# ACCESS TO ENVIRONMENT JUSTICE: LESSONS FOR NIGERIA FROM THE AARHUS CONVENTION*

**Abstract**:

*Access to environmental justice is a problem that has plagued aggrieved individuals whose lives and livelihood have been negatively impacted by the activities of the oil companies in Nigeria's oil rich Niger-Delta region. Many people living in close proximity to the operations of the oil industry feel left out of important decisions on projects that have huge impacts on their lives and are often powerless to seek justice in the courts due to the often prohibitive costs that are attendant to litigation and the protracted nature of cases in Nigeria. Despite the fact that oil is the mainstay of the Nigerian economy, people from the Niger-Delta feel left out and impoverished by the exploitation of oil which has enriched the whole nation. This paper examines the Aarhus Convention and lessons that can be learnt to ensure that access to environmental justice is guaranteed to all and consequently that there is greater protection of the environment.*

**Keywords:** Aarhus Convention, Access to Justice, Pollution, Environmental Protection.

## 1. Introduction

Nigeria is the largest oil producing country on the African continent and derives most of its foreign earnings from its oil industry. Despite the fact that Nigeria reaps huge financial benefits from its natural resources, the country flares huge amounts of gas. Furthermore, there are reports that show that hundreds of oil spills occur in Nigeria yearly.[1] Thus, within the Nigerian oil and gas industry, there is a recurring problem as regards pollution.

This work carries out a comparative analysis between the modes of operation adopted in the oil and gas industries of Nigeria and developed countries (with an emphasis on the UK), examining in the process, the existing and persistent problem of pollution which has plagued the Nigerian State and gone virtually unchecked for over six decades, and dealing with the lacunae in the law currently in place in Nigeria. This analysis is carried out to ascertain the possibility of improving environmental protection in Nigeria.

The thrust of the whole of this research is geared towards highlighting the pollution crisis in the Nigerian oil and gas industry, with a view to improving environmental protection in developing countries, with the emphasis on Nigeria, and achieving a uniform environmental regime in line with developed countries, which in turn has the effect of securing a sustainable future for everyone (including generations unborn) and reducing the impact of the actions of this present generation by dealing with our use of resources and by minimising adverse environmental impacts. Ensuring that we develop in a sustainable manner means living within the capacity of the planet to sustain our activities and where possible, to replenish the natural resources we have at our disposal. It also means ensuring that the actions we take today do not hinder our quality of life in the future, bearing in mind those who do not have access to the same level of resources, and the wealth generated by those resources.

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[1] Amnesty International, *Bad Information: Oil Spill Investigations in the Niger Delta* (London: Amnesty International Publications, 2013) Pg. 10. Also, Amnesty International, *On Trial: Shell in Nigeria, Legal Actions Against the Oil Multinational* (London: Amnesty International Ltd., 2020) Pg. 5.

## 2. Problems Accessing Environmental Justice

Despite the volume of oil spills that occur within the Nigerian oil industry and activities within that industry which negatively affect the lives of individuals living in close proximity of its operations, many victims elect not to enforce their rights through litigation at the courts. People living within the Niger Delta region of Nigeria often complain that the oil companies do not comply with the various laws that are in place to regulate their activities. In a working paper by Dadiowei, a complainant is reported as saying –

> We are told by NGOs that communities are supposed to give the oil companies the social licence to operate… Communities should also be involved from when projects are conceived to completion. We are yet to see it working in any community and this non involvement of communities is the cause of damages to our sensitive areas that support the livelihood of our people. The way our ecosystem is destroyed without a remedial action by the oil companies will continue to increase our poverty….[2]

In light of the foregoing, it is generally perceived that those most likely to be affected are seldom consulted and given a chance to participate in the decision making of proposed projects. Infractions by the oil companies have led to a number of suits being filed by various aggrieved parties in the Nigerian courts and these have resulted in the development of case law that shows *interalia* the judiciary's interpretation of statutory provisions governing the oil industry. It should be borne in mind that there have been cases in which the judgements of some courts have been at variance with the judgements of other courts.

Furthermore, there have been instances in which the cases were dismissed on technicalities and courts appeared unwilling to invoke their powers of equity. In *J. Chinda & Ors V. Shell B.P. Petroleum Company of Nigeria Limited*,[3] the court acknowledged that the plaintiff had suffered damage to their property as a result of the defendant's flare set, but since the claim was brought under the head of nuisance, the court did not find in favour of the plaintiff as it held that they could not prove that the defendant had been negligent in the management and control of the flare set.

On the occasions when the courts decided in favour of the individuals and/or communities, the compensation awarded were so little that the plaintiffs ended up feeling like losers anyway. In *R. Mon and B. Igara V. Shell B.P. Petroleum Company of Nigeria Limited*,[4] the plaintiffs brought an action for damage to their fishpond which was caused by the defendant. They sought compensation in the sum of Two Hundred Thousand Naira. The court agreed that the defendants were liable for the damage caused to the plaintiffs' pond, but awarded the plaintiffs only Two Hundred Naira. In light of the fact that the fish-pond was a source of livelihood for the plaintiffs, the amount was paltry. The quantum of compensation awarded may be justified on the ground that the defendant had paid compensation previously to the plaintiffs' community.

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[2] Tari Dadiowei, 'Environmental Impact Assessment and Sustainable Development in the Niger Delta: The Gbarain Oil Field Experience' (Working Paper No.24, 2009) Pg. 19. [This paper can be accessed online at http://oldweb.geog.berkeley.edu/ProjectsResources/ND%20Website/NigerDelta/WP/Dadiowei_24.pdf] (Last accessed on 29/03/2021).

[3] See Adewale, O., *Judicial Attitude to Environmental Hazards in the Nigerian Oil Industry*, in The Petroleum Industry and the Nigerian Environment, Proceedings of the 1985 Seminar, Department of Petroleum Resources (Environmental Planning and Protection Division).

[4] (1970-1972) 1R.S.L.R. 71.

## 3. Enter the Aarhus Convention

At this point, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (popularly and hereinafter referred to as the Aarhus Convention)[5] becomes of interest to this work. It must be emphasised here that the issue of compliance by the United Kingdom with European pieces of legislation as well as Treaties which the EU has signed up to and ratified like the Aarhus Convention[6] had only occurred because until very recently, the United Kingdom was a member of the European Union and surrendered a part of its sovereignty to the super national body that is the European Union and was thus subject to the decisions and judgments of the European Court of Justice where disputes arise.

The Aarhus Convention is a Treaty of the United Nations Economic Commission for Europe (UNECE) which was brought into effect with the aim of guaranteeing to every person the right to access to information, the right to public participation in decision making and the right to access to justice in environmental matters.[7] The United Kingdom ratified the Aarhus Convention on the 23rd of February 2005[8] and became a full party to the Convention ninety days later.[9]

The Aarhus Convention has been pinpointed as the environmental agreement which –

- Links environmental rights and human rights
- Acknowledges that we owe an obligation to future generations
- Establishes that sustainable development can be achieved only through the involvement of all stakeholders
- Links government accountability and environmental protection
- Focuses on interactions between the public and public authorities in a democratic context.[10]

There has been a lot of praise for the Aarhus Convention. The former Secretary-General of the UN, Kofi Annan said about the Aarhus Convention –

> Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of Principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.[11]

[5] The Aarhus Convention entered into force on 30 October 2001 and was signed and adopted in the city of Aarhus in Denmark on the 25th of June 1998.
[6] The UK also independently signed the Aarhus Convention on 25 June 1998 and ratified it on 23 February 2005.
[7] These three aims or areas, i.e. Access to Environmental Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, are more commonly referred to as the three pillars of the Aarhus Convention.
[8] The Aarhus Convention came into force in the United Kingdom on the 25th of May 2005.
[9] The European Community, as whole, is also a signatory to the Convention and ratified it on 17 February 2005. See Defra, 'Aarhus Convention on Environmental Democracy' <http://www.defra.gov.uk/environment/policy/international/aarhus/> (Last accessed on 16/01/2020).
[10] United Nations Economic Commission for Europe (UNECE), 'Aarhus Convention: About Convention – Introduction' <https://unece.org/environment-policy/public-participation/aarhus-convention/introduction> (Last accessed on 29/03/2021).
[11] See United Nations Economic Commission for Europe (UNECE), 'Aarhus Convention, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: Quotable' <https://unece.org/fileadmin/DAM//env/pp/contentofaarhus.htm> (Last accessed on 29/03/2021).

He further referred to it as "a remarkable step forward in the development of international law." He further stated that "environmental rights are not a luxury reserved for rich countries." This exactly is a pertinent point when thinking about the problem of environmental protection (or the lack thereof) and the environmental rights in Nigeria.[12] It is worthy of note that although the UK is independently signed up to and ratified the Aarhus Convention, it is under greater pressure to conform with the provisions therein as a result of being a member of the EU which also ratified the Convention, as the EU issues Directives and ensures that member States comply with the provisions of the Convention. To this effect, Nigeria would hugely benefit from being a member a super-national body like the EU[13] with similar scope and powers as this would mean that Nigeria would not be able to evade its obligations at will as there would be repercussions for such non-compliance and its citizens would have their rights protected. Furthermore, other parts of the world would benefit from international agreements like the Aarhus Convention.

Article 1 of the Aarhus Convention provides as follows –

> In order to contribute to the **protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being**, each Party **shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters** in accordance with the provisions of this Convention.[14]

This Article underscores the importance of this Convention when one looks at issues relating to the environment. The fact that parties to the Convention are compelled to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters shows that the public has a basis on which their environmental rights are provided[15] and guaranteed. This provision[16] will really be useful in Nigeria if it could be adopted and effectively enforced. This would cover situations like the continuation of gas flaring in Nigeria where the Minister and oil companies have been asked to show the Ministerial certificates issued which has allowed gas to continue to be flared in different oil fields in the country. It would also benefit projects like the Gbarain oil field where there was no public participation in the decision-making process for that development, the result of which has been terrible ecological devastation, which could have been easily avoided.[17]

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[12] It is acknowledged that the Aarhus Convention is not without its problems. There have been problems of implementation and compliance identified, as well as problems relating to access to justice which is discussed extensively below. See A. Andrusevych, and T. Alge and C. Konrad (eds.), *Case Law of the Aarhus Convention Compliance Committee (2004-2011)*, (2nd Ed. RACSE, Lviv: 2011).

[13] At present, there are bodies like the African Union (AU), the African Economic Community (AEC) and the Economic Community of West African States (ECOWAS), but none of these bodies currently exercise the clout of the EU and there is little power that these bodies have over the Member States. They have no power to compel independent States to take action nor have the power to sanction them when they have breached laws or Directives. Most of the benefits currently derived from the AEU and ECOWAS are economic and while the AU which took over from the Organisation of African Unity (OAU) is not primarily an economic body, it is far from being what the EU is currently is.

[14] Emphasis supplied.

[15] See Capacity Global, *The Aarhus Convention (Why is the Aarhus Convention Important?)*. [See http://www.capacity.org.uk/resourcecentre/article_aarhaus.html] (Last accessed on 14/02/2020).

[16] i.e. Article 1 (and indeed the whole Convention).

[17] Tari Dadiowei, 'Environmental Impact Assessment and Sustainable Development in the Niger Delta: The Gbarain Oil Field Experience' (Working Paper No.24, 2009) [This paper can be accessed online at http://oldweb.geog.berkeley.edu/ProjectsResources/ND%20Website/NigerDelta/WP/Dadiowei_24.pdf] (Last accessed on 29/03/2021). It has been alleged in this working paper that Shell rejected an initial EIA report which did not favour their operation. See pages 19 – 21 of the paper.

Articles 4 and 5[18] of the Aarhus Convention deal with access to environmental information. According to Article 4, the Parties to the Convention must ensure that where there has been a request for environmental information from public authorities, such authorities must make such information available to the public[19] and the information must be made available within one month of the request being made. However, there can be an extension of this period for up to two months after the request is made if the volume and the complexity of the information justify the extension. Where this is the case, the public authority must notify the applicant of any such extension and of the reasons for the extension.[20]

By virtue of Article 4(3 & 4), the public authority may refuse to provide environmental information if requested to do so where *inter alia* it does not hold the environmental information requested, or where the request is manifestly unreasonable or formulated in too general a manner, or where the request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice. The public authority may also refuse to provide the environmental information requested where the disclosure would adversely affect the confidentiality of the proceedings of public authorities if this is provided for under national law, International relations, national defence or public security, the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature, etc.[21]

It should however be borne in mind that the Aarhus Convention recognises that the public interest is served by disclosure and therefore the grounds provided for refusal under the Convention are to be interpreted in a restrictive way, taking into account whether the environmental information requested for relates to emissions into the environment.[22]

Article 5 of the Aarhus Convention lays a mandatory obligation on the parties to the Convention to ensure that public authorities possess and update environmental information which is relevant to their functions and also ensure that mandatory systems are established so that there is an adequate flow of

[18] There was a Directive made subsequent to these Articles of the Aarhus Convention. See *Directive 2003/4/EC* of the European Parliament and of the Council of 28 January 2003, on public access to environmental information, which repealed the previous Directive i.e. *Council Directive 90/313/EEC*.

[19] This should be done within the framework of national legislation of the parties. See *Article 4(1)* of the Aarhus Convention. The United Kingdom enacted the *Environmental Information Regulations 2004* (SI 2004 No. 3391) - which forms part of the Regulations made pursuant to the *Freedom of Information Act 2000* - to comply with the Access to information provisions of the Aarhus Convention and *Directive 2003/4/EC*. The *Environmental Information Regulations 2004* came into force on the 1st of January 2005 at the same time as the *Freedom of Information Act 2000*. *Regulation 5*of the 2004 *Environmental Information Regulations* covers the duty of a public authority in the UK to make environmental information available when a request for such has been made.

[20] See *Article 4(2)* of the Aarhus Convention.

[21] See *Article 4(3) and 4(4)* of the *Aarhus Convention* for the full list of instances where a public authority can refuse to provide environmental information where a request for it has been made.

[22] See *Article 4(4)* of the *Aarhus Convention*. This provision would on the face of it appear to throw up a potential problem, as what may be deemed as restrictive is subjective and this might have the effect of leaving applicants who request for environmental information at the mercy of public authorities, who are free to decide whether or not to provide the information requested on the grounds that it might marginally fall into one of the categories listed for refusal under the Convention. However, by virtue of *Article 4(7)*, where a public authority refuses a request for environmental information must give information on access to the review procedure, such that where persons who have made a request for information which has been refused wants to challenge or have the decision of the public authority reviewed, they can do so. The process and procedure for access to justice is covered by *Article 9* of the Convention.

information to public authorities about proposed and existing activities which may significantly affect the environment. Furthermore, it goes on to provide that where there is any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.[23]

In addition to the foregoing provisions, Article 5(2) of the Aarhus Convention states that each party to the Convention shall ensure that the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible.[24]

Articles 6, 7 and 8 of the Aarhus Convention deal with the duty of the Parties to the Convention to inform and involve the public in any decisions on proposed activities which may have a significant effect on the environment. By virtue of Article 6(1), the Parties are entrusted with making the decision whether to permit certain activities.[25] Article 6(2) stipulates that the public has to be informed early on in the environmental decision making process. Article 7 states that each Party shall make appropriate provisions for the public to participate during the preparation of plans, programmes and policies relating to the environment,[26] while Article 8 of the convention deals with time frames for participation at the appropriate stage during the preparation of regulations and rules which may have a significant effect on the environment.

To cap the foregoing provisions off, Article 9 of the Aarhus Convention is the provision that deals with access to justice. Some have described the access to justice provision of the Convention as "the weakest part of the convention".[27] This might be because while this Article appears to give with one hand, an obstacle seems to have been placed with the other hand. Article 9 provides that the Parties to the Convention must ensure that anyone, who feels that a request made for environmental information has been ignored, wrongfully refused, not dealt with or not adequately answered as specified under the Convention, is provided with access to a review procedure.[28] This Article further provides that Parties to the Convention must ensure that "such a person also has access to an **expeditious** procedure established by law that is **free of charge or inexpensive** for reconsideration..."[29]

Article 9(4) stipulates that the review procedure must "provide **adequate and effective remedies**, including injunctive relief as appropriate, **and be fair, equitable, timely and not prohibitively**

[23] See *Article 5(1) (a) – (c)* of the Aarhus convention.
[24] This shall be done within the national framework of the Party in question. As regards this work, the United Kingdom's *Environmental Information Regulations 2004* is the legislation that is applicable. *Regulation 4* of the *Environmental Information Regulations 2004* is the corresponding UK provision that deals with the accessibility of environmental information as covered under *Article 5(2) & (3)* of the Aarhus Convention.
[25] These activities are listed in Annex I to the Aarhus Convention and include among others (for the purpose of this work) mineral oil and gas refineries and installations for gasification and liquefaction. See Article 6(1)(a) of the Aarhus Convention. Article 6(1)(b) also extends to decisions on proposed activities which, though are not listed in Annex I to the Convention, may have a significant effect on the environment.
[26] This must be done within a transparent and fair framework after the Party has provided any necessary information to the public.
[27] Capacity Global, 'The Aarhus Convention: Access to Justice'. [See http://www.capacity.org.uk/resourcecentre/article_aarhaus.html] (Last visited on 14/02/2020).
[28] This would be within the framework of the national legislation of the party in question. The review procedure could be done before a court of law or an independent and impartial body. See Article 9(1) of the Aarhus Convention.
[29] Emphasis supplied. See Article 9(1) of the Aarhus Convention.

**expensive**."[30] Article 9(5) states that the Parties to the Convention "...shall consider the establishment of appropriate assistance mechanisms **to remove or reduce financial and other barriers to access to justice**."[31]

The problem with the Article 9(5) provision is that while it mandates the Parties to the Aarhus Convention to **consider** establishing appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice, it does not actually compel them to establish these mechanisms that should serve to reduce or remove financial[32] barriers that would stand in the way of anyone who otherwise might have brought a claim or an application for a review of a decision which impacts or would impact on the environment. Some might argue that the provisions of article 9(4) should take care of this lacuna, since it provides that the review procedure must not be "prohibitively expensive." The issue however becomes who decides what is "prohibitively expensive" and what is the yardstick for determining such? Is there supposed to be a blanket rule regarding expense or will this be decided on a case by case basis?[33] It should however be borne in mind that there have been reports which attempted to tackle the issue of costs and the prohibitively expensive nature of litigation. The Jackson Review of Civil Litigation Costs[34] recommended that in judicial review cases the costs ordered against the claimant "should not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances" and the 2010 Sullivan Update Report[35] recommended that an unsuccessful claimant in judicial review proceedings should not have to pay the costs of any other party unless they have acted unreasonably in bringing proceedings. Courts have in certain cases issued a Protective Cost Orders (PCO) in a bid to shield a party (often the claimant) from the high costs of litigation.[36]

In the Justice & Environment[37] Position Paper of 2010, the J & E highlighted that it had reached the conclusion that the efficacy of the access to environmental information and public participation in

[30] Emphasis supplied.
[31] Emphasis supplied.
[32] Also included are other barriers to justice.
[33] What might be prohibitively expensive for one individual might not be for the next individual when personal circumstances are taken into consideration. Thus, there might be a need to adopt a subjective approach to the problem instead of an objective one.
[34] See Paragraphs 136 and 142 of the 'Findings and Recommendations of the Aarhus Convention Compliance Committee with Regard to Communication ACCC/C/2008/33 Concerning Compliance by the United Kingdom'. It must be borne in mind that Lord Justice Jackson was commissioned to carry out a review of Civil Litigation Costs (this includes environmental litigation). See Jackson, the Right Honourable Lord Justice, 'Review of Civil Litigation Costs (Final Report)', [The Stationery Office, Norwich. 2010] Pg. xvi, Paragraph 2.6 and Pg. xxi Paragraph 5.11. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> (Last accessed on 12/03/2021).
[35] See Working Group on Access to Environmental Justice, 'Ensuring Access to Environmental Justice in England and Wales' (A.K.A. the Sullivan Report), (2008) at Pg. 26. It is pertinent to note in addition to the foregoing that in a recent update report made in 2010, it was noted that the situation remains unchanged. To this effect, please see also Working Group on Access to Environmental Justice, 'Ensuring Access to Environmental Justice in England and Wales', (Update Report), (2010) at Pgs. 1 – 14. See also Yaffa Epstein, 'Access to Justice: Remedies -- Article 9.4 of the Aarhus Convention and the Requirement for Adequate and Effective Remedies, Including Injunctive Relief', (09 March 2011), <https://poseidon01.ssrn.com/delivery.php?ID=959114027008108116098100086067079023001092026034079086085025024118067094006117100096020058018036060032020102021006073114094099024048022093036092124086079125013116107067043038105093066014099082075031122064094071093103120103018110105126077119096014064095&EXT=pdf&INDEX=TRUE> (Last visited on 18/02/2021].
[36] *R (Corner House Research) v Secretary of Trade and Industry* [2005] 4 All ER 1, or [2005] 1 WLR 2600.
[37] Justice & Environment (J & E) is an European network of environmental law organisations. It is a non-profit association with a mission which states that the association "aims for better legislation and implementation of environmental law on the national and EU level to protect the environment, people and nature." See Justice &

environmental decision-making pillars of the Aarhus Convention can only be determined by the strength of the access to justice in environmental matters pillar. Accordingly, the "…effectiveness of the other two Convention "pillars"… is fundamentally weakened without proper access to justice.[38]

The problem with the provisions of the Aarhus Convention which deal with the cost of justice, is what may be perceived as a lacuna in taking a firm stance as to the objective application of a costing method/mechanism which would serve the purpose of acting as a shield to protect potential litigants and/or claimants, instead of the present situation in which people who would otherwise have brought a claim[39] are scared away or effectively barred when they consider what could be their potential loss should their claim fail. As specified above, Article 9(5) of the Aarhus Convention mandates the Parties to the Convention to consider establishing appropriate assistance mechanisms which would serve the aim of **removing** or **reducing financial**[40] and other barriers to access to justice. Article 9(1) provides that in instances of court reviews, the Parties to the Convention have to ensure that people have access to a procedure which is free of **charge or inexpensive**[41] to reconsider such reviews, while Article 9(4) states that the review procedure must not be prohibitively expensive. Furthermore, Article 3(8) also touches on the issue of cost, but provides as follows –

> Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. **This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings**.[42]

Though the first part of Article 3(8) of the Aarhus Convention does not directly or exclusively deal with the financial costs associated to access to justice in environmental matters, the significance and advantage of a provision like this in a developing country like Nigeria cannot be overemphasised. This importance is underscored when one views the complaints and allegations of people living in the Niger-Delta (oil producing) region of Nigeria with regards to intimidation, victimisation and oppression, which includes, but is not limited to, physical assault, incarceration and/or death. Reference is made here to the case of the environmental activist Kenule Saro Wiwa whose active campaign against the operations of the oil companies in Nigeria and the attendant environmental devastation wreaked in the Niger-Delta had drawn a lot of international attention to the pollution and low quality of the lives of the people of the Niger-Delta. This resulted in his arrest on a few occasions and the last time he was arrested, the government accused him of complicity in the murder of four Ogoni Chiefs through incitement. He was charged and tried by a special military tribunal and executed (by hanging) alongside eight others (commonly known as the Ogoni Nine) on the 10th of November 1995 by the then Nigerian military government of General Sani Abacha on what is roundly believed to be trumped-up charges as many of the witnesses for the government subsequently said that they had been bribed by the Nigerian government to support the criminal allegations. In 1996, the Saro-Wiwa family brought a legal action before the United States District Court for the Southern District of New York under the Alien Tort Statute, the Torture Victim Protection Act of 1992 and the Racketeer Influenced and Corrupt

Environment (European Network of Environmental Law Organizations), 'Access to Justice in Environmental Matters under the Aarhus Convention' (Position Paper, May 2011) <http://www.justiceandenvironment.org/_files/file/J&E-Aarhus-position-paper-2010-05-24(1).pdf> (Last accessed on 29/03/2021).

[38] See Justice & Environment, *Supra* at Pg. 2.

[39] Or filed an application for a review of a decision which impacts or would impact on the environment.

[40] Emphasis supplied.

[41] Emphasis supplied.

[42] Emphasis added.

Organizations Act. This suit was filed against the oil company Royal Dutch Shell, its Nigerian subsidiary Shell Nigeria and Brian Anderson who was the Chief Executive Officer of Shell Nigeria and accused the defendants of colluding with the Nigerian government in committing human rights abuses against the people of Ogoni land. In 2009, thirteen years after the suit was initially filed and a day before trial was eventually supposed to start, Royal Dutch Shell settled the case out of court by agreeing to pay the plaintiffs 15.5 Million Dollars while maintaining that it did not have a role in any wrongdoing and saying that compensation paid was a "humanitarian gesture".[43]

All the foregoing provisions while touching on the fundamental issue of the cost of a review procedure, are quite vague[44] and do not provide guidelines on what costs should be applied nor an objective formula to arrive at the cost of such review procedures. Moreover, Article 3(8) reinforces the rights of national courts to award reasonable costs and all these have been interpreted loosely in different countries which are parties to the Convention as the costs which are applied/awarded vary[45] from one country to another.[46]

In light of the foregoing, the United Kingdom has recently come under fire for its failure to fully comply with the provisions of the Aarhus Convention which state that procedures should be "fair, equitable, timely and not prohibitively expensive."[47] This is mainly because the cost of challenging an administrative decision in the United Kingdom is costly and has been termed as "prohibitively expensive". In an article titled "*Environmental Litigation – A Way Through the Maze*?" Sir Robert Carnwath observed that "Litigation through the courts is *prohibitively expensive* for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds."[48]

About ten years after Sir Robert's observations, the United Kingdom's Working Group on Access to Environmental Justice noted in 2008 the significant problems which are associated with interim injunctions. The working Group observed that in the UK, courts usually require claimants who apply

[43] See The New York Times (Global Business), *Shell to Pay $15.5 Million to Settle Nigerian Case*, (08 June 2009) <http://www.nytimes.com/2009/06/09/business/global/09shell.html?_r=2&partner=rss&emc=rss> (Last accessed on 11/03/2021). See also The Times, *Shell Agrees $15.5m Settlement Over Death of Saro-Wiwa and Eight Others*, (09 June 2009) <https://www.thetimes.co.uk/article/shell-agrees-dollar155m-settlement-over-death-of-saro-wiwa-and-eight-others-x7vk999kdvf> (Last accessed on 29/03/2021). Also see The Guardian, *Shell Pays Out $15.5m Over Saro-Wiwa Killing*, (09 June 2009) <http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa> (Last visited on 29/03/2021).

[44] By using vague and intangible terms like "reasonable costs", "not prohibitively expensive", "inexpensive" and "reducing financial and other barriers to access to justice".

[45] See Jan Darpö, 'On Costs in the Environmental Procedure' (31 January 2011), <https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/Costs_JD_31012011.pdf> (Last accessed on 29/03/2021).

[46] And indeed in different proceedings. See Justice & Environment (European Network of Environmental Law Organizations), 'Price of Justice: International Comparative Analysis on Costs of Administrative and Judicial Remedies' (December 2009) <http://www.justiceandenvironment.org/_files/file/2009/12/price-of-justice.pdf>. Pgs. 8 & 9. (Last accessed on 29/03/2021).

[47] See Aidan Thomson, 'United Kingdom: Litigation Costs and the Aarhus Convention' (Barlow, Lyde & Gilbert) Mondaq (13 December 2010) <http://www.mondaq.com/article.asp?articleid=118032> (Last accessed on 29/03/2021); See also UK Environmental Law Association (UKELA), '*A*ccess to Justice (UK Government and Aarhus)' <http://www.ukela.org/rte.asp?id=96> (Last accessed on 13/02/2019].

[48] Emphasis supplied. See Carnwath, R., Sir, *Environmental Litigation – A Way Through the Maze?* (1999) Journal of Environmental Law Vol. 11 No. 1. (Oxford University Press). Pgs. 3 – 13 at Pg. 9. This paper was initially given as a talk in 1998.

for an injunction (while the substantive issue is pending), to give a cross-undertaking in damages[49] which could open the claimants to huge financial liability which could run into hundreds of thousands of pounds. This usually has the effect of stopping potential individuals and Non-Governmental Organisations from pursuing cases which relate to the environment.[50] It was recommended that when it comes to cases which fall under the Aarhus Convention, courts should not require the use of bonds since they do not exist in many countries which have a well-developed injunctive practice,[51] and the "normal requirement to provide a cross-undertaking in damages where an interim injunction is sought should not apply in environmental cases falling within Aarhus where the court is satisfied that an injunction is required to prevent significant environmental damage and to preserve the factual basis of the proceedings."[52]

In the *Findings and Recommendations of the Aarhus Convention Compliance Committee With Regard to Communication Concerning Compliance by the United Kingdom*,[53] the Committee concluded that the United Kingdom –

> ... has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as "to remove or reduce financial […] barriers to access to justice", as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider.[54]

The Committee further provided in Paragraph 141 that it found in conclusion that –

> ... by failing to ensure that the costs for all court procedures subject to Article 9 are not prohibitively expensive, and in particular by the absence of any clear legally binding

[49] Or bonds.

[50] See Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (A.K.A. the Sullivan Report), (2008) at Pg. 26. It is pertinent to note in addition to the foregoing that in a recent update report made in 2010, it was noted that the situation remains unchanged. To this effect, please see also Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales*, (Update Report), (2010) at Pgs. 1 – 14. See also Yaffa Epstein, 'Access to Justice: Remedies -- Article 9.4 of the Aarhus Convention and the Requirement for Adequate and Effective Remedies, Including Injunctive Relief', (09 March 2011), <https://poseidon01.ssrn.com/delivery.php?ID=959114027008108116098100086067079023001092026034079086085025024118067094006117100096020058018036060032020102021006073114094099024048022093036092124086079125013116107067043038105093066014099082075031122064094071093103120103018110105126077119096014064095&EXT=pdf&INDEX=TRUE> (Last visited on 18/02/2021].

[51] For example, France, Germany, Hungary and Italy. See Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (A.K.A. the Sullivan Report), (2008) *Supra* at Pg. 27.

[52] *Supra* at Pg. 36.

[53] ACCC/C/2008/33.

[54] See Paragraphs 136 and 142 of the *Findings and Recommendations of the Aarhus Convention Compliance Committee With Regard to Communication* ACCC/C/2008/33 *Concerning Compliance by the United Kingdom*. It must be borne in mind that Lord Justice Jackson was commissioned to carry out a review of Civil Litigation Costs (this includes environmental litigation). He submitted a report in 2009, in which he recommended inter alia, that a regime of 'qualified one way costs shifting' be introduced in the United Kingdom. Under this system, the amount of costs that an unsuccessful claimant may be ordered to pay is a reasonable amount, reflective of the means of the parties and their conduct in the proceedings. Furthermore, subject to certain qualifications, the 'qualified one way costs shifting' system will have the effect of relieving the claimant of the liability of paying for the defendant's costs if the legal action is unsuccessful, but the defendant will still be required to pay the claimant's costs if it the legal action is successful. See Jackson, the Right Honourable Lord Justice, 'Review of Civil Litigation Costs (Final Report)', [The Stationery Office, Norwich. 2010] Pg. xvi, Paragraph 2.6 and Pg. xxi Paragraph 5.11. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> (Last accessed on 12/03/2021).

> directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4.

In March 2010, the United Kingdom was issued with a reasoned opinion (also known as final written warning) by the European Commission.[55] This was as a result of a complaint brought by the Coalition for Access to Justice (CAJE) about the prohibitive costs of pursuing a legal suit before a court in the United Kingdom. Should the United Kingdom fail to comply, it could lead to a case being instituted before the European Court of Justice and could potentially lead to the United Kingdom being heavily penalised.[56]

## 4. Conclusion

From the foregoing, it is clear the Aarhus convention is a very important piece of legislation. It has succeeded in breaking new grounds with regards to environmental protection and legislation by subjecting numerous Sovereign States to the same standard of conduct and ensuring that members of the public and Non-Governmental Organisations have a say in the conduct of projects which would affect the environment (and a valid chance to voice their objections where they feel that such projects are not in the best interests of the environment). In this regard, parties are constantly kept on their toes and are answerable[57] to an authority or body higher than themselves. Thus, such parties cannot exact arbitrary powers over matters which impact on the environment as they do not have the final say on the matter and are subject to a uniform set of rules which bind them all. Therefore, a system of uneven or patchy development or neglect of pertinent environmental concerns will be the exception rather than the rule, as failure to comply with the provision of the Convention could result in strict and heavy penalties being applied against defaulting or non-compliant parties.

According to advocates of environmental justice, the Aarhus Convention "…provides a basis for the provision of environmental rights." It is further stated that the Aarhus Convention -

> "... has made significant gains in developing a groundbreaking threshold of good practice regarding access to environmental information and public participation. **These gains could be considered as most significant for citizens in the new EU member states (such as Romania or Bulgaria) that are now bound by a common EU legal framework**. Essentially **the Convention has the potential to provide socially excluded communities with the tools they need to influence and challenge decisions that will result in the degradation or destruction of the environment.** It places importance on environmental justice - a crucial factor in the drive to empower people to seek a good quality of life in a world that is, increasingly full of environmental hazards.[58]

There is an urgent need for the non-compliance problem of Nigeria to be urgently addressed. As advocated above, one way to secure uniformity and adherence with laid down laws/regulations will be if Nigeria surrendered a part of its sovereignty and became a member of a super body akin to the EU, as it will be compelled to conform with laid down rules and directions. Furthermore, the need for a

[55] This was subsequent to a First Written Warning (also known as a Letter of Formal Notice).
[56] See Working Group on Access to Environmental Justice, 'Ensuring Access to Environmental Justice in England and Wales' (Update Report) (2010) Pg. 6. "The Reasoned Opinion also raises the issue of interim injunctions and, in particular, the difficulty faced by individuals and NGOs in giving expensive and often unaffordable 'cross undertakings in damages' before such orders are granted by the courts." See Pg. 6.
[57] Like the United Kingdom currently is with the issuance of a reasoned opinion by the European Community.
[58] Emphasis supplied. See Capacity Global, 'The Aarhus Convention: Why is the Aarhus Convention Important?' [See http://www.capacity.org.uk/resourcecentre/article_aarhaus.html] (Last visited on 13/10/2019).

regional legislation like the Aarhus Convention in Africa cannot be overemphasised, as were it adopted and fully implemented, it would be difficult for Nigeria to get away with not applying valid statutory requirements regarding the environment and almost impossible for the oil companies operating in Nigeria to initiate and/or get away with sub-standard operations which have the effect of degrading the environment.

It is acknowledged that it is likely to take a long while (possibly several years) for the solutions proffered in this work to be fully implemented, even in the unlikely event that the wheels are put into motion immediately. This is bearing in mind that Africa does not have a body that has the sheer breath of power and scope that the EU does and it is highly unlikely bearing the lack of political will in Nigeria that significant progress can be achieved within a short timeframe.