

## Oil Spill Investigations in the Niger Delta Amnesty International Memorandum September 2012

### 1. Introduction

Oil spills are a serious problem in the Niger Delta. Poor maintenance of oil infrastructure, equipment failure, sabotage of oil infrastructure, theft of oil and illegal refining all contribute to oil pollution in the region.<sup>i</sup>

Oil companies frequently assert that most oil spilt is due to sabotage. The basis for this claim is the outcome of oil spill investigations in the Niger Delta. The investigation process has been the subject of community complaints over many years, with allegations that the process lacks transparency, does not always comply with national law and standards, and the data recorded on oil spill investigation forms are inaccurate.

#### **The Joint Investigation process**

When an oil spill occurs in the Niger Delta, a joint investigation team should be mobilized to visit the site. The joint investigation team includes representatives of regulatory agencies, the oil company, the affected community and the security forces. The team investigates the cause of the oil spill and is supposed to jointly agree and sign a report, which confirms the cause and includes other key information such as the volume of oil spilt. The process is often heavily dependent on the oil companies for transport to the site of the spill and for technical assessment of the cause of the spill and the volume of oil spilt.

The information recorded on the oil spill investigation form, known as a Joint Investigation Team (JIT) report (sometimes also known as the JIV report, meaning Joint Investigation Visit), is extremely important as it is the basis for deciding whether communities receive compensation for damage to their homes, fields and fisheries. The data also affects how much compensation they receive and may affect the extent and quality of clean up. If a spill is found to be due to sabotage or third party interference then the community gets no compensation from the oil company, regardless of the damage caused.

Over the course of several years of research into the oil industry and its impacts on human rights in the Niger Delta, Amnesty International has examined the oil spill investigation process and recorded several flaws and inadequacies.<sup>ii</sup> Amnesty International has brought these to the attention of oil companies and the Nigerian regulators. The majority of the cases investigated by Amnesty International relate to the joint venture operated by the Shell Petroleum Development Company, a subsidiary of Royal Dutch Shell.

The following is a summary of the inadequacies of the current oil spill investigation process. Fuller details are available in the following Amnesty International reports:

- Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta, 2009* (Index: AFR 44/017/2009)

- Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD), *The True Tragedy: Delays and failures in tackling oil spills in the Niger Delta, 2011* (Index: AFR 44/018/2011)
- Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD), *Another Bodo Oil Spill, Another Flawed Oil Spill Investigation in the Niger Delta, 2012* (Index: AFR 44/037/2012)

Amnesty International's assessment of the oil spill investigation process in the Niger Delta has been limited by the lack of access to the actual investigation forms, and supporting materials, such as video or photographs, which are held by the oil companies. Nonetheless, the reports of communities and NGOs, supported by examinations of actual JIT forms, where this has been possible, point to systemic problems with the oil spill investigation process.

Since January 2011 Shell has made oil spill investigation data public via its web site. This move was welcomed by Amnesty International. However, many of the concerns that had been raised with the organization by communities and NGOs relate to practices pre-2011. Amnesty International has asked Shell for access to pre-2011 investigation forms, but has been given access to fewer than 10 such forms. A thorough examination of the oil spill investigation process in the Niger Delta could be accomplished if the JIT forms and associated photos and videos, covering the last decade were made public. Amnesty International is seeking such disclosure.

## 2. Specific problems with oil spill investigations in Nigeria

### 2.1 Investigations are not independent

The exact proportion of oil spills in the Niger Delta that are caused by sabotage, as opposed to equipment failure, corrosion or human error, cannot be determined because the data on the causes of oil spills in the Niger Delta have never been subject to any independent or effective monitoring or verification. In most cases the oil company has substantial influence in determining the cause of a spill, even when a regulatory representative is present. This is partly due to the fact that the company has the technical expertise and neither the regulators nor the communities have the means to challenge their assessment.

In the cases examined by Amnesty International (several of which are detailed below) Shell has controlled the data that is recorded on JIT forms and these forms are treated, in the field, as the company's document. In some cases Shell staff conducted a joint investigation with the regulators and the community but would not specify the cause of the spill in the field, stating that they had to complete that part of the process at their offices.<sup>iii</sup>

#### **CASE 1: Ikarama spill, 2007**

On 31 March 2008 Amnesty International researchers visited Ikarama in Bayelsa State to investigate two oil spill incidents. The most recent oil spill had taken place on 22 July 2007, as the result of a fault with oil infrastructure. At the time of Amnesty International's visit, eight months after the spill, a heavy oil slick was still clearly visible in the water. Although the joint investigation team report states that a leaking valve was the cause of the oil spill, the joint investigation team report also states that the "cause of the spill will be established in Shell office".

After a 2002 oil spill in Batan, in Delta State, a case discussed more fully below, Shell rejected the findings of a joint investigation after its representatives had signed the report; the company claimed that its staff had been intimidated into signing the report, even though video footage of the investigation contradicted Shell's account.<sup>iv</sup>

The presence of regulators and community representatives during a joint investigation should, in theory, ensure the outcome is credible. However, in practice, both regulators and community representatives have very limited technical expertise and are reliant on the company's assessment. The weakness of the Nigerian oil industry regulators has been documented by United Nations agencies and the World Bank, as well as non-governmental organizations (NGOs).<sup>v</sup> In 2006, the UN Development Programme noted that "The oil companies, particularly Shell Petroleum, have operated for over 30 years without appreciable control or environmental regulation to guide their activities."<sup>vi</sup> Most recently, in August 2011, the United Nations Environment Programme (UNEP) issued a major report on the effects of oil pollution in the Ogoniland region of the Niger Delta. The report states that: "Government agencies are at the mercy of oil companies when it comes to conducting site inspections".<sup>vii</sup>

## 2.2 Lack of transparency

There has, historically, been a lack of transparency around the oil spill investigation process, despite the joint investigation process. Communities can be denied a copy of the JIT form, even after signing it. As noted above, Amnesty International has not been able to secure access to many of the pre-2011 oil spill investigation forms, despite repeated requests for data.

Lack of transparency occurs at different points in the oil spill investigation process. For example, there can be a lack of transparency during the field investigation about how key data, such as the volume of oil spilled, are established. There can be a lack of transparency when the key data are not recorded in the field and parts of the JIT form are left blank, or there is a requirement for additional evidence gathering processes, beyond field work, in which regulators and/or community representatives may not be involved. Communities may not get a copy of JIT forms, even after agreeing to sign them.

### **CASE 2: Bodo Oil Spill, June/July 2012**

On or close to 21 June 2012 an oil spill was discovered in the Bodo creek area of the Niger Delta. The leaking pipeline at Bodo is the responsibility of Shell. The leak was stopped on 30 June. The joint investigation into the cause of the spill was initiated at this time. Local people told Amnesty International that there were visible signs of corrosion on the affected area of the pipe, but that Shell and regulatory representatives said that the cause appeared to be sabotage and the issue needed further investigation. The justification for a preliminary assessment of sabotage was the fact that the hole in the pipe was at the "12 o'clock" position. It was agreed that the joint investigation would continue on 3 July and Shell told the community to bring an expert who could assess whether the pipe was corroded. The community asked an engineer, Osita Kenneth, to accompany them to the site. He requested further information from Shell, but said that, based on his experience gained over more than 10 years in the pipeline industry, there was evidence of a corrosion failure.<sup>viii</sup>

Amnesty International shared photographs of the pipe at the leak point with the US company Accufacts, which has some 40 years experience of assessing oil infrastructure. Accufacts stated: “This is apparently due to external corrosion. Notice the layered loss of metal on the outside of the pipe around the “stick” from pipe wall loss (thinning) due to external corrosion. It is a very familiar pattern that we have seen many times on other pipelines.”<sup>ix</sup>

When Amnesty International contacted Shell’s headquarters to ask for evidence to support the initial assessment of sabotage, Shell stated the company has not claimed that the cause of the spill was sabotage and the joint investigation has not been completed.<sup>x</sup> However, Shell could not explain the statements made to the community that the cause appeared to be sabotage because of the position of the hole in the pipe at the “12 o clock” position. Nor was Shell willing to make any comment about the visible corrosion of the pipe.

Amnesty International asked Accufacts to comment on the view that the “12 o clock” position of the hole on the pipeline indicates sabotage and they noted “A release on the top of the pipe does not necessarily mean the pipe failed because of sabotage...We have seen a lot of pipe failures from the top of the pipe and none were related to sabotage.”<sup>xi</sup>

Shell has said that they will take the affected length of pipe to a Shell facility for testing. The community, local environment and human rights activists expressed concern that this process – which will be under the control of Shell – lacks transparency and the outcome will not be credible. Amnesty International has asked Shell to explain how the company intends to assess the cause of the leak based on the removal of the pipe, given that a wooden stick has been inserted into the leak hole. If the claim is that the hole was deliberately bored into the pipe, then the insertion of a wooden stick is likely to have obscured the evidence to some extent. Shell did not respond to this question.

Additionally, in cases of sabotage, it is commonly the case that there are signs of prior excavation of the area, suggesting that someone has dug the soil to find and tamper with the pipe. Video footage of the site taken during the oil spill investigation, which clearly shows the pipe had to be excavated by Shell using a mechanical shovel, does not appear to show any signs of prior excavation. Shell also claimed that the joint investigation team was not able to complete the oil spill investigation because local youths threw stones at the team.<sup>xii</sup> However, Amnesty International could not identify any witnesses to corroborate this. Amnesty International asked Shell to provide further information on this incident but Shell did not respond.

The lack of transparency around oil spill investigations, and the related claims made by Shell, has affected efforts by communities to gain access to remedies, including clean up of pollution.

### **CASE 3: Bodo Spills, 2008**

Two major oil spills occurred at Bodo in 2008. Amnesty International has undertaken investigations into both spills and published a detailed report in November 2011. The report included photographic and satellite evidence showing the scale of the environmental impact of the oil spills (for which Shell has accepted responsibility), and exposed the failure by Shell to clean up the pollution, despite the requirements of Nigerian oil industry regulations. However, Shell has stated that current oil pollution

at Bodo is not due to the two major 2008 spills, but to other oil spills in the period since the 2008 spills. Amnesty International has therefore asked Shell, if there were other spills, between January 2009 and January 2011, can Shell disclose the JIT reports and associated photographs and video footage of the investigations for independent assessment. To date Shell has not responded to this request.

In addition, the Bodo community was initially denied a copy of the JIT report for the first of the two spills. They obtained the JIT for the first spill only after the second spill occurred (in December 2008), at which point the community demanded a copy of the first JIT report before they would sign the second one. Shell met this demand in February 2009.

### 2.3 Shell unilaterally changing the outcome of the investigation

During investigations into oil spills in 2008 and 2009, Amnesty International discovered evidence that Shell has changed the recorded cause of an oil spill after the investigation.

#### **CASE 4: The Batan oil spill, 2002**

An oil spill from an underground pipe occurred at Batan in Delta State in October 2002. Shell wrote to the governor of Delta State three days after the spill began – and two days *before* the joint investigation – claiming that the oil spill was caused by sabotage and naming seven likely culprits. Five days after the spill began the joint investigation team arrived at the site. The team included police and army officers, representatives of regulator and of Shell, as well as members of the community. The team also included a professional diver, who examined the underwater pipe. A member of the community captured the investigation on video, which Amnesty International has viewed. Although the diver found that loose bolts and nuts on the pipeline caused the spill, the Shell representative is heard in the video trying to persuade the other members of the investigation team not to write the cause of the spill on the investigation form. The regulatory representative appeared to support the Shell representative’s position. The team eventually recorded the spill as due to equipment failure, and the joint investigation team members signed the investigation report.<sup>xiii</sup> The following day, 22 October 2002, Shell wrote to the Batan community repudiating the report, claiming that their representatives were subjected to a “gruesome ordeal, duress and manhandling” by members of the community, with the result that “our representatives were coerced into taking the cause of the incident as being production equipment failure, instead of an act of third party interference, sabotage, which it clearly was.”<sup>xiv</sup>

The allegations made by Shell in this letter are contrary to the video evidence of the event, which includes footage of the armed public security personnel guarding the Shell representatives, and no evidence of the violence Shell claims occurred.

The Batan oil spill is not the only one in which Shell characterised the cause of a spill as sabotage despite evidence that equipment failure or human error was to blame. According to G.J. Frynas, who has studied and written extensively on oil litigation in Nigeria, “There are indeed strong indications that oil companies in Nigeria have used false claims of sabotage to avoid compensation payments...”<sup>xv</sup> Court actions in Nigeria such as *Shell v Isaiah* (1997) have reached similar conclusions.

**CASE 5: Court action - Shell v Isaiah, 1997**

In this case, the plaintiffs went to court seeking compensation because, during a repair operation on a Shell pipe, which was dented when a tree fell on it, oil leaked on to farmland and in to fishponds. Shell claimed the leak was caused by sabotage. The Appeal Court judge stated: “The issue of sabotage raised by the defendant is neither here nor there . . . . I am, having regard to the facts and circumstances of this case, convinced that the defence of sabotage was an afterthought. The three defence witnesses were agreed on one thing, that is that an old tree fell on and dented the shell pipe . . . . How could this have metamorphosed into an act of cutting the pipe by an unknown person? What is more, there is no evidence whatsoever in proof that the pipeline was ‘cut by a hacksaw.’”<sup>xvi</sup>

**2.4 Communities asked to sign incomplete forms**

Communities have been asked by Shell to sign incomplete JIT forms. This further undermines the claims that the oil spill investigation process is independent.

In 2009, the community at Edagberi (also known as Joinkrama 4 or JK4) was asked to sign a Joint Investigation form on which most of the data was not filled in. Amnesty International has obtained the Joint Investigation form which shows that key data has not been recorded. The volume of oil spilt is recorded but none of the data for the calculation has been completed.<sup>xvii</sup> Amnesty International received reports of other cases where people have been asked to sign JIT forms where not all of the data is included; for example, as noted above, the JIT form for the 2007 oil spill at Ikarama stated that the “cause of the spill will be established in Shell office”.<sup>xviii</sup> However, due to lack of access to JITs pre 2011, it is not possible to assess how widespread a problem this is.

**2.5 Serious weaknesses in recording of key data**

Questions have been raised about the accuracy of data recorded by Shell on JIT forms, following the exposure of problems in specific cases where it has been possible to secure an independent investigation.

**2.5.1 Problems with the estimation of the volume of oil spilt**

Amnesty International has asked Shell to explain the methodology used to calculate the volume of oil spilt, but Shell has not provided this information. According to community members and NGOs who have observed oil investigations, the assessment is often based on visual assessments by Shell staff.

**CASE 6: Bodo spill, August – November, 2008**

An independent assessment of the JIT form for one of the 2008 oil spills at Bodo (referred to above) has called into question the methodology and accuracy of the data on the volume of oil recorded as spilt on the forms. In this case, the JIT report for the spill records that the spill lasted for approximately four weeks<sup>xix</sup>, and that a total of 1,640 barrels of oil was spilled, covering an area of 61,350m<sup>2</sup>. However, a US-based firm, Accufacts, which has some 40 years’ experience examining oil infrastructure issues, found that between 1,440 and 4,320 barrels of oil were leaking *per day*, based on a review of video footage of the leak.<sup>xx</sup> As the leak went on for several weeks, it would appear that the figure recorded on the Shell JIT form is highly inaccurate. The source of the Bodo JIT report figure has not been made clear.

The serious under-recording at Bodo raises serious questions about the oil spill investigation process that Shell uses in the Niger Delta. It also has wider implications: Shell repeatedly claims to its investors, customers and the media that the majority of the oil spilt in the Niger Delta is caused by sabotage. The basis for this claim is the oil spill investigation process. Shell initially claimed to the media that only 15 per cent of oil spilt in the Niger Delta in 2008 was caused by their operational failures. The company later admitted that it had not included some oil spills in this estimate, which were found to be due to operational failures. Therefore the 2008 figure for oil spilt due to operational failure was closer to 50 per cent.<sup>xxi</sup> Based on the new evidence obtained by Amnesty International about the 2008 Bodo oil spill, the 2008 data would again be incorrect as there has been a far greater amount of oil spilt due to corrosion and operational failure.

### 2.5.2 Estimation of start date of oil spills

The Bodo community reports that the first 2008 oil spill began on 28 August, was investigated on 7 November, and was due to equipment failure. The JIT report states that the spill began on 5 October, was investigated on 7 November and was due to equipment failure.<sup>xxii</sup> The origin of the date on the JIT report is not clear. When Amnesty International investigated this case, the regulatory agency, NOSDRA, confirmed to Amnesty International in writing that an oil spill, caused by equipment failure, occurred in the Trans Niger pipeline “on August 28, 2008 and was investigated on 7 November”.<sup>xxiii</sup> Amnesty International asked Shell how it established the start date it recorded on the JIT, but the company did not respond. In a letter to the Bodo community’s lawyer in May 2009, Shell accepts that a spill took place in August 2008, but claimed that it was caused by “activities of unknown third parties”.<sup>xxiv</sup> According to Shell, another spill took place in October 2008, so there were, in fact two spills: one in August and one in October. The community refute this. Amnesty International asked Shell to provide the JIT for the August spill that was caused by sabotage. So far Amnesty International has not received the JIT.

Amnesty International asked Shell to explain how it establishes a start date in contexts where this is disputed, given that Shell is not on-site when spills occur, while the community is. The company did not respond on this point.

The inconsistencies in the information provided by Shell and the regulator, NOSDRA, in relation to the start date of the Bodo oil spill have also not been explained.

## 3. Condition of pipes not disclosed

Although numerous spills are due to corrosion of the oil infrastructure in the Niger Delta, Shell has refused to make public the condition of its oil pipeline. This failure has exacerbated community tensions around the oil spill investigation process, as absent transparency on the state of oil infrastructure, there is concern that it is – at least in some parts of the Niger Delta – in bad condition and this is the reason for the high number of oil spills.

Evidence of serious problems with Shell’s infrastructure has been mounting. A US diplomatic cable from 2008, recently published by wikileaks, stated that a contractor with many years’ experience of laying pipelines in the Niger Delta told the US consulate in Nigeria that “73 per cent of all pipelines there are more than a decade overdue for replacement. In many cases, pipelines with a technical life of 15 years are still in use thirty years after installation”. The cable continued: “because the

equipment is corroded and relatively close to the surface, making it more vulnerable to intentional and unintentional damage from natural and human causes, spills occur daily, and it often takes many hours to find the location of the spill and deploy the necessary clean-up equipment.” The contractor reportedly suggested that pipelines be replaced with “new, concrete-encased pipes that are placed three to four meters underground” which would reduce spills caused by both bunkering and equipment failure. The US cable concludes that this “assessment of the current state of pipelines has been confirmed by other of our interlocutors.”

#### 4. Questions about Shell’s verification of the oil spill investigation process

Following criticism of the oil spill investigation process in the Niger Delta, Shell announced in 2011 that it had hired a company called Bureau Veritas to verify the oil spill investigation system. Despite repeated requests by Amnesty International for information on what exactly Bureau Veritas has verified or will verify, and whether Bureau Veritas will be allowed to consider evidence provided by communities and NGOs, Shell has refused to respond. The value of the Bureau Veritas process, and the extent to which it addresses any of the long-standing problems with the oil spill investigation process, will depend on the parameters of its verification methodology. In the absence of a transparent process, there is serious concern that the Bureau Veritas initiative is a public relations response to mounting criticism of Shell’s impact in the Niger Delta.

#### 5. Conclusions

Shell refers to the joint investigation process for oil spills in the Niger Delta as a process that confers credibility on the information that Shell makes public about oil spills. Amnesty International has undertaken research into the oil spill investigation process in Nigeria. Contrary to the picture painted by Shell, this process has been widely discredited because of the significant control that the oil companies have over it and because there are documented cases where the data recorded during a joint investigation have been shown to be incorrect or have subsequently been altered.

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<sup>i</sup> The information and data in this Memorandum are drawn from the following Amnesty International reports, in which detailed evidence is provided: Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta* (Index: AFR 44/017/2009) and Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD), *The True Tragedy: Delays and failures in tackling oil spills in the Niger Delta* (Index: AFR 44/018/2011)

<sup>ii</sup> See: See Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta* (Index: AFR 44/017/2009) and Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD), *The True Tragedy: Delays and failures in tackling oil spills in the Niger Delta* (Index: AFR 44/018/2011)

<sup>iii</sup> Ikarama JIT form; see Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD), *Another Bodo Oil Spill, Another Flawed Oil Spill Investigation in the Niger Delta* (Index: AFR 44/037/2012) for details of the Bodo June/July investigation.

<sup>iv</sup> See Amnesty International, *Petroleum, Pollution and Poverty*, pp. 46, 7-8, 47-48.

<sup>v</sup> 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; UNDP Niger Delta Human Development Report, 2006; UNEP, *Environmental Assessment of Ogoniland*, 2011

<sup>vi</sup> Niger Delta Human Development Report, 2006

<sup>vii</sup> UNEP, *Environmental Assessment of Ogoniland*, 2011

<sup>viii</sup> See: Amnesty International and the Centre for Environment, Human Rights and Development (CEHRD), *Another Bodo Oil Spill, Another Flawed Oil Spill Investigation in the Niger Delta* (Index: AFR 44/037/2012)

<sup>ix</sup> Email communication with Accufacts, 9 July 2012

<sup>x</sup> Email communication with Shell, 10 July 2012

<sup>xi</sup> Email communication with Accufacts, 1 August 2012

<sup>xii</sup> Email communication with Shell, 10 July 2012

<sup>xiii</sup> Amnesty International, *Petroleum, Pollution, and Poverty in the Niger Delta*, p. 47.

<sup>xiv</sup> The letter is seen on the video documentary. The video is available for Amnesty International, International Secretariat.



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- <sup>xv</sup> G. J. Frynas, "Legal Change in Africa, "Evidence from oil-related litigation in Nigeria", *Journal of African Law*, Vol 43, No. 2 (1999), p128.
- <sup>xvi</sup> *Shell v. Isaiah*, (1997) 6 NWLR (pt. 508) 263.
- <sup>xvii</sup> JK4 JIT form, undated.
- <sup>xviii</sup> Ikarama JIT form, 2007.
- <sup>xix</sup> Bodo JIT form, 2008. Spill Incident Number: 2008-00217. The JIT records a start date of 5 October 2008 and that the spill was stopped on 7 November 2008.
- <sup>xx</sup> Signed letter from Accufacts which calculated a flow rate of 1 – 3 barrels per minute.
- <sup>xxi</sup> Shell Sustainability Report, 2010.
- <sup>xxii</sup> Bodo JIT form, 2008, Spill Incident Number: 2008-00261
- <sup>xxiii</sup> Letter from NOSDRA dated 16 September 2011
- <sup>xxiv</sup> Letter from Shell to Bodo community lawyers, 7 May 2009.