



Human &
Environmental
DEVELOPMENT AGENDA



Connecting the business and human rights and anti-corruption agendas

Joint Submission to 25th session of the Working Group on Business and Human Rights of the UN Office for Human Rights

21st February 2020

1. We welcome the Working Group's inquiry into the linkages between corruption and human rights abuses.
2. It is now widely recognised that corruption hits the poorest people hardest; and that this has a direct, often devastating impact on access to essential services, at the expense of their human rights to water, housing and health care, and also frequently on security.
3. This submission focusses on such impacts, in the context of the acquisition by Shell and Eni, two multinational oil companies, of the OPL 245 oil field in Nigeria in 2011.
4. At time of writing, Shell and Eni, and some of their most senior executives, are now facing bribery charges in Italy and Nigeria, in one of the biggest corporate corruption trials in history. Prosecutors allege that \$1.1 billion of their \$1.3 billion payment for the OPL 245 oil block funded bribes to key ministers. The trial is ongoing and the defendants have denied wrongdoing. Other officials involved in the deal also deny wrongdoing.¹
5. Shell and Eni still hold the licence for OPL245, even though the Nigerian government has called the deal 'corrupt'.
6. This submission focusses on the highly favourable terms that the companies gained through this corrupt deal; and the consequences for the human rights of poorer Nigerians.
7. We note, that whereas Italy and Nigeria have opened criminal cases, at time of submission, the Netherlands has yet to do so, even though its prosecutorial authorities are also in receipt of a criminal complaint. We hope the Netherlands will also live up to its obligations and commitments to prosecute corruption.

The OPL 245 Deal

8. Shell and Eni acquired the OPL 245 field in 2011 from Malabu Oil and Gas, with the Nigerian government acting as an intermediary. Malabu had been originally awarded the oil field concession in 1998 by Dan Etete, the then Nigerian oil Minister, who had a secret interest in the company. In effect, Etete, awarded the oil field to himself.
9. \$1.1 billion of Shell and Eni's payment for the oil block has now been traced by investigatory authorities and is alleged to have flowed into a vast bribery scheme (see Figure 1 below).

¹ For the responses of Shell, Eni and other defendants, see Annex 1 and Annex 2.

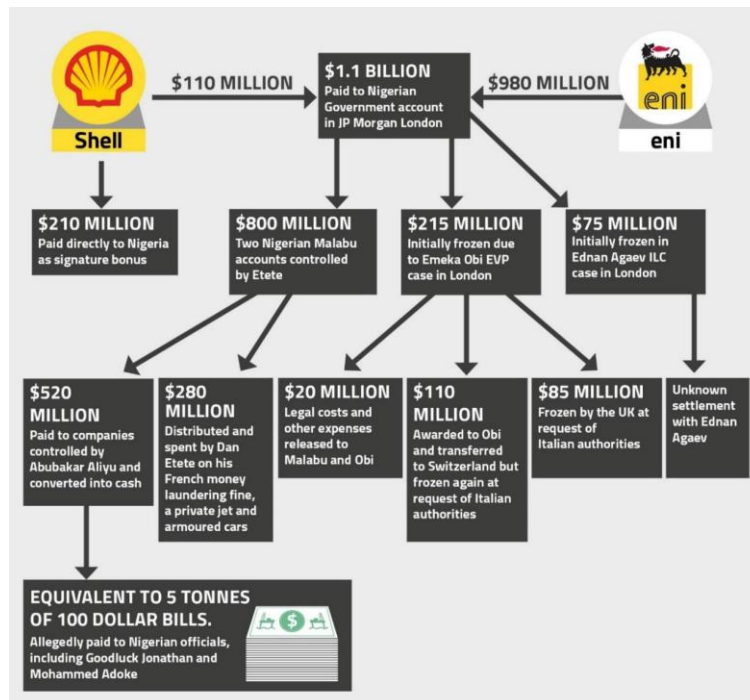


Figure 1: Flow of money from the deal

10. As documented by Global Witness in a 2017 report, *Shell Knew* [Annex 1], Shell knew their payment for the deal was not going into the public purse but would instead fill private pockets.

Crumbs for Nigeria

11. \$1.1 billion is enough to fund Nigeria's current annual health budget, but its diversion from the public purse is only a fraction of the cost of this deal to Nigeria.
12. Shell and Eni's deal for OPL 245 gave them more than an oil licence. For the companies, the true value of the licence lay in the terms on which they would be allowed to extract oil, and how they would split their profits with the state.
13. Shell and Eni's \$1.1 billion deal effectively excluded Nigeria from any share in the profits from oil produced.
14. As documented by Global Witness [Annex 2], Shell managers exchanged emails in which this was openly acknowledged. Malcolm Brinded, Shell's then Head of Exploration and Production, the second highest executive in the company, wrote: "***The solution proposed leaves NNPC [the Nigerian National Petroleum Corporation] without any economic interest in the Licence***".
15. Under the deal, a defining feature of standard production sharing contracts - the government getting a share of "profit oil" - was simply removed.
16. Internal Shell emails show that Shell's senior management clearly understood that calling their deal a production sharing agreement (as they did) was misleading.
17. The deal was strongly opposed by the most senior civil servant in Nigeria's Department for Petroleum Resources, who described the terms as "***highly prejudicial to the interests of the Federal Government***".
18. Despite this strong, clear objection, Nigeria's ministers agreed the deal.

Impacts on Human Rights

19. According to an analysis (jointly commissioned by us from Resources for Development [**Annex 3**]) of the fiscal terms granted to Shell and Eni , the deal deprived the Nigerian people of an estimated \$5.8 billion in projected revenues when compared to the terms that one might have expected to be applied.
20. This is enough money to fund Nigeria's combined Health and Education budgets for more than two years. This at a time when the majority of Nigerians live in poverty, on less than \$2 a day.
21. The impacts on human rights are clear. Poorer Nigerians will be denied opportunities that they might otherwise have had; and their human rights to education and health will be undermined.
22. Nigeria has already claimed in the English and Italian courts that it was the victim of a massive crime in the OPL 245 deal. In 2014, Nigeria's House of Representatives called for the deal to be cancelled.
23. We would urge the Working Group to support this call. .
24. The deal for OPL 245, represents a snapshot of but one corrupt resource extraction deal, amply demonstrating the crippling effect that corruption by foreign multinationals can have on development and basic rights in emerging economies. Host states of multinationals must fully take up their responsibilities under the framework of the Principles on Business and Human Rights, and take further measures to prevent future cases. Such measures should include prosecution of offenders, with credible sanctions and substantial compensation for victims.
25. The extractives sector writ large, as our groups and others have demonstrated through investigations and publications over past decades, is notoriously corrupt. We note that credible prosecutions and sanctions that amount to a greater consequence than a “cost of doing business” penalty are rare. It is clear, that more often than not, there is little disincentive to repeat offending, and indeed both Shell and Eni were subject to deferred prosecution agreements with the US DoJ for other corruption offences, just as their senior management were negotiating the deal for OPL 245. It is clear that more needs to be done to prevent corruption by the corporate sector. Thus, we call on the Working Group to recognise that corrupt and predatory deals between corporations and Governments are in themselves a direct threat to the human rights of citizens. As such, where there is a failure by states to provide appropriate criminal investigation, prosecution and sanction for such crimes, companies should face sanction under international law as crimes against humanity.

Annex 1: Global Witness - “Shell Knew” – April 2017:

<https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-knew/>

Annex 2: Global Witness - “Take the Future” November 2018:

<https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/take-the-future/>

Annex 3: Resources for Development, including access to OPL 245 model and analysis: “OPL 245 Economic Model with back-in”: <http://www.res4dev.com/opl245/>