Africa in the Economy of Francesco: Rethinking the Ethics of the International Financial Order at the Intersection of Tax Justice and Catholic Social Teaching

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In 2015, Pope Francis laid out his vision for an integral ecology in his Encyclical on Care for our Common Home Laudato Si', which flows from an understanding that everything is closely interrelated and that policy solutions to address climate change and poverty will need to be multidimensional and interdisciplinary. In the years since, integral ecology has broadened from a conversation focused on the environment to include a framework for radically rethinking the ethics of the international financial order, a program which has come to be known as the Economy of Francesco. Tax justice, as a concept of global redistributional justice examining means of reducing tax avoidance through the use of haven jurisdictions, is an area where the Catholic Church can be a dynamic, innovative conversation partner for those working to eliminate poverty in Africa. This Article situates Africa in the Economy of Francesco, exploring the intersection of tax justice and Catholic social teaching.

This Article provides a primer on the international tax system, highlighting the legal and ethical principles on which it is based. It then explores theories of taxation – how, where, and what to tax – and their implications for tax justice. The Economy of Francesco is then analyzed in detail, discussing Catholic social teaching on taxation and the economy from Vatican II up to the present. The Article concludes with a roadmap for African tax justice within the Economy of Francesco, proposing strategies for policy and advocacy which best leverage the continent's strengths before key international decision-making fora.

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Introduction

Tax avoidance and evasion by multinational corporations operating in the developing world results in a situation where approximately half of all the proceeds of world trade passes through tax haven jurisdictions in order to avoid paying tax on profits.[1] As a result of tax avoidance by large corporations and wealthy individuals, developing countries are estimated to lose revenues greater than annual aid flows.[2] Developing countries, particularly those in in sub-Saharan Africa, are therefore deprived of revenue which otherwise could be used for desperately needed infrastructure, social services, and other public goods. Tax justice, broadly speaking, is the concept of global redistributional justice which examines means of reducing tax avoidance through the use of haven jurisdictions and of increasing transparency in the current system.[3] Increased attention to issues of tax justice reflects a greater understanding of the centrality of taxation to the relationship between states in the global political economy.[4] Taxation, then, represents a new frontier in development ethics: an effort to reassess the obligations of rich societies and their citizens to poor societies, and to recognize "which agents and structures are to blame for the present state of global destitution and unequal opportunity."[5]

Reducing inequality is part and parcel of development efforts and are at the heart of the U.N.'s Sustainable Development Goals (SDGs), which are the guide for global development through 2030.[6] Likewise, the SDGs also place tax at the center of development. In 2015, SDG 17 (Strengthen the means of implementation and revitalise the global partnership for sustainable development) made its first target: "Strengthen domestic resource mobilisation, including through international support

1 Matti Konohen & Francine Mestrum, *Introducing the Tax Justice Network: Only the Little People Pay Taxes*, *in* Tax Justice: Putting Global Inequality on the Agenda xiii. (Marti Konohen & Francine Mestrum eds., 2008).

2 *Id.*

3 Matti Konohen & Francine Mestrum, *Introduction, in* Tax Justice: Putting Global Inequality on the Agenda 21 (Marti Konohen & Francine Mestrum eds., 2008).

4 Jeremy Leaman & Attiya Waris, *Why Tax Justice Matters in Global Economic Development, in* Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present 1 (Jeremy Leaman & Attiya Waris eds., 2013).

5 *See* David A. Crocker*, Development Ethics and Globalization,* 30 Philosophical Topics 9, 17 (2002).

6 *See* Thomas Pogge & Krishen Mehta*, The Moral Significance of Tax-Motivated Illicit Financial Outflows, in* Global Tax Fairness 1 (Thomas Pogge & Krishen Mehta eds., 2016). *See also* Xavier Casanovas, Tax Justice, A Global Struggle 8 (Cristianisme I Justícia, 2018).

to developing countries, to improve domestic capacity for tax and other revenue collection."[7] However, given the structural imbalances in the global financial system, even the Organisation for Economic Co-operation and Development (OECD) recognizes that low income countries are placed at a "distinct disadvantage" in making the most of their potential from "external challenges – such as aggressive tax avoidance by multinational enterprises."[8] Thus, "unilateral approaches to tax corporations whose operations span the globe are obsolete, and a multilateral approach is both essential and feasible."[9] Therefore, the question facing the Tax justice movement in Africa is not *whether* to ally itself with other progressive organizations or interests to achieve its policy goals, but with *who*. Perhaps surprisingly, the answer to that question is the Roman Catholic Church in the era of Pope Francis.

Francis is not the first modern pope to level heavy criticism at the inequalities inherent in the capitalistic global financial system,[10] nor is his critique outside of Catholic Social Doctrine or tradition.[11] However, where he differs from his predecessors is the manner in which he is willing to envision "a different kind of economy: one that brings life not death, one that is inclusive and not exclusive, humane and not

7 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, Goal 17: Partnerships for the Goals (Oct. 21, 2015), *available at* https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-17-partnerships-for-the-goals.html. *See* also OECD Centre for Tax Policy and Administration*, OECD Work on Tax and Development 2018-2019, at* 8–11 (2019).

8 *Id.* at 9.

9 Reuven S. Avi-Yonah, *Hanging Together: A Multilateral Approach to Taxing Multinationals, in* Global Tax Fairness 113 (Thomas Pogge & Krishen Mehta eds., 2016).

10 *See* John Paul II*, Encyclical Letter on the Hundredth Anniversary of Rerum Novarum Centesimus Annus,* §42 (May 1, 1991)*, available at* http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html.

> "Returning now to the initial question: can it perhaps be said that, after the failure of Communism, capitalism is the victorious social system, and that capitalism should be the goal of the countries now making efforts to rebuild their economy and society? Is this the model which ought to be proposed to the countries of the Third World which are searching for the path to true economic and civil progress? The answer is obviously complex. If by 'capitalism' is meant an economic systems which recognizes the fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector, then the answer is certainly in the affirmative, even though it would perhaps be more appropriate to speak of a 'business economy,' 'market economy' or simply 'free economy.' But if by 'capitalism' is meant a system in which freedom in the economic sector is not circumscribed within a strong juridical framework which places it at the service of human freedom in its totality, and which sees it as a particular aspect of that freedom, the core of which is ethical and religious, then the reply is certainly negative."

11 *See* Pontifical Council for Justice and Peace, Compendium of the Social Doctrine of the Church, §335 (Libreria Editrice Vaticana 2004).

dehumanizing, one that cares for the environment and does not despoil it,"[12] and to put the imprimatur of Catholic social teaching behind such an endeavor. He has gone so far as to convoke a conference in Assisi, now for November 2020, on the "Economy of Francesco" – what the Economist dubs "a papal anti-Davos" with the explicit aim of finding more sustainable ways of living that ease the burden on the poor, and with the implicit aim of exploring alternatives to free-market capitalism.[13] In fact, the "Economy of Francesco" should be seen not as a single conference event, but as a coherent body of Catholic Social Doctrine on development and the economy, with its roots in the documents of the Second Vatican Council, through the Medellín and Aparecida conferences, up to today. The Francis pontificate represents a Kairos moment in the Church, an opening for "epochal change," and a reaffirmation and recommitment to the spirit of Vatican II.[14] Francis's approach to social justice and the global financial system reflects his "simple but potent missionary commitment to engage the world as it is, a deeply practical pastoral option to pursue a realistic dialogue with modernity and all its various ideological offspring."[15] This marks a tremendous window of opportunity for the Tax justice movement to engage Catholic Social Teaching as an intellectual and moral partner for structural change in the international financial order. Especially now, as the dust settles from the wreckage that the Coronavirus has unleashed on the world economy, rocking the very foundations upon which capitalism and global finance have rest upon for the last hundred years, a unique liminal space may be opening up for bold action on the part of the Global South to stake their claim to a seat at the table where the New International Financial Order will take shape.[16] Pope Francis has actively encouraged this conversation and has facilitated bringing stakeholders from throughout the Global South together for

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12 Francis, Letter Sent by The Holy Father for the Event "Economy of Francesco" (May 1, 2019), http://www.vatican.va/content/francesco/en/letters/2019/documents/papa-francesco_20190501_giovani-imprenditori.html.

13 Henry Tricks, *Pope Francis Hopes to Anoint a New Economic Model,* The Economist (2020), https://theworldin.economist.com/edition/2020/article/17495/pope-francis-hopes-anoint-new-economic-model.

14 Allan Figueroa Deck, Francis, Bishop of Rome: The Gospel for the Third Millennium 3–4 (2016).

15 *Id*. at 15.

16 *See* Dambisa Moyo*, 3 Things to Make the World Immediately Better After Covid-19,* N.Y. Times (Jul. 31, 2020), https://www.nytimes.com/2020/07/31/opinion/coronavirus-economy.html.

collaboration through his creation of the Vatican's COVID-19 Commission through the Dicastery for Promoting Integral Human Development on March 30, 2020.[17]

Part I of this paper will set the stage, by describing the international tax system, how it came to be and how it works. A distinction will be made between tax *evasion* and tax *avoidance*, and why the two terms are not interchangeable for purposes of tax justice analysis. Further, I will examine the problem of transfer pricing and Base Erosion and Profit Sharing (BEPS), which serves as the hinge on which multinational corporations operating in the Global South generally, and Africa particularly, successfully avoid payment of tax in those jurisdictions where profit is generated or resources are extracted.

Part II will look at theories of taxation—how, where, and what to tax —which are emerging as a major point of contention among tax practitioners and policymakers, and a possible nexus where the interests of African governments and some richer countries may align. Part III will examine the Economy of Francesco, looking at the intersection of Tax justice with Catholic Social Teaching on the economy, highlighting that any discussion of tax justice in the post-pandemic world will have to take account of and deal with corruption among local elites. Part IV will propose a roadmap for African Tax Justice, providing ideas for policy and advocacy based on an appraisal of ways to leverage the continent's strengths in the international fora where key decisions are made.

I. SETTING THE STAGE: THE INTERNATIONAL TAX SYSTEM

A. What is Taxation? A Primer on an Ethics of Taxation

Taxation, for purposes of this paper, refers to the means by which governments finance their expenditures by imposing charges on individuals and corporate entities within their jurisdiction. A corporation is a legal entity, a fictive "person" under the law separate from its shareholders, created by statute, and for tax purposes is a separate taxpayer from its shareholders. For tax purposes then, a corporation is subject to tax in its own capacity for corporate-level events, specifically profits and capital gains. Two points are key for this discussion. First, a corporation is recognized as a person under the law – it can hold property in its own name, as well as sue and be sued in court. Second, and most importantly, a corporation and its shareholders are separate and

17 *See* Junno Arocho Esteves, Pope creates coronavirus commission to respond to pandemic, Crux (Apr. 16, 2020), https://cruxnow.com/vatican/2020/04/pope-creates-coronavirus-commission-to-respond-to-pandemic/.

distinct taxpayers – while a shareholder is certainly interested in what the corporation pays, that shareholder is generally not individually liable for the corporation's tax.

At the outset, one of the key issues facing a sophisticated discussion of ethics and taxation is that philosophers and lawyers are speaking two different languages, and the legal academy, especially, lacks the background to engage the philosophical arguments.[18] Philosophers too, have shown little interest in discussing the philosophy of taxation.[19] This lack of a broad literature discussing tax policy through a hermeneutic of philosophy opens a door for those with the training to provide an interdisciplinary approach to questions of ethics related to Tax justice.[20] As to issues of global distributive justice, the legal academy has noticed that political philosophers have insufficiently explored questions of the global allocation of tax revenue on development.[21] The question for tax scholars is how to "…do that work without feeling that they are simply second-rate philosophers, political scientists, or the like, as tax scholars have more generally feared with regard to their interdisciplinary ventures?"[22]

According to Daniel Halliday, lecturer in philosophy at the University of Melbourne, "[t]he fact that social scientists frequently bring considerations like inequality and harm into their work on tax reflects the fact that the domain of taxation,

18 *See* Diane Ring, *Critical Issues in Comparative & International Taxation: The Promise of International Tax Scholarship and its Implications for Research Design, Theory, and Methodology*, 55 St. Louis L.J. 307, 307 (2010) ("A review of modern international tax scholarship reveals that as the field has matured, international tax scholars have increasingly turned to other disciplines, especially social sciences, for their insights, ideas, and research to improve understanding of international tax policy. But this intersection with the social sciences [and the humanities] forces us to confront some distinct differences between the approach of the legal academy to research and scholarship and the approaches based in other fields. Many of the disciplines upon which international tax scholars rely explicitly discuss and examine questions of research, design, methodology, and analysis that are relatively foreign to the international tax scholar.").

19 *See* Daniel Halliday, *Justice and Taxation*, 8 Philosophy Compass 1111 (2013) ("[O]ne would expect moral and political philosophers to have an important contribution to make to the study of taxation. One of the most striking features of the philosophical literature on taxation, however, is how fragmentary it is. Taxation has not, at any rate, generated a philosophical debate centered around two or three general theories of how to make tax policy fit the requirements of justice. In this way, taxation contrasts quite sharply with other morally significant topics to do with state coercion, such as punishment. One can easily find book-length pieces of work defending the view that punishment has some very specific moral function. But philosophical work on tax is not like this at all.").

20 Ring, *supra* note 18, at 308 ("The importance of non-legal disciplines to the development of international tax policy, combined with the perceived inaccessibility of international tax to those working outside the field, renders international tax distinctive – if not unique…International tax scholars need to look beyond the traditional bounds of their field, but they cannot abdicate their territory to other disciplines.").

21 *See id.* at 323.

22 *See id.* at 324.

although fragmentary, is a *thoroughly moralised* territory.[23] Nevertheless, much of the "…often emotionally charged rhetoric tends to ignore the foundational question of *why*" multinational corporations should be subject to local taxation and have an ethical duty to pay tax levied by the legitimate authorities in the locations where they operate.[24] Tax justice is also a thoroughly moralized territory, pointedly asking why the international tax structure is the way that it is. Multinational corporations (MNCs) wield a tremendous amount of economic power in the developing world and the interests of their shareholders in maximizing profit and return on investment are often at odds with those of host governments.[25] While international tax, in general, is a major research topic in business, economics, law, history, sociology and other fields, remarkably little work has been interdisciplinary, despite cutting across so many disciplinary boundaries.[26] As Diane Ring notes, "[t]o maximize the relevance of their work, international tax scholars must embrace the expanded agenda and methodologies available to them without surrendering the distinctive sensitivity to the legal system and the real world that their own legal training has afforded them."[27]

B. How the International Tax System Came to Be and How it Works

Accepting Ring's challenge, maximizing the relevance of our work as international tax scholars calls us to understand how that system of taxation came to be, and our efficacy as critics of the ethics of that system require us to understand the construction of the pillars which support it.[28] The international tax system is a vestige of the post-World War I global order, the result of negotiations between the victorious powers that also led to the creation of the League of Nations. Although there had been a number of tax cooperation agreements among states prior to the twentieth century, the

23 *See* Halliday, *supra* note 19, at 1120 (italics added) ("Philosophers are well-placed to make contributions to new and emerging areas of inquiry and not [just] to topics that have the benefit of a well-defined philosophical literature.").

24 *See* David Elkins, *The Myth of Corporate Tax Residence,* 9 Colum. J. Tax L. 5, 8 (2017) (italics added).

25 John Christensen, *Taxing Transnational Corporations, in* Tax Justice: Putting Global Inequality on the Agenda 107 (Marti Konohen & Francine Mestrum eds., 2008) ("The past half-century has seen a massive shift of economic and political power from the state to companies. Transnational corporations (TNCs) bestride the globalized markets, wielding huge powers at national and international levels. The largest hundred corporations control 20 per cent of global foreign direct investment, and approximately 60 per cent of world trade occurs between subsidiaries of TNCs.").

26 Martin Zagler, *Introduction: International Tax Coordination – An Interdisciplinary Perspective on Virtues and Pitfalls, in* International Tax Coordination – An Interdisciplinary Perspective on Virtues and Pitfalls, 1, 5 (Martin Zagler ed., 2010).

27 Ring, *supra* note 18, at 329.

28 *Id.*

years immediately following World War I mark a watershed in the integration of the global economy that increased political pressure for a certain degree of international cooperation on tax issues.[29] Specifically, the increasing rates of direct taxation by states, particularly income taxes, as well as the exploding volume of international business meant that the problem of double taxation was becoming a source of tension in an ever more integrated global economy.[30]

Underlying the system of international taxation is the conundrum of double taxation, which according to Sir Cornelius Gregg, onetime Chairman of the British Board of Inland Revenue, "arises where you have the person in one country and his wealth in another, and *both* countries levy a toll on the wealth so that it has to bear two bites."[31] In the international arena the problem is the assertion of jurisdiction by more than one country to tax the *same* item of income.[32] Double taxation over this same item of income occurs given the fact that most countries exercise jurisdiction to tax on two separate bases: 1) as being the source of the income generated and 2) as the location of the residence of the recipient of the item of income.[33]

In short, what makes taxation *international*, and therefore distinctive vis-à-vis domestic taxation, is this relationship between source and residence country.[34] Charles Kingston offers insight into how "[s]ource and residence taxation interact. Source country A, for example, may grant income tax exemptions to attract investment from residence country B. The attraction, however, diminishes to the extent that B itself taxes the exempted income; and such interaction gives international taxation a coherence. In a coherent system, decisions connect: in international taxation, what

29 *See generally* Sunita Jogarajan, *Prelude to the International Tax Treaty Network: 1815-1914 Early Tax Treaties and the Conditions for Action,* 31 Oxford J. Legal Stud. 679–707 (2011).

30 *See* David H. Rosenbloom & Stanley I. Langbein*, United States Tax Treaty Policy: An Overview,* 19 Colum. J. Transnat'l L. 359, 361 (1981).

31 Cornelius J. Gregg, *Double Taxation,* 33 Transactions of the Grotius Soc'y 77 (1947) (italics added).

32 Donald R. Whittaker, *An Examination of the O.E.C.D. and U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy,* 8 N.C.J. Int'l L. & Com. Reg. 39, 40 (1982).

33 *See id.* at 40 ("A third jurisdictional base, exercised in the international arena primarily by the United States, is assertion of the right to tax because of the citizenship of the individual."). The United States taxes the worldwide income of "United States Persons" defined as citizens or residents of the United States as well as domestic corporations and partnerships. *See* 26 U.S.C. § 7701(a)(30).

34 *See* Charles I. Kingson, *The Coherence of International Taxation,* 81 Colum. L. Rev. 1151, 1152 (1981) ("This Article discusses the taxation of international income—income earned in one country but owned by a resident of another. The first country, called the source country, taxes because the income is earned there. The second, called the residence country, taxes because the owner lives or is managed there.").

one country decides will affect another."[35] Returning to Sir Cornelius and his "two bites" metaphor, "With low rates of tax two tax bites would not matter very much, but with high rates they might leave very little. It is then that the right of each country to bite and the size of bite becomes a vital issue."[36] Therefore double taxation becomes a problem when both the source and the residence country are levying tax at relatively high rates on the same income – precisely the problem that arose among the major global trading partners in the years during and following World War I.[37]

In the absence of a World Tax Organization, which would establish global rules for where and how an item of income is taxed, the problem of double taxation is addressed through bilateral tax treaties, which "tie their signatories into restrictions on if, how, and how much they can tax multinational companies and other cross-border economic activity, ostensibly to eliminate the barriers to such activity caused when countries' tax systems overlap."[38] Therefore, the "original and sole purpose" of the global tax regime as it developed in the years after 1918 is to mitigate international double taxation and therefore facilitate and streamline global trade and investment.[39] Despite the fact that the U.S. Senate rejected the Versailles Treaty and therefore was never a member of the League of Nations, the strength of the dollar ensured that American capital was the

35 *Id.* at 1153. *See als*o Whittaker, *supra* note 32, at 41.

> "Generally, a country will assert source jurisdiction over items of income which arise within the country. Such source jurisdiction is generally of either of two types when asserted upon a non-resident's income. In one situation, the non-resident individual or entity is present in the tax jurisdiction in a significant and meaningful way-the non-resident may be engaged in business activity in the jurisdiction or performing personal services there. This type of source jurisdiction is a form of in personam jurisdiction which is asserted because of participation in the source country's economy. The assertion of jurisdiction reflects a cost- benefit principle and seems to be a fundamentally fair application of the power of taxation. In the second situation, the non-resident taxpayer has none of the personal connections with the taxing country as he does above, but still receives a specific item of income through the economy of the source country. The most common items of income in such a case would be royalties, interest or dividends. The source country would then assert in rem jurisdiction over the items of income and impose a tax regardless of the residency status of the recipient. This assertion of jurisdiction is more difficult to justify because there is not a clear-cut cost-benefit relationship: Rather, the justification of taxation seems to be that the distributing entity, the borrower of money, the corporation, or the licensee, were beneficiaries of government services and the income derived through them should thus be taxed."

36 Gregg, *supra* note 31, at 77.

37 *Id.* at 78.

38 Martin Hearson, *Measuring Tax Treaty Negotiation Outcomes: the ActionAid Tax Treaty Dataset* 7 (International Centre for Tax and Development, Working Paper No. 47, 2016).

39 Thomas Rixen, *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance,* 18 Rev. Int'l Pol. Econ. 205 (May 2011).

main sustainer of the international economic system during the 1920s.[40] Therefore, despite not being a member of the League, the revitalized postwar global economy came to hinge on a relationship of financial interdependence between the United States and Europe.[41] As a result, despite having abstained from official League membership, a palpable American presence on the international stage, particularly on economic matters, was part of the intellectual and diplomatic climate of the 1920s.[42] This was the case when a 1923 report commissioned by the League's Financial Committee to address the problem of double taxation included a representative from the United States among its four members.[43]

Following the 1923 report, an additional report was generated by a Committee of Technical Experts, which as its name implies, delved into the more technical aspects of the merits of taxation based on either source or domicile, and was the first to systematically address the problem of tax evasion.[44] Finally, in 1927, the Technical Experts produced the first international draft model treaties to provide a framework for states to negotiate bilateral tax agreements.[45] These were based upon a compromise, as debated by the Technical Experts, between conflicts between capital importing and exporting countries, with the former favoring taxation based on the source principle and the latter the residence principle, since the respective allocation would yield the largest share of the international tax base to each.[46] The resulting solution, generally speaking, is that "…the primary (or exclusive) right to tax active business income is granted to the source country; the residence country, by contrast, has the primary (or exclusive) right to tax passive income, i.e., interest, dividends, or royalties."[47]

Most existing bilateral tax treaties today which are concluded on the basis of a model, such as the OECD Model Tax Convention or the United Nations Model, are the direct descendants of this first model treaty drafted by the League of Nations.[48]

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40 Akira Iriye, The New Cambridge History of American Foreign Relations, Volume 3: The Globalizing of America, 1913–1945, 92 (2013).

41 *Id*. at 93.

42 *Id*. at 107–08.

43 *See* Rosenbloom & Langbein, *supra* note 30, at 361–62.

44 *Id*. at 364–65.

45 *Id*. at 365.

46 *See* Rixen, *supra* note 39, at 205.

47 *Id*. at 205–06.

48 OECD, *Fundamental Principles of Taxation*, *in* Addressing the Tax Challenges of the Digital Economy 36 (OECD Publishing, 2014). *See also* Veronika Daurer & Richard Krever, *Choosing between the UN and OECD Tax Policy Models: An African Case Study*, 22 Afr. J. Int'l & Comp. L. 1, 2 (2014) ("Country representatives commonly draw on two model treaties prepared by the OECD and UN respectively when negotiating tax treaties. The OECD treaty shifts more

Thus, "while there can be substantial variations between one tax treaty and another, double tax treaties generally follow a relatively uniform structure, which can be viewed as a list of provisions performing separate and distinct functions: (i) articles dealing with the scope and application of the tax treaty, (ii) articles addressing the conflict of taxing jurisdiction, (iii) articles providing for double taxation relief, (iv) articles concerned with the prevention of tax avoidance and fiscal evasion, and (v) articles addressing miscellaneous matters (e.g. administrative assistance)."[49]

In cases where a bilateral tax treaty gives priority to the taxing rights of the source jurisdiction, the state of residence or domicile is then required to provide relief from double taxation, usually in the form of exemptions and credits.[50] It bears repeating that the model tax conventions are simply that, models. From the very beginning, states were free to negotiate more advantageous deals depending on their economic advantage vis-à-vis their respective trading partner. At their heart, what the model conventions, and the resulting bilateral treaties they are based upon, achieve is "no more (nor less) than [to] disentangl[e] the transnational tax base and assign it to different jurisdictions."[51] Once the jurisdiction to tax has been established, states are free to apply their national laws to their respective share as they see fit; the international tax regime "merely regulates the *interfaces* of autonomous national tax systems and, in consequence, governments retain almost unlimited sovereignty over their share of the international tax base."[52]

In the absence of a bilateral tax treaty, double taxation remains a problem between two tax jurisdictions irrespective of whether the source or residence principles is applied. The extent to which this is mitigated or exacerbated rests on the shoulders of the national taxing authority. However, the (relatively) unlimited sovereignty of governments to tax as they see fit within their jurisdiction means that there are openings for states to structure their tax regimes in such a manner as to maximize their tax base

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taxing powers to capital exporting countries while the UN treaty reserves more taxing powers for capital importing countries."). States are also free to draft their own model convention. *See* Allison Christians & Alexander Ezenagu, *Kill-Switches in the U.S. Model Tax Treaty,* 41 Brook. J. Int'l L. 1043, 1044–45 (2016) ("The United States, however, has long had its own Model Income Tax Convention, the newest version of which is formally referred to as the United States Model Income Tax Convention of February 17, 2016 ["U.S. Model"]… The U.S. Model is structurally very similar to the OECD and U.N. Models, yet stands alone as a conveyer of certain tax policy standards specific to the United States…").

49 OECD, *Fundamental Principles of Taxation, in* Addressing the Tax Challenges of the Digital Economy 36 (OECD Publishing, 2014).

50 *Id.* at 40.

51 Rixen, *supra* note 39, at 206.

52 *Id.*

in the absence of a bilateral treaty which might say otherwise – a point which we will return to later in the paper.

C. Tax Evasion v. Tax Avoidance

In the popular imagination, tax evasion and tax avoidance are interchangeable terms which refer to the concept of strategic tax behaviors, or tax planning strategies, "designed solely to minimize tax obligations, the legality of which is questionable."[53] However, for purposes of a tax justice analysis it is key to note that the terms are *not* fungible and refer to distinct behaviors with different ethical implications and potential legal consequences. Tax evasion can be defined as *intentionally illegal* behaviors, in direct violation of tax laws, designed to escape payment of tax.[54] Tax avoidance strategies, on the other hand, can be defined as those "illegitimate (but not necessarily illegal) behaviors reduced at reducing tax liability" which while they do not violate the letter of the law certainly violate its spirit.[55] Licit tax savings, or legitimate tax planning, serve as a third category of strategic tax behavior that employs commonly accepted tax behaviors to reduce the tax burden, but neither contradicts the letter nor the spirit of the law.[56]

First and foremost, it should be stressed that MNCs are scrupulous in their adherence to the tax laws; their veritable army of lawyers, accountants, and bankers is employed to ensure that they remain on this side of the law in any given jurisdiction.[57] Their scrupulosity is part and parcel of the complexity of the tax system itself: different national tax codes layered with regulations and opinions generated to counter aggressive avoidance strategies, coupled with bilateral treaties and the minutiae of

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53 Reuven Avi-Yonah, Omri Marian & Nicola Sartori, Global Perspectives on Income Taxation Law 101 (2011).

54 *Id.*

55 *Id.*

56 *See id.* at 102 ("This tri-partition is not generally accepted by economists. Professor [Joel] Slemrod, for example, splits strategic tax behaviors into two categories: tax avoidance when the behaviors are legal and tax evasion when they are not.") (citations omitted).

57 Christensen, *supra* note 25, at 107–08.

> "The focus within boardrooms has shifted from product innovation to financial engineering and novel tax planning – a euphemism for aggressive tax avoidance. Battalions of accountants, lawyers and bankers devise complex structures to exploit loopholes in domestic tax legislations, while advancing the idea that tax avoidance is crucial to promoting corporate *efficiency.* The outcome has been the creation of a business culture in which distributions to society through tax payments are regarded as a corporate cost, to be minimized, and tax avoidance is seen as a major profit centre. Any company that chooses to act in an ethical way by paying taxes on profits when and where they are due is seen as inefficient and therefore ripe for takeover by a private equity buyer – almost certainly controlled through an offshore financial centre."

modern accounting practice.[58] This "legalized nature" of tax avoidance encourages the formation of industries of lobbyists and corporate tax specialists which ensures not only that the rules are complex, but that they are complied with in the letter, if not the spirit.[59]

However, the scrupulosity of MNC's in adhering to the letter of the law should not be interpreted as giving their avoidance strategies a moral imprimatur vis-à-vis those who are engaging in outright criminal tax evasion. It is a thin line between tax avoidance and evasion in many cases and the tendency in the West to avoid seeing tax avoidance as part of a corrupt nexus with tax evasion and money laundering means that attention is drawn away from passing moral judgment on questionable practices by MNCs.[60] The legality of avoidance strategies, as well as their characterization as such by the lawyers, accountants, and bankers who devise them, should not be accepted as evidence of their moral neutrality without question.

From a tax justice standpoint, there are conflicting interests between the public and an MNC's shareholders. While the public's concern is whether or not a firm pays its share of taxes, shareholders are interested in reducing taxes to increase shareholder value. Therefore, "[i]f a firm avoids taxes, it increases profitability, but the reduction in taxes may affect support for governmental infrastructure and/or social programs, hence the firm may be categorized as socially irresponsible."[61] This conundrum plays out in the literature via corporate attempts to draw a line between licit and illicit activities based on the business purpose doctrine.[62] Activities that have no business purpose and are aimed primarily, if not exclusively, at avoiding tax should be considered illicit and probably illegal.[63] The opposite holds true for those transactions that are motivated by real business considerations and have important, albeit secondary, tax advantages.[64]

58 Grahame R. Dowling, *The Curious Case of Corporate Tax Avoidance: Is it Socially Irresponsible?,* 124 J. Bus. Ethics 176 (2014) .

59 *Id*.

60 *See* Sara A. Dillon, *Global Corruption: International Law's Counterrevolution,* 45 N.C.J. Int'l L. 111, 113 (2020).

61 Fariz Huseynov & Bonnie K. Klamm, *Tax Avoidance, Tax Management and Corporate Social Responsibility,* 18 J. Corp. Fin. 807 (2012).

62 Avi-Yonah, *supra* note 53, at 102. *See generally* Gregory v. Helvering, 293 U.S. 464 (1935) (The business purpose doctrine is a tax related doctrine stating that a transaction must serve a bona fide business purpose to qualify for beneficial tax treatment. If the transaction has no substantial business purpose other than the avoidance or reduction of tax, the tax law will disregard the transaction and deny the benefit).

63 Avi-Yonah, *supra* note 53, at 102.

64 *Id.*

Tax justice, therefore, is concerned with the ways in which MNCs exploit the gaps in national tax and regulatory schemes both for purposes of tax avoidance and to avoid the disclosure of information regarding beneficial ownership of assets to taxing authorities.[65] MNCs skillfully navigate global tax rules, as they currently exist, to guarantee that they pay as little tax as possible, taking full advantage of national tax laws, regulations, and accounting principles to report profits and losses in those jurisdictions most advantageous to their bottom line. Granted, these corporations will s*tretch* the law as far as possible, but will put in considerable effort to avoid the consequences of violating, or evading, the tax law.

There is a further distinction between tax avoidance and tax *competition*, which is competition between governments to attract investment.[66] Tax competition is a no less important issue in a broader discussion of tax justice, but moves the focus of analysis from the corporate actors and their aggressive tax planning, to national governments and matters of taxing policy. If anything, including tax competition in the analysis yields a more difficult calculus with an additional, potentially unpredictable, variable.

D. BEPS and the Problem of Transfer Pricing

How does tax avoidance work in practice? How are MNCs able to so skillfully, and successfully, manipulate the existing legal framework of taxation to their sole advantage? The answer lies in transfer pricing and in a practice known as Base Erosion and Profit Sharing (BEPS), which has the attention of taxing authorities worldwide.

Any discussion of taxation will invariably incorporate a quantitative aspect in addition to any theoretical one as to who or what to tax. Therefore, we need a common framework so that we are not discussing numbers in the abstract, but comparing like terms in a consistent manner. That is the role that financial accounting plays in that it uses consensual terms to "present and explain the actions and behavior of commercial

65 Christensen, *supra* note 25, at 109.

66 *See* Lilian V. Faulhaber*, The Trouble with Tax Competition: From Practice to Theory,* 71 Tax L. Rev. 311, 312–313 (2018).

> "[T]he distinction between tax avoidance and tax competition is much less clear than is generally understood. Tax competition is competition among governments, while tax avoidance consists of efforts by taxpayers to avoid the taxes imposed by governments. However, tax avoidance today relies on tax competition since most international tax avoidance transactions are only valuable to taxpayers if the country on the other side of the transactions provides a low rate or preferential treatment. Countries are complicit in tax avoidance schemes - and taxpayers (often multinational corporations) are complicit in tax competition. Recent efforts to curtail tax avoidance therefore can be described as efforts to limit tax competition."

entities" in a coherent and efficient manner.[67] It does so by using agreed-upon terms that "embody economic and financial meaning."[68] The lack of global convergence between the accounting standards used between taxing jurisdictions results in a situation where what is reported on a multinational corporation's balance sheet may markedly differ between the United States, China, and the European Union. Not only does this result in a lack of transparency, but it inhibits the development of policy if the books do not match across jurisdictions and we wind up trying to compare financial apples and oranges.

This lack of accounting convergence across jurisdictions contributes to BEPS, which are "tax-avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations."[69] The "beating heart of BEPS planning – the *sine qua non* of the transactions that triggered the universal interest in BEPS" is aggressive transfer pricing.[70] Corporations exploit transfer pricing to create tax benefits by reporting profits to entities in tax havens that do not correspond with actual activities in those entities.[71] Transfer price is the price at which divisions of a company transact with each other, i.e., the price for labor, goods, and services across a vertically integrated enterprise. When related companies buy or sell commodities, services, or assets internally, a transfer price must be charged in order to allocate profits.[72] In principle, transfer pricing is supposed to be measured on the basis of an arms-length transaction: the goods and services transferred internally must be exchanged at the same price as would be charged to an unrelated firm.[73] However, given the lack of transparency and convergence between accounting regimes, multinational corporations are able to manipulate transfer pricing to avoid paying tax on trillions of dollars of foreign profit.[74] They do this by charging, and reporting, artificially low or inflated prices on the goods and services transferred to report minimal profits or excessive losses in high tax jurisdictions, and the lion's share of profit in tax havens – where *none* of the tangible taxable activity actually took place. For example, the bulk of the profit from extractive mining activities in South Africa, or cocoa production in

67 *See* Israel Klein*, A Change in Accounting, A Change in Law,* 42 Del. J. Corp. L. 51, 55 (2017).

68 *Id*. at 5–56.

69 *See* Jane Gravelle, Cong. Research Serv., R44900, Base Erosion and Profit Sharing (BEPS): OECD Tax Proposals 1 (2017) (citing http://www.oecd.org/tax/beps/).

70 *See* Yariv Brauner, *What the BEPS?*, 16 Fla. Tax Rev. 55, 95 (2014).

71 *See* Gregory Pun, *Base Erosion and Profit Shifting: How Corporations Use Transfer Pricing to Avoid Taxation,* 40 B.C. Int'l & Comp. L. Rev. 287, 288 (2017).

72 *See* Gravelle, *supra* note 69, at 13.

73 *Id*.

74 *See* Brauner, *supra* note 70, at 97.

the Ivory Coast, is manipulated through transfer pricing to be reported in a tax haven such as Jersey, Luxembourg, or the Cayman Islands. This results in a Tax justice issue since jurisdictions in the developing world generally lack the administrative resources to allow their tax authorities to trace the economic data and combat aggressive corporate BEPS schemes.[75]

However, despite lacking the internal resources to combat aggressive BEPS schemes on their own, developing countries stand to benefit from the fact that the manipulation of transfer pricing has the attention of the G-20 countries as they try to repatriate more tax revenue into their own national coffers and away from tax havens.[76] In October 2015, the OECD published a final list of 15 BEPS action items, the "BEPS Project," which was endorsed by the G-20 Finance Ministers in February 2016.[77] While most of the BEPS Project Action Items address areas of substantive law – rules and practices to reduce erosion of a country's tax base – the OECD realized that substantive rules alone would be insufficient to foster an efficient tax system.[78] Without increased transparency and disclosure in reporting requirements, substantive changes to tax codes would be stymied by aggressive transfer pricing.[79] Therefore, in Action 13, the OECD recommended a commitment by participating jurisdictions to "country-by-country" (CbC) reporting for multinational corporations.[80] Broadly speaking, what makes CbC reporting an improvement over current methods of financial disclosure, at least from the perspective of a taxing jurisdiction, is that it requires an enterprise to disclose the name of each country where it operates, as well as its subsidiaries and affiliates therein, the performance of each within that country, the tax assessed and paid in that country, and the cost and book value of its assets and liabilities in that country.[81] This is a marked improvement from a system which only mandates *entity-*

75 *See* Diane Ring, *Developing Countries in an Age of Transparency and Disclosure,* 2016 B.Y.U.L. Rev. 1767, 1796 (2016).

76 *See* Itai Grinberg, *The New International Tax Diplomacy*, 104 Geo. L.J. 1137, 1145 (2016).

77 *See* Gravelle, *supra* note 69, at 1.

78 *See* Ring, *supra* note 75, at 1770.

79 *Id.*

80 *See* Gravelle, *supra* note 69, at 22–23 ("This action item provides for a standardized approach to providing information to document multinationals' activities. The first is the provision of a master file that contains information on operations and transfer prices and is available to all tax administrations. The second is detailed transfer pricing information in a local file for each country that identifies related-party transactions and transfer pricing analyses. The third is a CbC report that will provide, for each jurisdiction, information on revenue, profit, taxes paid, employees, capital, retained earnings, and tangible assets. It also requires information on the business activities of each entity in the jurisdiction.").

81 *See* Brauner, *supra* note 70, at 103–06.

by-entity reporting. Reporting by entity, as opposed to country, gives a company much greater space in which to mask tax avoidance and evasion through transfer pricing, as well as to hide the true extent of its operations and holdings within a jurisdiction.

Diane Ring notes several risks and limitations with the implementation of Action 13 from the perspective of the developing country.[82] One of the most interesting, from the perspective of development theory generally, is that as a country participates in the Action 13 plan and receives valuable information from the multinationals, "they are effectively stepping up their international tax enforcement efforts."[83] While that, in and of itself, is not problematic, the risk is that as local tax audit staff gain further experience in international tax issues, and multinationals and their accounting firms experience increased interaction with local authorities, those same multinationals may be inclined to hire away local tax personnel as their skill set improves and they become more attractive as candidates.[84] While that is not a reason not to participate in Action 13, it does highlight that a holistic, rather than piecemeal, approach to improving the quality and capacity of local tax authorities in the developing world is called for.

Transfer pricing is the quantitative gear at the center of a larger discussion of tax justice. PricewaterhouseCoopers itself acknowledges that if transfer pricing issues were properly dealt with, developing countries could collect over forty percent more in tax from multinational corporations than they already do.[85] However, properly addressing transfer pricing also calls for a holistic approach, particularly as financial accounting standards are concerned. For example, the U.S. Securities and Exchange Commission (SEC) largely requires filings to be in accord with Generally Accepted Accounting Principles (GAAP), while most other reporting jurisdictions of the world, including the European Union, use International Financial Reporting Standards (IFRS), or some variant thereof. The difference between the two is not trivial and the risk, even with CbC reporting, is that jurisdictions are still comparing financial apples to financial oranges – as mentioned above.

As with other areas in regard to the ethics of taxation, this too has flown under the academic radar. Israel Klein of Harvard Law School notes that the effect that financial accounting has had on both the U.S. legal system and legal systems worldwide has gone largely unnoticed by scholars.[86] Most of the literature has focused on the impact

82 *See generally* Ring, *supra* note 75, at 1812–25.
83 *See id*. at 1816.
84 *See id*.
85 *See* Pun, *supra* note 71, at 305–06.
86 *See* Klein, *supra* note 67, at 53.

of accounting standards and financial reporting on capital markets.[87] Klein suggests that the legal system endows the financial accounting system with a "quasi-legislative" capacity that allows changes made to the accounting parameters to have exogenous effects on the legal regimes that use those parameters.[88] If the relevant standards are set in Washington, New York, and London, it merits critique that those in the developing world lack a seat at that table where accounting convergence is being discussed.

The BEPS Project highlights a liminal space between the developed and the developing world in regard to a quantitative issue at the heart of Tax Justice: how are countries made privy to the financial data, already at the disposal of multinational corporations, of the true extent of those companies' holdings and activities within their borders? The weight and influence of the OECD countries may move the scale towards CbC reporting, but that alone will not be enough to counter the weight of other structural barriers to ensuring that jurisdictions in the Global South receive their fair share of tax assessed on activities taking place within their borders. As Diane Ring notes, "if the transparency and disclosure trend proves successful and enables participating jurisdictions to more effectively administer their tax systems, the failure to incorporate developing countries into the process could widen the gap between developed and developing countries, with notable distributional consequences."[89] Those distributional consequences would only serve to exacerbate the injustices already manifest in the global international tax regime

E. Setting the Rules: The OECD

Having established how the international tax system works, what interests it protects, and the fissures in the system which permit MNCs to exploit transfer pricing through BEPS to avoid tax on a global scale, who then sets the rules and where does a state actor need to be in order to effect changes in policy? The answer is disarmingly simple: the OECD.

The Organisation for Economic Co-operation and Development (OECD) is one of the institutions that can trace its lineage back to the family of international organizations that was born immediately after the Second World War, including the United Nations, the World Bank, the International Monetary Fund, NATO, and the

87 *Id*.
88 *Id*. at 55.
89 *See* Ring, *supra* note 75, at 1835.

Council of Europe.[90] It grew directly out of the Organization for European Economic Co-operation (OEEC) which was established in 1948 to oversee the Marshall Plan.[91] In its present form, the OECD may be traced back to a 1959 conference in Paris attended by the French and U.S. Presidents, the West German Chancellor, and the British Prime Minister, where it was proposed to reconstitute the OEEC to better focus on international development and coordination of trade policies, an effort which came to fruition with the signing of the OECD convention in December 1960.[92] Twenty countries signed the original OECD convention in 1960, with an additional sixteen becoming members since that date.[93] Neither China, nor India, nor any country in Africa, are members of the OECD.

The Committee on Fiscal Affairs, which is the main OECD body which deals with international tax reform efforts, functions effectively as an informal World Tax Organization, but its membership is limited to OECD members.[94] The Committee on Fiscal Affairs took on responsibility for consolidating pre-OECD versions of the model conventions and engages in technical elaboration and adaptation of the model, which serves as the basis for essentially all of the more than 2,000 bilateral tax treaties connecting about 180 countries.[95] The OECD Model Convention "represents the general consensus on international taxation; its principles, norms and rules also effectively constrain the policies that countries can pursue unilaterally vis-à-vis foreign tax revenues."[96] Therefore, having a seat at the OECD table is critical to having a voice not only on international tax policy generally, but more specifically, on the language of the Model Convention which most OECD members will use as a template in bilateral treaty negotiations.

However, membership in the OECD is a contentious issue, and has been since the foundation of the organization.[97] For most of its history, the OECD maintained an exclusive "club" structure which most of the countries of the world were not welcome

90 Timothy Bainbridge, *A Brief History of the OECD,* 221/222 The OECD Observer 111 (2000).

91 *Id.* at 112.

92 *Id.*

93 OECD, *List of OECD Member Countries – Ratification of the Convention on the OECD,* http://www.oecd.org/about/document/list-oecd-member-countries.htm.

94 *See generally* Arthur J. Cockfield, *The Rise of the OECD as Informal 'World Tax Organization' Through National Responses to E-Commerce Tax Challenges*, 8 Yale J. L. & Tech. 136 (2006).

95 Rixen, *supra* note 39, at 207.

96 *Id. (citing* Avi-Yonah, R.S., International Tax as International Law: An Analysis of the International Tax Regime (2016)).

97 *See Accession to the Organisation, OECD,* http://www.oecd.org/legal/accession-process.htm ("Becoming a Member of the OECD is not a simple formality but is the result of a rigourous review process. The OECD governing body [the Council], which comprises all the Members of

to join on account of lack of development and economic inferiority.[98] During the Cold War it was often referred to as the "economic counterpart" of NATO and often assumed confrontational postures toward the Soviet bloc.[99] The end of the Cold War has seen the OECD enter into accession discussions with a number of states, partially as an attempt to address the problem that economic governance on a global scale is exceedingly difficult if the major economic powers are not involved in your deliberations.[100] Notwithstanding the decline of its more generalized voice as a global economic voice, the OECD has pursued an active strategy to remain the focal point of the global regime complex for taxation, even expanding into new areas such as the nexus between taxation and development.[101] Therefore, as the global focal point of international tax policy, the OECD's restrictive and cumbersome membership policies are increasingly problematic.

II. A THEORY OF TAX JUSTICE: FRAMING THE DEBATE

After nearly a hundred years, the question of *where* to tax has reemerged as a point of contention in the international financial order, much of it driven by the digital economy and the ease by which products and services are bought and sold across borders in a way which was unimaginable a generation ago.[102] Source and residence as a basis for taxation were easy enough categories when the number of truly multinational corporations was few, and those same MNCs had not yet developed the transfer pricing schemes at the heart of the current tax avoidance paradigm, and telecommunications

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the Organisation, decides whether to open accession discussions with a country and fixes the terms, conditions and process for accession.").

98 Judith Clifton & Daniel Díaz-Fuentes, *From 'Club of the Rich' to "Globalisation à la carte'? Evaluating Reform at the OECD,* 2 Global Policy 303 (2011).

99 *Id*.

100 *Id*. at 307. *See also* Dries Lesage & Thijs Van de Graaf, *Thriving in Complexity? The OECD System's Role in Energy and Taxation,* 19 Global Governance 83 (2013).

> "Today it is fashionable to portray the Organisation for Economic Cooperation and Development (OECD) as an agency in crisis. There is no denying that, in a world where the geopolitical point of gravity is gradually shifting to the East, the OECD's exclusive Western membership looks increasingly anachronistic. Without the emerging powers aboard, the Paris based agency is losing centrality and, indeed relevance in global governance. At the same time, the OECD's role in global governance is also eroded by the rapid proliferation of institutions with partially overlapping mandates. The emergence of the Group of 20 (G-20) as the apex forum in global economic governance was definitely a game changer in this regard, to which the OECD and the rest of the international architecture are still adjusting at different speeds."

101 *Id*. at 90.

102 *See* Avi-Yonah, *supra* note 9, at 116–18.

had not yet advanced to the point to permit those MNCs to achieve BEPS. The digital economy, the ease by which goods and services are bought and sold across borders with a speed unimaginable a generation ago, places tremendous pressure in an aging tax paradigm which was not designed to accommodate the internet.

Digital platforms, i.e., those websites, apps, and applications which serve as the background of the modern economy, challenge the underlying principles of global tax in that they render the concept of physical presence in a market increasingly irrelevant.[103] The pressures they put on states to recover tax on the sizeable profits generated within their borders has pushed states, particularly OECD members, to envision new ways of taxing corporate income.[104]Beginning with France's Digital Services Tax in 2019, the United Kingdom, Spain, Italy, and the European Union generally, have tabled similar legislation.[105] The strain placed on the international tax order by the digital economy not only increases the pressure for a coordinated response among taxing jurisdictions, but opens up an intellectual space in which, to potentially rethink the pillars of the international tax order – a development far from irrelevant to an ethics of tax justice.

Likewise, the rise of China presents a tremendous challenge to the global international tax regime established and maintained by the OECD states.[106] China's strategic interests in this area are being shaped by its transformation from those of a capital importer and low value-added manufacturer to a capital exporter with high value-added industries and a large consumer market, belying the traditional dividing lines between capital-exporting OECD member states and capital-importing developing countries.[107] While it recognizes and has worked in collaboration with the OECD on its international tax agenda, most recently in regard to BEPS and tax transparency, China participates as an outside observer.[108] In the relatively short time since 1978 that China has been open to foreign investment, the Chinese government has learned and implemented best practices from developed countries and adopted sophisticated anti-tax avoidance measures, as well as found ways to engage the OECD

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103 Marcel Olbert & Christoph Spengel, *International Taxation in the Digital Economy: Challenge Accepted?,* World Tax J. 4 (2017).

104 *Id*. at 4–5.

105 Wei Cui, *The Digital Services Tax on the Verge of Implementation,* 67 Canadian Tax J. 1136–39 (2019).

106 Martin Hearson & Wilson Pritchard, *China's Challenge to International Tax Rules and the Implications for Global Economic Governance,* 94 Int'l Affairs 1287 (2018).

107 *Id*. at 1288.

108 *See* OECD Global Relations Secretariat, Active with the Peoples Republic of China 37 (Paris: OECD, 2018).

as an outsider to let policymakers in Paris know the Chinese position on any reform under review.[109]

While cooperating with the OECD, China has not been afraid to stake out its own territory and point out that "[a]s a developing country, China faces a number of difficult challenges, to many of which ready answers have not been found from the OECD guidelines."[110] Where this has been most apparent is in China's support for "Location-Specific Advantages" (LSAs) which would recognize "that a portion of the 'super-profits' that arise by virtue of operating in China should accrue, for tax purposes to the Chinese subsidiary" in an international tax framework.[111] In effect, LSA proposes that tax be levied where the workers are located, a theory of taxation that supports developing countries that have a comparative advantage in manufacturing. Not surprisingly, LSAs are also favored by India for the same reasons.[112]

Due in no small part to the combined pressures of the digital economy and BEPS, frameworks for unitary taxation are also under consideration by the OECD. A unitary taxation approach recognizes that business activities carried out, or profits earned, by a MNC accrue to the MNC *as a whole* rather than to the separate divisions of it.[113] For taxing purposes, the MNC is then treated as a single entity.[114] Profits of the MNC as a whole are then apportioned among states based upon a formula to be agreed upon.[115] Unitary taxation takes CbC reporting one step further by actually treating the MNC described in the CbC report as a single entity for taxing purposes on a global level. States are then free to tax their allocation of the MNC's profit under their domestic tax laws, as they see fit.

How then do the strains and fissures in the international tax order, which has remained in place for the last hundred years, have a bearing on tax justice? It is precisely these cracks in the foundation of the system that provide an opportunity to rethink and develop a framework for international taxation in a world where the traditional

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109 Shanshan Shi, *Coping with the Increasingly Stringent Global Anti-Tax Avoidance Environment: The Case of MNCs in China,* 43 Int'l Tax J. 29–31 (2017).

110 Hearson & Pritchard, *supra* note 106, at 1297.

111 *Id*. at 1298.

112 *See generally* Reji George & Y.V. Reddy, Corporate Tax in Emerging Countries: Some Aspects of India, 59 Int'l J. L & Management 357–66 (2015).

113 *See* Shubhankar Gupta, *Unitary Taxation: A Case for Developing Nations,* 7 Nirma U. L.J. 69, 77 (2018). *See also* George Turner, *Unitary Taxation – the new approach to corporate taxation and its critics,* Tax Watch UK (Nov. 15, 2019), https://www.taxwatchuk.org/labour_oecd_unitary_tax/.

114 *Id*. at 77.

115 *See* Sol Picciotto, *Towards Unitary Taxation: Combined Reporting and Formulary Apportionment, in* Global Tax Fairness 228–32 (Thomas Pogge & Krishen Mehta eds., 2016).

paradigm of taxing on the basis of source or domicile are no longer up to the job. Moreover, this is a conversation which is taking place at this moment, at the OECD, in front of the very body in a position to effectuate actual change.[116] The time is ripe for a paradigm shift in how MNCs are taxed on an international level.[117] Unless a tax justice perspective is voiced at the OECD table, the framework for the next hundred years could prove just as inequitable to the developing world as the one being laid to rest.

III. THE ECONOMY OF FRANCESCO: TAX JUSTICE AND CATHOLIC SOCIAL DOCTRINE

What then does Nairobi have to do with Jerusalem? Or Johannesburg, Lagos, Kinshasa, or Luanda? What does the Catholic Church have to offer to a broader discussion of tax justice for Africa? In fact, quite a bit. Not only is there a rich tradition within Catholic thought addressing the ethics of taxation, particularly as it implicates care for the poor, but in the Pope Francis era there has been a tremendous rearticulation of Catholic Social Doctrine, stemming from the Second Vatican Council, in regard to the ethics of economic development.[118] The result is what has become known as *The Economy of Francesco*.

Archbishop Emeritus of Philadelphia Charles Chaput, hardly Pope Francis's biggest fan among American bishops has this to say about him, "In matters of economic justice, Francis' concerns are the same as Benedict's and John Paul II's, and Pius XI's and Leo XIII's. He understands economic matters through the lens of Church teaching in the *Compendium of the Social Doctrine of the Church*. Like his predecessors, he defends human dignity in a world that consistently threatens it. But Francis stresses more directly than they did that human solidarity is a necessary dimension of human dignity.

116 *See* Wolfgang Alschner, *The OECD Multilateral Tax Instrument: A Model for Reforming the International Investment Regime,* 45 Brook. J. Int'l L. 1 (2019).

117 *See* Taxing Multinational Enterprises as Unitary Firms i (Sol Picciotto ed., 2017) ("The international tax system needs a paradigm shift. The rules devised over 80 years ago treat the different parts of a multinational enterprise as if they were independent entities, although they also give national tax authorities powers to adjust the accounts of these entities. This creates a perverse incentive for multinationals to create ever more complex groups in order to minimize taxes, exploiting the various definitions of the residence of legal persons and the source of income. While states may attempt to combat these strategies, they also compete to offer tax incentives, many of which facilitate such techniques to undermine other countries' taxes.").

118 *See generally* Charles E. Curran, *Just Taxation in the Roman Catholic Tradition*, 13 J. Religious Ethics 113–33 (1985). *See also* Robert M. Whaples, *The Economics of Pope Francis: an Introduction,* 21 The Independent Rev. 325–45 (2017).

We need both. Human dignity requires not just the protection of individuals, as in our prolife work, but an on-going commitment to the common good."[119]

While there is a definite continuity between Francis and his predecessors, it would be a mistake to see his vision of economic justice as offering nothing substantively new. Stewart Braun suggests that "…to read Francis as offering nothing new on matters of Catholic social and economic thought would be to bowdlerize his writings, separating them from his larger concerns. Even though Francis's message is consistent with his predecessors, there is a subtle shift of emphasis that needs to be elucidated. In particular, Francis appears to reinvigorate or reemphasize the importance of social and economic justice, pushing for a recognition of the impact of economic structures on human life. So while there is continuity, there is also development."[120]

The development in the Economy of Francesco, as illustrated by Archbishop Chaput, is Francis's emphasis on *human solidarity* as part and parcel of a protection of the dignity of the human person. "Consequently, Francis's approach is a good deal more radical than that of John Paul II, because he does not simply aim to rein in capitalism or warn of potential dangers, but rather to express the need for a reevaluation of our relationship with capitalism, at least as that system is currently constituted."[121] In fact, it is this call for a reevaluation of our relationship with capitalism, combined with Francis's emphasis on the nexus between human dignity and human solidarity, that opens up a rich space to articulate an ethics of tax justice based on Catholic Social Doctrine as it has developed under his papacy. The roots of that economic vision are as follows:

A. The Pope From the Global South – Solidarity with the Marginalized

When he was elected pope in 2013, Jorge Bergoglio was not only the first Latin American and the first Jesuit to become pope, he was also the first to be ordained a priest after the conclusion of Vatican II.[122] The date of his ordination, December 1969, is also a key benchmark in that it took place a year after the Second General Conference of the Latin American Episcopate (CELAM) in Medellín, Colombia.

119 Charles J. Chaput, *Pope Francis and Economic Justice,* 12 J. Catholic Social Thought 182 (2015).

120 S. Stewart Braun, *Pope Francis and Economic Democracy: Understanding Pope Francis's Radical (yet) Practical Approach to Political Economy,* 8 Theological Stud. 222 (2020).

121 *Id.* at 224.

122 Deck, *supra* note 14, at 7.

As a Jesuit provincial in the 1970s and the Archbishop of Buenos Aires through the 1990s and early 2000s, his life in ministry has been stamped by Medellín, liberation theology, and the question of what the world's peripheries can contribute to the larger Catholic social discourse. Medellín represents the only "continental reception of Vatican II carried out in a collegial and synodal manner,"[123] and was a direct response to the perception of the Latin American episcopate that underdevelopment is the direct result of systemic violence.[124] This serves as the superstructure onto which is grafted Francis's pastoral vision for the Global South and the intensity of his orientation towards praxis.

Pope Francis rejects the "great man" myth for himself, where "an anointed, otherworldly figure rises up to defeat overwhelming challenges with superhuman prowess."[125] However, he himself acknowledges that Latin America offers a "unique synthesis of faith, politics, and culture [which is] needed to be of service to the world at this time," and that he is both a product of and an embodiment of that synthesis in his own vocation story.[126] The significance of having a pope "from the ends of the earth," from the global periphery itself, particularly one arising out of the Latin American experience of the second half of the 20th century, should not be casually dismissed.[127] How this background makes Francis distinctive vis-à-vis his immediate predecessors is that it engenders an "absolute insistence on political participation and commitment to social justice" arising out of the experience of Latin America in the 1970s and 1980s, and provided him lessons about the limits of ideologies on the right or left.[128] To understand how Francis has developed Catholic social teaching on issues related to justice in the developing world, and the pastoral attention he has paid to Africa, it is necessary to begin with Vatican II and how the Latin American bishops committed themselves to the full implementation of the Council's reforms at Medellín.[129]

B. From Vatican II to the Economy of Francesco

123 Rafael Luciani, *Medellín Fifty Years Later: From Development to Liberation,* 79 Theological Stud. 566 (2018).

124 *Id.* at 570.

125 Austen Ivereigh, Wounded Shepherd: Pope Francis and His Struggle to Convert the Catholic Church 2 (2019).

126 *Id.* at 224.

127 Deck, *supra* note 14, at 123.

128 *Id.* at 124.

129 John Frederick Schwaller, The History of the Catholic Church in Latin America: From Conquest to Revolution and Beyond 246 (2011).

Promulgated on the last day of the Council (December 7, 1965), *Gaudium et Spes*, the Pastoral Constitution on the Church in the Modern World, was one of the four major constitutions of Vatican II and marked a major new contribution to Catholic social teaching by laying out well-developed theological grounds for the Church's concern "with all human struggles for life with dignity, with building up the solidarity of the human community, and with the humanization of all human activity and work."[130] Although the Church's involvement in social and political affairs is nothing new, nor had popes and bishops refrained from speaking out on social justice issues, *Gaudium et Spes* marked the potential for a more activist understanding of what it means for the Church to engage the world at large.[131] To accomplish all of this, the Church "has the duty in every age of examining the signs of the times and interpreting them in the light of the gospel, so that it can offer in a manner appropriate to each generation replies to the continual human questionings on the meaning of this life and the life to come and on how they are related."[132] Towards that end, of discerning the "signs of the times," the document notes the following:

> "Great numbers of people are acutely conscious of being deprived of the world's goods through injustice and unfair distribution and are vehemently demanding their share of them. Developing nations like the recently independent States are anxious to share in the political and economic benefits of modern civilization and to play their part freely in the world, but they are hampered by their economic dependence on the rapidly expanding richer nations and the ever widening gap between them. The hungry nations cry out to their affluent neighbors…" (*Gaudium et Spes*, §9.)[133]

> "God destined the earth and all it contains for all men and all peoples so that all created things would be shared fairly by all mankind under the guidance of justice tempered by charity…Therefore every man has the right to possess a sufficient amount of the earth's good for himself and his family. This has been the opinion of the Fathers and Doctors of the Church, who taught that

130 David Hollenback, *Commentary on Gaudium et Spes (Pastoral Constitution on the Church in the Modern World), in* MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS 266 (Kenneth R. Himes et al. eds., 2005).

131 *Id*. at 271.

132 *Pastoral Constitution on the Church in the Modern World Gaudium et Spes* §4 (Dec. 7, 1965)*, in* VATICAN II: THE ESSENTIAL TEXTS 196 (Norman Tanner ed., John Mahoney trans., 2012).

133 *Pastoral Constitution on the Church in the Modern World Gaudium et Spes* §9 (Dec. 7, 1965)*, in* THE RIGHT TO DEVELOPMENT: CONCILIAR AND PONTIFICAL TEXTS (1960-1990) 27 (Giorgio Filibeck ed., 1991).

> men are bound to come to the aid of the poor and to do so not merely out of their superfluous goods…Faced with a world today where so many people are suffering from want, the Council asks individuals and governments to remember the saying of the Fathers: 'Feed the man dying of hunger, because if you do not feed him you are killing him,' and it urges them according to their ability to share and dispose of their goods to help others, above all giving them aid which will enable them to help and develop themselves." (*Gaudium et Spes*, §69.)[134]
>
> "The development of a nation depends on human and financial resources. The citizens of every nation must be prepared by education and professional training to undertake the various tasks of economic and social life. This involves the help of experts from abroad, who, while they are the bearers of assistance, should not behave as overlords but as helpers and fellow-workers…The establishment of an authentic economic order on a worldwide scale can come about only by abolishing profiteering, nationalistic ambitions, greed for political domination, schemes of military strategy, and intrigues for spreading and imposing ideologies." (*Gaudium et Spes*, §85.)[135]

Whereas the Latin American bishops at Medellín would seek to "discover a plan of God in the signs of the times," for the present-day transformation of Latin America and form a continent-wide reception of *Gaudium et Spes* and the Second Vatican Council, one piece of the puzzle remained for the elucidation of a new systematic theology of development.[136] In 1967, less than two years after the conclusion of the Council, Paul VI published an encyclical, *Populorum Progressio*, "On the Development of Peoples," which took *Gaudium et Spes* one step further and expressly articulated a connection between Christian faith and the economic justice.[137] There, Paul VI "took the term *development* in its social and economic sense and sought to link it intimately with a Christian understanding of the human person in community."[138] One of the later criticisms of the document was the fact that Paul VI used the term *development* in an "unanalyzed and uncritical" manner "…without first dispelling the notion that in its concrete historical manifestation it is the solution to endemic poverty when, in

134 *Id*. at 28–29.

135 *Id*. at 30.

136 Hollenback, *supra* note 130, at 287. *See* Luciani, *supra* note 123, at 566.

137 Allan Figueroa Deck, *Commentary on Populorum progression (On the Development of Peoples), in* Modern Catholic Social Teaching: Commentaries & Interpretations 292–93 (Kenneth R. Himes et al. eds., 2005).

138 *Id*. at 292.

fact, it is a major part of the problem."[139] Notwithstanding the criticism, *Populorum Progressio*, coming on the heels of Vatican II, expands on the Council documents and provides "Catholic social teaching's Magna Carta on development" laying the foundation for the preferential option for the poor which will be fully enunciated at Medellín.[140]

The "spirit of Medellín," which shapes Francis's apostolic and pastoral priorities, expands upon the heritage of Vatican II and *Populorum Progressio*, recognizes the role of structural violence in the Global South, yet "view[s] the poor and the marginalized as subjects of their own history and development, as actors and protagonists of the changes to come, and never as objects or instruments of anybody."[141] As it pertains to the evolution of Catholic social teaching on the global economy during his pontificate, his promotion of the agency of the poor and marginalized in the midst of structural violence provides a useful hermeneutic for Francis's pastoral and political priorities in the developing world. Moreover, that hermeneutic is augmented and refined by considering the role that Jorge Bergoglio played at CELAM's 2007 general conference in Aparecida, Brazil, only the third general conference since Medellín.[142] There, as Archbishop of Buenos Aires, he served as president of the committed responsible for producing Aparecida's closing document.[143] In fact, according to Austen Ivereigh, "Aparecida is essential to understand the evangelizing vision of the Francis pontificate."[144]

The Aparecida closing document recognized the following:

> "A new period in history is opening up, with challenges and demands, characterized by pervasive discontent which is spread by new social and political turbulence, by the expansion of a culture distant form or hostile to Christian tradition, any by the emergence of varied religious offerings which try to respond as best they can to the manifest thirst for God of our peoples." (*Aparecida document*, §10.)[145]

The document recognized an urgent need for a "pastoral and missionary conversion,"

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139 *Id.* at 309.

140 *Id.* at 296.

141 Luciani, *supra* note 123, at 589.

142 Ivereigh, *supra* note 125, at 87.

143 Deck, *supra* note 14, at 4.

144 Ivereigh, *supra* note 125, at 153.

145 Episcopal Conference of Latin America, Fifth General Conference of the Latin American and Caribbean Bishops' Conferences at Aparecida Concluding Document §10 (May 29, 2007) [hereinafter *Aparecida Document],* https://www.celam.org/aparecida/Ingles.pdf.

in language with a Pentecostal urgency to it.[146] Aparecida was not satisfied with simply an accommodation to modernity, in the begrudging way that Vatican II had been interpreted by the broader Church in the John Paul II years, but for "an alternative modernity, built from the ground up, from the periphery, from those left behind."[147] It specifically referenced *Populorum Progressio* when it called for the "[pursuit] of an alternative development model, one that is comprehensive and communal, based on an ethics that includes responsibility for an authentic natural and human ecology, which is based on the gospel of justice, solidarity, and the universal destination of goods, and that overcomes its utilitarian and individualistic thrust, which fails to subject economic and technological powers to ethical criteria."[148] Rather than lamenting secularization in the broader culture, Aparecida "saw Christianity's loss of culture and political power as an opportunity to recover the gratuity of God's grace" through the paradox of allying itself with the poorest of the poor, those with the very least.[149] Bergoglio himself referred to the Aparecida document as a "grace event," unleashing pent up missionary potential in Latin America, and it would later serve as the blueprint for his papal agenda on social justice.[150]

In his first major letter as pope, *Evangelii Gaudium*, Pope Francis drew on the Aparecida Document and recognized that inequality spawns violence, "…[that] until exclusion and inequality in society and between peoples are reversed, it will be impossible to eliminate violence."[151] This violence is part and parcel of a "throw-away" culture where an economy of exclusion leads to a paradigm where human beings themselves are considered consumer goods to be used and then discarded.[152] In *Laudato Si´*, his encyclical on the environment, the first ever issued by a pope on that topic, Francis continued, "[w]hen nature is viewed solely as a source of profit and gain, this has serious consequences for society. This vision of 'might is right' has engendered immense inequality, injustice and acts of violence against the majority of humanity, since resources end up in the hands of the first comer or the most powerful: the winner takes all. Completely at odds with this model are the ideals of harmony,

146 Ivereigh, *supra* note 125, at 153.

147 *Id.* at 154.

148 *Aparecida Document,* §474(c).

149 Ivereigh, *supra* note 125, at 154.

150 *Id.* at 158.

151 Francis, Apostolic Exhortation on the Proclamation of the Gospel in Today's World *Evangelii Gaudium* §59 (Nov. 24, 2013) [hereinafter *Evangelii Gaudium*], http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html.

152 *Evangelii Gaudium,* §53.

justice, fraternity and peace as proposed by Jesus."[153] "[T]he common good calls for social peace, the stability and security provided by a certain order which cannot be achieved without particular concern for distributive justice; whenever this is violated, violence always ensues."[154] Here, in his exhortation on our collective responsibility as stewards of the environment, with specific reference to climate change, Francis invoked the spirit of Medellín, drawing a clear line between structural violence, political violence, and economic justice: a foundation for a new Catholic ethics of development.

Running through *Laudato Si'* is Francis's conviction that "everything is closely interrelated, and today's problems call for a vision capable of taking into account every aspect of the global crisis."[155] He argues that this calls for an *integral ecology* where it is essential to find "comprehensive solutions which consider the interactions within natural systems themselves and with social systems."[156] The crises we face are not separate, "one environmental and the other social, but rather one complex crisis which is both social and environmental."[157] While Francis's vision of integral ecology ostensibly began as a conversation on broadening our commitment to environmentalism and combating climate change, has in the last five years developed into a framework for radically rethinking the ethics of the global economy and pushing it towards greater respect for human dignity and the common good.

This vision of what integral ecology might mean in economic terms was first laid out in May 2018 when the Vatican's Congregation for the Doctrine of the Faith (CDF) and the Dicastery for Promoting Integral Human Development jointly published a groundbreaking document which for the first time addressed *moral* questions related to the global economic and financial system, and was specifically addressed to those in charge of the system, "those working in the fields of economy and finance."[158] The fact that this document was issued by the CDF, "whose competence extends to moral questions" and in the past has been known as both the Inquisition and the Holy Office

153 Francis, Encyclical Letter on Care for our Common Home *Laudato Si´* §82 (May 24, 2015) [hereinafter *Laudato Si´*], http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

154 *Laudato Si´,* §157.

155 *Laudato Si´,* §137.

156 *Laudato Si',* §139.

157 *Id*.

158 Congregation for the Doctrine of the Faith and the Dicastery for Promoting Integral Human Development, Considerations for an Ethical Discernment Regarding Some Aspects of the Present Economic-Financial System *Oeconomicae et Pecuniariae Questiones* §1 (May 17, 2018) [hereinafter *Oeconomicae et Pecuniariae Questiones],* https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/05/17/180517a.html.

is a strong indication of the importance Francis places on the nexus of ethics and the global financial system.[159] The document calls for a synthesis of appropriate regulation of the market with "a clear ethical foundation that assures a well-being realized through the quality of human relationships rather than merely through economic mechanisms that by themselves cannot attain it."[160]

Although not as widely discussed a document as *Evangelii Gaudium* or *Laudato Si´*, *Oeconomicae et Pecuniariae Questiones* expands on the insights of both and brings them into the realm where practical policy suggestions can be made to stakeholders, and it represents the cutting-edge of Catholic Social Doctrine on the global economy. The key to remember, however, is that Catholic teaching on the economy, as well as on the ethics of development, is an integrated whole – it includes and expands on the documents of Vatican II, of Medellín, of Aparecida, and the encyclicals and statements of the Francis era. All of that tradition, stretching back to the "spirit of Medellín," draws the firm link between structural violence and underdevelopment. What Francis has done is expand that into a sharper critical analysis of the global financial system expanding the link between violence and underdevelopment to include the structure of the international financial system, thus breaking open the alternative development model called for in the Aparecida Document and bringing it up to date with a zeal and intensity channeling the "spirit" of Vatican II and Medellín.

C. Bringing it Together: Integral Ecology, the Economy of Francesco, and African Development

Everything is related; everything is connected. This maxim is the beating heart of Pope Francis's conception of integral ecology and the pillars on which the Economy of Francesco rests. While it is undoubtedly a global vision, as it emerges out of the intellectual milieu of Vatican II, Medellín, and Aparecida, it has something distinct to say to the African experience.[161]

159 *Oeconomicae et Pecuniariae Questiones,* §6.

160 *Oeconomicae et Pecuniariae Questiones,* §1.

161 *See* Daniel P. Castillo, *Integral Ecology as a Liberationist Concept,* 77 Theological Stud. 353, 370–71 ("Francis's call for the realization of an integral ecology that is capable of adequately hearing and responding to the cries of the earth and poor is nothing less than an exhortation for dramatic paradigm shifts within the structural and cultural dimensions of the globalization project. Indeed, since the structural and cultural dimensions of society are recursive, the implications of Francis's call for a bold cultural revolution extend far beyond the realm of culture. Simply put, in calling for an integral ecology, Francis is calling for the radical conversion of the entire global system.").

In September 2019, Francis undertook his second trip as pope to sub-Saharan Africa, visiting Mozambique, Madagascar, and Mauritius, where the focus of his agenda was poverty, the environment, foreign exploitation of resources and corruption.[162] Francis's pontificate has been marked by a consistent call for a more equitable distribution of wealth among the developed and developed world, and particularly with an eye to Africa, he has defended the rights of countries to control their natural resources. In a 2019 interview with Reuters the Pope said, "We must invest in Africa, but invest in an orderly way and create employment, not go there to exploit it,"[163] As the first pope from the Global South, Francis's attention to Africa is not an accident and arises from an insight that the Latin American experience, the body of work coming out of Medellín and Aparecida, can have something to say to the wider Global South. For Francis, promotion of the agency of the poor and marginalized in the midst of structural violence, provides a framework for understanding the development of Catholic Social Doctrine on the economy during his pontificate. This provides a foundation for his contribution to an ethics of Tax Justice in the Economy of Francesco which recognizes the pervasiveness of structural violence and colonial structures in the global tax regime and provides support to local stakeholders, "as actors and protagonists of the changes to come."[164]

What the Medellín tradition contributes to an ethics of tax justice for Africa is the recognition of structures of violence and the role that they have on the economy and development. The crisis of faith which the Church faces in Africa, according to Emmanuel Katongle of the University of Notre Dame, is "neither primarily nor predominantly cultural, but political."[165] More specifically, this crisis stems from "the ongoing phenomenon of political violence, which is traceable to the colonial heritage and [its] imagination of Africa's modernity."[166]

D. The Elephant in the Room: Grand Corruption and Tax Justice

If everything is connected, and everything interrelated, as Pope Francis's integral ecology suggests, then we would be horribly naïve to think that the injustices inherent in

162 Philip Pullela, *Environment, poverty, corruption on agenda for pope's Africa trip,* Reuters (Sept. 1, 2019), https://www.reuters.com/article/us-pope-africa-preview/environment-poverty-corruption-on-agenda-for-popes-africa-trip-idUSKCN1VM15N.

163 *Id.*

164 Luciani, *supra* note 123, at 589.

165 Emmanuel Katongle, *The Gospel as Politics in Africa,* 77 Theological Stud. 704 (2016).

166 *Id.*

the global financial order, particularly as they are manifested through the international tax system, are solely caused by a "pinstripe infrastructure of professional bankers, lawyers, and accountants" exiting in the Global North.[167] Local elites and government officials in the Global South not only aid and abet the avoidance strategies of their Northern counterparts, but in many cases profit themselves quite handsomely from grand corruption[168], which "mainly involves relatively senior government officials or private sector operatives closely involved with the politically powerful."[169] While for the purposes of this analysis I continue to maintain the distinction between tax *avoidance* and tax *evasion*, bringing grand corruption into the discussion highlights that in the real world the distinction may not be as black and white, where those engaging in criminal activity can be cleanly separated from those looking to stretch the law to its limits.[170] While that complicates the analysis and the conceptualization of policy responses, pretending that there is not at times a fluidity in the boundary between tax evasion and tax avoidance schemes leads us to fail to see the forest for the trees and address tax justice issues in an ineffectual piecemeal fashion.

For scholars from the North there is a particular squeamishness in discussing corruption in the developing world, as if we are bound to seem condescending, neocolonial, or just plain rude, by asking the question.[171] However, a critique of the ethics of the global financial order and its application to Africa, no matter where it emerges from, would be disingenuous if it did not raise the issue. In fact, Catholic Social Doctrine has long recognized that corruption is among the chief causes

167 *See* Christensen*, supra* note 25, at 128.

168 *See* John Mukum Mbaku, *Corruption and Democratic Institutions in Africa*, 27 Transnat'l L. & Contemp. Probs. 311, 326 (2018) ("The literature on corruption distinguishes between petty and grand corruption. While grand corruption refers to the illegal activities of high-ranking civil servants and politicians, which usually involve large sums of money, petty corruption involves the activities of low-level bureaucrats and smaller sums of money.").

169 Alvin Mosioma & Bob Awuor, *Breaking the Vicious Circle: Grand Corruption in Kenya, in* Tax Justice: Putting Global Inequality on the Agenda 177 (Marti Konohen & Francine Mestrum eds., 2008). *See also* Susan Rose-Ackerman, *"Grand" Corruption and the Ethics of Global Business*, 26 J. Banking & Fin. 1889, 1892 (2002) ("Grand corruption" can undermine the functioning of states and lower the efficiency of production. The struggle to appropriate the gains of public projects can have a destructive impact on a country's economic and political system. Corruption is a two-sided deal involving both venal officials and corrupt bribepayers, but outside investors and aid organizations often play an active role in maintaining corrupt systems.").

170 *See* Steven A. Bank*, When Did Tax Avoidance Become Respectable?,* 71 Tax L. Rev. 123, 123–24 (2017) ("In large part, the reaction can be attributed to the perceived difference between tax evasion and tax avoidance… Today, most observers have characterized the latest tax schemes as involving at least legal tax avoidance, if not fully legitimate tax planning..And it appears that only outright tax evasion is considered truly scandalous.").

171 *See* Jason.C. Sharman, The Despot's Guide to Wealth Management: On the International Campaign Against Grand Corruption 2 (2017).

of poverty and underdevelopment throughout the world. [172] In fact, "questions related to the debt crisis of many poor countries," is abetted by "corruption, poor administration of public monies or the improper utilization of loans received."[173] Therefore, as Pope Francis recognizes in *Oeconomicae et Pecuniariae Questiones*, while the social doctrine of the Church would be a "considerable help" in rethinking the ethics of the global economy in line with principles of integral ecology, that same doctrine speaks just as strongly to those engaged in grand corruption within the Global South as it does to the powerbrokers and policymakers in the North.[174]

IV. CLAIMING A PLACE AT THE TABLE: A ROADMAP FOR AFRICAN TAX JUSTICE

A. Tax Justice as a Human Rights Issue

Tax justice is first and foremost an international human rights issue. According to Thomas Pogge, although the first-line responsibility for poverty-related human rights deficits lies with the governments where those deficits persist, the vast majority of these governments are themselves poor and lack the infrastructure and resources to tackle tax avoidance and evasion by MNCs operating within their borders on their own.175 The key to addressing the human rights deficit that results from this activity is global financial transparency: the abolition of shell companies and anonymous accounts, the automatic exchange of tax information worldwide, and country-by-country reporting by MNCs of profits, losses and holdings in each jurisdiction where they operate.176 In the 21st century, "unilateral approaches to tax corporations whose operations span the globe are obsolete , and a multilateral approach is both essential and feasible."177 As human rights discourse increasingly examines the nexus between sustainable economic development in the Global South and the business practices of MNCs, there is space for the tax justice movement to claim a seat at the table and highlight the compelling need for global financial transparency to policymakers as a means of accelerating action on curbing corruption.178

172 *See* Compendium of the Social Doctrine of the Church, *supra* note 11, at §447.
173 *See* Compendium of the Social Doctrine of the Church, *supra* note 11, at §450.
174 *Oeconomicae et Pecuniariae Questiones,* §10.
175 *See* Pogge & Mehta, *supra* note 6, at 3–4.
176 *Id.* at 6.
177 *See* Avi-Yonah, *supra* note 9, at 113.
178 *See* Erika George, *Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals,* 36 Wis. Int'l L.J. 298, 302

At this stage it may be tempting to ask what possible relation could there be between human rights and tax justice? How does the question of if and where MNCs pay tax measure up to access to clean drinking water, the right to due process, or the right not to be tortured by the police or the army? The response is that corporations today wield enormous power and increasingly engage in state-like activity in those areas of the world "where state power is weak or non-existent."[179] The end result is that while corporations are increasingly responsible through their shareholders, directors, managers, and agents for a myriad of human rights abuses, particularly in sub-Saharan Africa, individuals who are victims of these abuses have steadily been divested of judicial recourse against those very same corporate actors.[180] While there is a well-developed body of human rights law addressing duties, obligations and recourse when the perpetrator of abuse is a state actor, there is gap when it comes to remedying violations committed by *private* corporate actors. Therefore, corporate accountability for their business practices under local law, as well as financial transparency on an international level, are issues that touch directly on human rights discourse – particularly how to seek redress for corporate violations of human rights.

B. Claiming a Seat at Which Table? Africa at the OECD

By this point it should be manifestly clear that the beating heart of the international tax world is in Paris – if you are not at the OECD, either as part of a member state delegation or in a lobbying capacity, then you have absolutely no say in revisions to the OECD Model Convention, or any of the regulatory structure which it supports. The respective success of China and India in making their policy preferences known at the OECD, as well as being offered observer status before the Fiscal Affairs Committee, means that one does not have to be a full member of the OECD to have input on global tax policy in that forum.

Interestingly enough, a single African state, South Africa, also has observer status before the Fiscal Affairs Committee, as well as the African Tax Administration Forum

(2019).

179 *See* Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 Brooklyn J. Int'l L. 955, 961 (2008).

180 See Jacqueline Lainez Flanagan, *Holding U.S. Corporations Accountable: Toward a Convergence of U.S. International Tax Policy and International Human Rights*, 45 Pepp. L. Rev. 685, 687–89 (2018).

(ATAF), which is a regional organization founded in 2009.[181] Given that a regional approach will likely yield the best fruit as far as placing a distinctly African stamp on international tax issues, it is an open question whether South Africa desires to serve in this capacity, or whether other states on the continent would yield their time at the microphone and allow Pretoria to speak for them.[182] In any event, moving from articulating theories of tax justice to actually effectuating policy requires an active and persistent voice at the OECD. Whether South Africa or the ATAF can legitimately serve as the regional representative remains an open question.

C. Engaging the Economy of Francesco: Moving from Doctrine to Praxis

However desirable, the goal is not simply for the those interested in tax justice for Africa to have a seat at the table; doctrine needs to move towards praxis. Catholic Social Doctrine serves the tax justice movement as a viable partner only to the extent that it can help motivate policymakers to implement substantive changes in the global tax system. Without denying the truth of the observation that approaches to effectuate change must be multilateral, there is no reason why it has to be exclusively in the public international sphere, i.e., at the level of the United Nations or the OECD.[183] Instead, individual corporations may be encouraged to change their behaviors though implementation of Corporate Social Responsibility (CSR) initiatives or Socially Responsible Investment (SRI) practices.[184] To an extent, impact investing may be seen as a subset of SRI, and while there is some debate on that point, the key takeaway from Pope Francis's promotion of Catholic principles of impact investing is that the Church is developing a praxis-oriented ethics of the global economy that can be put to the service of the Tax Justice Movement.[185] The fact that in the Francis years the

181 Lee-Ann Steenkamp, *An Analysis of the Applicability of the OECD Model Convention to Non-OECD Member Countries: The South African Case,* 10 J. Econ. & Fin. Sci. 87 (2017).

182 *See* Annet Wanyana Oguttu, *Developing South Africa as a Gateway for Foreign Investment in Africa: A Critique of South Africa's Headquarter Company Regime,* 36 South Afr.Yearbook Int'l L. 61–93 (2011).

183 Avi-Yonah, *supra* note 9, at 113.

184 *See* Erika George, *Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals,* 36 Wis. Int'l L.J. 298, 310–12, 348–49 (2019).

185 *See* Kevin Mahn, *The Changing Face of Socially Responsible Investing,* Forbes (Apr. 26, 2016), https://www.forbes.com/sites/advisor/2016/04/26/the-changing-face-of-socially-responsible-investing/#34e3f171736a ("Looking to the past, traditional socially responsible investing [*the "old SRI"*] represented an investment style that used both positive and negative screens to include or exclude companies in a portfolio based on social, moral, ethical and religious criteria…Looking to the future, sustainable, responsible and impact investing [*the "new SRI"*] offers what I believe to be a more dynamic approach to investing in this rapidly growing area. In response to some of the previously mentioned critiques of the old SRI, this type of investing involves more of a posi-

Vatican had held three biennial Conferences on Impact Investing is not trivial (2014, 2016, and 2018).[186] This is an opening that those interested in developing an ethics of tax justice and articulating policy solutions would be foolish to dismiss simply because it is coming from the Catholic Church. Recalling Daniel Halliday's point that, "[t]he fact that social scientists frequently bring considerations like inequality and harm into their work on tax reflects the fact that the domain of taxation, although fragmentary, is a *thoroughly moralised* territory.[187] As thoroughly moralized territory, the Tax Justice Movement may find a kindred spirit and fellow-traveler in the contribution to the discussion that can be made by the Roman Catholic Church in the Pope Francis era.

V. CONCLUSION

Vatican II affirmed in *Lumen Gentium*, the Dogmatic Constitution on the Church, that "The integral development of every person, every human community, and of all people, is the ultimate horizon of the common good that the Church, as the universal sacrament of salvation seeks to advance."[188] This integral development of every human person, in solidarity and community, is at the heart of the Economy of Francesco – Pope Francis's thoroughgoing critique of capitalism and the global financial order. Francis's pastoral and intellectual interest in economic justice, in marrying doctrine to praxis, separates him from his immediate predecessors in the Chair of Peter.

The ruptures opened up by the global pandemic have opened up a tremendous opportunity for a radical rethinking of the global financial order, a project that Pope Francis actively encourages through the Vatican's COVID-19 Commission. Certainly, one of the key areas where the established order may be challenged is international taxation and there is potentially a once-in-a-century opportunity for the Global South, particularly the people of Sub-Saharan Africa, to have direct input into that decision making process. Joining intellectual forces, and finding common cause, with Catholic Social Doctrine offers the Tax Justice Movement the opportunity to take full

tive, proactive and comprehensive review of a company to provide for a more robust picture of the company's operations and social, as well as economic, impact.").

186 *See Third Vatican Conference on Impact Investing: July 8–11*, 2018, VII Conference, https://www.viiconference.org ("The biennial series of Vatican Impact Investing Conferences is a vital, long-term global platform around Pope Francis's vision of '*putting the economy at the service of peoples.'*").

187 Halliday, *supra* note 19, at 1120.

188 Paul VI, Dogmatic Constitution on the Church *Lumen Gentium* §48 (Nov. 21, 1964), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html.

advantage of the moral imprimatur that comes with having the Church as a partner in dialogue. While sovereign debt issues have always taken center stage when discussion turns to Africa's place in the global economy, taxation's location at the beating heart of the international financial order means that tax justice remains apropos to any rethinking of sovereign debt.[189]

The questions of *where, how,* and *what* to tax are at their most basic, moral questions. There is a tendency to see issues of taxation as dry, arcane, or mind-numbingly dull, but as this paper has attempted to demonstrate, they are anything but that. International taxation also remains one of those areas where an inordinate amount of power is held in remarkably few hands – by the members of the OECD's Financial Affairs Committee. Tax justice recognizes that it is "quite unrealistic to hope that the problem [of the inability of poor countries to collect reasonable taxes from MNCs] can be meaningfully reduced through their morally motivated self-restraint."[190] Therefore it is incumbent upon those states in the Global South, those most directly affected by the policy decisions being made at the OECD as to the contours of the new international taxing order being wrought by changes forced by the pressures of the digital economy, to be the proverbial fly in the ointment and lobby for their own interests. As a global concept of redistributional justice, tax justice can benefit from what Catholic Social Teaching in the Pope Francis era has to contribute to that discourse – the vision of *The Economy of Francesco*, a paradigm for a radical new way of envisioning the global economy based upon the integral development of the human person in solidarity with one another.

189 *See* Dambisa Moyo, Dead Aid: Why Aid is not Working and how There is a Better Way for Africa 3–9 (Farrar, Strauss and Giroux, 2009).

190 Pogge & Mehta, *supra* note 6, at 5.