Chapter 4, Problem II

National courts in the home states of multinational companies have recently ruled in important cases that their companies have duties under both international and domestic law to those affected by their activities abroad. In the United Kingdom, the UK Supreme Court ruled in 2019 in *Vedanta Resources v. Lungowe* that plaintiffs, Zambian residents living near a copper mine run by the subsidiary of a UK corporation, could sue the parent company in the UK for toxic emissions from the mine. The court found that although Zambian courts would be the normal venue for this litigation, the obstacles to finding qualified counsel there met that "substantial justice" could only be achieved in the UK.

In early 2020, the Canadian Supreme Court in *Nevsun Resources v. Araya*, went further. It held that the Canadian parent company of an Eritrean mining company could be held liable under international law in Canada for forced labor practices at the mine. In a 5-4 ruling, the court found that customary international law was part of Canadian law and that the alleged practices would indeed violate jus cogens, allowing for the claim to proceed in Canadian courts. The dissenting judges, echoing the views of some U.S. judges in ATS cases (see Chapter 5, Problem III), argued that customary international law did not place obligations directly on corporations, that the court should not recognize new torts under Canadian law, and that Canada's act of state doctrine precluded review.

Finally, Dutch courts have issued two important rulings in cases brought against Royal Dutch Shell (RDS) (incorporated in the UK but headquartered in The Hague):

• Regarding the tort case brought against RDS and its Nigerian subsidiary for oil spills in Nigeria discussed on pp. 261-62, in January 2021, the Hague Court of Appeal ruled on the merits of the issue, holding the subsidiary strictly liable for the oil spills, but finding no duty of care on behalf of RDS. It ordered compensation and preventive measures. Just a few weeks later, the UK Supreme Court ruled in *Okpabi v. Royal Dutch Shell* that RDS, as a UK company, could be sued in the UK under UK law for the conduct of the same Nigerian subsidiary. Relying extensively on *Vedanta*'s analysis of the liability of a parent company for the acts of its subsidiaries, the court found that it was possible that Shell owed a duty of care to the plaintiffs and remanded the case to the lower courts.

• In May 2021, in a groundbreaking ruling in *Milieudefensie v. Royal Dutch Shell*, the Hague District Court ordered RDS to reduce its greenhouse gas emissions after it was sued by Dutch NGOs. The court relied on Dutch tort law, which requires a company not to act in conflict with "proper social conduct," and found such conduct to include a variety of responsibilities under soft law, including the OECD Guidelines and UN Guiding Principles excerpted in the casebook. With respect to the UNGPs, the court wrote:

> In its interpretation of the unwritten standard of care, the court follows the UN Guiding Principles (UNGP). The UNGP constitute an authoritative and internationally endorsed 'soft law' instrument, which set out the responsibilities of states and businesses in relation to human rights. The UNGP reflect current insights. They do not create any new right nor establish legally binding obligations. . . . [T]he European Commission has expected European businesses to meet their responsibilities to respect human rights, as

> formulated in the UNGP. For this reason, the UNGP are suitable as a guideline in the interpretation of the unwritten standard of care. Due to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP, although RDS states on its website to support the UNGP. . . .
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> The responsibility of business enterprises to respect human rights, as formulated in the UNGP, is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights. Therefore, it is not enough for companies to monitor developments and follow the measures states take; they have an individual responsibility.

As a result, Shell was found to have an immediate obligation of result to reduce emissions by 45% in 2030 relative to 2019 levels. Shell announced that it would appeal the ruling.

Meanwhile, the UN Human Rights Council's Open-Ended Intergovernmental Working Group continued discussions on a draft treaty on business and human rights. States discussed a third revised draft in 2021. While many states in the developing world continued to support the draft and the process, Northern states remained skeptical. The United States and the European Union engaged in the talks, but had significant criticisms of the draft.

Questions:

1. Do these rulings by domestic courts contribute to the legal developments discussed in the book? Do they suggest that a treaty on business and human rights is needed or not necessary?

2. Do these rulings suggest that international law is directly binding on corporations? Or is domestic law still a filter through which liability must be found? If you were the legal counsel of Royal Dutch Shell, or of those harmed by their conduct, does this distinction matter in terms of your operations or reactions?

3. Do these domestic court rulings, coming from only three states – the UK, Canada, and the Netherlands – create uncertainty for multinational corporations, or are they likely to be replicated in other states? In this context, compare the approaches of these three courts to that of the United States Supreme Court regarding corporate conduct under the ATS, as discussed in Chapter 5, Problem IV.