how they use tax revenue to eliminate or reduce extreme poverty. However, existing literature also suggest that the international tax system promotes the interests of the elites, in individual and state perspectives, while attenuating social welfare for the poor. Beyond domestic taxation policy and duty to realise SR locally in Africa, there is an extraterritorial obligation on developed states to help African states in harnessing taxes to realise SR. Drawing on existing human rights instruments and literature, this chapter locates and develops an international cooperation model, as a useful vehicle for realisation of SR in Africa, using Nigeria as a case study. Through the lens of Third World Approaches to International Law (TWAIL), the chapter engages with the structural and economic imbalances between developed states and developing states, which make most African states unable to effectively deploy taxation to realise SR. To achieve this goal, the chapter first problematises the duty to cooperate internationally, and then assesses the evolving normative framework on international tax cooperation as a tool for realisation of SR. The chapter discusses the limits and latitudes of this duty to cooperate. It argues that the duty requires developed states to, among others, provide economic and technical support, avoid being tax havens, deploy their power and influence in the Bretton Woods institutions, and ensure that their multinational corporations operating in Africa are not only tax law-compliant, but also complying with human rights obligations.

1. Introduction

Over the years, taxation has remained an under-explored topic on the human rights agenda.¹ However, there is a current shift as countries have begun to intensify efforts to mobilise sufficient revenue through taxation to finance the much-needed social services including education and health.² Taxation unarguably remains a major source of providing the facilities needed to realise socioeconomic Rights (SR) or meet the Sustainable Development Goals (SDGs). Target 17.1 of the SDGs requires developed states to provide international support to developing countries to strengthen their domestic resource mobilisation, and improve domestic capacity for tax and other revenue collection. Thus, this chapter examines the relevance of international tax cooperation in realising SR, and it highlights issues around tax injustice and social inequalities, which international cooperation could address.

The importance of realising SR to meet the SDGs cannot be overestimated. SR aim to empower people with the material conditions and facilities necessary to lead a life of dignity. Thus, about 90 per cent of the world's constitutions recognise at least one SR, either in a justiciable or aspirational manner.³ The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises SR as including the right to work,⁴ the right to just and favourable conditions of work,⁵ the right to trade union membership,⁶ the right to social security,⁷ the right to family life,⁸ the right to an adequate standard of living,⁹ the right to enjoy the highest attainable standard of physical and mental health,¹⁰ and the right to education.¹¹ This chapter examines the engagement of international tax cooperation as a means of realising SR in Africa which currently suffers an acute dearth of facilities necessary

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¹ Ignacio Saiz, 'Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective' in Aoife Nolan, Rory O'Connell & Colin Harvey (eds) *Human Rights and Public Finance: Budgets & the Promotion of Economic and Social Rights* (Hart Publishing, 2013) 77.

² Tom Cardamone & Edith Nyabicha, 'Curbing Illicit Financial Flows to Enhance Domestic Resource Mobilisation: Leveraging Transfer Pricing Strategies to Close Tax Loopholes in Uganda' (November 2023 Policy Brief, Global Financial Integrity) 1.

³ Courtney Jung, Ran Hirschl & Evan Rosevear, 'Economic and Social Rights in National Constitutions' (2014) 62 *Am J Comp L* 1043-1094, 1053.

⁴ Art. 6.

⁵ Art. 7.

⁶ Art. 8.

⁷ Art. 9.

⁸ Art. 10.

⁹ Art 11.

¹⁰ Art. 12.

¹¹ Arts. 13 & 14.

Forthcoming as a book chapter in Eghosa Ekhatior, Chisa Onyejekwe and Newman Richards (eds) *Taxation, Human Rights and Sustainable Development* (Routledge, 2024)

for the realisation of these rights. International cooperation is relevant for the prevention of double taxation and non-taxation of eligible taxpayers.¹²

Over the past 20 years, many African countries have embraced SR by constitutionally recognising them either as justiciable rights¹³ or as directive principles of state policy (Directive Principles).¹⁴ Newer constitutions in Africa tilt towards justiciability of SR.¹⁵ This constitutional recognition has fed into an evolving positive judicial approach to SR in Africa. For example, the Supreme Court of Kenya recently observed that the ‘... question as to when the right to housing accrues, in our view, is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country’.¹⁶ The apex court also stated that:

Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The Courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of “the wretched of the earth”.¹⁷

Despite this evolving positive approach to SR in Africa, non-realisation of SR persists. A common argument usually advanced for this non-realisation is that African states cannot fulfil SR owing to resource constraints. The realisation of SR ‘depends on the availability of... material resources. Given the fact that our society is incredulously unequal, with the majority ...condemned to grinding poverty’, achieving these rights ‘remains but a pipe-dream for many’.¹⁸ Successive governments in Africa keep ‘erecting the defence of “lack of resources”’,¹⁹ in their bid to escape their SR obligations. To navigate this resource concern, some scholars have highlighted the essentialness of an effective state tax assessment and collection system in enhancing the realisation of SR.²⁰

¹² Nigeria’s National Tax Policy(NTP), 2017, para 2.2.7., available at: <https://www.firs.gov.ng/wp-content/uploads/2021/01/National-Tax-Policy-Revised-2017.pdf> (accessed on 04/01/ 2024).

¹³ For example, arts. 19, 20 and 43 of Kenyan Constitution 2010.

¹⁴ For example, chapter II of the Constitution of the Federal Republic of Nigeria, 1999.

¹⁵ Danwood Mzikenge Chirwa & Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa*, (CUP, 2016) xxi – xxii.

¹⁶ *Mitu-Bell Welfare Society v Kenya Airports Authority & Others* [2021] eKLR (Petition 3 of 2018), [2021] KESC 34 (KLR), ILDC 3265 (KE 2021), 11th January 2021, Supreme Court, para 149.

¹⁷ *Supra*, para 153.

¹⁸ *Supra*, para 149.

¹⁹ *Supra*.

²⁰ See Harun Rashid, Hussein Warsame & Shahid Khan, ‘Tax Collections and Democracy in Developing and Developed Countries’ in Ali Farazmand (ed) *Global Encyclopedia of Public Administration, Public Policy, and*

However, beyond state domestic tax system, international treaties and cooperation on taxation are necessary for states' domestic compliance with human rights obligations.²¹ This chapter examines the role of international tax cooperation, as a useful vehicle for mobilising resources for SR realisation in Africa. Through the lens of Third World Approaches to International Law (TWAIL), it argues that no matter how much they try, and owing to structural and economic imbalances between developed countries and developing countries, African states may not be able to effectively deploy taxation to fully realise SR of their people without the cooperation and assistance from developed states.

To achieve its set out objective, this chapter proceeds in eight sections. While this section introduces the work, section two discusses the relationship between taxation and SR realisation. Section three examines international cooperation in the context of SR realisation and section four unpacks TWAIL as an interpretive tool. In section five, the chapter engages TWAIL to assess the Organisation for Economic Cooperation and Development (OECD) framework on tax cooperation while section six examines the UN current work on tax cooperation. Section seven considers areas where international cooperation will be useful in enhancing SR realisation in Africa and section eight concludes the chapter.

2. Taxation and Realisation of SR

Taxation plays a key role in stimulating economic growth and enhancing sustainable development, leading to realisation of SR in any given nation. De Schutter notes that taxation is a human rights policy for several reasons.²² These reasons include the fact that taxation allows states to mobilise resources to realise SR, taxation is a means of wealth redistribution and taxation feeds into democratic participation and accountability.²³ It has been observed that 'healthy collections of tax provide state and local governments the money to improve education, hire police officers and firefighters, build and maintain roads, keep parks clean, and many other public services'.²⁴ The UN Committee on Economic, Social and Cultural Rights (CESCR) has also observed that a state's obligation to fulfil SR may 'require the mobilization of resources by the State, including by enforcing progressive taxation

Governance (Springer, 2021); Roger Gordon & Wei Li, 'Tax Structures in Developing Countries: Many Puzzles and a Possible Explanation' (2009) 93(7) *J Public Econ*.

²¹ For a detailed discussion on this, see Philip Alston & Nikki R. Reisch (eds), *Tax, Inequality, and Human Rights* (OUP 2019).

²² Olivier De Schutter, 'Taxing for the Realization of Economic, Social, and Cultural Rights' in Alston & Reisch (n 21) 60.

²³ *Ibid.*

²⁴ Halim Abdul & Rahman Mominur, 'The effect of taxation on sustainable development goals: Evidence from emerging countries' (2022) 8(9) *Heliyon* 3.

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schemes'.²⁵ Studies reveal that states which rely on domestic taxes as the main source of realising SR are more likely to be more answerable to their citizens than those who rely on natural resources or international aid.²⁶

One of the features of a well-functioning government is ability to mobilise tax revenue to provide public service or promote social welfare.²⁷ According to Roach,

Tax policy has important economic consequences,... Taxes can create incentives promoting desirable behavior and disincentives for unwanted behavior. Taxation provides a means to redistribute economic resources towards those with low incomes or special needs. Taxes provide the revenue needed for critical public services such as social security, health care, national defense, and education.²⁸

The above assertion finds corroboration in Turk's position that, 'progressive...measures of taxation can... lead to gentle and gradual forms of income redistribution within States...thereby creating conditions that enable a larger proportion of society to enjoy economic, social and cultural rights'.²⁹ Indeed, taxation can provide a foundation for the development of responsive and accountable governance in developing countries.³⁰ Taxation is central to the Sustainable Development Goals Agenda, because it provides 'a stable flow of revenue to finance development priorities, such as strengthening physical infrastructure, and is interwoven with numerous other policy areas, from good governance and formalizing the economy, to spurring growth'.³¹ Thus, in its Concluding Observations on Burundi, the CESCR suggested that the state should design and implement an effective tax collection system that is progressive and laced with social justice, and which takes a cautious approach to tax exemptions scheme which could undermine tax revenue.³² The CESCR took a similar position on the United Kingdom (UK) when it cautioned the UK against increase in

²⁵ CESCR, 'General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' para 23.

²⁶ Saiz (n 1) 83; Deborah Brautigam, Odd-Helge Fjeldstad & Mick Moore (eds), *Taxation and State-Building in Developing Countries: Capacity and Consent* (CUP, 2008); Michael L Rose, 'Does Taxation Lead to Representation?' (2004) 34 *British Journal of Political Science* 229.

²⁷ Diane Elson, Radhika Balakrishnan & James Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in Nolan, O'Connell & Harvey (n 1) 26.

²⁸ Brian Roach, 'Taxes in the United States: History, Fairness, and Current Political Issues', in *Global Development and Environment Institute* (Tufts University, 2010) 1.

²⁹ Danilo Turk, 'Report of the Special Rapporteur on the Realisation of Economic, Social and Cultural Rights' (UN Doc E/CN.4/Sub.2/1992/16).

³⁰ See generally Wilson Prichard, *Taxation, Responsiveness and Accountability in Sub-Saharan Africa: The Dynamics of Tax Bargaining* (CUP, 2015).

³¹ Mike Pfister, 'Taxation for Investment and Development: An Overview of Policy Challenges in Africa' (2009) 5, available at: <https://www.oecd.org/investment/investmentfordevelopment/43966821.pdf> (accessed on 03/01/2024).

³² CESCR, 'Concluding Observations on the Initial Report of Burundi' (15 October 2015) UN Doc E/C.12/BDI/CO/1, para 13f.

regressive indirect taxes and reduction in corporate income tax rate which could hamper domestic mobilisation of resources needed for realising SR.³³

International cooperation is key to the utilisation of taxes for realising SR. As Chowdhary & Picciotto assert, tax 'is the fundamental means by which States can fund the fulfilment of their domestic and international human rights obligations... International coordination and cooperation at all levels of government and civil society concerned with tax are essential to deliver this'.³⁴ The importance of the relationship between taxation and realisation of human rights is evident in relevant instruments.

For example, article 2(1) of ICESCR requires every state to take steps, to the 'maximum of its available resources', to realise SR progressively. This suggests that a state cannot be held accountable for not realising SR if it can show, for example through its reports to the UN bodies, that it has deployed the maximum of its domestically and internationally sourced available resources towards realising SR. So, without taxes being collected and utilised effectively, a state may not have the maximum available resources needed for SR realisation. Although 'available resources' within the context of article 2(1) of ICESCR go beyond financial resources and includes informational, natural, human and technological resources,³⁵ this chapter essentially focuses on resources from the perspective of finances sourced from taxation.

2.1. Tax Duties and SR Realisation in Africa: Nigeria as a Case Study

Article 29(6) of the African Charter on Human and Peoples' Rights (the African Charter) imposes a duty on the individual 'to work to the best of his [read their] abilities and competence, and to pay taxes imposed by law in the interest of the society'. Similarly, the African Commission Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (the Principles) impose duties on both the individual and the State as it relates to taxation as a means of realising SR. Hence, the Principles recognise that 'States need sufficient resources to progressively realise economic, social and cultural rights' and that there are 'a variety of means through which states may raise these resources, including

³³ CESCR, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland' (13 July 2016) UN Doc E/C.12/GBR/CO/6, para 16f.

³⁴ Abdul Muheet Chowdhary & Sol Picciotto, 'Streamlining the Architecture of International Tax through a UN Framework Convention on Tax Cooperation' (2021) 21 Tax Cooperation Policy Brief 6.

³⁵ See Robert E Robertson, 'Measuring State Compliance with the Obligation to devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Right' (1994) 16(4) Human Rights Quarterly 693-714, 695-697; Geraldine Van Bueren, 'Of Floors and Ceilings: Minimum Core Obligations and Children' in Danie Brand & Sage Russell (eds) *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives* (Protea Book House, 2002) 185.

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taxation'.³⁶ The Principles also state that the 'duty of the individual to pay taxes imposed by the African Charter implies that there is an obligation on the State to institute an effective and fair taxation system and a budgeting process that ensures that economic, social and cultural rights are prioritised in the distribution of resources'.³⁷

Thus, it is imperative that a state's taxation policy is effective and fair enough to correctly assess and collect taxes which are needed for meeting the SR needs of citizens and residents. Some scholars have argued that poor financial resources should be 'a basis for the enactment of legislation that guarantees revenue-generation for redistribution to the citizens through human rights enforcement'.³⁸ Indeed, the strength and efficacy of the tax system in a state are factors that feed into whether the state has available resources for human rights realisation.³⁹ This is because, the absence of a strong and effective tax system could trigger leakages that could remove or reduce the resources available for SR realisation.

As regards the duties created under the Principles above, it is unfortunate that some African states often emphasise the individual's duty to pay taxes but they fail to pay equal attention to the corresponding duty of states to use the resources derived from taxes to realise the SR of citizens. For instance, using Nigeria as a case study, the Nigerian Federal Government does not see itself as owing a duty to use taxes for SR realisation. This position is evinced in the Nigerian National Tax Policy (NTP) which defines tax as 'any compulsory payment to government imposed by law without direct benefit or return of value or a service whether it is called a tax or not'.⁴⁰ Although the NTP is not a legally binding document,⁴¹ it currently serves as the policy that guides the federal tax system in Nigeria, with its current non-committal position on benefits. This chapter argues that payment of taxes confers a corresponding right on the taxpayer to obtain direct and indirect benefits. As some authors assert, taxation is 'a process in which citizens entrust the government with a share of their income and in return expect efficient delivery of services'.⁴² Thus, this chapter argues that if

³⁶ See Principle 15 of the Principles.

³⁷ *Ibid.*

³⁸ Eghosa Ekhatior, Chisa Onyejekwe & Newman Richards, 'Human Rights and Taxation in Developing Countries: A Case for Tax Justice and Accountability in Africa' in Damilola Olawuyi & Oyeniyi Abe (eds) *Business and Human Rights Law and Practice in Africa* (Edward Elgar Publishing, 2022) 135.

³⁹ Committee on the Rights of the Child, 'Day of General Discussion – Resources for the Rights of the Child: Responsibility of States', 46th Session (2007) para 6.

⁴⁰ Nigeria's NTP, para 1.2.

⁴¹ See *UBN Plc v Ifeoruwa Nig. (Ent.) Ltd* (2007) 7 NWLR (pt 1032) 71 where it was held that a policy document is not legally binding.

⁴² Cardamone & Nyabicha (n2) 1.

the Nigerian government fails to provide efficient delivery of services in return of payment of taxes, that would be a violation of its SR obligations under ICESCR and domestic laws.

However, the Nigerian national and sub-national governments are always quick to assert that SR are not justiciable because they are provided for as Directive Principles in the Constitution,⁴³ but the same governments are quick to use the same Directive Principles⁴⁴ to argue that individuals owe a duty to pay taxes.⁴⁵ An effective and fair tax system should not only generate resources, but should also protect the human rights of taxpayers.⁴⁶

The Lagos State Government of Nigeria recently took the issue of taxation to a worrying dimension when it denied some pupils enrolment into the state public schools on the ground that the pupils' parents had no evidence of tax payment.⁴⁷ When the matter went to court, the trial court agreed with the government, stating that the right to education, being part of the Directive Principles under the Constitution, is not justiciable.⁴⁸ This judgment does not only punish innocent children for the sin of their parents, but it also flies in the face of relevant statutes that guarantee children's right to free and compulsory education. For example, sections 14(1) and 39(1) of the Child's Rights Law of Lagos State 2007, sections 13(1) and 14 of the Compulsory Free Universal Basic Education Law of Lagos State, 2005, article 17(1) of the African Charter⁴⁹, and article 11(1), (3) (a), (d) and (e) of the African Charter on the Rights and Welfare of the Child provide for children's right to education. Going by the decision of the Supreme Court of Nigeria in *Attorney-General of Ondo State v Attorney-General of the Federation and 35 Others*,⁵⁰ the enactment of these specific instruments to provide for the otherwise non-justiciable provisions of the Directive Principles, is an escape

⁴³ See Chapter II of the Nigerian Constitution.

⁴⁴ Section 24(f) of the Nigerian Constitution which is domiciled under the chapter on Directive Principles imposes a duty on every citizen to 'declare his income honestly to appropriate and lawful agencies and pay his tax promptly'.

⁴⁵ For example, see para 1.3 of Nigeria's NTP.

⁴⁶ Ekhaton, Onyejekwe and Richards (n 38) 137.

⁴⁷ See Shola Soley, 'Group Appeals Judgment On Tax Condition For Lagos Public School Enrolment'(Channels TV, 09 October 2023) available at: <https://www.channelstv.com/2023/10/09/group-appeals-court-judgment-on-access-to-public-schools> (accessed on 04/01/ 2024).

⁴⁸ *Incorporated Trustees of ISH-16 Human Rights & Social Justice Initiative (for and on Behalf of Disadvantaged Children of Lagos State) v Lagos State Government & Ors* (Suit No. ID/14042MFHR/22).

⁴⁹ This Charter has been legislatively domesticated and pronounced enforceable in Nigeria by the Supreme Court. It is superior to all domestic laws other than the Constitution. See *Fawehinmi v Abacha* (2000) 6 NWLR (pt 660)228; *Centre for Oil Pollution Watch v NNPC* [2019] 5 NWLR 518.

⁵⁰ (2002)9 NWLR (Pt. 772)222, (2002)6 SC (Pt 1)1.

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route to navigate the justiciability challenge.⁵¹ As the matter regarding the pupils has proceeded to the Court of Appeal, it is hoped that the appellate court will take a different view on the issue.

Despite the foregoing, it is not all a sorry situation in Nigeria. It is imperative to commend the Federal Government of Nigeria for some steps taken towards utilising taxes to realise the right to education which forms part of SR. For example, through the Tertiary Education Trust Fund (TETFund), the government now collects 2% education tax from the assessable profits of all registered companies in Nigeria.⁵² The proceeds of the tax is then utilised to build infrastructure, train lecturers and carry out other capacity-building activities within the Nigerian Higher and Further Education Sectors.⁵³ This move has boosted the capacity of Nigerian public universities to compete with their counterparts around the world.⁵⁴ This kind of move should be replicated in other sectors to fully realise SR in Nigeria.

That said, this chapter argues that an effective tax assessment and collection system for SR realisation may be unattainable in the absence of international cooperation among States. Research suggests that tax system design often promotes the interests of the elites, in individual and State perspectives, thereby attenuating social welfare of the poor,⁵⁵ hence the need for an international cooperation towards tax justice. As Roach argues,

Political leaders have used tax policy to promote their agendas by initiating various tax reforms: decreasing (or increasing) tax rates...The voluminous tax code is packed with rules that benefit a certain group of taxpayers while inevitably shifting more of the burden to others. Tax policy clearly reflects the expression of power...– those without power or favor are left paying more in taxes while others reap the benefits of lower taxes because of their political influence.⁵⁶

Thus, the formulation of tax policies often comes with political and economic interests of certain business groups and individuals who seek to take advantage of the policies, thereby

⁵¹ Philip E Oamen & Eunice O Erhagbe, 'The Impact of Climate Change on Economic and Social Rights Realisation in Nigeria: International Cooperation and Assistance to the Rescue?' (2021) 21 (2) *African Human Rights Law Journal* 1080-1111.

⁵² Section 1 of the Tertiary Education Trust Fund (Establishment, ETC) Act 2011.

⁵³ Udochukwu B. Akuru, 'Taxes to finance tertiary education: lessons from Nigeria's TETFund' (Global Dev., 10 May 2023) available at: <https://globaldev.blog/taxes-to-finance-tertiary-education-lessons-from-nigerias-tetfund/> (accessed on 01 April 2024).

⁵⁴ *Ibid.*

⁵⁵ Brett R Wilkinson & Amy M Hageman, 'The Role of Political Elites in Income Tax System Design and Tax Fairness' (2023) 55(3) *The British Accounting Review* 101172.

⁵⁶ Roach (n 28) 1.

attenuating the human rights of vulnerable people.⁵⁷ A state's failure to arrest corruption in its tax system amounts to failure to utilise the maximum of its available resources as required under article 2(1) of ICESCR.⁵⁸ Also, where a state perceives that national resources are not enough to realise the SR of its citizens, it owes the citizens a duty to request international cooperation and assistance.⁵⁹ Richer states to which such a request is made are obligated to provide the needed resources (broadly defined), provided that such provision will not lead to the richer states' failure to meet their own SR obligations to their own citizens domestically.⁶⁰ While a good tax policy 'shapes the environment in which international trade and investment take place',⁶¹ it is also pertinent to note the observation that 'a core challenge for African countries is finding the optimal balance between a tax regime that is business and investment friendly, and one which can leverage enough revenue for public service delivery'.⁶² Taxation is one major means of mobilising resources domestically towards meeting social welfare needs.⁶³ Effective tax policies should support sustainable economic development, reduce inequality, and promote growth.⁶⁴ Thus, scholars have advanced arguments that African States should be held accountable on how they design tax system-that enables tax evasion-and how they use tax revenue to eliminate or reduce extreme poverty.⁶⁵

Nonetheless, beyond state tax policy and African states' duty to realise SR domestically, there is an extraterritorial obligation on developed states to help developing states in harnessing taxes to realise SR. It has been suggested that 'economic, social, and cultural rights establish a clear role for the international community to support the realization of rights in low resource countries'.⁶⁶ While there are several ways this cooperation can be fostered,

⁵⁷ Ekhaton, Onyejekwe & Richards (n 38)127.

⁵⁸ See generally Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003).

⁵⁹ Elson, Balakrishnan & Heintz (n27) 16.

⁶⁰ See generally Philip Ebosetale Oamen, 'Realisation of Economic and Social Rights in Nigeria: The Role of National and International Cooperation' (PhD Thesis submitted and defended at the University of Birmingham, 2022).

⁶¹ Pfister (n31).

⁶² *Ibid.*

⁶³ See generally Newman U Richards, 'Sustainable Development Goals and Taxation in Nigeria' (2021) 47(3) Commonwealth Law Bulletin 570-588.

⁶⁴ Emo Idornigie Pearce & Chisa Onyejekwe, 'Taxation and the Implementation of Sustainable Development Goals in Nigeria' in Eghosa O Ekhaton, Serval Miller & Etinosa Igbinsosa (eds) *Implementing the Sustainable Development Goals in Nigeria: Barriers, Prospects and Strategies* (Routledge, 2021) 145.

⁶⁵ See Jia Liu & Olatunde Julius Otusanya, 'How Multinationals Avoid Taxes in Africa and what Should Change' in *(The Conversation, 05 April 2022)* available at: <https://theconversation.com/how-multinationals-avoid-taxes-in-africa-and-what-should-change-179797>; Olatunde Julius Otusanya, 'Anti-social Tax Practices and Social Economic Development in Nigeria: The Stakeholders' Perceptions' (2013) 2(4) AJAF 360.

⁶⁶ Jonathan Todres & Charlotte S Alexander, 'Bringing the Right to Education into the 21st Century' (2024) 42 Berkeley Journal of International Law (BJIL) available at SSRN: <https://ssrn.com/abstract=4391829> (accessed on 03/01/2024).

the main means will be in terms of providing technical support and cooperation in the fight against tax evasion.

A 2016 report on tax evasion in the United States of America (the US) reveals that, between 2008-2010, the gross tax gap due to tax evasion was \$458 billion.⁶⁷ If such ‘capital flight is occurring with [the US] regulatory frameworks commonly perceived as sound, one can imagine how many more opportunities exist for evasive practices in countries with weak regulatory and legal environments’.⁶⁸ Despite the challenges associated with the tax systems of developed countries, their systems still work better in terms of tax assessment and collection, and their effective tax collection and utilisation reflect on their better economic and social structures when compared with those of developing countries.⁶⁹ The developed countries should, therefore, cooperate with the developing countries to ensure that the latter are able to muster resources from taxation towards SR realisation. In this regard, this chapter echoes the words of developing countries under the auspices of G77 that:

Appropriate emphasis must be placed on an enabling global environment and global partnership for development, balanced against the increased emphasis being placed on domestic resource mobilization.... it is counterproductive to highlight the importance of domestic resource mobilization in developing countries, while at the same time not robustly tackle areas that impede their ability to capture necessary resources.⁷⁰

Thus, the above concern calls for international cooperation and assistance from developed countries in favour of developing countries, especially in Africa, to engender an effective tax legal and institutional regime, both at the domestic and international levels.

3. International Cooperation on SR Realisation

The role of international cooperation and assistance in realising SR is recognised in the United Nations normative framework. Although the nature and contours of this duty to cooperate internationally is still debatable,⁷¹ the duty is, at least, normatively recognised in

⁶⁷ Internal Revenue Service, ‘Federal Tax Compliance Research: Tax Gap Estimates for Tax Years 2008–2010’ Publication 1415 (Rev. 5-2016) Washington, DC, 6 available at: <https://www.irs.gov/pub/irs-soi/p1415.pdf> (accessed on 03/01/2024).

⁶⁸ Pfister (n31).

⁶⁹ Elson, Balakrishnan & Heintz (n 27) 27.

⁷⁰ G77, ‘Ministerial Declaration’ (2020) para 64, available at <https://www.g77.org/doc/Declaration2020.htm> (accessed on 10/01/2024).

⁷¹ See Meghan Campbell, ‘Cooperating to Continuously Improve Living Conditions’ in Jessie Hohmann & Beth Goldblatt(eds) *The Right to Continuous Improvement of Living Conditions* (Hart 2021) 41.

the ICESCR and the CESCR jurisprudence.⁷² For example, article 2(1) of ICESCR provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

It has been observed that the foregoing provisions create a treaty obligation which article 28 of the Universal Declaration of Human Rights (UDHR) inspired but could not achieve on its own.⁷³ This argument is plausible because, during the drafting of the ICESCR, poorer countries represented by Egypt and India argued that ‘the available resources of the smallest [poorest] countries, even if utilised to the maximum, would be insufficient, [and] as a result, those countries would have to fall back on international cooperation’.⁷⁴ Thus, Curtis and Darcy assert that,

...international cooperation can be characterised as a means of addressing the power differential between wealthy influential states and those states unable to realise the rights of their people. The concept of cooperation would then be fundamentally linked to this power differential, and obligations to cooperate would be based on any given State’s relative power to affect the realisation of rights in any other given State.⁷⁵

Put in another way, the need for international cooperation is informed by the stark reality on ground that some states are more powerful and richer than others, thus the need to prevent the use of the international order to suffocate less endowed States.⁷⁶ From a TWAIL perspective discussed below, this is particularly important against the backdrop of developed

⁷² See Hakeem Yusuf & Philip Oamen, ‘Realising Economic and Social Rights Beyond COVID-19: The Imperative of International Cooperation’ (2022) 32(1) *Indiana International & Comparative Law Review* 43-68.

⁷³ Josh Curtis & Shane Darcy ‘The Right to a Social and International Order for the Realisation of Human Rights: Article 28 of the Universal Declaration and International Cooperation’ in David Keane & Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future*, (Edward Elgar Publishing: 2012) available at <https://aran.library.nuigalway.ie/bitstream/handle/10379/2185/CURTIS%20AND%20DARCY%20Article%2028%20and%20International%20Coop.pdf?sequence=1&isAllowed=y> (accessed on 08/01/2024) 12.

⁷⁴ See Sigrun Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation*, (Intersentia, 2006) 85; Roland Burke, ‘Some Rights Are More Equal than Others: The Third World and the Transformation of Economic and Social Rights (2014) 3 *Humanity Journal* 427-448, 439.

⁷⁵ Curtis & Darcy (n73)13.

⁷⁶ Oamen (n 60) 159.

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countries' historical expropriation of developing countries through slave trade and colonialism.⁷⁷

Furthermore, several other provisions of ICESCR accentuate the role of international cooperation in realising SR. For example, article 11(1) provides that states shall take steps while 'recognizing ... the essential importance of international cooperation based on free consent', towards the realisation of the right to food. Article 15(4) similarly imposes an obligation on states to, while taking steps to realise the right to cultural life, 'recognize the benefits to be derived from the encouragement and development of international contacts and co-operation....' Also, article 23 requires States to recognise the importance of international action, methods, meetings, assistance and consultation in the realisation of ESR.⁷⁸

In addition, the CESCR has developed a rich jurisprudence to explicate the foregoing provisions of ICESCR. For example, General Comment No.3 states that,

A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and cooperation, especially economic and technical ...". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance...International cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.⁷⁹

The CESCR also notes that 'in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries'.⁸⁰ This underscores the important role that international cooperation plays in realising SR in developing countries, many of which lack the resources, domestically, to meet the demands of SR. The obligation to cooperate internationally requires states to 'cooperate

⁷⁷ *Ibid.*

⁷⁸ Similarly, the Guidelines on Treaty-Specific Documents to be submitted by States Parties under Articles 16 and 17 ICESCR, 24 March 2009, E/C.12/2008/2 also mandates States to indicate international cooperation and assistance rendered or given during a particular review period.

⁷⁹ CESCR, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' 14 December 1990 (Document E/1991/23), Paras 13 & 14.

⁸⁰ *Ibid.*, para 14.

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to mobilize the maximum of available resources for the universal fulfilment of economic, social and cultural rights'.⁸¹

However, a call for international cooperation does not in any way attenuate states' domestic duty to, as a matter of priority, mobilise resources to realise SR.⁸² Coomans' observation that SR obligations are essentially domestic in nature holds true here.⁸³ Skogly and Gibney also note that a 'person's home state is certainly the first place to look to in terms of the protection of economic rights – and all other human rights as well'.⁸⁴ Thus, international cooperation should be complementary rather than substitutive of domestic mobilisation of resources for SR realisation.⁸⁵

There is a debate on whether the duty to cooperate internationally is a binding one. While Alston and Quinn argue that it is problematic to uphold 'the argument that the commitment to international cooperation can be accurately characterized as a legally binding obligation upon a particular State to provide any particular form of assistance',⁸⁶ De Schutter, while recognising the challenge of state sovereignty to the duty to cooperate, notes that 'such a duty requires that the State put forward proposals, with a view to strengthening international cooperation, that are both sufficiently concrete and "reasonable", which means in particular that in the distribution of the burdens and benefits, such proposals should take into account the principle of common but differentiated responsibilities and respective capabilities'.⁸⁷ Whereas it is true that an imposition of a duty of international cooperation on states seems to negate the principle of sovereignty because it fetters states' ability to pick and choose what actions to undertake, it is argued that in this era of globalisation, there should be a move away from absolute sovereignty to shared sovereignty.⁸⁸

⁸¹ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, art. 31.

⁸² Saiz (n 1) 80.

⁸³ Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011)11(1) *Human Rights Law Review* 1-35, 5.

⁸⁴ Sigrun I Skogly & Mark Gibney, 'Economic Rights and Extraterritorial Obligations' in Shareen Hertel & Lanse Minkler (eds) *Economic Rights: Conceptual, Measurement and Policy Issues* (Cambridge University Press, 2007) 267.

⁸⁵ Oamen & Erhagbe (n 51) 1080.

⁸⁶ Philip Alston & Gerard Quinn, 'The Nature and Scope of States Parties Obligations Under ICESCR' (1987) 9 *Human Rights Quarterly* 156, 191.

⁸⁷ Olivier De Schutter, 'The International Dimensions of the Right to Development: A Fresh Start towards Improving Accountability' Human Rights Council Working Group on the Right to Development Nineteenth session 23 – 27 April 2018, 3 available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Development/Session19/A_HRC_WG.2_19_CRP.1.pdf (accessed on 03/01/2024).

⁸⁸ Oamen (n 60).

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Although shared sovereignty is often conceptualised as the process of sharing governmental powers between the Federation and the federating states within a domestic legal system,⁸⁹ Gusy asserts that the concept can be stretched to apply to international or supranational governance levels.⁹⁰ So, shared sovereignty would promote transnational identity through ‘pragmatic solidarities’⁹¹ among states, which will bring about a continuing rapprochement of the different levels of governance.⁹² It ‘balances the levers of power and provides a legitimisation forum for the workings of states, international institutions, global actors, individuals and civil society amongst others’.⁹³

However, one must note that this international cooperation and its attendant shared sovereignty could result in the ‘paradox of the many hands’ where ‘the larger the number of States involved in a situation that creates obstacles to the ability of any one State to fulfil its human rights obligations, the more difficult it will be to assert a responsibility of any individual State in that situation’.⁹⁴ This, however, does not mean that international cooperation should be abandoned. Perhaps, the many hands in the paradox might turn out to be cooperative and effective hands acting for the realisation of SR.

One key area where international cooperation would be helpful in the context of taxation is creation of legal instruments to prevent double taxation. Double taxation treaties are bilateral and multilateral arrangements that ‘serve to harmonize the tax systems of ...countries involved and apply not only to organizations, but also to individuals engaged in cross-border trade and investment’.⁹⁵ If no such treaties exist, , ‘income from cross-border transactions or investments may be subject to double taxation: first, in the country where the income is generated and, second, in the country where the recipient of the income is a resident’,⁹⁶ and this may reduce the available resources needed for SR realisation in the

⁸⁹ See Alexander Hamilton, James Madison & John Jay, *The Federalist Papers*, 1969 Paper No. 33, 198.

⁹⁰ C Gusy, ‘Demokraticdefizite postnationaler Gemeinschaften unter Berücksichtigung der Europäischen Union’ in H Brunkhorst & M Kettner (eds) *Globalisierung und Demokratie, Wirtschaft, Recht. Medien 2000*, 131, cited in Thomas Cottier & Maya Hertig, ‘The Prospects of 21st Century Constitutionalism’ (2003) 7 *Max Planck UNYB* 305.

⁹¹ Raymond Breton, ‘Identification in Transnational Political Communities’ in K Knop, et al (eds), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* (UBS Press, 1995) 41.

⁹² Anne Peters, *Elemente einer Theorie der Verfassung Europas*, 2001, 214, cited in Cottier & Hertig (n 90) 309.

⁹³ Aoife O’Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP, 2014).

⁹⁴ De Schutter (n 87) 16.

⁹⁵ Bakhtiyar Aslanbayli, ‘Different Aspects of Interstate Cooperation in the Elimination of Double Taxation’ (2023) 1 (2) *Energy Sustainability: Risks and Decision Making*.

⁹⁶ *Ibid.*

poorer countries. The OECD's tax treaties and the evolving UN tax cooperation mechanism which seek to address this challenge are assessed below.

4. Understanding TWAIL as an Interpretive Tool

This chapter uses TWAIL to problematise the existing attempts at tax cooperation. Particularly, the chapter argues below that the tax cooperation regime that OECD has developed is too Eurocentric and thus largely unbeneficial to developing countries. The chapter thus calls for a more participatory tax cooperation regime that takes the interests of developing countries into account, without mortgaging the equally valid interests of the developed countries.

TWAIL is 'an expansive, heterogeneous and polycentric dispersed network and field of study',⁹⁷ which 'offers both theories of, and methodologies for, analysing international law and institutions',⁹⁸ especially regarding developing countries. TWAIL '...is both reactive and proactive. It is reactive in the sense that it responds to international law as an imperial project. But it is proactive because it seeks the internal transformation of conditions in the Third World'.⁹⁹ Hence, in the realm of SR realisation, a TWAIL perspective reacts to developed countries' non-committal approach to the transformation of the socioeconomic conditions of people in developing countries.¹⁰⁰

Mainstream international law, TWAIL perspective argues, does not consider the historical or colonial underpinnings that inform the social and economic inequalities between developed countries and developing countries. Thus, TWAIL seeks to 'unpack the colonial history of ...the Third World, foreground colonialism's continual influence on the international system ...and focus on achieving some form of justice for peoples of the Third World'.¹⁰¹ TWAIL challenges the complacency in international law to treat the colonial legacy as dead letter, overcome by the process of decolonization.¹⁰² It argues that any reference to the colonial events should not be perceived as 'crying over milk that was split many decades back but

⁹⁷ James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 Trade L & Dev 26, 34.

⁹⁸ Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10 Int'l Comm L Rev 371, 377.

⁹⁹ Makau Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law Proceedings 31,36.

¹⁰⁰ Oamen (n 60).

¹⁰¹ Ibronke T Odumosu, 'Challenges for the (Present/) Future of Third World Approaches to International Law' (2008) 10 Int'l Comm L Rev 467, 468.

¹⁰² James Thuo Gathii, 'Third World Approaches to International Economic Governance' in Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge, 2008) 255.

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about being intuitive in understanding the systemic and structural constraints on the Third World that are heritages of a colonial legacy'.¹⁰³

TWAIL interrogates international law rules, to assess how they 'empower or disempower peoples in the Third World...'.¹⁰⁴ TWAIL seeks 'to centre the *rest* rather than merely the *west*, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case'.¹⁰⁵ It aims 'to transform the international economic system so that it could be an effective mechanism for the development needs of developing countries as much as it was and continues to be of the economic needs of developed countries'.¹⁰⁶ Thus, TWAIL scholars have 'a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench the features of the international system that help create or maintain the generally unequal, unfair, or unjust global order'.¹⁰⁷

Drawing on TWAIL as an interpretive tool to understand the duty to cooperate, this chapter argues that the historical or colonial impact on SR in developing countries should be given a serious thought.¹⁰⁸ The fact that SR are not being realised in developing countries should not just be discussed in terms of statistics without looking at the historical contexts.¹⁰⁹ Currently, international law helps to legitimise and sustain 'the unequal structures and processes that manifest themselves in the growing North-South divide'.¹¹⁰ Giving serious thoughts to this issue should feed into the legal architecture on international tax cooperation.

5. OECD Framework on Tax Cooperation: A TWAIL Assessment

The current legal and institutional architecture on tax cooperation is characterised by fragmentation and multi-layered approach. This section assesses the key player and instruments that currently dominate the international tax system. The essence of this assessment is to highlight how developed countries, through the OECD taxation mechanism, have attenuated the capacity of African states to mobilise resources (derivable from taxation)

¹⁰³ Opeoluwa Adetoro Badaru, 'The Right to Food and the Political Economy of Third World States' (2014) 1 *Transnat'l Hum Rts Rev.* 106, 116.

¹⁰⁴ Antony Anghie, 'TWAIL: Past and Future' (2008) 10 *Int'l Comm L Rev* 479, 480.

¹⁰⁵ Obiora Chinedu Okafor, 'Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall LJ* 176-177.

¹⁰⁶ Gathii (n 97) 259.

¹⁰⁷ *Ibid.*

¹⁰⁸ Oamen (n 60).

¹⁰⁹ Badaru (n 103) 121.

¹¹⁰ BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 1-27, 1.

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which are needed for SR realisation. It also seeks to spotlight the importance of incorporating other regional perspectives (in addition to OECD's) in the evolving UN's tax cooperation initiative discussed below.

Institutionally, OECD is unarguably the frontline body on international tax cooperation. For half a century, 'the most influential international rules and standards for taxing multinational corporations have been formulated by a select group of developed countries, the OECD, with lower-income countries on the outside'.¹¹¹ No doubts, OECD has influenced the development of several international tax law principles that have been codified into a number of bilateral and multilateral instruments.¹¹² The OECD is made up of 38 countries, 'each with a gross national income per capita that places them in the category of "upper-middle income economy" or "high-income economy", as defined by the World Bank'.¹¹³ Most members of OECD are from Europe and the Americas, while none is from Africa.¹¹⁴ As would be seen below, this composition undermines the interests of developing countries not represented in the OECD, because OECD occupies a predominant position in the framing of international tax cooperation.

The OECD produced the 1963 Model Tax Convention on Income and Capital,¹¹⁵ which provides residence-country taxation rules most favourable to developed countries and their multinational enterprises (MNEs). The OECD also produced the Convention on Mutual Administrative Assistance in Tax Matters 1988 (amended in 2010 to create a wider participation) and the Global Anti-Base Erosion (GloBE) Model Rules (which provides for the global minimum tax (15%) that jurisdictions can impose on MNEs). It has also produced other salutary tax rules as highlighted below.

¹¹¹ Rasmus Corlin Christensen, Martin Hearson & Tovony Randriamanalina, 'At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations' (ICTD Working Paper 115, 2020) 5 available at https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15853/ICTD_WP115.pdf?sequence=9 (accessed on 12/01/2024).

¹¹² Tax Justice Network Africa, 'RE: Tax Justice Network Africa's Inputs to the Tax Report 2023 on Promotion of Inclusive and Effective Tax Cooperation at the United Nations' (A submission to the UN) available at <https://globaltaxjustice.org/libraries/letter-200-csos-and-trade-unions-support-un-draft-resolution-for-inclusive-tax-cooperation/> (accessed on 12/01/2024).

¹¹³ UN, 'Promotion of Inclusive and Effective International Tax Cooperation at the United Nations: Report of the Secretary-General' (A/78/235) para 31 available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N23/220/39/PDF/N2322039.pdf?OpenElement>.

¹¹⁴ *Ibid.* South Africa is just a key partner of OECD.

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From a TWAIL perspective, it is pertinent to observe that, despite the laudable work that OECD has undertaken, it remains an exclusive club for a powerful set of nations which make up the G20, a forum of the world's twenty largest economies. So, there is little or no wonder that some of OECD's policy making processes do not provide a participatory environment for poorer nations such as African countries. The fact that 'much of international tax governance does not come from the United Nations, the organization whose membership includes all sovereign nations',¹¹⁶ questions the legitimacy of the OECD legal architecture on tax cooperation. The OECD model tax conventions are premised largely on the concept of reciprocity between the contracting states which are rich and powerful countries.¹¹⁷ As discussed below, examples of undemocratic practices – which undermine developing countries' participatory rights - abound within the international taxation system of OECD.

In attempts to address this democratic legitimacy concern, OECD began to carry out some institutional reforms from 2009 by trying to infuse a wider participatory tax governance.¹¹⁸ For example, the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) which was established in 2009, the Base Erosion and Profit Shifting (BEPS) and the Inclusive Framework on Base Erosion and Profit Shifting (IF) are some of the leading tax initiatives which the OECD has designed. While the Global Forum, with 170 members, is the leading international body on global transparency aimed at addressing tax evasion,¹¹⁹ the OECD in collaboration with G20 also launched the BEPS Project (currently with over 140 member-states) in 2013, to tackle the problems of tax avoidance by MNEs.¹²⁰ Furthermore, in 2016, the OECD and G20 launched the IF which currently has over 140 members) aimed at ensuring the timely, participatory and effective implementation of the results of BEPS Project.¹²¹ An essential feature of the IF is that it aims to give all its members 'equal footing' in the design and implementation of international tax cooperation mechanisms.¹²² According to OECD:

¹¹⁶ Abosede Abidemi Oladiji, 'Global Tax Regulation and Developing Countries' (A Thesis submitted to the Faculty of Graduate Studies of the University of Manitoba in partial fulfilment of the requirements of the degree of Master of Law, 2018) 57.

¹¹⁷ *Ibid.*

¹¹⁸ Ruth Mason, 'The Transformation of International Tax' (2020) 114(3) *American Journal of International Law* 353–402.

¹¹⁹ OECD, 'Putting an End to Offshore Tax Evasion' available at <https://www.oecd.org/tax/transparency/> (accessed on 12/01/2024).

¹²⁰ OECD, 'Tax Cooperation for Development: Progress Report on 2022' (2022) available at: <https://www.oecd.org/tax/tax-global/tax-co-operation-for-development-progress-report-on-2022.pdf> (accessed on 12/01/2024).

¹²¹ *Ibid.*

¹²² *Ibid.*

Importantly, developing country members of the Inclusive Framework have played a vital role in shaping the agreement, and have had significant influence on many of the essential components of the reforms. This demonstrates that the new international tax architecture provides not only a seat “at the table,” but also the potential for developing countries to have a strong voice in ensuring that international tax norms and standards reflect their priorities.¹²³

While it is true that the foregoing OECD initiatives have widened the tax governance spaces for developing countries,¹²⁴ whether the IF has indeed given a strong voice to developing countries is worth considering. The positive contributions of OECD initiatives to developing countries are well documented. These include such countries benefiting from reforms proposals championed by their allies who are powerful OECD or G20 members, benefiting from inputs from influential individuals such as Secretariat staff and delegates from more powerful countries, collaboration among lower-income countries, and with other countries with common interests, and benefiting from having people with expertise, personal experience and networks representing them at the negotiation table.¹²⁵

However, this chapter argues that, despite OECD’s salutary work on international tax system, the IF and indeed the entire OECD regime has not provided any ‘equal footing’. Instead, OECD serves as an impediment to the establishment of a truly participatory and universally inclusive tax regime. OECD’s current multiple and overlapping international tax standards have hampered the development of ‘a genuinely global international tax body... in the international economic system’ and this lacuna is a huge ‘disadvantage for developing countries, which are unable to participate in international tax standard setting as full and equal participants’.¹²⁶

From a TWAIL standpoint, OECD was created to have a Eurocentric outlook. Its occidental agenda was not accidental but well strategised from the very beginning of its existence. For example, the first Secretary-General that OECD ever had clearly stated that:

¹²³ OECD, ‘Developing Countries and the OECD/G20 Inclusive Framework on BEPS’ (OECD Report for the G20 Finance Ministers and Central Bank Governors, October 2021, Italy) available at <https://www.oecd.org/tax/beps/developing-countries-and-the-oecd-g20-inclusive-framework-on-beps.pdf> (accessed on 13/01/2024).

¹²⁴See OECD, ‘Tax Co-operation for Development: Progress Report’ (2020) available at <http://www.oecd.org/tax/global/tax-co-operation-for-development-progressreport.htm>; Ben Dickinson, ‘The Inclusive Framework is Considering Radical Proposals, but in *the Real World...*’ (18 November 2019) *International Centre for Tax and Development (ICTD)* Blog Post available at <https://www.ictd.ac/blog/oecd-inclusive-framework-tax-proposals-negotiation/> (accessed on 13/01/2024).

¹²⁵ Christensen, Hearson & Randriamanalina (n111) 7.

¹²⁶ Chowdhary & Picciotto (n34).

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.¹²⁷

So, from the beginning, OECD set out to develop and impose its initiatives and techniques, including the ones on taxation, on developing countries. Although the body has sought to carry out some reforms (such as the IF) owing to criticism against its Eurocentric position, the fact remains that those reforms have not been able to completely address the deep-rooted systemic imbalances infused into the OECD system from the beginning.

While not countenancing harmful tax practices in developing countries, this chapter argues that OECD should be quick to call developed countries to order when they engage in harmful tax practices, just as the organisation is often quick to classify powerless and small island countries as tax havens.¹²⁸ After all, it was the US which started the use of tax incentives, tax holidays and tax-free zones which have now snowballed into tax haven activities in developing countries, yet OECD has not targeted the US.¹²⁹ The US itself seems to have confirmed this point when its Treasury Secretary recently conceded that in ‘the popular imagination, the money laundering capitals of the world are small countries with histories of loose and secretive financial laws. But there’s a good argument that, right now, the best place to hide and launder ill-gotten gains is actually the United States’.¹³⁰ This concession might have emboldened the Bahamas (a much-touted tax haven) to rise to the occasion of voting in favour of a 2023 UN resolution for UN-regulated tax cooperation mechanisms.¹³¹ The resolution and mechanisms are discussed further down the line in this chapter.

¹²⁷ Thorkil Kristensen, ‘Five Years of O.E.C.D’ (1967) 13 *European Yearbook* 100-109, 103 -104, cited in Tony Porter & Michael Webb, ‘The Role of the OECD in the Orchestration of Global Knowledge Networks’ (2007) 3 available at <https://www.cpsa-acsp.ca/papers-2007/Porter-Webb.pdf> (accessed on 13/01/2024).

¹²⁸ Oladiji (n110) 61.

¹²⁹ 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* 532, 550-559.

¹³⁰ US Department of Treasury, ‘Remarks by Secretary of the Treasury Janet L. Yellen at the Summit for Democracy’ (09 December 2021) available at <https://home.treasury.gov/news/press-releases/jy0524>.

¹³¹ The Guardian, ‘The Guardian View on a UN Treaty: Stop Rich Nations acting like the Tax Havens they condemn’ (Editorial, 09 December 2023).

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In addition, the current decision-making configuration of OECD on tax matters is G20-centric in outlook. For instance, apart from requiring payment of huge fees to join IF and the Global Forum,¹³² OECD's IF document also ensures that non-OECD members joining the IF do not enjoy universal or full rights. Thus, their participation right comes with a condition of being bound by already existing OECD standards. For example, developing countries which joined BEPS under the 2016 IF are required to implement the four minimum standards (that is, BEPS action 5 on harmful tax practices, action 6 on prevention of tax treaty abuse, action 13 on MNEs' country by Country Report and action 14 on mutual dispute resolution) which OECD/G20 members had finalised in 2013.¹³³

The problem with the above condition is that the core standard setting on tax cooperation had been negotiated and concluded by OECD/G20 members before 2016 when the IF opened the door for non-OECD members. A similar position applies under the Global Forum where OECD requires developing countries which are joining the Forum to commit to implementing the Exchange of Information on Request Standard and the Common Reporting Standard, even though they never contributed to the framing of those standards.

While it could be argued that developing countries could resile from those pre-existing standards on the basis that, in international law, agreements are not binding on a state unless it consents to them,¹³⁴ one also has to consider the exception to this hallowed international law rule. It is settled law that customary international law (CIL) rules are an exception to the consensus element of international law. CIL finds its roots from widespread, consistent and uniform practice of states, whether internationally or regionally,¹³⁵ which the states have explicitly or implicitly recognised as binding.¹³⁶ It has been observed that the OECD tax

¹³² See UN (n 113) footnote 28 ('In 2022, the annual fee to join the Inclusive Framework was €21,500 (approximately \$24,000). In 2016, the minimum annual fee for the Global Forum was €15,300 (just under \$17,000 at the time)').

¹³³ Chowdhary & Picciotto (n34).

¹³⁴ Besson Samantha, 'State Consent and Disagreement in International Law-Making. Dissolving the Paradox' (2016) 29(2) *Leiden Journal of International Law* 289-316.

¹³⁵ *Asylum (Columbia v. Peru)* [1950] ICJ Rep 266.

¹³⁶ International Law Association, 'London Conference Final Report of Commission on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law' (2000) 8; *North Sea Continental Shelf case (Germany v. Denmark and Germany v. the Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 1969, 3; Thomas Buergenthal & Sean D Murphy, *Public International Law* (3rd edn, 2002) 18.

treaties have acquired such popularity that they can easily pass for CIL rules, and thus an exception to the consensus requirement in international law.¹³⁷

However, there is another question whether treaties produced by a non-state actor such as OECD (though made up of states) can constitute CIL. It could be argued that nothing stops such treaties from being recognised as CIL. As Baker notes, ‘multilateral treaties [such as OECD treaties] can transform into sources of customary international law, binding on all states in the international system, whether they are parties to the particular treaty or not, if a large enough portion of non-signatory states in the international system adheres to their provisions out of a sense of legal obligation’.¹³⁸ It could also be argued that the high number of OECD members signing up to its treaties might satisfy this test of adherence.¹³⁹ However, a better argument would be that OECD treaties do not form part of CIL, because they are ‘model’ treaties which means states have not universally recognised them as binding, and where they are discreetly imposed (e.g., through G20 loan conditionalities), they would lose the imprimatur of being referred to as ‘practice’.

Viewed through the lens of TWAIL, what the foregoing suggests is that developing countries’ participation on tax cooperation design is only on the periphery, the substantive standards having been set before they were invited. This practice ‘is inconsistent with the procedural criteria that all countries should be involved in agenda-setting’.¹⁴⁰ It leads to a situation where ‘African countries as capital importing countries have had little bargaining power in these processes and bilateral relations. For years, OECD and G/20 countries have set the standards for international taxation while their member countries have simultaneously been some of the biggest perpetrators of tax abuse.’¹⁴¹ This practice suggests that OECD/G20 members frame tax policies that align only with their ‘mutually agreeable norms’,¹⁴² not universally agreeable norms. As an empirical study reveals:

The IF’s expansion has made little difference to the number of lower-income countries attending meetings at which the practical technical policy work is done, and that most members are fairly silent participants. This is partly

¹³⁷ Oladiji (n 116) 58.

¹³⁸ Roozbeh (Rudy) B Baker, ‘Customary International Law in the 21st Century: Old Challenges and New Debates’ (2010) 21(1) *European Journal of International Law* 173–204, 177.

¹³⁹ For a detailed discussion on this, see Irma Johanna Mosquera Valderrama, ‘BEPS Principal Purpose Test and Customary International Law’ (2020) 33 *Leiden Journal of International Law* 745–766.

¹⁴⁰ UN (n 113) para 42.

¹⁴¹ Tax Justice Network Africa (n 112) 3.

¹⁴² Allison Christians, ‘Global Trends and Constraints on Tax Policy in the Least Developed Countries’ (2010) *Legal Studies Research Paper Series* (Paper No. 1086) 3.

because of well-documented structural obstacles not unique to the IF, but is exacerbated by some aspects of the OECD's decision-making processes, such as the pace and intensity of discussions, the culture of policymaking, the costs of attending regular meetings in Paris, and the absence of routine and timely translation of documents and meetings. This can make the OECD a daunting environment for member state delegates, but especially for those from lower-income countries. In addition, many have joined with no intention of influencing standards, but rather in pursuit of technical assistance or prestige, or under coercion from the European Union.¹⁴³

The above point finds corroboration in other reports which suggest that OECD outputs are not user-friendly to most developing countries which have not received technical training to unravel the complexities of the outputs. For example, the International Bureau of Fiscal Documentation states that the OECD tax guidance is more popular among developed countries than developing countries.¹⁴⁴ The UN traces this popularity concern to the 'complexity of the provisions and administration, lack of capacity in developing countries and some missed opportunities in the context of the base erosion and profit shifting project "to address comprehensively the key issues that are regarded as most pressing for developing countries'.¹⁴⁵

Another demonstration of the G20-centric colouration of the IF is that OECD's IF reports on BEPS are approved only by OECD and G20 members, making non-members of the bodies to play second fiddle.¹⁴⁶ This situation presents 'a paradox that the rich countries whose professional services firms are responsible for most of the world's cross-border tax abuse also write global tax rules'.¹⁴⁷ The fact that IF primarily 'reports only to the OECD and G20 countries', and that 'its Secretariat, which has played an increasingly powerful role, is provided by the OECD',¹⁴⁸ raises questions around the independence of thoughts and action among OECD non-members and begs the question of whether the IF has indeed given a strong voice to developing countries. Even the UN Secretary General (UNSG) agrees that

¹⁴³ Christensen, Hearson & Randriamanalina (n111) 7.

¹⁴⁴ International Bureau of Fiscal Documentation, 'Promotion of Inclusive and Effective Tax' (forthcoming), cited in UN (n113) para 33.

¹⁴⁵ *Ibid*

¹⁴⁶ See for example, OECD, 'OECD/G20 Inclusive Framework on BEPS Progress Report September 2022 – September 2023' available at <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-september-2022-september-2023.pdf> (accessed on 12/01/2024).

¹⁴⁷ The Guardian (n 131).

¹⁴⁸ Chowdhary & Picciotto (n34).

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OECD's recent 'two-pillar solution', though laudable in addressing global tax injustice, 'would not fully address a broader discontent rooted in the long-standing conviction, held by many countries and stakeholders, that existing tax treaty rules do not reserve sufficient taxing rights for countries hosting multinational enterprises and constituting markets for their products'.¹⁴⁹ Thus, it has been observed that the recent OECD's BEPS Two Pillar Solution in terms of taxing the digital economy, is too G20-centric, fuelling the 'G-77's renewed demand for a global tax body' as a matter of priority.¹⁵⁰ Empirical research also reveals that 'although individuals from non-OECD Inclusive Framework members can apply for a role at the OECD Secretariat, people in the important positions are all from OECD countries'.¹⁵¹

As the UN sets out to develop a tax cooperation mechanism which has a more global outlook, it should be intentional about considering other regional perspectives rather than just the Western perspective as represented by the OECD or G20. For example, just as the OECD and the African Union's initiatives contributed to the norm-setting for the UN Convention on Anti-corruption, the UN should also involve not only the OECD but also the African Tax Administration Forum and the Regional Platform for Tax Cooperation in Latin America and the Caribbean in its current efforts to set agenda and standards for an international tax cooperation regime.¹⁵² Such a fusion of regional initiatives and ideas will create healthy 'regime complexes' which could produce fruitful outcomes for developed and developing contexts.¹⁵³ It will also promote geographical, economic and linguistic diversity which is missing in current global tax governance.¹⁵⁴

However, a major concern is that developing countries have not mustered the capacity for regional agenda setting on taxation. They 'are not well organised into caucuses, unlike the OECD, G7 and European Union, which all have a long tradition of working together to negotiate common positions'.¹⁵⁵ While it is true that 'ATAF and the Intergovernmental Group of 24 (G-24) have emerged as developing country blocs within the IF, it will take time

¹⁴⁹ UN (n113) para 5.

¹⁵⁰ *Ibid.*

¹⁵¹ Lucinda Cadzow, *Et al.*, 'Inclusive and Effective International Tax Cooperation: Views From the Global South' (Institute of Development Studies, August 2023) 10 available at https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/18097/ICTD_WP_172_FINAL.pdf?sequence=1&isAllowed=y (accessed on 01 April 2024).

¹⁵² Cadzow, *Et al.* (n151) 19.

¹⁵³ Thomas Gehring & Benjamin Faude, 'The Dynamics of Regime Complexes: Microfoundations and Systemic Effects' (2013) 19 *Global Governance* 119-30.

¹⁵⁴ Cadzow, *Et al.*, (n151) 8.

¹⁵⁵ Martin Hearson, 'Corporate Tax Negotiations at the OECD: What's at Stake for Developing Countries in 2020?' (Summary Brief No. 2, 2020) 4 available at https://africaportal.org/wp-content/uploads/2023/05/Corporate_tax_negotiations1.pdf (accessed on 01 April 2024).

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and experience to build up a culture of effective caucusing'.¹⁵⁶ It is also worrying that an empirical research reports a leader from a developing country to have stated that the:

challenge [for] most developing countries is that we have not been part of the agenda. We do not come to defend an agenda, but only try not to get ourselves into a worse position. In contrast with US, no African country currently has an agenda. There has not been a time that we sat together to discuss an agenda.¹⁵⁷

It is, thus, pertinent for political leaders and technical experts from developing countries to brace up for setting agenda or taking a regional position. If the current UN efforts on tax cooperation will be of any benefit to developing countries, then their leaders must keep their feet on the ground and assert their position firmly and urgently. They need to 'draw on socio-technical resources—expertise and professional networks—as an alternative source of power in deeply technical policy-making processes'.¹⁵⁸ The next section considers the evolving international tax cooperation regime within the UN system.

6. Towards a UN Tax Cooperation Regime

Further to the foregoing, there is an urgent need to take ongoing UN tax cooperation talks and processes seriously. As far back as 2001, the UN noted the importance of international tax cooperation, insisting that such cooperation provides 'global public goods, meaning goods and services whose benefits accrue to humanity in general rather than to the residents of any single country'.¹⁵⁹ As the UN Addis Ababa Action Agenda provides, such tax cooperation '...should be universal in approach and scope and should fully take into account the different needs and capacities of all countries...'.¹⁶⁰

Prior to the Addis Ababa Action Agenda, the UN already had a body known as Committee of Experts on International Cooperation in Tax Matters (Tax Committee), established pursuant to ECOSOC Resolution 2004/69 and as a replacement of the defunct UN Ad Hoc Group of Experts on International Cooperation in Tax Matters which drafted the yet-to-be adopted 1980 UN Model Taxation Convention. (UN Tax Convention).¹⁶¹ The Tax Committee is made

¹⁵⁶ Ibid.

¹⁵⁷ Cadzow, *Et al* (n151) 19.

¹⁵⁸ Martin Hearson, *Et al*, 'Developing Influence: The Power of "the rest" in Global Tax Governance' (2023) 30(3) *Review of International Political Economy* 841–864, 842.

¹⁵⁹ UN, 'Technical Report of the High-Level Panel on Financing for Development' (2001), para 4 available at <https://www.iatp.org/documents/technical-report-of-the-high-level-panel-on-financing-for-development-0>; 'Preparatory Committee for the International Conference on Financing for Development' (A/AC.257/23) 13, available at <https://digitallibrary.un.org/record/439479?ln=en> (accessed on 12/01/2024).

¹⁶⁰ UN, 'The Addis Ababa Action Agenda of the Third International Conference on Financing for Development' (2015) para 28, available at: <https://sustainabledevelopment.un.org/frameworks/addisababaactionagenda> (accessed on 12/01/2024).

¹⁶¹ See <https://www.un.org/en/ecosoc/docs/2004/resolution%202004-69.pdf> (accessed on 12/01/2024).

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up of tax experts appointed by the UNSG on the recommendation of national governments (and taking equitable geographical spread into account). It is charged with enhancing and promoting international tax cooperation among national tax authorities; and considering ‘how new and emerging issues could affect international cooperation in tax matters and develop assessments, commentaries and appropriate recommendations’.¹⁶²

Ideally, the Tax Committee should be more appealing than the OECD because it is a UN mechanism and has evidently promoted pro-developing countries’ agenda. However, it is beset by several problems which make it unable to achieve its mandate. One of such challenges is the fact that the Committee is not a UN intergovernmental body and thus lacks the institutional legitimacy and resources to achieve its mandate. Thus, G77 members have called for its upgrading to an intergovernmental body to cure its legitimacy concerns.¹⁶³

The G20 members have resisted these calls because they see them as a threat to OECD’s prominence on tax cooperation matters.¹⁶⁴ Despite the paltry budget (USD 2.4 million as of 2010) proposed for the logistics in converting the Tax Committee to an intergovernmental and thus more powerful body, politicisation botched the idea.¹⁶⁵ Instead, the UN resolved that the UNSG should explore ‘how the Committee could be further strengthened, with the emphasis on more collaboration with other actors, namely the OECD and the Bretton Woods’.¹⁶⁶ To pursue this new goal that flies in the face of the original goal of upgrading, a new body, Platform for Collaboration on Tax was created to enable Bretton Woods institutions such as the International Monetary Fund to collaborate with OECD on tax matters, but this only confirmed and legitimised OECD’s domination on tax norm-setting.¹⁶⁷

Over the years, despite that it lacks an intergovernmental body status, the Tax Committee has shown that it is committed to promoting tax justice between developed countries and developing countries. For example, it has reviewed (in 2011, 2017 and 2021) the UN Tax

¹⁶² *Ibid.*

¹⁶³ For example, in 2010, Yemen submitted a draft resolution to the ECOSOC (E/2010/L.10)7 on behalf of the G77 calling for the upgrading of the Committee into an intergovernmental body. See <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N10/436/28/PDF/N1043628.pdf?OpenElement>; Jose Antonio Ocampo & Heidemarie Wiczorek-Zeulan, ‘Intergovernmental Tax Body at the United Nations Implementation Note on FACTI Panel on Recommendation 14b’ (FACTI Panel 2021) available at <https://factipanel.org/docpdfs/Implementation%20Note%20-%20Intergovernmental%20tax%20body%20-%202014B.pdf> (accessed on 12/01/2024). Also see Chowdhary & Picciotto (n 34).

¹⁶⁴ See generally Chowdhary & Picciotto (n 34).

¹⁶⁵ *Ibid* 4.

¹⁶⁶ *Ibid* 4. Also see ECOSOC (E/RES/2012/33) para 5 available at: <https://financing.desa.un.org/sites/default/files/2023-03/N1242145.pdf> (accessed on 14/01/2024).

¹⁶⁷ Chowdhary & Picciotto (n 34) 4.

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Convention and keeps updating the UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries. Both the Convention and the Manual have assisted developing countries in ‘developing and articulating their own treaty policies in negotiations’.¹⁶⁸ One major attribute of the Committee’s review is that the Convention has been adjusted to provide for retention of greater host country taxation rights (that is, a departure from ‘residence country taxation rules to ‘source country’ rules’).¹⁶⁹ This favours developing countries which usually host MNEs but are unable to tax them simply because they are headquartered in developed countries. Thus, it has been observed that the most important changes included in the Convention ‘address concerns expressed by developing countries regarding tax treaty obstacles to the taxation of foreign enterprises on income from automated digital services and on gains on so-called “offshore indirect transfers”’.¹⁷⁰ The latest Model has also streamlined, in favour of developing countries, the meaning of concepts such as ‘permanent establishment’ and ‘beneficial owner’ as they relate to taxation.¹⁷¹ It is hoped that the Model will become a binding treaty soon.

Indeed, the UN has begun to take steps towards the adoption of a real-world taxation Convention that may address global tax injustice. For example, on 23 November 2022, the African Group succeeded in moving the UN General Assembly (UNGA) Second Committee to pass a resolution that will pave ‘the way for a UN convention on taxation and a new global tax body’.¹⁷² The resolution seeks ‘ways to strengthen the inclusiveness and effectiveness of international tax cooperation, including the possibility of developing an international tax cooperation framework or instrument’.¹⁷³ It should be noted that OECD members opposed the resolution and sought to amend it, arguing that it would amount to a needless duplication of OECD’s work on tax cooperation.¹⁷⁴ Luckily for developing countries, the amendment sought was defeated when it was put to vote. The Second

¹⁶⁸ UN (n113) para 25.

¹⁶⁹ UN, ‘United Nations Model Double Taxation Convention between Developed and Developing Countries 2021’ (2021) iii available at https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf (accessed on 13/01/2024).

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Anna Isaac, ‘UN agrees Global Tax Rules Resolution giving Developing Nations Greater Say’ (The Guardian, 23 November 2022) available at <https://www.theguardian.com/world/2022/nov/23/un-agrees-global-tax-rules-resolution-giving-developing-nations-greater-say> (accessed on 13/01/2024).

¹⁷³ UN, ‘Promotion of Inclusive and Effective International Tax Cooperation at the United Nations’ (document A/C.2/77/L.11/Rev.1) available at [Concluding Its Session, Second Committee Approves 11 Draft Resolutions, Including Texts on Women’s Development, Global Tax Cooperation, Entrepreneurship | UN Press](https://www.un.org/press/docs/2024/20240109_a277l11rev1.html) (accessed 09/01/2024).

¹⁷⁴ *Ibid.*

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Committee subsequently referred the resolution to UNGA to begin intergovernmental discussions on it.¹⁷⁵

Consequently, on 30 December 2022, UNGA considered and approved the Committee's report.¹⁷⁶ UNGA resolved that 'developing countries are particularly susceptible to the negative impact of illicit financial flows' which 'reduce fiscal space along with the availability of valuable resources for financing for development' while recognising 'the importance of cooperation at the national, regional and international levels in combating illicit financial flows and promoting financial transparency'.¹⁷⁷ By this resolution, UNGA also decided 'to begin intergovernmental discussions ... on ... international tax cooperation through the evaluation of additional options, including the possibility of developing an international tax cooperation framework...'.¹⁷⁸ To achieve this goal, UNGA requested the UNSG to prepare a report on international tax cooperation.¹⁷⁹

The UNSG submitted the requested report to UNGA on 26 July 2023.¹⁸⁰ The report noted that UNGA has taken, 'by consensus, a potentially path-breaking decision... to strengthen the inclusiveness and effectiveness of international tax cooperation'.¹⁸¹ The report recommended a Convention that would serve as a regulatory framework, providing 'mandatory, preferably enforceable, obligations that are deemed essential for appropriate domestic resource mobilization...'.¹⁸² The Convention is also expected to establish an institutional body to monitor compliance and resolve disputes.¹⁸³ The efficacy of this Convention will depend on countries' political will, consensus and readiness to recognise tax justice as a global issue that requires a globally coordinated attention.¹⁸⁴

In furtherance of the UNSG's report, on 22 November 2023, UNGA approved a resolution (by simple majority votes of 125 to 48 with 9 abstentions) in favour of developing an international tax convention. The African Group stated that the resolution 'resonates with our aspirations as outlined in both the AU [African Union] Agenda 2063 and 2030 Agenda [for Sustainable Development], reinforcing our commitment to strengthening tax systems and

¹⁷⁵ *Ibid.*

¹⁷⁶ A/RES/77/244 available at <https://digitallibrary.un.org/record/3999979> (accessed on 12/01/2024).

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid* para 2.

¹⁷⁹ *Ibid* para 3.

¹⁸⁰ UN (n 113).

¹⁸¹ *Ibid* para 6.

¹⁸² *Ibid* para 53.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid* para 54.

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fostering tax equity'.¹⁸⁵ It noted that it was 'high time that the international community addresses this injustice in global taxing rights that is impoverishing millions, which goes back to the League of Nations, when most Member States were colonies and which has been perpetuated by the monopoly that rich country clubs have held over international tax rule-making'.¹⁸⁶ As usual, OECD members opposed the resolution. For example, the UK which was supported by the US preferred a framework rather than a convention, so as to attenuate the binding nature of the international tax cooperation instrument.¹⁸⁷ By seeking to block this significant resolution, OECD members were 'not only undermining a fair and effective global tax system, but also acting against the interests of their own citizens, who pay a high price when wealthy individuals and big corporations use international loopholes to dodge taxes'.¹⁸⁸

The 22 November 2023 resolution is historic in terms of its potential for raising resources for SR across the globe. It comes with benefits for the people of developing and developed countries. As Nigeria stated when introducing the resolution for UNGA approval,

By adopting a unified, UN-led framework convention for international tax cooperation, we open doors to significant economic advantages. For emerging economies, this means greater ability to mobilize domestic resources, directly fuelling development projects and social welfare programmes. For more developed nations, it promises a level playing field, reducing instances of tax evasion and avoidance that currently undermine economic fairness. Moreover, recent data from the International Monetary Fund suggests that improving international tax cooperation could significantly reduce illicit financial flows, a scourge that deprives economies, especially those in the developing world, of critical funding. For all countries, illicit flows can fuel crime, destabilizing societies.¹⁸⁹

¹⁸⁵ UN, 'Second Committee Approves Nine Draft Resolutions, Including Texts on International Tax Cooperation, External Debt, Global Climate, Poverty Eradication' (GA/EF/3597) available at <https://press.un.org/en/2023/gaef3597.doc.htm>

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Tove Ryding, 'Historic Tax Vote paves the Way for a UN Tax Convention' (22 November 2023) available at https://www.eurodad.org/historic_tax_vote_paves_the_way_for_a_un_tax_convention (accessed on 13/01/2024).

¹⁸⁹ AU, 'PRESS RELEASES: UN General Assembly Member States have voted with a Majority of 125 in favor of Adopting a Convention on International Tax Cooperation' (22 November 2023) available at

While the world awaits the direction these emerging UN developments will take in the law and practice of international tax cooperation, the current milestones within the UN system are worth celebrating. The fact that the Tax Committee also has a reviewed draft taxation Convention makes the potential for a speedy establishment of the UN legal and institutional frameworks real. However, this is not the time for too much celebration for developing countries. The task ahead of them now is, convincing or lobbying the powerful OECD members who voted against the resolution. The fact that the resolution sailed through without OECD members' support does not take away the fact that they still wield great influence. Their cooperation is highly needed as the UN proceeds into the next stage of developing the long-awaited Tax Convention which will, hopefully, democratise tax regimes and establish equitable intergovernmental mechanisms on tax cooperation.

This cooperation, as noted above, is fundamental. It will help to hold individuals and MNEs accountable for tax evasion. It can address tax havens whose activities impede SR realisation. Indeed, being a tax haven is a violation of a state's extraterritorial obligation to respect, protect and fulfil SR.¹⁹⁰ As the CESCR stated in its Concluding Observations to the UK, financial secrecy legislation and permissive rules on corporate tax affect the ability of the UK and other States to meet their obligation to mobilise the maximum available resources for realising SR.¹⁹¹ A developing country's domestic tax reforms may, therefore, never be effective enough, to shore up resources for SR, without being 'complemented by reforms in the countries which receive illicit financial flows from tax evasion or other forms of economic crime such as corruption'.¹⁹² Thus, the cooperation of all may be an effective way to arrest tax evasion and minimise tax avoidance, thereby shoring up resources for realisation of SR.

As the UN develops an international tax cooperation regime, there is a need to embrace subaltern realism which seeks to centre weak or poor states in the international arena, having been 'largely ignored by the elitist historiography as popularised by both neorealism and neoliberalism'.¹⁹³ Neorealism (which emphasises the role of power politics in international

<https://au.int/en/pressreleases/20231122/un-general-assembly-member-states-have-voted-majority-125-favor-adopting> (accessed on 13/01/2024).

¹⁹⁰ Saiz (n 1) 102; Nicholas Lusiani, 'Only the Little People Pay Tax: Tax Evasion and the Switzerland's Extraterritorial Obligations to Economic, Social and Cultural Rights in Zambia' in Mark Gibney & Wouter Vandenhole (eds) *Litigating Transnational Human Rights Obligations: Alternative Judgments* (Routledge Press, 2014).

¹⁹¹ CESCR (n33) para 16-17.

¹⁹² De Schutter (n 22) 67.

¹⁹³ Ronald Chipaike & Matarutse H Knowledge, 'The Question of African Agency in International Relations' (2018) 4(1) *Cogent Social Sciences* 1-16, 3..

relations) and neoliberalism (which promotes free market competition) both promote the interests of developed countries to the detriment of developing countries and the solution to these uncanny theories is embracing the subaltern realism theory. This theory problematises the widely differing economic conditions in developed countries and developing countries and advocates equity between these countries.¹⁹⁴

7. Looking into the Future

One area where international cooperation is vital is tax evasion. Tax evasion and avoidance lead to a huge loss of revenue to developing countries which lack the institutional mechanisms to confront the challenges. Developed countries should refuse being tax havens and resist other countries that serve as tax havens to the detriment of developing countries. According to Elson and colleagues,

The existence of tax havens, with very low tax rates, facilitates tax avoidance and evasion. Multinational corporations take advantage of tax havens to reduce tax payments. By setting up headquarters in a tax haven, then manipulating the price of imports purchased from and exports shipped to other divisions and affiliates of the same company operating in different countries, corporations can show their profits as accruing in a tax haven rather than in a country with higher taxes.¹⁹⁵

A UN report states that ‘[f]rom 2000 to 2015, the total illicit capital flight from Africa amounted to \$836 billion. Compared to Africa’s total external debt stock of \$770 billion in 2018, this makes Africa a “net creditor to the world”’.¹⁹⁶ To address this problem, cooperation between African nations and developed countries is urgently required. African nations cannot tackle the problem of tax evasion and avoidance alone, owing to a lack of relevant institutional mechanisms, and more fundamentally because of the transboundary nature of the problem.

Trade liberalisation is another area where international cooperation is needed. In line with the international cooperation obligation created in article 2(1) of ICESCR and other legal instruments, developed countries are required to contribute at least 0.7 per cent of their Gross

¹⁹⁴ Mohammed Ayoob, ‘Inequality and Theorizing in International Relations: The Case for Subaltern Realism’ (2002) 4(3) *International Studies Review* 27–48.

¹⁹⁵ Elson, Balakrishnan & Heintz (n 27) 27.

¹⁹⁶ UN, ‘Illicit Capital Robbing Africa and its People of their Future: UN Trade and Development Chief’ (September 2020) available at <https://news.un.org/en/story/2020/09/1074052> (accessed on 05/01/2024); UN Conference on Trade and Development, ‘Tackling Illicit Financial Flows for Sustainable Development in Africa’ (Economic Development in Africa Report 2020) available at https://unctad.org/system/files/official-document/aldcafrica2020_en.pdf (accessed on 05/01/2024).

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Domestic Product (GDP) to the Official Development Assistance (ODA), which is then used to carry out SR developmental projects in developing countries. While making their contributions to ODA, some developed countries often require the benefiting developing countries to enter into trade liberalisation agreements with them.

These agreements seek to remove trade barriers, including revenue tariffs on goods and services from developed countries to developing countries. The removal of such tariffs, which serve as a huge tax revenue, directly or indirectly reduces the resources domestically available to the developing countries to meet their SR obligations. For example, McKinley's study reveals that between early 1990s and early 2000s, trade liberalisation led to five per cent reduction of revenue tariffs in 25 low-income countries which led to insufficiency in locally mobilised resources for development needs.¹⁹⁷ The fact that ODA is not disbursed based on an objective assessment but on donor interests ranging from the maintenance of colonial ties, military alliances, the protection of spheres of influence, and trade and investment ties,¹⁹⁸ shows that it is not a dependable source of resources for SR realisation.

Therefore, this chapter calls for a halt on imposition of trade liberalisation as a condition for international cooperation and assistance. Using ODA as a trade or economic tool negates its essence, which is to assist developing countries to meet their development needs. Research reveals that although there are positive results (about 91 per cent compliance as of 2017) towards untying ODA commitments whereby recipient countries are free to determine procurement partners regarding ODA projects, some donors still insist that procurements regarding project funded by their ODA contribution must be contracted to companies in the donor countries, thereby fettering the discretion of the recipient country.¹⁹⁹ This ought not to be. Teleguiding recipient countries on procurement processes amounts to a contravention of the 2005 Paris Declaration on Aid Effectiveness and the 2008 Accra Agenda for Action. These documents which most countries willingly adopted have been recognised – even by the UN- as important commitment documents on aid utilisation. The documents emphasise the need to give recipient countries some 'breathing space' in their choice of suppliers of goods and services needed to complete ODA projects.

¹⁹⁷ Terry McKinley, *Why Have Tax Reforms Hampered MDG Financing?* (Brasilia, UNDP International Poverty Centre, 2007) 42.

¹⁹⁸ Thad Dunning, 'Conditioning the Effects of Aid: Cold War Politics, Donor Credibility, and Democracy in Africa' (2004) 58(2) *International Organization* 409-423.

¹⁹⁹ OECD, '2020 Report on the DAC Recommendation on Untying ODA' (DCD/DAC(2020)54/FINAL) available at [https://one.oecd.org/document/DCD/DAC\(2020\)54/FINAL/en/pdf](https://one.oecd.org/document/DCD/DAC(2020)54/FINAL/en/pdf) (accessed on 08/01/2024); Elson, Balakrishnan & Heintz (n27) 31-32; Edward J Clay, Matthew Geddes & Luisa Natali, 'Aid Untying: Is it working?' (Overseas Development Institute, 2009) available at <https://www.oecd.org/development/evaluation/dcdndep/44549932.pdf> (accessed on 17/01/2024).

8. Conclusion

The globalised nature and compact dynamics of contemporary issues of concern, such as climate change and pandemics justify a call for an international cooperation approach to addressing the issues. This call is also relevant in SR realisation, because of the devastating impact which the activities of multinational entities and individuals may have on people living overseas. Thus, it is pertinent that nations cooperate internationally with a view to mobilising resources to address socioeconomic needs whenever and wherever they arise. Sadly, there has been a lack of international cooperation framework on using taxation as an effective tool for mobilising globally available resources for the realisation of these needs. This chapter has examined the link between an effective tax system and realisation of SR. While it acknowledges the laudable efforts of OECD on tax cooperation, it argues that such efforts have still not produced the desirable outcomes of a universal and participatory tax cooperation regime. The chapter considers the UN's recent enthusiasm and evolving efforts aimed at establishing a UN legal and institutional framework on international tax cooperation. It is hoped that states will cooperate with the UN and with one another to address global tax inequities which have created new and exacerbated existing systemic imbalances among developed countries and developing countries. While the evolving UN's initiative may not be a full-blown solution to 'every barrier to inclusive and effective international tax cooperation', it will most likely serve 'as a space in which these barriers can be accommodated and gradually reduced'²⁰⁰.

²⁰⁰ Lucinda Cadzow, *Et al* (n 151) 24.