

DEVELOPMENTS IN THE FIELD

Fossil Fuel Industry Divestment and the Energy Transition: Lessons and Red Flags from Shell and the Niger Delta

Audrey Gaughran and Joseph Wilde-Ramsing 

SOMO, Amsterdam, The Netherlands

Corresponding author: Joseph Wilde-Ramsing; Email: J.wilde@somo.nl

Abstract

While divestments and decisions to exit commercial fossil fuel ventures are not new, the imperatives of the energy transition are catalysing such moves at a global industry-wide level, as oil companies position themselves for the future. The international normative framework for business and human rights provides clear guidance on how responsible divestment from fossil fuels should occur; however, in the absence of intergovernmental coordination and regulation, individual business divestment decisions create severe human rights risks. The case of Shell's divestment from onshore Niger Delta oil production illustrates business and human rights issues relevant to the energy transition.

Keywords: energy transition; human rights; international oil companies (IOCs); Niger Delta; responsible disengagement; Shell

I. Introduction: Shell's Niger Delta Exit

International oil companies (IOCs) have been divesting from onshore Niger Delta oil operations for over a decade, selling their interests in oil mining leases (OMLs) and associated infrastructure to domestic oil companies.¹ Some IOCs have recently sold or tried to sell their Nigerian subsidiaries entirely.

IOCs' divestment has been led by the Shell Petroleum Development Company of Nigeria (SPDC), a wholly owned subsidiary of UK oil major Shell.² Shell has been in the Niger Delta for close to a century, having begun its oil exploration under colonial rule.³

Between 2010 and 2021, Shell divested from 12 onshore OMLs, leaving it with stakes in a further 15. Even with the divestment, SPDC remains the largest onshore operator.⁴

¹ DO Salawu and M Kalesanwo, 'The Guidelines and Procedures for Obtaining Minister's Consent to Assignment of Interest in Oil and Gas Assets: A Short Commentary' (2015) 13:6 *Oil, Gas & Energy Law*; Stakeholder Democracy Network (SDN), *Divesting from the Delta*, (Port Harcourt, Nigeria: SDN, 2021).

² In 2022 Royal Dutch Shell changed its name to Shell Plc and moved its headquarters to the UK from The Netherlands.

³ Shell, 'The History of Shell in Nigeria', <https://www.shell.com.ng/about-us/shell-nigeria-history.html> (accessed 2 April 2024).

⁴ Shell International BV and Shell Nigeria, 'Nigeria Briefing Notes', 2022, https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/_jcr_content/par/toptasks.stream/1653314607835/69fco20fd40d0764f3d455c7cf3e3b89855f9512/shell-nigeria-briefing-notes-2021-updated.pdf (accessed 2 April 2024); SDN, note 1.

In January 2024, Shell announced it had found a buyer for SPDC.⁵ It will sell its Nigerian subsidiary to Renaissance Africa Energy Company, a newly created consortium of oil investors about which relatively little is known.⁶ Shell is divesting via the sale of all its shares in SPDC to Renaissance. After the sale (at the time of writing pending government approval), SPDC will be a company with a new owner, and Shell will no longer be involved.

The Niger Delta is arguably the most oil-polluted region on earth. Hundreds of oil spills happen every year, and very few are properly cleaned up. National and international civil society organisations (CSOs) have long called on Shell to clean up oil spills and related environmental damage in the Delta and to compensate affected people.⁷ Most Delta communities depend on farming and fishing, which are impossible when soil and waterways are deeply contaminated.

Shell has transferred ownership of its oil wells, pipelines, and other infrastructure to companies that, in many cases, appear to lack finances or willingness to deal with the old, damaged infrastructure or to undertake responsible closure and decommissioning. Proper decommissioning will become increasingly necessary as the energy transition progresses but has thus far received little attention. Questions of who is responsible and how decommissioning will be funded are critical to environmental and climate justice and human rights in the Delta, as well as to disengagement from fossil fuels globally in the energy transition.

II. The International Normative Framework for Responsible Divestment and Just Transition

Two of the most authoritative international normative standards on business and human rights—the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines)⁸ and the UN Guiding Principles on Business and Human Rights (UNGPs)⁹—are clear that all companies are expected to reduce their adverse impact on the climate and responsibly divest from climate-unfriendly operations. For example, the OECD Guidelines insist that companies reduce their emissions in line with the 2015 Paris Climate Agreement. In doing so, companies must take into account “the imperatives of a just transition to a sustainable economy, implying an urgent and responsible divestment from fossil fuels.¹⁰ Similarly, the UN Office of the High Commissioner for Human Rights (OHCHR) has clarified that the UNGPs demand from companies that they “be accountable for their impacts on the climate and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights”.¹¹

Since divestment is a business activity, Shell and other IOCs have a business relationship with the companies and investors to which they sell assets, oil licences, or shares. As the UNGPs note: ‘Business enterprises may be involved with adverse human rights impacts either through their activities or as a result of their business relationships with other parties.’¹² The OECD Guidelines and UNGPs also establish certain expectations of companies that are

⁵ Shell, ‘Shell agrees to sell Nigerian onshore subsidiary, SPDC’, 2024, <https://www.shell.com/media/news-and-media-releases/2024/shell-agrees-to-sell-nigerian-onshore-subsiary-spdc.html> (accessed 2 April 2024).

⁶ Renaissance Africa Energy Company website, <https://raecafrika.com/> (accessed 2 April 2024).

⁷ Amnesty International, *Nigeria: Tainted Sale?* (London: Amnesty International, 2023); SDN, note 1; Friends of the Earth Europe et al, *Nigeria: No Clean-Up, No Justice* (Brussels: Friends of the Earth Europe, 2020).

⁸ OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (adopted 2023).

⁹ UN Guiding Principles (UNGPs) on Business and Human Rights (adopted 2011).

¹⁰ OECD Guidelines, note 8, p.36.

¹¹ UN OHCHR, ‘Frequently Asked Questions on Human Rights and Climate Change’, 2021, p.26, https://www.ohchr.org/sites/default/files/2021-09/FSheet38_FAQ_HR_CC_EN_0.pdf (accessed 29 April 2024).

¹² UNGPs, note 9, commentary on principle 13.

(considering) divesting from fossil fuel assets. The norms are clear that divestment does not absolve a company from its remediation responsibilities. As part of the process of divesting, the OECD Guidelines expect the divesting company to remediate all of the previous adverse impacts it caused or to which it contributed while operating.¹³ Similarly, the UNGPs expect companies ‘to enable the remediation of any adverse human rights impacts they caused or to which they contribute.’¹⁴ Divesting from oil operations without clean-up or ensuring adequate provision for decommissioning is counter to the international normative standards and a breach of the responsibility to respect human rights.

In addition, companies are expected to identify and prevent any potential adverse impacts associated with the divestment itself. This includes evaluating whether the party to which the divesting company is selling its assets, shares, or operations is likely to behave responsibly and in line with the OECD Guidelines and UNGPs. Finally, in all business decisions around divestment, the normative standards expect companies to meaningfully consult and involve (potentially) affected rightsholders and other stakeholders.¹⁵

III. Shell’s Legacy Pollution With Limited Right to Remedy in the Niger Delta

Across the OMLs that Shell has exited and in areas it is transferring to Renaissance, there are many unremediated oil spills. Legal liability for oil spill damage affecting individuals and communities that happened *before* an OML transfer remains with SPDC.¹⁶ Shell, as the parent company, can also be held legally liable for oil spill damage caused by SPDC’s operations in some circumstances.¹⁷ The relevant body of law in this regard is the common law torts (wrongful acts) of negligence and nuisance, applicable in both Nigeria (the ‘host state’) and the UK (Shell’s ‘home state’). This has been the basis of legal claims against Shell in Nigeria and the UK.¹⁸ The Nigerian Oil Pipelines Act 1990, which provides for compensation to be paid to individuals or groups whose land or interests are harmed by oil industry operations and spills, is also relevant¹⁹ and a basis for legal action.²⁰

Because liability for damage resulting from oil spills prior to SPDC divesting from an OML stays with SPDC after it divests, it would be virtually impossible to establish in the Nigerian or UK courts a case against the new company that buys the OML for a spill that happened previously.²¹ The purchaser did not commit the tort and did not owe or breach any duty of care to the plaintiffs.

But if Shell sells its Nigerian subsidiary SPDC, the situation changes. SPDC will remain in existence after the sale of Shell’s shares to Renaissance. Therefore, legal action can still be brought against SPDC for past oil spills and new spills. Yet the SPDC against which claims are initiated will be owned by Renaissance, not Shell. The legal action will be against a new Nigerian-registered company without links to an IOC. Retention of the name ‘SPDC’ is misleading once Shell is no longer involved.

Legal action against Shell over spills that occurred when it was the owner of SPDC could, potentially, continue to be mounted in the UK after the current deal is completed. The legal

¹³ OECD Guidelines, note 8, Commentary to Chapter II General Policies, para. 25.

¹⁴ UNGPs, note 9, principle 15(c).

¹⁵ OECD Guidelines, note 8, Commentary to Chapter VI Environment, para. 70.

¹⁶ E Duruigbo, Legal opinion provided to Milieudefenise and SOMO, 2022, unpublished. For a report that includes this legal analysis, see SOMO, *Selling out the Niger Delta* (Amsterdam: SOMO, 2024).

¹⁷ *Okpabi et al v RDS and SPDC* UKSC 3 (2021).

¹⁸ *Billie and Ogale Group et al v Shell PLC* EWHC 510 (KB) (2024); JG Frynas, ‘Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria’ (1999), *Journal of African Law* 43.

¹⁹ Oil Pipelines Act 1990 (Nigeria), Section 11(5).

²⁰ *The Bodo Community and Others v. Shell Petroleum Company of Nigeria Ltd* EWHC 1973 (TCC) (2014).

²¹ E Duruigbo, note 17; SOMO, note 17

basis for action directly against the parent company at the time of the spills would have to be carefully evidenced. This offers hope for oil-impacted communities in Nigeria and corporate accountability, with a door still open to hold Shell accountable. But the practical challenges are likely to be even greater than they currently are.

IV. Reliance on Government Approvals

A critical element of responsible divestment should be ensuring legacy pollution is cleaned up properly. Shell points to Nigerian regulatory certification to claim it has cleaned up pollution, and this presents a major challenge.²² UN agencies and CSOs have long criticised Nigeria's regulator responsible for overseeing oil spills and clean-up, and providing certification of sites as remediated, the National Oil Spill Detection and Response Agency (NOSDRA), for lack of independence and capacity.²³

UN and CSO reports have exposed NOSDRA as certifying oil spill sites as cleaned up when they are not.²⁴ Despite being aware of the many reports and extensive evidence that NOSDRA certification is unreliable, Shell has repeatedly used its certification to claim it has cleaned up pollution and discharged its responsibilities.

Shell's repeated use of regulatory certification to avoid scrutiny and defend itself against legal compensation claims has denied hundreds of thousands of people the right to remedy. Yet, as the UNGPs state: "The responsibility to respect human rights is a global standard of expected conduct for all business enterprises ... It exists *independently of States' abilities and/or willingness to fulfil their own human rights obligations.*"²⁵

In 2011, the UN Environment Programme (UNEP) study of oil pollution in the Ogoniland region of the Niger Delta reported on 15 locations Shell had classified as 'remediation completed', 10 of which were still contaminated, in some cases severely.²⁶ Nigerian regulatory bodies have certified most such sites. UNEP noted Shell's criteria for clean-up contractors placed less emphasis on technical competence than on their track record in securing the regulator's certification.

A 2013 investigation by Amnesty International and the Centre for Human Rights, Environment and Development (CEHRD), a CSO based in the Niger Delta, set out systemic problems with NOSDRA's ability to record oil spill data or oversee clean-up.²⁷ A subsequent report by Friends of the Earth and Amnesty International also found serious issues with oil pollution clean-up.²⁸ In 2023, the Bayelsa State Oil and Environment Commission, a body set up by the Bayelsa State government to investigate oil industry impacts in the state, echoed these findings.²⁹

²² Amnesty International, *Niger Delta: Shell's manifestly false claims about oil pollution exposed, again* (London: Amnesty International, 2015); *Okpabi et al v Royal Dutch Shell plc and the Shell Petroleum Development Company of Nigeria Ltd* HT- 2015-000241 (2015).

²³ UNEP, *Environmental Assessment of Ogoniland* (Nairobi: UNEP, 2011); UNDP, *Niger Delta Human Development Report* (New York: UNDP, 2006); Sweet Crude Reports, 'Ogoni clean-up: ERA tasks NOSDRA on certification of remediated sites' (9 August 2020), <https://sweetcrudereports.com/ogoni-clean-up-era-tasks-nosdra-on-certification-of-remediated-sites/> (accessed 6 May 2024); Amnesty International, *Bad Information: Oil spill investigations in the Niger Delta* (London: Amnesty International, 2013).

²⁴ UNEP, note 24; Amnesty International, note 24; Bayelsa State Oil & Environmental Commission (BSOEC), *An Environmental Genocide: The Human and Environmental Cost of Oil in Bayelsa, Nigeria*, (Bayelsa State, Nigeria: BSOEC, 2023).

²⁵ UNGPs, note 9, commentary on principle 11 (emphasis added).

²⁶ UNEP, note 24.

²⁷ Amnesty International, note 23.

²⁸ Friends of the Earth Europe et al, note 7.

²⁹ BSOEC, note 25, p. 122.

The IOCs have undue influence on NOSDRA, which often depends on them for transport to oil spill sites. The agency acknowledges this heavy dependency.³⁰ Further, NOSDRA staff have been trained by Shell, using its staff as facilitators, and its materials.³¹ This conflict of interest underscores the industry's autonomy and Nigeria's regulatory weakness. NOSDRA staff would be unlikely to override Shell's self-assessment of the correctness or completeness of its oil spill remediation.

Official certification of oil spill sites as remediated, which Shell and other companies use as a shield against litigation, is a grave obstacle to justice for affected communities. IOCs' knowing reliance on a flawed process over which they have substantial control may amount to collusion in human rights abuses. A plain reading of the UNGPs is that any corporate regulatory capture or abuse of influence that leads to harm is a failure to respect human rights and undermines the state's ability to protect human rights.

V. Divestment, Human Rights, and Justice

There can be no just energy transition in response to climate change that includes a legacy of unremediated human rights and environmental abuses around former oil, gas, and mining projects. Yet this is happening and currently receives little international attention. When an oil project reaches the end of its lifetime, without proper abandonment and decommissioning of pipelines, wellheads, and other infrastructure, grave risks to the environment and local people will remain.

Despite the risks, across the Niger Delta, Shell, other IOCs, and new domestic companies have abandoned infrastructure without making it safe.³² Nigeria potentially faces huge future decommissioning challenges.

It is considered good practice for companies to make provisions for future decommissioning when setting up oil extraction projects.³³ Any exit deal involving Shell or other IOCs should include provisions for paying their share of costs associated with decommissioning and remediation of adverse impacts. However, in Nigeria, nobody knows how much, if any, money departing IOCs have placed in escrow for decommissioning. A 2023 investigation by SOMO suggests that designated funds may not exist: neither Shell nor the industry regulator, the Nigerian Upstream Petroleum Regulatory Commission, could point to any such accounts.³⁴

The Niger Delta is at the front line of the global divestment and decommissioning challenge, with all the IOCs exiting and selling to domestic oil companies.³⁵ Effective decommissioning will be crucial to avoid an intergenerational environmental crisis. The quantity of oil infrastructure is enormous, much of it old and/or poorly protected from tampering.

As established above, Shell and other divesting IOCs also have a responsibility under the OECD Guidelines and UNGPs to carry out due diligence to ensure that the divestment will not

³⁰ Amnesty International, note 24; NOSDRA, 'About oil spills in Nigeria', Nigerian Oil Spill Monitor, <https://nosdra.oilspillmonitor.ng/about.html> (accessed 2 April 2024).

³¹ IUCN, *IUCN Niger Delta Panel: Stories of influence* (Gland, Switzerland: IUCN, 2018).

³² A case in point is the Nembe Creek Trunk Line (NCTL), which Shell constructed in 2007-2010. Five years later, Shell sold the asset to a domestic oil company, Aiteo. By 2021, the NCTL was all but abandoned because of leaks and theft.

³³ Petroleum Industry Act 2021 (Nigeria) sec 223 (1); Nigeria Upstream Petroleum Regulatory Commission, 'Decommissioning Regulations', art 6 (2023).

³⁴ SOMO, note 17.

³⁵ SDN, note 1.

cause or contribute to additional human rights or environmental harms, which could be the case if the buyer is not committed to respecting international norms. Shell claims to do so: 'We ... carry out due diligence on potential buyers when divesting parts of our business ... [and] have a well-established, systematic and assured method of assessing risk in divestments. This includes ... conduct[ing] checks and examin[ing] key attributes of potential buyers ... include[ing] their financial strength; operating culture; health, safety, security and environment (HSSE) policies'.³⁶

There is no evidence that Shell has conducted adequate due diligence on the new buyers and in fact, mounting evidence it has failed to do this. Several companies to which Shell has sold OML stakes have faced financial difficulties, with one ending up in court and others seeking repeated refinancing. Two appear to have had to abandon their role as operators, while the government removed another. One operator has already sold up.³⁷

Shell has repeatedly failed to disclose information to the thousands of communities affected by its divestment. Many communities learn the OML where they live has been sold to another company only when they try to reach Shell over a problem such as an oil spill.

Shell's repeated response to questions about its Niger Delta divestments is that the government regulatory bodies have approved the sales.³⁸ But this is wholly inadequate amid growing evidence that Shell has in several cases sold to companies that cannot manage the responsibilities and are unlikely to have the finances to decommission the infrastructure.

VI. Conclusion

The manner of Shell's exit from the Niger Delta exposes communities to grave risks to their environment and human rights, long after oil operations cease and likely for generations to come.

The OECD Guidelines and UNGPs provide a framework to help address the way IOCs divest, based on the assumption that companies want to act responsibly. However, the voluntary international normative standards can do little to stop multinational corporations willing to exploit a weak regulatory environment. They do not adequately address the power imbalances between international companies, on the one hand, and host countries and impacted communities, on the other. This failure to address power and its historical roots in colonialism has ultimately rendered the OECD Guidelines and UNGPs ineffective thus far as a tool to facilitate a just energy transition in contexts like the Niger Delta.

This lacuna, in relation to divestment by multinational fossil fuel companies, can be addressed by collaborative governmental action. Establishing an intergovernmental or multi-stakeholder forum could provide the necessary spotlight on fossil fuel divestment and decommissioning and help set rules for a fair and transparent divestment process. Not all states would be involved, given the geopolitics surrounding the fossil fuel sector, but this should not impede collaboration between the home states of the major fossil fuel multinationals and host states in which these companies operate, and from which they will ultimately divest, to set up a commission or similar body. We only have a narrow

³⁶ Shell, *Sustainability Report 2019* (London: Shell, 2019).

³⁷ SOMO, note 17.

³⁸ Sandra Laville, 'Shell must clean up pollution before it leaves Niger delta, report says', *The Guardian* (28 February 2024); T Adebayo, 'Activists urge Nigeria to delay Shell's \$2.4 billion sale of assets in deeply polluted Niger Delta', *AP* (28 February 2024).

window in which to ensure a just energy transition, and this type of action by willing governments now is the most effective way to ensure that 'just transition' does not become another hollow phrase.

Competing interest. Audrey Gaughran and Joseph Wilde-Ramsing declare none.

Cite this article: Audrey Gaughran and Joseph Wilde-Ramsing, 'Fossil Fuel Industry Divestment and the Energy Transition: Lessons and Red Flags from Shell and the Niger Delta' (2024) *Business and Human Rights Journal* 9, no. 2: 301–307. <https://doi.org/10.1017/bhj.2024.15>