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ARTICLE

Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice

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Abstract
Public access to environmental information is a recurring theme in many international environmental law regimes. Nigeria has ratified and committed itself to many such regimes over the years. And yet, until recently, it had a culture of secrecy in (environmental) governance that was sustained by legislation, with the attendant harm to the environment and public well-being. This changed in 2011, with the enactment of the Nigerian Freedom of Information (FOI) Act. This article uniquely assesses the value of the Nigerian FOI Act in relation to what may largely be considered international best practice principles on public access to environmental information as generally reflected in the UNECE's Aarhus Convention. Even though Nigeria is not a party to it, it is argued that the Convention is still legally and politically relevant to Nigeria. This comparative analysis will reveal areas where the Nigerian FOI Act aligns with, probably goes beyond, but also falls short of best practice, thus leading to some suggestions for improvement in the Act in order to ensure better public access to environmental information.

Keywords: Public Access to Environmental Information, Public Participation, Aarhus Convention, Nigerian Freedom of Information Act

1. INTRODUCTION

It is universally acknowledged that the concept of democracy naturally calls for public participation in the process of governance.[1] Public participation in a democratic context transcends voting rights[2] to include reasonable opportunities for the public to make direct contributions in the decision-making processes of the state and to have meaningful

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1 See C. Pateman, *Participation and Democratic Theory* (Cambridge University Press, 1970).

2 M.A. Seligson & J.A. Booth (eds), *Elections and Democracy in Central America Revisited* (University of North Carolina Press, 1995), at pp. 3–4.

access to justice, as enabled by the disaggregation of state power.[3] Essentially, it is this form of participatory democracy – which embodies the idea that 'the governed should engage in their own governance'[4] – that underlies the notion of public participatory rights in environmental matters, to which access to environmental information is a key component.

The essentiality of public access to environmental information is made apparent by the fact that *meaningful* public participation in decision-making processes and *effective* access to justice in environmental matters rely largely on the adequate provision of information to the public.[5] Also, given that the environment may be considered to be a common good, fundamental to the health and survival of human beings, it seems logical and reasonable that information relating to this good should be accessible to the wider public, and not merely restricted to the hands of a few administrators.[6] This position is aptly echoed by Weiner's popular saying that '[t]o live effectively is to live with adequate information'.[7] In particular, among other reasons, members of the public require access to environmental information to enable them to make personal decisions about how to live their lives, as well as to criticize and to hold public authorities accountable in ways which might improve decision-making and prevent harm to humans and the environment.[8]

In the light of the above, considering that Nigeria is formally a democracy, this article aims to discuss, and compare with international best practice principles, aspects of the Nigerian legal regime – essentially the 2011 Freedom of Information (FOI) Act[9] – that allow for public access to environmental information held by public institutions. This discussion aims to understand the extent of the right granted under the Nigerian FOI Act in relation to the expectations created by relevant best practice principles, and aims to suggest improvements to the Act where necessary. Although the article focuses mainly on doctrinal analysis, the effectiveness of the Act, in principle, may still be undermined by potential problems of implementation and enforcement, for various socio-economic or political reasons. Yet, even though law reform *alone* is not sufficient for realizing effective public access to environmental information, it is

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3 See J.J. Rousseau, *The Social Contract* (F. Watkins (ed. & transl.), University of Wisconsin Press, 1986), at pp. 102–6.

4 G. Pring & S.Y. Noe, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development', in D.N. Zillman, A.R. Lucas & G. Pring (eds), *Human Rights in National Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resource* (Oxford University Press, 2002), pp. 11–76, at 11. See also, N. Roughan, 'Democratic Custom v International Customary Law' (2007) 38 *Victoria University of Wellington Law Review*, pp. 403–16, at 407.

5 See Pring & Noe, ibid., at p. 29; and N.A.F. Popovic, 'The Right to Participate in Decisions that Affect the Environment' (1993) 10(2) *Pace Environmental Law Review*, pp. 683–709, at 694.

6 L. Krämer, 'Transnational Access to Environmental Information' (2012) 1(1) *Transnational Environmental Law*, pp. 95–104, at 97–103.

7 N. Weiner, *The Human Use of Human Beings: Cybernetics and Society* (Doubleday & Company Inc., 1956), at p. 18.

8 See S. Kravchenko, 'Is Access to Environmental Information a Fundamental Human Right?' (2009) 11(2) *Oregon Review of International Law*, pp. 227–65, at 228; and S. Bell, D. McGillivray & O. Pedersen, *Environmental Law* (8th edn, Oxford University Press, 2013), at pp. 317–9.

9 Freedom of Information Act, 28 May 2011, Laws of the Federation of Nigeria, (2011) 36(98) *Official Gazette*, available at: http://foia.justice.gov.ng/pages/resources/Freedom_Of_Information_Act.pdf.

nonetheless a necessary prerequisite, and arguably remains the most fundamental element in achieving and sustaining effective public access.[10] This conclusion justifies the choice to perform a doctrinal comparative analysis.

Two fundamental questions necessarily arise when considering the aforementioned aim of this article. Firstly, as it relates to public access to environmental information, what reasonably constitute 'international best practice principles'? Secondly, why is this body of best practice principles both relevant to Nigeria and valuable as a basis for comparing and improving the related Nigerian (legal) regime? These questions will be dealt with in the next section of this article, which will also provide some Nigerian socio-political context to the general discussion. The following discussion will encompass a comparative analysis of the Nigerian FOI Act and selected best practice principles, based upon specific criteria regarding public access to environmental information held by public institutions.[11]

2. FRAMEWORKS: INTERNATIONAL BEST PRACTICE AND NIGERIAN LEGISLATION

2.1. *International Best Practice*

In light of the importance of ensuring public access to environmental information as discussed above, it is no surprise that a large number of international environmental regimes contain right-to-know provisions.[12] Examples of such (binding international) regimes that have been ratified by Nigeria include:

- the Convention concerning the Protection of the World Cultural and Natural Heritage (WHC);[13]
- the United Nations (UN) Framework Convention on Climate Change (UNFCCC);[14]
- the UN Framework Convention on Biological Diversity (CBD)[15] and its Cartagena Biosafety Protocol;[16] and

[10] See G. Tardi, 'Law as a Counterweight to Politicisation in Democratic Public Management' (2012) 38(4) *Commonwealth Law Bulletin*, pp. 591–615, at 595–6; and S. Kravchenko, 'Strengthening Implementation of MEAs: The Innovative Aarhus Compliance Mechanism', paper presented at the 7th International Conference on Environmental Compliance and Enforcement, Marrakech (Morocco), 7–15 Apr. 2005, at p. 4, available at: http://inece.org/conference/7/vol1/Kravchenko.pdf.

[11] This article focuses mainly on the duty of public authorities to provide environmental information upon request, and not on their duty to actively disseminate environmental information.

[12] See Pring & Noe, n. 4 above.

[13] Paris (France), 16 Nov. 1972, in force 17 Dec. 1975, available at: http://whc.unesco.org/archive/convention-en.pdf. Ratified by Nigeria on 23 Oct. 1974.

[14] New York, NY (United States), 9 May 1992, in force 21 Mar. 1994, available at: http://unfccc.int. Ratified by Nigeria on 19 Aug. 1994.

[15] Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, available at: http://www.cbd.int/convention/text. Ratified by Nigeria on 29 Aug. 1994.

[16] Cartagena Protocol on Biosafety to the Convention on Biodiversity, Montreal (Canada), 29 Jan. 2000, in force 11 Sept. 2003, available at: http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf. Ratified by Nigeria on 15 July 2003.

- the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa (UNCCD).[17]

In addition, notable international soft law instruments containing provisions calling on states to ensure public access to environmental information, which have been signed and approved by Nigeria, include the World Charter for Nature,[18] Agenda 21,[19] and the Rio Declaration on Environment and Development (Rio Declaration).[20]

It is useful to reflect briefly on the legal status of Principle 10 of the Rio Declaration which, among others, calls on states to ensure that the public has appropriate access to environmental information held by public authorities. This principle has helped to crystallize and to lend significant weight to the theme of public access to environmental information. The significance of Principle 10 in the field of international environmental law thus cannot be overstated. Importantly, it has inspired similar provisions in many international environmental regimes, including the popular UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention).[21] Even international institutions such as the World Bank,[22] the World Trade Organization (WTO),[23] and the African Development Bank[24] have had their programmes influenced by Principle 10. Although several countries admit that more still needs to be done in this regard, it has been acknowledged that Principle 10 has objectively helped to improve national legislation and practice in environmental democracy.[25] Thus, Principle 10 has been kept on the front burner, and its status has risen far beyond that of a mere soft law.

Its importance has been underlined by Händl, who has consistently argued that given the human rights foundation of Principle 10 and its widespread implementation, its significance 'ha[s] coalesced to the point where the normative provisions of Principle

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17 Paris (France), 17 June 1994, in force 26 Dec. 1996, available at: http://www.unccd.int/Lists/SiteDocumentLibrary/conventionText/conv-eng.pdf. Ratified by Nigeria on 8 July 1997.

18 UN General Assembly Resolution A/RES/37/7, 28 Oct. 1982, available at: http://www.un.org/documents/ga/res/37/a37r007.htm.

19 Adopted at the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, available at: http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

20 Report of the United Nations Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26, 12 Aug. 1992, available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

21 Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/welcome.html.

22 See N. Bernasconi-Osterwalder & D. Hunter, 'Democratizing Multilateral Development Banks', in C. Bruch (ed), *The New 'Public': The Globalization of Public Participation* (Environmental Law Institute, 2002), pp. 151–64.

23 See N. Gertler & E. Milhollin, 'Public Participation and Access to Justice in the World Trade Organisation', in Bruch, ibid., pp. 193–202.

24 See A. Fall, 'Implementing Public Participation in African Development Bank Operations', in Bruch, n. 22 above, pp. 165–74.

25 J. Foti, 'Rio+20 in the Rear View: Countries Commit to Improve Environmental Democracy', *WRI Insight,* 2 July 2012, available at: http://insights.wri.org/news/2012/07/rio20-rear-view-countries-commit-improve-environmental-governance.

10 must be deemed legally binding [internationally] … [it] arguably represent[s] established human rights'.[26] In a similar vein, there is increasing support for the notion that, since Principle 10 is widespread in laws and has gained wide acceptance among states (*opinio juris*), it has or may have acquired the status of 'customary international law'[27] binding on all states. The International Court of Justice (ICJ) recently held in the *Pulp Mills Case*[28] that an environmental impact assessment (EIA) in a transboundary context (which, as a general principle, should necessarily involve public consultation and access to related environmental information[29]) is now considered a requirement of 'general international law' (and not merely a treaty-based obligation) on the ground that the practice 'has gained so much acceptance among States'.[30] While the actual legal status of Rio Principle 10 may be debatable, it is nonetheless sufficient to argue here that, at a minimum, it is a fast-emerging rule of customary international law, especially as regards access to environmental information.[31] The rising status of Principle 10 is arguably sufficient to place a strong moral and (quasi) legal obligation on states like Nigeria that are committed to such regimes to expeditiously ensure that their laws and practices are in consonance with the aspirations of those norms.

However, despite the fact that the Rio Declaration and the regimes mentioned above broadly indicate best practice with respect to public access to environmental information, their provisions on the subject are mostly general and brief. Consequently, it is necessary to unpack these provisions in order to truly understand their relevance and enable a useful discussion of what should be done in a country such as Nigeria to fulfil the aspirations of these provisions. To a reasonable extent, the Aarhus Convention has achieved this. It is argued that the Convention has reorganized and clarified the legislative and practical steps required to successfully implement the more general access requirements in the aforementioned international regimes. Thus, the provisions of the Aarhus Convention constitute a plausible benchmark against which to

[26] G. Händl (ed), *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992* (UN Audiovisual Library of International Law, 2012), at p. 6, available at: http://untreaty.un.org/cod/avl/pdf/ha/dunche/dunche_e.pdf. See also G. Händl, 'Human Rights and Protection of the Environment: A Mildly "Revisionist" View', in C. Trindade (ed), *Human Rights, Sustainable Development and the Environment* (Instituto Interamericano de Derechos Humanos/Banco Interamericano de Desarrollo, 1992), pp. 117–42, at 139–40.

[27] A growing view highlighted in C. Bruch, 'Legal Frameworks for Public and Stakeholder Involvement', presentation at the Regional Workshop on Public Participation in International Waters Management in Latin America and the Caribbean, Montenegro (Uruguay), 6–9 Dec. 2006, available at: http://iwlearn.net/abt_iwlearn/events/workshops/p2/20061207/p2lac07-bruch. For a discussion on customary international law, see T. Treves, 'Customary International Law', in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (online edition) (Oxford University Press, 2008), available at: http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1393&recno=29&.

[28] *Case concerning Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment, *ICJ Reports* (2010), at p. 14, available at: http://www.icj-cij.org/docket/files/135/15877.pdf.

[29] A. Boyle, 'Pulp Mills Case: A Commentary', at p. 3, available at: http://www.biicl.org/files/5167_pulp_mills_case.pdf.

[30] *Pulp Mills Case*, n. 28 above, para. 205.

[31] See J. Cameron & R. Mackenzie, 'Access to Environmental Justice and Procedural Rights in International Institutions', in A. Boyle & M. Anderson (eds), *Human Rights Approach to Environmental Protection* (Oxford University Press, 1996), pp. 129–52, at 134.

assess Nigeria's compliance with its international law commitments in the field of access to environmental information, even though Nigeria is not a party to the Convention.[32] As such, in spite of the Aarhus Convention not being a formal source of law for Nigeria, it arguably bears weight in the country's political and legal systems.

Supporting the above perspective, former UN Secretary-General Kofi Annan has posited that '[a]lthough regional in scope, the significance of the Aarhus Convention is global' and it constitutes 'a possible model for strengthening the application of Principle 10 in other regions of the world'.[33] To facilitate this, the Aarhus Convention provides for some flexibility in deciding how some of its obligations will be implemented 'in view of the varying legal systems and governance capacities of various Parties across the UNECE region'.[34] The potential of the Aarhus Convention to enable countries around the world to keep up with international best practice with respect to public access to environmental information is widely recognized[35] by (among others) the United Nations Environment Programme (UNEP), which has praised the Convention for being 'an advanced articulation of Rio Principle 10'.[36] Consequently, a trend has emerged whereby states that have not even signed the Convention look to it for guidance in drawing up their environment-related access laws or evaluating them.[37] Examples include Brazil[38] and Mauritius.[39] It has also been noted that '[a] number of other regions of the world show a strong interest in the Aarhus Convention and are discussing the development of similar obligations'.[40]

There are further arguments to support the global significance of the Aarhus Convention and, indeed, its significance for Nigeria. The most important case to substantiate this argument is probably *Taskin* v. *Turkey*.[41] In this case, the fact that Turkey was not a party to the Aarhus Convention did not stop the European Court of

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32 See UN Institute for Training and Research (UNITAR), 'Rio Principle 10 National Profile and Action Plan Project', available at: http://www.unitar.org/egp/rio-principle-10-projects.

33 S. Stec & S. Casey-Lefkowitz, *The Aarhus Convention: An Implementation Guide* (UN, 2001), Foreword, at p. v. (Aarhus Guide).

34 M. Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10(3) *Global Environmental Politics*, pp. 10–31, at 21–2.

35 Ibid., at p. 160. See also Aarhus Guide, n. 33 above, at p. 6; R. Hallo, 'Access to Environmental Information: The Reciprocal Influences of EU Law and the Aarhus Convention', in M. Pallemaerts (ed), *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law* (Europa Law, 2011), pp. 55–66, at 62; A. Antonelli & A. Biondi, 'Implementing the Aarhus Convention: Some Lessons from the Italian Experience' (2003) 5(3) *Environmental Law Review*, pp. 170–78, at 170.

36 Available at: http://www.unep.org/dec/onlinemanual/Compliance/NegotiatingMEAs/Transparency/Resource/tabid/605/Default.aspx.

37 See J. Wates, 'The Future of the Aarhus Convention: Perspectives Arising from the Third Session of the Meeting of the Parties', in Pallemaerts (ed), n. 35 above, pp. 383–412, at 395.

38 See S.A. Nascimento da Nóbrega, 'Access to Environmental Information: A Comparative Analysis of the Aarhus Convention with Brazilian Legislation' (2011) 2 *Environmental Law Network International*, pp. 87–95, at 87–8.

39 UNEP, 4th Programme for the Development and Review of Environmental Law, UNEP/GC.25/INF/15/Add.2, 29 Oct. 2008, at p. 3, available at: http://www.unep.org/gc/gc25/info-docs.asp.

40 Aarhus Guide, n. 33 above, at p. 6.

41 *Taskin and Others* v. *Turkey*, ECtHR, Application No. 46117/99, Judgment of 10 Nov. 2004, pp. 1–29, available at: http://www.globalhealthrights.org/wp-content/uploads/2013/02/ECtHR-2005-Taskin-and-Ors-v-Turkey.pdf.

Human Rights (ECtHR) from directly reading the provisions of the Aarhus Convention into the European Convention on Human Rights 'in a particularly extensive form' in deciding the matter.[42] It is thus not surprising that the Aarhus Convention was embraced and recognized as 'a model of a public participation regime'[43] in a UN Economic Commission for Africa (UNECA) report on improving environmental public participation in Africa. Similarly, a study commissioned by the African Union to help African governments implement Article 23 ('Public Awareness and Participation') of the Cartagena Protocol on Biosafety,[44] has expressed the benefit of '[d]raw[ing] up an African convention similar to the Aarhus Convention on public participation or adopt[ing] the Aarhus Convention'.[45]

A further testament to the expansive influence of the Aarhus Convention is that new international environmental instruments are now being inspired by the Convention. One such important instrument is the 2010 UNEP 'Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters' (Bali Guidelines),[46] which have been adopted by the UNEP Governing Council[47] and which bear fundamental similarities to the Aarhus Convention. Notably, the 'Aarhus-like' Bali Guidelines were said to be primarily for developing countries (like Nigeria), to help them to implement their commitments under Rio Principle 10. The same applies to the draft Commentary to the Bali Guidelines which, in addition, makes explicit reference to portions of the Aarhus Convention. Although the text of the Commentary was not negotiated by governments or adopted by the UNEP Governing Council, it was developed by UNEP 'taking into account the comments received from Governments and civil society groups from around the world'.[48]

The final point to emphasize is that a straightforward and general comparison with the Aarhus Convention is arguably valuable in its own right, given its role in the field as an exemplary international instrument and law reform tool. This is so in light of the developing notion of the transnationalization of environmental law, especially considering that environmental law is itself 'inherently polycentric and multicultural'

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42 A. Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) *European Journal of International Law*, pp. 613–42, at 624.

43 UNECA, *Improving Public Participation in the Sustainable Development of Mineral Resources in Africa* (UNECA, 2004), at pp. 15–6 and 37, available at: http://repository.uneca.org/bitstream/handle/10855/5560/bib.%2039823_I.pdf?sequence=1.

44 See n. 16 above.

45 M.W. Kamara, *Public Participation in African Biosafety Regulations and Policy* (African Union Commission, 2010), at p. 8, available at: http://www.cbd.int/bs/doc/outreach/auc-public-participation-en.pdf.

46 UNEP/GCSS.XI/11, Decision SS.XI/5, Part A, 26 Feb. 2010, available at: http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf.

47 The UNEP Governing Council is a political body made up of 58 Member States elected by the UN General Assembly for three-year terms on the following basis (taking into account the principle of equitable regional representation): 16 seats for African states, 13 seats for Asian states, 6 seats for Eastern European states, 10 seats for Latin American states, and 13 seats for Western European and other states. Generally, the UNEP General Council has responsibility for recommending and providing policies relevant for environmental protection. See UNGA Resolution 2997 (XXVII), 15 Dec. 1972, on Institutional and Financial Arrangements for International Environmental Cooperation, available at: http://www.unep.org/PDF/UN_GA_2997.pdf.

48 Bali Guidelines, n. 46 above, Annex.

in nature and deals with subject matters that often extend beyond national boundaries.[49] It is argued that, as part of the notion of transnational environmental law, certain environmental legal principles and standards acquire authority not by virtue of domestic or international enactment, but by indirect influence on the sources of law formally recognized in a national legal system and other influential factors. These influential factors include basic usefulness, esteem, explanatory power, and overlap and affinity with officially recognized legal norms.

This offers an explanation as to why states like Brazil and Mauritius have taken to improving their legal regimes and practices with the guidance of the provisions of the Aarhus Convention despite not being parties to it. It is arguably also the reason why the ECtHR confidently applied the requirement of the Convention to Turkey despite it not being a party to the regime. Further support can also be found in the fact that in Nigeria, for example, 'mere compliance with existing municipal law is no longer acceptable to environmentally concerned communities as a good enough justification by government and developers for their actions';[50] rather they strive to hold the government and developers to account based on 'better laws' operational elsewhere, such as the Aarhus Convention. Environmental rights activists in Nigeria operate on similar standards and use the Aarhus Convention and other legal norms as a guideline for their work and campaigns, in so far as they relate to environmental procedural matters.[51]

It is in light of the discussion above that references to international best practice principles in subsequent parts of this article will make central use of certain provisions of the Aarhus Convention. The following exploration will demonstrate how some of these provisions overlap, emphasize or amplify existing provisions of other international environmental regimes. This constitutes the comparative basis that will contribute to providing a useful assessment of the value or adequacy of the relevant Nigerian legislation.

2.2. *Nigerian Legislation*

Although Nigeria has ratified and committed itself to several international environmental regimes, parts of which require Nigeria to guarantee public access to environmental information, for many years it had not given domestic effect to these regimes by failing to put in place the required legal mechanism.[52] In fact, a recognized general public right of

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[49] See V. Heyvaert & T.F.M. Etty, 'Introducing Transnational Environmental Law' (2012) 1(1) *Transnational Environmental Law*, pp. 1–11, at 3–5; and E. Fisher, 'The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers' (2012) 1(1) *Transnational Environmental Law*, pp. 43–52.

[50] Y. Omorogbe, 'The Power of the People: Public Participation and Control in Resource-rich States', presentation at the 36th Annual Conference of the Nigerian Society of International Law, River State (Nigeria), 14–6 Sept. 2006.

[51] See West African Insight, 'Oil Exploration, Environmental Rights, and the Future of Nigeria's Niger Delta', *West African Insight,* 10 Oct. 2010, available at: http://westafricainsight.org/articles/PDF/61.

[52] In Nigeria, in accordance with s. 12(1) of the 1999 Constitution of the Federal Republic of Nigeria (Cap 23, Laws of the Federation of Nigeria, 2004) (Nigerian Constitution), a legislative enactment is needed to give domestic effect to the provisions of a treaty ratified by the Nigerian government.

access to environmental information was non-existent in Nigeria until recently. This was because of a plethora of colonial laws[53] that remained operational even after Nigeria's independence in 1960 and its formal return to democracy in 1999 following 28 years of military rule. Principally, the Official Secrets Act[54] made it a crime for civil servants to give out classified official information, and for anyone to receive or reproduce such information without government authorization.[55] The most restrictive aspect of this Act, which prohibited the transmission of 'classified matter', was the wide and vague[56] interpretation given to the term 'classified matter'. Its implementation meant that any government information could fall within the purview of the Act. In practice, true to the spirit of the Act, nearly all information held by public institutions was strictly classified: newspaper cuttings already in the public domain were still included in classified government files, and government departments withheld information from each other and sometimes even from the National Assembly (Parliament).[57] In addition, the Nigerian Constitution does not expressly confer a right on the public to access environmental information held by public institutions. None of the provisions – including section 39(1), which stipulates the right to 'receive and impart ideas and information without interference' – have been officially recognized or interpreted by a court as including such a right of access.

The atmosphere of widespread and perverse secrecy in Nigeria took its toll on the environment and public well-being. The Niger Delta region of Nigeria – where crude oil exploration and exploitation have devastated the environment, especially through frequent oil spills and continuous gas flaring – is a telling example. Many people in this region drink, cook and wash in polluted waters; many eat fish contaminated with crude oil and breathe in gas-polluted air, leading to health problems that could have been avoided.[58] These problems have persisted on such a large scale partly because many inhabitants are unable to make informed personal choices since, according to Amnesty International, 'they have almost no information on the impacts of pollution[59] … [as] no law in Nigeria compels the publication of basic environmental monitoring data'.[60] This lack of access to environmental information has also contributed to fuelling serious conflicts between communities, governments and private corporations in the region.[61] It has rendered meaningless public participation in environmental

53 E.g., Evidence Act, Cap E14; Public Complaints Commission Act, Cap P37; Statistics Act, Cap S10; Criminal Code Act, Cap C38; National Security Agencies Act, Cap N74 – all under the Laws of the Federation of Nigeria, 2004.

54 Cap O3, Laws of the Federation of Nigeria, 2004.

55 Ibid., s. 1.

56 See s. 9(1).

57 S. Olukoya, 'Rights-Nigeria: Freedom of Information Bill Proves Elusive', *Inter Press Service*, 21 June 2004, available at: http://ipsnews.net/africa/interna.asp?idnews=24297.

58 Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (Amnesty International, 2009), at p. 21, available at: http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf.

59 Ibid.

60 Ibid., p. 61.

61 Ibid., p. 51.

decision-making processes and has negatively impacted on the ability of communities to seek legal redress for harm caused by extractive projects.[62]

The plight of the inhabitants of the Niger Delta came to the fore in the case of *Social and Economic Rights Action Centre (SERAC) and Another* v. *Nigeria*[63] (the *Ogoniland* case), adjudicated by the African Commission on Human and Peoples' Rights. In this case, the applicants alleged that the Nigerian government had withheld from the Ogoni communities information on the dangers created by crude oil exploitation.[64] On this point, the Commission recognized the procedural aspects of Articles 16[65] and 24[66] of the African Charter on Human and Peoples' Rights (African Charter)[67] – ratified by Nigeria – and held that in order for states to comply with the 'spirit' of those provisions, which the Nigerian government had failed to do, they must provide and ensure public access to environmental information, especially for communities exposed to hazardous materials and activities.[68] Relying on the fact that the decision was not legally binding (given the limited powers of the Commission[69]), the Nigerian government failed to put in place any mechanism aimed at complying with it. Moreover, despite Articles 16 and 24 of the African Charter being part of the implementing legislation in Nigeria,[70] the Commission's radical interpretation of the provisions had no noticeable formal impact in Nigeria.

The above developments reignited efforts to advocate for freedom of information in 1993. This advocacy 'originated as a citizen-led demand and was for the most part led by ordinary folks'.[71] Nigerian citizens put together a draft FOI Bill and submitted it to the National Assembly in 1999. '[T]he bill excited strong passions and strong suspicions'.[72] Nevertheless, on 24 May 2011, after eleven years of legislative dithering and several revisions, the National Assembly adopted the final version of the FOI Bill. The Bill was signed into law by the Nigerian President on 28 May 2011.

Nigeria's new FOI Act signals a significant legislative shift away from the era of legalized secrecy in favour of openness. As the Long Title of the FOI Act states, the

62 Ibid.

63 (2001) African Human Rights Law Reports 60.

64 Ibid., para. 4.

65 Art. 16 generally provides for the right of every individual to the 'best attainable state of physical and mental health'.

66 Art. 24 provides for the right of all peoples to 'a general satisfactory environment favourable to their development'.

67 Banjul (Gambia), 27 June 1981, in force 21 Oct. 1986, available at: http://www1.umn.edu/humanrts/instree/z1afchar.htm.

68 *Ogoniland* case, n. 63 above, paras 53 and 70–1.

69 African Charter, n. 67 above, Art. 45.

70 I.e., African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria, 2004.

71 C.A. Odinkalu, 'Nigeria's Freedom of Information Law: How Friends Launched a Movement', *Open Society Foundations,* 3 June 2011, available at: http://www.soros.org/voices/nigeria-s-freedom-information-law-how-friends-launched-movement.

72 Ibid.

'Act makes public records and information more freely available, [and] provide[s] for public access to public records and information' held by a 'public institution';[73] 'any person' (which includes groups and corporations) is invested with the right of access.[74] Importantly, the FOI Act takes priority over the Official Secrets Act and any other law relating to access to information.[75] Contravention of the FOI Act by public institutions or officers is criminalized,[76] and applicants are entitled to judicial review of the decisions of public institutions on their applications.[77] The FOI Act applies to all states in the Federal Republic of Nigeria.[78] As is the case in many countries,[79] the FOI Act does not distinguish 'environmental information' from other types of information held by public institutions in Nigeria, which 'includes all records, documents and information stored in whatever form'.[80]

Nigerian environmental law researchers have expressed high hopes that the passage of the FOI Act will substantially improve public access rights to environmental information in their country.[81] The Nigerian government claims that the Act is 'consistent with international best practice'.[82] The following sections will generally evaluate the extent to which these claims and aspirations are met by the FOI Act in view of some international best practice principles that are relevant to Nigeria, and suggest improvements to the law where necessary.

3. THE PUBLIC RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION

3.1. *The Request and the Right of Access*

In Nigeria, section 1(1) of the FOI Act provides that '... the right of any person to access or request information ... which is in the custody or possession of any public official, agency or institution howsoever described, is established'. This key provision exemplifies best practice as reflected in Principle 10 of the Rio Declaration, Article 4(1)

73 FOI Act, n. 9 above, s. 31 defines 'public institution' to include government bodies and some private entities.

74 Ibid., s. 1. See the definition of 'person' in s. 31 of the Act.

75 Ibid., s. 1(1). See also ss. 28 and 30(2).

76 Ibid., ss. 7 and 10.

77 Ibid., ss. 2(6) and 20.

78 See C.A. Odinkalu, '10 Myths about the FOI Act', *Right to Know*, 25 Aug. 2011, available at: http://www.r2knigeria.org/index.php?option=com_content&view=article&id=200&Itemid=313.

79 E.g., Finland, Sweden, the Netherlands, and the US: see Aarhus Guide, n. 33 above, at p. 35.

80 FOI Act, n. 9 above, ss. 1(1) and 31. See D. Shelton & A. Kiss, *Judicial Handbook on Environmental Law* (UNEP, 2005), at p. 27.

81 See V.E. Kalu, 'State Monopoly and Indigenous Participation Rights in Resource Development in Nigeria' (2008) 24(3) *Journal of Energy and Natural Resource Law*, pp. 418–49, at 441–2; and L. Atsegbua, V. Akpotaire & F. Dimowo, *Environmental Law in Nigeria: Theory and Practice* (2nd edn, Ambik Press, 2010), at p. 250.

82 The Federal Ministry of Justice, Nigeria, 'Nigeria's 4th Periodic Country Report: 2008–2010 on the Implementation of the African Charter on Human and People's Rights in Nigeria', Aug. 2011, at p. 14, available at: http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4_nigeria_2011_eng.pdf.

of the Aarhus Convention, the Bali Guidelines,[83] and a host of international environmental instruments.[84] However, unlike the Aarhus Convention and other instruments regulating best practice which remain silent on the specific issue of 'oral application',[85] the FOI Act erases all doubt by expressly giving the applicant the option of making an 'oral application for information' (which is useful for those who are illiterate). The relevant official of the public institution 'shall [then] reduce [the oral application] ... into writing ... and shall provide a copy of the written application to the applicant'.[86] In addition, in line with recommendations in the draft Commentary to the Bali Guidelines,[87] the Act goes further than the Aarhus Convention by expressly widening opportunities for access for illiterate and disabled applicants by giving them the right and option to 'make an application through a third party'.[88]

Furthermore, sections 1(1) and 3 of the FOI Act, which deal with applications for access to (environmental) information, seem also to accommodate electronic applications, in line with Article 4(1) of the Aarhus Convention and similar regimes. This should certainly be encouraged as it can aid the removal of barriers to access – such as difficult access to the offices of public institutions as a result of distance and the financial cost of making the trips – and make access easier and cheaper[89] for the substantial and rapidly growing section of the Nigerian public that have adequate internet access and technological skills.[90] Admirably, paragraph 1.9 of the FOI Act Implementation Guidelines[91] provides that information requests may be sent to email addresses which should be publicized by public institutions and configured to automatically generate receipts of the request. The Attorney-General, charged with implementing the Act,[92] has also directed that 'public institutions must establish a telephone line or internet service that persons requesting information under the Act may use to inquire about the status of their request'.[93] It is hoped that public institutions will take these

83 N. 46 above, Guideline 1.

84 E.g., UNFCCC, n. 14 above, Art. 6(a)(ii); UNCCD, n. 17 above, Art. 19(3)(b); and Cartagena Biosafety Protocol, n. 16 above, Art. 23(1)(b).

85 Cf. Aarhus Guide, n. 33 above, at p. 54.

86 FOI Act, n. 9 above, s. 3(4).

87 Commentary to Bali Guidelines 1 and 8, n. 48 above.

88 FOI Act, n. 9 above, s. 3(3).

89 For empirical evidence from India that supports this point, see A. Roberts, 'A Great and Revolutionary Law? The First Four Years of India's Right to Information Act' (2010) 70(6) *Public Administration Review*, pp. 925–33, at 931.

90 See Nigerian Communications Commission, 'Annual Subscriber Data: 2012', available at: http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=125:art-statistics-subscriber-data&catid=65:cat-web-statistics&Itemid=73. See also International Telecommunications Union (ITU), 'Measuring the Information Society' (ITU, 2012), at p. 211, available at: http://www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf.

91 'Guidelines on the Implementation of the Freedom of Information Act 2011, Revised Edition 2013', published under the authority of the Attorney-General of the Federation and Minister of Justice, available at: http://foia.justice.gov.ng/pages/resources/REVISED_GUIDELINES_ON_THE_IMPLEMENTATION_OF_THE_FOIA_2013.pdf.

92 FOI Act, n. 9 above, s. 29(6).

93 Attorney-General of the Federation, 'Implementation of the Freedom of Information Act 2011 and the Reporting Requirements under Section 29 thereof', Memorandum (HAGF/MDAS/FOIA/2012/I) issued on 28 Jan. 2012 to all public institutions (Attorney-General's FOI Act Memorandum).

directives seriously and will allocate adequate resources to progressively make them a widespread reality.

Furthermore, Article 4(1)(b) of the Aarhus Convention provides the applicant with a general right to request that environmental information be made available in a specific form, even if it differs from that in which it is currently stored.[94] A similar provision is set out in the draft Commentary to the Bali Guidelines.[95] Based on this right, the Aarhus Convention Compliance Committee recently held Spain to be in non-compliance when it provided a paper copy of a document containing 600 pages at a cost of €2.05 per page instead of providing it in a compact disc at a cost of €13, as requested.[96] This case highlights some benefits of providing the public with input on the form in which the information is provided, which may include ensuring cost- and access-effectiveness (including for the disabled), as well as improved convenience for the public and possibly also for the public authorities. Considering these benefits, it is regrettable that the FOI Act does not directly provide (environmental) information applicants with a right similar to that in Article 4(1)(b).

The only suggestion of a similar right in the FOI Act is to be found in section 8, which provides for fees to be charged for 'document *duplication* and *transcription* where necessary' (emphasis added). It would be preferable for the Act to provide a more direct right, to make it easier for applicants to successfully rely on it. Nonetheless, the term 'duplication' still allows the public to request environmental information in a variety of forms, as indicated in the Schedule to the FOI Act implementation Guidelines. The same applies to 'transcription' used in this provision, which moreover arguably enables the public to request that environmental information be translated and made available in a language they understand. The language issue arguably is not covered in the Aarhus Convention as its Article 4(1)(b) appears to contemplate only 'material form[s]'[97] and not immaterial forms such as 'language'. Its existence, however, is an important matter in the Nigerian context, given the numerous native languages spoken in addition to the country's *lingua franca* (English)[98] and the fact that a substantial number of people (especially in rural areas) are able to communicate effectively only in their native language.[99] Nigeria has acknowledged that the provision of

94 The reference to another form here should be taken to mean that the information contained in the original form must be the same as that contained in the form requested, and not a summary of it: Aarhus Guide, n. 33 above, at p. 55.

95 Commentary to Bali Guideline 1, n. 48 above.

96 Compliance Committee, 'Report of the Compliance Committee on its Twenty-sixth Meeting (Addendum): Findings and Recommendations with Regard to Compliance by Spain, Communication ACCC/C/2008/24', ECE/MP.PP/C.1/2009/8/Add.1, 8 Feb. 2011, at para. 70. See also the United Kingdom case of *Office of Communications* v. *Information Commissioner and T-Mobile (UK) Ltd*, Appeal No. EA/2006/0078, 4 Sept. 2007.

97 See Aarhus Convention, n. 21 above, Art. 2(3).

98 Nigeria has about 500 native languages: see R. Blench, *An Atlas of Nigerian Languages* (3rd edn, Roger Blench, 2012), available at: http://www.rogerblench.info/Language/Africa/Nigeria/Atlas%20of%20Nigerian%20Languages-%20ed%20III.pdf.

99 See National Bureau of Statistics (Nigeria), 'The National Literacy Survey', June 2010, at p. 12, available at: http://resourcedat.com/wp-content/uploads/2012/04/National-Literacy-Survey-2010.pdf.

environmental information in native languages is necessary for it to 'attain full compliance with international regulations, standards and guidelines' in the environmental law field.[100]

Lastly, unlike the Aarhus Convention – which obliges public authorities to assist and guide those seeking access to environmental information[101] – the FOI Act contains no such provision. This lacuna could mean that public institutions might be able to legitimately refuse applications for environmental information in cases where they could easily have assisted and guided the applicant in making an appropriate application. Again, this is an important issue in Nigeria, especially as the level of illiteracy is relatively high[102] and a reasonable number of applicants may well need some form of assistance and guidance in order to correctly apply for environmental information. A recent empirical study on India identified 'no assistance in drafting and filing … requests' as a major barrier to public access to information in the country.[103] So it may well be the case in Nigeria unless the legislative gap is filled. It would seem, however, that the Nigerian authorities have become aware of this problem and have taken steps to 'patch up' the gap with paragraph 1.10 of the FOI Act Implementation Guidelines, which urges public institutions to guide and assist applicants for information in making a viable application. Although welcomed, this provision is merely advisory and is subject to the whims of public institutions. It is therefore advisable for paragraph 1.10 to be entrenched in the FOI Act itself in order to prevent public institutions from being able to ignore it without legal consequences as this legislative change would go some way to removing the culture of secrecy which has existed for so many years.

3.2. *The Response*

Where the public authority holds the requested environmental information

The importance of stipulating and adhering to time limits for supplying environmental information, rather than merely relying on the discretion of public authorities, is highlighted by the fact that the value of such information may be time-sensitive for the applicant.[104] Furthermore, members of the public may be encouraged to take steps to access environmental information if they are aware of the time frame within which the application will usually be honoured. In Nigeria, '[w]here information is applied for under this [FOI] Act, the public institution to which the application is made shall ... within 7 days after the application is received' make the information available to the applicant or refuse the application.[105] However, upon notifying the applicant, the public institution may extend this time limit by a further 7 days in cases where 'the application is for a large number of

100 See O.S. Adegoke et al., 'Draft Objectives and Strategies for Nigeria's Agenda 21', UNDP Support Environment and Natural Resources Management Programme for Nigeria (NIR\C3) (1999), at para. 2.12, available at: http://www.nesrea.org/images/NIGERIA'S%20AGENDA%2021.pdf.

101 Aarhus Convention, n. 21 above, Art. 3(2).

102 National Bureau of Statistics (Nigeria), n. 99 above.

103 Roberts, n. 89 above, at pp. 927–8.

104 R.A. Mmadu, 'A Critical Assessment of Nigeria's Freedom of Information Act 2011' (2011) 1(1) *Sacha Journal of Human Rights*, pp. 118–47, at 142.

105 FOI Act, n. 9 above, s. 4(a) and (b).

records' or 'consultations are necessary to comply with the application' and these cannot reasonably be completed within the original time limit.[106]

The above provisions of the FOI Act are generally in line with best practice and are similar to Article 4(2) and (7) of the Aarhus Convention, except that the latter provisions give public authorities at least one month in which to grant or refuse the request after it has been made, and a further month if an extension is needed. The FOI Act is therefore more demanding of public authorities than the Aarhus Convention with respect to the time frame for granting or refusing an application. While, for now, public institutions in Nigeria may in some cases be unable to deal with applications for information within the 7- to 14-day time limit (mostly because these institutions generally employ low levels of technology in managing information),[107] the 7- to 14-day time limit may be commended for its ambition of providing applicants with timely access to environmental information. It also has the positive side-effect of putting pressure on public institutions to improve and computerize their information management systems to ensure quick and easy retrieval.

However, certain environmental information should ordinarily be accessible well before the 7-day time limit. This may be the case when applicants need access urgently, or have opted to view the requested information solely within the premises of the public institution rather than receive copies or transcriptions. In these situations, the obligation under Article 4(2) and (7) of the Aarhus Convention to grant or refuse information requests 'as soon as possible' (and at least within one or two months) becomes relevant. Such a condition helps to avoid undue delay. It is for this reason that the Bali Guidelines similarly posit that applicants should have 'timely' access.[108] This form of base standard is not contained in the FOI Act. Even though the FOI Act Implementation Guidelines attempt to make up for this gap by advising public institutions to grant or refuse information requests '*promptly* and in any event within 7 days',[109] such a provision, considering its importance, should be included in the FOI Act to make it binding.

Where the public authority does not hold the requested environmental information

In Nigeria, in accordance with section 1(1) of the FOI Act, public institutions are allowed to refuse an application for information which is not in their 'custody or possession'.[110] This provision is similar to Article 4(3)(a) of the Aarhus Convention,

106 Ibid., s. 6. This provision, however, is poorly drafted and may be confusing as it incorrectly refers to s. 6 as the provision containing the original time limit rather than s. 4 (which states that it (i.e. s. 4) is 'subject to section 6'). This requires amendment to avoid unnecessary conflict and to ensure clarity and consistency in line with the common sense position of Art. 3(1) of the Aarhus Convention.

107 Right to Know, 'Implementing Nigeria's Freedom of Information Act 2011 – The Journey so Far: A Report on the Level of Awareness, Compliance and Implementation of the Freedom of Information Act, 2011, 18 Months after its Enactment' (2012), available at: http://r2knigeria.org/index.php/downloads/foi-assessments-a-reports/doc_view/84-implementing-nigerias-foi-act-2011-the-journey-so-far?tmpl=component&format=raw.

108 N. 46 above, Guideline 1.

109 Ibid., para. 1.6 (emphasis added). See also Attorney-General's FOI Act Memorandum, n. 93 above.

110 Generally, the refusal must be effected within 7 days, and at most 14 days, after the application is received (the argument on this time limit in the preceding section applies here). See FOI Act, n. 9 above, s. 4.

under which an application for environmental information may be refused by a public authority if it does not hold the information.[111] It has been argued, however, that the word 'hold' indicates that the 'public authority is not obliged to assemble and record what it knows nor to ascertain matters so as to produce information that answers a request'.[112] While the second part of this statement may correctly reflect the scope of the word 'hold' (and even 'custody and possession'), the Aarhus Convention (and indeed the FOI Act) indicates the opposite regarding the first part,[113] especially as it obliges public authorities to possess and update environmental information relevant to their functions[114] (as with section 9(1) of the FOI Act). Relevant information held by officials must be disclosed in the appropriate form if requested in accordance with the law.

The FOI Act further fails to achieve best practice by having no provision to ensure the transfer of applications from a public institution that does not hold the requested information to one which it believes does hold the information, or at least to inform the applicant of such an institution, as provided in Article 4(5) of the Aarhus Convention. Arguably, such a provision is useful in entrenching the principle that 'public authorities have a collective responsibility for dealing with information requests from the public, irrespective of the particular agency or department to which a request is submitted'.[115] This lacuna in the FOI Act, which needs to be filled with a binding referral provision,[116] currently places an additional and avoidable burden on applicants to find the actual public institution that holds the required information. This situation may discourage potential applicants from accessing vital environmental information, when in fact the public institution which was the first port of call could more easily have made the process more efficient and less stressful for the applicant by transferring the application to the public authority that would be likely to hold the requested information. Such a lacuna might suppress the provision of relevant environmental information in Nigeria where there is still a lingering culture of secrecy in most public institutions.

Despite this limitation, the FOI Act contains a provision that allows for the transfer of applications and, where necessary, the transfer of the requested information from a public institution which holds the information to another which is viewed as 'ha[ving] greater interest in the [requested] information'.[117] This awkwardly drafted provision arguably is influenced by the historical culture of secrecy in public institutions in Nigeria; it should be struck from the FOI Act as it is contrary to best practice and potentially weakens efficient access to environmental information, and should be replaced with one

111 'The refusal shall be made as soon as possible and at the latest within one month, … [and at most] two months after the request': see FOI Act, n. 9 above, Art. 4(7).

112 P. Coppel, *Information Rights: Law and Practice* (3rd edn, Hart, 2010), at p. 184.

113 Aarhus Guide, n. 33 above, at pp. 56–7.

114 Aarhus Convention, n. 21 above, Art. 5(1)(a).

115 Aarhus Guide, n. 33 above, at p. 63.

116 For an attempt to fill this gap see the FOI Act Implementation Guidelines, n. 91 above, Template 1.

117 FOI Act, n. 9 above, s. 5(1). According to s. 5(3) of the FOI Act, 'a public institution has "a greater interest" in information if – (a) the information was originally produced in or for the institution; or (b) ... the institution was the first public institution to receive the information'.

similar to Article 4(5). The provision, it would seem, is geared towards frustrating and wasting the time of applicants. Why else should such transfers be made to a public institution with the same responsibility to ensure access to information under the FOI Act as the one making the transfer?

Where the request for environmental information is refused

Section 7 of the FOI Act provides that where a public institution refuses access to requested information, or to a part of it, 'the institution shall state in the notice given to the applicant the grounds for refusal, the specific provision of the Act that it relates to and that the applicant has a right to challenge the decision refusing access and have it reviewed by a court'. While the first part of this provision may give an applicant the opportunity to rephrase and resubmit the request, the latter part will help to ensure that an applicant does not waste resources by following the incorrect procedure.[118] This section has specific importance in the context of Nigeria, where empirical studies have shown that 'ignorance of legal rights' is a major barrier to access to courts in the country.[119] Section 7 is in accordance with best practice, as a similar provision is contained in Article 4(7) of the Aarhus Convention,[120] as well as the draft Commentary to the Bali Guidelines.[121]

Section 4(b) of the FOI Act contains a provision similar to that in section 7 above; it is submitted that section 4(b) is largely superfluous and could result in confusion that could limit the right of the public to access environmental information as it provides only that the relevant notice should contain 'reasons for the denial, and the section of this Act under which the denial is made'. The wording fails to meet best practice standards as it does not provide for applicants to be informed of the judicial review process. The scope of the section 4(b) notice is narrower than, and is clearly at variance with, the provision in section 7. It should therefore be expunged from the FOI Act for the sake of clarity and consistency, qualities mandated by Article 3(1) of the Aarhus Convention. Currently, however, section 7 of the FOI Act remains the operative provision dealing with notice of refusal, in compliance with the Nigerian Court of Appeals rule of statutory interpretation that favours the more recent provision in a statute in cases where two provisions are potentially in conflict.[122]

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118 See Compliance Committee, 'Report of the Compliance Committee on its Twenty-third Meeting (Addendum): Findings with regard to Communication ACCC/C/2007/21 Concerning Compliance by the European Community', ECE/MP.PP/C.1/2009/2/Add.1, 8 Feb. 2011, at para. 31.

119 J.G. Frynas, 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' (2001) 10(3) *Social and Legal Studies*, pp. 397–419, at 408.

120 See Compliance Committee, 'Report of the Compliance Committee on its Twenty-eighth Meeting (Addendum): Findings and Recommendations with regard to Communication ACCC/C/2009/36 Concerning Compliance by Spain', ECE/MP.PP/C.1/2010/4/Add.28, 8 Feb. 2011, at para. 58; and Compliance Committee, 'Report of the Compliance Committee on its Twenty-fifth Meeting (Addendum): Findings and Recommendations with regard to Communication ACCC/C/2008/30 Concerning Compliance by the Republic of Moldova', ECE/MP.PP/C.1/2009/6/Add.3, 8 Feb. 2011, at para. 39.

121 Commentary to Guideline 3, n. 48 above.

122 See *Ziza* v. *Mamman* (2002) 5 Nigerian Weekly Law Reports (part 760) 243, at p. 265.

Where the requested information/document contains exempted materials

The FOI Act provides that 'where an application is made to a public institution for information which is exempted from disclosure by virtue of this Act, the institution shall disclose any part of the information that does not contain such information'.[123] In practice, such exempted information will be marked out or deleted.[124] This provision is in alignment with best practice on this issue as reflected in Article 4(6) of the Aarhus Convention and the draft Commentary to the Bali Guidelines.[125]

3.3. *The Charge*

In accordance with best practice as reflected in Article 4(8) of the Aarhus Convention, the FOI Act provides for fees to be charged for supplying requested information and, according to section 8 of the Act, the '[f]ees shall be limited to standard charges for document duplication and transcription where necessary'. Obviously, activities involving public institutions searching for the information or the applicant examining the requested information in situ are not chargeable.[126] However, the wording of section 8 allows public institutions to transfer the entire cost of duplication and translation to the applicant, irrespective of how prohibitive the cost might be, and irrespective of the 'affordability' or 'reasonableness' of the cost of securing the environmental information.[127] This wording is arguably contrary to best practice, considering that (i) the Bali Guidelines provide for 'affordable' public access,[128] (ii) Article 4(8) of the Aarhus Convention allows for only a 'reasonable amount', and (iii) case law from the Aarhus Convention Compliance Committee[129] and the European Court of Justice (ECJ)[130] on the issue of 'reasonable' cost indicates that dissuasive charges, even if they are standard charges (as the FOI Act provides), are not in line with best practice. This is especially relevant in the Nigerian context where the poverty level is relatively high.[131]

International best practice anticipates that the public authority will pick up part of the costs incurred in administering the environmental information access law, especially where the original cost of access appears to be prohibitive. This 'additional' cost on public institutions is arguably offset by the enormous benefit that transparency brings to

123 FOI Act, n. 9 above, s. 18.

124 Aarhus Guide, n. 33 above, at p. 63.

125 Commentary to Guideline 3, n. 48 above.

126 It is noteworthy that charges for 'document search', provided for in the 1999, 2004 and 2007 versions of the FOI Bills, was readily excluded from the FOI Act.

127 It is noteworthy that while the 1999, 2004 and 2007 versions of the FOI Bill used the phrase 'reasonable standard charges', 'reasonable' was carefully excluded from the FOI Act to make way for the public to be charged fully in all instances.

128 Bali Guidelines, n. 46 above, Guideline 1. See also Aarhus Guide, n. 33 above, at p. 65.

129 Compliance Committee, 'Spain, Communication ACCC/C/2008/24', n. 96 above, paras. 77 and 79.

130 ECJ, Case C-217/97, *Commission* v. *Germany* [1999] ECR I-5087, para. 48. See Kravchenko, n. 8 above, at p. 258.

131 See Australian Law Reform Commission, 'Open Government: A Review of the Federal Freedom of Information Act 1982', Report 77, 1996, paras. 2.11 and 14.2, available at: http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf.

any society.[132] Furthermore, over time, as public institutions in Nigeria become more efficient in dealing with public requests and in properly organizing and maintaining all information in their custody 'in a manner that facilitates public access to such information' (following section 2(2) of the FOI Act), it is expected that the costs they bear will reduce.[133] It is also reasonable to expect that the continued advancement and employment of information technology will help to make it easier and cheaper for public institutions to provide information to the public.[134]

Furthermore, contrary to best practice as reflected in Article 4(8) of the Aarhus Convention, the FOI Act contains no provision for a schedule of charges, or similar, to be made available to potential applicants. In view of the benefits that a schedule of charges could deliver to the system of access to environmental information, including such an obligation in the FOI Act would be a welcome development. A schedule of charges could go a long way to help to protect against abuse and inconsistency in charging.[135] It is impossible to overstate the relevance of such a device in Nigeria where financial corruption is rife in public institutions. In addition, a schedule of charges has the potential to encourage the public to access information if they know in advance what it will cost.[136] Nevertheless, despite this lacuna in the Act, the Schedule to the FOI Act Implementation Guidelines contains a breakdown of the range of costs of the various methods of duplicating records – namely copying to compact disc or USB drive (if provided by the public institution), photocopying, scanning and printing – but it does not provide information about the cost of various types of transcription. It is advisable that the Schedule, supported by a binding provision in the FOI Act, be further developed to include this information.

Lastly, it is rather disappointing that the FOI Act does not provide for fee waivers as recommended by Article 4(8) of the Aarhus Convention. As the Aarhus Guide states, some countries may decide not to levy charges for 'copies of a limited number of pages … for non-commercial use or for limited postage'.[137] Fee waivers would be invaluable in the case of environmental non-governmental organizations (NGOs), many of which have very limited funds, and members of the public who reside in some of the poorest regions of Nigeria. Generally, such waivers would serve to motivate the public to take advantage of the access rights granted by the FOI Act. The FOI Act Implementation Guidelines provide limited aid in this regard by advising public institutions that '[w]here the cost of copying or transcription is negligible or where the cost of collecting or recovering the fees would be equal to or greater than the amount being collected, you may provide the information at no cost to the applicant'.[138]

132 Information Commissioner of Canada, 'Annual Report 1993–94', at p. 9, available at: http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx.

133 See Mmadu, n. 104 above, at p. 141.

134 Australian Law Reform Commission, n. 131 above, para. 14.19.

135 Aarhus Guide, n. 33 above, at p. 65.

136 Ibid.

137 Ibid.

138 N. 91 above, para. 1.11.

4. EXEMPTIONS TO PUBLIC ACCESS AND THE OVERRIDE

4.1. *General Standards*

It is generally accepted that the right of the public to access environmental information is not absolute; unrestrained access is 'incompatible with realistic, efficient and practical governance'.[139] To curtail excesses that may arise from unchecked access, the right of access is usually limited by exemptions. In this case, best practice dictates that such exemptions be narrowly drawn so that the public may still enjoy reasonable access to environmental information.[140] To a fair extent, this standard is reflected by the exemptions in the Aarhus Convention,[141] which have been stated to be 'undoubtedly more precise' (compared with those that existed in Europe before the Convention) and to leave far less room for the arbitrary exercise of public authority discretion.[142]

Still, '[t]he best access to information legal regimes have a public interest limitation, or override, on *all* exemptions to disclosure'.[143] This best practice is reflected in the Bali Guidelines[144] and Article 4(4)(h) of the Aarhus Convention, which stipulates that all the grounds for refusal of access provided in Article 4(4) 'shall be interpreted in a restrictive way', 'taking into account the public interest served by disclosure' (that is, if the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information, the information must be disclosed).[145] Thus, the fact that the requested information falls within an exemption does not in itself justify the immediate application of the exemption. The relevant public authority must carry out the necessary balancing exercise in accordance with the 'public interest test' to be able to properly determine whether or not it is right to invoke the exemption. The public interest test not only reduces the scope of the relevant exemption; it also reduces the risk of self-serving interpretations that may come with discretion as it relates to the exemptions provided,[146] and constitutes an important tool with which the courts/tribunals may overturn information application decisions that should have been decided in favour of the applicant had the balancing test been properly applied.

As expected, the FOI Act provides for some exemptions to the right of access to environmental information. But the important question is whether or not the exemption provisions are in line with best practice – that is, narrow enough to

139 Krämer, n. 6 above, at pp. 95–6.

140 Kravchenko, n. 8 above, at p. 245.

141 Aarhus Convention, n. 21 above, Arts. 4(3)-(4) and 5(10).

142 P. Davies, 'Public Participation, the Aarhus Convention, and the European Community', in Zillman, Lucas & Pring (eds), n. 4 above, pp. 155–86, at 162.

143 Kravchenko, n. 8 above, at p. 252 (emphasis added).

144 N. 46 above, Guideline 3.

145 A position reflected in Principle 6(G) of the Sofia Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making, ECE/CPE/24, 25 Oct. 1995, which is referred to in the Preamble to the Convention. See also the United Kingdom Environmental Information Regulations 2004 (SI No. 2004/ 3391), reg. 12(3), and Environmental Information (Scotland) Regulations 2004 (SI No. 2004/ 520), regs 10(3) and 11(1).

146 Cf. J. Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Yearbook of International Environmental Law*, pp. 51–97, at 92.

allow and sustain adequate access to environmental information, precise enough to curtail the arbitrary exercise of public authority discretion in a manner that would impede appropriate access, and adequately curtailed by a 'public interest override'.

4.2. *An Analysis of the Exemptions and the Override*

Similar to best practice as reflected in Article 4(4) of the Aarhus Convention, the FOI Act allows public institutions to refuse an application for information in the following instances:

- where its disclosure 'may be injurious to the conduct of international affairs and the defence of … Nigeria';[147]
- where it contains records that, if disclosed, could potentially interfere with administrative or law enforcement proceedings conducted by any public institution, or could deprive a person of a fair trial or obstruct an ongoing criminal investigation;[148]
- where the information contains personal details of an individual who has not consented to its disclosure;[149]
- where the information contains confidential or proprietary trade secrets and commercial or financial information obtained from a person or business, or its disclosure may cause harm to a third party;[150]
- where the information, if disclosed, would frustrate procurement or give an advantage to any person;[151]
- where the information is subject to professional confidential privileges conferred by an Act;[152] and
- where the information contains research material prepared by faculty members.[153]

The FOI Act, however, diverges from best practice by including an exemption that directly and negatively impacts on public access to environmental information and its benefits to society. Section 15(2) of the Act provides that '[a] public institution shall … deny disclosure of a part of a record if that part contains the result or product of environmental testing carried out by or on behalf of a public institution' whether or not any interest is adversely affected.[154] The FOI Act does not provide any details as to the

147 FOI Act, n. 9 above, s. 11(1).

148 Ibid., s. 12(1)(a)(i)(ii)(iii)(vi). For the purpose of s. 12(1)(a), 'enforcement proceeding' is defined in s. 12(4).

149 Ibid., s. 14(1) and (2).

150 Ibid., s. 15(1)(a).

151 Ibid., s. 15(1)(c).

152 Ibid., s. 16.

153 Ibid., s. 17. It should be noted that the FOI Act does not contain exemptions similar to those in Art. 4(3) (b) and (c) of the Aarhus Convention pertaining to where '[t]he request is manifestly unreasonable or formulated in too general a manner', and which 'concerns material in the course of completion or concerns internal communications of public authorities …', respectively.

154 See s. 15(3) of the FOI Act, under which public institutions may on their own volition choose to disclose such information.

scope of the broad and ambiguous term 'environmental testing'. The term may not only mean the testing of a product to determine its suitability in certain environmental conditions but could also mean its potential impact on the environment, or it could simply mean the testing of the quality of the environment, among others. This gap in the FOI Act leaves the interpretation to the discretion of public institutions, which they may choose to exercise in a manner that considerably limits public access to environmental information. It is submitted, therefore, that section 15(2) should be revised or struck from the Act as it runs contrary to both international best practice and the 1998 Nigerian National Policy on the Environment,[155] which arguably advocates wide access to environmental information.[156] The section could be replaced with an exemption similar to that set out in Article 4(4)(h) of the Aarhus Convention, which seeks to protect certain aspects of the environment where disclosure of information relating to it would adversely affect it.

Furthermore, it could be argued that a number of other exemptions under the FOI Act have been drafted too broadly and their operation has been left entirely to the discretion of public institutions. In line with best practice, some exemptions provide for a 'public interest override' to the effect that 'an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury that disclosure would cause';[157] however, the section 15(2) 'environmental testing' exemption discussed above is not made subject to the public interest' override, contrary to best practice. Similarly, the exemption on 'research materials' in section 17 fails to provide for the public interest override. In addition, even though the 'personal information' exemption in section 14 contains a public interest override in subsection 3, it largely nullifies the effect of the override by being made subject to section 14(2), which provides for public disclosure of personal information where 'the individual to whom it relates consents to the disclosure' or where 'the information is [already] publicly available'. Indeed, the public interest override is needed when the individual to whom the information relates is yet to consent to its disclosure and the information is not publicly available.

The FOI Act Implementation Guidelines refer to the exemptions in sections 15(2) and 17 as 'unqualified exemptions', which 'contain an inbuilt prejudice test' (rather than a 'public interest' test).[158] This test means that 'the harm to the public interest that would result from the disclosure of information falling within an unqualified exemption has already been established'.[159] This position is unacceptable as it falls below international best practice, especially as no authority can rightly foresee, in absolute terms, the fact that there would never be a stronger public interest which would warrant disclosure of exempted environmental information.

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155 Available at: http://www.nesrea.org/images/National%20Policy%20on%20Environment.pdf.

156 Ibid., para. 6.6(f).

157 See, e.g., FOI Act, n. 9 above, s. 11(2).

158 N. 91 above, para. 1.13.1. FOI Act, s. 16, not elaborated on here, is also one of the unqualified exemptions.

159 Ibid.

There is the further issue that even though section 1(1) of the FOI Act guarantees the public right of access to environmental information '[n]otwithstanding anything contained in any Act, law or regulation', this may not apply to the Public Complaints Commissions Act (PCC Act) and the National Security Agencies Act (NSA Act), both of which contain general provisions empowering the bodies they create to withhold information from the public. These Acts are entrenched in the Nigerian Constitution (to which all laws are subject) by virtue of section 315, and this provision has not been amended in line with section 9(2) of the Constitution to exclude those Acts. To achieve international best practice, it is imperative that the PCC Act and the NSA Act be made subject to the FOI Act, even though most of the environmental information that they hold may legitimately fall within the exemptions pertaining to national security and enforcement procedures under the FOI Act. However, if they were made subject to the FOI Act, the bodies created under them would have to apply the public interest test when deciding whether or not to make relevant environmental information available to the public, unlike the current situation where those bodies are not clearly obliged to do so.

Surprisingly, section 26(a) of the FOI Act completely exempts 'published material or material available for purchase by the public' from the application of the Act. While this exemption might refer to materials covered by intellectual property rights – which could potentially justify their exclusion under best practice, although it could still fall short for not being made subject to the public interest test – the use of an open phrase like 'published material' to describe the exempted material could easily foster broad interpretations. It could mean that *any* information that has been put in the public domain through *any* medium is not subject to the FOI Act. This is the interpretation given to that provision in the FOI Act Implementation Guidelines.[160] The Guidelines justify this position by stating that 'if there is another route by which someone can obtain information, there is no need for the Act to provide the person with further means of access to records'.[161] This is an unacceptable justification for the exclusion for a number of reasons, and which is arguably contrary to best practice.

Firstly, the public might face prohibitive costs in accessing or obtaining a copy of such environmental information, costs that could have been mitigated if the applicant had been able to request a cheaper (or possibly free) version of the same information. Secondly, there might be geographical (and resulting cost) barriers to the access of environmental information that is made publicly accessible only from a single point – say, a relatively remote public library. Thirdly, publicly available environmental information may not be effectively accessible to members of the public with special needs who no longer have the right to request transcribed or useful versions of this information from the relevant public institution. The section 26(a) exemption is also capable of undermining section 2(4) of the FOI Act, which obliges public institutions to make information 'readily available to members of the public through various means, including print, electronic and online sources, and at the office of such public institution', as materials could have been

160 Ibid., paras 1.2. and 12.1.1.

161 Ibid., para. 12.1.1.

'published' through a single medium and could be argued, based on section 26(a), not to be subject to section 2(4) which is largely in line with of best practice.

5. CONCLUSION

Nigeria has ratified and committed itself to a number of international environmental law instruments that oblige and commit it to ensure public access to environmental information. Despite these commitments, Nigeria maintained laws that helped to foster a culture of secrecy in public institutions until 2011 when the FOI Act was passed into law. The Nigerian government claimed that the FOIA Act is consonant with international best practice. In support of this view, the above analysis confirms that some core provisions of the FOI Act are essentially sound and in line with best practice. In a few instances, they even go beyond it. However, the comparative discussion equally uncovers weaknesses and gaps in certain provisions of the Act, and reveals that the older and more entrenched traditions of official secrecy have partly been maintained via liberal exemption provisions. These findings call for improvement to ensure that the application of the FOI Act better ensures public access in line with best practice. Despite these limitations, it is certainly plausible to say that Nigeria is in a better place than before the ratification of the FOI Act in terms of ensuring a transparent and open society, even though, as is the case worldwide, practical implementation of the law is a different ballgame.

This article also demonstrated in broad terms the usefulness of the Aarhus Convention in this case, not as a binding document to be enforced vis-à-vis the parties to it but as an authoritative reflection of a burgeoning set of general principles of international environmental law, which can be used as an interpretative guide in non-treaty contexts. Importantly, the extensive transnational influence of the Aarhus Convention arguably contributes to furthering the emerging customary international law status of Principle 10 of the Rio Declaration. This significant transnational value of the Convention and the manner in which it has been employed to realize the aim of this article also points to the potential of multilateral environmental agreements (MEAs) in general, if adequately explored, to project influence beyond their geographic and jurisdictional limits, and meaningfully influence environmental governance outside their conventional spheres of influence. If this becomes a recurring practice, it might possibly reduce the risk of non-ratification, as states increasingly recognize the strong potential of non-ratified MEAs to become politically and legally relevant to them in due course.