

Memorandum: Amnesty International's concerns regarding Shell's response to the United Nations Environment Programme report, Environmental Assessment of Ogoniland

14 February 2012

On 4 August 2011 the United Nations Environment Programme (UNEP) published a report on the impact of oil pollution in the Ogoniland region of the Niger Delta. The UNEP report exposed an appalling level of pollution with serious consequences for human rights, including the contamination of agricultural land and fisheries on which people depend for livelihoods and food; the contamination of drinking water; and the exposure of hundreds of thousands of people to serious health risks.

While significant responsibility for the environmental and human rights impacts of oil pollution rests with the government of Nigeria, it is clear from the UNEP report that substantial responsibility also lies with Shell. The UNEP report demonstrates that Shell has failed to take adequate action to prevent oil spills, and has repeatedly failed to properly clean up pollution and rehabilitate affected areas.

This memorandum outlines Amnesty International's concerns about Shell's response, to date, to the UNEP report's findings and recommendations. It includes several recommendations for action.

1. Key findings of the UNEP report

The UNEP report clearly exposes the following:

1.1 Serious and systemic failures in Shell's clean up of oil spills

For years Shell has claimed that it cleans up oil spills promptly and properly. The UNEP report is very clear that this has not been the case. On the contrary, the report exposes serious and systemic problems with Shell's clean-up processes in Nigeria. According to the UNEP report:

- "It is evident from the UNEP field assessment that [the Shell Petroleum Development Company's (SPDC)] post-oil spill clean-up of contamination does not achieve environmental standards according with Nigerian legislation, or indeed SPDC's own standards."¹
- Remediation by enhanced natural attenuation (RENA), the primary method of remediation of oil impacted sites used by SPDC, has not proved effective and "is failing to achieve either clean-up or legislative compliance."²
- "Ten out of the 15 investigated sites which SPDC records show as having completed remediation, still have pollution exceeding the SPDC (and government) remediation closure values." At eight of these sites the contamination had migrated to groundwater.³
- At 22 out of 33 sites along Shell's pipeline, soil contamination exceeded limits set by Nigerian law. At five of the sites hydrocarbons were detected in the drinking water of nearby communities.⁴
- There "was always a time-lag between the spillage being observed and dealt with..." The UNEP study further noted that the "time-lag between the spill event and the site being comprehensively cleaned up shows that issues of access are not the sole cause of delays."⁵
- The approach to oil spill containment was substandard and "the unethical action of channelling oil into the creeks cannot be laid at the door of the community".⁶

The clear conclusion of the UNEP report is that Shell has, for years, not cleaned up oil pollution properly. As a consequence hundreds of thousands of children, men and women have been exposed to a sustained assault on their human rights to food, water, health and work, amongst others.

1.2 *Serious failures of due diligence which have exposed people to contaminated drinking water and health risks*

The report notes several due diligence failures in relation to Shell's procedures. Two issues in particular are of concern:

- Firstly, the failure to ensure both that the company's clean-up approach took into account the prevailing environmental conditions, and that field work was done to substantiate assumptions about rehabilitation of land and water. This failure of due diligence has – at least in part – allowed the contamination of groundwater, as one assumption made by Shell was that the depth of soil contamination was limited – an assumption that UNEP's field work has shown to be false, and which field work by Shell could and should have exposed.⁷ This failure of due diligence resulted in greater and more prolonged exposure of the people of Ogoniland to contaminated drinking water.
- Secondly, when Shell left Ogoniland many of its facilities were not properly decommissioned and made safe. Decommissioning is a standard practice for the oil industry. Although more than 18 years have passed since Shell ceased operating in Ogoniland, UNEP noted: "UNEP's reconnaissance routinely came across oilfield resources which had evidently been abandoned in an uncontrolled fashion."⁸ UNEP also observed that: "The control and maintenance of oilfield infrastructure in Ogoniland is clearly inadequate. Industry best practice and [Shell's] own documented procedures have not been applied and as a result, local communities are vulnerable to the dangers posed by unsafe oilfield installations. The oil facilities themselves are vulnerable to accidental or deliberate tampering."⁹ Shell's failure to properly decommission its facilities cannot be defended by saying the company did not have access; while access is sometimes denied in Ogoniland, Shell has had access to the area, and over 18 years could have done more to make the area safe.

2. Shell's response to evidence of the company's human rights and environmental impact

In response to the serious concerns raised by Amnesty International, UNEP, and many other organizations about Shell's impact in the Niger Delta, the company has repeatedly defended itself by stating that most oil spills are due to sabotage or illegal activity or that Shell cannot clean up because the company does not have access to the spill-affected area. Amnesty International's research shows that Shell's claims frequently lack credibility and do not stand up to interrogation.

2.1 *The issue of sabotage and illegal activity*

Poor maintenance of oil infrastructure, equipment failure, sabotage of oil infrastructure, theft of oil and illegal refining all contribute to oil pollution in the Niger Delta.

However, Shell's claim that the majority of oil spilt in the Niger Delta is caused by sabotage and other illegal activity lacks credibility. The basis for this claim is the outcome of oil spill investigations in the Niger Delta. However, the investigation process is deeply flawed, and the outcomes of investigations lack credibility. In many cases the oil company has significant influence on determining the cause of a spill – even when a regulatory representative is present. As the company is liable for compensation payments if the spill is found to be due to corrosion or equipment failure, the practice of allowing companies so much control over the investigation process creates a deeply troubling conflict of interest. Amnesty International's research provides examples of cases where Shell claimed the cause of a spill was sabotage, but this claim

was subsequently called into question by other investigations or the courts. This evidence, which includes video footage of an oil spill investigation where the cause of the spill was changed – by Shell – from ‘equipment failure’ to ‘sabotage’, following the field investigation, has been shared with Shell.¹⁰

Additionally, while Shell is quick to point to illegal activity as a problem, the company has failed to take necessary action to prevent it. For example, as noted above, when Shell left Ogoniland it did not properly decommission its facilities, leaving them vulnerable to illegal activity – and leaving communities exposed to the associated risks. This is completely contrary to international oil industry standards as well as international standards on business and human rights, both of which require that Shell exercise adequate due diligence to prevent tampering with its oil infrastructure and the associated human rights and environmental risks.

Moreover, one of the most serious findings of the UNEP report is in relation to Shell’s failure to clean up properly. Nigeria’s oil industry regulations require the operating company to clean up all oil spills from its facilities, even if the spill is the result of sabotage. Therefore, the human and environmental impacts of Shell’s systemic failure to properly clean up pollution cannot be defended by reference to illegal activity that, allegedly, caused the oil spills.

However, this is exactly what Shell appears to now be doing. In a letter to Amnesty International dated 24 October 2011, Shell stated that resolution of two oil spills that occurred in 2008 at Bodo had been hampered by sabotage and bunkering activity in the area.¹¹ Shell’s reference to sabotage to justify its failure to clean up oil pollution for which it is responsible is deeply troubling. Shell is required to clean up oil spills, regardless of cause, and failure to do so at Bodo cannot be excused by reference to alleged illegal activity in the area.

This is a distinctly different issue from the UNEP report’s call for an end to all sources of pollution before a region-wide clean up of the water system is carried out; Nigerian regulations are clear that Shell must clean up individual spills. Any suggestion that UNEP’s report provides a justification for flouting the regulations and leaving communities to simply live with the aftermath of oil spills is both incorrect and indefensible. We ask that Shell clarifies its position on its obligation to clean up oil spills in the Niger Delta, irrespective of cause.

Sabotage and illegal activity are serious problems in the Niger Delta. Amnesty International has documented this and recommended action to address the issues, including the underlying causes. But sabotage and illegal activity can only be properly addressed when they are dealt with honestly – and not when Shell uses the issues as a public relations shield. Failure by Shell to adequately maintain its infrastructure and prevent oil spills is also a serious problem in the Niger Delta which must be addressed.

2.2 The issue of lack of access

When confronted with delays in stopping oil spills and cleaning up spill sites, Shell frequently claims that the company does not have access to the spill-affected area. While access can sometimes be delayed, this justification does not account for many of the failures to stop and clean up spills. UNEP noted that there “was always a time-lag between the spillage being observed and dealt with...” and that the “time-lag between the spill event and the site being comprehensively cleaned up shows that issues of access are not the sole cause of delays.”¹² Amnesty International’s investigations into several different oil spills made the same finding.¹³

In responding to the UNEP report, Shell has claimed that the reason that it never properly decommissioned its Ogoniland facilities and made them safe over the last 18 years was lack of access.¹⁴ This is not the case. Shell has had access to Ogoniland over the last 18 years, including to carry out the highly inadequate clean-ups that UNEP documented. Shell’s access to Ogoniland is undoubtedly restricted at times, but Shell

cannot defend its failure to decommission facilities in Ogoniland over 18 years by reference to problems of access.

2.3 Pollution in Ogoniland is not unique

In responding to the UNEP report, Shell has stated that Ogoniland is “not typical of the rest of the Niger Delta”¹⁵ and that the UNEP report “highlights the unique challenges and complexities of Ogoniland which [are] not representative of conditions in the rest of the Niger Delta.”¹⁶ In fact, the UNEP report highlights systemic problems with Shell’s clean-up procedures, and it can be reasonably concluded that the methods used by Shell in Ogoniland are the same methods used elsewhere in the Niger Delta, with similar effects, and that consequently tens of thousands more people are living with the aftermath of an inadequate clean up.

The UNEP report also exposes the systemic weaknesses in Nigeria’s regulatory system, stating that “government agencies are at the mercy of oil companies when it comes to conducting site inspections”. This finding confirms similar findings by the World Bank, the African Commission on Human and Peoples’ Rights and many NGOs; the conclusion is that there is no effective oversight of oil spill clean up anywhere in the Niger Delta.¹⁷

Amnesty International’s own research, which has included research on Ogoniland as well as other areas, and which has been shared with Shell, provides evidence that other oil-producing areas in the Niger Delta experience similar problems to those documented in Ogoniland, particularly in relation to inadequate clean-up of pollution.

UNEP itself has stated that: “Since the terrain, operator and regulators are similar in other parts of the Niger Delta, it is a reasonable assumption to make that there may be similar issues in other parts of the Niger Delta.”¹⁸

3. UNEP’s recommendations to Shell

In its response to UNEP, Shell has claimed to be taking action in line with UNEP’s recommendations. In several cases, however, the action being taken by Shell appears to be limited to reviewing whether UNEP is correct.

UNEP Recommendation to Shell: To fully review and overhaul procedures for oil spill clean-up and remediation as well as improve on contracting and supervision

As noted above, UNEP found that the RENA (remediation by enhanced natural attenuation) methodology was not effective, and pollution-affected sites were not being cleaned up properly. UNEP stated that “[t]he current approach by SPDC to clean up contaminated sites through remediation by enhanced natural attenuation (RENA) should be discontinued. Even SPDC’s revised Remediation Management System does not address the issues observed in UNEP’s assessment.”¹⁹ Rather than accept and act on this scientific finding, Shell states it “has carried out a preliminary review of its procedures...”, that RENA remains a proven and internationally recognised method; and that “in a few specific cases in Ogoniland we did not go deep enough in our pre-clean up assessments and this may have impacted the overall effectiveness of remediation in those areas”.²⁰ This is re-writing UNEP’s finding to suggest a limited ‘mistake’ on the part of Shell, and appears to discount UNEP’s findings in relation to the efficacy and appropriateness of RENA in the Niger Delta context.

The UNEP report demonstrates that the failures of RENA are one reason why people have been exposed to contaminated drinking water.²¹ Despite the gravity of this situation Shell’s response is to say it “will revisit the sites in Ogoniland investigated by UNEP to determine whether clean-up and remediation have been adequate, and take action as required.”²² UNEP, a respected UN agency, carried out an environmental assessment over a period of more than one year, and named the sites that have not adequately been

cleaned up. It is notable that Shell has not stated that it will determine *what* clean up and remediation action is needed but rather *if* action is required: this appears to call into question UNEP's findings. Shell's re-investigation of the sites appears not so much action as obfuscation.

With respect to its overall clean-up procedures, Shell has stated that it will review and, if necessary, further improve the company's remediation techniques in the Niger Delta, drawing upon independent expert scientific knowledge.²³ The UNEP report makes clear that Shell's remediation techniques need further improvement, not that this need has yet to be established.

Shell also states that it "will continue its ongoing efforts to ensure effective supervision of contractors and their full compliance with regulatory and contractual requirements."²⁴ This is a commitment to do nothing more than it was doing before, when the evidence clearly shows that what was being done was not effective.

Finally Shell states that it is reviewing "a sample of other remediated sites more widely across the Delta to check that adequate remediation has indeed been carried out". This is a welcome move, given that UNEP's findings show systemic problems both with Shell's clean up and remediation methods and with their implementation. Amnesty International urges transparency in relation to the sites to be investigated and the parameters of investigation. Shell should also ensure that the findings of its assessment are subjected to independent scientific review, in line with the standards set by UNEP. Additionally, we hope that Shell will be willing to carry out a review at sites where local communities have expressed concerns about the clean-up and remediation.

UNEP Recommendation to Shell: To conduct a comprehensive review of SPDC assets in Ogoniland and develop a decommissioning programme and Integrity Management Plan for the assets.

Shell states that it is now making plans to properly decommission its Ogoniland infrastructure. Shell also points to the fact that it capped and sealed 100 wells in Ogoniland between 2009 and 2010 to make them "more tamper proof, to stop further spills from them caused by theft and sabotage."²⁵

Shell claims that this important action was not taken at any time in the preceding 17 years due to the company's limited access to Ogoniland. As noted above, Shell's statements about lack of access do not stand up to scrutiny. The reality appears to be that Shell, having failed to make its infrastructure in Ogoniland safe before, is now doing so because this failure has been exposed.

While it is welcome that Shell is taking some action to properly decommission its infrastructure and make it safe, its failure to do so over almost two decades has undoubtedly further exposed the people of Ogoniland to serious harm.

UNEP Recommendation to Shell: To work with Nigerian regulators to clarify the legislation governing remedial intervention and target values.

In its response, Shell states that it will continue to engage with the relevant government regulators. Shell has not made public any outcome of these discussions, despite six months having passed since UNEP's report was published.

Shell's public statements in response to UNEP seek to present a picture of a company taking action, working with the Nigerian government, and trying to address problems. But in reality Shell has taken very little action: its clean-up process has not been overhauled; we do not know how many other communities are suffering the impacts of years of failed or inadequate clean-ups; rather than take action, Shell has pledged to review and examine issues; and 'sabotage' and 'lack of access' continue to be the default excuses, even though Shell's long-term failure to take necessary and feasible action to make its infrastructure safe has, at least in part, enabled sabotage and illegal activity to occur.

Moreover, Shell's responses are reminiscent of the company's response in the mid-1990s to international concerns about the environmental and human rights impacts of Shell's operations in Nigeria following the execution by the Nigerian State of Ogoni leaders, including Ken Saro-Wiwa. They had campaigned against the negative human and environmental impacts of the oil industry in Ogoniland, and were executed following a politically motivated prosecution and unfair trial.

At that time Shell claimed to be a company changing its practices – but many of the fundamental problems raised by Ken Saro-Wiwa and others remain. In 2001 the African Commission on Human and Peoples' Rights stated that “pollution and environmental degradation to a level humanly unacceptable has made living in Ogoniland a nightmare.”²⁶ And in 2011 – a decade later – UNEP stated that the people of Ogoniland “have lived with chronic oil pollution throughout their lives.”²⁷

It is clear that Shell's past efforts to address the company's negative impacts on the Niger Delta, a region in which it has operated for more than half a century, have been insufficient. This must not continue. Amnesty International urges Shell to act now. Unless Shell addresses its legacy in the Niger Delta, the human and environmental damage will remain a stain on its reputation; one that can only grow worse as time moves on. Specifically Shell must:

- Confirm that it supports the establishment of the Restoration Fund recommended by UNEP. Amnesty International has called for Shell to put up the \$1 billion that UNEP has recommended as the start-up capital needed for this Fund.
- Report publicly and regularly on its progress in implementing the UNEP recommendations, ensure full transparency in its actions, and allow for independent review.
- Clean up all oil spills to internationally accepted standards and ensure independent verification of the clean-up.
- Publicly commit to and support independent oil spill investigations in the Niger Delta, and make public the oil spill investigation reports and other data, such as video footage and photographs, to affected communities, including for spills that occurred before 2011.
- Support the inclusion, in the draft Petroleum Industries Bill, of clauses that protect the rights of oil-affected communities, including their rights to information, consultation, and to fair and adequate compensation, as well as access to independent systems to raise concerns and appeal decisions that affect their human rights.

¹ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 150.

² UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 145.

³ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 12.

⁴ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 112.

⁵ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 151.

⁶ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 151.

⁷ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 145 - 146. UNEP notes that: “Currently, SPDC undertakes RENA on the land surface layer only, based on the assumption that given the nature of the oil, temperature and an underlying layer of clay, hydrocarbons will not move deeper. However, this basic premise of limiting remediation to the surface soil is not sustainable since observations made by UNEP show that contamination can often penetrate deeper than 5 metres. The RENA approach, if using bioremediation as the primary process to be enhanced, will not work at depths below 1metre due to difficulties with oxygen transfer.” UNEP also states: “There are enough theoretical and practical reasons to recommend discontinuation of the RENA approach in Ogoniland for cleaning up contaminated land.”

⁸ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, pp 99 – 100.

⁹ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, pp 99 – 100.

¹⁰ For details of Amnesty International's research and findings on this issue, see: Amnesty International, 'Petroleum, Pollution and Poverty in the Niger Delta', 30 June 2009, AI Index: AFR 44/017/2009; and Amnesty International, 'The true "tragedy": Delays and failures in tackling oil spills in the Niger Delta', 15 November 2011, AI Index: Index: AFR 44/018/2011.

¹¹ In responding to media questions about Shell's failure to clean up oil spills that occurred at Bodo in 2008, Shell referred to ongoing pollution of the area caused by illegal activity. For details see: Amnesty International, 'The true "tragedy": Delays and failures in tackling oil spills in the Niger Delta', 15 November 2011, AI Index: Index: AFR 44/018/2011.

¹² UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 151.

¹³ Amnesty International, 'Petroleum, Pollution and Poverty in the Niger Delta', 30 June 2009, AI Index: AFR 44/017/2009; and Amnesty International, 'The true "tragedy": Delays and failures in tackling oil spills in the Niger Delta', 15 November 2011, AI Index: Index: AFR 44/018/2011.

¹⁴ Shell Statement: 'SPDC action on matters addressed in the UNEP report', available at:

http://www.shell.com.ng/home/content/nga/environment_society/our_response/. Shell states "Decommissioning of the facilities that are not in service in Ogoniland had not been possible due to the limited access SPDC has had in the past."

¹⁵ Interview with Mutiu Sunmonu, Managing Director of SPDC, available at: <http://www.youtube.com/watch?v=0aHa4VbQBZ8>

¹⁶ Shell Statement: 'SPDC action on matters addressed in the UNEP report', available at:

http://www.shell.com.ng/home/content/nga/environment_society/our_response/.

¹⁷ See: African Commission on Human and Peoples' Rights, Decision on communication of The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria (155/96), made at the 30th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, 13-27 October 2001, available at <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>, and World Bank, Defining an Environmental Development Strategy for the Niger Delta, 25 May 1995, Vol II, Industry and Energy Operations Division West Central Africa Department, p45.

¹⁸ UNEP email comment to Amnesty International, 13 January 2012

¹⁹ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 206.

²⁰ Statement: 'SPDC action on matters addressed in the UNEP report', available at:

http://www.shell.com.ng/home/content/nga/environment_society/our_response/.

²¹ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 12.

²² Statement: 'SPDC action on matters addressed in the UNEP report', available at:

http://www.shell.com.ng/home/content/nga/environment_society/our_response/.

²³ Statement: 'SPDC action on matters addressed in the UNEP report', available at:

http://www.shell.com.ng/home/content/nga/environment_society/our_response/.

²⁴ Statement: 'SPDC action on matters addressed in the UNEP report', available at:

http://www.shell.com.ng/home/content/nga/environment_society/our_response/.

²⁵ Interview with Mutiu Sunmonu, Managing Director of SPDC, available at: <http://www.youtube.com/watch?v=0aHa4VbQBZ8>

²⁶ African Commission on Human and Peoples' Rights, Decision on communication of The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria (155/96), made at the 30th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, 13-27 October 2001, available at <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>.

²⁷ UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 10