NIGERIA: JOINT MEMORANDUM ON PETROLEUM INDUSTRY BILL MARCH 2012

AMNESTY INTERNATIONAL

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Amnesty International and 12 Nigerian NGOs[1] call on the Special Task Force on the Petroleum Industry Bill to ensure human rights are at the centre of the Petroleum Industry Bill March 2012.

1. INTRODUCTION: THE CONTEXT OF OIL OPERATIONS IN NIGERIA

Fifty years of commercial oil extraction in the Niger Delta has brought impoverishment, conflict, human rights abuses and despair to many. Pollution and environmental damage caused by the oil industry have resulted in violations of the rights to health and a healthy environment, the right to an adequate standard of living, including the right to food and water, and the right to livelihood for hundreds of thousands of people living in the Niger Delta. The massive oil deposits have generated billions of dollars in revenues for the country yet the vast majority of people living in the oil producing areas live in poverty.

A lack of accountability and access to justice has sustained a context where the same human rights violations occur again and again. Impunity for abuses of the environment and human rights remains entrenched. Oil-affected communities are frequently denied access to the information they need to participate in decisions that affect their lives. Clean-up of oil spills in the Niger Delta is often slow and inadequate, leaving communities to cope with the ongoing impact of pollution on their livelihoods and health. Accessing compensation for oil spill damage is fraught with problems, lacks transparency and is open to abuse.

The regulatory system for the oil industry in the Niger Delta is deeply flawed. Nigeria has laws

[1] African Centre for Leadership & Strategy Development, Amnesty International, Centre for Democracy and Development (CDD), Centre for Environment, Human Rights and Development (CEHRD), Centre for Information Technology and Development (CITAD), Civil Society Legislative Advocacy Centre (CISLAC), Community Action for Popular Participation (CAPP), Environment Rights Action (ERA), Human Rights, Social Development and Environment Rights Foundation (HURSDEF), Public & Private Development Centre (PPDC), Publish What You Pay (PWYP), Social Action and Zero Corruption Coalition.

and regulations that require companies to comply with internationally recognized standards of "good oil field practice", and laws and regulations to protect the environment. These laws and regulations are poorly enforced. The government agencies responsible for enforcement are under-resourced, ineffective and, in some cases, compromised by conflicts of interest. Moreover, under the current system the oil companies have been given the implicit or explicit authority to deal with matters that have a direct bearing on human rights with little or no oversight, and no effective safeguards.

Research by national and international NGOs and the recently published report of the United Nations Environment Programme (UNEP) confirm that there are serious weaknesses in the Nigerian regulatory system, including lack of resources and capacity. Speaking about the National Oil Spill Detection and Response Agency (NOSDRA), UNEP stated: "The agency has no proactive capacity for oil-spill detection and has to rely on reports from oil companies or civil society concerning the incidence of a spill. It also has very little reactive capacity – even to send staff to a spill location once an incident is reported. Consequently, in planning their inspection visits, the regulatory authority is wholly reliant on the oil company. Such an arrangement is inherently inappropriate."

There is a general lack of transparency about the condition of oil infrastructure in Nigeria, including pipes. Both the Nigerian Oil Pipelines Act and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) require companies to check and maintain oil infrastructure. EGASPIN requires monthly inspection of pipelines, including corrosion-monitoring indications and measurements. But these requirements are not enforced. Moreover, there is no independent process whereby the regulators can assess and verify the condition of the oil industry infrastructure.

The Department for Petroleum Resources (DPR), under the Federal Ministry of Petroleum Resources, oversees the oil industry to ensure its compliance with the applicable laws and regulations, including the environmental regulation, EGASPIN. In addition, the DPR keeps records on oil industry operations, advises the government, ensures that royalties and rents are paid and processes all applications for licences. The Ministry is responsible for developing Nigeria's energy resources and as such ensuring maximum revenues. In practice, DPR exercises almost no meaningful regulatory controls in relation to the environment and pollution, despite its statutory responsibilities. For years, independent commentators have noted that the DPR has serious conflicts of interest, as it is also responsible for promoting the oil industry. This stark fact was confirmed in the 2011 UNEP study on the impacts of oil pollution in Ogoniland: "There is clearly a conflict of interest in a ministry which, on one hand, has to maximize revenue by increasing production and, on the other, ensure environmental compliance."

Nigerian law and regulations allow the authorities to apply specific measures to ensure that oil companies comply with regulations, including by imposing penalties. However, the fines that can be imposed on oil companies are generally considered to be too low to represent a meaningful sanction or deterrent. EGASPIN also stipulates that "any person, body corporate or operator of a vessel or facility, who persistently violates the provisions of these guidelines and standards, shall have his lease, license and/or permit revoked." However, there is no known incidence of a lease or licence or permit being revoked because of a failure to comply with environmental standards, despite the evidence that such violations are persistent and

widespread. The regulators' failure to intervene gives oil companies the freedom to act – or fail to act – without fear of sanction.

The drafting of the Petroleum Industry Bill (PIB) reflects the most comprehensive review of the legal framework for the oil and gas sector in Nigeria since the industry began commercial operations in the 1960s and could provide an important opportunity to ensure that the social and human rights impacts of the oil industry are adequately addressed.

This Memorandum outlines several important issues which should be included in the Petroleum Industry Bill. In making recommendations for the draft Bill we draw on the following:

- The provisions of the Economic Community of West African States (ECOWAS) Directive on Guiding Principles and Policies in the Mining Sector (applicable to extraction), adopted in Abuja in May 2009,[2] which amongst other things requires that: "Member States and Holders of mining rights shall ensure that the rights of the local communities are respected at all times. Where such Human rights legislations do not exist Member States shall enact appropriate legislation to ensure respect for Human Rights."

- Section 20 of Nigeria's constitution, which provides that "the State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria."

- The requirements of international human rights law, which requires States to take action to protect human rights in the context of business operations

- International standards in relation to the oil industry, in particular the globally-accepted standards of the American Petroleum Institute (API) and the guidance of the global oil and gas industry association for social and environmental issues (IPIECA)

- International standards on the management of social and environmental impacts of major projects, including the standards used by the International Finance Corporation of the World Bank.[3]

The proposals are also fully consistent with the corporate responsibility to respect human rights and the environment, as outlined in the UN Guidelines on Business and Human Rights, which are considered the minimum standards for responsible business behaviour.

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[2] Directive C/DIR.3/05/00, sixty-second Ordinary Session of the Council of Ministers, Abuja, May 2009

[3] The standards for social and environmental impact draw from the Sustainability Framework of the International Finance Corporation of the World Bank and the OECD Guidelines for Multinational Enterprises, as well as guidance developed by IPIECA.

2. INDEPENDENT OVERSIGHT OF THE OIL INDUSTRY

As noted above, communities, NGOs, UN bodies and the World Bank have all expressed serious concern about the current structure for oversight of the oil and gas industry and its social and environmental impact in the Niger Delta. Particular concern has been expressed that the nature of the relationship between the Department of Petroleum Resources and the oil companies is one of partnership, which fundamentally conflicts with the concept of an independent body regulating the industry. According to the World Bank, "this situation has resulted in the government inadequately regulating oil pollution while at the same time, being party to much of the oil-related environmental problems of the Niger Delta."[4] The 2011 UNEP report, *Environmental Assessment of Ogoniland*, also noted that DPR has a clear conflict of interest given its role in maximizing benefits from oil and gas, and that it could not act effectively as a check on the environmental pollution of oil and gas sector. This assessment came one decade after the African Commission on Human and Peoples' Rights (African Commission) had called on the Nigerian government to establish independent oversight of the oil industry, a recommendation that has never been implemented.

The Petroleum Industry Bill must establish an independent oversight body on the social and environmental impacts of the oil industry. Given the long history of poor regulation of the oil industry, the long-standing recommendations of the African Commission and other bodies, and the fact that social and environmental impacts of oil operations in the Niger Delta need to be addressed holistically and coherently, it is imperative the opportunity to put in place a single, independent body to bring about real change is taken.

This independent oversight body should be responsible for environmental, health and safety compliance by all oil companies. The independent oversight body should not be located in any ministry but should have a status similar to the National Human Rights Commission. It should have clear powers and authorities to set and enforce standards, to revise standards, such as EGASPIN, in line with international best practice, to monitor compliance and to sanction companies that breach agreed standards.

As an independent body overseeing the social and environmental dimensions of Nigeria's oil industry, it will be important to establish clear relationships with Ministries responsible for relevant social and environmental matters, including – but not limited to – ministries of health and environment. These Ministries, and relevant agencies, should be represented on an advisory board and the Petroleum Industry Bill should clarify the independent body's overall authority such that there is not overlapping authority. No responsibility for social or environmental compliance should rest with the Ministry of Petroleum.

The budget for the oversight body should also be independent of any Ministry, allocated, as a

[4] World Bank, 1995

set percentage of oil revenues, and should be adequate to carry out its functions independent of the oil industry and should be based on a clear funding structure, for example, a specific levy or a specific percentage of overall revenues.

3. SOCIAL AND ENVIRONMENTAL IMPACTS

As noted above, it is well established, in Nigeria and globally, that the oil industry can have a range of social and environmental impacts, some positive, some negative. The Petroleum Industry Bill should address those impacts, and locate the responsibility and authority with the independent body described above.

The Bill should specifically include the following:

a) Social and environmental impact assessment

The Bill should make clear that operating companies are obliged to carry out comprehensive social and environmental impact assessments, prior to the commencement of any major activity, including exploration, and to update such assessments over time, in line with international good practice.[5] The required process for and content of social and environmental impact assessments should reflect best practice internationally, with details to be included in guidelines provided by the independent oversight body (which would have authority to revise existing guidelines such as EGASPIN, or draft new guidelines, as appropriate). The Bill should reflect the importance of considering all relevant environmental and social risks and impacts associated with the proposed operation (exploration, extraction, transport, etc) and should note the following features as essential:

Consultation with affected communities: in order for consultation to be meaningful, affected communities should have access to adequate information on the proposed project or activity in advance of the consultation; the process itself should be transparent and documented; particular attention should be paid to ensuring the process is inclusive, allowing women, men and marginalized groups to participate.

Land, water and natural resource uses: all existing land and water use, including use of wild or forest resources, should be mapped as part of the social and environmental study. This should include, where appropriate, land and water use downstream of the activity, which may be affected. In mapping existing land use, social and environmental impact assessments

[5] See IPIECA

should ascertain the level of dependence of local communities on such resources for livelihoods, food, access to water and other economic and social rights.

Pollution: all known risks posed by pollution from oil and gas exploration, extraction and production should be assessed, including the impact of seismic activity, drilling, dredging, as well as oil spills, and the risks of third party interference with oil and gas installations. Each risk should be assessed in relation to the specific environment, and mitigation measures identified and implemented.

Disaggregated data: Data should be disaggregated by gender, age group and should enable the identification of particularly vulnerable or marginalized groups.

Clarity on when oil operations will not be permitted due to the nature of the environmental risks: impact assessments should enable risks to be identified and mitigated. However, where it is clear that social and environmental risks cannot be adequately addressed the Bill should make clear that no licence, permit or lease will be granted. The authority responsible for issuing permits, licences and leases (assumed to be DPR) should be required by statute not to grant such permits, licences or leases without the sign-off of the independent oversight body on social and environmental matters in the oil industry.

b) Environmental and Social Management Plan

All operators should submit an Environmental and Social Management plan to the independent oversight body. The Plan should be drawn up with involvement of local communities. It should be made public. For major projects, the plan should be subject to independent evaluation, which should also be a public document.

c) Ongoing monitoring plans

All operators should monitor risks and impacts at regular intervals, and should be required to report on action to prevent negative impacts or mitigate negative impacts to the independent social and environmental oversight body. These reports should be made public in a timely manner. The regulator (i.e., the independent oversight body) should also conduct independent monitoring of Environmental and Social plans, including field visits and independent testing of environmental parameters such as water quality, air quality, and other pollution indicators.

d) Clear responsibilities for action to prevent and address negative impacts

The Petroleum Industry Bill should clearly spell out the responsibility of the operator to address negative impacts which may arise, such as oil spills. The Bill should recognise the 'polluter pays' principle and require that negative impacts are reported to the regulator, addressed in a timely manner, in line with international best practice and prevailing Nigerian standards, and in consultation with affected communities.

e) Adjusting projects based on ongoing impact assessments

As noted above, where an initial social and environmental impact assessment identify risk that cannot be adequately mitigated it should be clear that the regulator (the independent oversight body) will not approve the activity. It should also be clear that, when ongoing monitoring reveals serious social or environmental impacts that cannot be adequately addressed the operator can be required to significantly alter the project or activity and, if there is evidence of serious risks to human well-being or of long-term or irreversible environmental damage the licence, permit or lease may be withdrawn.

4. REQUIREMENTS TO MAINTAIN INTEGRITY AND SAFETY OF PIPELINES AND INFRASTRUCTURE

The PIB should require that all oil companies operating in Nigeria operate to American Petroleum Institute (API) standards of relevance to pipeline integrity and management. All operators should be required to regularly conduct and disclose Asset Integrity Reviews, and to have in place, and disclose, Asset Integrity Management Plans. This provision should apply to existing operations, as well as new operations

5. RESPONSIBILITY TO MONITOR AND PREVENT SABOTAGE

Sabotage and illegal third party activity occurs in the Niger Delta, and contributes to oil spills and pollution. International oil industry standards require that operators act to prevent sabotage and illegal activity.

All operators should be required to take specific steps, in line with international best practice, to make their infrastructure and operations as safe as practicable from sabotage. The PIB should explicitly reinforce the common law position that the one who carries out hazardous activity on land is responsible for failing to anticipate and minimize the damaging

effect of all trespassers, even those who are ill intentioned. The specific actions which the PIB should require include:

Best Available Technology: The PIB should require that all operators in the Niger Delta incorporate Best Available Technology (BAT) into all oil field operations – exploration, production, transportation, and storage, including pipelines and vessels hauling petroleum and petroleum products. Similar legal provisions are found in the USA and other oil producing countries. This would include:

- **Equipment that is tamper resistant:** Ensuring all new installations are made tamper-proof in line with best available technology.

- **Leak detection:** All operators should be required to have in place a best available technology Leak Detection System (LDS).

- **Effective surveillance systems:** All upstream operators should be required to install surveillance systems to prevent sabotage and illegal activity. Such systems should be consistent with the rights of individuals and communities, including their right to privacy.

Additional, the PIB should require existing operators to take action to upgrade existing infrastructure in line with best available technology, and to present plans for such action within 12 months of the PIB coming into force. These plans should contain a timeline for completion of all necessary work.

6. INCLUDE A STRONG PRESUMPTION IN FAVOUR OF TRANSPARENCY AND DISCLOSURE OF INFORMATION

The PIB should state that all information will be publicly available unless there exists a legitimate reason for non-disclosure, such as commercial sensitivity, security-related issues or other well-established and reasonable grounds for non-disclosure. However, all social and environmental impact assessments should be made public, available and accessible as should studies that are conducted in the course of carrying out Social and Environmental Impact Assessments, and studies relied upon for such assessments. Communities and other stakeholders should also have access to official inspections and investigation reports for all pollution-related events.

7. PENALTIES FOR BREACHES OF ENVIRONMENTAL AND SOCIAL PROVISIONS

The PIB should include meaningful sanctions for failure to comply with strict environmental and social standards. All fines – which should be significant enough to act as a meaningful deterrent – should be used to fund the work of the independent oversight body. Persistent failure to comply with social and environmental regulations should result in loss of licence to operate.

8. PUT IN PLACE A FAIR AND TRANSPARENT COMPENSATION AND REPARATIONS SYSTEM

The provisions on compensation in current legislation are inadequate and have caused problems with compensation for communities whose lands, livelihoods and rights are infringed because of the operations of oil companies.[6] For example, provisions within the Petroleum Act and the Oil Pipelines Act empower the Federal government to grant access and use rights in relation to land for the purposes of oil prospecting and mining. Once a company has been given a permit, licence or lease, the state government has to give access

[6] Under the Petroleum Act, section 37, an oil operator should: "in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands." In a similar way, section 6(3) of the Oil Pipelines Act requires "reasonable steps to avoid unnecessary damage to any land entered upon and any buildings, crops or profitable trees thereon, shall make compensation to the owners or occupiers for any damage done under such authority and not made good." Part VIII of EGASPIN deals with oil spills. This section of the regulations states: "A spiller shall be liable for the damage from a spill for which he is responsible. Settlement for damages and compensation shall be determined by direct negotiation between the operator(s) and the landlord(s)."

to the land. The communities are compensated according to a formula that primarily assesses value based on "surface goods" lost.

Current legislation also requires that that licensee or lease holder is liable to pay: "fair and adequate compensation for the disturbance of surface or any other rights to any person who owns or is in lawful occupation of the licensed or leased lands" and for: "damage or injury to a tree or object of commercial value or which is the object of veneration..." However, the term "fair and adequate" is not defined, and taken together with the focus on surface goods, it has significantly disadvantaged communities in several ways: firstly, many things are not covered, including long-term damages – such as loss of livelihood over many years when farm land or fisheries are contaminated - harm to health or loss of access to communal resources including water systems; secondly, in most cases communities have to negotiate directly with oil companies, who have significantly more information and power, and there is no independent oversight of the process or means for communities to challenge unfair assessments by oil companies. The negotiations have tended to exclude and disadvantage women and marginalized people within communities. Moreover, the Land Use Act bars courts from addressing any concerns about the amount or adequacy of compensation paid to people who lose access to their land under the terms of the Act.

Such limitations run contrary to Nigeria's international human rights obligations under the International Covenant on Economic, Social and Cultural Rights, which requires that when people lose land, homes or livelihoods they receive adequate compensation and redress. Adequate compensation is often a necessary factor to prevent a human rights violation (i.e., a breach of international law) from occurring.

It is recommended that the text of the PIB require that:

The holder of a petroleum exploration licence, petroleum prospecting licence or petroleum mining lease shall pay fair and adequate compensation to individuals and communities whose rights are negatively affected by oil and mining operations. Fair and adequate compensation shall include:

- Compensation for loss of or damage to homes and buildings

- Compensation for loss of land owned by an individual or group and/or compensation for loss of the use of land to which an individual or group formerly had rights. Where possible people should be given access to adequate alternative land of similar quality and productivity, and have adequate security of tenure in relation to that land

- Compensation for lost income: where a person's livelihood is undermined due to oil and gas activities they should be given compensation for lost income and/or livelihood, which should include long-term loss of access to livelihoods. For example where a famer's land is polluted they should be compensated for lost use of the land until the land is properly restored to its former level of productivity (or given access to alternative acceptable land). At present compensation only covers the loss of crops and trees damaged – and does not take into account the fact that a family or community may be unable to use the land or water system for several years.

- Compensation for health impacts, which covers the cost of treatment as well as compensation for any loss of income due to inability to work.

- Damage to moving water bodies, such as rivers and streams: this is currently not covered by standard compensation calculations. The effects of an aquatic oil spill can be geographically extensive.

- Ensure that companies are required by law to pay damages both to individuals and for communal losses and that women are not discriminated against in the compensation process.

There should be an effective process for oversight of compensation payments, drawing on best available practice. At a minimum, specially trained government officials should ensure oversight and transparency of the system.

The PIB should also require that companies who cause damage to food sources and/or water sources have an immediate obligation to provide access to clean water for domestic use and access to food sufficient to sustain the affected population while clean up processes are ongoing. Such provisions should be without prejudice to any subsequent compensation process.

9. ENSURE SUSTAINABLE ECONOMIC SUPPORT TO COMMUNITIES

Proposals for a percentage of oil revenues to be given to communities should be included in the legislation. Communities affected by oil operations have long called for sustainable economic investment in their communities, which bear the brunt of the negative impact of such operations. They feel that by receiving a portion of the oil profits, the groups who are most negatively affected will also receive some of the benefits and will be able to use those resources for the development of their communities. A legal framework to ensure that communities receive 10% of oil profits should include robust safeguards to ensure that all members of the community benefit and monies are managed transparently. Such an arrangement should not be seen as an alternative to preventing, mitigating and cleaning up pollution and other negative impacts caused by the oil industry and to ensure that all actors respect human rights.

10. GRIEVANCE MECHANISM

The PIB should also require that the independent oversight body has a grievance mechanism that allows community members to directly raise concerns, request information and make complaints. The grievance process should be adequately staffed, have accessible offices in each State, and have in place procedures to deal with complaints in a timely and transparent manner.

SIGNED:

- African Centre for Leadership & Strategy Development
- Amnesty International
- Centre for Democracy and Development (CDD)
- Centre for Environment, Human Rights and Development (CEHRD)
- Centre for Information Technology and Development (CITAD)
- Civil Society Legislative Advocacy Centre (CISLAC)
- Community Action for Popular Participation (CAPP)
- Environmental Rights Action (ERA)
- Human Rights, Social Development and Environmental Rights Foundation (HURSDEF)
- Public & Private Development Centre (PPDC)
- Publish What You Pay (PWYP)
- Social Action
- Zero Corruption Coalition

APPENDIX 1: NIGERIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Under international law, the government of Nigeria has an obligation to respect, protect and fulfil its citizens' human rights. Its obligation to respect its people's rights means it should refrain from any measures that would result in preventing or undermining their enjoyment of their rights. Its obligation to protect requires the state to ensure that other actors – such as companies – do not undermine or violate human rights. Its obligation to fulfil means it must take positive action to facilitate its people's enjoyment of their human rights.

Nigeria also has a responsibility under its own laws to protect its people against, and address abuses. For example, the Nigerian Constitution states that "the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria". Under the Constitution, Nigerian authorities have to direct their policy towards protecting the environment, food and work

The Constitution is also clear that the oil industry should benefit the host communities, stating that "exploitation of … natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented".

The Nigerian Constitution requires the government to direct its policy towards ensuring that all Nigerians can earn a living. This is also guaranteed by article 15 of the African Charter on Human and Peoples' Rights, which Nigeria is a signatory to. Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a state party, also recognizes "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts".

The human right to water and food are part of the right to an adequate standard of living, recognised under Article 11 of the ICESCR. Article 12 guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

The UN Committee on Economic, Social and Cultural Rights is the expert body monitoring the implementation of the ICESCR. It has clarified that "the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as … a healthy environment".

The Committee has also clarified that a state's obligation under Article 12 extends to "the prevention and reduction of the population's exposure to harmful substances, such as …harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health".

The African Charter on Human and Peoples' Rights also recognizes the right to health. It obliges state parties to take measures to protect the health of their people. And it recognizes the right of all peoples to a "general satisfactory environment favourable to their development". This right is more widely known as the right to a healthy environment, and requires state parties to prevent pollution and ecological degradation.

The state's duty to protect its people against human rights abuses or harm caused by business requires it to take all necessary measures to prevent such abuses. In the context of the oil industry, effective prevention involves establishing an appropriate regulatory system based on international best practice and enforcing those regulations effectively.

Government failure to protect human rights against harm done by companies is a violation of international law. However, companies are also responsible for their impact on human rights. The UN Human Rights Council has confirmed that this "is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and "over and above compliance with national laws and regulations".