Conclusion: Can the AOG and MNC Be Liable in International Law?

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When studying questions of the international obligations of non-State actors (NSAs), as Joanna Kyriakakis pointed out in her contribution, we may not be able to circumvent the vexed issue of their international legal personality. After all, in the classic view, an actor's obligations are a function of its recognition as an international legal person: as the International Court of Justice held in its Reparation for Injuries advisory opinion,¹ the determination of an international actor's legal capacities, such as its participatory rights or its international obligations, depends on whether this actor enjoys international legal personality in the first place. The question of a NSA's international legal personality thus appears as a logical a priori with respect to the question of its obligations and responsibility. At the same time, however, it is well-known that in Reparation the Court derived the existence of an actor's legal personality from its possession of capacities to carry out certain functions. This circular reasoning has offered little clarification as to how an actor's legal capacities, including responsibility and obligations, are materialised. Instead, it appears to have encouraged dangerous subjective determinations of an actor's legal personality and obligations/responsibilities that may be arbitrary, capricious, or power-driven. The absence of 'neutral' international law-making and law-interpreting agencies, and the immature state of the international legal system, including its budding transnationalism, have so far proven incapable of self-modernisation in respect of the conceptualization of the NSA's responsibility. Consequently, the determination of a novel actor's personality and capacity remains subject to vertical reasoning which reflects the prevailing legal power arrangements. Reigning in the hierarchy as supreme, often exclusive, recognized actor, the State is safeguarding its systemic privileges denying the extension of international rights and obligations to newcomers. The original—and initially—sole subject of international law, the State operates as strict gate-keeper of the system, and only occasionally, when agreeable to its own purpose, recognizes (or confers) extended rights and obligations of NSAs.

At the current stage of development of international law, a NSA’s obligations and responsibilities are created by the State, at least according to the dominant positivist international law paradigm. Typically, a positivist international lawyer would then map the obligations and responsibilities which states, or intergovernmental organizations as clubs of states, have conferred (or rather imposed) on NSAs. A fine-tuned varied catalogue could result from this exercise, consisting of duties of armed groups to respect the basic tenets of international humanitarian law, requirements to be met by non-governmental organizations when they aspire to (maintain) rights of participation within international organizations, or specific private liabilities attached to the injurious consequences of economic operators’ activities in the fields of shipping and energy.

However, for the critical and reform-minded scholar, aware of the widening gaps separating the reality of global affairs and its formal (legal) governance, such an account of non-state actors’ obligations and responsibilities—while surely not futile—is unsatisfactory. Unquestionably, orthodox positivism fails to account for the variegated forms of factual NSA participation in global governance, and, importantly for our purposes, its attendant accountability challenges. The desire to render the many de facto power-wielding non-state actors accountable or answerable for their actions, especially to those they injure (victims), is at the heart of civil society and academic advocates’ efforts to assign international obligations to NSAs, especially in the face of regulatory and enforcement failures at the domestic level. These accountability and governance gaps have most prominently informed the discussion on the direct human rights obligations of transnational corporations, whose home and host states may prove unwilling or unable to assume their responsibilities.

Accountability advocates come in different categories of reasoning. It is important to realize that many are not necessarily challenging the primacy of the State in international law and governance. Rather, they aspire to locate accountability where it is due, namely with those actors who actually caused harm, whether these are the State or the NSA, or multiple actors jointly, albeit by advancing different rationales. Some of the accountability advocates may in fact be crypto-statists who view non-State accountability merely as a second best option to State accountability/responsibility; under certain circumstances, for instance for reasons of democratic legitimacy or financial resources, they

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2 See Barbara Woodward, Ch. 1.
3 See on shared responsibility of non-state actors, especially for human rights violations: Wouter Vandenhole, Ch. 2.