CHAPTER 3

Identifying the Participants in the Human Rights and Business Debate

The second intellectual task is to identify the participants. In order to propagate viable solutions to the problem under review, the observer, after clarifying her observational standpoint, must identify the participants involved in or affected by the problem. With regard to the human rights and business debate, the participants are the “world community.” Such a broad identification, however, does little to advance a resolution to the problem. Accordingly, “who,” in the “world community,” is most directly impacted by the problem needs to be further delineated.

Broadly speaking, participants are actors, either individually or through group associations, that act to optimize values (preferred events) through institutions affecting resources.1 “[A] participant in the constitutive process... is an individual or an entity which has at least minimum access to the process of authority in the sense that it can make claims or be subject to claims.”2 On a macro level, the participants are those individuals and group associations that comprise the world community.3 On a micro level, the participants will be members of a particular group that are bound by a territorial boundary that is being affected by deleterious activities, policies and practices of TNCS. Individuals, indigenous peoples and TNCS may be those sharing a high frequency of perspectives but not necessarily having the same territorial boundary.

When framed under the traditional state-centric, positivist concept, the main or sole participant in the human rights and business debate is the nation-state, since states are the traditional subjects of international law. States or governments, however, are legal fictions, represented by state officials (individuals). However, the traditional concept that states are the sole subjects of international law has been eroding continuously to where it is now widely

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2 McDougal & Reisman, World Constitutive Process, supra Chapter 1, note 109, at 262.
3 The New Haven School uses the term “community” to denote the types of “community or communities that can with a defined geographical area or an aggregate of participants that transcend boundaries.” Id.
accepted that states are the primary subjects of international law, but not the sole subjects. McDougal and Lasswell offer an alternate way of classifying international actors. Instead of viewing them as “subjects,” they consider them to be participants. McDougal and Leighton consider the nation-state as the “predominant” participant, but are not the “sole” participant. They and other scholars contend that states were never the “sole” subjects under international law and that this principle is actually a misrepresentation of international law. McDougal and Leighton assail the concept that states are the sole subjects of international law as a “nineteenth century canard,” which needs to change to embrace the international importance of TNCs.4 “[T]he theoretical relation of ‘states’ to the exclusion of individuals is in fact of relatively recent origin, a product of nineteenth century positivism.”5 Since 1945, there has been a shift in the doctrine that only states are subjects of international law and a move toward a broader participation to include nonstate actors.

By positioning the individual at the center of international law, adherents of policy-oriented jurisprudence stand firm in their affirmation that the purpose of international law, indeed, any law, but more specifically international human rights law, is to protect the individual6 and to seek a world public order of human dignity.7 Therefore, individuals or associations of individuals are the main participants under policy-oriented jurisprudence. The current debate is framed in such a manner that places the nation-state and TNCs as the primary participants. All, if not most, of the literature on the debate is captioned by placing a term that denotes a corporate entity first followed by

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5 Id. at 509; see also Duruigbo, supra Chapter 1, note 122, at 234.
6 Corporations also consists of individuals, who have human rights, i.e., shareholders, employees. Human rights law as originally envisioned and formulated only covered natural persons. The primordial human right, the right to life, cannot be conferred on an entity. Human dignity, by its very term, applies only to natural persons. Corporations are not born. They come into existence through the corporate charter, and give birth to their progeny through mergers and acquisitions. Death, however, does not naturally follow corporate birth. Perpetual life is a corporate option that evades natural persons.
7 McDougal and Reisman note that international law’s main emphasis has traditionally been on inter-state relations. This has led to international law being resistant to recognizing how other participants are involved in or influence the lawmaking process. See generally McDougal & Reisman, World Constitutive Process, supra Chapter 1, note 109, at 261, n. 7.