

LEGAL OPINION ON ENGLISH COMMON LAW PRINCIPLES ON TORT

CASE:

ODODO FRANCIS TIMI V ENI AND NIGERIAN AGIP OIL COMPANY (NAOC)

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## **1. Introduction - The growing international recognition of parent company's responsibilities**

Before delving into the legal analysis of the case at issue, it is useful to recall that the case promoted by the Ikebiri community against Eni s.p.a. and its Nigerian subsidiary is in line with the growing recognition, at the international level and in some national legal systems, of parent companies' responsibility for the social and environmental impacts caused by the activities of their subsidiaries. In 2011, the adoption of the United Nations' Guiding Principles on Business and Human Rights, although not devising a legally binding framework, marked the consolidation of a global consensus on the necessity to improve regulation and accountability of businesses, including in their transnational operations. Principle 18, in particular, calls on business enterprises to 'identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships'.<sup>1</sup> Such principle must be read together with Principle 17 which establishes the corporate responsibility to exercise due diligence regarding adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships. At the same time, states are expected to reduce the barriers that prevent legitimate cases from being brought before their courts by alleged victims of corporate-related violations (Principle 26). Recently, the UN Committee on Economic, Social and Cultural Rights, the body in charge of overseeing the compliance of the International Covenant on Economic, Social and Cultural Rights (by which Italy is legally bound), has clearly affirmed the states' duty to 'cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases'.<sup>2</sup>

The responsibility of parent companies within complex corporate groups or global supply chains for the adverse impacts caused by their subsidiaries, suppliers and business partners has been increasingly affirmed by non-judicial mechanisms (in particular, the OECD National Contact Points),<sup>3</sup> national courts, as well as through the legislative initiative of some states and of the European Union. The Dutch National Contact Point, for instance, has handled a complaint against Royal Dutch Shell in relation to oil spills in Nigeria, confirming that the parent company should

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<sup>1</sup> OHCHR, Guiding Principles of Business and Human Rights, 2011, Principle 18, [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

<sup>2</sup> CESCR, General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 2017, UN Doc E/C.12/GC/24.

<sup>3</sup> A non-judicial grievance mechanism, established at the national level, handling instances of alleged non-compliance with the OECD Guidelines for Multinational Enterprises, which contain a section on the human rights responsibilities of corporations.

‘exert its influence to stimulate proactive observance and implementation of its subsidiary SPDC in Nigeria of the OECD Guidelines for Multinational Enterprises’ and that ‘there is a role to play for the parent company when international governance standards require more than just compliance to local law’. It concluded that the parent company could not ‘ignore its own ultimate responsibility and accountability concerning local operations of SPDC’.<sup>4</sup>

Within the European context, a trend has emerged over recent years in European and national corporate law to increase regulation in order to protect individuals and communities from the adverse impact of business activities. One of the most relevant examples specifically concerns the duties of parent companies, and is constituted by the adoption of the French corporate duty of vigilance law,<sup>5</sup> which establishes a legally binding obligation for parent companies to devise vigilance plans preventing adverse human rights and environmental impacts resulting from their own activities and from activities of their subsidiaries and established suppliers.<sup>6</sup> Reporting requirements are another way to embed due diligence into law. Under the EU Non-Financial Reporting Directive,<sup>7</sup> 8,000 large EU companies and financial corporations, including Eni, are required to report on their principal impacts and risks regarding human rights, labour rights, the environment, and anti-corruption matters.

Furthermore, as next sections will explore in depth, there is an emerging jurisprudence in several European and non-European countries concerning the liability of parent companies of transnational corporate groups for human rights and environmental impacts caused by their subsidiaries in countries other than the parent’s home state. Recent lawsuits in which the courts of European countries have accepted jurisdiction of claims against both a EU-based parent company and its overseas subsidiary include the *Lungowe v Vedanta* case in the UK<sup>8</sup> and the lawsuit against Royal Dutch Shell and SPDC in the Netherlands.<sup>9</sup> Next sections will delve into a legal analysis showing that the plaintiffs in the case promoted before the Italian court by the Ikebiri community against Eni and its Nigerian subsidiary NAOC have a reasonable cause of action under the common law legal principle of ‘duty of care’.

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<sup>4</sup> Dutch NCP, Final Statement in Shell – Friends of the Earth /Amnesty International, 21 March 2013, <https://www.oecdguidelines.nl/notifications/documents/publication/2015/1/6/ncp-final-statement-shell---friends-of-the-earth-amnesty-international-i>.

<sup>5</sup> ‘Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre’, Decision no. 2017-750 DC, 23 March 2017.

<sup>6</sup> A constitutional amendment that would introduce a parent company due diligence obligation is currently under discussion in Switzerland.

<sup>7</sup> Directive 2014/95/EU.

<sup>8</sup> *Dominic Liswaniso Lungowe & others v Vedanta Resources Plc and Konkola Copper Mines Plc*. [2017] EWCA Civ 1528.

<sup>9</sup> Court of Appeal at The Hague, *Dooh and Milieudefensie v Royal Dutch Shell plc. and SPDC Ltd.*, 2015.

## 2. The Italian court has jurisdiction of the case and the applicable law is Nigerian law

Italian courts have jurisdiction of the case against the parent company Eni s.p.a. (from now on referred to as Eni, for brevity) and its subsidiary NAOC for the damage caused to the Ikebiri community in the Niger Delta. Moreover, according to the relevant norms of the Rome II Regulation, the applicable law before the Italian court in this case is Nigerian law,<sup>10</sup> a finding that is not disputed by the defendants.

The defendants contend that the lawsuit against the parent company has been instrumentally filed solely as a means to bring the Nigerian subsidiary under Italian jurisdiction, thereby abusing procedural law.<sup>11</sup> This contention must be firmly rejected in that, as the present contribution shows, the plaintiffs have at least one reasonable cause of action against Eni. In their submission, the plaintiffs address two possible causes of action, requiring the Italian judge to assess (1) whether the ‘corporate veil’ should be pierced to find Eni liable for the actions of its subsidiary, NAOC; and (2) whether Eni was directly liable for a breach of its duty of care towards the Nigerian plaintiffs. The scope of the present legal opinion is limited to the second cause of action, without prejudice to the plaintiffs’ arguments under the first.

Eni’s negligence is here discussed under the English common law definition of ‘duty of care’. This is because, as underlined by the district court of The Hague in the *Shell* case, ‘[...] Nigerian law as a *common law* system is based on English law, and common law, especially English case-law are important sources of Nigerian law’, which also entails that relevant common law precedents, such as *Chandler v Cape*,<sup>12</sup> can be relied upon.<sup>13</sup> As the common law definition of duty of care will be referred to, it is important to stress that nor its original articulation in the *Caparo* case, nor its application to parent company liability in *Chandler* (that will be addressed in para 3 of this legal opinion) are to be considered exhaustive of all the possible circumstances that would lead to a duty of care of the parent company.<sup>14</sup> As remarked by Lord Roskill in *Caparo*, ‘there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer

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<sup>10</sup> European Council Regulation n. 864/2007 (‘Rome II’), Arts. 4, 7.

<sup>11</sup> Eni, ‘Comparsa di costituzione e risposta’, 2017, pp 43-45.

<sup>12</sup> *Chandler v Cape* [2012] EWCA Civ 525.

<sup>13</sup> Court of Appeal at The Hague, *Dooh and Milieudefensie v Royal Dutch Shell plc. and SPDC Ltd.*, 2015, para 3.2, <https://uitspraken.rechtspraak.nl/inziendocument?id=ecli:nl:ghdha:2015:3586>.

<sup>14</sup> ‘The [*Chandler*] decision [...] does not exclude that other circumstances than those presenting themselves in that case may lead to a duty of care for the parent company’ (Ibid.). See also Dominic Liswaniso Lungowe & others v Vedanta Resources Plc and Konkola Copper Mines Plc. [2017] EWCA Civ 1528. ‘Mr. Gibson [Counsel for the corporate defendants] also pointed out that there had been no reported case in which a parent company had been held to owe a duty of care to a person affected by the operation of a subsidiary. That may be true, but it does not render such a claim unarguable. If it were otherwise the law would never change.’ (para 88).

to the questions whether (...) the law will or will not impose liability for negligence'.<sup>15</sup> As next paragraphs show, in the case at hand, sufficient elements are in place to substantiate the existence of a cause of action based on parent company liability for the breach of its duty of care. Before delving into that analysis, however, it seems useful to highlight that this type of foreign direct liability claims are not new either to European or to non-European legal systems.

As it is widely known, European law stipulates that a defendant shall be sued in its domicile, and that the domicile of a company is in the location of its corporate headquarters or its registered office.<sup>16</sup> In a case filed in the Netherlands against Royal Dutch Shell and its Nigerian subsidiary SPDC for damage linked to oil spills in the Niger Delta, the parent company challenged Dutch jurisdiction on grounds similar to those invoked by Eni in the present case, including the alleged abuse of procedural rules.<sup>17</sup> The district court (and later the court of appeal<sup>18</sup>) dismissed the argument pointing out that the claims against the parent company could not be designated as clearly certain to fail beforehand, given that, as demonstrated by *Chandler*, 'under certain circumstances, based on Nigerian law, the parent company of a subsidiary may be liable based on the tort of negligence against people who suffered damage as a result of the activities of that (sub-) subsidiary'.<sup>19</sup> The case was allowed to proceed against both the parent and the subsidiary, as the court found that there existed 'such a connection between the claims initiated against RDS, on the one hand, and the claims initiated against SPDC, on the other', that reasons of efficiency justified a joint hearing.<sup>20</sup> As next paragraphs show, there are similar reasons to reject the claim that there exist no reasonable cause of action against the parent company Eni, and that, therefore, allegations of procedural law abuse must be dismissed.<sup>21</sup>

The most recent example that can be quoted from the UK case-law is the lawsuit initiated against Vedanta and its subsidiary KCM by Zambian villagers claiming to have suffered from contamination of their water sources and from health problems linked to pollution. Although the

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<sup>15</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

<sup>16</sup> Regulation (EU) 1215/2012, art. 4(1), 63(1).

<sup>17</sup> District Court at The Hague, *Friday M. Akpan and Milieudéfensie v Royal Dutch Shell plc. and SPDC Ltd.*, 30 January 2013, para 4.3.

<sup>18</sup> Court of Appeal at The Hague, *Dooh and Milieudéfensie v Royal Dutch Shell plc.*, 17 December 2015, para 3.7.

<sup>19</sup> *Friday M. Akpan and Milieudéfensie v Royal Dutch Shell plc. and SPDC Ltd* (2013) para 4.3.

<sup>20</sup> *Ibid.*, para 4.1. Under UK law, as well, two subjects can be joined as co-defendants if the same facts must be assessed against both defendants in respect of a claim (R. Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States', 3(1) *City University of Hong Kong Law Review* (2011) 1, p 13). For examples from other jurisdictions, see: D. Augenstein, N. Jägers, 'Judicial remedies: the issue of jurisdiction', in J. J. Álvarez Rubio, K. Yiannibas, *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge 2017), at 7, pp 31-34.

<sup>21</sup> *Dooh and Milieudéfensie v Royal Dutch Shell plc.* (2015) para 3.6.

case has not been decided in the merit, yet, both the High Court and the Court of Appeal established English jurisdiction and allowed the claim to proceed against both companies.<sup>22</sup>

The case *Choc v Hudbay* constitutes a notable non-European example, in which a court in Ontario established its jurisdiction of a lawsuit against Hudbay and its foreign subsidiary, CGN. The court struck the defendants' motion to dismiss finding that it was not plain and obvious that the negligence allegations against the parent company were bound to fail, confirming that the plaintiffs had disclosed a reasonable cause of action.<sup>23</sup>

Finally, it is interesting to note that the Court of Appeal of The Hague in the *Shell* case mentioned above highlighted the ongoing developments in the field of foreign direct liability claims in several European and non-European jurisdictions to argue that it was 'foreseeable' for Shell's Nigerian subsidiary 'that they would be summoned before another court than the Nigerian court'.<sup>24</sup> Indeed, as this section has shown, this type of claims are increasingly becoming common and have already been litigated, also against Nigerian companies, without adverse consequences on the plane of international relations. This also contributes to confirming that no breach of international 'comity' would be implicated by the establishment of Italian jurisdiction over the case at issue. It must be remembered, in fact, that, contrary to what the defendants seem to hold, international comity<sup>25</sup> does not bar the exercise of extraterritorial jurisdiction, but only 'unreasonable' exercises thereof amounting to 'an unreasonable encroachment on the sovereignty of other states'.<sup>26</sup>

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<sup>22</sup> Dominic Liswaniso Lungowe & others v Vedanta Resources Plc and Konkola Copper Mines Plc. [2016] EWHC 975 (TCC), [2017] EWCA Civ 1528. For an overview of the case, see: <https://www.business-humanrights.org/en/uk-court-dismisses-vedanta-resources-appeal-allows-claim-of-villagers-over-water-pollution-in-zambia-to-proceed>. Previous examples include: *Connelly v RTZ* [1998] AC 854; *Lubbe v Cape* [2000] 1 WLR 1545; *Ngcobo and others v Thor Chemicals Holdings Ltd* (November 1996, per Maurice Kay J, unreported).

<sup>23</sup> The victims in this case are claiming direct negligence in tort by the Canadian parent company that authorized the subsidiary's security personnel in Guatemala. For an analysis, see: S. C. Mijares Peña, 'Human Rights Violations by Canadian Companies Abroad: *Choc v Hudbay Minerals Inc*', 5(1) *Western Journal of Legal Studies* (2014) 3, <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1105&context=uwojls>. A similar case is currently before the Canadian courts: Court of Appeal for British Columbia (Canada), *Garcia v Tahoe Resources Inc* 2017 BCCA 39.

<sup>24</sup> *Dooh and Milieudefensie v Royal Dutch Shell plc.* (2015) para 3.6.

<sup>25</sup> 'A somewhat vague doctrine (...) is the doctrine of 'international comity'. This doctrine - frequently invoked by courts though not considered by most commentators to be a positive legal requirement under public international law - refers to the need for each state to show respect for the laws, policies, traditions and aspirations of other states.' (J. A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas', Harvard Corporate Social Responsibility Initiative, Working Paper no. 59, 2010, p. 160). 'Its literal meaning is 'courtesy', and in this sense comity is regarded as something different from law of any sort; rules of comity are customs which are normally followed but which are not legally obligatory' (P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> Edition, Routledge, 1997, p 73).

<sup>26</sup> Zerk (2010) p 107.

### 3. Eni s.p.a and the duty of care

As Nigerian law is the applicable law in the present case, reference will be made to the common law ‘duty of care’ doctrine and its interpretation given by English courts. The aim of this paragraph is to examine in more detail the existence of a reasonable cause of action based on the duty of care of the parent company, Eni, and on the breach thereof.

- *Establishing the parent company’s duty of care does not require piercing the corporate veil*

It is important to underline since the outset that invoking the parent company’s liability for a breach of its duty of care does not entail ‘piercing the corporate veil’, that is to say, questioning the separate legal personality of Eni s.p.a. and NAOC. While this can constitute a distinct argument in establishing the parent company’s liability, it is not necessary to a finding of liability under the common law duty of care doctrine, and, therefore, it will not be addressed in the present contribution. Nothing in this legal opinion should be interpreted as barring the distinct ‘piercing the veil’ argument, also raised by the plaintiffs. However, the nature of the parent company influence that will trigger a duty of care is different in kind from the control that will trigger collapsing the difference between parent and subsidiary.

English courts have made it clear in the landmark *Chandler* decision that negligence claims based on the parent company’s alleged breach of a duty of care are not concerned in any way with lifting the corporate veil or collapsing the principle of limited liability.<sup>27</sup> Under the duty of care doctrine, the parent company may be held liable for *its own* actions or omissions when it can be established that it owed a duty of care towards the victims of damage to the environment and it failed to discharge it. For this purpose, the claimants do not need to show that NAOC was something akin to a ‘shell’ company at the time of the facts. What needs to be shown is whether the parent had a degree of influence and direction over the subsidiary’s policies which could have made a foreseeable difference if used.

- *The parent company’s duty of care*

A parent company will not, under UK, Nigerian or Italian law, be automatically responsible for the actions of its subsidiary simply by virtue of its ownership of the latter, even if that ownership stands

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<sup>27</sup> Chandler (2012) paras 42, 69.

at 100%,<sup>28</sup> or by virtue of its *potential* ability to control that subsidiary's policies and decisions.<sup>29</sup> However, notwithstanding the separate legal personality and the limited liability principles, liability can still attach to the parent company, under English common law, when where there has been an assumption of responsibility toward the claimant (see Lord Goff in *Smith v Littlewoods*).<sup>30</sup>

Considering how the negligence doctrine has been interpreted by English courts based on the *Caparo* test,<sup>31</sup> in order to establish the existence of the parent company's duty of care it is necessary to prove an 'assumption of responsibility' based on two criteria: that there exists a sufficient degree of proximity between the parent company and the aggrieved parties, and that it is fair, just and reasonable to impose a duty on the parent company.<sup>32</sup> The third pillar of the *Caparo* test is the 'foreseeability' of harm, an aspect that, it is submitted, is not controversial in the case at hand. The harm suffered by the claimants was the foreseeable consequence of Eni's non-delegable duty to ensure that NAOC would immediately and effectively clean up the area polluted by the oil spill caused by one of its pipelines. Eni, as discussed later in the present contribution, has a long-standing technical knowledge of the negative impacts of oil spills over the environment and the livelihoods and health of local communities, and could, therefore, not possibly ignore the foreseeable damages that would result from expanding pollution caused by an insufficient response to the accident.

As concerns proximity, it is noteworthy that, in English common law, the terms 'proximity', 'reasonableness' and 'assumption of responsibility' may be used interchangeably by the courts. As Lord Roskill said in *Caparo*,

'[a]t best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty.'<sup>33</sup>

In this respect, several aspects deserve closer consideration. First of all, ENI prides itself of what it defines a 'regulatory system',<sup>34</sup> an architecture formed by several policies that are said to be binding

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<sup>28</sup> Gower and Davies, *Principles of Modern Company Law*, 8th Edition, Sweet and Maxwell, 2008, Sections 9-16.

<sup>29</sup> Essex Business and Human Rights Project, 'Corporate Liability in a New Setting: Shell & the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta', 2012, pp 50-51, <https://www1.essex.ac.uk/ebhr/documents/niger-delta-report.pdf>.

<sup>30</sup> *Smith v Littlewoods Organisation Ltd* [1987] AC 241.

<sup>31</sup> *Caparo Industries plc v Dickman* (1990).

<sup>32</sup> *Chandler v Cape plc* (2012) para 32; D. Ikuta, 'The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scopes of *Chandler v Cape Plc* and *Thompson v Renwick Group Plc*' 6(1) *UCL Journal of Law and Jurisprudence* (2017) 60, p 67.

<sup>33</sup> Lord Roskill in *Caparo Industries plc v Dickman*.

<sup>34</sup> *Eni* (2017) p 36.



not only for Eni s.p.a., but for every entity in the corporate group. It must be noted that the High Court in the *Vedanta* case held that the company's sustainability report could be invoked to support the view that the applicant's claim as to the existence of Vedanta's duty of care was arguable.<sup>35</sup> In fact, the report contributed to identify the role that the company had assumed within the corporate group, committing to maintaining in place a governance framework preventing the occurrence of water pollution in the operations of its subsidiary.<sup>36</sup>

Eni, too, has elaborated what it terms 'normative instruments' aimed, among other things, at the prevention of environmental risks, and 'made sure', as can be read in the company's submission, that NAOC gave them actual implementation.<sup>37</sup> Subsidiaries like NAOC are expected to conform their procedures to the framework elaborated by the parent company.<sup>38</sup> Eni's normative framework is composed of Policies (including on human rights and the environment), of Management System Guidelines (MSG), and of operational standards and criteria to which the Group's companies are required to conform when devising their own procedural instructions.<sup>39</sup> Eni aims, through this framework, to 'identify, measure, manage and monitor' the main risks in the Group's activities,<sup>40</sup> which clearly include environmental and human rights risks related to oil spills in the Niger Delta.<sup>41</sup> Respect of the MSGs is not left to the discretion of the subsidiaries' management, but is described as *compulsory* for all entities in the Group.<sup>42</sup> Among others, one MSG is dedicated to maintenance of the industrial plants, and one to the integrated management of Health, Safety and Environment (HSE). According to Eni's website, the latter 'disciplines the activities foreseen for HSE processes and their interaction with other business processes and shares methods and common criteria'.<sup>43</sup> It is evident from Eni's own statements that not only 'prevention' and 'protection', but also 'information' and 'participation' are the pillars of the Group's approach to these matters.<sup>44</sup> As it emerges from this normative framework and from Eni's own representations, the parent company took it upon itself to decisively influence the implementation of its subsidiary's HSE policies

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<sup>35</sup> Lungowe v Vedanta (2016) para 119.

<sup>36</sup> '[W]e have a governance framework to ensure that surface and ground water do not get contaminated by our operations' (cited in: Lungowe v Vedanta (2016) para 119).

<sup>37</sup> Eni (2017) p 36.

<sup>38</sup> Ibid., p 30.

<sup>39</sup> Ibid. pp 30-31.

<sup>40</sup> Ibid., p 31.

<sup>41</sup> 'We manage oil spills in order to ensure the protection of the environment and actively participate in international prevention initiatives. ... 88% of the volumes resulting from operating oil spills in 2016 were attributable to the E & P sector, of which 75% were located in Nigeria, Egypt and Algeria' (Eni.com, [https://www.eni.com/en\\_IT/sustainability/environment/oil-spill-management.page](https://www.eni.com/en_IT/sustainability/environment/oil-spill-management.page)).

<sup>42</sup> C. Descalzi, 'Eni's upstream model – the key to business development', 13 May 2013, p 25, [https://www.eni.com/docs/en\\_IT/enipedia/financial-and-corporate-reporting/2013/eni-upstream-model.pdf](https://www.eni.com/docs/en_IT/enipedia/financial-and-corporate-reporting/2013/eni-upstream-model.pdf).

<sup>43</sup> Eni's Environmental Management System, [https://www.eni.com/en\\_IT/sustainability/environment/enis-environmental-management.page#](https://www.eni.com/en_IT/sustainability/environment/enis-environmental-management.page#).

<sup>44</sup> Ibid.

making sure that, notwithstanding the degree of operational autonomy enjoyed by NAOC, its own directives be implemented. Among the Group's policies that are 'mandatory' for both Eni s.p.a. and all controlled entities is the policy on protection and promotion of human rights,<sup>45</sup> which explicitly endorses the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises and internationally recognized human rights.<sup>46</sup> The Eni Guidelines on the Protection and Promotion of Human Rights clearly state the right of local communities to receive transparent information about Eni's activities, as well as the commitment to environmental protection in line with applicable international standards.<sup>47</sup> Eni, moreover, affirms on its general website that it has devised a 'grievance procedure' to 'ease the relationship between Eni's business operations and local communities' in Nigeria.<sup>48</sup>

In order for proximity to be established, the fact that the parent company does not have ultimate responsibility for the *implementation* of these policies, particularly in the fields of health, safety and environmental sustainability, is not decisive, according to English common law.<sup>49</sup> Eni has established an integrated system whereby it influences the relevant policies of the controlled companies, which are required to give implementation to policy guidelines decided at the Group level.<sup>50</sup> If the Eni's influence on a subsidiary is not accomplished with due care, this failure can in turn contribute to damage done by the subsidiary's operational decisions. These decisions must be held to the social and environmental standards that the parent company has devised for the whole corporate group. In the case at issue, effective remediation to what Eni defines a 'circumscribed' oil spill<sup>51</sup> could not be achieved in the course of several years, as shown by the analysis commissioned by the community in 2016 to International Energy Services Limited. This constitutes strong indication of a systemic failure<sup>52</sup> in the clean-up action carried out by NAOC. Eni was not only aware of the critical situation of oil spills in the Niger Delta in general, but also, specifically, of the persistent pollution affecting the Ikebiri community in the aftermath of the 2010 oil spill notwithstanding NAOC's contention that it had cleaned up the area. The situation that was created

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<sup>45</sup> Eni's commitment to human rights, [https://www.eni.com/en\\_IT/sustainability/integrity-human-rights/eni-s-commitment-to-human-rights.page](https://www.eni.com/en_IT/sustainability/integrity-human-rights/eni-s-commitment-to-human-rights.page).

<sup>46</sup> Ibid.

<sup>47</sup> 'Eni Guidelines on the Protection and Promotion of Human Rights', Circular No. 257, 2007, [https://www.eni.com/en\\_AT/attachments/pdf/eni-guidelines-protection-promotion-human-rights.pdf](https://www.eni.com/en_AT/attachments/pdf/eni-guidelines-protection-promotion-human-rights.pdf).

<sup>48</sup> Eni's sustainability projects in Nigeria, [https://www.eni.com/enipedia/en\\_IT/international-presence/africa/enis-sustainability-projects-in-nigeria.page](https://www.eni.com/enipedia/en_IT/international-presence/africa/enis-sustainability-projects-in-nigeria.page).

<sup>49</sup> *Chandler* (2012) para 74. See also *Lungowe v Vedanta* (2016) para 117 *et seq.* - Vedanta defended the claim by saying that it was not the operating company.

<sup>50</sup> Eni (2017) p 11

<sup>51</sup> Ibid., p 14.

<sup>52</sup> *Chandler v Cape plc* (2012) paras 57, 77.

as a result of the clean-up failure is in sharp contrast with the policies and public representations made by ENI, including as concerns the continuous update and improvement of the technologies applied by the Group for environmental reclaim.<sup>53</sup>

The Court of Appeal in the most recent decision concerning the *Vedanta* case has stated that one of the indicia indicating proximity, according to the *Chandler* precedent, is the fact ‘that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary. (...) Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary’.<sup>54</sup> In this respect, as a further proof of the existence of proximity, it is also relevant to stress that ENI has undertaken to use its superior knowledge<sup>55</sup> to advance the remediation technologies applied by the Group, and particularly by its Nigerian subsidiaries, in the context of oil spills. This superior knowledge is grounded, first of all, in the direct and long-standing experience of Eni in the oil extraction industry, which dates back to the 50s. The circumstance that the parent company and the subsidiary operated in the same business sector and that the parent company had a long-standing experience in the production and handling of asbestos was one of the elements that contributed to establishing proximity and, therefore, liability, in *Chandler*.<sup>56</sup> Eni’s superior knowledge is confirmed by the transfer of competences and procedures that the parent company affirms to facilitate by appointing Eni’s managers in NAOC’s board,<sup>57</sup> as well as by the company’s own statements. In relation to oil spills clean-up in Nigeria, Eni has been the target of criticism for the widespread use of the RENA (Remediation by Enhanced Natural Attenuation), a method that UNEP has described as ineffective in the particular context of the Niger Delta.<sup>58</sup> In 2013, Eni declared that RENA was the system usually adopted by NAOC, but stressed that Eni had “‘benchmarking” remediation technologies’ and pilot tests were being implemented ‘to identify the best available technologies’.<sup>59</sup> Eni, in its role of parent company, has assumed responsibility for improving prevention and response to oil spills. It affirms to be constantly engaged in initiatives, some of which focusing on the particular Niger Delta context,

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<sup>53</sup> Eni, ‘Answers to the questions received prior to the Shareholders’ Meeting, pursuant to art.127-ter of Italian Legislative Decree n. 58/1998’, 10 May 2013, pp 16-19, [https://www.eni.com/docs/en\\_IT/enicom/company/governance/shareholders-meeting/Q&A\\_Eng-2013.pdf](https://www.eni.com/docs/en_IT/enicom/company/governance/shareholders-meeting/Q&A_Eng-2013.pdf).

<sup>54</sup> Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc [2017] EWCA Civ 1528, para 83.

<sup>55</sup> *Chandler v Cape plc* (2012) para 80.

<sup>56</sup> *Ibid.*

<sup>57</sup> As stated by Eni: Eni (2017) p 22.

<sup>58</sup> UNEP, ‘Environmental Assessment of Ogoniland’, 2011, p 145, [https://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf).

<sup>59</sup> Eni (2013) p 17; Eni, ‘Relazione finanziaria annuale 2012 - Le bonifiche e la tutela del paesaggio’, p 261, [http://annualreport2012.eni.com/annual-report/consolidated-sustainability/environment/reclamation-and-landscape-protection.aspx?sc\\_lang=it-IT](http://annualreport2012.eni.com/annual-report/consolidated-sustainability/environment/reclamation-and-landscape-protection.aspx?sc_lang=it-IT).

precisely to this aim, and prides itself of transferring this knowledge to other entities in the group.<sup>60</sup> Coherently with this role, personnel from Eni (namely, the regional vice-president of Eni in the sector of Health Safety and Environment) has been sent to participate in the 2015 meeting, together with NAOC and the Ikebiri community, in which compensation for the affected community and clean-up of the site were discussed.<sup>61</sup> Whether the Eni officer was present in representation of Eni or, as Eni claims, solely as a consultant,<sup>62</sup> this is a further indication of the fact that, for HSE aspects, while retaining ultimate responsibility for policy implementation, NAOC relies on the expertise and superior knowledge that rests with the parent company, a company that has been long engaged in the same industrial sector in which NAOC operates<sup>63</sup> and that has undertaken to ‘use the most advanced technologies and technical standards in the area of health, safety and the environment’ in all activities of the Group.<sup>64</sup>

In the case at issue, it is not possible to identify the remediation technology applied by NAOC, as the only evidence available concerns the outburst of a fire over the polluted area,<sup>65</sup> while there was no disclosure of information by the company concerning its alleged clean-up intervention. The fact that the negative consequences of the oil spill persist, in any case, shows how the clean-up intervention, if any, did not bring sensible improvement to the affected environment. This, it is submitted, should have prompted Eni’s intervention (see below, para 4).

- *Additional remarks on the issues of ‘proximity’ and ‘reasonableness’*

Finally, it must be reminded that the *Caparo* test interpretation in cases concerning the parent company-subsidary relationship must be addressed on a case-by-case basis,<sup>66</sup> as its formulation in *Chandler* was, in the words of an English court, only ‘descriptive of circumstances in which a duty might be imposed rather than exhaustive of the circumstances in which a duty may be imposed’.<sup>67</sup> This means that it is not to be excluded that a court will take into consideration, in its assessment, elements that were not present or relevant in the specific circumstances of the *Chandler* case.

On the *Caparo* test criterion of reasonableness, for instance, it must be observed that, for the purpose of negligence litigation under tort law, the interpretation of the standard of care, i.e. what a

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<sup>60</sup> Eni, ‘Modello Operativo’, p 36, [https://www.eni.com/docs/it\\_IT/eni-com/sostenibilita/Eni-for-2016-Modello-Operativo.pdf](https://www.eni.com/docs/it_IT/eni-com/sostenibilita/Eni-for-2016-Modello-Operativo.pdf).

<sup>61</sup> Ododo Francis Timi, IKE VII, Writ of summons to appear before the Court of Milan, 2017, p 7.

<sup>62</sup> Eni (2017) p 38.

<sup>63</sup> *Chandler v Cape plc* (2012) para 80.

<sup>64</sup> Eni’s Environmental Management System.

<sup>65</sup> Writ of summons (2017) p 6.

<sup>66</sup> See also para 4 of this legal opinion.

<sup>67</sup> *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635, para 33.

'reasonable' subject would do in a given situation, is subject to an evolution that is partly dependent on regulatory and societal developments that affect the perceived role and responsibilities of companies. In this respect, the work of the former UN Special Representative on Business and Human Rights (Prof. John G. Ruggie) supports the contention that societal expectations concerning the role that a 'reasonable parent company' must take up in ensuring respect of human rights across its Group's operations has fundamentally evolved in the last decades, as demonstrated by the global consensus that surrounds the UN Guiding Principles on Business and Human Rights.<sup>68</sup>

On the specific issue of whether it is just and reasonable to attribute to ENI a duty of care to ensure that its environmental and human rights policies come to bear in the reality of its Nigerian subsidiary operations, it is interesting to note that some of ENI's own shareholders have clearly answered this question in the positive. In fact, on several occasions they have expressed the expectation for Eni s.p.a. to improve the effectiveness and transparency of its subsidiaries' response to oil spills in the Niger Delta.<sup>69</sup> The Ethical Council of the Norwegian Pension Fund (another Eni shareholder) found that 'Eni S.p.A has a responsibility for serious environmental damage in the Niger Delta' and recommended that the company be put under observation for a period of four years due to its alleged lack of consideration for the cumulative effects of oil spills and insufficient monitoring of the situation.<sup>70</sup> Although shareholders' expectations are not *per se* decisive to establish a parent company's duty of care, they can arguably be among the elements to look at in order to confirm that such a finding would not be unreasonable in the case at issue.

On the interpretation of the 'proximity' criterion, another interesting example can be drawn from a different jurisdiction. The Ontario court in the above-mentioned *Choc* case,<sup>71</sup> in allowing the case to proceed against the parent company, considered that the public representations made by the parent company about the Group's commitment to engage with the local community in Guatemala and to address land disputes, as well as about its endorsement of voluntary business and human rights standards, had given rise to legitimate expectations on the part of the plaintiffs that could contribute

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<sup>68</sup> UN Guiding Principles on Business and Human Rights, GPs 17-24.

<sup>69</sup> Such shareholders include Amnesty International (Eni (2013) pp 14 *et seq.*) and Fondazione Etica (Verbale dell'assemblea ordinaria degli Azionisti della 'Eni S.p.A', 13 April 2017, pp 56 *et seq.*, [https://www.eni.com/docs/it\\_IT/eni-com/azienda/governance/2017/Verbale-Assemblea-ordinaria-13-aprile-2017-navigabile.pdf](https://www.eni.com/docs/it_IT/eni-com/azienda/governance/2017/Verbale-Assemblea-ordinaria-13-aprile-2017-navigabile.pdf)).

<sup>70</sup> Norwegian Pension Fund – Council on Ethics, 'Recommendation to place the company Eni Sp.A under observation', 20 March 2013, p 22, [https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/02/Eni\\_2013\\_ENG.pdf](https://nettsteder.regjeringen.no/etikkradet-2017/files/2017/02/Eni_2013_ENG.pdf).

<sup>71</sup> *Choc v Hudbay*, 2013 ONSC 1414. The negligence test referred to by the court in this case was the *Anns* test (*Anns v Merton London Borough Council*, [1978] AC 728, [1977] 2 All ER 118). The duty of care under this test is established when: the harm complained of was a reasonably foreseeable consequence of the alleged breach; there is sufficient proximity between the parties and it would not be unjust or unfair to impose a duty of care on the defendants; and there exist no policy reasons to negate or otherwise restrict the duty.

to substantiate the element of proximity necessary for the establishment of a duty of care.<sup>72</sup> Importantly, the Court did not consider necessary to establish whether the parent company had taken action upon those commitments, as long as those representations had been publicly made.<sup>73</sup>

#### **4. Eni has an obligation to intervene**

Eni, having assumed a role through which it heavily influences the HSE and human rights policies of the controlled entity, failed to bring its own normative system to bear in the reality of NAOC's operations, breaching its own duty of care to the affected community. In the *Chandler* case referred above, a parent company was held to have a duty of care to an employee of its subsidiary where the employee had been made ill by asbestos dust on the subsidiary's premises.<sup>74</sup> A determinant aspect in that case was that the parent company had developed the health and safety policy that its subsidiary companies were required to observe in managing the toxic substance, much in the same way in which Eni has developed a normative system covering HSE and human rights standards. As pointed out above, it is not decisive that, as the defendant underlines in its submission,<sup>75</sup> the daily maintenance of pipelines falls under the subsidiary's responsibility, nor that relevant standards are set both at the parent and at the subsidiary level.<sup>76</sup> These elements were also present in *Chandler*, and the Court insisted that even if the parent company did not decide on all aspects of health and safety policy, it retained 'overall responsibility' for it, much as it is for Eni's policies on environmental protection, human rights, health and safety.

The Court in *Chandler* found that, having assumed this role of the body with ultimate authority in the Cape group for the provision of standards, the parent company owed a duty of care to the injured employee, and so shared responsibility for his injury.<sup>77</sup> Furthermore, and contrary to the view taken by Eni, the Court was clear that a parent company in this position has a duty to *intervene* in the subsidiary's operation in order to try to prevent the damage. The company's responsibility is not just to monitor the situation, which Eni claims to have done,<sup>78</sup> but to actively do something about what has gone wrong.<sup>79</sup> Liability in *Chandler* arose not from a 'failure in day-to-day management', but instead from 'a systemic failure of which the

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<sup>72</sup> *Choc v Hudbay*, paras 67-70.

<sup>73</sup> *Ibid.*, para 68.

<sup>74</sup> *Chandler v Cape plc* (2012); See also the informative High Court judgement at [2011] EWHC 951 (QB) 2011.

<sup>75</sup> *Eni* (2017) p 11.

<sup>76</sup> *Essex Business and Human Rights Project* (2012) p 53.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Eni* (2017) p 29.

<sup>79</sup> *Chandler v Cape plc* (2012) para 79 approving High Court [2011] EWHC 951 (QB) 2011 para 75.

Defendant was fully aware'.<sup>80</sup> The only basis on which the parent company's responsibility can be discharged will be if, in any given case, it can be shown that, having taken responsibility for formulating the Group's relevant standards, Eni did all it could be reasonably expected to do to assure itself that these standards would be implemented. In the case at hand, however, there is no indication that Eni acted to correct the systemic failure that soon became evident in NAOC's response (or lack thereof) to the oil spill, as well as to stop the continuation of its adverse consequences.

*- Eni's failure to ensure respect for the relevant standards*

Eni had a duty, as a minimum, to ensure that the most basic principles of its HSE and human rights policies were observed by the subsidiary, whose inaction or inadequate intervention, as well as lack of meaningful communication with the local community, caused the situation of pollution to persist, contributing to perpetuate the damage suffered by the plaintiffs in the aftermath of the spill.

This would have been consistent with the standards that the parent company publicly endorses and presents as 'compulsory' for its subsidiaries, such as:

'Right to information:

- Respect and ensure the right of all stakeholders to be informed on Eni activities;
- Promote transparency in the information addressed to local communities, with particular reference to the issues of major interest to them.'<sup>81</sup>

Eni further declared, in its 2009 Sustainability Report:

'Eni promotes transparency of the information addressed to local communities, with particular reference to the topics that they are most interested in. Forms of continuous and informed consulting are also promoted, through the relevant Eni structures, in order to consider the expectations of local communities in conceiving and conducting corporate activities.'<sup>82</sup>

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<sup>80</sup> [2011] EWHC 951 (QB), para 73; approved by *Chandler v Cape plc* (2012) para 79.

<sup>81</sup> 'Eni Guidelines on the Protection and Promotion of Human Rights' (2007) p 8.

<sup>82</sup> Eni Sustainability Report 2009, p 30.

According to Eni, '[t]he protection of the environment is an essential part of [Eni's] operations and goes beyond mere regulatory compliance'.<sup>83</sup> The company declares to carry out its activities in accordance with national and international standards concerning environmental protection, human rights, workers' health and safety, 'and in general to conduct its activities in a manner contributing to the wider goal of sustainable development'.<sup>84</sup>

It is important to note that such standards are anchored in the international human rights instruments that Eni also explicitly declares to respect, including the European Convention of Human Rights.<sup>85</sup> It is, therefore, pertinent to stress that, in the jurisprudence of the European Court of Human Rights, business-related environmental pollution has been put in relation with breaches of art. 2 (the right to life)<sup>86</sup> and art. 8 (the right to private and family life),<sup>87</sup> among others. The Court, in matters of pollution-related human rights violations, has attributed paramount importance to procedural rights, including the right of affected communities to have access to accurate information about the environmental and health risks.<sup>88</sup>

Importantly, Eni committed

'to ensuring respect for internationally recognised human rights in its activities and to promoting respect in the context of activities entrusted to or conducted with partners in line with the UN Guiding Principles for Businesses and Human Rights (UNGP) published in 2011, and adopted in the revision of the OSCE Guidelines for Multinational Enterprises the same year.'

Both the UN Guiding Principles and the OECD Guidelines establish a standard of conduct defined as 'human rights due diligence' that, in the case of parent companies, also implies a duty to exercise leverage over the business entities they are able to influence. Such leverage can be exercised through a variety of means varying with the nature and context of operations, the seriousness of the human rights risk, and other factors. There is no merit to Eni's objection that the parent company does not hold a license to carry out extractive activities in Nigeria,<sup>89</sup> as the wide range of steps that Eni could have taken to discharge its own duty of care by exercising its leverage over the subsidiary

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<sup>83</sup> 'Eni For 2011 - UN Global Compact Communication on Progress', p 34, [https://www.eni.com/fr\\_BE/attachments/pdf/cop-eng-web.pdf](https://www.eni.com/fr_BE/attachments/pdf/cop-eng-web.pdf). See also: 'Eni Code of Ethics', 2014, para 2, [https://www.eni.com/docs/en\\_IT/enicom/sustainability/code-of-ethics-english-2014.pdf](https://www.eni.com/docs/en_IT/enicom/sustainability/code-of-ethics-english-2014.pdf).

<sup>84</sup> 'Eni Guidelines on the Protection and Promotion of Human Rights' (2007) p 8.

<sup>85</sup> Ibid., p 3.

<sup>86</sup> ECtHR, Oneryildiz v. Turkey, App. no. 48939/99, 2004.

<sup>87</sup> ECtHR, Fadeyeva v. Russia, 2005, App. no. 55723/00; ECtHR, López Ostra v. Spain, App. no. 16798/90, 1994; ECtHR, Taşkın and Others v. Turkey, App. no. 46117/99, 2004.

<sup>88</sup> F. Francioni, 'International Human Rights in an Environmental Horizon', 21(1) *The European Journal of International Law* (2010) 41, pp 49-50; Oneryildiz v. Turkey; Taşkın v Turkey.

<sup>89</sup> Eni (2017) p 20.



were not dependent on such a license – by means of example, such activities might have included: requesting the subsidiary to remedy the ineffectiveness of the first clean-up; sending its expert personnel to advise on and facilitate the adoption of alternative, more effective clean-up methods; calling a joint meeting with NAOC management to elaborate a strategy to ensure effective clean-up of the site; requesting the subsidiary to disclose information about the clean-up activities allegedly carried out; sharing that information with the plaintiffs, etc. It fell with the parent company to identify the possible means to intervene, in the respect of applicable laws, to stop the damage suffered by the Ikebiri community.

Based on what described above, it was fair, just and reasonable to expect that the parent company would intervene to ensure NAOC's compliance with the directives provided by Eni, which were blatantly disregarded in this case. Eni's inaction vis à vis evidence of persisting pollution from the oil spill, ineffective or inexistent clean-up, and lack of information provided to the community, therefore, finds no justification and establishes the parent company liability.<sup>90</sup>

## 5. Conclusion

This legal opinion has shown how the applicants in the case at issue have an arguable claim under the common law doctrine of the parent company's duty of care and that, therefore, the Italian judge should establish jurisdiction over the claims against both Eni s.p.a. and its subsidiary NAOC. Without prejudice to other possible causes of action (e.g. the 'piercing the veil' argument), the reasoning here presented *per se* demonstrates that, based on the relevant rules on jurisdiction and applicable law, the claim brought by the Ikebiri community through its representative is reasonable and deserves consideration in the merits. It also confirms that the claim can not be summarily dismissed as an attempt to abuse procedural law, an allegation which is not only unfounded, but in contrast with the findings of common law and civil law courts in analogous cases.<sup>91</sup>

On a final consideration, providing foreign claimants with access to effective remedies in the courts of the parent company's home country, when there is a reasonable legal basis to do so, has been increasingly affirmed, in recent years, by UN treaty bodies as a corollary of states' human rights

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<sup>90</sup> The parent company's liability does not in any way exclude or diminish the parallel negligence of NAOC for failing to clean up the pipeline and to promptly inform the plaintiffs about the intervention carried out and its outcome.

<sup>91</sup> On a side note, the Court of Appeals' decision to establish UK jurisdiction over the Lungowe v *Vedanta* claim has been listed by the Oxford University Press Blog as one of the 10 top developments in international law in 2017 (M. Alstein, 'Top ten developments in international law in 2017', *OUPBlog*, 8 January 2018, <https://blog.oup.com/2018/01/top-ten-international-law-2017/>).

obligations under international human rights covenants that Italy has ratified.<sup>92</sup> The same principle is reflected in Pillars I and III of the UN Guiding Principles on Business and Human Rights, to whose concrete implementation Italy has committed.

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<sup>92</sup> CCPR, ‘Concluding Observations: Canada’ (2015) UN Doc CCPR/C/CAN/CO/6; ‘Concluding Observations: Germany’ (2012) UN Doc CCPR/C/DEU/CO/6, para 16; ‘Concluding Observations: Korea’ (2015) UN Doc CCPR/C/KOR/CO/4, paras 10–11; CESCR, ‘Concluding Observations: China’ (2014) UN Doc E/C12/CHN/CO/2, para 13; ‘Concluding Observations: United Kingdom’ (2016) E/C12/GBR/CO/6, paras 11–12. See also: CESCR, General Comment 24, para 30 (‘The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control’); CRC, General Comment 16: State Obligations Regarding the Impact of the Business Sector on Children’s Rights, 2013, UN Doc CRC/C/GC/16, para 44 (‘States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned.’).