Tax havens and international human rights: Tainted research funding

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The danger facing any research institution seeking external funding is that those funds may be tainted. Programmes could collapse under the weight of tracing and asset confiscation procedures. No matter how extensive the enquiries on the part of those wishing to verify the *bona fides* of the donors—the usual anti-money laundering (AML) and countering-the-financing-of-terrorism (CFT) enquiries about their source of wealth and source of funds, and online checks of their personal histories—the presence of certain tax haven structures (particularly those openly marketed as "orphan structures", which are designed to have no owner in any sense of the word) poses an additional threat. Homage is due to the *Panama Papers* and the *Paradise Papers*, exposing political or financial corruption, money laundering or the financing of terrorism; but the focus in this paper is on international human rights and how tax havens not merely facilitate but actively connive at their breach. This paper is a field manual for the scientific researcher seeking funding who needs to look behind the façade and to go beyond conventional AML/CFT procedures. It deals with two intertwined themes:

- It addresses international human rights, from a double perspective—firstly the danger posed to anyone dealing with an abuser of such rights, and secondly how those who benefit from such abuse are able to remain immune and hidden from view; and how by the use of international human rights principles they may be held to account.
- It provides a detailed explanation of the tax haven "orphan structures" and how these are being deployed globally with the aim of eliminating any form of ownership, and hence any possibility of accountability.

> The human rights movement is structurally predisposed to focus on victims […]. But very little mention is ever made of beneficiaries. Those who (directly or indirectly) live off the practices and processes that victimise others have been allowed to remain comfortably out of sight.[1]

The superélite of complete anonymity and nonaccountability and the countries that support them are bound by international human rights. Governments may claim to have full control of their tax systems, and to have the right to sovereignty, but the damage that they engender goes far beyond their borders. They must be held globally accountable as human rights abusers.

1. INTRODUCTION

The fallout from the *Panama Papers* and the *Paradise Papers* is already evident. The Labour Party in particular has pledged to tackle tax avoidance and to increase transparency, advocating the setting up of a register of beneficial owners of UK companies. Labour will not permit the real owners and beneficiaries to hide behind nominee shareholders and directors. There will be a public register of trusts. Crown Dependencies and Overseas Territories will have to meet a minimum standard that will include a public register of owners, directors, major shareholders and beneficial owners.

But will this work? There is a very powerful lobby in opposition to all of this, which has already found ways round it: *accountability avoidance*.

Tax is the honey trap that gets people to go to these countries but, when they see what else they can do there, tax becomes almost a sideshow. The main show is a total absence of accountability. Paying or not paying one's taxes is one concern, but not being accountable for anything by virtue of simply not owning anything is the determining factor.

This is an entirely new field of study. My book *Tax Havens and International Human Rights* sails in uncharted waters.[2] It takes a human rights-based approach to tax havens, and is a detailed analysis of structures and the laws that generate and support these. It makes plain the unscrupulous or merely indifferent ways in which, using tax havens, businesses and individuals systematically undermine and, for all practical purposes, eliminate access to remedies under international human rights law. It exposes as abusive

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[1] See ref. 1, p. 76.

[2] See ref. 2. My latest book, *Ownership, Financial Accountability and the Law: Transparency Strategies and Counter Initiatives*, is in preparation, and will be published by Routledge in early 2019.

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of human rights a complex structural web of trusts, companies, partnerships, foundations, nominees and fiduciaries; secrecy, immunity and smoke screens. It also lays bare the cynical manipulation by tax havens of traditional legal forms and conventions, and the creation of entities so bizarre and chimeric that they defy classification.

2. TAX AVOIDANCE AND TAX EVASION: HUMAN RIGHTS APPROACH

Studies and analyses on tax avoidance and tax evasion are legion, and the rôle of tax havens has been central to much of the research currently available. This has focused, naturally enough, on the fiscal implications of tax avoidance and tax evasion, with little regard to the collateral damage done to international human rights compliance, which results from the disappearance of enormous wealth and resources into carefully constructed fiscal black holes, which could in principle be used by governments to fulfil their human rights obligations.

To evaluate the threat posed in monetary terms to human rights implementation globally by the tax havens, it is essential to understand at least in outline the issues surrounding what for many of those tax havens has been their *raison d'être*. The minimization of taxation exposure—legitimately avoided or blatantly evaded—became the engine driving the development and expansion of the tax havens. As late as the 1970s the industry was unsophisticated and smacked of the wild frontier. "Tax havens, like any other sphere of human activity, attract their fair share of rogues and fools. There is no substitute or the use of good common sense to avoid being made to look a fool by either rogues or other fools" [3].

The global initiatives, particularly those aimed at tax havens, which have been pursued by such institutions as the European Union, FATF,[3] OECD and the G20 have generated a vast literature,[4] and a comparative analysis of them is outside the scope of this paper.[5] Some of the initiatives have indeed already failed and fallen by the wayside.[6]

"Human rights impact" immediately conjures up a picture of embattled human rights under threat of extinction. The idea of tax avoidance and tax evasion impacting human rights is indeed fairly self-evident; but the reverse may also be true. Applying human rights norms to those entities that benefit from these abusive tax practices may be a "… barrier to a worldwide, voracious and highly divisive brand of supranational capitalism".[7] No matter how sophisticated fiscally based techniques countering tax avoidance and tax evasion become—and they are currently far from effective—it does not follow that a purely fiscal strategy suffices. It rarely follows that just because one has the best hammer, the problem is always a nail. There is a need for a concurrent human rights-based approach.

3. THE IMPACT OF TAX HAVENS

Tax avoidance and tax evasion strategies are implemented worldwide, and are not confined to the use of tax havens. In the case of legitimate tax avoidance, there is currently a global race to the bottom on corporate tax in an attempt to attract business. Oxfam estimates that in the past three decades, whilst net profits posted by the world's richest corporations tripled in real terms, from US$2 trillion in 1980 to US$7.2 trillion in 2013, this increase is not reflected in a proportional increase in tax revenue, which Oxfam attributes partly to the tax havens. Developing countries lose UD$100 billion annually as a result of corporate tax avoidance schemes.[8] By their very nature, illicit corporate tax evasion schemes are largely unquantifiable.

Aggressive tax planning, evasive or avoidance, undoubtedly distorts international capital flows and this distortion may impede the implementation by a State of its human rights obligations by limiting the means available to it to do so. In the lead-up to the G8 Summit of June 2013 Paul Collier wrote: "Private financial wealth sitting in tax havens seems to be of the order of $21 trillion, of which around $9 trillion is from developing countries.[9]

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[3] The Financial Action Task Force, headquartered in Paris.

[4] See for example the extensive studies published by the Tax Justice Network (www.taxjustice.net).

[5] See ref. 2, ch. 4 for a full analysis.

[6] For example, the European Union Savings Tax Directive introduced in 2005 and repealed in 2015: Directive 2003/48/EC required the automatic exchange of information between EU member states on private savings income. This enabled interest payments made in one member state to residents of other member states to be taxed in accordance with the laws of the state of tax residence. In its stead Directive 2014/107/EU implements the single global standard developed by the OECD for the automatic exchange of information. The OECD standard was endorsed by G20 finance ministers in September 2014 (http://www.consilium.europa.eu/en/press/press-releases/2015/11/10-savings-taxation-directive-repealed/).

[7] See ref. 4, especially pp. 470–1. See also *Human Rights Translated: A Business Reference Guide* (Monash University, Castan Centre for Human Rights Law, 2008), which illustrates through the use of case studies how human rights are relevant in a corporate context (available at: http://www2.ohchr.org/english/issues/globalization/business/docs/Human_Rights_Translated_web.pdf).

[8] Oxfam policy paper (12 December 2016): *Tax Battles: The Dangerous Global Race to the Bottom on Corporate Tax* (https://www.oxfam.org/sites/www.oxfam.org/files/bp-race-to-bottom-corporate-tax-121216-en.pdf).

[9] See ref. 2, ch. 1 for examples of the wealth of developing nations funneling into tax havens.

Some miniscule jurisdictions … have become the legal home of trillions of dollars of corporate assets through offering the unbeatable attractions of zero taxation plus secrecy. Some industries are dominated by tax havens: half the world's shipping is registered in them. […][T]here are over 700 independent tax jurisdictions, most fundamentally ill-suited to real economic activity."[10]

4. TAX HAVEN CHIMAERIC STRUCTURES

The tax havens have developed arcane, chimaeric structures designed to hold and protect assets that would otherwise be accessible to taxation elsewhere, and have themselves adopted low or zero tax régimes, specifically in relation to the taxation of corporations.[11]

In terms of human rights accountability, offshore structures are the brick wall against which the human rights enforcer bangs its head to no avail. These structures are designed to conceal their true ownership, the extent of their wealth and their purpose, and may even remove the concept of beneficial ownership altogether. Their proliferation has been tax-driven, and the collateral effects on anti-money laundering and the countering of terrorist financing have, since the turn of the century, become widely debated.[12] The elephant in the room is the human rights abuse that these structures facilitate.

In many cases, a structure as familiar as a company or a trust, not in itself unique to tax havens, is in the hands of tax haven governments and professionals, morphed into something lacking transparency, expressly anonymous and asset protective and, from a rights-based perspective, potentially abusive. These chimaeric entities sit amidst well-understood structures universally acknowledged to be legitimate, yet in most respects share none, or hardly any, of the legal characteristics of those familiar forms. They are not entities that have evolved to serve a social need—which social need is reflected in the development of trusts and uses, and as a result of commercial and business pressure has resulted in the development of limited liability trading structures—but the entities are wholly artificial.[13]

5. TOOLS OF ABUSE

The following tools of abuse are wholly or in part common to many of the tax haven structures, and in most cases have been consciously applied in domestic legislation:

- The structures are subject to artificially low levels of domestic taxation, or are wholly exempt from income and capital taxes or customs duties.
- Reciprocal enforcement of foreign judgments in domestic courts is limited or disapplied altogether (and domestic court proceedings may be held in secret).
- Limitation periods (the time within which a claim may be brought, at the expiration of which that right is extinguished) may be so short as to preclude in practice the preparation and filing of a claim.
- Foreign rules on forced heirship (a system common in civil law jurisdictions whereby heirs have a fixed entitlement to the property of the deceased, regardless of the deceased's preferences to the contrary) are disapplied.
- Domestic remedies relating to fraudulent transfers (the transfer of property into a structure that either intentionally defeats or is deemed in law to defeat the interests of legitimate creditors and other claimants) are disapplied.
- The structure may be aggressively asset-protective, and assets held within it may not be capable of being alienated or passed by bankruptcy, insolvency or liquidation; or liable to be seized, sold, attached or otherwise taken in execution by process of law.
- A structure may be an "orphan" with no beneficial owner, neither in law nor in equity.
- The requirement to place details of the structure, its existence, its finances and its activities in the public domain (in the form of a publicly accessible register) may be minimal or entirely absent.

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[10] Paul Collier "In pursuit of the $21 trillion", 27 March 2013, writing in *Prospect Magazine* (www.prospectmagazine.co.uk—but article no longer available online).

[11] See ref.2, chs 1 and 2 for a discussion of tax strategies and structuring offerings. For an overview of the offshore economy at the beginning of the 21st century see ref.5, ch. 1.

[12] For a recent statistical overview from a money laundering and tax evasion perspective see Alex Marriage (European Network on Debt and Development, 2013) *Secret structures, hidden crimes: Urgent steps to address hidden ownership, money laundering and tax evasion from developing countries* (http://eurodad.org/files/integration/2013/01/Secret-structures-hidden-crimes-web.pdf).

[13] They serve to illustrate the proposition articulated over twenty years ago that "The structures of power and interest and the forces at work in the international economy and within developing countries themselves pull remorselessly in the opposite direction to a basic rights agenda" (ref. 6, p.56).

- Structures that under generally accepted legal principles have a limited life span (such as private trusts) may be given perpetual existence.
- Fiduciary responsibilities of those administering or managing the structures—be they directors, trustees or any other responsible officers—may be disapplied or, if applied, those otherwise responsible may, through a combination of manipulated limitation periods and indulgences, be deemed not culpable, or culpable but absolved.
- The structure may take a form unknown under generally accepted legal principles, or may have the power to shift shape.

6. THE STRUCTURES

Structures may be corporate in nature, having a legal personality separate from that of their participants, or may be relationship-based, such as the interaction between settlors, trustees and beneficiaries. In the tax havens these distinctions become blurred. Elements essential to the creation and sustainability of structures—members of corporations, beneficiaries of trusts—may be eliminated. What results are structures best described as chimaeras: they sit inside the body of law by which they are ostensibly identified and to which apparently they belong, but share none of its "DNA". When is a company not a company? When is a trust not a trust? And what possible social purpose could such chimaeras serve within those jurisdictions? The answer is that there is no domestic social benefit, other than foreign earnings generated by their tax haven service providers. Many of the structures have been commissioned by tax haven governments to provide them with a competitive edge in attracting those customers for whom privacy, secrecy or (dropping the jaded euphemisms) accountability avoidance is a priority.[14]

The following are examples of some of these tax haven structures, showing how the generic form has been mutated to meet market needs:

- Generic corporations
  - Nominee directors, nominee shareholders
  - Absence of information on public record—Seychelles IBC
  - Bahamas Executive Entities
- Generic trusts
  - Charitable trusts
  - Non-charitable purpose trusts
    - Isle of Man Purpose Trusts
  - Cayman STAR Trusts
  - BVI VISTA Trusts
- Foundations
  - Liechtenstein Private Benefit Foundation
  - Panama Private Foundation
  - Nevis Multiform Foundation.

6.1 Generic corporations

A corporation can take a number of forms—public or private, limited by shares or by guarantee (or by both), with directors or (in the case of a limited liability company — LLC) without. The key in all cases is that the corporation has a legal personality that is separate from its members. Also key, in general terms, is that the property held by a corporation is owned by that corporation, and is not held directly by the members of the corporation—it is the simplest of concepts: the members own the company; the company owns the assets. Corporations owe their existence to the State and this fact alone has, in the context of international human rights, spawned a vast literature and body of soft law on what standards of corporate governance must be applied in order that a corporation, bound by proxy as it were to observe the human rights obligations of the State that has enacted the legislation that creates it and which by not repealing that legislation sustains it, is not used as a vehicle of abuse.[15]

Let us focus more narrowly on the ways in which tax havens manipulate the generic corporate structure to promote concealment.[16] The dangers are compounded by the sheer volume of companies formed within, or formed elsewhere but managed and controlled within, the tax havens. Motivated by a combination of the need for low taxation, for privacy (or concealment) and for local legitimacy of the structures,

[14] For a review of tax haven structures from the perspective of taxation and globalization, see ref. 7, ch. 3.

[15] See (1) the UN Principles on Business and Human Rights (the "Ruggie Principles") (http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (2) Statement of the Economic and Social Council 12 July 2011 E/C.12/2011/1 *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural* rights; and (3) Statement of the Economic and Social Council 17 October 2016 E.C.12/60/R.1 *General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (Olivier De Schutter and Zdzislaw Kedzia, Rapporteurs); and (4) Ch. 7 "International soft law initiatives on business and human rights", in: Nadia Bernaz, *Business and Human Rights: History, Law and Policy—Bridging the Accountability Gap*. Routledge (2017).

[16] It must however not be overlooked that unaccountability and a lack of oversight in the matter of company formation is by no means exclusive to the tax havens. See Tom Bergin and Stephen Grey, *Insight —how UK company formation agents fuel fraud* (Reuters, 18 March 2016; http://uk.reuters.com/article/uk-regulations-agents-insight-idUKKCN0WK17W). This has

thousands upon thousands seek to use corporate structures in and from the tax havens.

6.1.1 Nominee directors, nominee shareholders

The simplest form of concealment is to employ nominee shareholders and nominee directors of corporations.[17] It is a strategy widely used and, until recent years with the growing awareness of drug trafficking and international terrorism, had not aroused significant interest.[18]

A simple company limited by shares is controlled by its directors who are answerable to the shareholders. The shareholders as such do not take part in the day-to-day management and control of the company. They have the right to vote in general meetings of the company, and the extent to which their consent is required, if at all, to proposed management decisions will be set out in the company's constitutional documents. The issue is not therefore one of undue empowerment of shareholders through the use of nominees, but of the inability of any third party accurately to position the company within a wider framework. If, in addition to there being nominee shareholders in place, the directors are themselves *de facto* (when not *de juris*) nominees the problem is compounded. Those truly pulling the strings are invisible and seemingly inviolable. Corporate responsibility becomes opaque and the cross-border activities of such companies as potential members of a network of similar institutions under common ownership cannot be successfully investigated:[19] "Currently, we regulate the birth certificates of people far more closely than the birth certificates of companies".[20]

Statutory checks on money laundering, drug trafficking and anti-terrorism[21] are fine and necessary in themselves, but from an international human rights perspective the inability of those who in practical terms only nominally manage and control trading companies to influence in any meaningful way the activities of those companies is an open door to human rights abuse. Financial services regulators may try to stem the tide (for example, the Isle of Man Government Financial Services Authority[22] has ultimate authority over those who administer companies, requires them to have more than a working knowledge of such companies' activities,[23] and seeks to limit the number of directorships that any one person my hold) but in practice there are not enough hours in the day—or even in a lifetime—for those holding multiple directorships to be made and kept fully aware of each company's trading activities.

6.1.2 Absence of information on public record—Seychelles IBC

Many tax havens have very loose public filing requirements for companies (an extreme example being the Principality of Liechtenstein, which has no companies registry at all[24]), and the Seychelles International Business Company (Seychelles IBC) serves as an example. Seychelles IBCs originated in 1994[25] and are now governed by the International Business Companies Act 2016.[26]

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ostensibly been addressed in the UK with effect from 30 June 2016 by the introduction of the Register of People with Significant Control (https://www.gov.uk/government/news/people-with-significant-control-companies-house-register-goes-live ; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555657/PSC_register_summary_guidance.pdf). The full statutory guidance takes no account of the tax haven technique of separating ownership and control, or of avoiding beneficial ownership altogether (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/523120/PSC_statutory_guidance_companies.pdf).

[17] *How the nominee trick works* (David Leigh, Harold Frayman and James Ball, *ICIJ*, 25 November 2012) (https://www.icij.org/offshore/how-nominee-trick-done). An indication of the potential scale of the nominee business was shown in a joint investigation by the *ICIJ*, the BBC and the *Guardian* newspaper (UK) in 2012, which unmasked 28 nominee directors who between them held more than 21,500 directorships: *Front Men Disguise the Offshore Game's Real Players* by David Leigh, Harold Frayman and James Ball, *ICIJ*, 25 November 2012 (https://www.icij.org/front-men-disguise-offshore-players). See also *Faux Corporate Directors Stand in for Fraudsters, Despots and Spies* by Gerard Ryle and Stefan Candea, *ICIJ*, 7 April 2013 (https://www.icij.org/offshore/faux-corporate-directors-stand-fraudsters-despots-and-spies).

[18] See ref. 2, ch. 3 for the critique by the G20 in its *High Level Principles on Beneficial Ownership Transparency*.

[19] See ref. 2, ch. 3 for a fuller discussion on beneficial ownership avoidance.

[20] See footnote 10.

[21] For example, see the *Anti Money Laundering and Countering the Financing of Terrorism Requirements Guidance* issued by the Isle of Man Government Financial Services Authority (https://www.iomfsa.im/amlcft/amlcft-requirements-and-guidance/) and *Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands* (August 2015 version) issued by the Cayman Islands Monetary Authority (http://www.cimoney.com.ky/AML_CFT/aml_cft.aspx?id=144).

[22] www.iomfsa.im

[23] Financial Services Act 2008 (http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2008/2008-0008/FinancialServicesAct2008_1.pdf); *Financial Services Rule Book 2016* (https://www.iomfsa.im/media/1470/financialservicesrulebook20131.pdf) as amended with effect from 1 August 2018 by the *Financial Services (Amendment) Rulebook 2018* (https://www.iomfsa.im/media/2472/signedamendment-rulebook.pdf).

[24] http://www.lihk.li/CFDOCS/cms/cmsout/index.cfm?u=1&GroupID=20&meID=75

[25] International Business Companies Act 1994 (repealed).

[26] http://www.seylii.org/sc/legislation/act/2016/15. Since 1994 it is estimated that the Seychelles has registered around 180,000 IBCs,

The Seychelles IBC has very wide trading powers, which it need not specify, though it is not permitted to trade within the Seychelles itself. Neither meetings of members nor board meetings of directors are required. The use of nominee shareholders is common. Its accounts are not publicly filed and there is no audit requirement. Details of directors and shareholders are maintained by the company itself but these are neither available for public access nor filed publicly. There is no "annual return" (an annual report commonly found in mainstream jurisdictions, filed at the relevant companies registry, which provides details of officers and members). There is no requirement to publicly file details of any mortgages or charges against the company. The Seychelles IBC is wholly exempt from taxation in the Seychelles. It is, therefore, typical of the opacity afforded to many corporate forms in the tax havens, concealing purpose, governance, ownership, financial and accounting status and, above all, accountability.

6.1.3 Bahamas Executive Entities

Bahamas Executive Entities (BEE) are a bizarre, artificial creation, unique to the Bahamas, the design of which was commissioned by the Bahamian government from leading London lawyers in 2010 to fill what the government believed to be a gap in the offshore products market.[27]

BEEs were introduced under the Executive Entities Act 2011,[28] with the intention of facilitating the establishment, operation, management and termination of a new private wealth structure. The BEE is unique to the Bahamas. A BEE is defined as "*a legal person established by a Charter to perform only executive functions and registered in accordance with the Act*" and is "*able to sue and be sued in its own name*". The BEE is therefore simply a vehicle to carry out executive functions, primarily in wealth and asset-holding structures. Executive Functions are defined in §2: *"executive functions" means: (a) any powers and duties of an executive, administrative, supervisory, fiduciary and office-holding nature including, but not limited to, the powers and duties of (i) an enforcer, protector, trustee, investment advisor and the holder of any other office (and a committee of any of the aforementioned) of any trust, and (ii) the holder of any office (and a committee of the aforementioned) of any legal person; and (b) the ownership, management and holding of (i) executive entity assets; and (ii) trust assets.*

The BEE is created by a founder, and may have officers and a supervisory council. It has unlimited capacity and is of perpetual existence.

No estate, inheritance, succession or gift tax, rate, duty, levy or other charge is payable by a founder or any other person with respect to any interest given to or received from a BEE. The BEE is statutorily immune to foreign forced heirship rights, challenges to fraudulent dispositions or the application reciprocally of foreign judgments.

In practice this means that if assets have been transferred into the ownership of a BEE the validity of that transfer cannot be challenged. This opens the possibility that anyone seeking to avoid their accountability for an international human rights breach—including breaches of corporate governance standards on the Ruggie Principles[29]—has a clear home run: the transfer may clearly have been made with the express intent to defraud a known or ascertainable creditor (the victims of the breach) by denuding the abuser of substantial assets, but no foreign judgment upholding a claim brought on this ground will have any effect on the BEE in the Bahamas and no claim based on a fraudulent transfer can be brought against the BEE in the Bahamas courts.[30] Fundamentally, and in particular from a human rights accountability perspective, it is an "orphan" structure: there are no shareholders or members of any

with over 18,000 in 2015 alone. The Seychelles IBC is ranked fourth in the global tax-exempt company market (the first three rankings being the US State of Delaware, the British Virgin Islands and the Republic of Panama. See Peter Burian, Seychelles:beating the odds, *Offshore Investment*, issue 265, April 2016 (http://www.offshoreinvestment.com/seychelles-beating-the-odds-archive/—subscription-only service).

[27] http://citywire.co.uk/wealth-manager/news/lawrence-graham-seeks-to-revolutionise-offshore-trust-structures/a395505/print?section=wealth-manager

[28] http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2011/2011-0052/ExecutiveEntitiesAct2011_1.pdf together with the Executive Entities Regulations 2012 (http://laws.bahamas.gov.bs/cms/images/LEGISLATION/SUBORDINATE/2012/2012-0013/ExecutiveEntitiesRegulations2012_1.pdf).

[29] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[30] This sits uneasily with the rôle of the Bahamas as a founder member in June 2015 of the Association of Integrity Commissions and Anti-Corruption Bodies in the Commonwealth Caribbean (the other members being Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Lucia, St Kitts and Nevis, St Vincent and the Grenadines and Trinidad and Tobago) (http://thecommonwealth.org/media/press-release/caribbean-integrity-commissions-form-new-commonwealth-body-fight-corruption) and see Bruce Zagaris, Changes in international regulatory regimes on Caribbean corporate, financial regulatory and transparency law, *Offshore Investment*, issue 263, February 2016 (http://www.offshoreinvestment.com/changes-in-international-regulatory-regimes-on-caribbean-corporate-financial-regulatory-and-transparency-law/—subscription-only service).

kind, and no beneficiaries. It is the corporate equivalent of the noncharitable purpose trust.

6.2 Generic trusts

Trusts are a long-established vehicle in common law jurisdictions and approximate roughly to foundations under civil law. They are a means whereby funds can be alienated by a donor, held by persons whom the donor trusts to deal with them fairly and responsibly, for the benefit of named individuals or for charitable purposes. A simple discretionary trust is a triangular structure, the three points being the donor (or "settlor/grantor"), the trustees themselves, and the beneficiaries for whom the trustees hold the assets. The trustees do not themselves benefit from the funds placed in the trust by the donor.[31] The beneficiaries do not own the trust funds, but they do have a right to be considered as and when the trustees exercise their discretion whether or not to make payments from the trust fund to any one of them. Trusts are not required to be publicly registered and all details remain confidential.[32] Taking advantage of the division in common law jurisdictions between legal ownership (in simple terms, the name on the property) and equitable ownership (those entitled to benefit from the property), individuals using trusts can alienate property rights and distance themselves from creditors,[33] and transfer responsibility for the management of the property to the trustees.

Arguments for the registration of trusts continue to be put forward, which would at least aid in initial identification of their existence even if the substantive details of the trust themselves were to remain confidential, but there appears globally to be an absence of political will not merely to overcome the difficulties of forcing those in a private, equitable relationship (the settlor and the trustees, together with any beneficiaries) to place this on public record but also how to determine (and enforce) what such registers should contain.[34]

In the tax havens this long-established trust device has morphed into many artificial forms, some of which—for example, the noncharitable purpose trusts, which have no beneficiaries of any kind—being wholly counterintuitive. The driving force behind the populating of this legal freak show has, as with the re-engineering of corporate forms, been the desire for secrecy (more euphemistically characterized as an assertion of privacy rights) and the avoidance—or outright evasion—of taxation. But the collateral effect has been a rupture in the accountability that is fundamental to the operation of the international human rights continuum.[35]

6.2.1 Charitable trusts

On the face of it a trust for charitable purposes offers little scope for concealment. The literature on charitable trusts is extensive and a detailed consideration of them is outside the scope of this paper. The Isle of Man serves as an illustration. The technical and artificial meaning attached under English law to the words "charity" and "charitable" do not apply under Isle of Man law, which is more liberal "and in any event not narrower" than that of England;[36] nevertheless, a clear charitable intention is necessary, and in this regard English, Scottish and Irish cases are treated by Isle of Man courts as guides to those courts in deciding what is charitable.[37]

Charitable status may be obtained by trusts, companies and foundations. However, regard must be had to the provisions of the Charities Registration Act 1989,[38] which provides[39] that any institution which in the Isle of Man takes or uses any name, style, title or description

[31] They may receive a fee for their work.

[32] A further refinement common in tax haven trusts is that the name of the Settlor/Grantor does not appear in the trust deed itself. The trust takes the form of a "declaration" whereby the Trustees state that they hold and have held the trust fund since a given date. The identity of the settlor remains confidential to them. In the hands of less scrupulous trust practitioners, a sham settlor may be used—a person who is indeed the settlor of a trust with, say, $100 as the trust fund, but who is not in fact the true source of the bulk of the funds, which are added to the trust fund subsequently. This device is also common in the case of foundations where the founder is in many cases a service provider acting as a man of straw.

[33] A number of tax haven structures specifically exclude the rights of creditors who would otherwise be in a position to bring an action in respect of fraudulent transfers (e.g. the Nevis Multiform Foundation). In others, this right of action is not extinguished. In the Isle of Man, for example, the principle that a transfer made with the intention of defeating a just creditor (i.e., a current debtor or a debt falling due on a known future date) is void and of no effect became hard law under the Fraudulent Assignments Act 1736 (http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1736/1736-0002/FraudulentAssignmentsAct1736_1.pdf) (the Act remains in full force and effect today).

[34] See Andres Knobel, The case for registering trusts—and how to do it, the *Tax Justice Network*, 3 November 2016 (http://www.taxjustice.net/wp-content/uploads/2013/04/Registration-of-Trusts_AK.pdf).

[35] In a fiscal context, see Andres Knobel (ed. Nicholas Shaxson), Trusts: weapons of mass injustice?, 13 February 2017, the *Tax Justice Network* (http://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf).

[36] *Costain, Re (1961)* 1961-71 MLR 1, at 7, per Deemster Kneale.

[37] *Ring, Re, (1962)* 1961-71 MLR 60, at 66, per Deemster Kneale.

[38] http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1989/1989-0011/CharitiesRegistrationAct1989_1.pdf

[39] §1.

implying or otherwise pretends that it is a charity or which holds itself out as a charity is guilty of an offence unless it files a statement in the prescribed form at the General Registry in the Isle of Man. The Chief Registrar has the power to refuse the filing if he is of the opinion that the institution is not established for charitable purposes, or does not have a substantial connexion with the Isle of Man, or has a name that is undesirable or misleading.[40]

These hurdles once overcome, should the donor of the charitable trust choose at the outset that the trust is to be revocable,[41] the property in the trust is alienated only for its duration. The unscrupulous may make merely token distributions within the Isle of Man, in order to maintain a real connexion and hence registration, whilst preserving the bulk of the charitable trust fund for ultimate return to the donor upon its being revoked. This pattern of potential abuse is in no way unique to the Isle of Man.

The potential to "warehouse" assets in plain sight within a socially worthy medium, only later to have them "returned to sender" represents accountability avoidance in its purest form.

6.2.2 Noncharitable purpose trusts[42]

The noncharitable purpose trust (NCPT) takes concealment to a new and dangerous level, by not simply hiding the identity of a beneficial owner but by abolishing the concept of beneficial ownership altogether. Traditionally, a trust in which the beneficiaries could not be clearly identified, or for purposes that were not charitable (and so capable of benefiting persons identified not by name but by classification), would be void. The NCPT takes the triangle and cuts off the third corner. At common law, a noncharitable purpose trust would be void for want of identifiable beneficiaries to enforce it and for breach of the rule against perpetuities.

NCPTs are now available worldwide in both offshore and onshore jurisdictions under legislation that bears a universal similarity.[43]

6.2.2.1 Isle of Man Purpose Trust[44]

In the Isle of Man, NCPTs are amongst the longest established. The Purpose Trusts Act 1996[45] provides for the creation of NCPTs. The purpose must be certain, reasonable and possible; and must not be unlawful, contrary to public policy or immoral.[46]

The following are *not* capable of being regarded as NCPTs: those made

(a) for the benefit of a particular person (whether or not immediately ascertainable);
(b) for the benefit of some aggregate of persons identified by reference to some personal relationship; or
(c) for charitable purposes.

The purpose itself is not the issue: anything lawful, compatible with public policy and moral will suffice. The purpose may be—and most often is—simply to hold the shares in a company. The issue is that *there are no beneficiaries.* This is something more than simply saying that an individual cannot "own" the trust fund, but that he or she could at some point in time (at the discretion of the trustees) be eligible to receive a distribution. There is *no one* who owns the trust fund. For the duration of the NCPT,[47] although the legal title to the assets in the trust is held in the names of the trustees, there is no beneficial owner.

The trust must be created by deed or by a will that is capable of being, and which is, admitted to probate in the Isle of Man (or in the alternative in respect of which letters of administration are capable of being and are granted) (§1(1)(b)).

There must be two or more trustees, of whom at least one must be a person falling into one of the categories designated under the Act: an advocate, a foreign-registered legal practitioner, a qualified auditor, a member of the Chartered Institute of Management Accountants, a member of the Institute of Chartered Secretaries and Administrators, a fellow or associate member of the Institute of Bankers, or a trust corporation (§§1(1)(c) and 9(1)).

To enforce the trust there must be an "enforcer". The trust instrument must provide for the enforcer to have an absolute right of access to any information or document that relates to the trust, the assets of the trust or to the administration of the trust (§§1(1)(d)(i) and 1(1)(e)).

The trust instrument must specify the event upon the happening of which the trust terminates and must provide for the disposition of surplus assets of the trust upon its termination (§1(1)(f)).

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[40] §3(1).
[41] Assuming this is not regarded by the Chief Registrar or by HM Attorney General in the Isle of Man as a bar in itself to charitable status—(§§3 and 4).
[42] See ref. 2, Ch. 3 for a fuller treatment of this topic.
[43] See Appendix A.
[44] For a review of NCPTs and beneficial ownership avoidance see ref. 2, Ch. 3.
[45] http://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/1996/1996-0009/PurposeTrustsAct1996_1.pdf
[46] §1(1)a).
[47] A maximum of 80 years—§1(1).

The designated person must keep a copy of the trust (including supplemental instruments), a register (specifying the creator of the trust, its purpose and the details of the enforcer), and trust accounts. These accounts are to be open to inspection by the Attorney General (or anyone authorized by the Attorney General). Public inspection is, however, not required (§2).

Should the enforcer die or become incapable, the Attorney General must be informed, and he may apply to the High Court of Justice of the Isle of Man to appoint a successor (§3).

No land or any interest in land in the Isle of Man may be held, directly or indirectly, in a purpose trust (§5).

At the end of the trust period, the trust funds, which is now regarded no longer as a trust fund (because the trust has terminated) but as surplus assets, pass to an individual or institution ("the recipient of surplus") who is either named in the purpose trust deed or who can be identified using a descriptive formula contained in the trust deed, such as "the spouse and issue of the grantor". This opens up various planning possibilities, including:

(a) holding shares in a company that can then be voted in accordance with the terms of the trust (of particular importance in circumstances where an individual may not wish beneficially to own such assets);
(b) Protection of subsidiaries where a parent company borrows—the shares of the subsidiary are placed in trust until the loan is repaid, thereby protecting the subsidiary from creditors of its parent;
(c) Protection of the lender where a parent company borrows—the shares of the subsidiary can be placed in trust until the loan is repaid, thereby preventing ownership of the subsidiary from changing;
(d) Capital financing and securitization projects, in which the trust assets are off the balance sheet of one or more parties to the transaction.

The practical effect is substantial. It is common to find that the entire issued share capital in a company, say "ABC Limited", is held in a NCPT. *ABC Limited therefore has no beneficial owner whilst the NCPT is in existence*.[48] The recipient of surplus may be the very company ("Parent Limited") of which ABC Limited would have been a subsidiary, but which Parent Limited prefers to keep off its balance sheet. Investigating the books of Parent Limited during the life of the purpose trust will give no indication whatsoever of the existence of ABC Limited. Yet, ABC Limited is destined to become the property of Parent Limited. Until that time, Parent Limited has no legal responsibility for the good governance of, or any economic connexion with, ABC Limited.

A common use of ABC Limited would be to place under its ownership hazardous assets, such as bulk cargo tankers or brownfield toxic development sites; or politically sensitive projects such as mining or rainforest development: ABC Limited has by its very nature limited liability, and apart from the assets which it holds has no means to satisfy any claims that could be brought against it. Parent Limited, which will ultimately benefit from any profits and capital gains made by ABC Limited, remains wholly invisible and inviolate throughout.

6.2.3 Cayman STAR trusts

Cayman STAR trusts derive their name from the Special Trusts (Alternative Regime) Law 1997, now replaced by Part VIII Trusts Law (2011 Revision)[49] as amended by the Trusts (Amendment) Law 2016 with effect from 24 October 2016,[50] which introduced the concept of private purpose trusts into a jurisdiction that up to that point recognized trusts only for beneficiaries or for charitable purposes, drawing its strength from English common law. It is another example of an artificial construction—no doubt justified locally as an evolutionary step—to serve the demands of the burgeoning Cayman finance and fiduciaries industries and to provide what is perceived to be a competitive edge.

The Cayman STAR trust shares many of the characteristics of a noncharitable purpose trust, save that beneficiaries are possible. There is no limitation on the number of beneficiaries or of purposes (whether charitable or not). One such purpose can be wholly self-referring: the preservation of the trust assets. The trust is enforced by an enforcer—again a similarity with the noncharitable purpose trust—to the exclusion, however, of any rights in equity of the beneficiaries themselves to seek to enforce its terms, to have information concerning the trust disclosed to them, or to challenge, the trust in any way. The Cayman STAR trust is, if desired, perpetual, and because it is open to constant re-interpretation by the trustees (with or without Court

[48] The initiative taken by the United Kingdom Government under the Small Business Enterprise and Employment Act 2015 (http://www.legislation.gov.uk/ukpga/2015/26/contents) to establish a register of people with significant control (https://www.gov.uk/government/news/keeping-your-people-with-significant-control-psc-register) would be wholly thwarted by this.
[49] Access to Cayman Islands legislation and to the decisions of its courts is obtainable on subscription from the Cayman Islands Judicial Administration (www.judicial.ky).
[50] See footnote 49.

assistance) it can never fail or be held void *ab initio* for perceived uncertainty.

The beneficiaries will have a right to be considered by the trustees for a distribution, but have no means to enforce this—they will in effect be no more than men and women of straw in any human rights enforcement action in which they seek to attach trust assets. The enforcer has no proprietary rights, in law or in equity, in the trust assets and exists merely to monitor decisions of the trustees, the parameters of which they themselves have set.

In terms of accountability, therefore, the settlor of a Cayman STAR trust can warehouse assets within the trust for any purpose, and section off assets for beneficiaries who have no means of influencing the administration of the trust—generation after generation. Those assets held for a purpose will have no beneficial owner in any sense of the words and, in addition, will from a corporate perspective be "off balance sheet". In consequence, they will be completely unattachable. As there is no requirement for Cayman STAR Trusts to be registered publicly, even their very existence is concealed.

The Cayman STAR trust may hold shares in a private trust company (that is, a company established solely to act as trustee of a particular trust), and it is not beyond the bounds of imagination that this company itself may be the trustee of a noncharitable purpose trust. Thus is the ownerless itself made ownerless, *ad infinitum*.

6.2.4. BVI VISTA trusts

The VISTA[51] trust is created and subject to the Virgin Islands Special Trusts Act 2003, as amended most recently (2013).[52] It is a creation of statute, unique to the BVI, and hence not naturally occurring in any accepted body of trust law. Specifically designed for, and confined to, the holding of company shares, it has therefore the chimaeric qualities of many of these genetically engineered tax haven structures.

It is a long-established principle of trust law that a trustee is under a duty of care and must act prudently when making decisions concerning the assets in a trust fund.[53] In the case of trustees holding shares in a company, their duty to act as prudent businesspersons is paramount: speculative, bordering on reckless, behaviour by trustee shareholders is a breach of their fiduciary duty. Similarly, speculative or reckless conduct on the part of the directors of the company, who have its management and control, can be monitored by the trustee shareholders and reined in when felt not to be in the best commercial interests of the company or of its stakeholders. Those stakeholders include not only the shareholders themselves, but also the likes of creditors, suppliers and the company's customer base (not forgetting overriding principles of good corporate governance).

In the case of a VISTA trust, this principle is dis-applied. It is a form of trust for holding shares in companies where it is intended that the shares will be held indefinitely and the trustee is not intended, other than in special and defined circumstances, to intervene in the conduct of the affairs of the underlying company or companies. The trustees as shareholders, regardless of any countervailing provisions of BVI company law (as VISTA applies only to BVI companies), have no management responsibility, leaving the directors with unconstrained authority. The trustees have a statutory duty to retain the shares. Even the appointment of directors is limited by "office of director" rules contained in the trust deed, which specify how the trustee shareholders must exercise their votes in respect of the appointment, removal and remuneration of directors. All authority is therefore vested in the directors.

The shareholder trustees have no fiduciary duty in relation to the assets or affairs of the company.[54] Though the VISTA trust is permitted only to hold shares in a BVI company and no other assets, there is no restriction on the assets that the BVI company itself may hold, which may of course include shares in non-BVI companies. For a period of up to 20 years the trustees are denied the right under the long-established common law rule in *Saunders v Vautier 1841*[55] to vary or terminate the trust.[56]

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[51] VISTA is simply the acronym for the Act.

[52] Virgin Islands Special Trusts Act 2003 (http://www.bvifsc.vg/Portals/2/Virgin%20Islands%20Special%20Trusts%20Act,%202003.pdf) and Virgin Islands Special Trusts (Amendment) Act 2013 (http://www.bvifsc.vg/Portals/2/Virgin%20Islands%20Special%20Trusts%20(Amendment)%20Act,%202013.pdf).

[53] In some jurisdictions this equitable principle has been enshrined as a statutory duty of care: Part 1, Trustee Act 2000 (United Kingdom) (http://www.legislation.gov.uk/ukpga/2000/29/contents); Part 1, Trustee Act 2001 (Isle of Man) (https://legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2001/2001-0018/TrusteeAct2001_1.pdf).

[54] In one jurisdiction, the Isle of Man, the rule is diametrically opposed to this. The position of creditors in relation to assets owned by a company that is itself wholly owned by a trust is subject to the *corporate-trust fusion principle* established on 19 September 2002 in *Re Poyiadjis 2001-03 MLR 316.* Under the corporate-trust fusion principle, where trustees hold 100% of the issued share capital in a company, and may even themselves be the directors of that company, their fiduciary responsibility in relation to the shares extends to the company's own assets, requiring that those assets be dealt with as if directly held in the trust itself.

[55] [1841] EWHC J82, (1841) 4 Beav 115.

[56] Exceptionally, if an "interested person" (e.g., a beneficiary) calls upon a VISTA trustee to intervene in the company's affairs then

No trust deed under BVI law is subject to public registration. One of the marketing advantages claimed for the VISTA trust is the creation of blind trusts for politicians, who can thereby distance themselves from the companies in which they have a financial interest and easily refute accusations that they abuse their position of influence.

In terms of human rights accountability, this claimed advantage is pernicious. Any entity or individual which or who but for the VISTA trust would hold shares directly in a human rights abusive corporation remains with clean hands throughout and will be wholly absolved from responsibility in the company's affairs as only the directors are empowered.

6.3 Foundations

Foundations, once in offshore terms the preserve of Liechtenstein (Stiftungen) are now available globally, and what was originally the preserve of civil law is now a form recognized by and promoted within common law jurisdictions.[57]

Unlike a trust, which has no legal personality of its own (a trust exists in the relationship between the settlor, trustees and beneficiaries), a foundation is a legal entity, with the capacity—like that of a corporation—to govern itself. Unlike a corporation, it has no shareholders or other form of participation but, in common with a trust, has beneficiaries. It is an "orphan" structure.

As a State creation, a foundation registers its creation with that State, though in many cases the register is not available for public inspection, or merely to the extent that the name of the foundation is accessible.

As with a trust, a foundation exists in order to hold a fund, which can comprise any form of property. A foundation itself does not trade, but by holding shares in trading entities this limitation is of no practical effect. The assets transferred to a foundation may come from any person, and not merely the founder identified in the constitutional documents of the foundation itself. This is reflected in the fact that it is very common for the founder to be a professional fiduciary.

The purpose of the foundation is contained in its constitution. It is common for the founder to have powers reserved under which the founder can amend the purpose and amend the identity (or percentage entitlement) of the beneficiaries, in much the same way as the objects of a company and the rights attaching to its shares can be mutated over time. Entitlement to benefit can therefore pass from group to group, each supplanting its predecessor, and prominence may be given to a particular individual, wholly secretly.

Unlike a trust, which is open to attack as a sham—on the basis that the settlor did not have a true intent to create it, that those intended to benefit and the funds to be settled are insufficiently identified (the "three certainties")—the existence and validity of a foundation, once registered, is beyond challenge. Because the founder has in many jurisdictions wide powers in relation to the administration of the foundation and of disposition, the difficulty often encountered by overzealous and possessive settlors of trusts, who whilst acquiescing in the transfer of assets to trustees nevertheless seek still to control those assets (which eliminates one of the three certainties and fatally wounds the trust) is entirely absent.

The more common uses of foundations (and the motivations for using foundations) relevant to human rights abuse include tax and estate planning, asset protection planning, maintenance of corporate control, assistance to charities, separation of voting and economic benefits in investment holding companies, ownership of private trust companies, operation of employee share option schemes and holding assets off balance sheet.

6.3.1 Liechtenstein private-benefit foundation

The Liechtenstein foundation, the archetype upon which all later foundation laws have been based, and by the degree of their divergence from which archetype the radicalization of this offshore structure can be assessed, is created under the Personen- und Gesellschaftsrecht 1926 as most recently amended by the Stiftungsgesetz 2009.[58]

A private-benefit foundation may be purely to benefit a family, or may be in a mixed form that serves both the family and other charitable and noncharitable purposes. The foundation itself cannot in general terms trade, but may hold the shares in a trading company—and as such is then designated a holding foundation. The minimum foundation capital is 30,000 euros, Swiss francs or US dollars.

In the case of private-benefit foundations, registration is not required—the foundation has a legal personality upon being established. All that is required of the foundation is that it give notice of its formation—its name and purpose, details of its Liechtenstein-based

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the trustee must do so if the interested person has a "permitted ground of complaint", which must be specified in the trust instrument.

[57] See Appendix B.

[58] LGBl. 2008 no.220 (https://www.gesetze.li) (further amended, but not germane to the present topic, by the Gesetz vom 1. Dezember 2016 über die Abänderung des Personen- und Gesellschaftsrechts).

registered agent and the identity of the members of the foundation council (the body that administers and represents the foundation). No beneficiary details need be notified. Nothing held at the Liechtenstein Land and Public Register Office is made available to the public: all that it is permitted to reveal to third parties is that the unregistered foundation exists.

It is common for a fiduciary to act as founder, its name appearing in the documentation establishing the foundation, which means that the actual founder has the option of remaining anonymous. The actual founder may sit on the foundation council and may be a beneficiary (possibly the sole beneficiary).

The foundation is of perpetual duration but this irrevocability on the part of the actual founder can be countered by provisions in the foundation's articles that the founder retains the right both to revoke and to amend not only its administrative provisions but also the identity of the beneficiaries. Dissolution (in most cases at the instance of the foundation council) is also an option. On a revocation or dissolution, the assets within the foundation pass to the actual founder as ultimate beneficiary (unless other provisions to the contrary have been included). Alternatively, the re-domiciliation of the foundation is permitted, subject to the laws of the foreign jurisdiction allowing the foundation to re-domicile as a continuing entity not deemed to have been liquidated and re-established.

There is no audit requirement, unless the private benefit foundation were voluntarily to submit to the supervision of the Foundation Supervisory Authority.[59] However, a control body may at the founder's option be appointed to verify annually that the foundation assets are being managed and distributed in accordance with the purpose(s) of the foundation: the control body can be the founder himself or herself, an auditor appointed by the Court, or a specialist adviser.

The new Liechtenstein foundation law places particular emphasis on good corporate governance, which in the case of private benefit foundations focuses on internal management controls and the information rights of beneficiaries, and in the case of those that have submitted voluntarily to supervision by the Foundation Supervisory Authority to provide the Authority upon request with information and with access to the foundation's books.

Forced heirship avoidance is absent. Every contribution to the assets of a foundation is open to challenge by the donor's heirs, where those heirs have forced heirship rights (either under the law of Liechtenstein itself or under foreign law, in which case the provisions of the Liechtenstein Private International Law Act will be applied). A claim against the foundation for payment of the relevant compulsory portion has to be made to the Princely Court of Justice.[60]

Liechtenstein has extremely limited provisions for the recognition and enforceability of foreign judgments (Switzerland and Austria), and this lack of reciprocity is seen as an advantage for foundations, against which an action must with the exception of Swiss and Austrian judgments be brought in the Liechtenstein Courts. Significantly, and positively, there is no provision that would automatically prevent the relitigation before the Liechtenstein Courts of a foreign, nonreciprocal judgment.

Asset protection is contemplated in the new law, but in a conscious effort to weight the rights of legitimate creditors against the rights of the founder and of the foundation. There is no duty to preserve the foundation assets, but no distribution is permitted if as a result the foundation were left with funds inadequate to meet its debts. Claims against the foundation will, if successful, attach to foundation assets; but successful claims against the founder or against beneficiaries in their personal capacities will not.

6.3.2 Panama Private Foundation

Panama Private Foundations (PPF) are a creation of La Ley de Fundaciones de Panamá 1995.[61] There are no restrictions on the purposes for which it may be formed, but it cannot engage in commercial or for-profit activities as a day-to-day activity.

A PPF may take effect on its incorporation or may instead become active upon a later event, such as the death of the founder. The asset minimum upon incorporation is a lowly 10,000 USD. Any inheritance laws in the jurisdiction where the founder or any of the beneficiaries are domiciled are dis-applied. Equally, in the event of any judgment or other seizure of assets of the founder, the assets of the PPF are inviolate. Unlike the Bahamian BEE for example, the transfer of assets into a PPF is open to challenge by creditors on the basis that it was done fraudulently to defeat the rights of those creditors, but subject to a limitation period of three years from the date on which the transfer of those assets was made (bearing in mind that such a transfer can occur throughout the life of the PPF)—beyond that date, no claims will be heard before the Panamanian courts. In respect of non-Panamanian assets, the PPF is tax-exempt in Panama.

[59] Stiftungsaufsichstbehörde Liechtenstein (http://www.stifa.li/en/).
[60] http://www.gerichte.li/
[61] http://docs.panama.justia.com/federales/leyes/25-de-1995-jun-14-1995.pdf

The administrative workings of the PPF are found in its charter, in which the names of the founder, the foundation council and (if appointed) the protector are contained. Only the names of the founder and council members need be made public—the option exists that the protector may be appointed privately. The beneficiary provisions are contained in its regulations, which are wholly private.

A PPF is subject[62] to a State duty of confidentiality, without limit as to time, which binds not only the members of the foundation council and any protector, but also any person in a civil service or private capacity who has knowledge of the activities of the PPF. Violation of this duty incurs a six month jail sentence plus a fine of 50,000 USD in addition to any civil penalties.

6.3.3 Nevis Multiform Foundation

The Nevis Multiform Foundation is a creation of the Nevis Multiform Foundations Ordinance 2004.[63] It is the ultimate chameleon, and has the ability to designate itself as a trust, a company, a limited liability company, or a general or limited partnership.[64] If none of these forms is specified, then the foundation is governed by the terms of the Ordinance as a foundation plain and simple; but if so designated, then the relevant laws of Nevis apply to each designated form.

The multiform foundation throughout its life is a shape-shifter. Only one multiform may be adopted at a time, but following establishment or, as the case may be, continuation or transformation or conversion or consolidation or merger, a stated multiform may be changed by amendment to the constitution, together with, if appropriate, a change in name.

There may be any purpose, or more than one purpose, whatsoever, be it charitable or noncharitable, commercial or noncommercial, so long as not contrary to public policy in Nevis. There is no requirement to have a beneficiary.[65]

Nevis is robust in its defence of the multiform foundation. No multiform foundation governed by the law of Nevis and no subscription of property to a multiform foundation valid under the law of Nevis is void, voidable or liable to be set aside or defective in any manner by reference to the law of a foreign jurisdiction.[66] Expressly, the fact that the laws of any foreign jurisdiction prohibit or do not recognize the concept of a foundation, a multiform foundation or any stated multiform will be disregarded. In many jurisdictions, heirs have fixed rights to the deceased's estate – a civil law concept known as "forced heirship". In the case of multiform foundations these rights are expunged.

There is a State duty of confidentiality,[67] without temporal limit, which binds any person in possession of or having control over any information relating to the multiform foundation. Violation of this duty incurs a six month jail sentence or a fine of 50,000 USD or both in addition to any civil penalties. Further, the 1985 Confidential Relationships Act No 2 of St Christopher and Nevis[68] applies to every multiform foundation established under the Ordinance. All judicial proceedings, other than criminal proceedings, relating to multiform foundations are to be heard in camera (that is, without members of the public present) and no details of the proceedings are to be published by any person without leave of the Court.

Hard-wired into the Ordinance is a wide range of asset-protective features:[69]

- The multiform foundation itself and the beneficiaries are tax-exempt in Nevis.
- There is a right to silence: a person may refuse to answer any question put to him or her pursuant to any provision of the Ordinance if that person's answer would or might tend to expose that person, or the spouse of that person, to proceedings under the law of Nevis or elsewhere for an offence or for the recovery of any penalty.
- Acting honestly, in the opinion of the Court, is a full defence to an action against any member of the foundation's management for negligence, default or breach of duty.
- Notwithstanding that it is proved beyond reasonable doubt by a creditor that a multiform foundation was subscribed to, by or on behalf of a subscriber with principal intent to defraud the creditor of the subscriber and did at the time such subscription took place render the subscriber insolvent or without property by which that creditor's claim (if successful) could have been satisfied, such subscription will not be regarded by the Court as void or voidable and the multiform foundation shall instead be liable to

[62] Article 35 La Ley de Fundaciones de Panamá 1995.
[63] http://www.liburddash.com/legislation/MFO,%202004.pdf
[64] Nevis Multiform Foundations Ordinance 2004 §10.
[65] Nevis Multiform Foundations Ordinance 2004 §11.
[66] Nevis Multiform Foundations Ordinance 2004 §46.
[67] Nevis Multiform Foundations Ordinance 2004 §113.
[68] http://www.nexus.ua/images/legislation/Nevis_Confidential_1985.pdf
[69] Nevis Multiform Foundations Ordinance 2004 Part XV.

satisfy the creditor's claim. Such liability is however limited to the extent of the interest that the subscriber had in the property representing or comprising the subscription prior to subscription.

- If a creditor has a cause of action (wherever this arises, and not merely in Nevis) against a subscriber to the multiform foundation, and the subscription into the multiform foundation was made more than one year after that cause arose, the matter is time-barred. If the subscription is made within that year, the creditor must commence the action no later than six months from the date of the subscription, or be time-barred.
- No assets or property of the multiform foundation available for distribution to a beneficiary are to be alienated or pass by bankruptcy, insolvency or liquidation or be liable to be seized, sold, attached, or taken in execution by process of law.[70]
- The constitution of a multiform foundation may provide that any beneficiary or any creditor of the beneficiary or trustee-in-bankruptcy or liquidator of the beneficiary shall forfeit his beneficial entitlement in the event that he or any creditor of the beneficiary or trustee-in-bankruptcy or liquidator of the beneficiary challenges the creation of the multiform foundation, any subscriptions to the multiform foundation, the constitution or any provision thereof or any decision of the management board or the supervisory board.
- No foreign judgment against the multiform foundation, its management or the beneficiaries will be enforced in Nevis.
- The Statute of Elizabeth[71] (enactment entitled 13 Elizabeth 1 Ch 5 (1571)), which renders void any fraudulent transfer of property, and which would otherwise apply under the laws of Nevis, has no application to any multiform foundation which takes the form of a trust, nor to any subscription to such a multiform foundation.

From a human rights perspective, a Nevis multiform foundation is opaque and unassailable.[72]

7. CONCLUSION

The growing use of orphaned structures such as non-charitable purpose trusts and the Bahamas Enterprise Entity, specifically designed to facilitate accountability avoidance and aggressively marketed to promote it, should be curbed. None of these structures is born of domestic need in the jurisdictions adopting them, perhaps other than a desire to boost the incomes of their financial and fiduciary sectors (to which many if not all tax havens find themselves in thrall). Compounding the problem there is a general unawareness of these structures other than within the charmed circle of the tax havens themselves and on the part of those who operate through the tax havens.

Regulating tax havens solely in terms of taxation—being bound by the self-definition of such jurisdictions—will prove to be ineffective, given the chameleonic nature of international tax planning and the endless supply of

[70] Multiform Foundations Ordinance 2004 §47(1).

[71] "For the avoiding of feigned, covinous and fraudulent feoffments gifts, grants, alienations, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants etc. have been and are devised and contrived of malice, fraud, covin, collusion or guile to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, etc; not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued.

"Be it therefore declared, ordained and enacted, that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken, only as against that person or persons, his or their heirs, successors, executors, administrators and signs of every of them, whose actions, suits, debts, etc; by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate, and of none effect, any pretence, color feigned consideration, expressing of use or any other matter or thing to the contrary notwithstanding.

"Provided that this act or anything therein contained shall not extend to any estate or interest in land, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be, upon good consideration and bona fide, lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid."

[72] Notwithstanding that St Kitts and Nevis is a founder member in June 2015 of the Association of Integrity Commissions and Anti-Corruption Bodies in the Commonwealth Caribbean (the other members being Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, the Bahamas, Saint Lucia, St Vincent and the Grenadines and Trinidad and Tobago) (http://thecommonwealth.org/media/press-release/caribbean-integrity-commissions-form-new-commonwealth-body-fight-corruption).

camouflage cloth available to those who wish to wrap their dealings. An appeal to conscience and morality is unlikely to succeed in the context of taxation,[73] but conscience and morality are the bedrock of international human rights norms. If, therefore, the war on tax evasion/avoidance is constantly evolving and seemingly endless—"[T]he battle against tax avoidance is like that against disease: the only viable approach is repeated changing of the locks"[10]—it must follow that the *wrong war is being fought*.

In the context of scientific research, those whose aim is to benefit from the abuse of human rights and who seek accountability avoidance will continue to hold all the cards unless research institutions and individual researchers develop a detailed understanding of just how those opponents plan and manage their campaigns and assemble their armouries. Without that detailed understanding, and unless research institutions and individual researchers are given the ability to engage both on a jurisprudential and on a commercial level, matched strength for strength in the business arena, fully briefed before the courts, the threat—embodied in the instruments described in this paper—to the financial integrity of scientific research will go unchallenged.

An informed, interdisciplinary approach is essential.

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[73] See the discussion in ref. 2, ch.1 of the Morton's Fork dilemma – once a tax haven, always a tax haven. Their dilemma is to face two choices, both of which are equally unattractive. They are in a negative feedback loop, unable to raise sufficient revenue to spend on development beyond their minimum revenue needs: "[…] if they increase domestic taxes to raise revenue, they lose the tax base they attracted with tax competition in the first place, while if they do not they cannot raise additional revenue to invest in those public goods necessary to spur development beyond their minimum revenue needs. Absent relieving the pressure to rely on such institutions by providing other ways to access capital, such countries may effectively be incapable of ceasing to act as tax havens even in the face of increasing punishment.

APPENDIX A

Noncharitable purpose trust jurisdictions (sampled)

Jurisdiction	Statute
Belize	Trusts Act 1992
British Virgin Islands	Trustee Act (Cap. 303) as amended by Trustee (Amendment) Act 2013
Barbados	International Trusts Act 1995
Cayman Islands	Introduced into the Cayman Islands via the Special Trusts (Alternative Regime) Law, 1997, now embedded in Part VIII of the Trusts Law (2011 Revision) ("STAR Trusts")
Cook Islands[74]	International Trusts Amendment Act 1995-6, section 8
Guernsey	Trusts (Guernsey) Law 2007, section 12
Isle of Man	Purpose Trusts Act 1996
Jersey	Trusts (Jersey) Law 1984 (as amended by Trusts (Amendment No. 3) (Jersey) Law 1996 with effect from 24 May 1996)
Labuan	Labuan Trusts Act 1996 (as amended, 2010) Section 11A
Mauritius	Trusts Act 2001, section 19
Niue	Trustee Companies Act 1994, section 31
Samoa	Trusts Act 2014, section 66
Turks and Caicos Islands	Trusts Ordinance 2016
USA, Delaware	Del. Code tit. 12, Section 3556
USA, New Hampshire	N.H. Rev. Stat. Section 564-B
USA, South Dakota	South Dakota Codified Laws Section 55-1-20
USA, Wyoming	Wyo. Stat. Section 4-10-410

APPENDIX B

Foundation jurisdictions

Jurisdiction	Statute
Anguilla	Anguilla Foundation Act 2008
Antigua and Barbuda	International Foundations Act 2007
Austria	Privatstiftungsgesetz 1993
Bahamas	Foundations Act 2004 (amended 2005, 2007, 2011)
Barbados	Foundations Act 2013-2
Belize	International Foundations Act 2010
Cook Islands	Cook Islands Foundations Act 2012
Denmark	Danish Foundation Act (Fondsloven)
Guernsey	Foundations (Guernsey) Law 2012
Isle of Man	Foundations Act 2011
Jersey	Foundations (Jersey) Law 2009
Liechtenstein	Personen und Gesellschaftsrecht 1926; Stiftungsgesetz 2009
Malta	Act XIII of 2007
Mauritius	Foundations Act 2012
Netherlands Antilles	National Ordinance Regarding Foundations 1998; Civil Code, Book 2 2004 ("Stichting Particulier Fonds")
Nevis	Multiform Foundation Ordinance 2004
Panama	La Ley de Fundaciones de Panamá 1995
Seychelles	Foundations Act 2009
St Kitts	Foundations Act 2003
Vanuatu	Foundations Act 2009

[74] Pacific Islands Legal Information Institute (www.paclii.org).