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LEGAL REGULATION OF CIVIL AVIATION IN COMMONWEALTH AFRICA.

ABSTRACT

TITLE. LEGAL REGULATION OF CIVIL AVIATION IN COMMONWEALTH AFRICA -- A COMPARATIVE STUDY

DEPARTMENT. INSTITUTE OF AIR AND SPACE LAW

DEGREE SOUGHT. D.C.L.

AUTHOR. WILBERFORCE OLADELE ODUBAYO

In this comparative study, we examine the legal regulation of civil aviation in Commonwealth Africa. In Chapter 1, we examine the history of Nigeria, Ghana, Kenya, Uganda, Tanzania and the evolution of the East African Community. Chapter 2 deals with colonial regulation of aviation. In Chapter 3, we consider problems of state succession in relation to aviation during the periods of transition to independence. Chapter 4 deals with treaty-making procedures of the respective states, while in Chapter 5, we examine the legislative, administrative and judicial processes of these states in relation to aviation. Licensing of air transport undertakings is considered in Chapter 6, while Chapter 7 is devoted to designation and control of airports. Some aspects of international economic law concerning aviation are considered in Chapter 8, while in Chapter 9, we examine the reconstruction of the state-owned airlines. In Chapter 10, we summarize and draw final conclusions.

RESUME

TITRE: REGLEMENTATION LEGALE DE L'AVIATION CIVILE EN AFRIQUE DU COMMONWEALTH: UNE ETUDE COMPARATIVE

DEPARTEMENT: INSTITUT DE DROIT AERIEN ET DE DROIT DE L'ESPACE

POUR LE DIPLOME DE: D.C.L.

AUTEUR: WILBERFORCE OLADELE ODUBAYO

Dans la présente étude comparative, nous examinons la réglementation légale de l'aviation civile en Afrique du Commonwealth. Dans le premier chapitre, nous examinons l'histoire du Nigéria, du Ghana, du Kénia, de l'Ouganda, de la Tanzanie et l'évolution de la Communaité est-africaine. Le chapitre 2 traite de la réglementation coloniale de l'aviation. Dans le chapitre 3, nous considérons les problèmes de la succession d'états en rapport avec l'aviation pendant les périodes de transition vers l'indépendance. Le chapitre 4 traite des procédures d'élaboration des traités des différents états, tandis que dans le chapitre 5, nous examinons les procédures législatives, administratives et judiciaires de ces états en ce qui concerne l'aviation. La réglementation des permis des entreprises de transport

aérien est passée en revue dans le chapitre 6 alors que le chapitre 7 est consacré aux conditions de création et de functionnement et au controle des aérodromes. Certains aspects du droit économique international particuliers à l'aviation sont évoqués dans le chapitre 8 et dans le chapitre 9, nous examinons le reconstution des lignes aériennes possédées par l'état. Finalement, dans le chapitre 10, nous donnons un résumé et tirons les conclusions générales.

LEGAL REGULATION OF CIVIL AVIATION

IN COMMONWEALTH AFRICA

REGLEMENTATION LEGALE DE L'AVIATION CIVILE

EN AFRIQUE DU COMMONWEALTH

BY

W.O. ODUBAYO

To my wife

Ajibike

for her patience, devotion

and encouragement

LEGAL REGULATION OF CIVIL AVIATION IN COMMONWEALTH AFRICA -- A COMPARATIVE STUDY

REGLEMENTATION LEGALE DE L'AVIATION CIVILE EN AFRIQUE DU COMMONWEALTH -- UNE ETUDE COMPARATIVE

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ABBREVIATIONS

A.C.	Appeal Cases
A.J.I.L.	American Journal of International Law
All. N.L.R.	All Nigeria Law Reports
A.T.L.A.	Air Transport Licensing Authority
A.T.L.B.	Air Transport Licensing Board
B.O.A.C.	British Overseas Airways Corporation
B.Y.I.L.	British Yearbook of International Law
C.A.B.	Civil Aeronautics Board
Cap; Ch.	Chapter
C.L.R.	Commonwealth Law Reports
Cmnd.	Command Papers
D.L.R.	Dominion Law Reports
E.A.A.C.	East African Airways Corporation
E.A.A.T.A.	East African Air Transport Authority
E.A.C.A.B.	East African Civil Aviation Board
E.A.C.S.O.	East African Common Services Organisation
E.A.H.C.	East Africa High Commission
E.A.L.R.	East Africa Law Reports
E.C.A.C.	European Civil Aviation Conference
E.I.	Executive Instrument

F.Supp.	Federal Supplement
Harv. L.R.	Harvard Law Review
H.M.S.O.	Her Majesty's Stationery Office
I.A.T.A.	International Air Transport Association
I.C.A.O.Doc.	International Civil Aviation Organization Document
I.C.J.	International Court of Justice Reports
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
J.Air L.& C.	Journal of Air Law & Commerce
J.B.L.	Journal of Business Law
J.C.P.C.	Judicial Committee of the Privy Council
Jo. R.A.S.	Journal of the Royal Aeronautical Society
K.B.	King's Bench
L.I.	Legislative Instrument
L.N.	Legal Notice
L.N.T.S.	League of Nations Treaty Series
M.L.R.	Modern Law Review
N.L.C.D.	National Liberation Council Decree
N.L.R.	Nigeria Law Reports
N.T.I.F.	Nigeria's Treaties In Force
Pet.	Peters Reports

P.C.I.J.	Permanent Court of International Justice Reports
Rev.	Revised
S.C.	Supreme Court
S.I.	Statutory Instrument
S.R.& O.	Statutory Rules & Orders
U.S.	United States
U.S. Av. R.	United States Aviation Reports
U.N.	United Nations
U.N.G.A.Res.	United Nations General Assembly Resolution
U.N.T.S.	United Nations Treaty Series
W.A.A.C.	West African Airways Corporation
W.A.A.T.A.	West African Air Transport Authority
W.A.L.R.	West African Law Reports
Y.I.L.C.	Yearbook of International Law Commission

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I also acknowledge with gratitude the financial assistance given to me by the Institute of Air and Space Law to meet part of my expenses for the academic year 1972/73.

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Adebiyi. LL.B.(Hons)London, LL.M.(Harvard), (formerly Deputy Solicitor-General of Nigeria and Federal Director of Public Prosecutions), Judge of the High Court of Lagos, for his supervision of this thesis during the period that I was based in Lagos.

This work could not have been accomplished without the co-operation of various state officials, by way of supplying or calling our attention to relevant materials concerning their respective states, granting interviews, or assisting in cross-checking references in the footnotes. In this regard, I am especially grateful to Messers K.G. Awunyo, formerly Principal State Attorney and Legal Draftsman, Ministry of Justice, Ghana, and now of the Legal Department of the I.B.R.D. in Washington; T.K. Pappoe, Senior Operations Officer, Ministry of Transport and Communications, Ghana; J.D. Ogundere, Deputy Solicitor-General of Nigeria; The Honourable Mr. Justice Seaton, Judge of the High Court of Tanzania and Special Adviser to the External Affairs Ministry, Dar-es-Salam; the officials of the Federal Ministry of Transport, Lagos and of the Office of the Legal Counsel of the East African Community.

My appreciation and thanks go to Dr Gerald Fitzgerald,Prin-

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Finally, I must express my appreciation to my family and friends for their constant support and encouragement.

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STATEMENT OF CONTRIBUTION TO ORIGINAL KNOWLEDGE

This dissertation, being on a subject that has not hitherto been explored, is the first of its kind and is an additional contribution to original knowledge. The travaux preparatoires consist of treaties, statutes, Official Reports, Gazettes and other unclassified governmental sources, which have not, prior to this time, been subjected to any in-depth, analytical scrutiny for purposes of comparative, systematic legal study. Where the works of other authors have helped to mould or shape our views, due

acknowledgements are made either in the texts or footnotes. Finally, we hasten to point out, that Parts B and D of the introductory Chapter 1 and Part B of Chapter 3, are not original, having been based on earlier published works of other authors. These, however, are also duly acknowledged either in the footnotes or texts. Even in this respect, we have, in several instances, verified the original sources cited in these earlier works.

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PART ONE

CHAPTER 1

INTRODUCTORY

A. GENERAL

In this dissertation, we propose to examine at some depth, some aspects of the legal regulation of civil aviation in Commonwealth Africa. It would be presumptuous on our part to assert, that all the legal problems arising from or concerning such regulation have been identified, analysed and discussed here. Our objective has been to identify major legal problems, which have confronted the new states of Commonwealth Africa and the different ways in which each or a group of them has tackled these problems.

The countries under consideration are Nigeria, Ghana, Kenya, Tanzania[1] and Uganda. We have referred to these countries in the title collectively as "Commonwealth Africa". This uniform or collective description may be deceptive, since we have not dealt here with all Commonwealth African

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[1] This is the new state created by the Act of Union of the Republic of Tanganyika and Zanzibar. We do not propose to deal separately with Zanzibar which is now a composite territory of Tanzania, but shall only refer to it specifically in passing where necessary.

countries. In Commonwealth West Africa for example, civil aviation started as a regional co-operative effort of the Colonial administrations in the respective territories. However, we have ignored inclusion of Sierra-Leone and Gambia in this study, because of their relatively small sizes and the rather insignificant impacts which these countries had on the development of civil aviation in West Africa generally.

A third caveat we would register, concerns our use of terms and expressions such as "Commonwealth Africa" and "British Africa", by which we have referred to the legal and constitutional status of those countries in relation to specific periods in their evolution to sovereign statehood. "Commonwealth Africa", in this context denotes the five countries referred to above after their attainment of independence, while the term, "British Africa", is used to designate these countries in the period when they constituted parts of Her Majesty's Colonial possessions[2].

2
It is appropriate that we should mention here, that we did consider but rejected as unprecise for our present purposes the expression "Anglophone Africa" which in our estimation would embrace a diversity of countries ranging from the United Arab Republic, Sudan, Liberia, West Cameroon and parts of Somalia; whereas the expressions "Commonwealth Africa" and "British Africa" which we have adopted, manifest a built in unifying force, signified by their membership of the Commonwealth, the common heritage of the common law and other survivals of Anglo-Saxon legal and political traditions.

In Part Two, we use the expression "periods of transition". We have not attempted to ascribe specific dates to these "periods of transition". In a continent which witnessed rapid political changes during the last decade, it would be impossible to pin point specific dates when particular legal problems arose in the aviation field or when solutions to such problems were adopted; an example was the case of the long negotiations preceding the break up of the West African Air Transport Authority[3] and the West African Airways Corporation[4] on the attainment of independence by Ghana. What we have done therefore, is to adopt as historical landmarks of these periods, the time between the date of Ghana's independence in 1957, being the first British Colonial territory in Africa to achieve sovereign statehood and the date of Kenya's independence in 1963, being the last of the five Commonwealth African countries to achieve independence.

This thesis is divided into four parts. Part One, which has two chapters, is purely introductory, and is designed to

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3 Infra.pp. 102-106.

4 Ibid.

give background knowledge and information necessary for a proper understanding, assessment and appraisal of the subject. Part Two has only one chapter - Chapter 3, in which we discuss some of the legal problems of the transitional period. In Part Three, we identify, analyse, discuss and compare the major post-independence aviation legal problems in Commonwealth Africa. In Part Four, we give our final summaries and conclusions and proffer some recommendations and suggestions which we think might be useful to these countries in the light of experience and practice elsewhere particularly in those "States of chief importance in air transport"[5].

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5 This is an I.C.A.O. expression denoting the categorisation of its member states for purposes of election by the Assembly of the Organisation for a three year term to the thirty member Council. Falling into this category of States are U.S.A., U.K., Canada and immediately before the 1971 Vienna Assembly of I.C.A.O., Australia was in this category. We shall refer to some of the practices of these countries in our final conclusions below.

B. DIGEST OF THE HISTORY OF BRITISH AFRICA

(a) Nigeria

(i) The Early History and Exploration of Nigeria

The country known as Nigeria[6] occupies that part of the Gulf of Guinea on the West Coast of Africa, that is bounded on the East by the Republic of the Cameroons, on the West by the Republic of Dahomey, on the North by the Republic of Niger and on the South by the Bights of Benin and Biafra. Nigeria covers a total land area of 356,669

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6 The name Nigeria was first applied by Lady Lugard (Miss) Flora Shaw), wife of the first Governor-General of the Colony and Protectorate of Nigeria to describe the lands bordering the basin of the third largest river in Africa - the River Niger. Cf. for detailed history of Nigeria - Keith M. Buchanan, and J.C. Pugh: Land and People in Nigeria; The Human Geography of Nigeria and its environmental Background, London; University of London, Press, 1955; Sir Alan Cuthbert Burns: History of Nigeria, London: Alan and Unwin 5th Edition 1955; James Smoot Coleman, Nigeria: Background to Nationalism, Berkley, University of California Press 1958; M. Crowder: A Short History of Nigeria - New York: Praeger 1962; C.T.Quinn - Young and T. Herdman: Geography of Nigeria. 4th Edition, London, 1954; Lady Lugard (Flora Shaw): A Tropical Dependency, London, 1905; F.J.D. Lugard: The Dual Mandate in British Tropical Africa, Edinburgh, London, 1922.

square miles[7] extending from longitude 2^{o} 30^{1} East to 14^{o} 30^{1} East and from latitude 4^{o} 30^{1} North to 14^{o} 17^{1} North. With an estimated population of 64 million people[8], Nigeria is the largest country in Africa. The history of Nigeria, for this thesis, begins with the first European contact with that part of Africa. European penetration into Nigeria took place from two directions; firstly, from the Atlantic seaboard and secondly from the north through the Sahara desert.

7
Pre - 1961 writers on Nigeria give the area of the country as being 373,250 sq. miles. This figure would not be correct today. Taking account of the secession of the former Southern Cameroons from the Federation of Nigeria on 1st October, 1961 to merge with the former French Cameroons, the area of Nigeria was thereby reduced by some 16,581 sq. miles leaving a total land area of 356,669 square miles. This figure is inclusive of the former British Mandated Territory of Northern Cameroons which became a part of the former Northern Region of Nigeria by transfer from Her Majesty's Government in the U.K. to the Government of the Federation of Nigeria; Cf. U.K. Northern Cameroons (Administration) (Amendment) Order-in-Council, 1961, S. I. 1961. No. 998. p. 1926; and for the Nigerian legislation incorporating the territory into the Federation of Nigeria, from 1st June, 1961, See: Nigeria Constitution First Amendment Act, 1961 (Laws of the Federation of Nigeria and Lagos, No. 24 of 1961).

8
See Second National Development Plan 1970-74. p. 29. Federal Ministry of Information, Lagos. The last census in Nigeria took place in 1962. The results of the census was not announced officially owing to the confusion, accusation and allegations of fraud concerning inflation of figures by the respective Regional Governments (as they were then called). The figure given in the Development Plan is probably an estimation for purposes of development planning.

Both penetrations had one primary motivation - to discover the source, course and the terminus of the River Niger. It is said, that from the time of Herodotus, the existence of a great river in the dark continent (as Africa was then referred to owing to the inpenetrable barrier created by the Sahara desert), had romantic associations in the minds of people of that age and was a source of debate and speculation among geographers. In order to verify the authenticity of these speculations, the Portuguese Prince Henry the Navigator despatched an expedition to the West Coast of Africa in the fifteenth century. The first expedition sailed down the West African Coast as far as the Gambia before returning to Portugal. Although successive Portuguese explorers did not discover the source, course or the terminus of the River Niger, they however, founded the slave trade in which other European nations soon joined.

By the beginning of the nineteenth century, public opinion in England regarding the permissibility of the slave trade had changed and Parliament had passed an Act[9] abolishing the slave trade and authorising the Royal Navy to arrest, even

[9] 46 Geo. III. c. 52.

on the high seas,[10] ships of all nations engaging in the traffic of slaves. In this connection, the British Government stationed a Naval Patrol on the West African Coast to enforce the Slavery Abolition Act.[11]

While these events were going on, the Royal African Society in London had commissioned a Scottish doctor by the name of Mungo Park, to explore the source, course and the terminus of the Niger. In 1795, Dr. Mungo Park set out on his first African journey and landed at a point near Gambia. He travelled over land and reached the source of the river. Before he returned to England on this first expedition, he travelled on the river downstream in order to prove that the river flows in an easterly direction. In 1806, he arrived again in Africa to continue further exploration of the river. This expedition, however, met with disaster; as his boat

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It is illuminating to look back in retrospect on the state of development of international law in 1807; and what the doctrine of the 'freedom of the seas' as propounded by Grotius in an earlier age meant in that era. We venture with respect to suggest two explanations. Firstly, there was the unchallanged supremacy of the Royal Navy on the High seas. Secondly, there was the genuine humanitarian concern of the British Abolitionists for the fate of the Africans. That era, unconsciously marked the beginning of the jus cogens, which today, makes the slave trade, a crime under international law.

11
Supra. p. 7. n.9.

struck some rocks at Bussa rapids[12] inside present day Nigeria.

The unfinished task of Mungo Park's pioneering discoveries on the River Niger was completed by Richard and John Lander who discovered that the River Niger flows into the Gulf of Guinea[13], and not into some inland lakes in the Sahara as conjectured by early geographers.

Simultaneously with penetration of the territory now known as Nigeria from the South, other explorers entered Northern Nigeria from across the Sahara. Between 1823 and 1825, Dixon Denham and Hugh Clapperton visited Bornu and Sokoto. About 1850, a German explorer named Heinrich Barth, on commission from the British Government also entered Northern Nigeria from the Sahara. While the trans-Sahara penetration was going on, British and other European traders, realizing the possibility of reaching the hinterland of Nigeria from the Atlantic seaboard, began to establish stations all along

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12 At a point upstream from where this distinguished early explorer met his death, a Hydroelectric power project has now been completed with funds provided inter alia by the International Bank for Reconstruction and Development.

13 Although the River Niger is the third largest river in Africa after the Nile and the Congo, the Niger delta is reported to be the largest in Africa with a total coverage of 14,000 sq. miles. See: Encyclopaedia Britannica, Vol. 16. (1961 Edition) at p. 438.

the banks of the river to trade in oil.[14] The proliferation of British and European trading companies in the hinterland of Nigeria soon led to competitions and rivalries among the British companies inter-se on one hand and between the British companies and other European companies on the other. In order to arrest these unhealthy competitions and rivalries, an Englishman, by the name of George Goldie - Taubman, arranged an amalgamation of all the British companies on the Niger into a big combine under the name of the Niger Company. Taubman did not stop at that. He proceeded to do two things, (i) to buy out the rival French companies and (ii) to conclude treaties of friendship with native chiefs; thus ensuring the preservation of the hinterland of Nigeria as an exclusive British trading monopoly.

(ii) The Cession of Lagos

While the British Government was engaged in suppressing the slave trade on the Atlantic, King Kosoko of Lagos had not co-operated with the British Government as did some of the tribes on the Niger Delta in putting a stop to the slave trade. For this reason, in 1851, a British Consul by the name

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14 See generally K.O. Dike: Trade and Politics on the Niger Delta, 1830-1885, (1956 Edition).

of John Beecroft who was in command of the Naval Patrol, with headquarters in Fernando Po, despatched an expedition to attack Lagos. King Kosoko fled from his domain and Beecroft proceeded to install Akintoye on the throne of Lagos. A treaty was concluded by the British Government with King Akintoye who agreed to abolish the slave trade, put a stop to human sacrifices and to protect missionaries.

On the death of King Akintoye in 1861, his son Dosumu succeeded him. He was reported to be a weak and ineffectual ruler. On 6th August, 1861, and in return for a pension, he signed a treaty ceding the territory of Lagos to the British Government.[15]

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15 Cf. U.K. Select Committee Report, Parl-Papers, 1865, Vol. 5. p. 23. Art 1 of the Treaty of Cession provided as follows:

"In order that the Queen of England may be the better enabled to assist, defend, and protect the inhabitants of Lagos, and to put an end to the slave trade in this and the neighbouring countries, and to prevent the destructive wars so frequently undertaken by Dahomey and others for the capture of slaves, I, Docemo, do, with the consent and advice of my council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and Island of Lagos, with all the rights, profits, and revenue as the direct, full, and absolute domination and sovereignty of the said port, island, and promises, with all the royalties thereof, freely, fully, entirely, and absolutely. I do also covenant and grant that the quiet and peaceable possession thereof shall, with all possible speed, be freely and effectually delivered to the Queen of Great Britain, or such person as Her Majesty shall thereunto appoint for her use in the performance of this grant: the inhabitants of the said island and territories, as the Queen's subjects, and under her sovereignty, Crown, jurisdiction, and Government, being still suffered to live there".

(iii) The Berlin Conference of 1884-1885[16]

The Berlin Conference of 1884-1885 is generally referred to as the culmination of the scramble for Africa. The British delegation to this Conference was able to secure international recognition for the "exclusive competence"[17] of Great Britain on the Niger and the hinterland of Nigeria. In establishing this exclusive competence, reliance was placed on the treaties of friendship which George Goldie-Taubman had concluded with the Chiefs and Emirs. The Conference recognised in preference to all other claimants, the British Government's claim to the territories around the Oil Rivers, over which a Protectorate was later declared under the name and style of The Oil Rivers Protectorate.

(iV) The Consolidation of British Rule in Nigeria 1885-1914

Although other European powers recognised British claims over the Oil Rivers Protectorate at the Berlin Conference, nevertheless, the British Government was reluctant to assume direct control for the government of Nigeria. In 1893, the

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16 Hertslet's Treaties, Vol. 17, p.62.

17 We have borrowed this expression from McDougal, H. Lasswell and I. Vlasic: Law and Public Order in Space. (New Haven and London; Yale University Press, 1963, Ch. 3, where this expression is used generally to denote similar areas of public domain where some states do in fact exercise jurisdiction to the exclusion of all others.

territory was renamed the Niger Coast Protectorate[18], and apart from exercising de jure control over the territory, actual day to day administration was in the hands of the Royal Niger Company to which the British Government had granted a Royal Charter in 1886 to administer the hinterland of Nigeria[19].

The Company began to set up an administrative machinery for the country, constituted courts of justice and raised an armed Constabulary to help it enforce law and order within the territory. Following a border dispute between the Company and France on the Western Frontier, the British Government revoked the Charter granted to the Company and from January 1, 1900, assumed direct responsibility for the administration of Nigeria.

In assuming direct responsibility for the government of Nigeria, two separate protectorates were created, namely, The

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18 London Gazette, May 16, 1893.

19 By way of comparison, it is instructive to note that in similar circumstances in Uganda and Kenya, the British Government had been reluctant to assume direct responsibility for the government of those territories. Instead, a Royal Charter was granted to the Imperial British East Africa Company to administer the British Territories in East Africa until finally in 1895, the Charter was revoked and a Protectorate was proclaimed in East Africa. In Nigeria too, the Charter granted to the Royal Niger Company was revoked in 1899.

Protectorate of Northern Nigeria,[20] which included all the lands to the North of the Rivers Niger and Benue and the Protectorate of Southern Nigeria[21]. On May 1, 1906, the Colony of Lagos was amalgamated for administrative purposes to the Protectorate of Southern Nigeria under the name of the Colony and Protectorate of Southern Nigeria.

On January 1, 1914, the two protectorates were amalgamated under the name of the Colony and Protectorate of Nigeria with Lord Lugard as the first Governor-General.

(V) The Colony and Protectorate of Nigeria

With the creation of the Colony and Protectorate of Nigeria, the British Government assumed complete control and direct responsibility for the administration of Nigeria[22]. Responsibility for the control and administration of the country on behalf of the United Kingdom Government was exercised by the

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20 Northern Nigeria Order-in-Council, 1899, SRO 1899. No. 994, p.628.

21 Southern Nigeria Order-in-Council, 1899. SRO 1899. No.995, p.634.

22 For a detailed and illuminating legal and constitutional history of this period, See: O.I. Odumosu: The Nigerian Constitution: History and Development (London: Sweet & Maxwell 1963) Chs. 1, 2 and 3. Cf. Kalu Ezera: Constitutional Developments in Nigeria. (Cambridge: Cambridge University Press, 1960.)

Colonial Office through a resident Governor. A Governor over Her Majesty's Colonial territory was usually a United Kingdom Civil Servant appointed by Letters Patent. He is generally responsible for the day to day administration of the territory and the maintenance of law and order. In addition to the instrument of his appointment, he is issued with Royal Instructions which is a Constitutional document establishing the guide-lines for the government of the territory. Between 1914 and 1st October 1960 when Nigeria attained "fully responsible status within the Commonwealth"[23], various constitutional changes were made in keeping with the tempo of political and economic development in the country. These constitutional changes were usually promulgated by Orders-in-Council.[24]

(vi) Political and Constitutional Developments Since 1960

The Independence Constitution of Nigeria[25] established for the country a monarchical form of government. On the anniversary of Nigeria's independence in 1963, by a

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23
Nigeria Independence Act. 1960.(8&9 Eliz.,2,C.55).

24
See for example,Nigeria(Legislative Council)Order-in-Council, 1922; as amended by the Nigeria (Legislative Council) Order-in-Council, 1928 and the Nigeria (Legislative Council) (Amendment) Order-in-Council 1941. The Nigeria (Constitution) Order-in-Council, 1951, No. 1172, Nigeria (Constitution) Order-in-Council, 1954. No. 1146.

25
Nigeria (Constitution) Order-in-Council 1960. No, 1652.

unanimous resolution of both Houses of Parliament sitting as a Constituent Assembly, a new Constitution was enacted which changed the status of the country from a monarchy to a Republic[26]. Apart from the Preamble and the creation of a new territory in the Federation[27], the Republican Constitution was in substance a re-enactment of the Independence Constitution. We do not propose to embark here on an examination of that Constitution since substantial portions of it were suspended when the Armed Forces of the Republic seized control of the Government of the Federation on January 15, 1966, and have since ruled the country by Decree[28].

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26 The Constitution of the Federal Republic of Nigeria, 1963. No. 20. Sec. 2.

27 Ibid. Sec. 3.(1)

28 Cf. Constitution (Suspension and Modification) Decree 1966, Decree No. 1 of 1966. This Decree suspends certain provisions of the Constitution, particularly those dealing with the office of President, the powers of Parliament and the office of Ministers. After theCounter-coup d'etat of July,1966,other Decrees were issued to amend, vary or abolish certain provisions of Decree No.1. and in particular,the form of Government established by Decree No.34. was abolished. Briefly,the Constitutional position in Nigeria at present is that Nigeria is still a Federation. The powers of the President and the Prime Minister under the Constitution are now concentrated in the hands of the Head of the Federal Military Government and Supreme Commander of the Armed Forces. The powers of Parliament are nowvested in a Supreme Military Council and a Federal Executive Council composed of Military and Civilian members. The Republic of Nigeria is now made up oftwelve states instead of four Regions and the Federal Territory of Lagos. Each of the twelve States now exercises

In the wake of a counter coup d'etat on July 29, 1966 and subsequent disagreements among members of the Supreme Military Council, the former Eastern Region of Nigeria under its Military Governor Lt.-Colonel Ojukwu seceded from the Federation of Nigeria and was proclaimed as the Republic of Biafra.[29] In order to ensure the preservation of the territorial integrity of the country, Nigeria, under its leader Major-General Yakubu Gowon declared war on the secessionist regime.[30] On January 15, 1970, the Republic of Biafra collapsed and Lt-Colonel Ojukwu fled from the secessionist enclave.[31]

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28 (cont.)
such powers as were formerly exercised by the Regions prior to January 15, 1966, subject to the power of the Head of the Federal Military Government to issue a decree on any matter whatsoever for the whole of Nigeria.

29
For the text of the Proclamation and other decrees and statements of the short lived Republic of Biafra. See Vol.6.(1967) ILM 665-681 and p. 681. pp. 1237-1240.

30
For the Federal Government of Nigeria's statement on the events leading to the Civil War and other war measures against the rebel regime see Vol. 6.(1967) ILM 682; Vol. 7. (1968) ILM 162-169.

31
Since the end of the Civil War, Nigeria has embarked on a programme of rehabilitation and reconstruction of the war affected areas. Preparations are now afoot for a return of the country to Civilian rule by 1976.Cf: Colin Legum & John Drysdale: Africa Contemporary Record, Annual Survey and Documents (1968-69) at pp.1-12; 551-575; 645-689;(1969-1970 Edition) at pp. B543-583; C59-89; (1970-71 Edition)at pp. B411-432; C101-110.

(b) Ghana[32]

(i) The Early History

The West African state of Ghana is bounded on the West by the Republic of Ivory Coast, on the North by the Republic of Upper Volta, on the East by the Republic of Togo and on the South by the Atlantic Ocean. The international boundary lines run along latitudes $4^{o}\ 45^{1}$ and $11^{o}\ 10^{o}$North and longitudes $1^{o}\ 12^{1}$ East and $3^{o}15^{1}$ West. The total land area of the country is 91,843 square miles[33] and it has a population

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32
Ghana, formerly known as the Gold Coast, was the first British Colonial territory in Africa to achieve independent sovereign status within the Commonwealth under the new name of Ghana. This name was derived from an ancient West African Empire sited approximately within the same location as the former Colony and Protectorate of the Gold Coast and from which most of the ethnic groups inhabiting the territory of present day Ghana were reputed to have descended. For a detailed political and legal history of the evolution of Ghana see: Kwame Nkrumah: Ghana (1957) W.E.F.Ward: A History of the Gold Coast (1949); D.E.Apter: The Gold Coast in Transition; M.Wight: The Gold Coast Legislative Council (1947); A.W.Cardinall: A Bibliography of the Gold Coast (1932); W.W. Claridge: A History of the Gold Coast and Ashanti, 2 Vol. (1915); T.O. Elias: The British Commonwealth, The Development of its Laws and Constitutions, Vol. 10, Ghana and Sierra-Leone (Stevens, London, 1962).

33
Encyclopaedia Britannica, Vol. 10. (1961) Edition) at page 486.

of about eight and a half million people.[34]

The first Europeans to reach the Gold Coast in the fifteenth century were the Portuguese who were soon followed by the British and other Europeans. These various nationalities came to the Gold Coast primarily to trade in slaves, ivory and pepper. They built forts on the coast, from where they conducted their business with the coastal Chiefs and embarked slaves for the new world.

These forts changed hands from time to time as one European nation supplanted the other in the keen competition to secure an exclusive foothold in the territory. In order to establish their presence in the territory, the British, as was customary, formed a joint stock company called the Royal Adventurers Trading into Africa, which was granted a Royal Charter in 1618. In 1750, the company was replaced by another company known as the Company of Merchants Trading to West Africa or otherwise called the Royal African Company.

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34 The Statesman's Yearbook 1971-1972. (Macmillan London 1971), p. 409.

(ii) The First Phase of the Ashanti Wars

The chief suppliers of slaves to European traders in the Gold Coast were the Ashantis, a virile and warrior nation inhabiting the central highlands. As could be expected, abolition of the slave trade in 1807 was unacceptable to them. A period of unrest, harassment and reprisals were unleashed by the Ashantis against the more sedate Fantis on the coast who had settled down to co-operate with the British and were then engaged in legitimate trade in gold, ivory and pepper.

In 1821, by Act of Parliament, the Royal African Company was dissolved and the British Government entrusted the administration of the Company's properties into the hands of Sir Charles MacCarthy, who at that time was Governor of Sierra-Leone. There was mutual dislike betweem the Ashantis and Sir Charles MacCarthy. This soon erupted into war in which Sir Charles lost his life. A decision had to be taken to put a final stop to these harassments by the Ashantis and also to avenge the death of MacCarthy. Although the British finally defeated the Ashantis in the famous battle of Dodowa in 1824, nevertheless, they decided to evacuate and abandon the trading stations in the Gold Coast. The Administrator of the British forts in the territory, Sir Neil Campbell, Governor

of Sierra-Leone was then instructed to withdraw British officials from the territory.

This decision angered the resident merchants,who, rather than be withdrawn from the territory,formed themselves into a private company. About 1830, Captain George Maclean was appointed President by the London Committee of the company with authority to take over the management of the company's affairs. On his arrival on the Gold Coast, Captain Maclean adopted a policy of friendship with the Ashantis, which was signified by the Ashanti Treaty of 1831.

Various allegations of maladministration were made against Captain Maclean which prompted the British Government to appoint a Commission of inquiry concerning the future administration and government of the areas around the forts. The Commission found nothing againstMaclean personally, but recommended that the relationship between the Crown and the coastal chiefs should be regularised by conclusion of formal treaties.

(iii) The Bonds of 1844

It fell to the lot of the new Governor who was appointed in 1844,,to see to the conclusion of these treaties numbering

about twelve, which were referred to collectively as "The Bonds of 1844".

These treaties provided as follows:

"1. Whereas power and jurisdiction have been exercised for and on behalf of Her Majesty the Queen of Great Britain and Ireland, with divers countries and places adjacent to Her Majesty's forts and settlements on the Gold Coast; we Chiefs of countries and places so referred to, adjacent to the said forts and settlements do hereby acknowledge that power and jurisdiction and declare that the first objects of law are the protection of individuals and property.

"2 Human sacrifices, and other barbarous customs, such as paryarring, are abominations, and contrary to law.

"3 Murders, robberies, and other crimes and offences, will be tried and enquired of before the Queen's judicial officers and the Chiefs of the districts, moulding the Customs of the country to the general principles of British Law.

"Done at Cape Coast before His Excellency the Lieutenant-Governor, on this 6th day of March, in the year of our Lord, 1844".[35]

(iv) The Second Phase of the Ashanti Wars

At the time of Maclean's death in 1847, the United Kingdom Government had no settledpolicy concerning the Gold Coast. The coastal ethnic groups,particularly the Fantis,had by this time settled down and made friends with the British, and were gradually appreciating the benefits and amenities derived from Western civilization. The Ashantis,however, exploited the temporising attitude of the British to discredit the Fantis among the other ethnic groups of the Gold Coast and to resume once again their age long attacks on the British forts and castles.

In 1874,Sir Garnet Wolseley led a military expedition to Ashanti which captured the Ashanti capital of Kumasi; consequently,the Ashantis were forced to sign the Treaty of Fomena in which they promised to keep the peace and to pay an indemnity to the British Government. In spite of

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35
Cited by T.O. Elias in The British Commonwealth, The Development of its Laws and Constitutions,Vol. 10, Ghana and Sierra-Leone. at page 17 (Stevens, London1962).

this defeat and the subsequent Treaty of Fomena, the Ashantis were still restless, threatening invasions of the British held coastal lands and denouncing the Treaty of Fomena. Finally, in 1895, the British Government was forced to despatch another military expedition to Ashanti, which once again captured Kumasi after some stiff resistance by the Ashantis. Victory, having finally eluded the Ashantis, the British Government declared a Protectorate over the Ashanti Kingdom.[36]

(v) The Annexation of the Gold Coast

In order to secure the hinterland of the Gold coast as an exclusive sphere of influence for British Trading Companies, the jurisdiction of Her Majesty's Government was extended further inland to the North of the Ashanti Kingdom. In 1901, by Order-in-Council,[37] Her Majesty's Government defined the areas of Her Majesty's jurisdiction on the Gold Coast. Under the Order-in-Council, the Gold Coast Colony was described as a Colony by settlement, Ashanti as a British Colony by conquest and the Northern Territories as a British Protectorate.

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36 It has been suggested that between 1824 and 1895 a total of seven battles were fought between the Ashantis and the British; See T.O. Elias, op. cit. at p. 4.

37 For a detailed study of Constitutional changes made in Ghana between 1850 and 1960. See Ibid. at Chs. 2,3, and 4.

After the end of the First World War, the German territory of Togoland came under the Mandate system established by the League of Nations; Western Togoland became a British Mandated Territory and was administered as part of the Cold Coast Colony. With the establishment of the U.N. Organisation after the Second World War, Western Togoland became a Trust Territory in accordance with Chapter XII of the Charter of the U.N. The territory was incorporated into the Gold Coast in 1956 after a plebiscite conducted by the United Nations.

(vi) Constitutional Changes

Various constitutional changes which we shall not go into here were made by Orders-in-Council in the Gold Coast between 1850 until the attainment of independence on March 6, 1957 with Dr. Nkrumah as Prime Minister.[38]

38
Under the independence Constitution, Ghana was a Monarchy. On July 1, 1960, Ghana became a Republic with Dr. Nkrumah as first President. This Republican Constitution was suspended by the Military Junta which seized power in February, 1966. When the country was returned to civilian administration in 1970, a Second Republican Constitution was enacted by a constituent assembly summoned specifically for the purpose by General Afrifa the Military Head of State. Under this constitution, the former Leader of the Opposition in Dr. Nkrumah's administration became the Prime Minister of Ghana. In January, 1972, Dr. Busia was himself overthrown as Prime Minister in a bloodless army coup d'etat in which Colonel Acheampong assumed office as Chairman of the National Reformation Council.

(c) Kenya

(i) Early History

Lying across the Equator on the Eastern seaboard of Africa, the Republic of Kenya is bounded on the North by the Sudan and Ethiopia, on the East by the Indian Ocean and Somalia, on the South by Tanzania and on the West by Uganda and Lake Victoria. The territory has a total area of 224,960 sq. miles and a population of 10,890,000.[38a]

Penetration of East Africa by foreign nationals first began with the Arab slave traders from Arabia and Persia who had settled on the coast long before any Europeans came to East Africa. When the Portuguese arrived in the 16th century on their way to the East Indies, they found the Arabs firmly entrenched there. The Portuguese built a fortified installation on the coast named Fort Jesus, which soon brought them into conflict with the Arab Moslems. In the ensuing struggle, however, the Portuguese were ejected and had to withdraw Southwards to the area of present day Mozambique, thus leaving the Eastern seaboard of Africa to

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38a Colin Legum (Ed), Africa Contemporary Record (1971-72) (Africana Publishing Corporation, New York 1972) at p. B. 146.

the undisputed supremacy of the Arabs.[39]

Britain first appeared on the scene in East Africa in the 19th Century in the course of the abolition of the slave trade. In 1822, she obtained the consent of the Imam Seyyid Said the Arab potentate of the East African Coast, to search Arab ships for slaves. Contact was not made by any Europeans with the interior until 1848, when two German nationals Johann Ludwig Krapf and Johannes Rebmann, evangelists for the Church Missionary Society, penetrated and explored the hinterland.

By the middle of the 19th Century, the strategic importance of East Africa as a staging post on the sea route to India had become apparent to the British India Steam Navigation Company, which had, under its Chairman Sir William Mackinnon, established in 1872, regular steamship services between East Africa, England and India. In 1877, Sir William obtained from the Sultan Barghash a concession to administer the territories

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39
For a detailed account of the contemporary history of Kenya: Reginald Coupland: East Africa and Its Invaders from the Earliest Times to the Death of Seyyid Said (Oxford 1938): The Exploitation of East Africa 1856-1890 (London,Toronto 1939): Gerald Portal: The British Mission to Uganda in 1893 (London 1894); Charles Eliot: The East Africa Protectorate (London 1905): W.McG.Ross: Kenya From Within (London 1927); N.F.Hill: Permanent Way (Nairobi 1949); L.S.B. Leakey: Maumau and the Kikuyu (London 1952); L.S.B. Leakey: Defeating Maumau.

of the Sultan and manage its customs ports. As we indicated above, in the case of Nigeria and Ghana, the British Government at this period was not interested in Colonialexpansion.[40] For this reason, Sir William was unable to accept the Sultan's offer without the express consent of the Foreign Office.

A German explorer, Dr. Karl Peters, had been active in East Africa and by 1885 had concluded treaties of protection with some chiefs in the area. In order to protect the interest of the Sultan of Zanzibar, the British Government was induced by the action of the German Government to join with Germany and France to define, in 1886, the territorial claims of the Sultan of Zanzibar.[41]

Britain and Germany also agreed between themselves that apart from the coastal strip of ten miles over which the Sultan of Zanzibar would exercise jurisdiction, the two Powers

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40
See Supra. p. 12. and pp. 20-21.

41
The territorial claims of the Sultan were contained in a letter cited by Sir Kenneth Roberts-Wray- Commonwealth and Colonial Law (Praeger New York 1966) at page 757.

would exercise jointly influence in the territory between River Rovuna and Tana. By a subsequent agreement, this territory was apportioned between Britain and Germany so that Britain took the area "North of a line running from the mouth of the Umba River, opposite Pemba Island, and skirting North of Mount Kilimanjaro to a point where the 1° 5' latitude cuts the Eastern shore of Lake Victoria. The German sphere was South of that line".[42]

Responsibility for the administration of the British sphere of influence was assumed by a British company as was the case initially in Nigeria and Ghana. Sir William Mackinon's British East Africa Association reluctantly took over this responsibility. On April 18, 1888, the Association was incorporated by Royal Charter as the Imperial British East Africa Company.

(ii) The Penetration of the Hinterland - The New Mobility Created by the Railway

Actively engaged in the quest for annexation of colonies on behalf of the Imperial German Government, Dr. Karl Peters had attempted to extend German authority to Buganda where

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42 Encyclopaedia Britannica, Vo. 13. (1961) Edition) at page 341.

British and French Missionaries had been active from 1877. This German action infuriated the British Government. It was expected that the Imperial British East Africa Company would take adequate measures to neutralize German designs in the area. This,however, the Company was unable to do;not possessing the material resources to engage in that type of diplomatic activity. Although a Protectorate was declared over Buganda in 1894, it dawned on the British Government that in order to:

(a) maintain a continuous presence in the hinterland,

(b) secure the headwaters of the Nile and

(c) fulfil international obligations with regard to the suppression of the slave trade assumed at the Brussels Conference in 1889-90,

a railway should be constructed to link Mombassa on the coast to Lake Victoria.

Work on the railway,which was carried out by Indian labourers imported into East Africa for this special purpose,was commenced in December 1895 and reached Kisumu on Lake Victoria in December 1901.

(iii) <u>The Proclamation of the East African Protectorate</u>

A Committee headed by Sir Gerald Portal which was

commissioned to report on the East African territories had in 1894, recommended among others, that the Charter granted to the Imperial British East Africa Company should be revoked and that reasonable compensation be paid by the British Government to the Company for the loss of its charter. The Committe also recommended that the British Government should assume direct responsibility for the administration of the territory. These recommendations were accepted. On July 1, 1895, the East Africa Protectorate was proclaimed at Mombassa with Sir Arthur Hardinge as first Commissioner.

For the first ten years of the Proclamation of the Protectorate, the administration was engaged in pacification of the hinterland as risings and revolts by the native populations became rampant. The chief causes of these revolts were the series of Orders-in-Council issued between 1901 and 1904,[43] which gave to European immigrants from England, attractive land grants and concessions on fertile

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43 L.S.B. Leakey, Op. cit., Cf. Jomo Kenyatta: Facing Mount Kenya; for an insight into the land problem in Kenya and the plight of the Kikuyus.

agricultural lands in the hinterland then made accessible by the railway. The native populations felt restless at the pressure of the new wave of immigrants, who dispossessed them of their commonly held fertile agricultural lands and left them only with the less fertile lands in small holdings on reservations. Furthermore, unlike in Nigeria and Ghana, the native populations of Kenya did not have any recognisable indigenous political organisation, which would have made it possible for the Indirect Rule system of government practised successfully in Nigeria to be introduced in Kenya.

(iv) Political and Constitutional Developments

In the 18th Century, Britain had learnt the colonial lesson in the American colonies, that a policy of taxation without representation might lead to friction between a settler element and the mother country. As the African populations in Kenya were poor and could therefore not be taxed to pay for the railway or other expenses connected with the development of the hinterland, the burden of taxation to pay for the railway fell on the shoulders of the European settlers. In order, therefore, to involve the European settlers in the administration of the country, an

Executive Council composed of European farmers was appointed in 1905 to advise the Governor Sir Percy Giroud. In 1907, a nominated Legislative Council was constituted to provide machinery for administration and law-making in the territory.

When the First World War broke out in 1914, most of the European farmers offered their services to fight in the East African campaign over the German Colony of Tanganyika. This resulted in a financial set back for the economy of Kenya. After the war, efforts to induce European immigrants to Kenya did not meet with much success.

Therefore, in June 1920, His Majesty's Government promulgated an Order-in-Council annexing the East African Protectorate to His Majesty,s dominions under the name of the Colony of Kenya.[44]

From this time onwards, European settlers were granted elected representation in the Legislative Council. By the end of World War II, Africans were, for the first time, nominated to the Legislative Council, thus making Kenya, the first East African territory with an African in its

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44 Kenya (Annexation) Order-in-Council, 1920, S.R.O. 1920, No. 2342, S.R.O. and S.I. Rev. II., 673.

Legislative Council. In 1948, the East African High Commission was set up to administer certain services of mutual benefit to Kenya, Uganda and Tanganyika.[45] The outbreak of the maumau rebellion accelerated African advancement to an elected African majority government. In 1963, Britain granted self government to Kenya with Mr. Jomo Kenyatta as first Prime Minister. In 1964,Kenya became a Republic within the Commonwealth with the first Prime Minister designated as President and Head of State.

(d) Tanzania[46]

A glance at any current political map of Africa would showtthat

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45
See Infra, pp. 52-59.

46
The United Republic of Tanzania came into being in 1964 when the People's Republic of Zanzibar was united with the Republic of Tanganyika following a violent revolution on the island of Zanzibar which unseated the Sultan. In accordance with the Articles of Union signed on April 22, 1964 by President Julius Nyerere of Tanganyika and President Abeid Karume of Zanzibar, the Constitution of Tanganyika was adopted as the Interim Constitution for the United Republic. That Constitution was modified, however to provide for exclusive jurisdiction of the Parliament and Executive of the United Republic in certain Union matters, namely, (i) The Constitution and Government of the United Republic; (ii) External Affairs;(iii) Defence; (iv) Police; (v) Emergency Powers, (vi) Citizenship;(vii) Immigration; (viii) External trade and borrowing;(ix) The Public Service of the United Republic;(x)Income tax, corporation tax, customs and excise duties;(xi)Harbours, civil aviation, post and telegraphs. The United Republic of Tanzania is a curious legal phenomenon;in that the administration of 1st Vice President in Zanzibar has such a wide degree of autonomy that it is not immediately clear whether the United Republic is in practice a Federation, Confederation, Customs Union or a Unitary State. Section 3 of the Interim Constitution Decree 1964, however provides that "Tanganyika and Zanzibar are one United Republic". As any inquiry in this regard is outside the scope of this dissertation we shall therefore not probe into it here. Cf. Vol.3.(1964)ILM 763-777.

the mainland of Tanzania is bounded on the East by the Indian Ocean, on the South West by Rhodesia and Malawi, on the West by Zaire, on the North West by Ruanda and Burundi, on the North East by Uganda and on the North by Kenya. Together with the two islands of Zanzibar and Pemba and an inland waters of 20,650 square miles on Lake Tanganyika, the total area of Tanzania is 383,471 square miles.[47]

(i) Early History Leading to the Proclamation of a Protectorate by Germany

The early history of Tanganyika before the declaration of a Protectorate by the Imperial German Government on January 1, 1891, is indistinguishable from that of Kenya up to 1886, as the same personalities and events were at interplay, and it would serve no useful purpose for us to repeat them here.[48]

We may only mention however, for fullness, the pioneering discoveries in Tanganyika of some European explorers. R.F. Burton and J.H. Speke discovered and explored Lake Tanganyika and Lake Victoria. In 1861, Speke, accompanied

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47 International Year Book and Statesman's Who's Who (Burke's Peerage Ltd. London 1971) at pp. 465-467.

48 Supra. pp. 26-29.

by J.A. Grant explored Lake Victoria and proved that it was the source of the Nile. In that same year, the explorer K.K. Von der Decken explored the area around Mount Kilimanjaro, and in 1866, Dr.David Livingstone set out on his last journey to the interior where he was met by H.M. Stanley at Ujiji in 1871. In 1875,Lovett Cameron embarked on an expedition from Tanganyika with the main purpose of crossing Africa from East to West.

Other explorers,notably Germans,were also active in this area during this period.

Prominent among such explorers were Franz Stuhlmann, O. Baumann and Dr. Karl Peters, who had,in 1881,founded the Union for German Colonization and had travelled to East Africa with the sole aim of concluding treaties with native chiefs and annexing territories.

After the Anglo-French-German Commission of 1886, which defined the extent of the territorial claims of the Sultan of Zanzibar, and the Anglo-German agreement which recognized German sphere of influence South of latitude 1^{o} South, the German Government began to develop the territory. With the Proclamation of a Protectorate on January 1, 1891, by the Imperial German Government, construction of two railway lines were commenced and large

scale agricultural plantations were being developed. These programmes, however, suffered serious set-backs as the Arab and African populations were constantly in revolt and rebellion against German authority. The outbreak of World War I brought to a close German jurisdiction over the territory of Tanganyika.

(ii) Tanganyika under the Mandate System

Part of the settlement and price which the Imperial German Government had to pay for her part in the First World War was her renunciation of her rights over the territory of Tanganyika. Part IV Section 1, Article 119 of the Treaty of Versailles provides as follows:

> "Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions".[49]

Under the Mandate System set up by the League of Nations, Tanganyika was placed under British Mandate. On January 31, 1920, a Royal Commission was issued appointing

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49 See - The Treaties of Peace 1919-1925 Vol. 1. at page 84, (published in two volumes by the Carnegie Endowment for International Peace, New York 1924). Cf. T.S. Woolsey. The Provisions of the Treaty of Peace Disposing of German Rights and Interest Outside Europe. Vol. 13. (1919). A.J.I.L. 741-745.

Sir Horace Byatt as Administrator of German East Africa. By Order-in-Council, His Majesty's Government made provision for the government of Tanganyika on similar lines as is followed in other colonial territories under powers conferred by the Foreign Jurisdiction Act 1890.[50]

In April 1925, Sir Donald Cameron was appointed Governor. During his tenure of office in Tanganyika, he laid the infra structure for the economic and political development of the territory. His Governorship was notable in the following important respects:-

(i) He established a Legislative Council for the territory in 1926.

(ii) He re-appointed and re-established the native institution of Chieftaincy which was abolished by the Germans.

(iii) He introduced into Tanganyika the Indirect Rule System of government which had been evolved and practised successfully in Nigeria.

(iv) He extended the railway line further inland.

The orderly development of Tanganyika was interrupted once again by the outbreak of war in 1939. After the war,

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50 Tanganyika Order-in-Council, 1920, S.R.O. No. 1583. S.R.O. and S.I. Rev. VIII. 266.

the territory was placed under Trusteeship on similar lines as the British Mandated Territories of the Cameroon and Togoland.[51]

(iii) Developments from 1946 Onwards[52]

In keeping with British practice of making constitutional changes in the Colonies by Orders-in-Council, Tanganyika progressed rapidly on the road to sovereign status.[53] In 1948, when the East African High Commission was set up, the Governor of Tanganyika became a member.[54] In 1961, the Trusteeship Agreement was terminated by the United Nations at the request of Her Majesty's Government, and on December 9 of the same year, the country became an independent sovereign member of the Commonwealth with Mr. Julius Nyerere as Prime Minister. In 1962, a Republican form of Government was adopted under which the Prime Minister

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51
Supra. pp. 6. and 25.

52
For a detailed account and evaluation of the history of this period. See J.F.R. Hill and J.P.Moffett,- Tanganyika: A Review of its resources and their Development (London, 1955); Handbook of Tanganyika. (Dar-es-Salaam (1957); J.S. Cole and Denison, - The British Commonwealth: The Development of its Laws and Constitutions, Vol. 12. Tanganyika (Stevens & Sons London 1964).

53
See Tanganyika Independence Act, 1961 (10 & 11 Eliz.2, c.1.) Cf. also The Constitution Order-in-Council, 1961 (S.I.1961.No. 2274).

54
See Infra at pp. 54-59.

became an Executive President and a new Prime Minister Mr. Rashidi Kawawa was appointed to run the day to day affairs of the Government. When the United Republic of Tanzania was formed in 1964, the President of Tanganyika became President of the United Republic, the President of Zanzibar became First Vice President of the United Republic, while the Prime Minister of Tanganyika became Second Vice President of the United Republic.

In 1967, Tanzania joined with Kenya and Uganda to create the East African Community, the Headquarters Secretariat of which is sited in Arusha in Tanzania.

(e) Uganda

(i) Early History[55] - The Advent of Europeans

Any attempt at writing a digest of the early history of Uganda would necessarily centre on the history of Buganda (one of the four Kingdoms in Uganda) because it is by far

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Reference could be made for a comprehensive history of Uganda to the following: - H.B.Thomas and R. Scott, - Uganda (London, N.Y. 1935; F.D. Lugard, - The Rise of our East African Empire (London 1893); J.V. Wild - The Story of the Uganda Agreement (London 1952); Sir Albert Cook, - Uganda Memories; J.D.Tothill,- Agriculture in Uganda (London 1940); H.F. Morris and J.S.Read, - The British Commonwealth: The Development of its Laws and Constitutions, Vol. 13, Uganda, (Stevens & Sons London 1966); H.F.Morris. - A History of Ankole (Nairobi 1962).

the largest and most important. Furthermore, before the advent of Europeans, only Buganda among the other ethnic groups had evolved a highly sophisticated political organisation represented by the Lukiko[56], the Katikiro[57] and a very powerful and colourful monarchy known as the Kabaka[58]. We would therefore urge the reader not to be alarmed if it appears that we have here constituted the history of Uganda principally by events and developments in Buganda.[59]

Uganda, like Kenya, lies across the Equator and is bounded on the South by Tanzania, on the West by Zaire, on the North by the Sudan and on the East by Kenya. With a population of 7,367,000 and a total area of 93,981 square miles inclusive of 13,689 square miles of water, Uganda attained independence as a member of the Commonwealth on March 3, 1962. While in

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56
This was the name given to the traditional Parliament, Court or Council of the Kings of Buganda.

57
The traditional Prime Minister of Buganda is the most important office holder in traditional Buganda Society ranking next in importance and influence to the Kabaka himself.

58
Buganda Kings were known by the Royal style of 'Kabaka'. The last occupant of the throne of Buganda, His Highness Sir Frederick Mutesa II, became President of Uganda, but was forced into exile in a coup d'etat engineered by Prime Minister Milton Obote. The Kabaka died in penury in London in 1969.

59.
Infra, pp. 44-47.

the case of Nigeria, it was the quest for scientific discovery as to the source and course of the River Niger that motivated the first European penetration into the hinterland, in the case of Uganda, the first European entered the territory about the middle of the 19th Century in search of the source of the River Nile.[60]

As happened in Nigeria, European penetration of Uganda came simultaneously from two directions - the North and South. The explorer Speke, looking for the source of the Nile, entered Uganda in 1862 from the South and reached the Court of Kabaka Mutesa I. Explorer Samuel Baker, who was also engaged on a similar scientific expedition entered Uganda from the North. Around 1872, Samuel Baker returned to Uganda as an emissary of the Khedive of Egypt to negotiate, without success, treaties of annexation of Northern Uganda to Egypt. (One individual, however, who succeeded in this respect was H. M. Stanley. -)

A clear pattern seemed to have been established as we have indicated above in the case of Nigeria, Gold Coast

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60 See generally, J. H. Speke, - Journal of the Discovery of the Sources of the Nile (1863).

and Kenya, that in annexation of Colonial territories, the fore-runners of such annexations were usually British Trading Companies. In the case of Uganda, the Imperial British East Africa Company acquired in 1888 from the explorer H. M. Stanley, the personal treaty acquired by him surrendering sovereignty rights over certain areas of Uganda to him in his personal capacity by some of the Chiefs of the area.[61]

(ii) The Era of the Imperial British East Africa Company

We discussed above[62] how the Anglo-German Agreements of 1890 demarcated the respective spheres of influence of both Britain and Germany in East Africa. By that Agreement, the territory now referred to as present day Uganda fell within British jurisdiction. In pursuance of that Agreement, the Imperial British East Africa Company

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61
See H.F. Morris and J.S. Read, Op. Cit. p. 7. where one of these personal treaties is cited as follows: "We, Uchunku, Prince of Ankori and Mpororo, by authority and on behalf of my father Antari the King and the Chiefs and elders of the tribe of Wanyankori occupying and owning the territory of Ankori and Mpororo, do hereby cede to Bula Matari (or H.M. Stanley), our friend, all rights of government of the said districts and do hereby grant him or his representative the sovereign right of government over our country for ever." Cf. Sir Edward Hertslet, Op. Cit. Supra, p. 12. No. 57.

62
Supra. p.29.

dispatched one of its ablest officials Frederick Lugard[63] to Buganda to negotiate a treaty of protection with the Kabaka.

The treaty which he concluded with the Kabaka on December 26, 1890, placed the Kabaka's Kingdom under the Company's jurisdiction in return for the Company's protection.

Religious wars between Roman Catholics, Protestants and Muslims characterised the brief period of the Company's rule in Uganda, so that by 1892, the Company decided to withdraw from Uganda. As a result of mobilisation of public opinion in England against this course of action, the British Government reluctantly sent Portal the Consul-General in Zanzibar, to Uganda to study the situation and make recommendations. Portal arrived in Uganda in March 1893, and proceeded to re-negotiate on behalf of the British Crown agreements with native kingdoms similar to the ones negotiated by Lugard on behalf of the Imperial British East Africa Company. On June 19, 1894, by a Proclamation in the London Gazette, the British Government declared a Protectorate over Uganda.[64]

63
This was the same gentleman who came to Nigeria and introduced the system of Indirect Rule there. He became the first Governor-General of Nigeria in 1914.

64. H.F. Morris and J.S. Read, Op. Cit. pp. 11-19.

(iii) The Protectorate Government and The Native Kingdoms

Briefly, the major problems confronting His Majesty's Government in the first few years of its existence in Uganda were:-

(a) the regulation of relations with the native Kingdoms of Buganda, Ankole, Toro and Bunyoro;

(b) defining the separate, individual or inter-related functions of both the Protectorate Government and each of the Native Kingdoms respectively:

(c) creating a land settlement in answer to the problems arising from the religious wars;

(d) establishing constitutional guidelines for the Native Kingdoms on the role and functions of traditional institutions such as the Lukiko, the Katikiro, and traditional office bearers.

Settlements of these major problems, some of which were incorporated into written documents, are usually referred to collectively as "The Uganda Agreements" of 1900-1902.[65]

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65 These Agreements or Treaties were applicable between His Majesty's Government in the U.K. on the one hand and the Native Kingdoms of Buganda, Toro, Ankole and Bunyoro separately and severally on the other. We do not intend in this dissertation to focus our attention on the provisions

See - cont. on p.46.

(iv) The Path to Independence

The first major constitutional document relating to the administration of Uganda after the proclamation of a Protectorate was the Uganda Order-in-Council 1902,[66] which entrusted detailed administration of the Protectorate government to a Commissioner, constituted a High Court, and laid the infra structure for the maintenance of law and order. In 1920, provision was made by Order-in-Council[67] for the setting up of Legislative and Executive Councils for the Protectorate. It should be borne in mind, that from 1900, Buganda, in accordance with the Agreements, continued to function as a separate Administration and government in Uganda side by side with the Protectorate government.

> " For a generation, power was in the hands of those Chiefs of the two Christian parties who, as young men, had fought in the religious wars and seen the defeat of Islam and paganism and the deposition of the unreliable Mwanea and who were now the owners of the large estates which the Agreement had given them. Yet, although the Chiefly offices were to be divided

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65 ft.n.cont.
of these agreements, their legal status or their impact on the constitutional and political developments in Uganda in so far as any such exercise is irrelevant to subsequent development of aviation in Uganda.

66 See, Laws of the Uganda Protectorate 1910 (Stevens & Sons Ltd.) Appendix A, pp. 884-896.

67 See, Order-in-Council, No.25. Laws of Uganda Protectorate. (Revised 1923) Govt. Printer Uganda) pp. 1210-1215.

> between Roman Catholics and Protestants, it has been the latter who have ever since remained in the ascendancy in Buganda's administrative and political affairs. Epitomising the new order was the Regent and Katikiro, Apoli Kaggawa; a devout Christian, autocratic, courageous and progressive in outlook and, until the latter years of his life, enjoying the full confidence of the Protectorate Government, he administered the Kingdom in the name of the young Kabaka with a firm, if almost ruthless, efficiency, ensuring the success of such reforms or innovating measures the Protectorate Government prompted him to introduce. For the next half century the control of Buganda affairs lay with the chiefly class, the beneficiaries of the religious wars and of the Agreement. Not only were they the administrators and judges, but they also formed the overwhelming majority in the Lukiko as they did in the lower councils at szaza, ggombolola and muluka level. On the whole, able and as a result of the education which the wealth from their estates assured them, the most enlightened members of the community, they served the Kingdom well. Moreover, although members of a civil service, they were a part of traditional society and were sufficiently in touch with the people they administered to prevent their being regarded as an alien bureaucrecy."[68]

A situation such as this would naturally tend to engender conflict and rivalry between the Buganda government and the Protectorate government. It was not surprising therefore, that the unrests in Uganda in the 1950's either directly emanated from or were inflamed by events in Buganda. Rapid constitutional changes were made by Her Majesty's government to keep pace with the desire for independence.

Uganda achieved independence as a federal state. It became a Republic in 1963 with the Prime Minister replacing

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68 H.F. Morris and J.S. Read. Op. Cit. p. 29.

the Kabaka as President.[69] In 1970, following a military coup d'etat, President Obote was replaced by General Amin as Head of State.[70]

C. The Evolution of the East African Community Historical Antecedents

The three East African Countries of Kenya, Tanzania and Uganda being geographically contiguous, and their colonial boundaries having been drawn (as in the rest of Africa) without account being taken of the ethnic or linguistic compositions of the local populations affected by these artificial frontiers, do present, prima facie, a definite and logical picture of a composite political entity were artificial boundaries together with their consequences to disappear. From the earliest days of British activity on the East African mainland, the question whether Uganda and Kenya (Tanganyika being at that time under German sphere of influence) should be centrally administered as one country; or if not, where the geographical boundaries demarcating the two territories should be drawn had been a contentious subject for debate. In 1899, Sir Harry Johnston in his capacity as Special Commissioner to Uganda had articulated

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69
See, for a detailed diary of events leading to and after the establishment of a Republic, Colin Legum and John Drysdale; Africa Contemporary Record, Annual Survey and Documents 1968-9. (Africa Research Ltd. London) at pages 230-237.

70
Colin Legum and John Drysdale, Op. Cit. (1970-71 Edition) at pages B.187--B.204.

the desirability for the British government to provide for the territories of Kenya and Uganda to be jointly under one single administration.[71] His recommendation in this respect was however ignored by His Majesty,s Government.

In spite of the set back which befell Sir Harry Johnston's idea, compelling economic reasons represented by the extension of the railway from Mombassa to the White Highlands, soon forced the British Government to re-examine the whole question again. As we indicated above,[72] the opening up of the interior of Africa and the consolidation of British presence there as a counter-weight to German designs in the area, meant that the British Government should find the money to extend the Railway westwards even beyond the White Highlands.[73]

The decision to levy taxes on European farmers to pay for the railway, meant that more of the land to the west of

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71
Sir Harry Johnston: The Uganda Protectorate (London 1902). Vol. 1. Ch. 8., Cf, H.F. Morris and J.S. Read, Op. Cit. page 25.

72
Supra. pp. 29-30.

73
It is interesting to note that the railway was in fact referred to as the Uganda Railways, and not the Kenya or Mombassa railway which was its terminus.

Kenya Protectorate would have to be made available for European agriculture. Uganda Africans, mainly in Buganda, fearing a diminution in the authority of their native government or in the prestige of the Kabaka, opposed all suggestions of unification, centralisation, control or supervision of their native government by a Protectorate government based in Kenya.[74] It was not until the end of the first World War that this matter again came to the fore front; this time with the appearance of the former German Colony of Tanganyika, then a British Mandated territory to be included in any possible future integration.

(a) The Governors Conference

As is suggested by its name, the Governors Conference was a Conference of British Colonial Governors of Kenya, Tanganyika and Uganda with the British Resident of Zanzibar meeting to discuss, agree on or frame common policies to be applied in the territories for which they were respectively responsible. The first Conference met in 1926 and it became a useful forum for co-ordinating policies on such subjects such as railways

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74
In 1925, and as amended subsequently from time to time, His Majesty's Government, by Order-in-Council, did create the office of High Commissioner for Transport under the Kenya and Uganda (Transport) Order-in-Council, 1925; Cf. S.R. and O (1925) No. 1458 page 1674.

and customs tariff. It was also useful as a forum for co-ordinating the war effort of the East African territories during the Second World War.[75]

Appraising the suitability of the machinery of the Governors Conference for achieving the desired objective of economic integration of the East African territories, the Colonial Office itself made the following observations,

> "The Governors' Conference is a body which was established by administrative direction of the Secretary of State and which has no juridical or constitutional basis. It functions without public debate or discussion and its decisions are normally based on material available only to the Governments concerned and not to the general public. In practice it is frequently necessary for the Governors, having agreed in the Governors' Conference to a certain course of action, to present their Executive and Legislative Councils with what amounts to a fait accompli. By its nature the Conference is not well designed to enlist the support of public opinion

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75 It is worthwhile to state here, that the Governors' Conference could not have discussed aviation matters prior to 1945 when the East African Territories (Air Transport) Order-in-Council, 1945, was promulgated. Furthermore, neither the Orders-in-Council providing for the administration of each of the territories of Kenya, Tanganyika or Uganda conferred any authority on the Governors concerning aviation, nor the Letters Patent appointing each of these Colonial Governors nor the Royal Instructions issued to them. Jurisdiction in respect of aviation was specifically reserved for His Majesty,s Government in the United Kingdom by virtue of the Colonial Clause in Article 40 of the Convention Relating to the Regulation of Aerial Navigation, Signed at Paris, October 13, 1919, Vol. XI. (1922) L.N.T.S. page 197.

> and to take full advantage of the considerable body of expert knowledge and experience which is available in East Africa. In fact it must be admitted that, although it has served an important purpose, the Governors' Conference in its present form is no longer an appropriate or effective means of discharging the important responsibilities and functions which must continue to be performed on an inter-territorial basis .....
>
> When common legislation is necessary, the procedure is to present identical ordinances separately to the three legislatures. This is not only unwieldy, but it places the territorial Governments in the position of being unable to accept amendments of any kind as a result of debate without destroying the very uniformity which the legislation aims to achieve. At the best the Ordinance which is passed first forms the model for the other legislatures and their debates become unreal. The procedure is manifestly unworkable as a permanent arrangement."[76]

These defects having been spotlighted, the Colonial Office proposed in 1947 the setting up of an East Africa High Commission[77] structured to take account of the defects of the Governors' Conference which it was designed to replace.

(b) The East Africa High Commission

The Order-in-Council[78] creating the High Commission was

76
Inter-Territorial Organisation in East Africa (Colonial Office Document No. 191. This document is also cited in the East Africa, Report of the Economic and Fiscal Commission (otherwise called the Raisman 1961 Committee Report), London, H.M.S.O. Cmnd. 1279. pp. 2-3.

77
Inter-Territorial Organisation in East Africa-Revised Proposals (Colonial Office Document No. 210). Cf. Ibid.

78
The East Africa (High Commission) Order-in-Council, 1947, 1947.No. 2863. The Laws of the High Commission Revised Edition 1951. pages 305-326.

made by His Majesty's Government on December 19, 1947, and was brought into operation on January 1, 1948, by Proclamation made jointly by the Governors of the three territories in their respective Official Gazettes. The Order-in-Council was in six parts. The Preamble to the Order-in-Council stated clearly the desired objectives of His Majesty's Government as follows:-

> "It is desirable and expedient in the interests of good government to make provision for the control and services of common interest to the inhabitants of the Colony and Protectorate of Kenya, the Trust Territory of Tanganyika and the Protectorate of Uganda and for that purpose to establish an East Africa High Commission and an East Africa Central Legislative Assembly for those territories".[79]

(i) Interpretation

We shall now proceed to examine for purposes of systematic analysis the detailed provisions of the Order-in-Council. Part 1 contained the interpretation clause and therefore does not call for any discussion. However, we should call attention to Section 3 which provided that "Parts III and IV of this Order shall continue in operation for a period of four years and

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79
Ibid.

shall then cease to have effect"[80].

(ii) The Composition, Structure and Powers of the High Commission

Part II established the High Commission, composed of the Governors of Kenya, Tanganyika and Uganda and with headquarters at Nairobi in Kenya.[81] Legal personality was granted to the High Commission, with perpetual succession, an Official Seal and the right to deal in movable and immovable property.[82] It was provided that the Governor of Kenya shall be the Chairman at Conferences of the High Commission,[83] and was given power to act on behalf of the High Commission when the High Commission was not in session. He, however, must report to the other members of the High Commission any decisions taken in their absence.[84] In order to make for smooth day to day running of the affairs of the High Commission, provision was made for the

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80 Ibid. The purpose of this provision was to palliate opposition to the creation of the High Commission. In 1951, His Majesty's Government amended the provisions of Parts III and IV by The East Africa (High Commission) (Amendment) Order-in-Council, 1951 No. 2126, by extending the operation of Parts III and IV for another four years.

81 Ibid. Sec. 4(1).

82. Ibid. Sec. 4(2).

83 Ibid. Sec. 5(1).

84 Ibid. Sec. 6

Chairman to delegate some of his administrative powers to an Administrator who was an expert employee of the High Commission.[85]

The administrative powers and services to be administered by the High Commission were specified in two Schedules to the Order-in-Council.[86] In addition, it was provided for the High Commission "to take over the functions of and to replace the East African Air Transport Authority",[87] to appoint advisory consultative bodies[88] and "to take over the functions of the East African Transport Policy Board".[89]

Finally in Part II, it was provided that the High Commission should publish in the Gazette,

"(a) all Bills,

(b) all Acts, and

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85 Ibid. Sec. 7.

86 Ibid. Sec. 9(1) (a); Sec.

87 Ibid. Sec. 9(1) (c)

88 Ibid. 9(1) (d)

89 Ibid. 9(1) (e)

This included civil aviation or civil aviation related matters such as the East African Directorate of Civil Aviation, the East African Income Tax Departments, The East African Posts and Telegraphs Department, The East African Meteorological Department, Services arising out of the functions of the High Commission as East African Air Authority, The East African Customs and Excise Department and the East African Radio Communication Services.

(c) all such other matters as the High Commission may consider should be published".[90]

One is struck by the reference to "all Acts". The Central Legislative Assembly established by the Order not being a sovereign legislature could not correctly refer to its legislations as Acts. Judging by the general practice of Colonial Legislatures, legislations of such bodies were generally referred to as Ordinances. On the attainment of independence, and by special legislations termed "Adaptation of Laws", "Ordinances" became "Acts" etc.[91]. One wonders whether the intention of His Majesty's Government was to accord some sovereign status to the Central Legislative Assembly or whether it was an error of the legal draftsman. On the other hand,it might be that what was meant were "Acts of the Imperial Parliament", and not of the Central

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90
Ibid. Sec. 11.

91
See for example, Section 27(1) of the Interpretation Act 1964 (Laws of the Federal Republic of Nigeria 1964).

Legislative Assembly of the High Commission.[92]

(iii) The Assembly and the Legislative Process

Part III[93] dealt with the Assembly, its composition, the office of Speaker and the rules of procedure. Part IV[94] dealt with legislations and legislative procedure. In

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92
Writing on the East African High Commission, Ingrid di Delupsi was probably misled by imperfections of legislative drafting such as this to have made the surprisingly untenable assertion that "the High Commission and the Assembly were too tied up with Britain to constitute an autonomous international organisation - which should not be subjected to the ultimate power of any State but be international in the sense that it is independent of its founding States or of its actual member States". Further on, the learned writer went on to say that "Among international organisations there are only a few that have been given the power to make rules that break through national barriers": The simple fact is, in our submission, that neither the High Commission nor the Central Legislative Assembly were international organisations, nor were they meant to be. An international organisation is one that is created by agreement of sovereign states, either by Treaty, Convention or Other Agreements. Neither the High Commission nor its Central Legislative Assembly satisfies this requirement. At best, the legal character that could be ascribed to the High Commission is that of an inter-territorial or intercolonial organisation created by exercise of sovereign power of His Majesty's Government. Cf. I.D. Delupsi: The East African Community and Common Market (Longmans 1970) pp. 29-31, where the assertion which we have disputed here is made.

93
The Laws of the High Commission Revised Edition 1951, pages 311-316. The Assembly was given powers to legislate on certain subjects enumerated in the Third Schedule to the Order. Among these subjects were civil aviation and the aviation related subjects referred to above.

94
Ibid. pages 316-321.

Section 33,[95] certain reserved powers over legislations were given to the High Commission; and in Section 34[96], the form of enacting words were given concerning the three modes of enacting legislations under the Order. These forms were:-

"34. (1) In the case of laws made by the High Commission with the advice and consent of the Assembly the words of enactment shall be:-

"Enacted by the East Africa High Commission with the advice and consent of the Legislative Assembly thereof".

(2) In the case of any law having effect by virtue of a declaration made by the High Commission under section 33 of this Order, the words of enactment shall be:-

"Enacted by the East Africa High Commission in accordance with the provisions of section 33 of the East Africa High Commission Order-in-Council, 1947".

(3) In the case of laws made by the High Commission with the advice and consent of the Legislative Councils of the Territories the words of enactment shall be:-

"Enacted by the East Africa High Commission with the advice and consent of the Legislative Councils of the Colony and Protectorate of Kenya, the Trust Territory of Tanganyika and the Protectorate of Uganda."

(iv) Financial and Miscellaneous Provisions

Part V[97] dealt with financial matters such as definition of which services were to be classified as self contained

95 - Ibid. 96 - Ibid. 97 - Ibid. pp. 321-322.

services and also the creation of a Contingency Fund. Part VI[98] deals with miscellaneous matters such as appointments and conditions of service of employees of the High Commission.

(c) The East African Common Services Organisation (EACSO)

1. Origin

Defects in the operations of the High Commission during the first few years of its existence soon became apparent. These defects could be summarised briefly as follows:-

i. Bills of legislation generally required prior scrutiny by individual territorial governments taking into account their respective territorial interests, thus resulting in the final product lacking any East African orientation in content.

ii. There was no pari passu adjustment in the rate of constitutional advancement granted to the territories in relation to that of the High Commission which remained static. For example, while elected territorial Ministers were gradually assuming responsibility for the functions formerly vested in the Governors in the territories, the attendance of the Governors as representative of the territorial governments in the High Commission became rather anomalous.

iii. The Central Legislative Assembly had no definite life time, its life having to be extended from time to time by Order-in-Council.[99]

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98 Ibid, pages 322-325.

99 See for example Sec. 2 of The East Africa (High Commission) (Amendment) Order-in-Council. 1951, 1951 No. 2126. The Laws of of the High Commission Revised Edition 1951, at page 328.

iv. Financial administration of the "self contained" and "non self contained" services remained an unsatisfactory arrangement.

With these defects in view, and in July, 1960, the Rt. Hon. Iain Macleod, Secretary of State for the Colonies appointed a Commission under the Chairmanship of Sir Jeremy Raisman to enquire into the economic and fiscal aspects of the East Africa High Commission.[100] The final report of the Commission made a number of recommendations. For the purposes of this dissertation, the part of the recommendations dealing specifically with aviation was that concerning the financial contributions of the territorial governments to the Directorate of Civil Aviation and the Meteorological Department.[101] Following a conference between Her Majesty,s Government in the United Kingdom and representatives of the Governments of Tanganyika, Kenya and Uganda, it was agreed that a new Organisation should be created to take over the functions formerly exercised by the High Commission. By agreement between the governments of Tanganyika, Kenya and Uganda, (Tanganyika having become independent by that time) the East African Common Services Organisation was

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For the text of the terms of reference, see, East Africa Report of the Economic and Fiscal Commission, (London HMSO) Comnd. 1279. at page 1.
101
Ibid, page 74.

created in December 1961[102].

(ii) Legal status of EACSO

It is not easy to determine with precision the legal status of either EA-CSO or the instrument under which it was created before the independence of the three territories. The character of the parties to the agreement creating the new Organisation varied juridically at different points in time. By December 9, 1961, Tanganyika was a state in international law; whereas Kenya and Uganda were dependent territories. One would have thought, that the United Kingdom, as the state responsible for the conduct of the international relations of both Kenya and Uganda would have signed the agreement on their behalf. Had that been the case, the agreement would have had the status of an international agreement or a treaty properly so called in international law.

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102 The winding up operation of the High Commission was effected by Order-in-Council which provided for (1) the revocation of certain Imperial Orders-in-Council, listed in the Schedule to the Order, (ii) transitional provisions in respect of the effect of The East Africa (High Commission) Order-in-Council, 1947 in relation to Tanganyika, (iii) transfer of assets and liabilities of the High Commission to the East African Common Services Authority, (iv) transfer of offices and officers to EACSO and (v) adaptation of the laws of the High Commission to enable effect to be given to the Agreement creating the new Organisation. Cf, The East Africa (High Commission) (Revocation) Order-in-Council. 1961, S.I. 1961 No. 2315.

While we do not deny that an international legal person could legitimately enter into an agreement with a non-international legal person, nevertheless, we submit that prudence and strict legality demands that there should have been executed a prior instrument between the United Kingdom Government and the Government of Tanganyika in which the United Kingdom Government would have contracted first on behalf of Kenya and Uganda before the tripartite agreement between the territories was executed.[103] This procedure, however, might be mere legal niceties which neither the United Kingdom nor Tanganyika would have wished to belabour themselves with at that time considering the desire among the political leaders in the territories to create the new Organisation and the determination of the United Kingdom Government to rid herself of her colonial possessions.

It follows from the above, that EACSO was not at its inception an international Organisation. It is a curious legal phenomenon to which we would ascribe the status of a

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103
We are reinforced in our views having regard to the practice of the United Kingdom in connection with certain International Financial Agreements entered into in 1958 between the United Kingdom and the I.B.R.D. on the one hand and between the IBRD. and the Federation of Nigeria on the other in which the United Kingdom contracted on the international plane for Nigeria prior to the Federation of Nigeria executing the Financial Agreements in her own name.

quasi-international organisation. The instrument creating it we also characterize as a quasi-international agreement.

(iii) Structure and Administration of E.A.C.S.O.

We shall not dwell at length here with the structure and administration of E.A.C.S.O. because they follow closely with some modifications the structure and working of the High Commission - discussed above[104]. It should be stated, however, that E.A.C.S.O. took over most of the Common Services run by the High Commission.[105] However, the following salient features are worth noting:-

1. The Agreement created a Common Services Authority composed of the three Presidents of the three member states who together constitute the Supreme Authority of the Organisation.

ii. Five Ministerial Committees were created to assist the Authority. Membership of the Ministerial Committee was made up of one Minister from each member state with responsibility within his

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104
Detailed description of the structure and administration of the East African Common Services Organisation is given in C. Leys and P. Robson (Editors) - Federation in East Africa: Opportunities and Problems (Oxford University Press 1965) pages 30-40; Cf. Ingrid di Delupis) The East African Community and Common Market (Longmans 1970). pages 42-50.

105
These included certain departments directly connected with aviation, namely The Directorate of Civil Aviation, Meteorological Department, Customs and Excise Department and Income Tax Department.

own state government for the particular subject for which an E.A.C.S.O. Ministerial Committee was responsible.

iii. Both the Secretary General and the Legal Secretary of the Organisation were allowed to sit in the Assembly as ex-officio members.

iv. The Central Legislative Assembly's power over legislation was increased.[106]

v. A Court of Appeal was constituted for Eastern Africa.

The ultimate aim of East African political leaders was to secure a federation of their three territories, but as that objective was not immediately attainable, it was decided that E.A.C.S.O. should be strengthened. In pursuance of this, the Treaty for East African Co-operation was signed on June 6, 1967, and the East African Community was inaugurated on December 1, 1967.

(d) The East African Community

The Treaty for East African Co-operation was signed in Kampala by the Heads of State of Tanzania, Uganda and Kenya at Kampala on June 6, 1967. We shall now examine and interpret this treaty in the light of its civil aviation content.

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106 Its power to legislate over civil aviation was unimpaired while provision was made for the Headquarters Secretariat of E.A.C.S.O. to continue to service the Directorate of Civil Aviation.

Although the preamble to a treaty or a statute in municipal law of common law jurisdictions does not form part of the treaty or statute for purposes of interpretation, nevertheless, it is permissible to look at the preamble in order to gain some insight into the aspirations and objectives of the parties to the treaty in question.[107] It is with this justification in mind that we now embark on our examination of The Treaty For East African Co-operation,[108] beginning with:-

(i) Preamble

Reference is made in the preamble to the close commercial, industrial and other ties which the three Partner States had enjoyed since the days of the East Africa High Commission and E.A.C.S.O. both of which institutions facilitated the control and administration of certain matters and services of common interest to the Partner States on an East African basis.

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107 See D.P. O'Connell- International Law, Vol. I. (Stevens & Oceana 1965) at pages 278-279. Cf, Rights of Nationals of the United States in Morocco Case (I.C.J. Reports, 1952).

108 Treaty for East African Co-operation, (Printed on behalf of East African Common Services Organisation by the Government Printer, Nairobi, Kenya, June 1967). The Treaty was divided into five Parts of 98 Articles and fifteen Annexes.

It then goes on to refer to the trade and other economic imbalances existing between the states which the Partner States intend to rectify by the establishment of an East African Community and a Common Market.[109]

(ii) Aims of the Community

Article 2 of the treaty gives the aims of the Community as being:-

"(a) the establishment and maintenance, subject to certain exceptions, of a common customs tariff and a common excise tariff;

(b) the abolition generally of restrictions on trade between Partner States;

(c) the inauguration, in the long term, of common agricultural policy;

(d) the establishment of an East African Development Bank in accordance with the Charter contained in Annex VI to this Treaty;

(e) the retention of freedom of current account payments between the Partner States, and freedom of capital account payments necessary to further the aims of the Community;

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109 Ibid, Art. 1. Although the Partner States are designated members of the Community, the Presidents of these States jointly form 'The East African Authority' which is the principal executive authority of the Community. See Articles 46 and 47.

(f) the harmonization, required for the proper functioning of the Common Market, of the monetary policies of the Partner States and in particular consultation in case of any disequilibrium in the balances of payments of the Partner States;

(g) the operation of Services Common to the Partner States;

(h) the co-ordination of economic planning;

(i) the co-ordination of transport policy;

(j) the approximation of the commercial laws of the Partner States; and

(k) such other activities, calculated to further the aims of the Community, as the Partner States may from time to time decide to undertake in common".

(iii) Institutions of the Community

The Community institutions comprise of the following:-

"(i) the East African Authority;

(ii) the East African Legislative Assembly;

(iii) the East African Ministers;

(iv) the Common Market Council;

(v) the Common Market Tribunal;

(vi) the Communications Council;

(vii) the Finance Council;

(viii) the Economic Consultative and Planning Council;

(ix) the Research and Social Council,

and such other corporations, bodies,departments and services as are established or provided for by this Treaty".[110]

The establishment and detailed regulations of these institutions are provided for in Articles 30-89 of the Treaty.[111]

(iv) Functions in Respect of Civil Aviation

As far as aviation is concerned, the "corporations, bodies, departments and services" of common interest to the Community includes:-

(a) The East African Airways Corporation which is charged with providing services and facilities relating to East African and international air transport.

(b) The East African Posts and Telecommunications Corporation which has responsibility for posts, telecommunications and other associated services such as allocation and control of radio frequencies to aircraft

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110 Ibid Article 3 (1).

111 Ibid, pp. 22-53. We shall not concern ourselves here directly with the composition, functions, powers and procedures of these institutions, but only refer below to those of them that have a direct relevance to aviation.

operating in the territories of the Partner States in accordance with the obligations assumed by each of the Partner States under the International Telecommunications Union Convention.[112]

(c) Departments mentioned in Annex IX as Services to be administered either by the Community or by the Corporations would include:-

1. The East African Directorate of Civil Aviation,
2. The East African Meteorological Department,
3. The East African Customs and Excise Department, and
4. The East African Community Service Commission.

Finally, it should be mentioned that legislative power over civil aviation is granted to the East African Legislative Assembly by virtue of Item 4 of Annex X of the Treaty.[113] In addition, the Assembly is also granted power to legislate over civil aviation related subjects as mentioned in Items 5, 6, 13, 15, 16, 17, 20, 23 and 27 of Annex X. We shall defer for examination in the subsequent chapters the procedure provisions, the control of the Corporations and the decentralisation measures concerning aviation.[114]

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112 For text of the Convention See A.J. Peaslee: International Governmental Organisations (Martinus Nijhoff 1956) Vol.II. at pp.1400-1435.

113 See Supra. n.108.

114 Ibid, Annexes XI, XIII and XIV.

D. HISTORICAL DEVELOPMENT OF AVIATION IN BRITISH AFRICA

1. GENERAL

With the successful conclusion of the Treaty of Versailles[115] and the Paris Convention on Aerial Navigation[116] at the end of the First World War in 1918, Great Britain, as well as other Allied Powers, realized that aviation which had played such a vital role in the war could also play a more useful role in peace time. It should be recalled that by 1920, Britain possessed a vast colonial empire scattered all over the globe. Traditionally, the only means of communication with this far flung colonial empire was by sea on which Britain was undisputably supreme.

The emergence of the aircraft as a medium of transportation altered the pattern of access to those widely scattered territories and proved advantageous in:-

(i) providing a quicker means of transportation of passengers and cargo to the British Empire than was hitherto the case with the traditional sea routes;

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115 See p. 37.n.49.Supra.

116 Vol. XI. (1923) L.N.T.S. 173-310.

(ii) providing an impetus for economic development and unification of the Empire;

(iii) originating the development of a Colonial Air Mail service.

Two instrumentalities of the British Government were directly responsible for these pioneering developments. Firstly, there was the Royal Air Force which was responsible for route survey, charting of air lanes, establishment of flight paths and identification of land marks useful to civil aviation. Another function of the Royal Air Force at this period was to test and certify for reliability the equipments that would be used later for commercial flights. The second instrumentality of the British Government of this era was Imperial Airways, (the predecessor of B.O.A.C., B.E.A. and the now defunct B.S.A.A.) which was responsible for commercial development of air transportation between the United Kingdom and the overseas Colonial Empire.

In this connection, three routes were pioneered and firmly established by Imperial Airways. The first was the Eastern route, which originated in the United Kingdom, and, flying through Southern Europe and Cairo, went on to India and Australia. The second route was the Southern route, which followed the Eastern route to Cairo; from where it made a detour through the Sudan, over East Africa and

terminated in Cape Town[117]. The third route, known as the Horse Shoe route, originated in England; and flying through the West Coast of Africa to South Africa, joined the terminus of the Eastern route in Australia.

2. The Period 1920-1939

(a) West Africa

As we indicated, the first flight to West Africa was made by the Royal Air Force. This took place on 25th October, 1925. Starting out from England to Cairo, the first flight across Africa to Kano in Northern Nigeria marked the beginning of flight in West Africa. By 19th November, 1925, the RAF completed the return flight to England.[118]. It took about ten years after this historic flight of the RAF before Imperial Airways inaugurated the first Air Mail Service between London and West Africa. This service originated as a branch line from Khartoum on the main Southern route to Cape Town. In the initial stages, Kano was the terminus of all flights to West Africa; and mails destined for Lagos and Accra had to be forwarded by surface transport from Kano.[119] However,

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117
John Pudney - The Seven Skies (Putnam 1959) at p. 28.

118
John Stroud; Annals of British and Commonwealth Air Transport (Putnam 1962) at pages 63-64.

119
Id. p. 130. Cf. Robin Higham; Britain's Imperial Air routes 1918-1939. (Shoe String Press, Connecticut, 1961).

with Imperial Airways, an airline known as the Elders Colonial Airways was formed by Elder Dempster Lines, (a Liverpool Shipping Company with services to West Africa) with a view to providing a link up service between Kano and Lagos. The first service on this new route reached Lagos on 15th October, 1936 and was subsequently extended to Accra.[120]

(b) East Africa

Unlike the case in West Africa, aviation reached East Africa much earlier than West Africa because of the strategic position of the area in relation to the main line trunk route to South Africa. In order to assess the practicability of a Cairo[121] to Cape Town air service, and under the auspices of the Times of London, the inaugural flight to Cape Town took off from Weybridge on 24th January 1920. On leaving Cairo, the aircraft flew over the British Colonial territories of East Africa - Kisumu and Nwanza, but

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120
R.E.G. Davies: A History of the World's Airlines (Oxford, 1967) at pages 182-195.

121
Cairo, at this period, because of her strategic position in the Middle East and the technological limitations of the aircraft of that era, became an important main line traffic connection and stop over in the operations of Imperial Airways to India, Australia and South Africa; a position similar to that occupied by Rome in present day airline routing pattern in relation to the Middle East, Asia, Australia and Africa.

unfortunately, crashed at Tabora in Tanganyika on February 27, 1920.[122]

The tragedy which befell this inaugural flight did not discourage Imperial Airways in opening and developing a regular trunk route service through East Africa to Cape Town. In addition, some sort of a local regional service was also commenced in East Africa. It is known, that by November 30, 1926, air transport in British East Africa had reached a stage of development whereby experimental regular services had been opened between Khartoum and Kisumu by sea-plane; and early in 1927, a regular Air Mail Service was opened between Kisumu, Lake Victoria, Khartoum and Cairo.[123] Direct weekly services between England and East Africa were commenced by Imperial Airways on 28th February, 1931.

3. The Period 1940-1959[124]

(a) West Africa

Early in the Second World War, particularly after the

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122 John Stroud op. cit. at pages 37-38.

123 Ibid. pages 69-70 and 85-86.

124 We have chosen 1959 as being an important watershed in the history of aviation in British Africa because that was the year when the WAAC came of age by mounting its own operations in competition with BOAC in respect of the Lagos - London route. It must be pointed out that EAAC had matured in this respect earlier than WAAC because it had taken over and operated in direct competition with BOAC as early as 1957 air services between Dar-es-Salaam - Nairobi and London.

fall of France, access to the British territories in West and East Africa through Europe and Cairo became not only perilous but impossible for B.OA.C.[125]. However, in view of the pending decision for a North African Campaign, and in order to assist the war effort, R.A.F. Transport Command inaugurated a United Kingdom - West African Coastal Service. The R.A.F.,having established the reliability of that route and its comparable safety from harassment by the Luftwaffe in preference to the European and Cairo route, B.O.A.C. commenced operations on the route on October 19, 1940,through Lisbon, Freetown, Takoradi and Lagos. The service was operated at ten days interval and was used primarily for the carriage of government passengers, official despatches and urgent freight, and to supplement the operations of R.A.F. Transport Command.[126]

As the operations of Elders Colonial Airways had been interrupted by the North African Campaign, B.O.A.C. extended its

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125
This is the successor to Imperial Airways. The British Government had enacted legislations which reconstituted Imperial Airways and the British South American Airways by establishing two statutory Air Corporations, namely, B.O.A.C. and B.E.A. B.O.A.C. took over the routes operated by Imperial Airways to Asia, Australia, South America and Africa, while B.E.A.'s operation was confined to Europe and the Middle East.

126
John Stroud op cit. at page 180.

Coastal Service to Kano in Northern Nigeria. By April 16, 1944, R.A.F. Transport Command phased out its operations on the United Kingdom, Takoradi - Lagos route in order to enable B.O.A.C. to take over completely.[127] The Corporation continued to operate the United Kingdom - West African route via North Africa until 1959, when Nigeria Airways commenced its separate operation between Lagos and London in competition with B.O.A.C.

We have examined so far the development of aviation in West Africa purely as a metropolitan technology bearing probably only a superficial impact on the economic and social development of the African Colonial territories. We now hasten to examine briefly,for purposes of systematic analysis the local impact which this technology made in West Africa as a whole.

Local Impact of Aeronautics in West Africa

Soon after the end of the Second World War, His Majesty,s Government set up by Order-in-Council,[128] The West African Airways Corporation (W.A.A.C.) to operate and develop inter-Colonial West African air transport coastal services.

127
Id. page 195.
128
S.I. 1946/682.

By 1948, this airline had extended its operations to Dakar and by 1950, it was operating to Khartoum. The airline continued to exist as constituted by the Order-in-Council until the independence of Ghana in 1957.[129]

(b) East Africa

As in West Africa, the normal development of the Empire Southern Route through Europe and Cairo was interrupted by the War. In spite of this temporary set back, air communications was developed between British West Africa and East Africa. In October 1941, Panam began to operate a series of five weekly services between Takoradi - Lagos - Kano - Maiduguri - Khartoum[130], which connected with the local sea plane service between Khartoum - Kisumu and Lake Victoria.

Local Impact of Aeronautics in East Africa

On October 30, 1945, His Majesty's Government, similarly as in West Africa, promulgated the East African Territories (Air Transport) Order-inCouncil.[131] In pursuance of this Order, the Government of Kenya, Tanganyika, Uganda and

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129 John Stroud op.cit at pages 560-566, Cf. Infra, Ch. 2.

130 Id. pages 183-184.

131 S.R.&O. 1945/1370.

Zanzibar founded on January 1, 1946 the East African Airways Corporation with a total capitalisation of £50,000. Before the end of that year, the Corporation had acquired aircraft and was responsible for the running of all the domestic services in the four territories. By 1957, the Corporation had prospered and developed its own expertise to an extent that it was able to take over from B.O.A.C. the operations in respect of the route London - Nairobi - Dar-es - Salaam.[132]

E CONCLUSIONS

We have in this introductory chapter dealt in a nutshell with the historical evolution of British Africa in the context of the introduction and development of civil aviation there. One unifying thread which runs through our foregoing presentation is that Great Britain introduced aviation to Africa and pioneered its development. When the time came for the national airlines of these territories to assume responsibility for the running of their individual airlines, both regionally and internationally, Britain did not hesitate to terminate voluntarily her monopolistic

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132
John Stroud op cit. pages 458-460.

operations on the African routes even though these territories still constituted part of Her Majesty's Colonial possessions.

CHAPTER 2

COLONIAL REGULATION AND CONTROL OF CIVIL AVIATION

INTRODUCTION

By its inherent nature, civil aviation has from its very inception been the subject both of international and municipal regulations.[1] The first public international law on aviation to which the U.K. was a Party, was the Paris Convention.[2] She was also a Party to the first Private international law on aviation held in Warsaw, in 1929.[3] These two early Conventions for instance contained provisions for the application of the Conventions to the Colonial possessions and dependent territories of the High Contracting Parties.[4]

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1 See, P.H. Sand, G.N. Pratt and J.T. Lyon:- A Historical Survey of the Law of Flight, (Publication No. 7, Institute of Air and Space Law, McGill University, Montreal 1961).

2 Convention Relating to the Regulation of Aerial Navigation, Signed at Paris, October 13, 1919 with Additional Protocol, Signed at Paris May 1, 1920; L.N.T.S. Vol. XI. (1922) p.174-198. The U.K. gave effect municipally to this Convention by enacting the Air Navigation Acts 1920 and 1936. These Acts were made applicable to the Colonies by The Colonial Air Navigation (Application of Acts Orders 1937 vide S.R. & O. 1937/378.

3 The Convention for the Unification of certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October, 1929. (H.M.S.O. Comnd. 4284).

4 Article 40 of the Paris Convention provides as follows: "The British Dominions and India shall be deemed to be States for the purposes of the present Convention. The territories and nationals of Protectorates or of territories administered in the name of the League of Nations shall, for the purposes of

In pursuance of and in implementation of these multilateral Conventions, the United Kingdom Parliament enacted various municipal legislations on aviation which were made applicable to the Colonies.[5]

We shall now examine in detail the constitutional processes whereby aviation legislations of the U.K. were extended to the Colonies and the operational and organizational structure of civil aviation established in those territories by Statutory Instruments.

A. CONSTITUTIONAL PROCESSES OF ENACTING AVIATION LEGISLATIONS IN THE COLONIES

Colonial territories, even those that possess representative legislatures are, as a rule, constitutionally incompetent to legislate on aviation. The reason for this constitutional incapability is that the constitutions of colonial territories being generally contained in two related documents, namely the Letters Patent

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4 ft.n.(cont.)
the present Convention, be assimilated to the territory and nations of the Protecting or Mandatory States." The U.K. English translation of the Warsaw Convention annexed as Schedule 1 to the Carriage by Air Act 1932 provides in the Additional Protocol as follows: "The High Contracting Parties reserves to themselves the right to declare at the time of ratification or of accession that the first paragraph of Article 2 of this Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority."

5 Supra.n.2.

appointing a colonial Governor and providing for the government of a colonial territory and the Royal Instructions issued to a Governor[6] do not contain specific provision authorising a Governor or a colonial legislature to exercise any functions in respect of aviation. The reason for this, we venture to suggest, is prima facie to preclude a colonial Governor or colonial legislature from exercising functions which may have extra-territorial implications.[7]

Enactment of aviation legislations in the colonies were therefore effected in three ways:-

(i) by Orders-in-Council made by Her Majesty on the advice of the Privy Council;

(ii) by Statutory Instruments made by a U.K. Minister or by one of Her Majesty's Principal Secretaries of State extending to the Colonies;

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6 E.C.S. Wade and A.W. Bradley;- Wade and Phillips' Constitutional Law, (7th Edition, 1965, Longmans) at p. 417).

7 See Infra. p. 92. as to the circumstances for sub-delegation of aviation functions to colonial Governors of Nigeria and the Gold Coast and in the case of the East African Territories to the High Commission. For the literature on delegated legislation and sub-delegated legislation, see the following:-C.K. Allen, Law in the Making, (Oxford Paperbacks Edition 1961) pp. 517-569. S.A. de Smith,- Sub-delegation and Circulars (1949) 12 M.L.R. 37-43;A.E. Currie,- Delegated Legislation, (1948) 22 Australian Law Journal 110; J.A.G. Griffith, - Delegated Legislation - Some Recent Developments, (1949) 12 M.L.R. 297-318.

(iii) by sub-delegated legislation in the form of Regulations or Orders made by a colonial Governor under powers conferred by a U.K. Statutory Instrument.[8]

(a) Orders-in-Council

These were peculiar but unique constitutional legislative devices of the United Kingdom Government by which the Crown, on the advice of the Privy Council, was able to legislate directly for the colonies either in exercise of a power granted by an Act of Parliament or in exercise of the Royal Prerogative. For example, the preamble to the Colonial Air Navigation Order, 1955[9] states as follows:-

"Her Majesty, in pursuance of the powers conferred upon Her by the Civil Aviation Act, 1949[10] and the Colonial Civil Aviation (Application of Act) Order, 1952[11], and of all other powers enabling Her in that behalf, is pleased by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:-"

Similarly, when the U.K. Parliament implemented domestically

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8 Ibid.

9 1955 No. 711. Series of Orders were issued under this name between 1955 and 1958 and are collectively referred to as "The Colonial Air Navigation Orders 1955-1958."

10 12.13 and 14 Geo. 6.c. 67. Sec. 66.

11 S.I. 1952/868 (1952 I.P. 565).

in the U.K. the international obligations assumed under the Warsaw Convention[12] by enacting the Carriage by Air Act 1932[13], provision was made for the extension of Sections 1 and 2 of the Act to those Colonial territories the foreign relations of which the United Kingdom was responsible. This extension was carried out by an Order-in-Council the preamble to which provides:

> "WHEREAS a Convention signed at Warsaw on the 12th day of October, 1929, is in force as regards the territories mentioned in the Second Schedule to this Order.[14]
>
> AND WHEREAS it is expedient to extend the provisions of Sections 1 and 2 of the Carriage by Air Act, 1932[15] subject to certain adaptations and modifications to such territories.
>
> NOW, THEREFORE, Her Majesty, by virtue of and in exercise of the powers in this behalf by the Carriage by Air Act, 1932[16], or otherwise in Her Majesty vested, is pleased by

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12 Supra. p. 80, n. 3.

13 22 and 23 Geo. 5.c.36.

14 The territories referred to in the Second Schedule included among others: - Gold Coast - (a) Colony, (b) Ashanti, (c) Northern territories, (d) Togoland under United Kingdom trusteeship; Kenya (Colony and Protectorate); Nigeria (a) Colony (b) Protectorate (c) Cameroons under United Kingdom trusteeship; Tanganyika; Uganda Protectorate and Zanzibar Protectorate.

15 Supra.n.13.

16 Ibid.

and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:-[17].

It is clear from the foregoing, that Orders-in-Council were generally resorted to as legislative machinery for Colonial territories. The question therefore arises: What is the legal or juridical basis for an Order-in-Council in relation to those Colonial territories with which it has such close and intimate connection?

The answer to this question, we submit, is that an Order-in-Council is founded on the Crown's general powers over the Colonies based either on each, or all, or a combination of

i. The Royal Prerogative[18]

ii. The Foreign Jurisdiction Act 1890[19]

iii. The British Settlement Act, 1887[20] as amended by the British Settlements Act, 1945[21].

It is these various sources which were generally relied on as providing the legal basis for Her Majesty's Government in regulating

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17 The Carriage By Air (Colonies, Protectorates and Trust Territories) Order, 1953, S.I. 1953/1474.

18 Order-in-Council based on this power is a remnant or survival of some of the ancient sovereign power of the Queen to legislate in her own right unfettered by any Parliamentary control. Cf. Report from the Select Committee on Delegated Legislation (HMSO London 1959).

19 53 and 54 Vict. c.37.

20 50 and 51 Vict. c. 54.

21 8 and 9 Geo. 6, c.7.

civil aviation in the colonial protectorates.[22]

The legality of exercising jurisdiction in Colonial territories by Orders-inCouncil was confirmed in the case of the King V. The Earl of Crowe Exparte Sekgome[23] arising in Bechuanaland Protectorate, where the British High Commissioner had, by a Proclamation, ordered the arrest and detention of one Sekgome a native tribal Chief. An application for a writ of habeas corpus was filed in the Divisional Court challenging the validity of the Proclamation authorising such arrest and detention. The Court of Appeal, affirming the decision of the Divisional Court, denied the application, and held, that a protectorate is a foreign country within the meaning of the Foreign Jurisdiction Act 1890, and that any act done in such protectorates by Her Majesty's representative under powers conferred by Orders-inCouncil was valid.

The case of Sobhuza II V. Miller and Ors[24] which came before the Judicial Committee of the Privy Council also centred on the question of validity of an Order-in-Council and a Proclamation

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22
See for example the preamble to the West African Territories Air Transport Order-in-Council 1946/682; and the preamble to the East African Territories (Air Transport) Order-in-Council 1945, S.R. & O. 1945/1370 where these sources of power are recited in the preambles to the Orders-in-Council

23
(1910) 2.K.B.576-629 (C.A.)

24
(1926) A.C. 518-529 (J.C.P.C.)

made under it by which Her Majesty's High Commissioner in Swaziland had declared contrary to a Convention and previous Orders-in-Council certain vacant lands crown land. The following dictum of Viscount Haldane in delivering the judgement of the Court underlined the fundamental nature of an Order-in-Council. His Lordship observed:

"The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an act of state which cannot be questioned in a Court of Law. The Crown could not, excepting by statue, deprive itself of freedom to make Orders-in-Council, even when these were inconsistent with previous Orders".[25]

It would appear, therefore, that in British constitutional practice, Orders-in-Council were extensively used to achieve the legislative objectives of the executive, either in respect of the United Kingdom or any of the overseas colonial possessions.

Conclusions

We may therefore draw the following general conclusions concerning the nature of an Order-in-Council and as to the various

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25 Ibid. pp. 528-529. Cf. In re Southern Rhodesia, (1919) A.C. 211-249 (J.C.P.C.) where Their Lordships held that on a conquest of territory, a formal proclamation of annexation is unnecessary to constitute the Crown owner of the territory. It is sufficient if the Crown manifests its intention of such annexation of the territory by Order-in-Council

occasions when resort to this mode of legislation was adopted by Her Majesty's Government in her relations with British Africa. Orders-in-Council were used:-

i. for enacting, amending, suspending or revoking colonial aviation legislation;[26]

ii. for extending to the Colonies municipal aviation legislations of the United Kingdom[27] which would not otherwise have been applicable in British Africa being outside the ambit of the definition of "Statutes of General Application"[28] that have been received and recognised as clearly within the general body of laws of the United Kingdom Parliament applicable within the legal systems of the various territories of British Africa;

iii. for applying to British Africa multilateral international air law conventions to which the United Kingdom is a Party and which contain provisions permitting any of the High Contracting Parties to extend all or parts of such Conventions to any of their colonial

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26 Supra. pp. 81-86. Inclusive here is the practice of certification from time to time who the High Contracting Parties to a particular Convention are, the territories in respect of which they are Parties and the extent to which such High Contracting Parties have availed themselves of the provisions of the Additional Protocol to the Convention. Cf: The Carriage by Air (Parties to Convention) Order, 1958 S.I. 1958/1252, S.I. 1958/2190.

27 Supra. p. 80.

28 For a detailed examination of "Statutes of General Application"

dependencies;[29]

iv. that Orders-in-Council were valid and normal legislative instruments wherewith Her Majesty exersises sovereign governmental powers in the Crown Colonies, Protectorates, Mandated or Trusteeship territories.

(b) Statutory Instruments

A second process of enacting aviation legislation in the Colonies was by Statutory Instruments. What is a Statutory Instrument, and by whom is it exercisable? Section 1(1) of the Statutory Instruments Act, 1946[30] provides that:-

"Where by this Act or any Act passed after the commencement of this Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty-in-Council or on any Minister of the Crown then, if the power is expressed-

(a) in the case of a power conferred on His Majesty, to be exercisable by Order-in-Council;

(b) in the case of a power conferred on a Minister of the Crown, to be exercisable by Statutory Instrument,

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(cont.)
In Nigeria, Ghana, Kenya, Tanzania and Uganda, See the following:- A.Allott; Essays In African Law, (London, Butterworths 1960) Chs. 1 & 2; W.C. Ekow Daniels: The Common Law in West Africa (London, Butterworths 1964) Ch. 12; J.S.R. Cole and W.N.Denison, Op.Cit, Ch.8; H.F.Morris and J.S.Read, Op.Cit.Ch.10.

29 Supra.n.2.

30 9 and 10 Geo.6.

any document by which that power is exercised shall be known as a "Statutory Instrument" and the provisions of this Act shall apply thereto accordingly".

The Act then further provides that where by "any Act passed before the commencement of this Act, power to make Statutory rules within the meaning of the Rules Publication Act 1893[31] was conferred on any rule-making authority within the meaning of that Act, any document by which that power is exercised after the commencement of this Act shall, save as is otherwise provided by regulations made under this Act shall, be known as a "Statutory Instrument" and the provisions of this Act shall apply thereto accordingly".[32]

From the words "any document" which occur in the Sections of the Act quoted above, it would appear that an indeterminate congeries of documents would fall within this definition.[33]

31
56 and 57 Vict. c.66.

32
Supra.n.30.sec.1(2).

33
For an enumeration of the type of documents that fall within this definition, See: The U.K.House of Commons Select Committee Report on Delegated Legislation (1953) quoting from the earlier Report of the Committee on Ministers Powers (The Donoughmore Committee 1932) made the following observations at page vii of their Report:-

> "21.The Donoughmore Committee in paragraph 7, page 28, of their Report stated:-
>
> "There is no simple classification of the heterogeneous collection of regulations, rules and orders in force today; nor is it easy to

(c) Sub-delegated Legislations

Within the framework of Colonial civil aviation, we may define a Statutory Instrument as being a generic term used for describing a multitude of law making instruments, ranging from an Order-in-Council made by His Majesty pursuant to a power conferred by an Act of Parliament,[34] to Proclamations, Regulations, Orders and Notices made by either the Minister with departmental

(cont.)

formulate one which is either simple or satisfactory."

22. The same Committee in their Report, pages 16 to 19 called attention to the bewildering miscellany of names used for the same functions. They pointed out that "The Acts of Parliament which delegates the power may in so many words lay down that 'regulations' 'byelaws', or 'rules', 'orders','warrants', 'minutes', 'schemes', or other instruments (for delegated legislation appears under all these different names) may be made or approved". They added "But the confusion of names is not only due to the use of many different words for the same thing. It is aggravated by the use of the same word for different things."

23. Very rightly, in paragpraph 15, page 64, of their Report the Committee recommended:

> "The expressions 'regulation', rule, and 'order' should not be used indiscriminately in statutes to describe the instruments by which the law making power conferred on Ministers by Parliament is exercised. The expression 'Regulation' should be used to describe the instrument by which the power to make law about procedure is exercised. The expression 'order' should be used to describe the instrument of the exercise of (a) executive power and (b) the power to take judicial and quasi-judicial decisions'.

Your Committee agree with and endorse these recommendations."

34 Supra. p. 83.

responsibility for Civil Aviation in the U.K. or the Secretary of State for the Colonies. In practice, however, neither United Kingdom Ministers nor any of Her Majesty,s Principal Secretaries of State exercised directly powers under the Civil Aviation Act 1949[35] in the Colonial territories. The administrative procedure adopted was for these powers to be sub-delegated to the Colonial Governor in charge of the particular territory.[36] We hasten to mention, however, that while this was the procedure adopted in the case of Nigeria and the Gold Coast, as far as the East African territories of Kenya, Tanganyika, Uganda and Zanzibar were concerned, these powers were sub-delegated to the High Commission rather than the individual territorial governors.[37] In some cases, however, regulations made by Colonial Governors or the High Commission required confirmation by the Secretary of State to have any effect.[38]

35
12, 13, and 14 Geo. 6.c. 67.

36
See: The Colonial Civil Aviation (Application of Act) Order, 1952, S.I. 1952/868, and as amended by subsequent Orders, See particularly Schedule 1 of this Order which is an adaptation of Secs. 8,9,10,11,13,14,19,27,51,62 of the Civil Aviation Act 1949 in which the Governor is given power to exercise these functions which in the U.K. would be exercisable by the Minister or a Secretary of State.

37
Ibid. Sections 3,4, and 5.

38
Supra.n.35 particularly Sections 13, 52(4) (a) 52 (4) (b) and 52 (4) (c) of the Civil Aviation Act 1949.

B. OPERATIONAL AND ORGANIZATIONAL STRUCTURE OF AVIATION

The end of the Second World War signified a new landmark in aviation, not only on the international scene, but in British Africa as well.[39] The importance of this era was marked by the establishment of local aviation authorities in the Colonial territories to take over some of the functions which hitherto, or otherwise, would have to be performed directly by His Majesty's Government in the United Kingdom. It was thought that some of these aviation functions could best be discharged on the spot by Colonial Office officials stationed in the respective territories. It was believed also that the post-war economic development of the respective territories would be accelerated by creating an infra- structure for local development of civil aviation there, more particularly, as the potentialities of these territories and the advantages of aviation there, were manifestly justified before and during the period of the Second World War.[40]

39
It will be recalled that soon after the conclusion of the Convention on International Civil Aviation in 1944, Great Britain enacted the Air Navigation Act 1947 which was extended to the Colonies by The Colonial Air Navigation (Application of Act) Order 1947 vide S.R.&O. 1947/2738. When the Civil Aviation Act 1949 was enacted, the Order of 1947 was repealed and replaced by The Colonial Civil Aviation (Application of Act) Orders, 1952-1958. When the U.K. & U.S.A. met at Bermuda in 1946 to work out a world pattern of post-war civil aviation by reciprocal grants of traffic rights to each other in their respective territories, traffic rights were granted in Schedule III (b) Route 13 (as subsequently amended by Exchange of Notes) to the designated air carriers of the United States in Accra, Lagos, Nairobi and Dar-es-Salaam.

40
Supra. pp.70 to 75.

In pursuance of this policy, therefore, the four British territories in West Africa consisting of Nigeria, the Gold Coast (as it was then known), Sierra-Leone and the Gambia were designed to be joint participants in the new aviation institutions to be created. Similarly, the four British East African Territories of Kenya, Tanganyika (as it was then known), Uganda and Zanzibar were also to be joint participants for the same purpose. By the West African Territories (Air Transport) Order-in-Council, 1946[41] and the East African Territories (Air Transport) Order-in-Council, 1945[42], the operational and organizational structure of civil aviation in British Africa were thereby first established.

(a) West Africa

It was stated in the preamble to the West African Territories (Air Transport) Order-in-Council 1946[43], that His Majesty "proposed to establish for those territories in British West Africa which are set out in the Schedule[44] to this Order an Air Transport

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41 S.I. 1946/682.

42 S.R.&O. 1945/1370.

43 Supra. n. 41.

44 The territories referred to in the Schedule were listed as being:- The Colony and Protectorate of Nigeria, Cameroons under British Mandate, the Gold Coast Colony, Ashanti, the Northern Territories of the Gold Coast, Togoland under British Mandate, The Colony and Protectorate of Sierra-Leone and the Colony and Protectorate of the Gambia.

Authority to control aircraft flying for hire and reward, and a Corporation, to be known as "West African Airways", to develop efficient air transport services in the said territories and to secure the operation of such services at reasonable charges". We shall now proceed to make an analytical in-depth examination of these two institutions starting with:-

1. The West African Air Transport Authority

(i) Establishment and Composition

Part II. of the West African Territories (Air Transport) Order-in-Council 1946[45] provided in Section 3(1) for the establishment of a West African Air Transport Authority. The composition of the Authority[46] were as follows:-

(1) the Officer administering the Government of Nigeria, who was designated President of the Authority;

(2) the Chief Secretary, West African Inter-Territorial Secretariat;

(3) a person nominated by the Officer administering the government of Nigeria;

(4) one person nominated by the Officer administering the Government of the Gold Coast;

(5) one person who was nominated by the Officer administering the Government of Sierra-Leone; and

(6) a person nominated by the Officer administering the Government of Gambia.

45 Supra.n.41.

46 Ibid. Section 3(2).

(ii) Internal Procedural Rules of the Authority

The instrument constituting the Authority provided for the six individuals mentioned above to act "save when specifically otherwise provided herein, jointly or in conference."[47] Very wide administrative and executive powers were conferred on the Officer administering the Government of Nigeria under which the Officer could exercise full powers of the Authority when the Authority was not in conference. He was, however, expected to report to the conference of the Authority concerning any decision (apart from minor administrative decisions) taken when the conference was not in session.[48] The instrument further provided, that the Authority should meet in conference at least once a year.[49] Provision was also made for any disagreement on air transport matters among members of the Authority to be referred to the Secretary of State for the Colonies for his decision.[50]

(iii) Powers of the Authority

Under its constituent instrument, the Authority was given discretionary powers of licensing and control of aircraft engaged

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47 Ibid.

48 Ibid. Section 3(3).

49 S.I. 1951/1775.

50 Supra.n.41. Section 4(2).

in air commerce "in or between the West African Territories or between these territories and any other place"[51]. The discretion granted to the Authority in this regard was subject to the limitation that it must take into account:

" (a) the existence of other air services in the area through which the proposed services are to be operated;

(b) the possibilities of air transport in that area;

(c) the degree of efficiency and regularity of the air services, if any, already provided in that area, whether by the applicant or by other operators;

(d) the period for which such services have been operated by the applicant or by other operators;

(e) the extent to which it is probable that the applicant will be able to provide a satisfactory service in respect of continuity, regularity of operation, frequency, punctuality, reasonableness of charges, and general efficiency;

(f) the financial resources of the applicant;

(g) the type of aircraft proposed to be used on the service",[52]

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51 S.I. 1949/1234.

52 S.I. 1946/682 as amended by S.I. 1949/1234; S.I. 1951/1775; S.I. 1954/1373; S.I. 1956/91.

in considering an application for a licence.
It must also take account of any objections or representations made under The Air Services (Licensing) Regulations.[53]

2. The West African Airways Corporation

(i) Establishment and Incorporation

Under Section 7 of the West African Territories (Air Transport) Order-in-Council 1946,[54] the West African Airways Corporation was constituted as a juridical legal person, "with perpetual succession and a common seal", "capable of sueing and of being sued, and of purchasing or otherwise acquiring, holding and alienating property, movable and immovable, and of doing or performing all such acts and things as bodies corporate may by law do and perform."

The Board of Directors of the Corporation was composed of eight members, four of whom were "persons not holding any office of emolument under the Crown in the West African Territories".[55] It was the duty of the West African Air Transport Authority to appoint these Directors who held office during the pleasure of the Authority. Appointment of a Chairman and Vice-Chairman of the Corporation was entrusted to the Officer Administering the Government of Nigeria, and both appointees held office during his

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53 See Sec.8.(Regulations 20 of 1950; 23 of 1951 and 8 of 1953).

54 S.I. 1946/682.

55 Ibid, Section 8(1)(2) as substituted by S.I. 1949/1234.

pleasure.[56]

For purposes of day to day administration and commercial management of the Airways, the Board was entrusted with the duty of appointing a General Manager acceptable to the Authority.[57]

(2) Aims and Objectives

The aims and objectives of the Corporation were contained in Section 10 of the Order-in-Council. In general, the Corporation was enjoined:

(i) to secure the fullest development of efficient air transport in and between the West African territories;

(ii) to ensure that such air services were operated at reasonable charges;

(iii) to provide air transportation for the carriage of mails for the Posts and Telegraphs Department.

In order to enable the Corporation attain these objectives, it was empowered specifically:

"(a) to acquire aircraft, parts of aircraft, aircraft equipment and accessories and stores;

(b) to acquire or construct buildings and repair shops;

(c) to acquire plant and equipment;

(d) to sell, let, or otherwise dispose of any property belonging to them and not in their opinion required

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56 Ibid.

57 Ibid. Section 9.

for the proper discharge of their functions;

(e) to establish or maintain air transport services in or between the West African Territories or between those territories and such other places as may be approved by the Authority and, for that purpose, to enter into arrangements or agreements with any other person;

(f) to act as agents for any other undertaking engaged in the provision of air transport services, or in other activities of a kind which the corporation have power to carry on;

(g) to undertake flights on charter terms;

(h) to provide accommodation, in hotels or otherwise, for passengers, and facilities for the transport of passengers to or from aerodromes and for the collection, delivery and storage of baggage and freight;

(i) to make, with persons carrying on a business of providing any facilities for passengers or freight in connection with air transport services, arrangements for the provision of such facilities."[58]

(3) Management

The Board of Directors of the Corporation had very wide

58
Ibid., Section 10.

powers in the exercise of which the approval of the Authority must be obtained. Firstly, the raising of working capital by the issue of stock, overdraft or other recognised procedures for borrowing money from the territorial governments was left to the Board.[59] The Corporation was enjoined to establish an Airways Fund into which all receipts of the Corporation must be paid, to keep proper accounts and to submit audited annual reports to the Authority for laying before the respective territorial legislative councils.[60] Secondly, part of the management functions of the Board included the preparation of comprehensive route schedules and flight operations of the Corporation for each preceding year, and the financial implications of such operations. Thirdly, the Corporation was given a free hand over equipment procurement suitable for the type of operations it engaged in, together with powers to decide on the phasing out of obsolescent equipments. Fourthly, the determination of tariff rates applicable to the Corporations's operations was assigned by the Authority to the Board. Fifthly, the Corporation must prepare detailed estimates of income and expenditure concerning its operations.[61]

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59 Ibid. Sec.II. The situation created by this arrangement was that none of the individual territorial governments were share holders of the Corporation as such; their rights were only of Bondholders subject to redemption by the Corporation. Cp.With the case in East Africa where the territorial governments were shareholders of East African Airways Corporation. Cf: Infra .pp. 108-109.

60 Ibid., Sections 13,14,15 and 16.

61 Ibid., Section 17.

(4) Recruitment of Staff

The most important employee of the Corporation was the General Manager. He was appointed by the Corporation with the approval of the Authority. As Chief Executive, he had direct relationship with the Authority in that before the Authority approved any programme submitted to it by the Board of the Corporation, he was consulted by the Authority.[62] However, the General Manager had authority to delegate some of his functions to other employees of the Corporation. Two systems of staff recruitment were adopted by the Corporation:-

(i) by direct appointment,

(ii) by secondment of staff from other services. These two categories of staff, were, as a general rule regarded as servants of the Corporation.[63]

3. The Disintegration of W.A.A.T.A. and W.A.A.C.

The independence of Ghana on March 6,1957[64], marked the beginning of the end of the two inter-territorial aviation institutions in West Africa-viz, the West African Air Transport Authority and the West African Airways Corporation. Soon after its independence, the Government of Ghana gave notice of its

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62 Ibid., Section 17(2)(b).

63 Ibid., Section 18.

64 Supra. p.25.

intention to withdraw from these organisations. The reason given by the Ghana Government was that her new status as an independent sovereign state was incompatible with membership in Colonial institutions. To underline Ghana's determination to terminate her membership in these two institutions, the Parliament of Ghana, proceeded rapidly to enact the Air Transport Authority (Withdrawal of Ghana) Act 1958[65]. Ghana then established a Ministry of Transport and Communications, and proceeded to enact a Civil Aviation Act.[66] Under this Act, a Ghana Air Transport Licensing Authority was established.[67] The Government of Ghana further proceeded to initiate legislations in the Ghana Parliament concerning the establishment of Statutory Corporations.[68] The Ghana Airways Corporation was established pursuant to that legislation.[69]

65
Acts of Ghana No. 35. of 1958. Sec. 3. of the Act repeals the West African Territories (Air Transport) Order-in-Council 1946 in its application to Ghana.

66
No. 37. of 1958.

67
The Ghana Air Transport Licensing Authority Order, 1959, vide L.N. 239 dated September 1, 1959. (Now repealed and replaced by The Ghana Air Transport Licensing Authority Order 1962, E.I. 363.)

68
The Statutory Corporations Act 1959, No. 53 of 1959. (Now repealed and superseded by The Statutory Corporations Act 1964, Act 232.)

69
Ibid., Section 2 of the Act empowered the Governor-General "to make an instrument providing for the establishment as a body corporate (a) of any existing organisation or body, not being already a body corporate; or (b) of a new organisation or body".

Arrangements were then made for the dissolution and sharing of assets of W.A.A.T.A. and W.A.A.C. and for such assets of these institutions as were located in Ghana to be vested in a Receiver or Liquidator appointed by the Government of Ghana.[70]

As Her Majesty's Government was at that time still responsible for the government of the remaining territories in West Africa,[71] Her Majesty, by Order-in-Council, enacted the West African Territories (Air Transport) (Revocation) Order 1959,[72] whereby the joint operational and organizational structure of civil aviation established in British West Africa was dismantled.

Following negotiations and a subsequent agreement between Nigeria, Ghana, Sierra-Leone and Gambia, satisfactory settlements were made concerning:-

(1) The sharing of assets and liabilities of W.A.A.C.;

(2) As an interim arrangement, the Department of Civil Aviation in Nigeria was entrusted with the performance and rendering of technical aviation services in Sierra-Leone and the Gambia, pending the time that

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70 Supra.n.65.Section 5.

71 By 1958, the Federation of Nigeria had reached the stage of responsible internal self-government, although reserved powers and responsibilities for some subjects such as defence, external affairs and aviation were still vested in the Governor-General. By virtue of this, the Governor-General of Nigeria continued to perform the functions of President of the West African Air Transport Authority.

72 S.I.1959/1980.For some constitutional and administrative

those two territories were able to establish their separate Departments of Civil Aviation;

(3) While Ghana Airways assumed responsibility for domestic services in Ghana, W.A.A.C.(Nigeria) Limited[73] provided services to, in and between Nigeria, Sierra-Leone and the Gambia;

(4) Ghana Airways was also allowed to share in the traffic offering between Lagos and Dakar.[74]

Since the bulk of the equipments and the operative headquarters of W.A.A.C. were located in Nigeria, a solution had to be found to the disposal of Nigeria's share of the assets of W.A.A.C. In this connection, the Federal Government of Nigeria became beneficial owner of the assets of W.A.A.C. in Nigeria by the payment of L530,150 to the liquidator. In order to put these newly acquired assets into use, a private limited liability company was incorporated under the Nigerian Companies Ordinance[75] on Octoberl, 1958 under the name W.A.A.C.(Nigeria)Ltd.

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reasons, this Order-in-Council which was expected to be promulgated in September 1958, was not brought into force until late in 1959. By tacit consent of all the interested parties, however, the negotiations for the final dissolution of W.A.A.T.A. and W.A.A.C. progressed unhindered.

73
See Infra, p.118.

74
See: Federation of Nigeria,-Annual Report of the Department of Civil Aviation 1958-59. (Lagos: Federal Government Printer, 1961), Ch.1. entitled:"Effect of Constitutional Changes on Civil Aviation in West Africa".

75
Ibid. Note:- Before the attainment of independence by Nigeria,

The shareholders of this newly constituted company which emerged from the ashes of W.A.A.C. were the Federal Government of Nigeria, 51%; British Overseas Airways Corporation, 322/3 % and Elder Dempsters Limited, 161/3%.[76]

W.A.A.C.(Nigeria) Limited continued as the chosen instrumentality of the Government of the Federation of Nigeria for providing domestic, regional and international air transport and related services until the attainment of independence by the Federation of Nigeria on October 1, 1960.

(b) East Africa

Although The East African Territories (Air Transport) Order-in-Council 1945[77] preceded in point of time The West African Territories (Air Transport) Order-in-Council,[78] both Orders were, however, in material content identical. We did examine the West African Order first because it was convenient to do so for purposes of our presentation. The East African Order, like its

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a local legislation was referred to as "Ordinance". On the attainment of independence and following the constitutional practice of the U.K. and other Commonwealth countries, all Ordinances were designated "Acts". The Companies Ordinance under which W.A.A.C.(Nigeria) Limited was incorporated has now been repealed and replaced by the Companies Decree 1968,No.51 .

76.
Ibid.,Cf.Infra Ch.9 for the subsequent history and reconstitution of W.A.A.C.(Nigeria) Ltd.

77.
S.R.& O. 1945/1370, The Laws of the High Commission,Revised Edition 1951.pp. 341-350.

78
Supra.p.94.

West African counterpart, established two institutions - namely, the East African Air Transport Authority and the East African Airways Corporation.

1. The East African Air Transport Authority

(i) Establishment and Composition

The Order-in-Council provided for the Authority to be composed of:-

"(a) the officer administering the Government of Kenya;

(b) the officer administering the Government of Uganda;

(c) the officer administering the Government of Tanganyika Territory; and

(d) the British Resident, Zanzibar, acting jointly or in conference".[79]

(ii) Functions, Procedure and Powers of the Authority

The Authority performed similar functions in relation to the East African territories as the West African Authority performed in relation to the territories in West Africa. Its internal procedural rules and powers were also similar to those of the West African Authority. We shall therefore not repeat those functions, rules and powers here but merely incorporate them by reference.[80]

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79 Supra. n.77. Section 3(2).

80 See: Supra. pp.96-98.

2. The East African Airways Corporation

(i) Establishment and Incorporation

Identical provisions to the West African Order were made which provided for the establishment of an East African Airways Corporation, endowed with legal personality and all the attributes of a body corporate.[81] Its functions were also similar to those of its West African counterpart. However, its Board of Directors, being composed of six persons, was smaller than that in West Africa.[82]

(ii) Aims and Objectives, Management and Recruitment of Staff

To avoid any repetition, we hasten to point out that the provisions in the East African Territories (Air Transport) Order-in-Council, 1945[83] concerning the Aims and Objectives, Management and Recruitment of staff were almost similar to identical provisions in the West African Territories (Air Transport) Order-in-Council 1946,[84] save for some differences which we have spotlighted below.[85] It is convenient to mention here, however, that unlike the arrangement in West Africa, the respective territorial governments of East Africa were original shareholders of this Corporation in the following proportion;

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81 *Supra*. p. 98.n.54. at Section 7.

82 *Ibid.* Section 8(1).

83 *Supra.* n.77.

84 *Supra.* pp.99-102.

85 *Infra.* pp. 114-115.

Kenya 68%; Uganda 23%, Tanganyika 9% and Zanzibar 7%[86].

3. Adaptability of E.A.A.T.A. and E.A.A.C. to changing political climate

The general movement of the East African territories towards a unified political and economic system had been examined at some length above.[87] However, we shall now examine here briefly, how the two colonial aviation institutions established in East Africa (i.e. E.A.A.T.A. and E.A.A.C.) responded to the changing patterns of political and economic systems that were taking place in that region.

Following the establishment of the High Commission on January 1, 1948, Proclamations[88] were "Made Under The East Africa (High Commission) Order-in-Council, 1947",[89] in which the High Commission fixed "the 1st January, 1948, as the date upon which the said High Commission shall:-

(a) take over the administration of the services set out in the First Schedule to the said Order;[90]

86
R.E.G. Davies; A History of the World's Airlines, (Oxford 1967) at p. 416.

87
Supra. pp. 48-69.

88
See: The Laws of the High Commission (Revised Edition) 1951 p.509.

89
S.R.& O. 1947/2863.

90
The Services listed in the First Schedule to the Order included among others, the East African Directorate of Civil Aviation and

(b) take over the administration of the East African Literature Bureau;

(c) take over the functions of and replace the East African Air Transport Authority established by the East African Territories (Air Transport) Order-in-Council, 1945;[91]

(d) assume the powers conferred upon it by paragraph (d) of sub-section (1) of Section 9 of the said Order; and

(e) take over the functions of the East African Transport Policy Board"[92].

When in December 1961, the East Africa High Commission was replaced by the East African Common Services Organisation, provision was made by the East African Territories (Air Transport) (Amendment) Order-in-Council, 1961,[93] for the revocation and replacement of Part II. of the East African Territories (Air Transport) Orders-in-Council, 1945[94] to 1958[95], to enable the

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Services arising out of the functions of the High Commission as East African Transport Authority, which included responsibility for East African Airways Corporation and Meteorological Department.

91 Supra.p.94.n.42.

92 Supra.p.109.n.88.Cf.S.I.1955/711;E.A.H.C.Legal Notice.No.31.of 1955.

93 S.I.1961/2320 Cf.The East Africa(High Commission)(Revocation)Order-in-Council,S.I. 1961/2315 under which all the properties, rights and liabilities of the High Commission were transferred to E.A.C.S.O.

94 S.R.& O. 1945/1370 (Rev.VIII.p.342:1945 I,p.397.

95 Ibid;S.I.1953/590; 1955/1651, 1955/1819; 1958/916.

East African Common Services Organisation perform the functions of the East African Authority in place of the East Africa High Commission. The amended provision of Part II, read as follows:-

"PART II

ESTABLISHMENT OF THE EAST AFRICAN AIR TRANSPORT AUTHORITY

3 (1) There shall be established an East African Air Transport Authority.

(2) The East African Air Transport Authority established by this Order (hereinafter referred to as "the Authority") shall be the East African Common Services Authority".[96] A transitional provision was inserted in the 1961 Order to the effect that "Until the East African Common Services Authority is established, the reference in the principal Order to that Authority shall be construed as a reference to the East Africa High Commission".[97]

Again, in 1967, when the Treaty for East African Co-operation[98] was entered into by the Governments of Kenya, Tanzania and Uganda, transitional provisions were made in Article 90 and Annex XV of the Treaty for certain functions or duties arising from the Treaty and devolving on the Community to be assumed by specified officers or agencies of E.A.C.S.O. on the coming into force of the Treaty.[99]

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96 Supra. n.93.

97 Ibid.

98 Supra.p.65.n.108.

99 Ibid.at p.53.&pp.124-125.

In addition, in the legislations enacted by the Community and the Partner States implementing the Treaty in their respective States, provisions were inserted concerning adaptation of laws. The total effect of these legislations was that reference to E.A.C.S.O. and its existing institutions would be deemed to refer to the East African Community and corresponding institutions established by the Treaty.[100]

The foregoing examination thus show, that both the E.A.A.T.A. and E.A.A.C. have been quite adaptable to the changes in the political, organizational and administrative structures established by the Partner States, concerning which in similar circumstances in West Africa, both W.A.A.T.A. and W.A.A.C. were dissolved.

C. COMPARISONS

1. COMPARISON BETWEEN THE WEST AFRICAN TERRITORIES (AIR TRANSPORT) ORDER-IN-COUNCIL 1946 AND THE EAST AFRICAN TERRITORIES (AIR TRANSPORT) ORDER-IN-COUNCIL 1945

(1) It seems to us, that the drafting technique adopted in the drafting of the West African Order was more sophisticated than that adopted in the drafting of the East African Order. This is explicable on the ground that the East African Order preceded the West African Order in point of time. For example, while the West African Order first set out clearly in the Preamble, the intention of Her Majesty, the East African Order left this to be gathered from the general body of the Order.

100 - The Treaty for East African Co-operation (Implementation) (Adaptation of Laws) Order 1967. Legal Notice No.1 of 1967, East

(2) While the West African Order listed the countries affected by the Order in Schedule attached to it, the East African Order simply mentioned these countries in the interpretation clause.

(3) In the choice of the Board of Directors of E.A.A.C., the East African Order referred to "three of whom shall not be members of the public service" while the West African Order referred to "persons not holding any office of emolument under the Crown". It is submitted that the language of the West African Order was a more lawyer-like expression than that of the East African Order in this respect.

2. COMPARISON BETWEEN THE WEST AFRICAN AIR TRANSPORT AUTHORITY AND THE EAST AFRICAN AIR TRANSPORT AUTHORITY

(1) The composition of the Authority in West Africa was made up of six members, while the composition of the Authority for East Africa was made up of four members.[101]

(2) In West Africa, only the Officer administering the Government of Nigeria was a member of the Authority in his own right; while in East Africa, each of the Officers administering the Governments of the respective territories and the British Resident Zanzibar were members.[102]

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cont.
African Community Gazette Supplement No.1. of 14th December 1967. (Tanzania); East African Community Act.1967, (Uganda); Treaty for East African Co-operation Act 1967. (Kenya).

101 Supra. pp. 95 and 107.

102 Ibid.

(3) Although the Officer administering the Government of Kenya had powers of general administration and control of the Authority when the Authority was not in conference, subject however to making a report to the next conference of the Authority, he was not designated President of the Authority in the East African Order; while the West African Order, on the other hand, specifically designated the Officer administering the Government of Nigeria as President of the Authority.

(4) The composition of the West African Authority was such that right from its inception, it was dominated by the Nigerian Government in that the Officer administering the Government of Nigeria was the only territorial Governor on the Authority. Furthermore, he was designated President of the Authority, appointed one other member to the Authority and had the headquarters of the Authority sited in his own territorial headquarters in Lagos. The Governor of Kenya did not enjoy similar powers.

3 COMPARISON BETWEEN THE WEST AFRICAN AIRWAYS CORPORATION AND THE EAST AFRICAN AIRWAYS CORPORATION

(1) In the West African Order establishing the Airways Corporation, the appointment of the Chairman of the Corporation was made by the Officer administering the Government of Nigeria; whereas, in the East African Order, the appointment of the Chairman was made by the East African Air Transport Authority.

(2) Under the West African Order, provision was made for the

office of a Vice-Chairman who was also appointed by the Officer Administering the Government of Nigeria, whereas, in the East African Order, no provision was made for the office of a Vice-Chairman.

(3) Both the Chairman and the Vice-Chairman of W.A.A.C. held office during the pleasure of the Officer Administering the Government of Nigeria; whereas, in the case of E.A.A.C., the Chairman held Office during the pleasure of the Authority.

D. CONCLUSIONS

(1) It is lamentable that the framework for West African co-operation in civil aviation did not survive the Colonial era. We submit, however, that the demise of these institutions was inevitable. In this connection, we point to the preponderant influence of Nigeria both in the W.A.A.T.A. and in W.A.A.C. This inherent inequality of the territorial governments in the affairs of these aviation institutions naturally created an intolerable situation which accelerated their subsequent break up.

(2) Happily enough, this type of inequality did not exist in the East African aviation institutions; which later turned out as one of the major unifying factors in that region.

(3) Finally, we submit, that E.A.A.C. was from its inception operated as a successful commercial proposition, while its West African counterpart (W.A.A.C.) was operated as a social service corporation; - a crippling fetter on the commercial development of any airline.

PART TWO

CHAPTER 3

THE TRANSITIONAL PERIOD (1957-1963)

As we indicated above, the transitional period spanned the years immediately preceding and closely following the attainment of sovereign statehood by Ghana and Kenya.[1] Our aim in this Chapter is to examine some of the aviation problems arising during this period and how each of the states dealt with in this dissertation or the multinational institution serving their common interests responded to these constitutional changes.

A. LEGAL STATUS OF EXISTING AVIATION INSTITUTIONS

(a) West Africa

1. The West African Air Transport Authority

The independence of Ghana marked the end of the West African Air Transport Authority.[2] In Nigeria, the functions of the Authority develved on the Department of Civil Aviation of the Ministry of Communications; which also assumed responsibility for the performance of similar functions which the West African Air Transport Authority formerly exercised in

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1 Supra. p.3.

2 Supra. pp. 102-105.

respect of Sierra-Leone and Gambia.[3] Before the end of 1960 when Nigeria became self governing, both Sierra-Leone and the Gambia made arrangements to assume responsibility for such services which the Nigerian Department of Civil Aviation was operating in the two territories respectively. In Ghana, the functions of the Authority were transferred to the Minister of Communications who exercised those functions through the Director of Civil Aviation.[4]

2. The West African Airways Corporation

We have discussed the arrangement made by the Government of Nigeria concerning the disposition of its share of the assets of W.A.A.C. We should point out, however, that from 1958, the status of the Corporation in Ghana was that of a foreign Company. Despite this status, the Company was accorded special privileges and commercial co-operation with the newly established Ghana Airways Corporation. This

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3 Ibid.

4 The Air Transport Authority (Withdrawal of Ghana) Act, 1958 No.35 of 1958. Section 6 of the Act which was described as a Supplementary provision, provided as follows: "The Minister may make such incidental, consequential and supplementary provisions as may seem to him necessary or expedient for giving full effect to the provisions of this Act and may make orders enabling the Director of Civil Aviation or other public officers to exercise any functions transferred from the Air Transport Authority or the Airways Corporation to the Minister under this Act.

special relationship could be explained by the historical aviation ties between Nigeria and Ghana during the years preceding Ghana's independence.

Sierra-Leone and the Gambia, not having an airline of their own, accorded W.A.A.C.(Nigeria)Ltd. the same rights and privileges which its predecessor, W.A.A.C., enjoyed in the two territories. The only diminution in the commercial value of these rights and privileges was that the newly established Ghana Airways Corporation was also granted some commercial rights to and from the two territories. Although the status of W.A.A.C.(Nigeria) Ltd. in the two territories was also that of a foreign company, it enjoyed immense patronage because of the special services which the Government of Nigeria and the airline were providing there.

(b) East Africa

(1) The East African Air Transport Authority

Unlike its West African counterpart, E.A.A.T.A. was adapted from time to time and as the need arose, to suit the successive political changes in British East Africa.[5] In 1948, when the East Africa High Commission was established, the aviation function, exercised by E.A.A.T.A. on behalf of the

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5 See: Supra.pages 109-112.

Governors Conference under the East African Territories (Air Transport) Order-in-Council 1945[6] was transferred to the High Commission by the East Africa (High Commission) Order-in-Council 1947,[7] which empowered the High Commission "to take over the functions of and to replace the East African Air Transport Authority established by the East African Territories (Air Transport) Order-in-Council, 1945;[8] whereupon any reference in the said Order-in-Council to the East African Air Transport Authority shall be construed as a reference to the High Commission".[9]

When the East Africa High Commission was abolished and replaced by the East African Common Services Organisation in 1961, provision was made in the East African Territories (Air Transport) (Amendment) Order-in-Council, 1961[10] for E.A.A.T.A. to be replaced by the East African

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6 S.R. & O. 1945/1370 (Rev.VIII.p. 342;1945 I,p.397.)

7 S.R. & O. 1947/2863 (Rev. XI, p. 695; 1947 I, p. 758.)

8 Supra. n.6.

9 Supra.n.7 See.9(1)(c).

10 S.I. 1961/2320; Cf, E.A.C.S.O Legal Notice No.5 of 1962.

Common Services Authority.[11] We submit, that in legal theory, there was no change in the legal status or functions of E.A.A.T.A. in relation to the member states served by it except as to the various changes in the names by which it was known during the transitional period.

(ii) The East African Airways Corporation

In examining the legal status of the East African Airways Corporation during the transitional period, it is useful to recall that the Corporation was first established under the East African (Air Transport) Order-in-Council 1945.[12] In 1961, when E.A.C.S.O. was established to replace and take over some of the functions performed by the High Commission, it was thought necessary to reconstitute and reconstruct the E.A.A.C. as a full fledged statutory Corporation of E.A.C.S.O. In this connection, therefore, and in exercise of powers granted to it under Item 3 of the Second Schedule to the Constitution of E.A.C.S.O., the Central Legislative Assembly of E.A.S.C.S.O.

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11 Ibid. The explanatory note attached to the Order, although not forming a part of the Order itself, but was intended to indicate its general purport, hinted that "the East African Common Services Authority, when established, shall perform the functions of the East African Air Transport Authority in place of the East Africa High Commission".

12 Supra. page 119.n.6.

enacted legislation in 1963 reconstituting the Airline.[13] The most significant provision in the Act reflecting the changes in the constitutional development of the three East African States was that providing for the nomination of the members of the Board of Directors directly by the member states.

B. STATE SUCCESSION AND ITS EFFECT ON AVIATION

The second major aviation problem which loomed large during the periods of transition concerned the extent to which Commonwealth African States were bound on their attainment of independence by aviation commitments validly entered into by Her Majesty's Government in the United Kingdom.[14] We have seen above, the process of colonial regulation of civil aviation in British Africa and how United Kingdom domestic

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13 The East African Airways Corporation Act 1963, No.4. of 1963. (Now repealed by the 1967 Act.)

14 See, for example, the attitude taken by Nigeria in 1961 to the Agreement Between the Government of the United Kingdom and the Provisional Government of the French Republic Relating to Air Transport Between British and French Territories, signed at London on 28th February, 1946, as Modified by Exchange of Notes dated 21st January, 1953. When France exploded an atomic device in 1961 in the Sahara, Nigeria severed diplomatic relations with France and denied over flight and landing rights in Nigeria to French aircraft on the ground that the United Kingdom - France Bilateral Air Services Agreement was not binding on Nigeria. Cf. Statement by T.O. Elias: Yearbook of the International Law Commission (1962).Vol. I. pages 4-5.

legislations and international conventions to which the United Kingdom was a Party were extended to the Colonies.[15] The emergence of these territories on the international plane as sovereign, independent states, meant therefore, that some solutions had to be found or definitive positions taken concerning both the continued application of, and or, the extent to which these territories were bound by:-

(a) domestic aviation legislations of the United Kingdom made applicable to British Africa during the Colonial era;

(b) bilateral aviation agreements or related matters;

(c) multilateral private air law conventions; and

(d) multilateral public air law conventions entered into by the United Kingdom and extended to them.

We commence our analysis of this problem by first examining the doctrinal basis of the theory of state succession in international law.

1. Doctrine of State Succession in International Law

The origin of the doctrine of state succession has been credited to Grotius, who was believed to be the first jurist to introduce this theory into international law. Based on natural law and Roman law oriented jurisprudence of his time, Grotius, in his examination of the legal effect of, and termination of ownership and sovereignity, equated a state to an individual in private law. He argued, that as "the person

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15 Supra. Ch.2.pages 1-2.

of the heir is considered the same as the person of the deceased in all that concerns the continuation of ownership of both public and private property"[16], so was that of a state on a change or termination of sovereignty over a territory. This theory was endorsed by continental European jurists such as Pufendorf, Vattel, Despagnet and de Martens, who shared with Grotius the same legal background and juristic approach to legal problems.[17]

Fundamentally, the central core of this doctrine was that the acquisition or loss of sovereignty[18] by a state over a territory could occur either by annexation of territory to another by force of arms, by cession of territory by one sovereign to another, by emancipation or grant of independence, by formation of a Union or Federation of two sovereign states into one sovereignty, and by secession of part of a state

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16 Hugo Grotius: De Jure Belli ac Pacis Libri Tres, Vol.II. Translation Book II at p. 319. (Publications of the Carnegie Endowment for International Peace, in the Series, Classics of International Law, 1925).

17 Cf.D.P.O'Connell: The Law of State Succession, (Cambridge University Press, 1956) at p. 7.n.1., where a list of authoritative sources on this subject are cited.

18 For a definition of "Sovereignty" and "state". See L.Oppenheim: International Law, Vol.I., 8.Edition by H. Lauterpacht, (Longmans 1955) at pp. 118-119. Cf. A.W. Dicey: The Law of the Constitution, 10th Edition by E.C.S. Wade. (MacMillan 1960) at p. 429.

into a separate sovereign state.[19] Arising from these changes, irrespective of the manner in which the changes occurred, were the attendant problems and their solutions concerning the rights and duties of the predecessor sovereign in the affected territories.

In formulating applicable rules for solutions of these problems, due recognition had to be given to the existence of some prior "grundnorm" or legal order in the world community into which new states were born and which have generally been recognised as clearly binding and mandatory if any meaningful social intercourse among states were to be conducted in an orderly manner. Inclusive in these grundnorms were customary international law,[20] jus cogens, the Charter of the United Nations and the various Humanitarian Law Conventions such as the 1907 Hague Rules and the four

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19
D.P.O'Connell: International Law.Vol.1. (Stevens and Oceana 1965) at pp. 423-522. Cf. D.P.O'Connell: State Succession in Municipal Law and International Law.Vols. I.&II.(Cambridge University Press 1967).

20
As to the reaction of new states to customary international law, See, e.g. S.Prakash Sinha: Perspective of the Newly Independent States on the Binding Quality of International Law. (1965) Vol. XIV. I.C.L. Q. 122; J. J.G. Syatanw: Some Newly Established Asian States and the Development of International Law (The Hague, 1961), pp. 25, 239; R.P.Anand: Attitude of the Asian-African States toward certain problems of International Law,(1966) Vol. XV. I.C.L.Q., 56; J. Castenada: The Undeveloped Nations and the Development of International Law. Int.Org.Vol. XV.(1961), pp. 38-40, cited in R.R.Wilson (Ed.), International and Comparative Law of the Commonwealth (Duke University Press N.C.1968) at p. 43.n.8, and page 45.n. 13.

1949 Geneva Conventions on the Laws of War.[21]

As Professor O'Connell observed, "a new state is born into a world of law. Indeed it is a state, inasmuch as the term is meaningful to a lawyer, only because of a law that lays down the conditions for and the attributes of statehood".[22]

Three theories have emerged from the practice of states and the teachings of publicists[23] as being applicable solutions in those cases where the question of the succession of a new state to the obligations of its predecessor

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21
See C.W.Jenks: State Succession in respect of Law Making Treaties (1952).Vol.XXIX.B.Y.I.L. pp. 105-144.: Cf. R.R.Wilson (Ed.) Op. cit. at pp. 27-62.

22
W.V.O'Brien (Ed.): The New Nations in International Law and Diplomacy. The Yearbook of World Polity; Vol. III.(Praeger Washington1965) at page 12.

23
We take into account state practice and the teachings of publicists in accordance with Article 38(1) of the Statute of the I.C.J., which enumerates as indicative of sources of international law:

"(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
(b) international customs, as evidence of a general practice accepted as law;
(c) the general principles of law recognised by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

sovereign were to be determined.[24] The first theory recognised a total succession to the rights and obligations of the former sovereign by the new state in the classical tradition as enunciated by Grotius.[25] This has been termed the 'Universal Succession Theory'.

The second theory, which has been termed the 'Positivist or Clean Slate Theory', maintained that on a change of sovereignty, the obligations of the previous sovereign were not inherited by the new sovereign. This theory was qualified only to the extent that 'dispositive treaties' or real treaties such as boundary agreements were binding on the new sovereign.[26] The third theory, which has been

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A clear distinction should be drawn here between succession of states and succession of governments. While succession of states is of interest to international law in deciding questions of succession to international obligations or recognition, succession of governments is a matter that is regulated by internal, domestic, constitutional legal order of a state and does not affect or alter the validity of international obligations entered into by successive governments Cf, J.G. Starke: An Introduction to International Law (5th Edition, 1963, Butterworths, London) pages 276-278.

25
See W.E.Hall: A Treatise on International Law (7th Edition Sec. 29 p. 101. Cf. Halleck: International Law, (4th Edition). Vol.II. ch. 34.

26
A.B.Keith: Theory of State Succession with Special Reference to English and Colonial Law (1907); Cf. Lord McNair: The Law of Treaties (1961) pages 654-655.

christened the 'Nyerere Doctrine', postulated that a new state did not succeed ipso facto to the treaty obligations of its predecessor sovereign;[27] but that such a new state should be free within a stated period, (2 years) after its attainment of statehood, to pick and choose which of the treaty obligations of the predecessor sovereign would continue to bind the new state. Those treaty obligations which were not acknowledged as being binding on the new state after the expiration of the stated period would automatically be deemed to have lapsed.[28]

We shall now proceed to examine how these theories have been applied in actual state practice with a view to determine what effect, if any, they had in Commonwealth Africa.[29]

27
This is subject to the limitation that 'real' or 'dispositive' treaties were not within the contemplation of the Nyerere Doctrine.

28
D.P. O'Connell: State Succession In Muncipal Law and International Law. Vol.II.(1967) pages 116-119.

29
For criticisms of the various theories of state succession See Ibid. Vol. I. pp.24-35.

2. State Practice

(I) British & Dominion Practice

It is convenient to group the United Kingdom and the Dominions together because of the evolutionary history of the Dominions and the generally identical outlook and unity forged by the common law and the British Crown. We shall therefore, discuss separately, first, the United Kingdom practice before we take the Dominions together as a group.

(a) The United Kingdom Practice

The practice of the United Kingdom had been pragmatic and variable according to the particular situation, the period in history and the extent of British interest involved in any given circumstances. In the 19th Century, when annexation of Colonial territories was fashionable, the tendency was for the United Kingdom to deny succession to the obligations of its predecessors.[30] On such occasions, however, it is useful to remember that the practice of Her Majesty's Government might have been based on extra-legal

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30 Viewing this practice against the background of the 20th Century in which annexation of territories is looked upon with disapproval by the world community, and also in the light of various United Nations General Assembly Resolutions denouncing Colonialism and urging metropolitan powers, to grant independence to their Colonial territories and to which the United Kingdom had to a large measure responded over the last twenty five years, one may, with some degree of confidence,

considerations. Such were the situations arising from the annexation of South Africa.[31]

Judicial dicta presented conflicting statements of the law and thus rendered Her Majesty's position uncertain and shifty. In the case of the West Rand Gold Mining Company V.The King,[32] the plaintiff company initiated proceedings to secure the return or compensation for certain bars of gold that were seized from the plaintiff by the predecessors in title of the respondent; (i.e. the Government of the Republic of South Africa). The plaintiff's case rested on the premise that by virtue of the annexation of South Africa, Her Majesty's Government became the universal successor to the sovereignty of South Africa and thereby inherited the rights and obligations of the previous sovereign (i.e. South Africa). It was argued, that as the bars of gold were initially illegally seized by the South African Government, Her Majesty's Government was bound as

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Cont.
suggest that this practice is now probably only useful as a piece of historical curiosity. Cf. U.N.G.A. Res. 1514(XV) of 1960.

31
Examples of such cases collected from United Kingdom Foreign Office Confidential Papers and, based on opinions and reports of the Law Officers are contained in the Appendix to D.P. O'Connell, Op. Cit. Supra.p. 123.n.17. particularly at pp. 396-400; 404-405; Cp. however pages 400-404.

32
(1905) 2 K.B. 391.

the successor sovereign to make good the default of her predecessor. The case of the respondent (The King) was that "there is no principle of international law by which a conquering state becomes ipso facto liable to discharge all the contractual obligations of the conquered state".[33] Finding for the respondent, Lord Alverstone C.J. held that "there is no principle of international law by which after annexation of conquered territory, the conquering state becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered state incurred before the outbreak of war".[34]

A conflicting decision to the West Rand Gold Mining Company V.The King[35] was made by the Judicial Committee of the Privy Council in the case of Amodu Tijani V. Secretary, Southern Nigeria.[36] In this case, the appellant Amodu Tijani, who was one of the Idejo white cap Chiefs of Lagos, held certain lands in Lagos as head of his family under Yoruba Native Law and Custom and in respect of which he exercised

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33 Ibid. at page 394.

34 Ibid. Obiter dictum of Lord Alverstone C.J. summarized in the headnote at page 391.

35 Ibid.

36 (1921)2A.C.399.(J.C.P.C.).

'Seigneurial' rights both before and after the cession of Lagos to the British Crown in 1861.[37] In exercise of powers conferred on him by the Public Lands Ordinance 1903,[38] the Governor of Southern Nigeria attempted to acquire certain lands in Lagos, (which included some of the lands held by the appellants) subject to the payment of compensation to owners absolutely entitled. The contention of the respondent was that as the appellant only enjoyed a usufructuary title over the land, he was not entitled to compensation as absolute owner of the land in view of the Treaty of Cession and the later designation of the ceded territory as Crown settlement by Her Majesty's Government. Viscount Haldane, delivering the judgement of the Board, reviewed the Articles of the Treaty of Cession and cited with approval the dictum in another case, to the effect that even in a case of cession "the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired and as freely exercisable after the cession as before".[39]

Their Lordships expressed the view, that "a mere change in sovereignty is not to be presumed as meant to disturb

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37 Supra. Ch.1.p.11.

38 No.5.of 1903.Lagos (Now repealed).

39 Oduntan Onisiwo V.A.G.Southern Nigeria, 2 NigerianL.R.77.

rights of private owners; and the general terms of a cession are prima facie to be construed accordingly."[40]

The apparent contradictory results arrived at by these two cases could be explained on the grounds that while the West Rand Gold Mining Coy case[41] arose as a consequence of annexation and conquest, the Amodu Tijani case[42] was concerned with a problem arising from a voluntary cession of territory. Secondly, one could refer to the Courts before which the two cases were heard to underline their respective legal value either as persuasive authorities or as creating binding precedent. While the West Rand Gold Mining case came before a Divisional Court in England, the Amodu Tijani case came on appeal from a Colonial Court (The Supreme Court of Nigeria, as it then was) to the Judicial Committee of the Privy Council.[43]

Turning now to a second aspect of the United Kingdom practice, i.e., where the United Kingdom herself was a claimant in territories of other foreign powers, she had

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40 Supra. p.130.n.36. at page 407.

41 Supra. p. 129.n.32.

42 Supra. n.36.

43 For stare decisis and the binding force of precedent See, R.W.M. Dias: Jurisprudence (London, Butterworths 2nd Edition 1964). Ch.3.

generally maintained and insisted that her treaty rights and privileges granted by the preceding sovereign continued unimpaired and unaffected by the change of sovereignty and that the new sovereign was bound to respect these rights and privileges. This attitude was clearly illustrated by the various claims lodged by the United Kingdom following the French declaration of a protectorate over Madagascar in the second half of the 19th Century.[44] Similar claims were made concerning British rights in Tunis and Morocco.[45]

By the middle of the 20th Century, when the decolonisation process began, the United Kingdom had developed a different practice to the two mentioned above concerning the obligations assumed by her on behalf of her colonial territories. By arrangement with the different territories, these obligations were deemed to have devolved on the territories on their attainment of independence.[46]

(b) The Practice of the Dominions

The evolution of the dominions of Australia and Canada into international legal maturity as far as treaty making

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44
See documents cited in the appendix to D.P. O'Connell: Op.Cit. Supra.p. 123.n.2.nos.55,56,57,58 and 61.

45
Ibid. nos.48. and 50. Cf. Nationality Decrees in Tunis and Morocco case P.C.I.J. Ser.C.,No.2.pages 156 etc. Cited by O'Connell.Ibid at page 29.fn.4.

46
See the examples cited in Sir Kenneth Roberts-Wray;Op.Cit.p.274.

capacity was concerned had been a slow and carefully regulated process.[47] Based originally on the common law doctrine of indivisibility or unity of the Crown,[48] Her Majesty's Government in the United Kingdom negotiated, signed and ratified all international instruments on behalf of the British Empire.[49] It was not until the Imperial Conference of 1926[50] and the subsequent enactment by the United Kingdom Parliament of the Statute of Westminster,[51] that the old dominions finally came of age in the realms of treaty law. This, therefore, raised the question of the extent to which the various dominions were bound by Imperial treaties entered into by the Crown and made applicable to them.

47
For an examination of Australia's evolution to international personality. See D.P. O'Connell -(Ed) International Law in Australia (London), Stevens 1965) Ch.1. See also the comprehensive bibliography on Canada cited by J.G.Castel: International Law (University of Toronto Press 1965) at page 813.

48
See O.Hood Phillips: Constitutional and Administrative Law (3rd Ed1962) pages 708-711.

49
D.P.O'Connell-(Ed) Op.Cit.Supra.n.47.

50
In the Balfour Declaration issued at the conclusion of the Conference, the dominions were acknowledged as "Autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations" Cmnd.2768.p.14; cited by O'Connell Ibid.at page 16.

51
22 & 23 Geo.6.c.4.

(1) Australia

Prior to Jannuary 1, 1900, some of the component states of the Australian Commonwealth were parties to certain international engagements concluded on their behalf by the United Kingdom. On the introduction of the Commonwealth Constitution in 1900, it became necessary to determine whether:-

(a) the individual Australian states continued to be bound by the United Kingdom treaties[52] or

(b) these treaties were extinguished as a result of the constitutional changes in Australia or

(c) the Commonwealth Government in virtue of its external affairs powers became subrogated to the rights and duties of the states, and

(d) what should be the proper relationship between the states and the Commonwealth government concerning the implementation of treaties.

The protracted consultations with the Law Officers of the Colonial Office in London on these issues first served as an early pointer to some of the perplexities inherent in a Federal constitution, which was manifested later in the

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52

A list of these treaties is given by O'Connell. Op.Cit.Supra. p.123. at page 12 n.60.

Goya Henry Case.[53]

In this case, the defendant Burgess had been convicted for an offence of flying his aircraft within the state of New South Wales, in contravention of the Commonwealth Air Navigation Regulations, made pursuant to the Air Navigation Act empowering the Governor-General to implement the Paris Convention. The Act had sought to appropriate sovereignty in the airspace over Australia to the Commonwealth. The High Court held, that the Air Navigation Act was valid to the extent that it sought to implement the Paris Convention being a valid exercise of the external affairs power of the Commonwealth. It further held, however, that the trade and commerce power invoked by the Commonwealth applied to inter state commerce and could not be extended to intra state commerce by air.[54]

Australian practice on treaty succession would seem to have followed the opinion expressed by the Law Officers to the Colonial Office that:-

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53
R.V.Burgess: Ex parte Henry (1936) 55 C.L.R.608. Although this was not a case of state succession, it did show, however, that within a federation, the component states of that federation could have a general decisive function to fulfil concerning implementation of treaties irrespective of federal power on treaty making.

54
For some comments on the Goya Henry Case, See an article by J.E.

"(a) Treaties to which states of the Commonwealth adhered before confederation are still binding on the Commonwealth in respect of the state concerned.

(b) In cases of Treaties whose subject-matter falls within the legislative competence of the Commonwealth, adhesion should be notified on behalf of the Commonwealth, and on the advice of the Commonwealth Government, without reference to the States.

(c) In cases of Treaties whose subject-matter falls within the exclusive legislative competence of the States, adhesion should be notified on behalf of the Commonwealth Government on the advice of both Governments.

(d) That it was possible for adhesion to be signified on behalf of one or more States only, in cases where all the States were not prepared to adhere."[55]

(2) Canada

Canadian practice had been to maintain a continuity of Imperial Treaties applied to Canada prior to the Statute of Westminster 1931.[56] This practice was considered and approved in the case of Ex parte O'Dell and Griffen[57] which came before the Ontario High Court in 1953. In that case, the applicants had been arrested and confined in prison pending extradition to the United States. The two applicants filed habeas corpus proceedings in the High Court and contended at the hearing

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Cont.
Richardson: Aviation Law in Australia (1965). Federal Law Review 242, at pages 251-252.

55 Cited in McNair. Op. Cit. pages 647-648.

56 Supra. n. 51.

57 (1953) 3D.L.R.207.

that the Ashburton Treaty of 1842 between Great Britain and the United States concerning extradition of fugitive criminals had ceased to be applicable in Canada because of the changed status of Canada resulting from the Statute of Westminster 1931.[58] Schroeder J. rejecting this contention made the following observations:-

> "Had it been intended that the Ashburton Treaty or any other convention which had been entered into or any other statute which had been enacted by the Imperial Government of Parliament prior to this time, affecting Canada or any of its Provinces, should cease to have validity, one would expect to find express provision for it in the Statute of Westminster or in some other Statute. There is nothing to prevent Canada from entering into a new Treaty with the United States or substituting some other extradition arrangement for the one which is now embraced within the terms of the Ashburton Treaty, but until that is done, that

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58. Supra. n.51.

Treaty remains in full force and effect and is binding upon the signatories thereto, including Canada".[59]

(3) India and Pakistan

Prior to 1947, British India was one of Her Majesty's Colonial territories to which many Imperial Treaties concluded by Her Majesty's Government in the United Kingdom had been extended. In addition, however, British India enjoyed some peculiar international status. She was a signatory to the Peace Treaty of Versailles in 1919, a member of the League of Nations, a participant in the San Francisco Conference in 1944 and was an original member of the United Nations. The Indian Independence Act, 1947,[60] enacted by the United Kingdom Parliament, created two international legal entities out of the former British India - India and Pakistan.

While the new India continued to enjoy the rights and

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59 Supra. n.57. p.210. Cf. for judicial recognition and approval of the continuity of Imperial Treaties in Canada in respect of the Jay Treaty, 1794, in Francis V.The Queen (1955) 4 D.L.R. 760. See also for legal, administrative and other re-arrangements following the entry of Newfoundland into the Canadian Federation, British North America Act, 1949, 12 & 13 Geo. VI. C.22: and D.P.O'Connell (1967 Op. Cit. Vol. II. at pages 65-67.

60 10 & 11. Geo. VI. C.30.

treaty obligations of British India, the position of Pakistan vis-a-vis these treaty rights and obligations came up for determination. Pakistan had claimed an automatic right to membership in the United Nations as a constituent part of the former British India, and maintained, therefore, that she would not have to go through the admissions process required for new members, since both India and Pakistan succeeded jointly to all treaty rights. To this claim, the Secretariat of the United Nations gave the following opinion:-

> "From the viewpoint of International Law, the situation is one in which part of an existing state breaks off and becomes a new state. On this analysis there is no change in the international status of India; it continues as a State with all treaty rights and obligations, consequently with all rights and obligations of membership in the United Nations. The territory which breaks off - Pakistan - will be a new state. It will not have the treaty rights and obligations of the old state and will not of course have membership in the United Nations. In International Law, the situation is analogous to the separation of the Irish Free State from Britain, and of Belgium from the Netherlands. In

these cases the portion which separated was considered a new state, and the remaining portion continued as an existing state with all the rights and duties which it had before".[61]

In the light of the opinion quoted above, Pakistan had to apply de novo for membership in the United Nations and the Specialised Agencies.[62] Subsequently, arrangements were made by the Indian Independence (International Arrangements) Order, 1947,[63] for the apportionment of some of the inherited treaties 'as had an exclusive territorial application to' the two states.

(II) The Practice of the U.S. & Western European States

The United States came into being following a unilateral declaration of independence from Great Britain in 1776. It has been suggested that "the United States never regarded itself nor was regarded by Britain as bound by or entitled to the

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61
United Nations Press Release, P.M. 473, 12 August, 1947; New York Times, 12 August, 1947; Cited by McNair, Op.Cit.p. 649.

62
It is useful to draw the inference here, that in the case of the new state of Bangla Desh which has itself seceded from Pakistan, the Arrangements adopted between India and Pakistan in 1947 may be a useful precedent in solving the state succession problems following the emergence of this new state.

63
C.C.O. No.17. of 14 August, 1947, Indian Gazette Extraordinary of 14/8/47 Cf.Dabrai v.Air India Limited, International Law Reports (1953), page 41.

latter's treaties".[64] She could therefore be regarded as having entered the international arena with a clean state. Nevertheless, the practice of the United States when dealing with matters involving state succession had been to maintain the continuity of treaty rights, except in cases where it was patently clear that by the doctrine of rebus sic stantibus fundamentally affecting the character of the new sovereign, such continuity could not be maintained.[65]

United States practice crystallized into three broad patterns, namely:-

(i) where continuity was maintained even though a new sovereign had displaced an earlier one;[66]

64
D.P.O'Connell, Op.Cit.(1956 Edition)p.34; Cf. Wharton, Digest Vol. II.p.71.cited by O'Connell.

65
E.g. the termination by the United States of some lend-lease agreements between the United Kingdom and United States of America concerning some territories in the former British West Indies that have since achieved independence.

66
E.g. The Jay and Ashburton Treaties with Canada discussed above, and various treaties with some former British colonial territories in Africa such as Nigeria, and Ghana on the basis of the inheritance agreements entered into by those countries with their metropolitan power.

(ii) where territories had been ceded to or annexed by the United States;[67]

(iii) where the United States had prosecuted claims before international tribunals in maintenance of treaty rights.[68]

We have discussed indirectly above, while dealing with Canadian practice, our first categorisation of United States practice.[69] We shall now proceed to discuss the second pattern of United States practice. This was manifested in the leading case of U.S.V.Percheman.[70] Briefly, the facts in that case were as follows. The appellant claimed 2000 acres of land in Florida under a grant made by the Spanish Governor in 1815 when Florida was a Spanish Colony. In 1819, Spain ceded Florida to the United States. After the cession, the United States appointed Commissioners to look into and settle all problems arising from titles to land in the territory. The plaintiff lodged his claims with the Commissioners but was rejected. Proceedings were initiated

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67
Cases arising from the Treaties of cession of Louisiana 1803; Treaty for cession of Florida 1819. Cp. however the United States practice on the annexation of Hawaii in 1898; Cf. D.P. O'Connell Op.Cit.(1956) Edition pp. 21-22; See also Hyde in A.J.I.L. Vol.XXVI (1932), page 133. cited by O'Connell.

68
United States Nationals in Morocco Case. I.C.J. Reports 1952.

69
Supra.pp. 137-139.

70
7 Pet. 51.

in the lower courts which later came on appeal to the Supreme Court. In delivering the judgement of the Court, Chief Justice Marshall made the following observation:-

> "It is very unusual even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other; and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the rights of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the

ancient sovereign... A cession of territory is never understood to be a cession of the property belonging to its inhabitants.... The cession of a territory by its name from one sovereign to another... would be necessarily understood to pass the sovereignty only, and not to interfere with private property".

The rule enunciated in the case cited above was approved and extended by the Supreme Court in a later case in which the Court remarked:

"that by the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, retain all rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession ... That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee".[71]

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71 Mitchel V. United States (1835) 9.Pet.711. at 733. Cf. Leitensdorfer V.Webb (1857), 20 Howard 176, where the Supreme Court held that "this is the principle of the law of nations, as expounded by the highest authorities. In the case of the Fama, in the 5th of Robinson's Reports at page 106, Sir William Scott declares it to be 'the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relation to each other, and their rights of property not taken from them by the orders of the conqueror, remain undisturbed'. So too it is laid down by Vattel, book 3d,

The third pattern of United States practice is evident from the case involving the Rights of United States Nationals in Morocco.[72] The facts of the case were briefly as follows: By the Treaty of Fez, 1912, between France and Morocco, the latter surrendered her sovereignty to France, as a result of which France declared Morocco a Protectorate. Before this time, however, there had existed certain treaties concluded by Morocco with various powers including the United States, among which were the General Act of Algeciras of April, 7, 1906, and the Treaty between the United States and Morocco of 1836, which replaced a similar one of 1787. Under these treaties, the United States secured for her nationals equality of treatment with other nations in respect of any commercial privileges in Morocco. She also secured the right to exercise consular jurisdiction over her own nationals in Morocco. In 1948, the French Government introduced discriminatory fiscal regulations in Morocco injurious to American business there. The United States protested to the French Government alleging that the fiscal measures constituted a violation of American treaty rights guaranteed under the General Act of Algeciras and the Treaty between the United States and Morocco of 1836. France

Cont.- cap.13, Sec. 200, that the conqueror lays his hands on the possessions of the state, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is, that they only change masters".

72. Supra.n.68.

instituted proceedings by application before the I.C.J. which found among others that:-

1. "The consular jurisdiction of the United States continues to exist to the extent that may be necessary to render effective those provisions of the Act of Algeciras which depend on the existence of consular jurisdiction".[73]

ii. "The United States of America is entitled by virtue of its Treaty with Morocco of 1836, to exercise in the French Zone of Morocco Consular jurisdiction in all disputes, civil or criminal, between citizens or proteges of the United States; by ten votes to one, finds that the United States of America is also entitled, by virtue of the Act of Algeciras, to exercise in the French Zone of Morocco Consular jurisdiction in all the cases, civil or criminal, brought against citizens or proteges of the United States, to the extent required by the provisions of the Act relating to consular jurisdiction"[74].

73
Ibid. Cited by L.C.Green: International Law through the Cases (3rd Edition,Stevens Oceana 1970) 378 at p. 387.

74
Ibid at page 390.

As a matter of general practice, American jurisprudence on treaty succession have been cited with approval and followed as being indicative of international law by eminent continental jurists from France, Germany and Italy.[75]

(III) The Practice of Socialist States

Socialist doctrine of international law, although plagued by the historical evolution of the U.S.S.R., would appear to recognize a general doctrine of state succession founded on the principle of pacta sunt servanda and not on any general principles of customary international law. In this connection, the practice of the Soviet Union was conditioned by three elements, namely, (1) the period in history with which a treaty right was concerned, (2) the nature of the treaty itself, and (3) the fundamental character of the new regime. We shall examine the practice of the Socialist states in the light of these three elements.

Four periods of sometimes conflicting theories and practice seem to be discernible from Soviet diplomatic and foreign policy postures concerning treaty rights. These periods covered:-

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75
See e.g. Gidel: Des effects de l'annexion les concessions; at page 90; Fiore: Droit International (translated by Antoine) at page 150 Sec. 154; Huber: Staaten - Succession at page 57; Cf. Calvo: Droit International (5th Edition 1888), Vol. IV Sections 2478-2479 at pages 399-400.

(a) the era of Imperial Russia,

(b) the era of the Provisional government of Kerensky,

(c) the era of the Soviets and

(d) the post Second World War period.[76]

The Soviet Union have claimed on favourable occasions that she is the successor to the treaty and other international rights of Imperial Russia.[77] After the October Revolution in 1917 and the installation of a Provisional government by Kerensky, all the treaties concluded under the regime, referred to by the Second All-Russian Congress of Soviets as secret conventions, war debts, exploitational privileges and imperialist obligations were by decree of the Soviets annulled.[78]

From the 1920's to the end of the Second World War, the Soviet Union allegedly following the line laid down by Lenin, pursued a pragmatic approach dictated by the need for economic development, unity within the Soviet Union and maintenance

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76
See, Jan F.Triska and Robert M.Slusser: The Theory,Law and Policy of Soviet Treaties(1962 Stanford University Press),Ch.XI.

77
See for example the claims of the Soviet Union to the Antarctica continent from 1946 and before the treaty of Antarctica; which she based on prior discovery by the Russian explorers Captains Bellingshausseu and Lazarev who "by order of His Imperial Majesty Alexander Parlovich of glorious memory sailed for the Antarctic in the summer of 1819 and on Jan. 16, 1820, approached the Antarctic continent," Cf. Peter A.Toma: Soviet Attitude Towards The Acquisition of Territorial Sovereignty in the Antarctic (1956).Vol.50, A.J.L. 611-626.

78
For a citation of some parts of the text of this decree,

of a state of peace with her neighbours. She continued to deny the existence of a general doctrine of state succession.[79] Soviet publicists, in recent times, however, have adopted a more definitive and confident posture in articulating their views on the succession of states to treaty obligations of their predecessors.

Writing in the American Journal of International Law on the subject of Soviet Treaties and International Law, Professor Eugene A. Korovin sums up the position of the Soviet Union thus:-

"Every international agreement is the expression of an established social order, with a certain balance of collective interest. So long as this social order endures, such treaties as remain in force, following the principle, pacta sunt servanda, must be scrupulously observed. But if in the storm of a social cataclysm, one class replaces the other at the helm of the state, for the purpose of reorganising not only economic ties

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the drafting of which was credited to Lenin, See J.F. Triska and R.M. Slusser, Op.Cit. page 142.

79
It was maintained in the memorandum submitted by the Soviet Delegation to the Economic Conference in Genoa on April 20, 1922 that "The Revolution of 1917, having completely destroyed all the old relationships, economic, social and political, and having replaced the old social order (class divisions) by the new social order, the sovereignty of an insurgent people, turning over the power of the Russian state to a new social class,

but the governing principles of internal and external politics, the old agreements, in so far as they reflect the pre-existing order of things, destroyed by the revolution, become null and void. To demand of a people at last freed of the yoke of centuries the payment of debts contracted by their oppressors for the purpose of holding them in slavery would be contrary to those elementary principles of equity which are due all nations in their relations with each other. Thus, in this sense, the Soviet Doctrine appears to be an extension of the principle of rebus sic stantibus, while at the same time limiting its field of application by a single circumstance - the social revolution".[80]

Returning again to an expatiation of the Soviet Doctrine, but omitting any reference to the principle of the clausula rebus sic stantibus, Professor Korovin, in 1946, asserted that:-

> "Faithfulness to obligations taken upon itself is the characteristic trait of the foreign policy of the Soviet State. There are no firmer treaties in the world than the treaty obligations of the U.S.S.R. The guarantee

cont.- did by this fact break the succession of those civil obligations which were component elements of the economic relationships of the social order now extinct"; cited by M.M. Whiteman: Digest of International Law (U.S.Dept. of State Publication 7553, 1963). Vol. 2 p. 776.

80- E.A. Korovin: Soviet Treaties and International Law (1928). Vol. 22.A.J.I.L. at page 763.

of their durability lies in the peculiarities of the socialist state;

(1) The Soviet Socialist state has not, nor can it have those incentives for violating its international obligations that emanate from an imperialist policy. (2) The exceptional stability of Soviet foreign policy and consequently of Soviet treaty law is the natural consequence of the monolithic unity of the Soviet system and of the absence of antagonistic classes in it. (3) Soviet international practice being the practice of the most democratic of all existing states on earth, it is characterised by clearness, directness, and honesty-qualities inalienably inherent in genuinely popular diplomacy".[81]

The deduction may therefore be made, that in cases where changes in sovereignty were accomplished by acts of violence there would not in Soviet practice be any succession to the obligations of the predecessor sovereign. If, however, the changes in sovereignty were accomplished peacefully, succession to treaty rights and obligations might be presumed.

The Soviet practice is followed in other Socialist states. For example, the German Democratic Republic has always claimed to be the legitimate successor to the Reich. Similarly, the

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81 J.F. Triska and R.M. Slusser, Op.Cit. p. 53.

Peoples Republic of China has maintained consistently since it came to power on the Chinese mainland to be the legitimate government of China and entitled to the Chinese seat on the United Nations Security Council and the General Assembly. This claim was only recently recognised by the United Nations General Assembly in 1971, thus, in effect, preserving the continuity of Chinese representation after expelling the Nationalists.[82]

(iv) The Practice of Commonwealth African States

The practice of Commonwealth African States has polarised in two directions. On the one hand, are the West African States which concluded Devolution Agreements with the United Kingdom on the date of their independence thus maintaining a continuity of treaty rights and obligations. On the other hand, are the East African Commonwealth States which adopted the Nyerere Doctrine. We shall examine these two practices separately.

(1) West Africa

The United Kingdom, following the former practice adopted in the case of the Mandated Territories of Jordan and Iraq and the former colonial territories in Asia, signed inheritance

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82
On Tuesday, November 23, 1971, the People's Republic of China took her seat in the Security Council, as an original member of the United Nations under Article 3 of the U.N. Charter.

agreements with both Ghana[83] and Nigeria[84], transferring to the respective states all the treaty rights and obligations of the United Kingdom in respect of those territories. A list of the relevant treaties were subsequently made available to the two States.

(2) East Africa

Tanganyika was the first of the three East African countries under consideration to achieve independence. However, Tanganyika did not sign a devolution agreement with the United Kingdom, but, instead, made a declaration to the Secretary-General of the United Nations defining Tanganyika's attitude on United Kingdom treaties applied to the territory.[85] The text of the letter to the Secretary-General of the United Nations read as follows:-

> "The Government of Tanganyika is mindful of the desirability of maintaining, to the fullest extent

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83 Exchange of Letters, November 25, 1957. Cmd 345; U.N.T.S. Vol.287, p. 234.

84 Exchange of Letters, October 1, 1960, Cmd 1214; U.N.T.S.Vol. 384, p. 207.

85 Prime Minister Nyerere (as he then was) initially explained this policy to the Tanganyika Parliament on November 30, 1961. Cf. for the text of his statement to Parliament, International Law Association, The Effect of Independence On Treaties (Stevens-Rothman 1965) at pages 370-373.

compatible with the emergence into full independence of the state of Tanganyika, legal continuity between Tanganyika and the several states with which, through the action of the United Kingdom, the territory of Tanganyika was prior to independence in treaty relations. Accordingly, the Government of Tanganyika takes the present opportunity of making the following declaration":-

"As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika, or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence (i.e. until December 8, 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated."

"It is the earnest hope of the Government of Tanganyika that during the afore-mentioned period of two years the

normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties."

"The Government of Tanganyika is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depository in each case what steps it wishes to take in relation to each such instrument - whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review, any party to a multilateral treaty which has prior to independence been applied or extended to Tanganyika may, on basis of reciprocity, rely as against Tanganyika on the terms of such treaty".[86]

The text of this declaration was circulated to all member States of the United Nations and in acknowledgement of which the United Kingdom also made a declaration to the

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86
W.Friedman, O.J. Lissitzyn and Richard C. Pugh: International Law-Cases and Materials (West Publishing Company, 1969) page 435. Cf.,(1962) 2. Y.I.L.C.,106,paragraphs 127 & 128.

United Nations for circulation among member states, "that upon Tanganyika becoming an independent sovereign on the 9th of December, 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika".[87] This Tanganyika formula was later termed the 'Nyerere doctrine', which had such an infectious appeal to the other territories of the East African Community; that when Uganda and Kenya later became independent, a modified version of the Nyerere doctrine was adopted as indicative of their position on succession to the treaty rights and other obligations of the United Kingdom applicable to their respective territories.

3. Effect of the doctrine of state succession on civil aviation

In Commonwealth Africa, the transformation from Colonial status to independence did not manifest any adverse effect on the air transport relations between the new states and other foreign states. It would appear, that in the process of transformation of these states to independence, the following categories of aviation agreements continue to apply:

87

Ibid. p. 436.

(a) Air Services Agreements.[88]

(b) Agreements on Personnel Licensing.[89]

(c) Agreements concerning Prohibition of Carriage of Dangerous Cargo in Aircraft.[90]

(d) Private Air Law Conventions.[91]

In conclusion, it seems to us that the effect which the doctrine of state succession had on aviation in Commonwealth Africa was a beneficial one. By the invocation of the doctrine, the facilitation and continuity of international commerce by air was guaranteed at a time when these new states have not entered into any international agreements or arrangements concerning the regulation of the various aspects of civil aviation in their respective territories.

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88 See e.g. U.S. Dept. of State Publication 2565, Treaties and Other International Acts Series 1507, Air Services Agreement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland signed at Bermuda February 11, 1946. This Agreement is still applicable to Ghana and Nigeria.

89 U.S.Dept. of State Publication No. 738. Executive Agreement Series, No. 77. Arrangement between the United States of America and Great Britain on Air Pilot's Licenses Effected by Exchange of Notes signed on March 28 and April 5, 1935. This arrangement was applicable to Ghana, Nigeria, Kenya, Uganda, Tanganyika and Zanzibar. See also, L.N.T.S. Vol. 162. page 59.

90 U.N.T.S. Vol. 118. p. 143.

91 E.g. Warsaw Convention in its application to Nigeria and Ghana by U.K. ratification on 3/12/34. See Keenan, Lester and Martin - Shawcross and Beaumont on Air Law (3rd Edition) Butterworths 1971. Vol.II.at pp.5 and 6.

C. CONCLUSION

In conclusion, we submit, that judging by the practice of a majority of states, succession to treaty rights is now an accepted fact of international life. In this connection, we recall the opinion of the Permanent Court of International Justice in the case of Free Zones of Upper Savoy and Gex[92] to the effect that the evolution from subject to sovereign status of a former colony might effect such a fundamental alteration in the position of the parties as would render obsolete any agreement, the objects of which were incompatible with the changed circumstances. This opinion notwithstanding, the new states themselves and a majority of the older nations too, seemed to have recognised the need to maintain some continuity in their international intercourse on the emergence of new states rather than embark on a course of conduct the ultimate consequences of which might prove disadvantageous to the new states.

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92 P.C.I.J. (1929) Series A.No.22.

PART THREE

CHAPTER 4

THE POST INDEPENDENCE ERA

- TREATY PRACTICES IN RELATION TO CIVIL AVIATION

A. GENERAL INTRODUCTION

In this Chapter, we shall consider the aviation treaty practices adopted in Commonwealth Africa during the post independence era. As we saw in the last chapter, some aviation treaties entered into by the U.K. continued to apply to the new states of Commonwealth Africa as they emerged into sovereign statehood. With independence, these new states in the course of entering into diplomatic contact with other states had to adopt treaty practices and procedures in accordance with their contsitutional pattern, and in exercise of the right to conclude treaties with other states - being one of the special attributes of their newly acquired sovereignty.[1]

1. Definition

A treaty is defined in the Vienna Convention on the Law of Treaties as an "international agreement concluded between

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[1] Judge Bustamente Y. Sirven, a former Judge of the Permanent Court of International Justice in his critical examination of sovereignty identified three different manifestations of external sovereignty as:-

"(1) nomination of diplomatic representatives and consular agents,

(2) conclusion of treaties; and

(3) participation in international conferences, which is the

states in written form governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[2] In the light of this definition and for purposes of this dissertation, we shall not deal here with the civil aviation commercial agreements[3] entered into by airlines even though the airlines are state or government owned, as such agreements are not treaties in international law.

ii Classification of aviation treaties

Treaties are generally classified as being either Multilateral or Bilateral. Multilateral treaties are those in which more than two High Contracting Parties regulate among themselves matters of either a public or private international law nature and such treaties may be open to accession or adherence by other states.[4] Bilateral treaties, on the other hand, are

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most frequent form of the exercise of independence and one of the tests for deciding which states are in actual enjoyment of such authority". Cf. Three Derecho International Public. French Edition.Vol.1. p.240.

2
Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969), 8 I.L.M. 679.

3
E.g. Commercial agreements generally entered into by civil airlines owned by Commonwealth African Governments either separately or in association with others concern the following subjects: (i) Training facilities, (ii) lease, purchase or servicing of Aircraft, (iii) Agency Agreement, (iv) Pooling Agreement, (v) Interchange of Aircraft and (vi) Aircraft financing.

4
Examples of such multilateral treaties are the U.N.Charter, The Chicago Convention, The Warsaw Convention and the Vienna Convention on the Law of Treaties to mention just a few.

agreements between two states on a matter of exclusively mutual interest between them.[5] The great bulk of treaties concerning civil aviation are bilateral since the failure of a majority of states to agree on a Multilateral Exchange of Commercial Rights at Chicago in 1944.[6] Three varieties of bilateral treaties are employed by states in regulating civil aviation; these are:-

(a) Air Transport or Air Services Agreement,

(b) Memorandum of Understanding, and

(c) Exchange of Notes.

An Air Transport or Air Services Agreement is a formal international engagement between the Governments of two States regulating air services between and beyond their respective territories. When the Parties to an Air Transport Agreement are also Parties to the Convention on International Civil Aviation, it is customary to recite in the Preambular Clause to such agreement that it is supplementary to the said Convention. Where, however, one of the Parties is not a Party to the Chicago Convention, such a recital is omitted. The effect of these two variations is that in the case of the former, it is intended that all the provisions of

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5 Air Transport Agreements such as the Bermuda Agreement fall into this class. We should point out here, that even in countries which form joint international operating agencies in respect of their airlines, the Air Transport Agreements entered into by such states are still concluded on a bilateral basis.

6 The International Air Transport Agreement produced

the I.C.A.O. Convention together with the Annexes and Recommended Practices which the two states have accepted, apply as between the two States while in the case of the latter, these provisions do not apply. In such case, therefore, specific provisions would have to be made in the Air Transport Agreement to cover vital elements of the Chicago Convention, the Annexes and Recommended Practies.[7]

The second variety of treaties which is prominent in the legal regulation of civil aviation in Commonwealth Africa is the Memorandum of Understanding. This is described by Lord McNair as "an informal but nevertheless legal agreement between two or more states, particularly when that agreement forms a step in the process of tidying up a complicated situation"[8]. States resort to the use of Memorandum of Understanding in recording and effecting those secret and confidential aspects

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at the Chicago Conference in 1944 was not favoured by the U.K. and the Commonwealth. Some of the States who were Parties to the Agreement have since denounced it. For a text of the Agreement: P.B. Keenan, A. Lester and P. Martin, Shawcross and Beaumant on Air Law (3rd Edition). Vol.2. pp. 137-141.

7
Before the U.S.S.R. became a member of I.C.A.O. in 1969, it is usual for Bilateral Air Services Agreements between the U.S.S.R. and other States to contain comprehensive and detailed Annexes dealing with matters such as Flight Planning and Air Traffic Control Procedures, Aircraft Equipments, Communications Facilities, Provision of Informations etc. which are not directly referred to but incorporated by reference in bilaterals of I.C.A.O. members. Now that the Soviet Union is a member of I.C.A.O., one may with some degree of confidence suggest that the pattern

of their bilateral air transport negotiations which are not intended to be communicated to third parties.[9]

The third variety of aviation treaty-making takes the form of an Exchange of Notes. This is resorted to in amending or explaining certain provisions of an Air Transport Agreement. It generally emanates from the Foreign or External Affairs Department of a State or where an Ambassador has been given full instructions on the matter, it may emanate from the Ambassador or other duly accredited State Official.[10]

B PROCEDURAL ASPECTS OF TREATY-MAKING

(a) Parties:-

A party to a treaty is defined in the Vienna Convention as "a State which has consented to be bound by the treaty and for which the treaty is in force". In treaty-making, a State is referred to by its constitutional designation under municipal law of that State and its consent to be bound by the treaty or its continued validity is not affected by any changes in the name, style or designation of the government of that State. For example, most of the States in Commonwealth Africa, have at one time or the other either changed their constitutions or

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of Soviet Air Transport Bilaterals would accord more with those of earlier members of I.C.A.O.

8 (Cont.)
Lord McNair, The Law of Treaties, (Oxford 1961) p.15.

9
For a comprehensive examination of the role of Memorandum of

experienced military revolutions. These constitutional changes or emergence of military regimes automatically altered both the character, designation and style of the existing civilian governments which they replaced. In spite of these fundamental changes, the continued validity of international agreements entered into by the various civilian regimes and the willingness to be bound by them were never denied by the successive military governments.[11] International law or the community

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Understanding in Air Transport Agreements See W.O. Odubayo: The Process of making and Executing Treaties in Nigeria with Special Reference to Aviation Agreements, Vol.IV.(1968).Nigeria's Lawyers Quarterly pp. 78-93.

10 (Cont.)
Odubayo Op.cit. at pp. 92-93.

11
When British Africa achieved independence, the various constitutions provided for these territories to be Monarchies. In the Post Independence Era, all Commonwealth Africa abolished their respective independence Constitutions and became Republics. Soon after, a series of military coup d'etat were imposed on these countries. First, in Nigeria for example, the name of the Government was changed from The Government of the Federation of Nigeria to The Government of the Federal Republic of Nigeria indicating a change from a Monarchy to Republican status in 1963. In 1966, following the first military government of General Ironsi, the Constitutional designation of the government was changed to the Federal Military Government and later to the National Military Government, following the promulgation of Decree No. 34. When General Gowon seized power in August 1966, he changed the name of the Government to its earlier one of The Federal Military Government. Similarly, Ghana, Uganda, Kenya and Tanganyika abolished their Constitutions to become Republics and Tanganyika united with Zanzibar to become a United Republic. Ghana's first Military Government was known as the National Liberation Council while the current Government is known as the National Redemption Council.

of States is not concerned with changes in the names of governments. What it is concerned with is the existence de facto and de jure of a government in succession to a previous one with which it can deal.[12]

(b) Full Powers and Credentials

This is a "document emanating from the competent authority of a State designating a person or persons to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty".[13] The competent authority of a state issuing this document is usually the Head of State, Prime Minister or the Minister for Foreign Affairs. It is normal in some treaties to refer in the preamble to the exchange and mutual examination of the Credentials of a negotiator which must be found to be in due and proper form before the commencement of negotiations. Full Powers and Credentials in aviation treaty-making do not at the present time have the same aura they used to have in classical treaty making.[14] The reason for this is, firstly, that aviation

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12
J.G. Starke. Introduction to International Law. Ch.10 (5th Edition 1963).

13
Supra. n.2. Art. 2(1)(c).

14
Sir Nevile Bland (Ed); Satow's Guide to Diplomatic Practice (4th Edition, Longmans, 1958) Ch.8.

treaties are concluded by most states with such degree of regularity that they are now a matter of routine occurrence. A second reason for the decline in the use of Full Powers and Credentials is that under the constitutional law procedures of most states, aviation treaties are treated as executive agreements or Inter-Governmental Agreements rather than as treaties in the classical Head of State Form.[15]

(c) Negotiation, Initialing and Signature

Negotiation is the process of drawing up and adoption of the text of a treaty between negotiating states.[16] Negotiation takes the form of a Conference at which the accredited representatives of the Parties meet to discuss and record in written form the points of accord for the approval of their respective Governments. The text of an accord so prepared by the Conference is initialled by the Heads of respective Delegations to the negotiations. The effect of this initialing is merely to authenticate the text and does not make such texts binding on the Contracting Parties. In practice, the Contracting Parties might at any stage propose amendments

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15 See Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States (1962 Edition). Vol.2. pp. 10-34, and the authorities referred to in the footnotes. See also McNair, op.cit.supra,n.8.at pp.63-65; Cf.,Oliver J. Lissitzyn: The Legal Status of Executive Agreements on Air Transportation. 17 J.Air L.& Com.436 (1950); 18 J.Air L.& Com. 12 (1951).

16 Supra.n.2 Art.2(1)(e).

to an initialled text of a treaty. Signature of a treaty is the stage when a state, having considered and approved an initialled text of a treaty, takes the final step of signing the treaty through a representative (usually the Ambassador) specially accredited for that purpose.[17] An Air Transport Agreement may come into force immediately on signature, thus dispensing with the act of ratification.[18]

(d) Ratification, Registration and Publication

Some treaties, after formal signature by the accredited representative of a state, may still require that the obligations assumed under the treaty by the act of signature be ratified by some bodies or organs of the state to give the treaty an unequivocally binding effect internationally.[19] In the case of multilateral treaties, it is customary for instruments of ratification to be deposited with the state

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17
In the Air Services Agreement between the U.K. and Ghana in 1958, Mr. Asafu Adjaye the High Commissioner for Ghana in the United Kingdom was given Full Powers and Credentials to sign the Agreement in London on behalf of the Ghana Government.

18
See Art. 15. of the U.K. - Ghana Air Services Agreement H.M.S.O. (1958) Cmnd. 567.

19
See n.2.Supra, Art. 2(1)(b).

which is the host country to the Diplomatic Conference at which a multilateral treaty is negotiated. However, where a multilateral treaty is a Protocol to another Convention, it is customary for the Instruments of ratification of the Protocol to be deposited with the Depository of the Convention.[20]

In the case of bilateral aviation treaties which contain a provision for ratification, it is generally provided for the Agreement and its annex to be provisionally applicable from the date of signature and to come into force definitively on the date of exchange of instruments of ratification. In order to ensure that either Parties would take steps to ratify the accord without unnecessary delay, it is usual to insert another clause to the effect that:

"If instruments of ratification are not exchanged within twelve months from the date of signature, either Contracting Party may terminate the provisional application of this agreement by giving six months notice in writing to the other Contracting Party".[21]

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20 See, however, the novel case of the Guatemala Protocol (1971) to the Warsaw-Hague Convention in which the Polish Government as depository for the Warsaw Convention and the Hague Protocol lost the battle to act as depository of the Guatemala Protocol to the host Government. By some novel arrangement, the Government of Guatemala was to act as Depository for a period of six months after which the function of Depository was to be transferred to I.C.A.O.

21 - e.g. Art 16(3) of the Air Transport Agreement Between

It is now imperative, in international law, that for a state to be able to invoke a treaty before the International Court of Justice or any other organ of the United Nations, such a treaty must be registered with the U.N. and published in the U.N. Treaty Series.[22] In this connection, Article 102 of the U.N. Charter provides as follows:-

"1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No Party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."[23]

A complementary provision to the U.N. Charter is provided by Article 83 of the Chicago Convention which also provides that

"Subject to the provisions of the preceding Article, any contracting state may make arrangements not inconsistent with

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Nigeria and Switzerland U.N.T.S. Vol. 602.p.152.

22
This necessity for registration referred to here is subject to the proviso that secret treaties are not by the custom and practice of states registered with the U.N.

23
See L.B. Sohn: Basic Documents of The United Nations, Companion Volume to his Cases on U.N. Law (Brooklyn The Foundation Press Incorporated 1956) at p. 23. Cf. Article 80(1) of the Vienna

the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible".

Bilateral aviation agreements entered into in Commonwealth Africa are registered with the Council of I.C.A.O. After registration by I.C.A.O., a certified true copy is then forwarded by the Secretary-General of I.C.A.O. to the U.N. Secretariat in New York for publication in the U.N. Treaty Series, as I.C.A.O. does not publish a separate Treaty Series of its own.

(e) Implementation

Once a valid treaty has been concluded, its application within the municipal law of the State is a matter regulated by the Constitutional Law of that State. Some treaties, by their nature, do not produce any municipal effect.[24] Others are self executing and do not require any special legislation to give effect to them within the municipal legal system of the Sate.[25] Some others, however, require special legislations

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Convention on the Law of Treaties which reiterates the provisions of Art 102 of the U.N. Charter.

24
McNair Op. Cit. at p. 79. gives examples of such treaties as including treaties of alliance or neutrality and treaties guaranteeing independence or neutralization.

25
Ibid. The Constitution of the United States is referred to, for example, in which treaties entered into by the United States automatically are assimilated into the municipal law. To this

to give effect to them domestically.

In Commonwealth Africa, following the practice of the United Kingdom, the notion of self executing treaties is unknown. For this reason, every treaty entered into by Commonwealth African States requires domestic legislation to give effect to such a treaty. In this connection, the Civil Aviation Acts of all Commonwealth Africa were designed to give effect to the Chicago Convention.[26]

In a similar way, the Treaty for East African Co-operation was implemented in the Partner States by legislation.[27]

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effect, Article V of the Constitution of the United States provides as follows "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding".

26
See for example Art 3 of the Ghana Civil Aviation Act 1958; Art 1(1) (a) of the Nigerian Civil Aviation Act 1964 and the Preamble to the East African Civil Aviation Act 1964.

27
See, The Treaty for East African Co-operation (Implementation) Act 1967 of Tanzania, the East African Community Act 1967 of Uganda and the Treaty for East African Co-operation Act 1967 of Kenya.

Bilateral Air Transport Agreements generally do not require implementation by legislation since they are agreements of a type which the respective Commonwealth African governments enter into with such a degree of frequency.

C. STATE PRACTICES IN COMMONWEALTH AFRICA

(a) Nigeria

The Federal Ministry of Transport is responsible for the initiation and conduct of negotiation of Bilateral Air Transport Agreements in Nigeria. In some cases, the Ministry of External Affairs, in its conduct of foreign relations with other States, may request the Federal Ministry of Transport to commence negotiation with a foreign State with which Nigeria desires friendly relations. Furthermore, on a few occasions, a foreign airline operating on a provisional licence to Nigeria may approach the Federal Ministry of Transport to request that negotiations be initiated between Nigeria and the State whose nationality the airline possesses.

A Nigerian delegation to a Bilateral Air Transport negotiation is usually made up of one representative each from the Ministries of Transport, Finance, Justice and Nigeria Airways. The representative from the Ministry of

Transport who is usually an Administrative Officer not below the rank of Deputy Permanent Secretary is designated Chairman of the delegation.

At the conclusion of a negotiation, the agreed text of the negotiated Agreement is submitted with a report to the Federal Executive Council. If the Council is satisfied that the agreement is fair and is within the terms of the instructions given to the negotiating team and if also the Attorney-General and Commissioner for Justice has no other objections, authorisation is given by the Council to the Commissioner for Transport to sign the Agreement on behalf of the Nigerian Government.

(b) Ghana

Responsibility for the negotiation and conduct of Bilateral Air Transport Agreements in Ghana is vested in The Air Transport Licensing Authority. The Authority is constituted by The Ghana Air Transport Licensing Authority Order 1962,[28] made pursuant to Section 9(2) of the Civil Aviation Act 1958.[29]

A Ghanian negotiating team is composed of all the members of the Authority, which are made up of the Commissioner for

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28 E.I. 363.

29 No. 37 of 1958.

Communications as Chairman, the Executive Secretary, a representative from the Ministry of Justice, the Director of Civil Aviation and an Administrative Officer from the Ministry of Communications not below the rank of Principal Assistant Secretary.

Before the A.T.L.A. commences negotiations with a foreign State, approval of the Cabinet is sought, and the Ministry of Justice is asked to submit or study the draft agreement on which the negotiations will be based. When the Agreement has been negotiated, a report of the negotiations is prepared by the Executive Secretary of the A.T.L.A. for submission to the Cabinet through the Commissioner of Communications. When Cabinet approval has been obtained, either the Commissioner of Communications or a Diplomatic Representative of Ghana not below the rank of Ambassador may be designated by the Government to sign the Agreement on behalf of the Government of Ghana.

(c) The Practice of the East African Community

Under The East African Civil Aviation Act 1964[30] and the Treaty for East African Co-operation[31], the East African Authority comprising of the Presidents of Kenya, Uganda and Tanzania are responsible for the conduct of Bilateral Air

30 Act No. 22.of 1964

31 Printed on behalf of the East African Common Services Organisation by the Government Printer, Nairobi, Kenya 1967.

Transport Agreements for the three Partner States of the Community. In performing this function, the Authority is assisted by the East African Ministers. These Ministers are nominated by each of the Partner States but are appointed by the Authority. The Minister for Communications and Research is the Chairman of the Communications Council. Negotiation of bilaterals is one of the important functions carried on by the Communications Council on behalf of the Authority. In discharging this function, the Council is assisted by the East African Civil Aviation Board which is enjoined among others to "consider and advise the Authority in relation to the following matters:-

(a) negotiations with other countries for the establishment of international air services";[32]

In addition to the members of the East African Civil Aviation Board on the negotiating team[33], representatives of East African Airways Corporation are included to give expert advice on practical problems of airline operations.

Although the Community negotiates bilateral Air Services Agreements jointly as a team in accordance with obligations assumed by them under the Treaty for East African Co-operation, nevertheless, the actual signature of a concluded Agreement is the

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32 Supra.n.30.Sec.5(1)(a).

33 The E.A.C.A.B. is composed of a Chairman who is the Executive Officer to the Communications Council responsible for Civil

individual responsibility of the respective Partner States, who then signs separate Agreements, though in similar terms, with the particular foreign State.[34]

D. COMPARISONS AND CONTRASTS

a. COMPARISON BETWEEN THE NIGERIAN AND GHANA PRACTICE IN THE NEGOTIATION OF AIR TRANSPORT BILATERALS

(1) In Ghana, the Commissioner of Communications who is a political appointee and a member of the Cabinet is a permanent statutory member and Chairman of the negotiating team; while his Nigerian counterpart, - the Commissioner for Transport is not a member at all.[35]

(2) While the composition and procedure of the Ghana A.T.L.A. concerning the negotiation of bilaterals is regulated by an Executive Instrument, the composition and procedures of the Nigerian negotiating team is based on practice and administrative convenience.

Cont.
Aviation, The Director-General of Civil Aviation, two members each appointed by the Governments of Kenya, Uganda and Tanzania respectively.

34
This is similar to the procedure followed by the Scandinavian Countries of Norway, Sweden and Denmark associated in the Scandinavian Airlines Systems (S.A.S.) Cf. R.A.Nelson: Scandinavian Airlines System Co-operation in the Air, (1953) J.Air L.& C., pp. 178-196.

35
The reason for this fundamental difference in the approach of the two countries, we venture to suggest, is that during the regime of late President Nkrumah, Ghana used aviation as an important instrument of her foreign policy. For example, she acquired expensive aircraft from both Britain and the Soviet Union, concluded bilaterals with many states around

(3) Practice in Nigeria developed since the post-independence era dictates that a member of the negotiating team should represent Nigeria Airways; in Ghana, where the composition of the negotiating team is regulated by Statutory Instrument,[36] a representative of Ghana Airways is not technically a member of the team. However, as a matter of practice, a representative of Ghana Airways is usually invited to accompany a negotiating team as an adviser.

b. CONTRAST BETWEEN THE WEST AFRICAN PRACTICE IN THE NEGOTIATION OF AIR TRANSPORT BILATERALS AND THE EAST AFRICAN COMMUNNITY PRACTICE

(1) The absence of a joint international operating agency in Commonwealth West Africa makes the negotiation of Air Services Agreements in Nigeria and Ghana a truly bilateral relationship between these States and other foreign States. In the case of the East African Community, although a *prima facie* bilateral relationship is maintained between the individual component States of the Community and other foreign States by the fact that the respective Partner States signs individual separate agreements with foreign States, however, no real bilateral relationship exists, since the Partner States must consult each other before commencement of nego-

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the world, and Ghana Airlines flew with excess capacity to major capitals of the World. Nigeria was rather cautious in this respect.

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Supra. n.28.

tiation, conclusion, amendment, suspension and revocation of any agreement.

(2) While a foreign state may conclude agreements based on divergently opposed civil aviation policies with either Nigeria or Ghana based for example on either the Bermuda type of agreement favouring free competition or the predetermination policy[37], such a situation cannot arise in negotiations with the East African Community because civil aviation policy in Kenya, Uganda and Tanzania is a Community responsibility, and thus, in effect, ensuring uniformity of policies.

(3) Registration of aviation treaties entered into by Commonwealth Africa is effected with the Secreteriat of I.C.A.O. which then arranges for publication in the U.N. Treaty Series. Apart from Nigeria which publishes The Nigeria's Treaties in Force incorporating a few aeronautical agreements, neither Ghana, Kenya, Uganda nor Tanzania publishes any individual Treaty Series of their own.

37
Professor Bin Cheng describes this policy as an arrangement whereby the "aeronautical authorities of the Contracting Parties, before the Services are actually inaugurated by agreement fix in advance, in accordance with the principles governing capacity laid down in the agreement, the actual capacity to be made available, and therefore continue to keep the matter under constant review and their control. The airlines are not allowed to exceed this pre-determined capacity, except temporarily and by agreement between themselves to meet any unexpected traffic

E. CONCLUSIONS

(1) Prior to this dissertation, nothing, to our knowledge, has been written about the treaty practices and procedures of Ghana, Kenya, Uganda and Tanzania.[38] In this regard, we note and observe that the U.N. publication entitled "U.N. Legislative Series, Laws and Practices concerning the Conclusion of Treaties: ST/LEG/SER B/3" contains a general description of the treaty practices and procedures of many states around the world. As the last edition of the publication appeared before all states in Commonwealth Africa attained independence and treaty-making capacity, we suggest that it would be highly desirable if the respective Foreign Offices of Commonwealth African states could bring to the knowledge of the international community, their treaty practices and procedures, by making available to the U.N. Secretariat, mate-

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demands of transient character, but any such increases must be reported forthwith to the competent aeronautical authorities which may confirm or modify them. Once the initial capacity has been determined, the designated airlines of both sides will then agree on the actual load factor and frequencies. These are subject to the approval of the two States. A rigid governmental control is thus exercised". Cf. Bin Cheng, The Law of International Air Transport 1962, at page 424.

38
A full examination of the aviation treaty practices of Nigeria is dealt with in the article referred to in n.9. Supra.

rials and data for up-dating the U.N. publication referred to above.

(2) If conclusion of treaties is regarded as an important aspect of international relations, the publication of such treaties, in a Treaty Series, we submit, is a complementary and important aspect of that relationship. For this reason, it is suggested that each of the states in Commonwealth Africa that has not embarked on the publication of Treaty Series should make immediate provisions in this regard, thus facilitating the dissemination of information as to the nature and variety of treaties entered into by them, with a view to terminating the present practice whereby treaties concluded by these states, not being secret treaties, are not generally disseminated until they find their way into the U.N.T.S. more than about two years after such treaties were concluded.

CHAPTER 5

ESTABLISHMENT OF LEGAL MACHINERY FOR DEALING WITH AVIATION PROBLEMS

A. LEGISLATIVE

Among the many colonial heritages bequeathed by Great Britain on Commonwealth Africa are a parliamentary system of government, an efficient administrative service and a judicial system based on the common law. These institutions, have played a major role in meeting some of the challenges and problems arising in the aviation field after the independence of colonial territories.

The independence constitutions of all Commonwealth Africa vested supreme legislative authority on the respective Parliaments of the territories.[1] Following British constitutional practice, legislations enacted by these bodies were referred to as Acts of Parliament.[2] By virtue of her prior attainment of independence before the other territories in British Africa, Ghana was first in the field to enact "An Act to provide for the regulation of civil aviation and

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1 See, for example, Section 1 of the Tanganyika Independence Act 1961 and the First Schedule to the Act.

2 For a comprehensive treatment of this subject See:F.A.R. Bennion: The Constitutional Law of Ghana (Butterworths, London 1962). Ch.8. Since the detailed procedures described by Bennion is applicable with slight variations in all the territories of Commonwealth Africa, we shall not waste the readers time by recapitulating them here. Cf. Art. 59 of the Treaty For East

air navigation; to authorise the establishment and maintenance of aerodromes; to define liability for damage or injury caused by aircraft; and to provide for purposes connected with the foregoing matters".[3]

Two categories of legislations regulate aviation throughout Commonwealth Africa. The first category is in the form of Acts of Parliament, passed by the sovereign legislatures in the respective territories or in the case of Kenya, Tanzania and Uganda by the East African Authority.[4] The second category is in the form of subordinate or delegated legislations exercisable by either the Head of State[5], the Minister responsible for aviation matters,[6] the Authority, in the case of the East African Community[7] or the technically

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African Cooperation which regulates the procedures for enactment of Acts of the Community; Laws of Uganda, Cap. 15.

3
See the head note to the Ghana Civil Aviation Act,1958, No.37 of 1958 which came into force on October 1, 1958.

4
See infra pages 189-190.

5
See Ghana Civil Aviation Regulations 1970.L.I. 674.

6
See e.g. The Ghana Air Transport Licensing Authority Order, 1962.E.I. 363.

7
The East African Community (Immunities and Privileges)Order 1967, East African Community Gazette Supplement L.N.No.7. of 1967.

qualified civil servant,usually styled the Director of Civil Aviation,particularly in matters concerning the safety of flight operations.[8]

As is usual with British legislations dealing with highly technical or specialist subjects, general provisions are usually made in the Act, leaving the gaps to be filled by detailed provisions in the subordinate legislations as and when occasion demands. In accordance with this practice, for example, the Ghana Civil Aviation Act 1958[9] empowers the Governor-General by Order to make subordinate legislations "as appears to him to be requisite or expedient for carrying out the Chicago Convention, any annex thereto relating to international standards and recommended practices (being an Annex adopted in accordance with the Convention) and any amendment of the Convention or any such annex made in accordance with the Convention",[10] to regulate air navigation;[11] generally both in peace time and in times of war or other national emergency[12], for the investigation of accidents[13] and to give effect to the Rome Convention.[14]

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8 See Sec. 14 of The East African Civil Aviation Act 1964.

9 The Ghana Civil Aviation Act 1958,No.37.of 1958.The expression "Governor-General"should now be read and construed as meaning Head of State.

10 Ibid, Section 3. 11 Ibid. Section 4. 12 Ibid. Section 5.
13 Ibid. Section 8. 14 Ibid. Section 30.

In addition to the powers conferred in this Act on the Governor-General to make subordinate legislations by Order, the Minister with responsibility for aviation is also empowered in his own right to make subordinate legislations prohibiting "aircraft from flying over such areas in Ghana as may be specified either in the order or by notice in the gazette.[15]

The legislative machinery adopted by Nigeria in the Civil Aviation Act 1964[16] is similar to that of Ghana, as both are modelled on the United Kingdom Civil Aviation Act 1949[17]. There is, however, one important point of difference between the Nigerian Civil Aviation Act 1964[18] and the Ghana Civil Aviation Act 1958[19] concerning the special powers vested in the Head of State of Ghana to make subordinate legislations. No such powers are vested in the Head of State of Nigeria. Rather, such powers as were vested in, or exercisable by the Head of State in Ghana, are, in Nigeria, vested in and exercisable by the Commissioner with responsibility for civil

15 Ibid. Section 6.

16 1964 No. 30.

17 12, 13 & 14 Geo. 6 c.67.

18 Supra. n.16.

19 Supra. n.9.

aviation. Thus, section 1(1) of the Civil Aviation Act 1964[20] provides that "the Commissioner may by regulations make such provision as appears to him to be necessary or expedient -

(a) for carrying out the Convention on International Civil Aviation concluded at Chicago on the seventh day of December, 1944, any annex to the convention which relates to international standards and recommended practices and is adopted in accordance with the convention, and any amendment of the Convention or of any such annex which is made in accordance with the Convention;

(b) generally for regulating air navigation"

These general powers, are, in section 1(2), enumerated in some detail to include the power to make regulation

"(a) as to the registration of aircraft in Nigeria:

(b) for prohibiting aircraft from flying unless certificates of airworthiness issued or validated under the regulations are in force with respect to them and except upon compliance with such conditions as to maintenance and repair as may be prescribed;

(c) for the licensing, inspection and regulation of airports, for access to airports and places where aircraft have landed, for the inspection of aircraft factories, and for prohibiting or regulating the use of airports which are not licensed in pursuance of the regulations;

(d) for prohibiting persons from engaging in, or being employed in or in connection with, air navigation in such capacities as may be prescribed unless

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20 Supra. n.16.

they satisfy the prescribed requirements, and for the licensing of persons employed at airports in the inspection, testing or supervision of aircraft;

(e) as to the conditions under which, and in particular the airports to or from which, aircraft entering or leaving Nigeria may fly, and as to the conditions under which aircraft may fly from one part of Nigeria to another;

(f) as to the conditions under which passengers and goods may be carried by air and under which aircraft may be used for other gainful purposes, and for prohibiting the carriage by air of goods of such classes as may be prescribed;

(g) for minimizing or preventing interferences with the use or effectiveness of apparatus used in connection with air navigation, and for prohibiting or regulating the use of such apparatus and the display of signs and lights liable to endanger aircraft;

(h) generally for securing the safety, efficiency and regularity of air navigation and the safety of aircraft and of persons and property carried in aircraft, and for preventing aircraft from endangering other persons and property;

(i) for requiring persons engaged in, or employed in or in connection with, air navigation to supply meteorological information for the purposes of air navigation;

(j) for regulating the making of signals and other communications by or to aircraft and persons carried in aircraft;

(k) for instituting and regulating the use of a civil air ensign and any other ensign established by the Minister for purposes connected with air navigation;

(l) for prohibiting aircraft from flying over such areas in Nigeria as may be prescribed;

(m) for applying, with or without modifications, the enactments relating to customs in relation to airports and to aircraft and to persons and property carried in aircraft;

(n) as to the manner and conditions of the issue, validation, renewal, extension or variation of any certificate, licence or other document required by the regulations (including the examinations and tests to be undergone), and as to the form, custody production, cancellation, suspension, endorsement and surrender of any such document;

(o) for the registration of births and deaths occurring in aircraft and of particulars of persons missing from aircraft;

(p) for regulating the charges that may be made for the use of airports licensed under the regulations and for services provided at such airports;

(q) for specifying the fees to be paid in respect of the issue, validation, renewal, extension or variation of any certificate, licence or other document or the undergoing of any examination or test required by virtue of the regulations and in respect of any other matters in respect of which it appears to the Minister to be expedient for the purposes of the regulations to charge fees;

(r) for exempting from the provisions of the regulations or any of them any aircraft or persons or classes of aircraft or persons".

In addition to these general powers, but unlike in Ghana, the Commissioner is also empowered to "make regulations providing for the investigation of any accident arising out of or in the course of air navigation and either occurring in or over Nigeria or occurring to Nigerian aircraft elsewhere."[21]

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21 Ibid. Section 2(1).

In East Africa, where civil aviation is a Community subject under the Treaty for East African Co-Operation, the machinery for regulating civil aviation is contained in the East African Civil Aviation Act, 1964[22]. In this enactment, "the President of the United Republic of Tanganyika and Zanzibar, the President of Uganda and the Governor-General of Kenya on behalf of the East African Common Services Organisation,with the advice and consent of the East African Central Legislative Assembly",[23] by an Act assented to on behalf of the East African Common Services Organisation, made provision "for the constitution and the functions of the East African Civil Aviation Board, to enable effect to be given to the Chicago Convention and to provide generally for the control, regulation and orderly development of civil aviation" in East Africa.

Unlike the practice in Ghana where the legislature conferred power to make subordinate legislation on both the Head of State and the Minister, or in Nigeria where the power is

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22
Act No. 22. of 1964.

23
As the East African Civil Aviation Act 1964 was enacted before the Treaty for East African Co-operation, the Act should be now read and construed in the light of Constitutional and political changes in East Africa discussed in some detail in Chapter 1.

conferred only on the Commissioner, the East African Civil Aviation Act 1964 reserves the power to make subordinate legislation exclusively to the East African Authority composed of the three Heads of State of the territories of the Community.[24] While the Authority seems to guard jealously its legislative powers,[25] it seems, however, that the only exception to this practice is the power to make subordinate legislations, delegated to the Director of Civil Aviation in connection with safeguards to ensure the safety of air navigation.[26]

B. ADMINISTRATIVE REORGANIZATION OF INSTITUTIONAL FRAMEWORK FOR DEALING WITH AVIATION MATTERS

As the title of this section suggests, the expression "reorganization of institutional framework for dealing with aviation matters" connotes a state of constant changes, trials and error, adaptations and innovations in formulating suitable and efficient structural framework for the handling of matters connected with civil aviation in Commonwealth Africa.[27] It is not our intention in this dissertation to

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24 See n. 22. Supra at Section 12.

25 The Authority even reserves to itself the power to make procedural regulations concerning the affairs of the East African Civil Aviation Board. See Ibid, Section 9.

26 Ibid, Section 14.

27 Cp. the institutional structures described in I.C.A.O. Doc. 7604/9. Information on National Civil Aviation Departments,

enumerate or discuss all the problems which arise from time to time in aviation. What we intend to do is to examine the organizational chart of the respective aviation Ministries or departments in Commonwealth Africa beginning with:-

1. Nigeria

a. The Federal Ministry of Transport

The Department of Government at present charged with responsibility for civil aviation in Nigeria is called the Ministry of Transport.[28] This Ministry is made up of

(a) Administrative Division,

(b) Maritime Division,

(c) Inland Waterways Division,

(d) Government Coastal Agency,

(e) Aviation Division,

(f) Nigerian Railway Corporation,

Cont.
(Ninth Edition) 1960 with the organizational chart described in the 1970/71 Edition of that publication, and the transformations of these institutions within the past decade would be at once apparent. We shall, in this section, describe these institutions as at present constituted.

28
The former Colonial Department of Civil Aviation, was, at independence, transformed into a Ministry of Transport and Aviation. Subsequently, in 1964, a separate Ministry was created for Aviation. In 1967, however, the Ministry of Aviation became a Division of the Ministry of Transport.

(g) Nigeria Airways,

(h) Nigerian Ports Authority,

(i) Nigerian Civil Aviation Training Centre, and

(j) Nigerian National Shipping line.[29]

We shall only concern ourself in this chapter with (a), (e), and (l).

Responsibility for policy control of the Ministry of Transport is vested in the Federal Commissioner of Transport,[30] who is a political appointee and holds office at the pleasure of the Head of the Federal Military Government and Supreme Commander of the Armed Forces. He is assisted by a panel of experts, made up of civil servants, who are permanent officials. Foremost among these, is the Permanent Secretary; who is the direct adviser to the Commissioner and through whom all communications from the

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29
Federal Republic of Nigeria, Office Directory 1972, Federal Ministry of Information, Printing Division, Lagos, at pages 142-155.

30
See Federal Republic of Nigeria Gazettee No. 54. Vol. 54. of 6th July 1967. It should be noted that under Item 3 of the Exclusive Legislative List, in Part 1 of the Schedule to the Constitution of the Federation, "Aviation including airports, safety of aircraft and ancillary transport and other services" is a Federal subject. Since the office of Ministers have been abolished by the Constitution (Suspension and Modification) Decree 1966, No. 1. of 1966, civilian members of the Federal Executive Council are now designated Commissioners. See Supra Ch. 1. page 16.n.28.

various divisions of the Ministry to the Commissioner must be routed.

For convenience of presentation, we shall describe the general framework of the Ministry, below the Permanent Secretary, under two categories.

(i) Administrative Division

The Administrative Division, is staffed principally by administrative officers; who are to assist in the formulation and execution of aviation policies. In the main, they are not experts in any aspects of aviation; except that whatever knowledge of aviation these categories of officials might possess have been acquired on the job.

The division is responsible generally for formulating policies concerning licensing of Air Transport Services, the Nigeria Airways Limited[31] and relations between the Ministry and the Nigerian Civil Aviation Training Centre[32]. It is also responsible in consultation with other Ministries such as External Affairs and Justice for the conduct and negotiation of bilateral air transport agreements.[33]

(ii) Aviation Division

This division is manned wholly by technically qualified

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31 Infra. Ch.9.

32 Infra. pages 195-198.

33 Supra. Ch.4.

personnel at the head of which is a Director of Civil Aviation. The division is responsible for all technical aspects of civil aviation and the maintenance of airports and aerodromes. It is responsible for operations, air traffic control, communications, licensing of flight crews, air safety services and investigation of accidents. It should be mentioned, that these services are at present available in Nigeria by special arrangement either between the Government of Nigeria and the United Kingdom Government on the one hand, (as for example in offering expert services for aircraft survey, certification and other duties connected with Air Registration Board) or between the Nigerian Government and Aeradio on the other ,in providing staff for air traffic control services.

b. Other Ministries

Since responsibility for aviation and aviation related subjects are not centrally located in one ministry, it follows, that other ministries would as of necessity be called upon from time to time, to render supporting services in this direction. For example, under Section 6 of the Civil Aviation Act 1964[34], the Commissioner has power to establish and maintain airports. However, as land required for this purpose may have to be acquired by either a compulsory

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Supra. n.16.

purchase order or compulsory acquisition under the Public Lands Acquisition Act,[35] the Federal Ministry of Works and Survey, being the department of government authorised to acquire land required by the Federal Government for all public purposes, its cooperation must be enlisted by the Ministry of Transport in this regard.

Meteorology is an important technical aspect of civil aviation. This, notwithstanding, the Nigerian Meteorological Services is not a division directly under the Ministry of Transport but of the Federal Ministry of Agriculture and Natural Resources. It is this ministry, therefore, which provides meteorological services for the Ministry of Transport.

Finally, we should mention the Ministry of Communications, which is responsible for allocation and control of radio frequencies under the I.T.U. Convention and on which the Aviation Division depends not only in respect of radio frequencies but also for the repair and maintenance of its telecommunication equipments.

c. The Nigerian Civil Aviation Training Centre

Established in 1964, by an Act of Parliament,[36] the

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35 Laws of the Federal Republic of Nigeria, (1958 Edition). Cap. 167.

36 Nigerian Civil Aviation Training Centre Act, 1964, No. 31.

Nigerian Civil Aviation Training Centre is joint venture between the Nigerian Government, the United Nations Special Fund and I.C.A.O. as the Executing Agency on behalf of the Fund.

The Centre, which is sited in Zaria, is charged with the general duty of providing:-

"(a) Civil aviation courses, standard or special, designed for use in flight training or in airport operation and management as may from time to time be prescribed under this Act for approved persons;

(b) training of approved persons in the installation, maintenance and operation, as the case may be, of technical equipment the use of which is calculated or likely to increase the margin of operational safety of civil aircraft services;

(c) equipment and necessary facilities for technical research or normal use by approved persons at the training centre as may from time to time be authorized or allowed by the board or governors",[37]

It is also provided for the centre to be a body corporate,

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37 Ibid. Section 1(1).

with perpetual succession and a common seal. It is given power to hold or acquire property, movable and immovable, but is precluded from mortgaging, charging or disposing "of any property held by it over the value of fifty pounds without the consent in writing of the Commissioner".[38]

The Centre is under the control of a Board of Governors which is "charged with responsibility for the organization, administration and policy planning of the training centre".[39] The Board is made up of six members, three of whom are appointed by the Commissioner, one by I.C.A.O., the Director of the United Nations Special Fund in Nigeria, and the sixth member, who is also designated Chairman is appointed by the Federal Executive Council.[40] The Principal of the Centre acts as Secretary to the Board.[41] The Centre gets its funds from money allocated to it by the Government of Nigeria, the Special Fund, donations and subsidies, fees from students and from other sources as the Board may approve.[42]

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38 Ibid. Section 1(3).

39 Ibid. Section 3(1).

40 Ibid.

41 Ibid. Section 3(2).

42 Ibid. Section 4(1).

We should mention, that the Centre is an I.C.A.O. Technical Assistance mission to Nigeria and is intended to serve as a training centre for the whole of the West African region. Thus, students have attended the Training Centre not only from Nigeria, but also from Ghana and other countries in West, Equatorial and Central Africa.

ii. Ghana

The Ghana Ministry of Transport and Communications is one of the most centralised and highly integrated ministries in Ghana, of which the Department of Civil Aviation forms a part.

At the apex of the civil aviation structure, is the Commissioner of Transport and Communications.[43] His responsibility to the cabinet for the policy matters affecting the ministry and his relations with the civil servants under his control in the day to day running of the ministry are similar to that described above.[44] However, the actual formulation of civil aviation policy and general direction of the Department of Civil Aviation are functions

43
After the two coup d'etat in Ghana between 1966 and 1971, and following the precedent in Nigeria, the offices of Ministers were abolished and new appointees were re - designated Commissioners.

44
Supra. pp. 193-194.

of the Director of Civil Aviation, who is a career civil servant and a technically qualified expert. He is assisted by a Deputy Director of Civil Aviation, who oversees the work of the various technical divisions into which the department is sub-divided. Among these divisions, to mention just a few, are communications division, a section dealing with all I.C.A.O. and other International affairs, airport management, operation of air traffic services, airworthiness, investigation of accidents, aircraft inspection, registration of aircraft and the special section handling the training programme of the department.

Directly responsible to the Director of Civil Aviation, (but not through the Deputy Director) and through him to the Commissioner for Transport and Communications, is the Air Transport Licensing Authority.[45] The A.T.L.A. has attached to it, a special statistics section, whose function is to keep a record, among others, of the number of passengers that embark or disembark in Ghana, the airlines that operate

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45 For a full treatment of the composition, functions and powers of the A.T.L.A. see Infra. Ch. 6. at pages 235-238 .

scheduled and non-scheduled services to Ghana, the frequency of operations, and the revenue that accrue to the country either by way of landing fees, fares or taxes.

Aviation related subjects such as aviation meteorology, telecommunications and allocation of radio frequencies are provided directly by the relevant departments within the centralised Ministry of Transport and Communications.

iii The East African Community

The treaty creating the East African Community, vests responsibility for aviation and all other services relative thereto on the East African Minister for Communications.[46] There is a Communications Council, over which the Minister presides as Chairman. In discharging his ministerial responsibilities, the Minister acts, through the East African Directorate of Civil Aviation. We shall now consider in detail the organizational structure of civil aviation in the Community.

(a) The Communications Council

This is the highest and most important policy-making body on aviation in East Africa. Its powers, subject to the East African Authority, derive from Article 55 of the

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46 Treaty for East African Co-operation, Article 51.

Treaty and as elaborated in Annex XIII of that Treaty.[47] The Communications Council is composed of "three East African Ministers, together with three other members, being the persons holding office as Ministers responsible for matters relating to communications in the respective Governments of the Partner States".[48] The Council also acts as a kind of forum for consultation among the Partner States on communication matters generally.

In addition to its duties of laying down policies for the East African Airways Corporation and the East African Civil Aviation Board,[49] it also advices the East African Authority concerning legislative proposals and directives issued to it by the Authority.

(b) The Directorate of Civil Aviation

The federal or quasi federal pattern of civil aviation in East Africa, makes it desirable, that while maintaining an essentially uniform and united services in the Partner States, some degree of devolution of powers of deployment

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47 Ibid. pp. 110-120. Included in the specific duties of the Communications Council are responsibilities for the East African Posts and Telecommunications Corporation, the East African Railways Corporation, The East African Harbours Corporation and the East African Airways Corporation.

48 Ibid. Article 54(b).

49 This is the body responsible for licensing of air services.

of staff to the Partner States is necessary, in order to prevent inefficiency or delay in taking decisions, which is often characteristic of large corporate institutions. It is to prevent such possibilities, that a Directorate of Civil Aviation was created for the Community.[50]

The Director-General is responsible through the Secretary-General of the Community to the Communications Council. He is a Community civil servant with technical qualifications in aeronautics. He is assisted by a Deputy Director-General. The two officials are based in Nairobi. Each of the three states of the Community has a resident Director of Civil Aviation, who are also Community civil servants, but are responsible to the Director-General of Civil Aviation through the Deputy Director-General rather than to any of the territorial governments of the respective Partner States.

The functions of the Directorate of Civil Aviation concern the technical aspects of aviation; such as air safety, air traffic control, search and rescue operation, air calibration of navigational aids, aviation telecommunications, airworthiness and licensing of flight crews.

(c) The East African Meteorological Department

Following the structure of the Directorate of Civil

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Op. cit., Supra. n.46.

Aviation, the East African Meteorological Department provides aeronautical meteorological services for the whole of East Africa. The Director-General of Meteorological Services and his Deputy have their offices in Nairobi while Assistant Directors are assigned to Uganda, Kenya and Tanzania.

C. COMPARISON BETWEEN THE INSTITUTIONAL STRUCTURES OF CIVIL AVIATION IN NIGERIA, GHANA AND THE EAST AFRICAN COMMUNITY

(1) In Nigeria, responsibility for civil aviation matters is diffused through many ministries while in Ghana and the East African Community respectively, there is a centralised ministry or institution dealing with all major aviation related subjects.

(2) A Permanent Secretary, who is an administrative officer, with no specialist qualifications or knowledge of aviation or aeronautics is the closest and direct adviser to the Commissioner of Transport in Nigeria, while in Ghana, the Director of Civil Aviation, who is technically qualified in a branch of aeronautics or aviation has a direct channel of communication with the Commissioner for Transport and Communications, and is the Commissioner's immediate and closest adviser.

(3) The Administrative Division of the Ministry of Transport in Nigeria is more powerful and influential in relation to its expertise in aviation and aeronautics than the purely technical Aviation Division. The Administrative Division controls and formulates Nigerian government policies in respect of:-

(a) Nigeria Airways Limited over which the Deputy Permanent Secretary of the ministry presides as Chairman.

(b) It constitutes the Air Transport Licensing Authority and considers all applications for licensing of scheduled and non-scheduled services for the carriage of passengers, mail and cargo.

(c) It exercises considerable influence in the affairs of the Nigerian Civil Aviation Training Centre even though the Centre is essentially a technical institution.

In Ghana and the Community, however, the Departments of Civil Aviation are wholly technical departments.

(4) In Nigeria, there is a total absence of a Stati-

stics Department either in the Ministry of Transport as a whole or in the Aviation or Administrative Divisions. In order to keep track of important statistics necessary for future expansion and developmental planning, the Ministry of Transport has to rely on the Statistics Department of the Federal Ministry of Economic Development and Reconstruction, which, in this respect, services all federal ministries. Owing to pressure of work in the Federal Ministry of Economic Development itself, an up to date statistical record is not available. Ghana has tackled this problem vigorously by establishing a statistics division in the Department of Civil Aviation, while, in the Community, there is a Research Secretariat attached to the Communications Council.

(5) There is no special section in the Aviation Division of the Nigerian Ministry of Transport dealing with I.C.A.O. and other international aviation affairs; while Ghana has created such a division within its own institutional aviation

structure. In the Community, this is a subject under the jurisdiction of the Communications Council.

(6) Nigeria has not yet evolved an effective aviation training programme, even though there is an I.C.A.O. assisted Civil Aviation Training Centre sited in the country. The reason for this is that the salary structure in Nigeria is discriminatory against technically qualified personnel, while favouring the administrative, clerical and professional classes. The effect of this is, that there is little or no incentive for qualified people to make a career in the Ministry of Transport as technically qualified personnel, since administrative officers have more attractive conditions of service.

It should be stated, that the situation in Ghana is not much different from Nigeria; although, there is now a conscious effort to ameliorate this problem. A vigorous training programme is in effect in the Community; and with all the resources at the disposal of the Community, the day will not be long when the nationals of the Community will man all aspects of its civil aviation.

D. THE LAW AND PROCEDURE REGULATING SUITS BY OR AGAINST AVIATION AUTHORITIES

Among the many principles of the common law exported into British Africa were the rules governing the liabilities of the Crown for the deeds or misdeeds of its servants. These rules may be summarised briefly as follows:-[51]

1. That the Crown can do no wrong. It follows from this that the Crown cannot be sued for any wrong doing which it has presumably authorised or committed by its servants in the course of their employment. The individual Crown servant, however, may be liable for a wrong committed by him in the course of his employment.
2. That a claim against the Crown arising from a breach of contract is only maintainable at the instance of a party by way of the special procedure known as petition of right.
3. That the relationship of master and servant is not applicable to servants of the Crown,as all civil servants are fellow servants of the Crown.

51
For a detailed discussion of Crown liability, See:Lord Simonds- Halsbury's Laws of England, (3rd Edition Butterworths & Co. London 1955) at pages 1-154.,:Clerk & Lindsell on Torts, (12th Edition) Sweet & Maxwell, London) pp.74-81.

At Common Law, the following types of suits are maintainable against aviation authorities in British Africa.[52]

(i) Actions for non performance of a statutory duty e.g. the duty to maintain all airports in good repairs.

(ii) Actions founded on negligence of air traffic controllers.

(iii) Actions based on nuisance from airports e.g. noise etc.

(iv) Actions in respect of damage done by aircraft.

(v) Actions for the prerogative writs of mandamus, prohibition and certiorari.

As usually happened in British Africa, common law rules were generally enacted as local ordinances in the various territories and, subject to consequential amendments, were after independence, designated Acts.[53] In this connection, therefore, colonial ordinances were enacted regulating the procedures for actions against the government[54] and the

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The Common law has since been altered by the Civil Aviation legislations in Commonwealth Africa. See e.g. (Nigeria) Civil Aviation Act 1964, Secs. 9 and 10; (Ghana) Civil Aviation Act 1958, Secs. 23, 24 & 25. (East African Community), The East African Civil Aviation Act, 1964, Secs. 16 and 17.

53
Supra. p. 105. n.75.

54
See: Petitions of Right Act Cap 149, Laws of the Federation of Nigeria and Lagos 1958. Edition; The Government Proceedings Act. 1961. Act. 51 (Ghana); Government Suits Act Cap 5 Laws of the

protection of public officers.[55]

The expansion of government departments as large employers of labour whose activities touch directly on the daily lives of the public, coupled with the general dissatisfaction over the archaic procedures of the petition of right, culminated in the passing by the United Kingdom Parliament of the Crown Proceedings Act, 1947.[56] This Act fundamentally altered the common law rules summarised above and made the Crown liable in tort and contract as though it were a private person. Not all states in Commonwealth Africa have modernized their laws in this respect as we shall see below.

1. Nigeria

Two legislations are directly relevant here. These are the Petitions of Right Act[57] and the Public Officers

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Cont.
United Republic of Tanzania: The Crown Proceedings Act. Cap 40 Laws of the Republic of Kenya (Rev. 1962).

55
For example See: Public Officers Protection Act Cap 168 Laws of the Federation of Nigeria and Lagos (1958 Edition); The Public Officers Protection Act, Cap 186, Laws of the Republic of Kenya (Rev. 1962).

56
10 and 11 Geo. 6c.44. For a legal analysis and criticism of the Crown Proceedings Act, See generally, Glanvile Williams, Crown Proceedings: H.Street. Governmental liability Cf.H. Street (1948) II M.L.R. 129.

57
This Act is based on the U.K. Petitions of Right Act 1860, 23 and 24 vict. C.34, and was enacted as Cap. 149 of the Laws of the Federation of Nigeria and Lagos (1958 Edition).

Protection Act.[58]

(a) Petitions of Right Act[59]

The officer of the Federal Government empowered by the Act to bring a claim by the Federal Government against any private person is the Attorney-General of the Federation or any officer authorised by law to prosecute claims for the Federal Government.[60] Although the law specifically empowers either the Attorney-General or any officer authorized by law to prosecute claims for the government, it is now settled law that the expression "any officer authorised by law" does not mean that an action must be brought in the name of a particular governmentdepartment or ministry. In Attorney-General V. Eronini,[61] the plaintiff sued the defendant for services rendered by the Marine Department in salvaging the defendant's craft. The defendant applied to the Court to have the action dismissed on the ground that the

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58
Laws of the Federation of Nigeria and Lagos (1958 Edition), Cap. 168.

59
Laws of the Federation of Nigeria and Lagos (1958 Edition) Cap. 149.

60
Ibid. Sec. 2. For the powers of the Attorney-General in respect of aviation Cf. Civil Aviation Act 1964 Section 13(2) and the Civil Aviation (Investigation of Accidents) Regulations, 1965, L.N. 14 of 1965.

61
9 N.L.R. 115: Cp. Anueviagu v. Deputy Sheriff, Kano (1962) I. All N.L.R. 52 where the Supreme Court held that a Deputy Sheriff entering into a bond on behalf of the government can

proper party to bring the suit was the Director of the Marine Department pursuant to Section 53(2) of the Wrecks and Salvage Ordinance and not the Attorney-General. The Court held, that Section 2 of the Petitions of Right Ordinance enabled the Attorney-General to sue on a claim by government.

Where a private person intends to bring a claim against the Federal Government, such an individual must in the first instance obtain the consent of the Attorney-General of the Federation before commencing the suit. Secondly, the individual must commence the action in a superior court of competent jurisdiction i.e. the High Court or the Supreme Court. Thirdly, the Attorney-General must be joined as defendant.[62]

In civil proceedings between individuals, an action is commenced by issuing a writ of summons. Under the Petitions of Right Act however, a plaintiff commences an action by filing his statement of claim in the Registry. Two copies of the statement of claim so filed are served on the Attorney-General. It should be pointed out, that unlike in ordinary civil proceedings, no court fees are payable in respect of these transactions.[63]

Cont. - prosecute an action on behalf of the government in his own name as an officer authorised by law.

62 - Supra. n.59. Section 3.

63 - Ibid. Section 4.

One of the two copies of the statement of claim served on the Attorney-General is returned to the Registrar by the Federal Ministry of Justice with the Attorney-General's fiat endorsed on it.[64]

Trial of the suit is held in open court. When judgement is entered for either the plaintiff or the defendant, the Registrar of the court must transmit a copy of the judgement or other order or orders of the court to the Federal Ministry of Justice. If the government were found liable to pay a monetary sum to the other party, the Attorney-General of the Federation would give an order authorising the payment of such sum without delay from funds provided by the Federal Government.

(b) Public Officers Protection Act[66]

This Act, the purpose of which is to "provide for the protection against actions of persons acting in the execution of public duties",[67] is the shortest legislation in the Nigerian Statute Book.

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64 Ibid. Section 5.

65 Ibid. Section 7.

66 Supra. n.58.

67 Ibid. See the headnote to the Act.

It provides that "where any action, prosecution, or other proceeding is commenced against any person for any action done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority",[68] the action shall not be entertained unless it is commenced within a period of three months from which the tortious act complained of arose. This limitation period of three months is also applicable to tortious acts of a continuing nature in respect of which an action is maintainable within three months of the cessation of that tortious act.

In order to prevent frivolous or vexatious actions being brought against public officers, the Act provides that the government, which generally stands behind the public officer in such actions, can recover from the plaintiff the costs of the defence if the court were to find for the defendant.[69] The Act also makes available to the public officer the defence of tender of amends.[70]

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68 Ibid. Section 2.

69 Ibid. Section 2(b).

70 Ibid. Section 2(c).

(c) Conclusions:

The law and procedure regulating suits concerning aviation authorities in Nigeria is rather archaic in that it is a static preservation of the legal era preceding the enactment of the United Kingdom Crown Proceedings Act 1947. Although an individual can bring an action against aviation authorities, such an action must proceed by way of the prerogative writ of Petitions of Right. The individual civil servant would, however, not be liable personally. It is hoped, that the time would not be too long, when the Petitions of Right Act[71] and the Public Officers Protection Act[72] would give way to legislations similar to the United Kingdom Crown Proceedings Act[73], which has been re-enacted in almost all Commonwealth Africa, subject to suitable local amendments and adaptations.

11 Ghana

Three principal legislations are applicable to proceedings by or against governmental aviation authorities in Ghana. They are, The Civil Service Act[74], The State Proceedings Act[75] and The Public Officers Act[76].

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71 Supra. n.59.

72 Supra. n.58.

73 10 and 11 Geo. 6. C.44.

74 1960, C.A. 5.

75 1961. Act. 51.

76 1962. Act. 114.

(i) The Civil Service Act[77]

The constitutional foundation for the Civil Service in Ghana goes back to colonial times. After the attainment of independence, and in order to preserve itsindependence, integrity and efficiency, successive governments in Ghana have ensured that constitutional provisions are made and have also enacted legislations to guarantee the existence of the Civil Service as a separate but integral arm of government.[78] The main purpose of the Civil Service Act is "to provide for the creation of Civil Service posts, for the setting up of Ministries and Departments, for the appointment, promotion and retirement of Civil Servants, and for conditions of service, disciplinary proceedings and other matters relating to the Civil Service".[78a]

(ii) The State Proceedings Act[79]

This Act, which replaces the Petitions of Right Ordinance, makes provision for legal proceedings by and against the Republic of Ghana. The Act is in four parts. Part I deals with the general liability of the state. It provides that for an action to be instituted against the state, the

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77 Supra. n.74. - See also Public Service Commission Decree, 1969, N.L.C.D. 393; and The Constitution of the Republic of Ghana (1969), Articles 138-141.

78 Ibid.

78a Ibid. The headnote.

79 Supra. n.75.

fiat of the Attorney-General must be obtained.[80] Similar to proceedings under the Petitions of Right Act in Nigeria, a claimant shall not issue a writ of summons against the state, but shall merely file a statement of claim in a court of competent jurisdiction. A copy of such statement of claim as filed is then served by the Registrar of the court on the Attorney-General.[81] The Act makes detailed provisions for the liability of the government to be the same as that of a private person in respect of contract, tort, industrial property, ships, docks and salvage claims involving any ship, aircraft or cargo of the government of Ghana.

Part II of the Act deals with procedure for instituting claims by or against the state, which shall, as far as possible, be in accordance with the Civil Procedure Rules applicable to proceedings between private persons. The Attorney-General is designated the proper officer to be a party in all proceedings instituted by or against the government.

Part III, which deals with judgements and execution, makes provision for the nature of relief which may be granted in respect of actions involving the government.

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80 Ibid. Section 1(1).

81 Ibid. Sections 1(2) and 1(3).

For example, the following equitable reliefs which are obtainable in suits by or against private persons are not obtainable by a private person in proceedings against the government, namely: - execution, injunction, specific performance or an order for the recovery of land or delivery of property..

At best, all that a litigant against the government may obtain instead of these equitable remedies is a declaratory order concerning his rights.[82]

In Part IV, miscellaneous provisions are made concerning the claim of privilege from disclosure in respect of government documents.[83] It also excludes proceedings in rem against the government for "the arrest, detention or sale of any ship, aircraft, cargo or other property belonging to the Republic, or give to any person any lien on any such ship, aircraft, cargo or other property".[84] If however, an action in rem were

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82
Ibid. Section 13.

83
See the cases of Asiatic Petroleum Co. Ltd. V. Anglo Persian Oil Co. Ltd. (1916) I.K.B. 822. Duncan V.Cammell Laid & Co.Ltd. (1942) A.C. 624 where the claim of Crown privilege was extensively considered in respect of government documents. Cf. the recent Article by D.H. Clark entitled, The last Word on the last Word (1969) 32 M.L.R. 142-154.

84
Supra. n.75, Section 19(1).

instituted in error against the government, it is provided in Section 19(2) for the court in its discretion to make an order that the proceedings be treated as an action in personam.

(iii) Public Officers Act[85]

The purpose of this Act is to provide for the "protection of public officers from legal proceedings in respect of certain liabilities, for the protection of persons acting in the execution of public duties and also for the change of official designations and other purposes connected therewith".[86] Section 1 of the Act refers to cases in which no action shall lie against public officers. Section 2 of the Act, which is similar in material content to the Public Officers Protection Act of Nigeria,[87] deals with substantive provisions regulating actions against public officers.[88]

In Quist V.Attorney-General,[89] plaintiff suffered damage as a result of certain works carried out by the Electricity

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85 Supra. n.76.

86 Ibid. The headnote.

87 Supra. n.58.

88 Cf. Supra. pp. 212-213.

89 2 W.A.L.R. 312.

Department on land adjacent to the plaintiff's property; as a result of which, the plaintiff's house collapsed. The Department claimed that the action was statute barred under Section 2 of the Public Officers Protection Act and the Public Lands Act. In giving judgement for the plaintiff, the Court held, that the protection afforded by the Public Officers Protection Act to persons executing a public duty extends to such persons in their personal capacity and gives no protection to the employing authority. The Court also held, that even if the protection were available to the Authority, time begins to run from the cessation of the injury or damage. In the present case, as the injury was still continuing, the action was therefore not statute barred.

One unique feature of this Act is that provided in Section 3(1), which declares as void, "all proceedings and documents in or incidental to an action brought in contravention" of the Act. In proceedings under the Act, jurisdiction is vested in the superior courts; and the public officers within the contemplation of the Act includes:-

"(a) any person in the service of the Government,

(b) any person in the service of any local authority.[90]

90
Supra. n.76. Section 7.

(iv) Conclusion

We submit, that the combined effect of the Civil Service Act 1960, the State Proceedings Act 1961 and the Public Officers Act 1962 is that an individual can bring an action against aviation authorities in Ghana. Such an action, however, is not maintainable against the civil servant in his personal capacity.

111. The East African Community

The Community inherited from its predecessor E.A.C.S.O., the East African Community Service Commission[91] created by statute in 1962[92], the Commission was vested with responsibility for Public Service in E.A.C.S.O. including "power to appoint persons to hold or act in offices in that part of the public service consisting of the services which are not self contained (including power to make appointments on promotion and transfer and to confirm appointments), to exercise disciplinary control over persons holding or acting in such offices and to remove from office persons so

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91
See, Treaty for East African Co-operation Annex IX, Item 9 of Part A.

92
The Public Service Commission Act. 1962 No. 6 of 1962. Cf. Articles 62 and 64 of the Treaty.

appointed".[93] The Commission is protected from suit in respect of its actions in the territories of the Partner States.[94]

This protection from suit enjoyed by the Public Service Commission, is also extended to "persons employed in the service of the Community, the Corporations or the Bank."[94a] It is provided that such persons "shall be immune from civil process with respect to acts performed by them in their official capacity".[95] Such immunities are also extended to experts or consultants rendering services to the Community, the Corporations or the Banks in the Partner States as the Authority may determine.[96]

It should be pointed out, that although each of the Partner States has enacted its own domestic legislations regulating suits by or against the governments of the respective territories, by Article 95 1(b) of the Treaty, each

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93 Ibid. Section 11(1). The First Schedule to the Act contains a list of Organizations for which the Public Service Commission is responsible. This includes the Directorate of Civil Aviation and the Meteorological Department.

94 Ibid. Section 16.

94a Treaty for East African Co-operation, Article 3(4).

95 Ibid. Article 3(4)(a).

96 Ibid. Art. 3(5). Cf. The East African Community (Immunities and Privileges) Order 1967. L.N. No. 7 of 1967.

of the Partner states undertakes to give effect to the Treaty and "to confer upon the Community legal capacity and personality required for the performance of its functions and to confer upon Acts of the Community the force of law within its territory".[97]

E. CONCLUSION:

Although aviation authorities in Nigeria and Ghana enjoy some measure of protection from suit, nevertheless, an action can be maintained against any of these authorities within the scope of the law in force in the respective territories. This, however, is not the case in the East African Community, where total immunity from suit is enjoyed by the aviation authorities of the Community. We submit therefore, that while the Community can bring an action against a private person by virtue of Article 95(1)(b), a private person cannot bring an action against either the Community or persons employed in the service of the Community in respect of acts performed by them in their official capacities. This advantage of immunity from suit enjoyed by the Community and persons employed by it

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97 For the implementing legislations, see The Treaty for East African Co-operation (Implementation) Act 1967 (Tanzania): The East African Community Act 1967 (Uganda) and The Treaty For East African Co-operation Act 1967 (Kenya).

is not only unfair to the ordinary citizens of the Community but is also unjust. We therefore submit, that the Treaty for East African Co-operation and The East African Community (Immunities and Privileges) Order 1967 should be amended, to give the citizens of the Community and other individuals the right to bring suit against the Community or persons in its service, whenever the rights of such citizens or individuals are infringed.

CHAPTER 6

LICENSING AND CONTROL OF AIR TRANSPORT UNDERTAKINGS

About the most important aspect of the regulation of civil aviation is that of licensing and governmental control of air transport undertakings. Every state in the world, to and from which aircraft operate both domestic and international scheduled[1] and non-scheduled services, practises some system of licensing. This is a necessary device which governments and air transport authorities in Commonwealth Africa operate with a view to:

(i) minimise wastage of aircraft capacity;

(ii) prevent undue competition among rival airlines;

(iii) regulate fares and protect the travelling public from any arbitrary fare structures;

(iv) ensure availability of air services on certain routes which otherwise may not be served; and

(v) facilitate the orderly development of civil aviation as a whole.

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[1] For example, in Nigeria, the term "scheduled journey" is defined in the interpretation Section 2(1) of the Civil Aviation (Air Transport) (Licensing) Regulations,1965 as being "a series of journeys which are undertaken between the same two places and which together amount to a systematic service operated in such a manner that the benefits thereof are available to members of the public from time to time seeking to take advantage of it." This definition is based on Art 96 of the Convention on International Civil Aviation and the definition adopted by the I.C.A.O. Cf.I.C.A.O. Doc. 7278-C/841 of May 10, 1952.

Different regimes govern the mechanics of these operations in Commonwealth Africa. We shall now examine the various regimes of licensing adopted by those respective states.

A. NIGERIA

(a) Power of Commissioner to grant a licence

The authority invested with power of control over air transport undertakings in Nigeria is the Commissioner of Transport. Section 4 of the Civil Aviation Act 1964[2] empowers the Commissioner to make regulations:

> "(a) to secure that aircraft shall not be used in Nigeria by any person -
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> (i) for plying, while carrying passengers or goods for reward, on such journeys or classes of journeys (whether beginning and ending at the same point or at different points) as may be prescribed,
>
> (ii) for such flying undertaken for the purpose of any trade or business as may be prescribed, except under the authority of and in accordance with a licence granted to him by the

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2 1964. No. 30.

prescribed authority.[3]

(b) as to the circumstances in which a licence may or shall be granted, refused, revoked or suspended, and in particular as to the matters to which the licensing authority is to have regard in deciding whether to grant or refuse a licence;

(c) as to appeals (if any) from the licensing authority by persons interested in the grant, refusal, revocation or suspension of a licence;

(d) as to the conditions which may be attached to a licence (including conditions as to fares, freight or other charges to be charged by the holder of the licence), and for securing compliance with any conditions so attached;

(e) as to the information to be furnished by an applicant for, or the holder of, a licence to such authorities as may be prescribed; and

(f) specifying the fees to be paid in respect of the grant

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[3] Regulation 4 of The Civil Aviation (Air Transport) (Licensing) Regulations 1965 makes it an offence for anyone to use an aircraft in Nigeria for a scheduled journey without a licence or a provisional licence under the Air Transport Licensing Regulations. Similarly, Regulation 13 makes it an offence for anyone to use an aircraft in Nigeria in respect of a non-scheduled journey without obtaining a permit from the Commissioner.

of a licence, or enabling such fees to be specified by such person or authority as may be prescribed".

(b) Procedure for grant of Licence or Permit

In pursuance of this power, The Civil Aviation (Air Transport) (Licensing) Regulations, 1965[4] are made creating a regime of licensing in respect of scheduled and non-scheduled journeys and general provisions governing the regime. The licensing power of the Commissioner is exercised through the Permanent Secretary, Ministry of Transport and his subordinate staff. These are mainly administrative officers.[5]

Any airline, whether Nigerian or foreign, desirous of operating scheduled international or domestic services to, from and inside Nigeria, makes application in writing through its accredited representative (but addressed to the Commissioner as a matter of administrative practice) to the Permanent Secretary, Ministry of Transport, Lagos. The application must be received by the Ministry at least eight weeks before the commencement of the scheduled services.[6] In the case of a permit in respect of non-scheduled journey, an application could be made by telegram.[7] The following particulars

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4 L.N. 11 of 1965.

5 Ibid., First Schedule at paragraph 1.

6 Ibid., at paragraph 3.

7 Ibid., Third Schedule at paragraph 1.

must be stated on the application, namely:

"(1) Name and address of the applicant:

(2) Places between which passengers or goods are to be carried:

(3) Places at which intermediate landings are to be made for the purpose of loading or landing passengers or goods;

(4) Times and frequency of the services;

(5) Number and types of aircraft proposed to be used on the service;

(6) Whether the service is to carry passengers, goods or both;

(7) Maximum fares to be charged to passengers in respect of any journey or portion of a journey for which separate fares are charged;

(8) Date on which the service is to commence;

(9) Period for which the licence is desired;

(10) Particulars of any insurance policy held or proposed by the applicant to cover third party risks in respect of the proposed service;

(11) Particulars of other services operated by the applicant at the time of the application or immediately prior to that time;

(12) Particulars of working arrangements with other companies.

(13) Particulars of the applicant's business and audited copy of the last published accounts."[8]

Notice of the application must be published in the Gazette with an invitation to the public to make representations or objections in writing to the Commissioner within 28 days from the date of publication of the Notice in the Gazette. In granting a licence or permit, the Commissioner must take into account:

"(a) the existing or potential need or demand for any air service proposed;

(b) the existence of other air services in the area in or through which the proposed services are to be operated;

(c) the degree of efficiency and regularity of the air services, if any, already provided in that area, whether by the applicant or by other operators;

(d) the period for which such services have been operated by the applicant or by other operators;

(e) the extent to which it is probable that the applicant will be able to provide a satisfactory service in respect of safety, continuity, regularity of

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[8] Supra.n.4. in the First Schedule at paragraph 4.

operation, frequency, punctuality, reasonableness of charges and general efficiency;

(f) the financial resources of the applicant;

(g) the type of aircraft proposed to be used;

(h) the remuneration and general conditions of employment of aircraft and other personnel employed by the applicant";[9] and

(i) the representation or objections by the public.

The decision of the Commissioner in connection with an application for grant of a licence or permit or of his intention to cancel, revoke or suspend such a licence or permit is published for general information in the Gazette.[10] The Commissioner may revoke or suspend a licence or permit if he is satisfied that the holder of a licence or permit has been convicted of a criminal offence under Regulation 4 or 13 of The Civil Aviation (Air Transport) (Licensing) Regulations, 1965, or has failed to comply with any special conditions attached to the licence or permit. In such a case, the Commissioner must not revoke or suspend the licence until after the expiration of 28 days when his intention is communicated to the holder of the licence or

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9 Ibid. Regulation 21.

10 Ibid. Regulation 9.

permit.[11] Provision is made for the holder of a licence or permit to ask the Commissioner to hold an enquiry within seven days from the expiry of the notice of intention to revoke or suspend the licence. The report of the enquiry is taken into account by the Commissioner in exercising his powers of revocation or suspension of a licence or permit.[12]

(c) Types and Duration of Licence or Permit[13]

Two types of licences and permits are available in respect of an application to operate scheduled and non-scheduled domestic or international air transport services to, from and inside Nigeria for the carriage of passengers, mail and cargo. The first type is a general licence or permit available to a designated Nigerian airline. It is also available to any designated foreign airline in respect of which there exists or is pending, a bilateral air transport agreement between the Federal Republic of Nigeria and the foreign country whose

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11 Ibid. Regulation 10.

12 Ibid., See Second Schedule for the form adopted for Publication of Decision of the Commissioner.

13 Note: In The Civil Aviation (Air Transport) (Licensing) Regulations 1965, the term "licence" is used in connection with scheduled air transport services while the term "permit" is used in connection with non-scheduled journeys.

nationality the foreign airline possesses. It is not unusual for such a licence or permit when granted to be subject to certain conditions, the purpose of which is to safeguard the interests of other competitors, protect the foreign and domestic commerce of Nigeria by air and to ensure the needs of the postal services of the country. To this effect, The Civil Aviation (Air Transport) (Licensing) Regulations, 1965 provides that

"It shall be a condition of every licence that:-

(a) the holder of the licence and any person having a financial interest in the business of the holder of the licence shall refrain from stipulating that any other person shall:-

(i) refuse booking facilities to any other holder of a licence or

(ii) shall afford such facilities to such other holder only on terms less favourable to that holder than the terms which are enjoyed by the first mentioned holder;

(b) the holder of the licence shall perform all such reasonable services as the Commissioner may from time to time require in regard to the conveyance of mails (and of any person who may be in charge thereof) upon

journeys made under the licence; that the remuneration for any such services shall be such as may be from time to time determined by agreement between the Commissioner and the holder of the licence."[14]

The second type of licence or permit is a provisional licence or permit usually granted to a foreign carrier with whose country of nationality there is no air transport bilateral agreement in force. A provisional licence or permit is granted almost immediately when an application is lodged, subject to its determination at any time by the Commissioner.

The duration of a licence is generally stipulated on the licence and is usually endorsed to cover a period of between three and five years. This is to enable the government review periodically the terms and conditions of the licence in the light of the statistical, economic and technical developments in aviation generally. In the case of a provisional licence, the duration is usually six months. We should mention, however, that the duration of any licence may be extended from time to time by the Commissioner; subject to a provisional licence being terminated as soon as a bilateral air transport agreement is in force between Nigeria and the country of nationality of the airline.

14
Ibid. Regulation 5(2)

(d) COMPARISON BETWEEN THE LICENSING PROCEDURE IN NIGERIA AND THOSE OF THE U.K. ,U.S.A. AND CANADA

(1) It would appear that The Nigerian Civil Aviation (Air Transport)(Licensing) Regulations, 1965 is one step behind the U.K. Civil Aviation (Licensing) Act 1960. While the U.K. Act establishes an Air Transport Licensing Board, with powers of licensing of air transport undertakings, the Nigerian legislation vests those powers in the Commissioner and the administrative staff of his Ministry[15].

(2) While in the U.K., U.S.A. and Canada,licensing of air transport services is a quasi judicial function carried out by elaborate systems of "hearings" in which an applicant appears in person or by counsel before the A.T.L.B. or the Civil Aeronautic Board examiners, in Nigeria, licensing is regarded as an administrative or ministerial function.[16]

(3) In Nigeria, the perfunctory concession to participation in the licensing process granted to the public is

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Cf. H.Caplan: The Licensing of British Air Transport (1961) J.B.L. 23; Stephen Wheatcroft: Licensing Biritsh Air Transport (1964)Jo.Of The Royal Aeronautical Society Vol. 68, p.169. See also (1960) J.B.L. 438 and Lloyd's List, May 12, 1960.

16
For comprehensive treatment of the role of the C.A.B in air transportation, see Calkins: The Role of the C.A.B. in the Grant of Operating Rights in Foreign Air Carriage (1955) 22 J. Air L. & C. 253; Sweeney, Post war International Route Planning by C.A.B. (1949) 16 J.Air L.&C. 388 Note: C.A.B. Regulation of International Aviation (1962) 75 Harv. Law Review 575.

hardly known to the majority of the population who are, in any case, illiterates. Even the educated minority, who should take an interest in these matters are either not air minded, or are now conditioned to their state of unconcern with such an important aspect of governmental activity, that this function is now carried out solely by the Commissioner of Transport and his administrative officers. Furthermore, these Ministry officials too, have no systematic policy guidance or directives from the government, which makes it appear to us, that licensing is a matter dictated more by the whims and caprices of the Ministry,[17] rather than by a carefully formulated civil aviation policy.

B. GHANA

(a) The Air Transport Licensing Authority

A system of licensing of air transport services closely

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17 See Report of Inquiry into the Affairs of W.A.A.C. (Nigeria) Limited, otherwise known as Nigeria Airways, for the period 1st March, 1961 to 31st December, 1965; (published by Federal Ministry of Information, Printing Division Lagos (1968) at Ch.2 paragraphs 2.3.2.10 and 2.3.3.1, where the irresponsibility of the Minister of Aviation (as he then was) in proceeding "to grant traffic rights in the face of strong opposition" and "acting against expert advice" is condemned.

akin to that of the U.K. has been set up in Ghana.[18] Section 9(1) of the Civil Aviation Act 1958[19], makes provision for the establishment in Ghana of an Air Transport Licensing Authority. Section 9(2) of the Act, empowers the Ghana Head of State by order to"provide for the constitution and procedure of the Licensing Authority, which shall include at least two persons appearing to him to be persons who have had experience of aircraft or air transport.[20]

In exercise of this power, the Ghana Air Transport Licensing Authority Order, 1962 was made as an Executive Instrument by the Minister of Communications and Works "by command of the President."[21]

(b) The Composition, Powers & Procedures of the A.T.L.A.

The A.T.L.A. is composed of five members consisting of

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In point of time, the Ghana Civil Aviation Act 1958, section 9 of which provides for the establishment of an Air Transport Licensing Authority, precedes the U.K. Civil Aviation (Licensing) Act, 1960. While the Ghana Act was assented to in Her Majesty's name by Lord Listowel, Governor-General of Ghana on 18th September, 1958, the U.K. legislation received the Royal Assent only on 2nd June, 1960, and was not entirely in force until 6th February, 1961.

19-- No. 37 of 1958.

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Cp. this provision with the practice in Nigeria, where the Minister - a layman, and his administrative officers who have little or no knowledge of aviation constitute the Licensing Authority for Nigeria.

21
E.I. 363.

the Commissioner of Communications as Chairman, an Executive Secretary, the Director of Civil Aviation, a representative of the Ministry of Justice and a Principal Assistant Secretary in the Ministry of Communications. The appointments of the members of this Authority are made with the prior approval of the Head of State.[22] As the A.T.L.A. is, with the exception of the Chairman, composed entirely of career civil servants, they do not hold office for a fixed term of years, and may be subject to re-assignment to other duties in accordance with the exigencies of the service. It should be stated, that both the Executive Secretary and the Director of Civil Aviation are professionally or technically qualified in aviation.

The Order makes provision for procedures at meetings of the A.T.L.A., including the duties of the Executive Secretary, such as summoning of the meetings of the Authority, recordation of minutes and the voting procedures in decision making.[23]

The A.T.L.A. is empowered to negotiate on behalf of the Government of Ghana bilateral air transport agreements with foreign powers.[24] It is also empowered to grant, refuse, revoke or suspend any licence in respect of air transport undertakings to, from and within Ghana. It is empowered to stipulate conditions "which may be attached to any licence (including conditions as to fares, freight or other charges to be

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22 Ibid. Section 1(1).

23 Ibid. Section 2.

24 See Supra. pp. 174-176.

charged by the holder of the licence) and for securing compliance with any such conditions".[25] The Authority is also authorised to request for such informations, which it may consider necessary from applicants for licences.

(c) Types and Duration of Licence

Unlike Nigeria, Ghana does not make any distinction between a licence granted either in respect of scheduled or non-scheduled services. While the generic term "licence" is used to cover these two types of operations, Nigeria uses the term "licence" in respect of authorisation granted to operate scheduled services,while the term "permit" is used in connection with authorisation to operate non-scheduled services. No specific duration is indicated in a licence issued by the A.T.L.A. It is presumed that a licence is valid and continues to be operative while the holder does not contravene any conditions attached to the licence.

(d) COMPARISON BETWEEN LICENSING PROCEDURE OF NIGERIA AND THAT OF THE A.T.L.A. IN GHANA

(1) While licensing powers are vested in Nigeria on the Commissioner who is not an expert in aviation, in Ghana, the power is vested in an Authority composed mostly of experts in aviation matters.

(2) Although the licensing procedures are similar with respect to the types of matters which must be taken into account

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25 Supra.n.19.Sections 11(1)(a) and 11(1)(b).

by the Commissioner in Nigeria[26] or the A.T.L.A. in Ghana,[27] it seems to us that because of the professional competence and qualifications of the members of the A.T.L.A.,licensing is carried out in a much more business-like manner in Ghana than in Nigeria.

(3) Neither Nigeria nor Ghana has a system of "hearings" as is the practice with the A.T.L.B. in the U.K. and Canada or the C.A.B. in the United States.

(4) While in Nigeria it is possible for an aggrieved applicant for a licence to request the Commissioner to hold an inquiry within 7 days before taking a final decision on the revocation, suspension or refusal of a licence, an aggrieved applicant in Ghana has no such corresponding remedy, or cause of action open to him.

(5) While in Nigeria provision is made for publication in the Gazette of the Commissioner's decision concerning the grant, refusal, revocation or cancellation of a licence or permit, it would appear that in Ghana, apart from notification to the applicants, the minutes of proceedings of the A.T.L.A. are protected by government privilege.

C. THE EAST AFRICAN COMMUNITY

The two legislations of the Community important for our purposes here are the East African Civil Aviation Act 1964[28] and

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26 Supra. pp. 229-230.

27 Supra. n.19.Sec.9(3).

28 Act No.22. of 1964.

The East African Licensing of Air Services Regulations,1965.[29] By virtue of section 2(c) of TheTreaty For East African Co-operation (Implementation) (Adaptation of Laws) Order 1967,[30] existing laws' of the Community are defined as "enactments of the East Africa High Commission and the East African Common Services Organization in force or having effect immediately before the coming into force of this Order and includes any rules, regulations, orders or other instruments in force or having effect as aforesaid are made in pursuance of those laws". On the basis of this provision therefore, the East African Civil Aviation Act, 1964 and the East African Licensing of Air Services Regulation 1965 subject to consequential amendments continued in effect as existing laws of the Community in 1967.

(a) Civil Aviation Board-Functions

Section 4 of the East African Civil Aviation Act 1964[31] establishes the East African Civil Aviation Board, charged with the duty of advising the East African Authority on matters concerning:

"(a) negotiations with other countries for the establishment of international air services;

29
L.N. No. 47. of 1965.

30
L.N. No. 1. of 1967, East African Community Gazette Supplement No. 1. of 14th December, 1967.

31
Supra. n.28.

(b) civil aviation legislation including legislation to give effect to the Chicago Convention, any Annex thereto, and other international conventions relating to civil aviation;

(c) the measures necessary to give effect to the standards and recommended practices adopted in pursuance of the Chicago Convention and any Annex thereto;

(d) any matter relating to the East African Airways Corporation within the ambit of the powers of the Authority under the East African Airways Corporation Act, 1971;

(e) the establishment, maintenance and development of aerodromes and consultations with and communications to the Governments of the Territories relating thereto;

(f) air navigation facilities and services;

(g) the cost of establishing and maintaining aerodromes and air navigation facilities and services and the policy to be adopted to recover such costs;

(h) fares and freight rates and related matters in-

cluding any resolutions of the International Air Transport Association; and

(i) such other matters affecting civil aviation as the Authority may from time to time refer to the Board."[32]

In addition to these functions, the East African C.A.B. exercises executive functions "in relation to the licensing of air services"[33].

(b) Composition of the Board

The Board is composed of eleven members made up as follows:

(i) a Chairman who is appointed by the Authority;

(ii) the Director-General of Civil Aviation and the three territorial Directors;

(iii) two members each appointed by and representing each of the three Partner States of Kenya, Tanzania and Uganda.[34]

Apart form the ex-officio members, membership of the Board is for a period of two years or such period as is specified in the instrument of appointment of the particular menber.[35] Where a vacancy occurs in the member-

32 Ibid., Section 5(1).
33 Ibid., Section 5(2).
34 Ibid., Section 6.
35 Ibid., Section 7(1).

ship of the Board by death or resignation of a member, the territorial government responsible for the original appointment of such a member may nominate another person to fill the unexpired period of the original appointment.[36] Sections 8 and 9 of the Act make provision for meetings and procedures of the Board.

Another subsidiary body established to act in an advisory capacity to the Board is the East African Civil Aviation Technical Committee.[37] The main functions of this Committee are to "consider and advise the Board on technical aspects of Civil Aviation generally and on such particular matters as the Board may refer to it for advice."[38]

(c) PROCEDURES FOR GRANT OF LICENCE - COMPARISONS AND CONTRASTS BETWEEN THE EAST AFRICAN PRACTICE AND THOSE OF NIGERIA AND GHANA

Since the matters which all the various licensing authorities in Commonwealth Africa take into consideration before granting, refusing or revoking a licence are the same, since the main motivation behind licensing and control of air transport undertakings by various governments are also the same and since furthermore, the par-

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36 Ibid, Section 7(2).

37 Ibid., Section 10(1).

38 Ibid., Section 11.

ticulars which an applicant for an air services licence in Commonwealth Africa must submit to the licensing authorities are similar, we shall, in order to avoid unnecessary repetition and save time, describe the licensing procedure of the East African Community by making a comparison with those of Nigeria and Ghana.

(i) In Nigeria and Ghana, the licensing authorities do not conduct "hearings" in considering applications for licences, but in the East African Community, the East African Civil Aviation Board may allow an applicant for a licence to appear before it either in person or be represented by Counsel;

(ii) While no provision exists in Nigeria and Ghana for an appellate tribunal to which an aggrieved applicant for a licence may appeal, in the East African Community however, an aggrieved applicant may appeal to the Authority for review of any decisions of the Board.[39]

(iii) As we saw above, actions by and against aviation authorities in Nigeria and Ghana are maintainable at the instance of and subject to the fiat of the Attorneys-General of the respective territories.

39 -- This is similar to the procedure in the United States where in the licensing of foreign air carriers by the C.A.B., ultimate appeal lies to the President, who, in exercise of his executive

In the case of the East African Community, no action for the prosecution of an offence under the East African Licensing of Air Services Regulations 1965[40] can be instituted without the consent of the Counsel to the Community. It seems to us, that this provision may be difficult to enforce in the territories of the Partner States of the Community on the basis that having to obtain prior consent of the Counsel to the Community before prosecuting any offence under the air transport licensing regulations committed in the territory of a Partner State may constitute an infringement by the Community of the constitution of the Partner State. This point came up on appeal from the High Court of Kenya before the Court of Appeal for East Africa. In the lower court, the Attorney-Ge-

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responsibility for the conduct of the foreign relations and foreign policy of the United States, may override any C.A.B. refusal to grant a foreign air carrier licence. An example of the situation is the U.K. - U.S.A. negotiations for the B.O.A.C. to obtain additional rights in the U.S., is referred to by Bin Cheng - The Law of International Air Transport 1962. pp. 363-373.

40
Supra. n.29.

neral of Kenya had instituted prosecutions against two persons,[41] charging them with certain offences against the Official Secrets Act[42] of the East African Community, section 8(1) of which provides that:

> "A prosecution for an offence under this Act shall not be instituted except with the written consent of the Counsel to the Community."

Consent of the Community's Counsel was not obtained before the Attorney-General instituted these prosecutions. It was claimed, that the consent was unnecessary and that section 8(1) of the Official Secrets Act of the Community is invalid in Kenya because it is a clog on the powers given to the Attorney-General of Kenya by virtue of section 26 of the Constitution of Kenya wich empowers him "in any case in which he considers it desirable so to do - (a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person." The High Court of Kenya held that sec-

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41 Republic of Kenya V Charles Okunda Mushiyi: Republic of Kenya V Donald Meshack Ombisi (High Court of Kenya Constitutional Reference Nos. 2 and 3 of 1969 reported in Vol. IX. (1970) I.L.M. pp. 556-566.

42 East African Community Act 4 of 1968.

tion 8(1) of the Community's Official Secrets Act "is invalid and of no effect in Kenya in so far as it makes the consent of the Community's Counsel necessary for prosecutions brought by the Attorney-General for offences contrary to the Community's laws."[43]

Against this finding, the Counsel to the Community appealed to the Court of Appeal for East Africa,[44] who dismissed the appeal and upheld the decision of the High Court of Kenya. We submit therefore, that an offence against the air services licensing regulations committed in any of the territories of the Partner States can be prosecuted in accordance with the local legislation in force in the Partner State, notwithstanding any contrary provisions of the East African Licensing of Air Services Regulations 1965, or any other law.

D. CONCLUSIONS

(1) Air transport undertaking, being an important international and domestic economic activity, calls for some regulation by governments. This notwithstanding, it is desirable that any regulation of this aspect of economic activity should be free from any exercise of arbitrary power. We note, that

43 R.v Mushiyi and R.v Ombisi, Op. Cit. Supra.

44 Criminal Appeal No. 156 of 1969. East African Community V The Republic of Kenya Vol.IX. (1970) I.L.M. 561-566.

in Nigeria, the Commissioner for Transport and in Ghana the A.T.L.A. perform these regulatory functions. From the decisions of these regulatory authorities there are no procedures for appeal to higher authorities or tribunals. We submit, that these arrangements leave room for exercise of arbitrary power and corruption of the officials concerned.

(2) In Nigeria and the East African Community, the decisions of the Commissioner for Transport and of the Authority concerning applications for licences are published in the Official Gazettes of the respective territories. In Ghana, however, the decision of the A.T.L.A. is communicated only to the applicant. We submit, that in order to make the granting of licences known to the public, the results of all applications for licences should be published for general information, as is the practice of the C.A.B. in U.S.A. or the A.T.L.B. in Canada.

(3) Finally, we submit, that the East African Authority should enact legislation to enable the Counsel to the Community to prosecute offences against the East African Air Transport Licensing Regulations, wherever any such offences might have been committed in the territories of the Partner States, and without having either to obtain the prior consent of the Attorney-General of the particular territory where the offence is

committed, or rely on him to prosecute any such offences on behalf of the Community. We appreciate that this submission if adopted, might entail constitutional amendments in the Partner States; nevertheless, we submit that this is desirable if any enforcement of the Community laws were to have any practical or meaningful significance at all.

CHAPTER 7

DESIGNATION OF AIRPORTS[1] AND CONTROL OF LAND FOR AVIATION

We are not concerned in this chapter with the general problem of land tenure in Commonwealth Africa, nor do we intend to engage in any discussion of the common law maxim "cujus est solum, ejus est usque ad coelum"which has been extensively dealt with by text writers.[2] We shall, therefore, limit ourselves to an examination of the statutory powers of aviation authorities to designate airports and examine the general powers whereby these authorities exercise control over such airports.

The old common law maxim "cujus est solum" having been put to sleep by statute[3] and various decisions in the United States[4], have inevitably influenced the direction in which aviation legislations throughout Commonwealth Africa have developed.

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1 We have used the word 'airport' in this chapter as being synonymous with the word 'aerodrome'. While the word 'airport is used in the Chicago Convention to refer to a place where an aircraft may land or take off, the U.K. Civil Aviation Act 1949 on which the Air Laws of Commonwealth Africa are based uses the word 'aerodrome' to refer to "any area of land or water designed, equipped, set apart or commonly used for affording facilities for the landing and departure of aircraft".

2 M.R.E.Kerr and Anthony H.M. Evans (Ed), Lord McNair: The Law of the Air (3rd Edition, Stevens & Sons)London, 1964, at Ch.3. See also for the origin and history of the maxim, M.R.E.Kerr (Ed).pp. 393-397.

In this connection, it is useful to mention that all Commonwealth African states, following the example created by the U.K. Civil Aviation Act 1949[5], have modelled their aviation legislations along similar lines, as we shall show hereafter.

A NIGERIA

(a) Acquisition and Control of Land for Aviation

As a federal state, jurisdiction and control over land in Nigeria is vested in the respective state governments of the federation where a particular parcel of land might be situated. This exclusive jurisdiction of the state governments arises by virtue of Section 69(5) of the Constitution of the Federation,[6] which provides that "nothing in this Section shall preclude the legislature of a region from making laws with respect to any matter that is not included in the Exclusive Legislative List". Since land is not one of the subjects specifically enumerated in the Exclusive Legislative List, it follows, therefore, that state governments

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3 Federal Aviation Act, 1958 (1958) U.S.Av.R. 321.

4 United States V. Causby (1946) 328 U.S.256; 66 S.Ct.1062; Mills V. Orcas Light & Power Co. (1960) 355 p.(2d)781;Newark etc V.Eastern Airlines Inc.etc.(1958)159 F.Supp.750;Griggs V.County of Allegheny, Pennsylvania (1962)369 U.S.84.

5 12, 13 & 14 Geo. 6.c.67.

6 The Constitution of the Federal Republic of Nigeria,1963,No.20.,as amended by The Constitution (Suspension and Modification) Decree 1966, Decree No.1.

have residual jurisdiction as against the federal government over land situated within their respective territorial boundaries, but subject to the rights of private land owners.

"Aviation, including airports, safety of aircraft and ancillary transport and other services"[7] being a federal subject, it is imperative that the federal government, in order to fulfil its constitutional obligations, must resort to compulsory acquisition of such lands necessary for the establishment of airports and safety of aircraft.[8] In accordance with the procedure laid down for the acquisition of land under the Public Lands Acquisition Act,[9] the Head of State is empowered to acquire "any lands required for a public purpose of the Federation".[10] What constitutes public purposes of the Federation is not described in the Act. However, Section 6(2) of the Civil Aviation Act 1964[11] declares that such purposes includes the establishment and maintenance of airports, roads, approaches, apparatus, equipment and buildings. On the

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7 Ibid. See the Schedule, Item 3 of the Exclusive Legislative List.

8 Ibid. It would appear that this power is also derivable from Item 45 of the Exclusive Legislative List and as further clarified in the Interpretation in Part III of Item 1(c) of the Schedule to the Constitution of the Federation.

9 Laws of the Federal Republic of Nigeria (1958 Edition) Cap 167.

10 Ibid. Sec.3(1).

11 1964 No.30.

completion of the process of acquisition, such lands become state lands.

Before the full administrative machinery for acquisition of land is set in motion, certain preliminary investigations must be carried out; such as charting of the topographical features of the land, clearing and marking the boundaries of the land and such other acts as are necessary to determine the suitability of the land for the purposes for which it is being acquired.[12] It is only after these preliminary investigations have been completed, that the government serves on the land owners notice of intention to acquire the land for public purposes. This notice is also published in the gazette.

As compensation would have to be paid in respect of lands subject to compulsory acquisition, it is ensured that the person entitled to convey the land to the government is paid a fair amount of compensation determined by government valuation experts in the Federal Ministry of Works and Survey. This Ministry bears departmental responsibility for the administration of this Act for the Federal government.[13] In the case of private

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12 Ibid. Sec. 4.

13 Supra. Ch. 5. pp.194-195.

lands subject to native law and custom, or lands which are the property of a native community, the procedure adopted is that the Head Chief of the native community who conveys the fee simple or the term of years required over such lands is paid the compensation money. The Chief is however enjoined to distribute the compensation money among all the entitled members of the native community in accordance with native law and custom.

In view of the emergency situation in Nigeria as a result of the last civil war, a Requisition And Other Powers Decree 1967[14] was promulgated, with provisions in respect of land similar to that in the Public Lands Acquisition Act. For example, when land has been acquired for an airport or in the case of existing airports, it is essential that some powers of control must be exercised either in the airport or over private properties adjoining such airports and in order to ensure that such adjoining properties do not create a threat or hazard to the safety of aviation, the Federal Military Government is empowered to acquire in this respect such lands or properties compulsorily and pay compensation to the owners of such properties.

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14 Laws of the Federal Republic of Nigeria, 1967 No.39.

Extensive powers of control is also entrusted to the Commissioner of Transport by Sections 7 and 8 of the Civil Aviation Act 1964. Section 7 provides that "if he is satisfied that it is necessary so to do in order to secure the safe and efficient use for civil aviation purposes of any land, structure,works or apparatus vested in him or which he proposes to acquire or install,by order declare that any area of land specified in the order shall be subject to control by directions..."[15]. In this respect, the directions of the Commissioner may require the total or partial demolition of any building or structure within the area of an airport,[16] restrict the height of trees or other vegetation in the area,[17] extinguish any private right of way over land in the area[18] and restrict installation of cables, mains, pipes, wires and other apparatus in the vicinity.[19] The Commissioner also has the duty in accordance with Section 8 of the Act to indicate the presence of obstructions in the vicinity of airports and to take steps to compel airport operators to erect

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15 Supra.n.11.Sec.7(1).

16 Ibid.Sec.7(2)(a).

17 Ibid. Sec.7(2)(b).

18 Ibid. Sec. 7(2)(c).

19 Ibid.Sec. 7(2)(d).

warning lights over such obstructions.

(b) Power to Provide and Operate Airports

All airports in Nigeria at the present time are owned by the federal government. Nothing, however, precludes a private person or organization to own and operate airports in Nigeria provided such individual obtains a permit or licence from the Federal Ministry of Transport.[20]

The Commissioner for Transport derives his power to "establish and maintain airports and provide and maintain, in connection with airports established by him, roads, approaches, apparatus, equipment and buildings and other accommodation" by virtue of Section 6(1) of the Civil Aviation Act 1964.[21] This power also enables the Commissioner to ensure that land in the vicinity of the site of an airport shall not be used in such a manner as to endanger aircraft in, approaching or leaving the airport.

In addition to establishing airports, government is also

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20 Civil Aviation (Air Navigation) Regulations 1965, L.N. 15 of 1965 Reg.61. It is important to note here that the powers vested in the Commissioner under these Regulations are exercised by him through the technically qualified Director of Civil Aviation. Because of the technical and specialist nature of this aspect of aviation law, the Commissioner does not consult the administrative officers directly, although the Director of Civil Aviation still deals with the Commissioner through the Permanent Secretary. See, infra, for the practice in Ghana and the East African Community, at pp. 259-269.

21 Supra.n.11.

responsible for operating the airports by providing necessary facilities such as control towers, air traffic controllers and other essential facilities for the landing and departure of aircraft. It is pertinent to observe here, that the government, as the proprietor of all airports in the country, also enjoys the right to police such airports. We hasten to mention, however, that the government would not have the right to police a private airport, as a private airport operator exercises similar rights to that of a private land owner in respect of his land. We should mention further, that the relationship between an airport operator and other users of the airport such as aircraft operators or visitors may be statutory, contractual or based in tort.[22]

(c) Designation and Classification of Airports

Airports available for the landing and departure of aircraft in any country are contained in Notams disseminated by the aeronautical authorities. These airports from which aircraft may take off or land are of two types - (1) customs airports

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22 See Williams; The Operation of Airliners (1964) pp. 69-80. Cf. Payne and Bell Legal Framework of Airport Operation. Vol. Vol. XIX J.of Air L.&C. p.253. See also Civil Aviation (Air Navigation) Regulations 1965, L.N. 15 of 1965 for the technical regulations, rules and procedures concerning the operation of aircraft and airports.

and (2) non-customs airports. A customs airport is one where foreign aircraft may land for the purposes of immigration and emigration controls and the availability of customs facilities to which foreign aircraft registered in States, Parties to the Convention on International Civil Aviation[23] are entitled.

In Nigeria, the designated customs airports are located in Lagos, Kano, Calabar and Maiduguri.[24] However, for purposes of economy and based on the available statistics of aircraft using these airports, an arrangement has been made whereby customs facilities are only available at Maiduguri and Calabar only if an aircraft operator gives 48 hours notice to the aeronautical, immigration and customs authorities.[25]

Three classes of aerodromes exist in Nigeria; these are "(a) a Government aerodrome notified as available for public use; (b) a licensed aerodrome and (c) a place authorized by the Commissioner for use as an aerodrome."[26] The regulations make it obligatory that all aerodrome operators must obtain an aerodrome licence from the Commissioner,[27] the period of

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23 Arts 23 and 24.

24 Supra.n.20. See Regulation 66 at Schedule 13.

25 Ibid.

26 Ibid. Regulation 63.

27 Ibid. Regulation. 61.

validity of which is stated on the licence and which may be revoked, suspended or varied, were the licence holder to be in breach of any conditions attached to the licence.[28]

B GHANA

In substance, the law and procedure regulating the designation of airports and control of land for purposes of civil aviation in Ghana is similar to that of Nigeria. The differences which exist relate to the constitutional structure of the forms of Government in Nigeria and that of Ghana. While Nigeria is a Federal State,Ghana is a Unitary State. Furthermore, for the reasons which we gave above[29] and the relatively small size of Ghana when compared with Nigeria, Ghana has a simpler and less complex procedure, which we shall examine under the following headings:-

(a) Power to provide aerodromes

The power to provide aerodromes and maintain ancillary services such as roads, approaches, equipment and buildings necessary for the smooth running of such aerodromes is vested in the Commissioner for Transport and Communications.[30] In

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28
Ibid. Regulation 54.

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Supra. Ch. 5. pp. 198-200.

30
The Civil Aviation Act, 1958, No.37 of 1958,at Sec.13(1).

order to obtain land for the establishment of an aerodrome, the Commissioner makes a recommendation to the Head of State of Ghana, urging him to acquire in accordance with the law in force in Ghana for compulsory acquisition of land required for public purposes.[31] In this connection, the law at present in force in Ghana are The Administration of Lands Act, 1962[32] and the State Lands Act, 1962[33]. We shall examine these Acts very briefly in relation to acquisition of land for aviation.

(i) The Administration of Lands Act, 1962

This Act consolidates "with amendments the enactments relating to the administration of Stool[34] and other lands"[35].

As we do not want to get into a discussion of lands subject to incidents of native law and custom, we shall only refer to the provision dealing with acquisition or use of such lands for public purposes. Section 10(1) of the Act provides that

> "The President may authorise the occupation and use of any land to which this Act applies for any

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31 Ibid. Sec. 13(2).

32 Act 123.

33 Act 125

34 Stool land is defined in Section 31 of this Act as including "land controlled by any person for the benefit of the subjects or members of a Stool, clan, company or Community, as the case may be and all land in the Upper and Northern Regions other than land vested in the President.

35 Supra. n.32. The headnote to the Act.

purpose which, in his opinion, is conducive to the public welfare or interests of the state, and may pay into the appropriate account out of moneys granted by vote of the National Assembly such annual sums as appear to him, having regard on the one hand to the value of the land and, on the other hand, to the benefits derived by the people of the area in which the land is situated from the use of the land, to be proper payments to be made for the land; and the money so paid into the account shall be applied in the same way as other revenues collected under this Act".

The special procedure for notification in the Gazette[36] and computation and payment of compensation and appeal to an appellate tribunal[37] are laid down in the Act.

(ii) The State Lands Act, 1962

This Act, as extended by the Lands (Miscellaneous Provisions) Act, 1963[38], makes provisions for "the acquisition of land in the national interest".[39] Section 1(1) provides that "whenever it appears to the President in the public interest so to

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36 Ibid. Sec. 10(2).

37 Ibid. Sec. 10(3) and 10(4).

38 Act 161.

39 Supra. n.33. in the headnote.

do, he may by executive instrument, declare any land specified in the instrument, other than land subject to the Administration of Lands Act,1962 (Act 123), to be land required in the public interest; and accordingly, on the making of the instrument, it shall be lawful for any person, acting in that behalf and subject to a month's notice in writing to enter the land so declared for any purpose incidental to the declaration so made". It is provided further, that as soon as this declaration is made, the land shall vest in the President free from encumbrances.[40]

The procedure for notification to the person in immediate occupation of such land is either by serving a copy of the instrument on him personally, or by affixing it at a convenient spot on the land, or by publishing the instrument in three consecutive issues of a newspaper in circulation in the district where the land is situated.[41]

Provision is made for the constitution of a special tribunal under the Chairmanship of a High Court Judge, sitting with two other persons, to deal with matters of disputes arising under the Act which the President may refer to such Tribunal.[42] The decision of the Tribunal is final, but it may refer questions

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40 Ibid. Sec. 1(3).

41 Ibid. Sec.2.

42 Ibid. Sec. 3(1).

of law to the Supreme Court for determination.[43]

Persons claiming an interest in a land that is affected by an executive instrument made under this Act must apply in writing to the Commissioner of Lands stating

"(a) particulars of his claim or interest in the land;

(b) the manner in which his claim or interest has been affected by the instrument;

(c) the extent of any damage done;

(d) the amount of compensation claimed and the basis for the calculation of the compensation"[44].

On the basis of this claim, the Commissioner for Lands would either make monetary payment of compensation to the claimant or offer him another land of equal value in exchange.

(b) Power to obtain rights over land

The Head of State is also given power, subject to the certification of the Commissioner for Transport and Communications, to make an order for the acquisition of land or such rights in, over or under lands required for or adjacent to an aerodrome.[45] A penalty clause is provided, making it an offence punishable by fine or imprisonment anyone who wilfully obstructs an officer in the execution of his duties under the Act.[46]

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43 Ibid. Sec. 4(1).

44 Ibid. Sec. 4(1).

45 Op.Cit.n.30.supra.at Sec.14(1).

46 Ibid. Sec.14(4).

(c) Other powers in connection with aviation

The power to ensure observance of sanitary regulations at aerodromes is conferred jointly on the Commissioner of Health and the Commissioner for Transport and Communications "(a) for preventing danger to public health from aircraft arriving at any aerodrome, and (b) for preventing the spread of infection by means of any aircraft leaving any aerodrome, so far as may be necessary or expedient for the purposes of carrying out any treaty, convention, arrangement or engagement with any country"[47]. Duties in connection with sanitary controls at airports may be performed by a local authority within the area where the aerodrome is situated, subject to satisfactory arrangements between the Commissioner of Health and the Commissioner of Local Government on the financial implications of the performance of these duties.[48]

The Commissioner for Transport and Communications also has power to exercise general control over lands adjacent to airports in the interest of aviation,[49] and of requiring the proprietor of an aerodrome to install warning lights indicating the presence of obstructions near aerodromes.[50] Other powers

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47 Ibid. Sec. 15(1).

48 Ibid. Sec. 15(2).

49 Ibid. Sec. 16.

50 Ibid. Sec. 17.

include the power to stop and divert highways[51] and powers of entry on land for purposes of survey where there is an acquisition order in force in respect of that land.[52]

(d) Designation and Classification of Airports

Responsibility for the designation of customs airports vests in the Director of Civil Aviation and the Comptroller of Customs and Excise. It is provided that these two officials may "by executive instrument designate an aerodrome to be a place for the landing or departure of aircraft for the purpose of the enactments for the time being in force relating to customs".[53]

Two types of aerodromes exist in Ghana; viz (1) Government aerodrome as specified in Notams or one in which an airport commandant has given his permission for a particular aircraft to take off or land[54] and (2) any licensed aerodrome.[54]

C. EAST AFRICAN COMMUNITY

Although aviation is a service administered by the Community under the Treaty for East African Co-operation,[55] the designation of airports and control of land for aviation is,

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51 Ibid. Sec. 18.

52 Ibid. Sec.19.

53 Civil Aviation Regulations 1970 L.I.674 Regulation 70.

54 Ibid. Regulation 61.

55 See Article 43 Annex IX Part A Item 2 & Part B Item 4 & Annex X Item 4.

however, a joint function or joint responsibility of each of the Partner States and the East African Authority. The reason for this, we venture to suggest, is that the systems of land tenure in each of the Partner States differ and vary according to their respective evolutionary history.[56]

(a) Power to Establish and Maintain Aerodromes

Section 13(1) of the East African Civil Aviation Act, 1964 provides that "The Government of any part of the Territories and the Authority may establish and maintain aerodromes, and provide and maintain in connection therewith roads, approaches, apparatus, equipment and buildings and other accommodation".[58] This enactment, however, is subject to a proviso "that the Authority shall only act under this sub-section in relation to the establishment of an aerodrome at the request of the Government concerned and upon that Government making financial arrangements satisfactory to the Authority".[57a] In exercising these powers, it is provided that the Authority and a Territorial Government may acquire land in accordance with the law in force in the particular territory concerning acquisition of land for public purposes.[58] As we do not intend

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56 Supra. Ch.1.

57 1964 No.22.

58 Ibid. Sec. 13(2).

57a Ibid., Sec. 13(1).

here to examine the law and procedure relating to acquisition of land in all the three territories, we shall examine, for illustrative purposes only, the land acquisition law in Tanzania.

The Land Acquisition Act[59] empowers the President of Tanzania to acquire for public purposes any land in the Republic. The definition section in the Act defines public purposes as including among others "land required for or in connection with such of the Scheduled Services of the East Africa High Commission as are administered for the time being by the said Commission". These "Scheduled Services" include aviation;[60] and are now administered by the Community.[61]

For purposes of brevity, we should state that the procedure in Tanzania for acquisition of land for public purposes is substantially similar to the procedures in Nigeria and Ghana concerning preliminary investigation,[62] service on the land owners of notice of intention to acquire land compulsorily,[63] valuation, payment of compensation and settlement of disputes by the High Court as to the amount of compensation to be paid[64]

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59 Laws of the Republic of Tanzania, Chapter 118.(Revised Laws 1964).

60 See Supra.Ch.1.pp.68-69.

61 Supra.n.55.

62 Op.cit.Supra.n.59.Sec.4.

63 Ibid. Secs. 5,7 and 8.

64 Ibid. Secs. 9,10 and 11.

and the vesting in the Government of such land subject to compulsory acquisition.[65] Provision is also made for penalty for anyone who wilfully hinders or obstructs the Republic or officers of the Republic in the execution of their duties from exercising rights of entry or possession over the land.[66]

(b) Designation and Classification of Airports

The East African Community, unlike Nigeria, vests important functions concerning the technical aspects of civil aviation in the Director-General of Civil Aviation and the East African Civil Aviation Technical Committee. As we indicated above,[67] responsibility for airports is jointly vested in the Authority and the Government of the Partner State where an airport is situated. In this connection, therefore, once a territorial Government gives the indication that a particular piece of land is to be designated as an aerodrome and subject to that territorial Government being responsible for the financial cost of the project, the Authority would not object. However, the responsibility for the day to day running and control of the aerodrome is vested in the Director of Civil Aviation for that particular territory. We hasten to point

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65 Ibid. Sec.24.

66 Ibid. Sec. 26.

67 Supra. pp.265-266.

out, that notwithstanding the central control of the Authority and the Director-General over civil aviation, different regulations may be applicable in respect of different aerodromes in different parts of the Territories.[68]

Similar to the classification in Ghana, but unlike in Nigeria, two classes of aerodromes exist. These are, Government aerodromes and other aerodromes licensed as such under the Regulations.[69] The notification of availability of Government aerodromes for take off and landing of aircraft is that of the Director-General.[70] He is also responsible for the licensing of all aerodromes in each of the Partner States.[71]

D COMPARISONS AND CONTRASTS BETWEEN THE U.K. CIVIL AVIATION ACT 1949 AND THE CIVIL AVIATION ACTS OF NIGERIA, GHANA AND THE EAST AFRICAN COMMUNITY

As we saw above, the U.K. Civil Aviation Act 1949[72] was extended to British Africa by Orders-in-Council.[73] On the attainment of independence, it became necessary for the respective states in Commonwealth Africa to repeal the U.K. Orders-in- Council and enact their own aviation laws. These new aviation enactments, however, still bear some characteristic resemblance

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68 Op.cit.Supra n.57.Sec. 12(3).

69 The East African Air Navigation Regulations, 1965, Regulation 61.

70 Ibid. Regulation 62.

71 Ibid. Regulation 63.

72 12, 13 & 14 Geo. 6c. 67.

73 Supra. Ch.2.

to the U.K. Civil Aviation Act 1949. We shall now take a close look at this Act with a view to comparing and contrasting its provisions with those of the comparatively more recent enactments in Commonwealth Africa in order to focus attention on their essential inter-relationship.

(1) The Civil Aviation Act 1949 on the one hand is a consolidating Act in respect of earlier U.K. Civil Aviation legislations such as The Air Navigation Act, 1920,[74] The Air Navigation Act 1936,[75] The Air Navigation (Financial Provisions) Act 1938,[76] The Ministry of Civil Aviation Act 1945,[77] The Civil Aviation Act, 1946[78] and the Air Navigation Act 1947[79], while on the other hand The Nigerian Civil Aviation Act 1964,[80] The Ghana Civil Aviation Act 1958[81] and The East African Civil Aviation Act 1964[82] are each, respectively, adaptations of the U.K. Civil Aviation Act 1949.

(2) On account of its consolidating nature, The Civil Aviation Act 1949 with 71 Sections is therefore necessarily longer than the Nigerian Civil Aviation Act 1964 which is divided into 19

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74 10 & 11 Geo. 5.c.80.
75 26 Geo. 5 & 1 Edw. 8.c.44.
76 1 & 2 Geo. 6.c.33.
77 8 & 9 Geo. 6.C.21.
78 9 & 10 Geo. 6.C.70.
79 10 & 11 Geo. 6.C.18.
80 1964, No.30.
81 No.37.of 1958.
82 Act No. 22.of 1964.

Sections, the Ghana Civil Aviation Act which has 43 Sections and the East African Civil Aviation Act 1964 with 27 Sections.

(3) Unlike Nigeria,[83] but similar to the Ghana[84] and The East African Community[85] legislations, the Civil Aviation Act 1949 makes provision for two categories of aerodromes, namely Ministers aerodromes and local authorities aerodromes.[86]

(4) The Civil Aviation Act 1949 establishes an Air Transport Advisory Council charged with the important duty of considering representations on the adequacy of services provided and the charges made in respect of them by the Air Corporations[87]. It also considers such matters as the Minister may refer to it.[88]

We observe, in this connection, that all the aviation legislations in Commonwealth Africa omit to establish such an important Advisory Council.

(5) While in furtherance of the provisions of Section 13 of the Civil Aviation Act 1949, the Civil Aviation (Licensing) Act 1960[89] was enacted establishing an Air Transport Licensing Board; no corresponding provisions exist in the Nigerian Civil Aviation Act.[90] However the Ghana Civil Aviation Act

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83 See p. 258. Supra.

84 See p. 265. Supra.

85 See p.269.Supra.

86 Op.cit.Supra.n.72.Secs. 16,17,18,19,20,21 and 22.

87 Ibid.Sec.12(2)

88 Ibid.Sec.12(3).

89 8 & 9 Eliz.2 c.38.

90 See Supra.pp.225-231.

makes provision for the establishment of an Air Transport Licensing Authority[91] while The East African Act also makes provision for the establishment of an East African Civil Aviation Board.[92]

(6) A supplemental provision is inserted in the U.K. Act which empowers the Minister to appoint Special Constables to perform police duties at Minister's aerodromes.[93] No corresponding provision exists in the respective Aviation Acts of Nigeria, Ghana and the East African Community.

E CONCLUSIONS

(1) Most of the aerodromes in Commonwealth Africa are survivals from the Colonial era. The immediate preoccupations of the various aviation authorities have been to upkeep and up-date the standards of these aerodromes in accordance with the obligations assumed by the respective states on becoming Parties to the Chicago Convention. These states have also trained and produced a new breed of civil servants specially trained as airport managers or commandants in keeping with the technological advances in air transportation which has influenced the development of large capacity and long range jet aircraft requiring specially managed, designed and appropriately located aerodomes.

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91 See Supra.pp. 235-238.

92 See Supra.pp. 240-243.

93 Op.cit.Supra.n.72.Sec.37.

(2) We note, that the great majority of aerodromes in Commonwealth Africa are either Government owned or controlled by Government related agencies. The reason for this, we venture to suggest, is that air transportation is still a new and developing industry in Commonwealth Africa. It is hoped, that in future, when air transportation assumes more importance in the economic lives of these states, we shall witness the emergence of privately owned and operated airports in the respective territories of Commonwealth Africa, as is the case in the U.K., U.S.A, Canada and Australia.

CHAPTER 8

INTERNATIONAL ECONOMIC LAW CONCERNING AVIATION

The major, often published and politicized aspect of civil aviation in the modern world is the diplomatic aspect - showing the flag of a foreign country in another. This is now regarded generally as indicative of the degree of friendly relations existing between any two countries.[1] Against this background, the economic aspects of civil aviation is, it appears, consciously minimised. Notwithstanding this conscious down play of the economic aspects, civil aviation is one of the most developed international industries today, having a special fascination and appeal even to the poorest and smallest of nations.[2] In this chapter, we shall examine briefly, some legal aspects of the international economic regulation of civil

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We note in this connection the conclusion of a Bilateral Air Transport Agreement between the United States and the Soviet Union in 1966. This event signalled a major thaw in the cold war between the East and West and marked the beginning of an era of detente between the two ideological giants in the world representing the Communist and Capitalist systems.

2
The rapid growth in the membership of I.C.A.O. and I.A.T.A. between 1960 and 1971 bears eloquent testimony to the interest of new nations in aviation. In 1960, the membership of I.C.A.O. and active I.A.T.A. membership stood at 83 and 80 respectively. In 1971, the membership has reached an all time high figure of 122 and 91 respectively. Cf. Annual Report of the Council to the Assembly for 1960, I.C.A.O. Doc. 8140 A14-p/3 at p. 82; I.A.T.A. Bulletin 1960 No.28. at pp. 96-97; Annual Report of the Council 1971 I.C.A.O. Doc. 8982A19-p/1 p. 101; I.A.T.A. Bulletin No. 35. pp. 128-129.

aviation by the respective Governments in Commonwealth Africa, which the respective states themselves impose, in contra-distinction to those measures of a purely inter - airline arrangement such as interchange of aircraft,aircraft financing, charter and lease of aircraft and the private international air law of carriage by aircraft, which are outside the scope of this dissertation. We begin by examining some of the uniform aspects of the public international economic law of civil aviation applicable generally to all the countries in Commonwealth Africa.

A. REPATRIATION OF EXCESS OF RECEIPTS OVER EXPENDITURE

This is now an institutionalized economic regime in civil air commerce. The purpose of this economic regulation normally inserted in bilateral air transport agreements, is to enable the designated airline of one Contracting Party to repatriate to its country of nationality, its surplus revenue (after deduction of local expenses) without any restrictions from the Exchequer in the foreign territory. This concession, which is reciprocal, is inserted to protect foreign airlines from any restrictive measures which countries (particularly those that do not have a free economy or which suffer from periodic economic difficulties necessitating the imposition

of Exchange Control Regulations) might wish to impose.

This economic regulation has its origin in the proposal of the Final Conference of the European Civil Aviation Conference in 1959, which had drawn up a Standard Form of Agreement[3] which it recommended to I.C.A.O. for adoption by all states. All the states in Commonwealth Africa have adopted the E.C.A.C. Standard Clauses (with slight variations) in their bilateral Air Transport Agreements. Article 8 of the E.C.A.C. Standard Clauses provides as follows:-

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3 The adoption of Standard Drafts as models in the conclusion of international agreements is not a novel development. Before the days of the League of Nations, bilateral treaties of Friendship, Commerce and Navigation and Consular Conventions concluded by European powers followed some regular, recognisable, standard pattern of draftsmanship. In the early 1930's, however, the League of Nations took some positive steps in proposing some Standard Draft Agreements which members of the League may adopt as basis for negotiating their bilateral treaties. The main purpose of these Standard Draft Agreements was to achieve some degree of uniformity where differences in legal systems or failure to arrive at an acceptable multilateral treaty may otherwise prevent a solution to a pressing international problem. As to the background and the details of the League Procedure in this connection, See; M. Hill: The Economic and Financial Organisation of the League of Nations (Publications of the Carnegie Endowment for International Peace) in the series "Studies in the Administration of International Law and Organisation" No.6. at pp. 72-74.

"Either Contracting Party undertakes to grant to the other party free transfer, at the official rate of exchange, of the excess of receipts over expenditure achieved on its territory in connection with the carriage of passengers, baggage, mail shipments and freight by the designated airline of the other Party. Wherever the payments system between Contracting Parties is governed by a special agreement, this agreement shall apply".

It is useful to relate here the historical background of this clause. At the European Civil Aviation Conference in Strasbourg in 1959 when this clause was first adopted,[4] Western Europe was then faced with the general problem of economic recovery from the devastating effect of the Second World War. By an O.E.E.C. Agreement (Organisation for European Economic Co-operation), the regulation of monetary transfer and general mobility of capital within Europe was

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[4] See I.C.A.O. Document 7977, E.C.A.C/3-1 (1959); Cf, Bin Cheng The Law of International Air Transport (Stevens & Oceana 1962) pp. 241-246. For an up-to-date history and comprehensive citation of E.C.A.C. documentation, See P.B. Keenan, A.Lester and P. Martin, Shawcross and Beaumont on Air Law (3rd Edition London, Butterworths 1966) at pp. 67-68.

supervised by a central European organisation with the co-operation of the Central Banks of the respective Western European countries. However, not all the states that participated in the European Civil Aviation Conference in 1959 were members of O.E.E.C. Some of those that were members, even entertained reservations concerning certain provisions in the Agreement. In order to provide a solution to the objections raised by such states or to allay their anxieties, a procedure was designed for the conclusion of separate Payments Agreement outside the Air Services Agreement regulating the delicate problem of currency transfer from one state to the other. By this new procedure, E.C.A.C. was able to ensure that a state not a Party to the O.E.E.C. Agreement, would not suddenly, but for this new economic arrangement, be faced with the problem of shortage of freely convertible foreign currencies, which it might urgently require for its general economic recovery programme.

1. The Nigerian Approach

A clause similar to Article 8 of the E.C.A.C. Standard Clauses is incorporated in all bilateral Air Transport Agreements concluded by Nigeria.[5] Although Section 7 of the Ex-

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5 See e.g. Article 10. (Nigeria - U.A.R. Air Transport Agreement N.T.I.F. (Federal Ministry of Information, Lagos, 1969) p. 117. See also Ibid Article 14(2) of the Nigeria - USSR Bilaterals, at p. 127.

change Control Act 1962[6] provides that no person shall:-

"(a) make any payment to or for the credit of a person resident outside Nigeria; or

(b) make any payment to or for the credit of a person resident in Nigeria by order or on behalf of a person who is resident outside Nigeria; or

(c) make any payment whatsover in respect of any loan, bank overdraft or other credit facilities outside Nigeria: or

(d) place any sum to the credit of any person resident outside Nigeria;" and Section 8 further provides that:-

"no person resident in Nigeria shall, without the permission of the Commissioner, make any payment outside Nigeria to or for the credit of a person resident outside Nigeria, or take or accept any loan, bank overdraft or other credit facilities", the clause similar to Article 8 of the E.C.A.C. Standard Clauses existing in all the bilateral Air Transport Agreements entered into by Nigeria, which provides for the repatriation of excess of receipts over expenditure earned

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1962 No. 16.

by foreign airlines operating in Nigeria, enables these airlines to repatriate their earnings from Nigeria, subject to the permission of the Central Bank of Nigeria being obtained.

ii The Ghanian Approach

Ghana, more than any other state in Commonwealth Africa has experienced great economic difficulties. For this reason, Ghana, more than any other state needs an Exchange Control Act to safeguard her sagging economy and assure herself of some period of grace within which to satisfy her international and domestic monetary obligations. In this connection, The Ghana Exchange Control Act,[7] which is similar in purport to the Nigerian Exchange Control Act referred to above, regulates the transfer of excess of receipts over expenditure by foreign airlines in a manner particularly favourable and beneficial to the economy of Ghana. Such is the intention, for example, in Article 8 of the Ghana-U.K. Air Transport Agreement 1958.[8] The Article provides as follows:-

> "Each Contracting Party grants to the designated airlines of the other Contracting Party -
>
> (a) the right to transfer to their head offices in

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7 1961, Act 1961.

8 Cmnd.567.(1958).

Ghanian currency or sterling at the official rates of exchange all surplus earnings, whatever the currency in which they were earned; and

(b) so far as the currency regulations of the first Contracting Party in force at the time will allow, the right to transfer surplus earnings to their head offices in the currency in which they were earned."

iii The East African Community Approach

As a Community subject, civil aviation and any regime which regulates it would, prima facie, be provided for in the Treaty establishing the Community.[9] In this connection, Chapter VII of the Treaty For East African Co-operation dealing with Currency and Banking and Annex VII entitled 'Current Account Payment' are relevant to any examination of the approach of the East African Community to the bilateral standard provision concerning the repatriation of excess of receipts over expenditures earned by any airline in the territories of the Partner States.[10]

Under the Treaty provisions, each Partner State, in the

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9 Treaty For East African Co-operation 1967. Government Printer Nairobi.

10 See for example Art 11 of the Air Transport Agreement between the Kingdom of the Netherlands and the Government of the Republic of Kenya published in Tractatenblad van het Koninkrijk der Nederlanden, Joargang 1969 Nr. 160.

exercise of its sovereign existence as a State, its individual membership of the International Monetary Fund and the International Bank for Reconstruction and Development, establishes a Central Bank, has its own currency and consequently exercises control over its currency and all securities held in its Central Bank in the interest of its own economy. However, we hasten to point out, that the currency of each of the Partner States are easily convertible in any of the territories of the Community since the primary object of the Community is to create a favourable environment for the mobility of persons, goods and services. In this regard, Article 24 of the Treaty provides:

> "The Partner States undertake to make arrangements through their central banks, subject only to exchange control laws and regulations which do not conflict with this Treaty, whereby -
>
> (a) their respective currency notes shall be exchanged without undue delay within the territories of the Partner States at official par value without exchange commission".

In order to illustrate, for practical purposes, the

economic controls over money in the Partner States, we shall refer only to the Kenya Exchange Control Act,[11] since Kenya constitutes the most developed, virile and dynamic economic unit in the Community. Section 7 of the Kenya Exchange Control Act which is similar to Section 7 of the Nigerian Exchange Control Act provides that

> "Except with the permission of the Minister, no person shall do any of the following things in Kenya, that is to say -
>
> (a) make any payment to or for the credit of a person resident outside the scheduled territories, or
>
> (b) make any payment to or for the credit of a person resident in the scheduled territories[12]

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11 Laws of Kenya Cap 113 (Vol. II Rev. 1962).

12 The Scheduled Territories are referred to in the First Schedule to the Act as consisting of 1.) The fully self-governing countries of the British Commonwealth except Canada 2.) Any Colony under the dominion of Her Majesty. 3.) Any territory administered by the government of any part of Her Majesty's dominions under the trusteeship system of the United Nations. 4.) Any British protectorate or British protected state. 5.) The Irish Republic. 6.) Iceland. 7.) Burna. 8.) The Hashemite Kingdom of Jordan. 9.) South West Africa. 10.) The United Kingdom of Libya. Cf. the case of El Mann v. Republic (1970) E.A.L.R. pp. 24-32, where the East African Court of Appeal considered the provision of Section 7 of the Kenya Exchange Control Act.

by order on on behalf of a person resident outside the scheduled territories; or

(c) place any sum to the credit of any person resident outside the scheduled territories".

Section 8, which like the corresponding Section in the Nigerian Exchange Control Act, similarly regulates payments outside Kenya.

The restrictive provisions of the domestic law on international transfer of funds (subject to Ministerial permission) notwithstanding, Article 25 of the Treaty provides that "Each Partner State undertakes to permit, in the currency of the Partner State in which the creditor or beneficiary resides, all bona fide payments on current account falling within the definition of current account payments set out in Annex VII to this treaty, and undertakes to ensure that all necessary permissions and authorities are given without undue delay."[13]

Conclusion

It would appear that provision on free transfer of excess of receipts over expenditure is only common today in bilateral

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13 Among the Current Account Payments listed in Annex VII which relates to aviation or operation of airlines are "Payments in respect of the carriage of goods or passengers by any means of transport, including payments for the chartering of such transport; payments in respect of services incidental to the carriage of goods or passengers by any means of transport, including warehousing and storage and transit facilities; and payment in

Air Transport Agreements between developing countries inter-se on the one hand, or between developed countries and developing countries on the other. A casual examination of the Air Services Agreements concluded in recent times between developed countries among themselves or between countries which have a free economy do not now have a clause as restrictive as Article 8 of the E.C.A.C. Standard Clauses.[14]

B AVOIDANCE OF DOUBLE TAXATION AGREEMENTS

This is a bilateral arrangement between states outside the normal bilateral Air Transport Agreements, whereby the Contracting Parties exempt from tax in their respective territories, the income earned by the airline of the other Party in its territory, since that airline would be subject to tax in the country of its nationality on the income earned by it abroad. Avoidance of Double Taxation between states has now become a customary practice in international trading. Under the League of Nations, various Commissions were set up to examine the problem of double taxation in conjunction with the

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respect of the operation of transport services, including bunkering and provisioning, maintenance, assembly and repair of equipment and installation, fuel and oil, garaging, and expenses of staff."

14
See Art XIII (h) of U.S.A.-Canada Air Transport Agreement U.N.T.S.Vol. 586 p. 168.

International Chamber of Commerce.[15]

Over the years, therefore, states have envolved a system of bilateral agreements on the Avoidance of Double Taxation on incomes, in order to alleviate any injustice which may arise as a result of an individual or corporation being subjected twice to taxation in respect of the same income. A number of bilateral agreements on the Avoidance of Double Taxation were concluded by the U.K. as the Metropolitan Power, which were extended to British Africa. Many of these agreements are still subsisting today either by virtue of the doctrine of state succession in international law[16] or by express declaration of continuity.[17]

i Nigeria

From sections 17, 18 and 19 of the Companies Income Tax Act 1961,[18], it appears that the basis of Company Taxation in

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15 F.E.Koch - The Double Taxation Conventions, Vol.I, Taxation of Income (London, Stevens 1947) p.3.; See at footnote 1 the comprehensive literature on the subject cited by the author.

16 See Supra.Ch.3. This is the position in the case of Nigeria and Ghana. Cf. S.R. & O. 1947/2878; S.R.&O. 1947/2868.

17 Ibid. Kenya,adopting a modified version of the Nyerere Doctrine,continues to regard as valid and binding on Kenya some agreements on the Avoidance of Double Taxation. Cf.E.A.C.S.O. Gazette Supplement No. 11. Legal Notice No. 60. of 30th September 1964 and Legal Notice No.61 of 1964.

18 1961, No.22.

Nigeria is source from which "the profits of any company accruing in, derived from, brought into, or received" in Nigeria is attributable to such companies. However, section 26(1)(9) of the Companies Income Tax Act 1961 exempts from tax "gains or profits from the business of operating ships or aircraft carried on by a company other than a Nigerian company in so far as in the case of ships the business is not carried on in inland waters only ..."
The effect of this provision is, that by the nature of their business, shipping and airline companies are treated as international trading companies. The incomes of such companies therefore, cannot without some injustices being done, be construed as emanating from any one particular country for tax purposes.

Secondly, in addition to the exemption clause in section 26, the Act provides for relief in respect of Commonwealth income tax,

"(a) if the Commonwealth rate of tax does not exceed the rate of tax under this Act, the rate at which relief is to be given shall be one half of the Commonwealth rate of tax;

(b) if the Commonwealth rate of tax exceeds the

rate of tax under this Act, the rate at which relief is to be given shall be equal to the amount by which the rate of tax under this Act exceeds one-half of the Commonwealth rate of tax".[19]

Thirdly, it is provided in the Act that the Federal Executive Council may, by order declare, that arrangements "have been made with a view to affording relief from double taxation in relation to tax imposed on profits charged by this Act and any tax of a similar character imposed by the laws of the country, and that it is expedient that those arrangements should have effect, the arrangements shall have effect notwithstanding anything in this enactment".[20]

Nigeria succeeded by operation of law to a number of Conventions for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.[21]

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19 Ibid. Sec. 36(2).

20 Ibid. Sec. 37(1). as amended by the Constitution (Suspension and Modification)Decree No.1. 1966.

21 These Conventions were applied to Nigeria by the following Orders-in-Council:- The Double Taxation Relief (Taxes on Income) (United Kingdom) Order-in-Council, 1948; The Double Taxation Relief (Gold Coast) Order-in-Council, 1950; The Double Taxation Relief (Sierra Leone) Order-in-Council, 1950; The Double Taxation Relief (Gambia) Order-in-Council, 1950; The Double Taxation Relief (Taxes on Income) (New Zealand) Order-in-Council, 1951; The Income Tax (Double Taxation Relief) (Sweden) Order 1954;

The provisions of these Conventions are generally similar. We should, however, draw attention for example to Article V of the U.K.-U.S.A. Avoidance of Double Taxation Convention; which exempts from taxation incomes derived from shipping and air transport[22] on a similar terms as section 26(1)(9) of the Nigerian Companies Incomes Tax Act 1961.[23]

ii Ghana

As in Nigeria, the basis of taxation in Ghana is residence. For this reason, all incomes accruing in or derived from Ghana are subject to tax.

Provision is made in the Income Tax Act, 1943,[24] as amended by the Income Tax (Amendment) Act 1958,[25] regulating the taxation of incomes of companies not resident in Ghana.[26] In this regard, provisions similar to the Nigerian Companies Income Tax Act 1961 exist in the Ghana Income Tax Acts, whereby

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Cont.
The Income Tax (Double Taxation Relief)(Denmark Order, 1955; The Income Tax (Double Taxation Relief Norway) Order, 1956; The Income Tax (Double Taxation Relief) (U.S.A.) Order 1958.

22 U.S.Dept. of State, Treaties and Other International Acts Series 1546.

23 Supra. n. 18.

24 No. 27 of 1943.

25 No. 29 of 1958.

26 Ibid. Sec. 26.

relief in respect of Commonwealth income tax is granted. Furthermore, Ghana too, like Nigeria, succeeded by operation of law to certain Bilateral Agreements on the Avoidance of Double Taxation.[27] Thirdly, Ghana would grant, on a reciprocal basis, exemption from tax, on the incomes of foreign airlines doing business in Ghana.

iii The East African Community

Taxation in East Africa is a unified subject. This is understandable because, if the Common market and the economic union established in the Community by the Treaty is to have any worthwhile meaning, a common and uniform taxation policy among the Partner States particularly in connection with company taxation, is not only desirable but imperative. In this connection, the East African Income Tax (Management) Act, 1958 exists as the law regulating the basis for uniform taxation policy among the Partner States.

We hasten to point out that each of the Partner States has on their statute books separate personal and company income tax laws.[28] For this reason, relief from double taxation is a matter for the individual Partner States to grant.

27
See e.g. The Double Taxation Relief (Taxes on Income) (Gold Goast) Order 1947 S.R.&O. 1947 No. 2868.

28
e.g. See Income Tax (Rates and Allowances) Ordinance 1959. No. 7 of 1959 (Uganda)

Once a Partner State has signified to the Authority its decision to grant relief from double taxation to any foreign country, however, the Authority is empowered and it is in fact obliged to proclaim such domestic arrangement of the Partner State as though it were made under the East African Income Tax (Management) Act, 1958.[29]

Among the Partner States, for example, Kenya has concluded a number of arrangements for double taxation reliefs with a number of countries.[30] In these arrangements, special reference is made to incomes derived from aviation. In Article V of the Double Taxation Relief (Switzerland) Arrangements Notice, 1964 it is provided that

> "Notwithstanding the provisions of Articles III and Iv profits which a resident of one of the territories derives from operating ships or aircraft, including profits of that resident from the sale of tickets for passages by such ships or aircraft, shall be exempt from tax in the other territory".[31]

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29 East African Income Tax (Management) Act 1958 Sec. 71(1).

30 See e.g.The Double Taxation Relief (Switzerland) Arrangements Notice 1964; and The Double Taxation Relief (Norway) Arrangements Notice, 1964.

31 E.A.C.S.O. Gazette Supplement No.11. Subsidiary legislation No. 10. L.N. No. 60. 1964.

Conclusion

All Commonwealth Africa accord relief from double taxation to foreign airlines resident in the respective territories. This economic concession is granted either under the income tax laws of the respective states, or under bilateral agreements for avoidance of double taxation; or where no bilateral agreements for avoidance of double taxation exist, by ad hoc arrangements on a basis of reciprocity.

C. AVOIDANCE OF DUPLICATORY INSURANCE COVERAGE

The United Kingdom and the Colonial territories in British Africa as a whole, are not parties to the International Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, signed at Rome on May 29, 1933[32]. However, the U.K. signed The Convention Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in Rome, 1952,[33], but has not yet deposited its instruments of ratification. As the Convention is not therefore in force as far as the U.K. is concerned, it was not applied to the Colonial territories prior to their independence.

32
H.M.S.O. (1935) Cmd 5056.
33
H.M.S.O. (1953) Cmd 8886.

The question therefore arises, "How do the states in Commonwealth Africa ensure protection against loss or damage caused to any person or property on the surface, by, or from aircraft? As we indicated earlier,[34] the Civil Aviation Acts of Commonwealth African states are based on the U.K. Civil Aviation Act 1949. We shall, therefore, consider this question in the light of the common law and legislations both in the U.K.and in Commonwealth Africa.

COMPARATIVE ANALYSIS OF THE INSURANCE PROVISIONS IN THE U.K. CIVIL AVIATION ACT 1949. THE NIGERIAN CIVIL AVIATION ACT 1964, THE GHANA CIVIL AVIATION ACT 1958 AND THE EAST AFRICAN CIVIL AVIATION ACT 1964

1. At common law, any damage or loss suffered by a party in the absence of contract, is actionable at the instance of the injured party in an action for unliquidated damages, based on the principle of res ipsa loquitur.[35] Since damage done by a foreign aircraft involves conflict of laws problems, the Rome Convention 1933, while recognising the common law principle of liability, sets down a limitation for such liability. The U.K., although not a Party to the Rome Convention 1933, makes provision in Sections 42-48 of the

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34 Supra Ch. 7 p. 269-272.

35 For a discussion of this principle and its application, See: Clerk & Lindsell on Torts 12th Edition (Sweet & Maxwell) pp. 441-446.

Civil Aviation Act 1949,[36] limiting the amount of liability in respect of damage or loss caused by or from aircraft to third parties on the surface. No corresponding provision exists in the Nigerian Civil Aviation Act 1964,[37] or The East African Civil Aviation Act 1964.[38] But in Section 25(1) of the Ghana Civil Aviation Act 1958[39] provision is made for the limitation of liability in accordance with the provisions of the Second Schedule to the Act.[40]

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36 12, 13 & 14 Geo. 6, C.67.

37 1964, No. 30.

38 Act No. 22. of 1964.

39 No. 37. of 1958.

40 Ibid. The Second Schedule provides the limit of liability as follows:- "1. The limits of liability under Sub-section (1) of Section 25 of this Act in respect of such loss or damages as is mentioned in that Sub-section shall, in the case of an aircraft of any such description as is mentioned in the first column of the following Table be an amount to be ascertained, in relation to that description of aircraft, by reference to the Second Column of the said Table.

Description of Aircraft	Limit of liability
(a) Airships	L25,000
(b) Ballons (whether fixed or free)	L5,000
(c) Gliders	L2,000, so however, that not more than L1,000 shall be payable in respect of loss or damage to property.

ii Neither Nigeria nor any of the Partner States of the East African Community are Parties to the Rome Convention 1933. In the Civil Aviation Act 1958, power is given to the Head of State of Ghana to give effect to the Rome Convention 1933 by order -

"(a) directing:-

(i) that the provisions set out in the order shall, in relation to aircraft registered in any such country as may be specified in the order, have effect instead of the provisions of this Part of this Act, save Section 24; or

(ii) that all or any of the said provisions shall in relation to such aircraft as aforesaid, have effect subject to such modifications, adaptations and exceptions, as may be specified in the order; and

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(d) Other aircraft -

(1) if the weight of the aircraft fully loaded ..... does not exceed 5,000 pounds; weight of the aircraft fully loaded ..... exceeds 5,000 pounds but does not exceed 10,000 pounds	L10,000, so, however, that not more than L5,000 shall be payable in respect of loss of or damage to property. L10,000, so however, that, in respect of loss of, or damage to property, there shall not be

(b) making such provisions as appears to the Head of State to be required for securing that an aircraft registered in Ghana shall not leave Ghana on a flight to or over any such country as aforesaid, unless there is on board the certificate relating to a policy of insurance, a security or a deposit of money in respect of the aircraft, being a certificate in such form, and issued by such person, and containing such particulars, as may be prescribed by the order."[41]

Cont.

	payable more than L1 for each pound of the weight of the aircraft fully loaded.
(iii) if the weight of the aircraft fully loaded exceeds 10,000 pounds but does not exceed 25,000 pounds.	L1 for each pound of the weight of the aircraft fully loaded.
(iv) if the weight of the aircraft fully loaded exceeds 25,000 pounds	L25,000

41 Ibid. Sec. 30.

(iii) Both the Nigerian Civil Aviation Air Transport (Licensing) Regulations 1965[42] and the East African Licensing of Air Services Regulations 1965[43], require an applicant for a licence to supply particulars of any insurance policy held or proposed by the applicant to cover third party risks in respect of the proposed service.

D SPECIAL TREATMENT FOR CIVIL AVIATION

The Chicago Convention to which all Commonwealth Africa are parties, grants certain privileges to aircraft engaged in international air navigation. Article 24 of the Convention provides as follows:-

"(a) Aircraft on a flight to, or across the territory of another contracting state shall be admitted temporarily free of duty, subject to the customs regulations of the state. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting state, on arrival in the territory of another contracting state and retained on board on leaving the territory of that state shall

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42 L.N. 11 of 1965. Note. Nigeria is a Party to the Rome Convention 1952. Cf. Annual Report of the Council.- 1971 I.C.A.O. Doc. 8982 A19-p/1 at p. 107.

43 L.N. No. 47.of 1965.

be exempt from customs duty, inspection fees or similar national or local duties and charges. This exemption shall not apply to any quantities or articles unloaded except in accordance with the customs regulations of the state, which may require that they shall be kept under customs supervision.

(b) Spare parts and equipment imported into the territory of a contracting state for incorporation in or use on an aircraft of another contracting state engaged in international air navigation shall be admitted free of customs duty, subject to compliance with the regulations of the state concerned, which may provide that the articles shall be kept under customs supervision and control."[44]

Parties to bilateral Air Transport Agreements generally declare in the preamble to such agreements, that the bilaterals are supplementary to the Chicago Convention. In this connection, a usual provision in all bilaterals concluded by Commonwealth African states is a provision emphasizing the special privileges granted to civil aviation under Article 24 of the Convention. In addition, this privilege is ex-

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[44] Note also Article 27 of the Chicago Convention concerning exemption from seizure on patent claims of aircraft of contracting states engaged in international air navigation.

tended to cover tobacco, food and drinks taken on board an aircraft for use on board that aircraft during the course of an international journey by air.

CONCLUSIONS

The special privileges acccrded to civil aviation, makes the airline industry one of the most corsetted and favoured by States. The protection enjoyed by airlines arising from Conventions, both multilateral and bilateral and also under domestic legislations in the respective states, makes aviation the star industry in both the developed and developing nations.

CHAPTER 9

RECONSTRUCTION OF STATE-OWNED AIRLINES

All the airlines created in British Africa during the Colonial era, namely, W.A.A.C. and E.A.A.C. proved unsuitable to meet the requirements of the newly independent territories of Commonwealth Africa. During, and soon after the transitional period, critical re-examination of the structures, powers, management and ownership of these airlines were undertaken in the respective countries prior to their reconstruction. A choice had to be made whether these state-owned airlines should be structured either as Public Corporations or as Companies.[1]

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[1] See ante Ch. 1. Cf. for example, Statement of Policy by the Government of the Federal Republic of Nigeria on The Relation Between The Federal Public Corporations and the Legislature, the Government and the Public and Between the State-owned Companies and the Government, Sessional Paper No. 7. of 1964, Published by the Federal Ministry of Information, Lagos; Stephen Wheatcroft, E.A.C.S.O., Report on the Constitutional Position of East African Airways, 11 May, 1965; (I.T.A. Note 5353); Aviation Problems in East Africa (Part One) (I.T.A. Bulletin Current Topics 35/R No.4. of 24 January, 1960); Aviation Problems in East Africa (Part Two) (I.T.A. Bulletin Current Topics 100/R, No. 5. of 31 January, 1966); Harold Poulton, Report on Review of Civil Aviation in East Africa with recommendations for Future Development, 1962.

We may therefore ask the question, What is a Public Corporation? and How does it differ from a Company? A Public Corporation may be defined as a Corporate entity created by a special statute in contra-distinction to a company registered under the Companies Act. A Public Corporation differs from a Company in that a Corporation has no share capital or share holders but receives a subvention from the Government in order to fulfil its functions. A Company, on the other hand, has a share capital and share holders. The nominal share holder, if he may be described as such, of a Public Corporation is the Minister who has parliamentary responsibility for the Corporation; while the state, private individuals or other legal entities may constitute the share holders in a Company. A Public Corporation is subject to parliamentary scrutiny by way of Annual Reports and Audited Accounts, which must be laid before the legislature by the responsible Minister. A Company is free from this requirement. A Public Corporation may from its objectives be designed as a social service institution - one not operating essentially for profit but providing a social service, while a Company, on the other hand, is generally designed to operate on sound commercial basis, with profit motive as a

primary objective.[2]

We shall now, in the light of the above, examine the present structures of the national airlines of Nigeria, Ghana and the East African Community beginning with:

A NIGERIA - THE NIGERIA AIRWAYS LIMITED

(i) Establishment and Constitution of the Company

Nigeria Airways Ltd, formerly known as W.A.A.C.(Nigeria) Limited, adopted its new Corporate name of Nigeria Airways Limited by a simple resolution of the Company in January 1971[3].

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2 See W. Friedman (Ed.) The Public Corporation: A Comparative Symposium (The Carswell Coy. Ltd. Toronto 1954) Cf, D.C.M. Yardley - A Source Book of English Administrative Law (1963, Butterworths London); See, generally also, W.Friedman and J.F. Garner, Government Enterprise (Stevens & Sons, London,1970).

3 The resolution, filed with the Registrar of Companies, Lagos, and now attached to the Memorandum and Articles of Association of W.A.A.C.(Nigeria) Limited, Registered No. 1740 states simply that "It was RESOLVED that the name of the Company be and is hereby changed from W.A.A.C.(Nigeria) Limited, to NIGERIA AIRWAYS LIMITED". It should be mentioned, that although as far back as 1961, the Company has been referred to generally as Nigeria Airways, no formal resolution was adopted by the Board and notified to the Registrar of Companies to the effect that the Corporate name of the Company had been changed from W.A.A.C. (Nigeria Ltd.) to Nigeria Airways Ltd. This error of omission was only discovered during negotiations with the Boeing Company for the purchase and funding by the Export - Import Bank of Boeing 707 Aircraft which Nigeria Airways Ltd. intended to acquire for its fleet.

It would be recalled,that soon after the dissolution of W.A.A.C. in 1958, the airline was reconstituted and continued to operate as a Nigerian Company with the Nigerian Government as the majority share holder.[4]

Consequently, the name of the Company was changed from W.A.A.C. into W.A.A.C.(Nigeria) Limited, and its registered office situated in Nigeria. With a share capital of six million pounds sterling, divided into 60,000 shares of L100 each, the Company commenced business on 25th day of July, 1958.[5]

(ii) Functions, Powers and Duties of the Company

The objects of the Company follow the usual general object clause of similar companies. However, some specific

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4
See Supra Ch.2. pp. 102-106: See also the Report of Inquiry into the Affairs of W.A.A.C.(NIGERIA) LIMITED otherwise known as Nigeria Airways for the period 1st March, 1961 to 31st December, 1965, (Federal Ministry of Information,Lagos 1968) pp. 12-15.

5
The subscribers to the Memorandum and Articles of Association of the Company were Chief Samuel Ladoke Akintola, Minister of Communications and Civil Aviation, John Hall Joyce Esq.,Company Director and John Wells Booth Esq., Company Director. After the take over of the Company by the Federal Government of Nigeria, the Company was, from 1961-65, run by a Board of Directors appointed by the Minister of Aviation. As for the detailed account of the running of the Airline during this period,See Report of Inquiry into W.A.A.C. etc.Op. Cit. n.4.

functions, powers and duties for which the Company is established include among others the following:-

"(a) To take over and carry on the business or any part thereof now carried on by WEST AFRICAN AIRWAYS CORPORATION, together with all or any of the real and personal property and assets of that business used in connection therewith or belonging thereto.

(b) To take over and honour the agreement between the FEDERAL GOVERNMENT OF NIGERIA AND WEST AFRICAN AIRWAYS CORPORATION for the provision of Aircraft for security purposes and all existing contracts entered into by WEST AFRICAN AIRWAYS CORPORATION with all Governments, persons, bodies and Corporations, including employees and staff of the said Corporation.

(c) To pursue a policy of employment by the Company in all branches of its activities of persons of Nigerian nationality.

(d) To ensure that the Company in co-operation with the Federal Government of Nigeria or other institutions or bodies sponsored by the Government shall afford all practicable assistance in the training of the Nigerian personnel of the Company in order that in

due course, they may play their full part in all branches of the Company's activities.

(e) To carry on business as an Air Transport undertaking and to do anything which is calculated to facilitate or is incidental or conducive to the same.

(f) To establish, operate, manage and arrange for the operation of air transport services for the carriage of passengers, live-stock, goods, baggage, mail and freight to and from or within any territories of West Africa or to and from any such territories to any other part of the world and to enter into agreements or arrangements of any kind (either as purchasers or agents) with Governments, Authorities, Corporations, Companies, firms or persons in connection with such services or for the interchange of traffic or otherwise as the Company may think expedient.

(g) To enter into or procure contracts for the carriage of passengers, mails or freight of any description and to act as booking agents or general agents for any other Corporation, Company, firm or individual in this connection.

(h) To manufacture, construct, purchase or otherwise acquire, sell, import, export and otherwise deal in, charter, take and let on hire, operate, maintain and repair aircraft and aircraft components and plant and equipment of any description and articles of all kinds necessary or useful in carrying on any of these business and to undertake flights on charter terms."[6]

The Company operates through a Board of Directors.[7] When the Company was incorporated in 1958, the first Director was R.W.C. Baker-Beall Esq. The Articles of Association however provides that "every member holding one seventh of the paid up

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6 Other objects of a wide ranging nature usually incorporated in the Object Clause of Companies, which are incidental to the attainment of the objectives of any Company, are inserted in the Memorandum and Articles of Nigeria Airways Ltd. e.g. the power to acquire and deal in property, to construct and alter buildings, to acquire patents, to amalgamate, to invest, lend or borrow money, to hold shares in other Companies, to procure registration abroad etc. Cf. Memorandum and Articles of Association of W.A.A.C.(Nigeria) Limited. (Certificate of Incorporation No.1,740, Ministry of Trade,Lagos).

7 Ibid. Art 67 provides that the number of Directors shall not be less than two nor more than seven.

capital of the Company shall be entitled to appoint one Director. In addition, every member who holds more than one seventh of the paid up capital shall be entitled to appoint one further Director in respect of every additional one seventh of the paid up capital held by him."[8] This provision is subject to a proviso that "the Government Member shall, in any event, be entitled to appoint not less than three Directors".[9]

Since the take over of the Government of the Federation by the Armed Forces in 1966, the composition of the Board of Directors has changed. The Board, appointed by the Commissioner, is now composed of Administrative Officers representing the Federal Economic Ministries such as the Federal Ministry of Economic Development and Reconstruction, The Federal Ministry of Trade, The Cabinet Office and The Federal Ministry of Finance. The Chairman of the Board is the Deputy Permanent Secretary in the Federal Ministry of Transport.[10] These Board members receive no remuneration for their services. The Board has responsibility for laying down general policy

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8 Ibid. Art. 68.

9. Ibid.

10 Statutory Corporations Etc. (Special Provisions) Decree 1969 Secs.2 & 3.

for the Company, subject to the Commissioner giving the Board directives of a general or special nature with regard to the exercise by the Company of its functions. The day to day running of the Company's business is in the hands of a General Manager who is the Chief Executive of the Company and his staff.

(iii) Staff Appointments (Terms & Conditions of Service)

By The Statutory Corporations Service Commission Decree 1968[11], and The Statutory Corporations etc.(Special Provisions)Decree 1969[12], the Nigeria Airways Ltd., although a state-owned Company, is for purposes of staff appointments, discipline, salary and conditions of service treated as a Statutuory Corporation. Section 2 of the Statutory Corporations etc. (Special Provisions) Decree 1969 enumerates the Statutory Corporations and Companies controlled by the Federal Military Government as including among others W.A.A.C.(Nigeria) Limited.[13]

The Statutory Corporations Service Commission, like the Public Service Commission created under the Constitution of the Federation,[14] is responsible for appointments, promotion,

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11 Decree No.53.

12 Supra.n.10.

13 Cf, Supra n.11.at Sec.14(4)(b).

14 The Constitution of the Federal Republic of Nigeria 1963 No.20. Secs. 146-153.

transfer and discipline of staff of Statutory Corporations and State-owned Companies. The Commission may delegate its powers to the most Senior Executive Officer of the Company in respect of posts where the initial basic salary scale is less than L354 per annum (or with the prior approval of the Commission where such basic scale is L364 or more per annum in a junior post).[15]

The staff of the Company are entitled to pension in accordance with regulations made by the Federal Commissioner for Establishments. They are, however, required to contribute a proportion of their salaries into the pension fund.[16] The scale of salary applicable to officers of the Company is regulated by Decree,[17] in order to harmonise it with salaries in the Civil Service.

B. GHANA- THE GHANA AIRWAYS CORPORATION

i. Establishment of the Corporation

Ghana's withdrawal from the West African Airways Corpo-

15 Supra.n.13.Sec.5; Cf. Statutory Corporations Service Commission Disciplinary Regulations 1970. L.N. 80 of 1970.

16 Ibid, Sec. 10.

17 Statutory Corporations (Salaries and Allowances, etc.) Decree 1968, Decree No.59. See The Schedule to the Decree.

ration in 1958,[18] prompted the setting up of Ghana Airways as a Statutory Corporation, first with the enactment of the Statutory Corporations Act 1959[19]. Between 1959 and 1964, Ghana had enacted series of legislations concerning the general structure of Statutory Corporations in Ghana. The first of these statutes was TheStatutory Corporations Act 1959.[20] This was repealed by the Statutory Corporations Act 1961.[21] This was in turn amended and re-enacted by The Statutory Corporations Act 1964.[22] In view of the major legislative activity in that period, we shall not waste time to discuss those repealed legislations, since they are now merely matters of legal history. Furthermore, since the provisions of these repealed legislations have been substantially re-enacted in the existing legislations, we shall proceed rapidly to examine the existing legislations concerning the Ghana Airways Corporation.

Section 1 of the Statutory Corporations Act, 1964 provides as follows:-

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18 See Air Transport Authority (Withdrawal of Ghana) Act, 1958 Cf, West African Territories (Air Transport) (Revocation) Order-in Council 1959.S.I.1959 No.1980.

19 No.53 of 1959.

20 Ibid.

21 Act 41 (Now repealed). See also The Ghana Airways Corporation Act,1963,now deemed revoked by Sec.5.of The Statutory Corporations Act,1964.

22 Act 232.

The President may, by legislative instrument, provide for the establishment as a body corporate -

"(a) of an existing organisation or body, not being already a body corporate; or

(b) of a new organisation or body:

Provided that an existing organisation or body shall not be established unless it was originally constituted by or under the authority of a Minister or is required to act in accordance with directions given by a Minister or is otherwise under Govenrment control."

In exercise of this power, the Ghana Airways Corporation Instrument, 1965[23] was made.

ii. Powers of the Corporation

The Corporation is empowered by the Statutory Corporations Act 1964 to be a body corporate with:

(i) "perpetual succession and a common seal";[24]

(ii) to "sue and be sued in its own name";[25] and

(iii) "subject to the provisions of the instrument by which it was established shall have power, for any

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23 L.I. 432.

24 Supra. n.22, Sec.3(a).

25 Ibid. Sec.3(b).

purpose which, in the opinion of its governing body, is necessary or expedient for or in connection with the proper exercise of the functions of the Corporation, to acquire and hold any movable or immovable property, and to enter into any other transaction."[26]

iii. Objectives of the Corporation

The objectives of the Corporation as described in the Ghana Airways Corporation Instrument, 1965 are:-

"(a) to establish, operate and maintain airlines or regular services of aircraft of all kinds whether in Ghana or outside Ghana; and

(b) to carry on in Ghana and outside Ghana the business of transporting mails, passengers and goods by the Corporation's own aircraft and conveyances or by the aircraft and conveyances of others".[27]

In order to assist the Corporation achieve its above stated objectives, it is given certain ancillary powers which may enable it to:-

"(a) enter into contracts with any persons for the interchange of traffic;

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26 Ibid. Sec. 3(c).

27 Supra.n.23. Part II(1).

(b) carry on the business of warehousing goods, wares and merchandise;

(c) buy, sell, lease, erect, construct and acquire hangars, aerodromes, seaplane bases, landing fields and beacons; and

(d) carry on such other activities as may appear to the Corporation to be conducive or incidental to the attainment of all or any of its objects."[28]

The authorised capital of the Corporation is LG,4,000,000, subject to this amount being increased "to such amounts as the Board may on the recommendation of the State Enterprises Secretariat and with the approval of the Commissioner responsible for Finance from time to time determine".[29] At this stage, it is necessary to comment briefly on the functions of the State Enterprises Secretariat in the public administrative system of Ghana.

The State Enterprises Secretariat is an organ of the Government of Ghana, which acts as some kind of Ombudsman in respect of all Statutory Corporations and state-owned companies controlled by the Government of Ghana. The Sec-

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28 Ibid. Part.II(2).

29 Ibid. Part III(1).

retariat is very powerful and influential. It must be consulted in the decision making processes of all Statutory Corporations and acts as a medium of communication between all Statutory Corporations, Commissioner or such other bodies, in respect of matters in which the approval or authorisation of the Head of State or any Commissioner must be obtained.[30]

iv. Policy Control, Management and Recruitment of Staff

Policy control over the Ghana Airways Corporation and all its affairs is vested in a Board of Directors.[31] This consists of a Managing Director and eight other members appointed by the Commissioner with the approval of the Cabinet. Apart from the Managing Director, the members of the Board hold office for one year each, subject to such members being re-appointed to the Board for a further one year term. Members of the Board, except the Managing Director, do not receive any remunerations for their services, but are paid expenses of their attendance at meetings of the Board.[32]

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30 Ibid, Part Xiii.Cf, the process for performance of certain functions through the State Enterprises Secretariat in the Instrument of Incorporation of the State Enterprises Audit Corporation 1965, L.I. 468, in Part XIII.

31 Ibid. Part VI. The Commissioner may give directives on policy matters to the Corporation and the Corporation is obliged to comply with such directives.

32 Ibid. Part IV.

Power of recruitment of such staff necessary for the day to day activities of the Corporation is vested in the Board.[33] Appointment to the post of General Manager or Manager, however, is made by the Commissioner upon the recommendation of the State Enterprises Secretariat and with the approval of the Cabinet.[34]

The terms and conditions of service of the staff of the Corporation are laid down by the Board with the approval of the State Enterprises Secretariat.[35] The Board may make rules concerning the granting of "pensions, gratuities or retiring allowances to employees of the Corporation and may require them to contribute to any pensions, provident fund or superannuation scheme."[36]

The powers of the Board of the Corporation discussed above are subject to the special powers of the President or Head of State of Ghana. In Part XIV of the Ghana Airways Corporation Instrument, 1965, it is provided that the President may, "at any time, if he is satisfied that it is in the national interest so to do, take over the control and management

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33 Ibid. Part VII(1). The Board may, however, delegate to the Managing Director the appointment of Staff whose salary is less than LG680 per annum.

34 Ibid. Part VII(2).

35 Ibid. Part VII(6).

36 Ibid. Part VII(9).

of the affairs or any part of the affairs of the Corporation". In exercising this power, the President may "reconstitute the Board or appoint, transfer, suspend or dismiss any of the employees of the Corporation; and do in furtherance of the interest of the Corporation, any other act which is authorised or required to be done by any person" under the Ghana Airways Corporation Instrument 1965.

C THE EAST AFRICAN COMMUNITY - THE EAST AFRICAN AIRWAYS CORPORATION

The joint "international operating agency"[37] established in Commonwealth East Africa and generally known as the East African Airways Corporation started its life as a Colonial airline operated by the former colonial territories of Kenya, Uganda, Tanganyika and Zanzibar.[38] We traced briefly in

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Article 77 of the Chicago Convention permits States to set up international operating agencies or multinational airlines. In this connection S.A.S.,Air Afrique and E.A.A.C. have proved a success. For examination of the legal problems in respect of aircraft operated by multinational agencies,See, G.F.Fitzgerald:Nationality and Registration of Aircraft Operated by International Operating Agency and Art. 77 of the Convention on International Civil Aviation 1944,(1967) Canadian Yearbook of International Law, 193-216;R.H.Mankiewicz: Aircraft Operated by International Operating Agencies 31 (1965) J.Air L.& Com.304-310; See also International Law Association Helsinki Conference 1966, Air Law Committee Report on Nationality and Registration of Aircraft with Special Reference to Article 77 of the 1944 Chicago Convention on International Civil Aviation by Professor John Cobb Cooper (Rapporteur)-Preface by Dr.Bin Cheng.

38
For a detailed history and analytical examination of E.A.A.C.,See, M.A. Bradley, East African Common Institutions (Kenya, Uganda and Tanzania) in (1967) Yearbook of Air and Space Law pp.232-238.

Chapter 1 above, the historical origin and development of this airline under the High Commission. When the High Commission was replaced by the East African Common Services Organisation in 1961, the Central Legislative Assembly reconstituted E.A.A.C. by enacting the East African Airways Corporation Act 1963.[39] With the formation of the East African Community in 1967, the East African Airways Corporation was further reconstituted and re-structured to meet the needs of an integrated economic community and the politically independent states forming the Community. We shall now examine E.A.A.C. in the context of its re-organisation and re-constitution by the Treaty for East African Co-operation[40] and The East African Airways Corporation Act 1967.[41]

i. E.A.A.C.- Establishment and Incorporation

Article 3 of the Treaty for East African Co-operation enumerates the Institutions of the Community as being

"the East African Authority

the East African Legislative Assembly

the East African Ministers

39
E.A.C.S.O. Act No.4. of 1963 (Now repealed).

40
Printed on behalf of E.A.C.S.O. by the Government Printer, Nairobi, Kenya, 1967.

41
L.N. No.4. of 1967.

the Common Market Council

the Common Market Tribunal

the Communications Council

the Finance Council

the Economic Consultative and Planning Council

the Research and Social Council,

and such other Corporations, bodies, departments and services as are established or provided for by this Treaty".

Among such other Corporations provided for by the Treaty as an institution of the Community is the East African Airways Corporation.[42] The Corporation was formally established by an enactment of the East African Authority.[43] In the enactments it is provided that the Corporation shall be a body corporated with perpetual succession and a common seal. It has the power to sue and be sued in its corporate name, to acquire, hold and dispose of movable and immovable property for the purposes of the Corporation.[44] The Act further provides for the headquarters of the Corporation to be located in Nairobi, Kenya.[45] The endowment capital of the Corporation

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42 Supra. n.40. Art 71(2).

43 Supra. n.41.

44 Ibid. Sec.3(2).

45 Ibid. Sec. 3(4).

consists of all the assets and liabilities of its predecessor established under the East African Airways Corporation Act, 1963.[46]

ii. Aims and Objectives of the Corporation

The primary aims and objectives of the Corporation are to provide air transportation and relative facilities within the Partner States of the Community and between those states and other foreign states.[47] In carrying out these objectives, the Corporation has a duty to ensure:-

"(a) the fullest development, consistent with economy, of the undertaking of the Corporation;

(b) that the undertaking of the Corporation is operated efficiently, economically and with due regard to safety;

(c) that the financial administration of the Corporation is conducted in accordance with the provisions of Part VI of this Act; and

(d) that the Corporation provides all reasonable facilities for the carriage of passengers, mail

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46 Ibid. Sec. 4.

47 Ibid. Sec. 9(1).

and cargo."[48]

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48 Ibid. Sec.9(2). The Corporation was also given powers necessary or advantageous for the proper discharge of its functions. In Sec.15. of the statute establishing the Corporation, it has power to:-

"(a) acquire aircraft, parts of aircraft, aircraft equipment and accessories and stores;

(b) manufacture and repair aircraft, parts and equipment thereof;

(c) acquire, construct and manage aerodromes, buildings and repair shops;

(d) acquire and operate lights, beacons, wireless, installations and other plant and equipment;

(e) subject to any directive, either general or particular given by the Communications Council to sell, let or otherwise dispose of any property belonging to it.

(f) enter into arrangements or agreements with any other person in relation to the establishment or maintenance of air transport services or facilities relating thereto;

(g) act as agents for, and provide services to, any other person engaged in the provision of air transport services or in other activities of a kind which the Corporation has power to carry on;

(h) undertake flights on charter terms or on terms which include payment for accommodation, transport by land or other facilities connected therewith;

(i) acquire, operate or manage restaurants and hotels and to provide accommodation in hotels for passengers and facilities for the transport of passengers to and from aerodromes and for the collection and delivery and storage of baggage and freight;

iii. The Board of Directors & Policy Control of the Corporation

The Board of the Corporation consists, among others, a Chairman and a Director-General who are both appointed by the Authority. In addition, there are eight other members; two of whom are appointed by the Authority while each of the Partner States appoints two members to represent it on the Board.[49]

Members of the Board are generally chosen from persons with experience in commerce, industry, finance, administration or with technical experience or qualification in aviation.[50] They are entitled to draw such allowances, remunerations or expenses as the Authority may determine; subject, however, to the proviso that such members of the Board who are civil servants either in the service of the Community or any of the Partner States shall not be entitled to any payments, except as the Authority may determine.[51]

Cont.
make, with persons caryying on a business of providing any facilities for passengers or freight in connection with air transport services, arrangements for the provision of such facilities; and

(k) hold shares in any other Corporation and to establish or acquire any subsidiary Corporation".

49 Ibid. Sec. 5.

50 Ibid.

51 Ibid. Sec. 7.

Policy control and direction over the affairs of the Corporation are vested in the Authority which may in this connection:-

"(a) give directions of a general nature to the Communications Council; and

(b) give directions to the Board as to the exercise and performance of the functions of the Corporation in relation to any matter which appears to the Authority to affect the public interest; and

(c) determine matters referred to it by the Communications Council or by the Board of Directors."[52]

This general power of the Authority over policy does not mean that the Board or the Communications Council are impotent. Under Annex XIII, Part D, Paragraph 3 of the Treaty and Section 12 of the East African Airways Corporation Act 1967,[53] the Board performsthe following duties subject to any directives given by the Authority or the Communications Council:

(a) the provision of air transport services, and facilities relating thereto, within the Partner States and elsewhere;

(b) the determination of policy governing the operation

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52 Supra.n.40.Annex XIII Part D at Paragraph 8.

53 Supra.n.41. at Section 13 and Op.cit.n.40. at paragraph 5 for the powers and duties of the Communications Council in E.A.A.C.

of the Corporation;

(c) keeping the Communications Council informed of the affairs of the Corporation, and to consult it where appropriate and give effect to its directions;

(d) approving the annual programme of services and the financial estimates submitted by the Director-General;

(e) preparing in respect of every five-year period of the operations of the Corporation a development plan, including estimates of expected traffic growth, proposals for the development of air routes and for the use and operation of aircraft, and estimates of probable revenue and expenditure for submission to the Communications Council;

(f) submitting to the Communications Council for approval any proposals affecting tariff policies in respect of international air services, which the corporation wishes to put forward to the International Air Transport Association;

(g) submitting to the Communications Council for approval any proposals for an alteration in the tariffs, rates, fares and other charges in respect of air transport services provided within the Partner States.

iv. Recruitment of Staff and Conditions of Service

The Chief Executive of E.A.A.C. is the Director-General who is appointed by the Authority. He is responsible for the Management and running of the Corporation. It is his duty to ensure that the Corporation carries out the policy directives of the Authority, the Communications Council and the Board. Statutory power is vested in the Director-General to

"(a) establish and operate air transport services, and facilities relating thereto, within the Partner States and elsewhere;

(b) approve recurrent expenditure within limits determined by the Board;

(c) approve any individual capital work of which the estimated cost does not exceed 200,000 Kenya shillings or such other sum as the Authority may, by order, determine;

(d) subject to the provisions of the Treaty, approve any alteration in salaries, wages or other terms and conditions of service of employees of the Corporation not involving expenditure in excess of the limits determined by the Board;

(e) approve any alteration in the organization or establishment of the Corporation other than an alteration involving a major re-organization or a substantial reduction in the number of employees; and

(f) allocate functions under this Act to employees of the Corporation".[54]

The Corporation appoints its own staff on such salaries or other terms and conditions of service as may be determined by the Board. The Board, however, may delegate to the Director-General its powers over staff matters. In this connection, the Director-General may "approve any alteration in salaries or other conditions of service not involving expenditure in excess of the limit imposed by the Board."[55]

D COMPARISONS AND CONTRASTS BETWEEN THE STATE-OWNED AIRLINES OF NIGERIA, GHANA AND THE EAST AFRICAN COMMUNITY

(1) While the State-owned airline of Nigeria was constituted as a Company registered under the Companies Decree, those of Ghana and the East African Community were incorporated as commercial Corporations under special statutes.

(ii.) Nigeria Airways has a nominal share capital which is now vested wholly in the Commissioner for Transport. In this respect it is similar to Ghana Airways Corporation which was

54-- Supra.n.41.Sec.11. 55-- Supra.n.52.at Paragraph 2(d).

endowed by its constituent instrument with some assets and working capital all of which are held in trust for the people of Ghana by the State. The East African Airways Corporation, on the other hand, was endowed at its reconstruction in 1967 with the assets and liabilities of the E.A.A.C. which were raised from loans, guarantee and issue of stock in a proportion laid down by the Governments of Kenya, Uganda and Tanzania.

(iii) The Board of Directors of Nigeria Airways, during the civilian regime, was composed of political appointees of the Minister of Aviation (as he then was). They were chosen usually without due regard being paid to the members having any special knowledge in business, finance, economics, technical or professional qualifications in aviation. Since the take over of the Government of the Federation by the Armed Forces, the position has slightly improved; in that the Board is now composed of professional civil servants, some of whom have qualifications in economics and finance and could be expected to discharge their functions without regard to political or other expediences. In this respect, the position is better in Ghana, in that the composition of the Board (both during the civilian regimes and the two regimes of the Military Forces) has generally been based on technical and professional competence in aviation, business and finance. In contrast

with Nigeria and Ghana, the success of East African Airways Corporation justifies the criteria applied in the choice of members of its Board, which require by a statutory provision, that such members must be persons with experience in industry, finance, administration or with technical experience or qualification in aviation.[57]

iv. In Nigeria, a statutory body known as the Statutory Corporations Service Commission is responsible for appointment, promotion and discipline of the intermediate and senior staff of Nigeria Airways Limited. In Ghana, on the other hand, the Corporation itself is responsible for all appointments, promotion and discipline, subject to the proviso that the appointments of the General Manager and Manager are made by the Commissioner for Transport upon the recommendation of the State Enterprises Secretariat and with the approval of the Cabinet. In the case of the Community, all appointments are made by the Corporation, except that the appointment of the Director-General is made by the Authority.

E CONCLUSIONS

(1) Every state has the right to determine for itself the structure of its designated flag carrier. Whether this takes the form of a registered company or a statutory cor-

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57
Supra. n.50.

poration, it is a fact that civil air transport undertaking is a capital-intensive business, which requires the services of highly skilled and specialized personnel. If Commonwealth Africa intends to make a significant impact in this enterprise, the respective governments must re-organise their national carriers, to enable foreign capital and management to invest and participate in these airlines as they already do in other spheres of the economy of the respective Commonwealth African States. In making this submission, we would enjoin, however, that every precaution must be taken by the governments to ensure, that "substantial ownership and effective control" of the airlines remain vested in the nationals of the respective states.

(2) Nigeria, of all the states of Commonwealth Africa considered here, is the only one whose national airline is a registered company rather than a statutory corporation. Nevertheless, Nigeria Airways Ltd. is treated like a statutory corporation, in that it is subject to the Statutory Corporations Service Commission for purposes of appointment, discipline and conditions of service of certain categories of its staff. We submit, that if the airline is to function efficiently as a company, it must be removed from the cate-

gory of state-owned companies and corporations subject to the Statutory Corporations Service Commission.

(3) The Head of State of Ghana has far reaching powers to take over, if he so desires, all or some of the affairs of Ghana Airways Corporation. Although no occasion has so far arisen when this power has been exercised, we submit, that the existence of this power on the Statute Book is an open invitation for interference in the affairs of the airline; which, in our submission, would be incompatible with efficient management and competitiveness of the airline.

PART FOUR

CHAPTER 10

FINAL SUMMARY AND CONCLUSIONS

We have examined in the preceding chapters, the legal regulation of civil aviation in Commonwealth Africa. We traced, for background purposes, the evolution of Nigeria, Ghana, Kenya, Uganda and Tanzania from the status of colonial dependency into independent sovereign membership of the Commonwealth. We saw the break up of the West African Airways Corporation and the West African Air Transport Authority during the final years of the colonial era in West Africa. We also saw the evolution and emergence of a multinational institution in East Africa from the Governors Conference of the Colonial era into the East African Community.

The introduction of air transport into the economic life of the colonies proved beneficial to these countries. All the various states have now evolved distinct legal machineries for regulating civil aviation in their respective territories, different from the regulatory machineries applied in the Colonial era, which, in any case, would have been unsuitable for their new status.

Problems of international law, particularly in treaty law required urgent attention and the need to establish and define the postures, practices and attitudes of the new States,

State succession, the negotiation and conclusion of bilateral and multilateral treaties, licensing, the designation and control of airports, the exercise of economic regulatory controls over the assets of foreign airlines operating in their respective territories, constituted the major legal problems for which all the states in Commonwealth Africa had to formulate fitting solutions during the periods of transition to independence and since the early stages of the post-independence era.

A legitimate interest in establishing civil airlines to serve as the flag carriers of the States in Commonwealth Africa led to the formation of Nigeria Airways Limited, Ghana Airways Corporation and the East AfricanAirways Corporation. Although these airlines still carry a small percentage of the world's air traffic owing to their limited means in procuring equipments, expertise, adequate aeronautical infra-structure and attractive and stable political climate, which are all necessary pre-requisite and stimulus for the development of tourism and reception of foreign capital investments. We submit, that if Commonwealth Africa intends to make an impact in the civil aviation field, the states would do well to consider the following suggestions in formulating their future civil aviation policies:-

1. We suggest the establishment of a National Task Force, Commission or Committee in each of the States of Commonwealth Africa to identify national aviation goals with a view to defining international and domestic aviation policies of the respective States.

2. We also suggest the setting up in each of the States of an Air Transport Consumers Council. This Council should be composed of representatives of the Chambers of Commerce, the Universities and other organised groups with a view to acting as watchdogs over licensing of air transport undertakings. Such an organisation would be particularly concerned with the tariff rates of domestic and international air transportation in Africa, which unfortunately, are excessively high when compared with the tariff rates of airlines in other parts of the world or of other I.A.T.A. Traffic Conference Areas.

3. We suggest the adoption of a system of "hearings" in which an applicant for a licence appears before the licensing authority either in person or by Counsel as is the practice in the U.K., Canada, U.S.A. Adoption of a system such as this would ensure openness in licensing operations rather than the present system whereby licensing looks more like some secret act of government. A system of hearings

would kindle public interest and awareness in this aspect of governmental function. It would lead to a system of rationalisation of air transport generally as the decisions of these "hearings" would, of necessity have to be based on some definite criteria. From this, a category of lawyers, air transport economists and administrators especially trained and qualified in all aspects of aviation law and practice would emerge, thereby ensuring that the standard of skill, competence and competitiveness of the national airlines of the respective Commonwealth African States compare favourably with those of "States of chief importance in air transport."

4. All the civil airports in Commonwealth Africa are at present owned, managed and controlled by the respective governments. We suggest the establishment of an Airport Authority in each of the respective states on similar lines as the British Airport Authority or the New York Airport Authority, with powers and resources to develop, manage and run airports on a strictly commercial basis. In addition, local communities may be encouraged to develop and manage local airports as an economic enterprise thereby opening up more areas to the benefits of air transportation and tourism.

5. In order to facilitate international commerce by air, the respective governments in Commonwealth Africa must consider, as a matter of primary objective, the lifting of Exchange Control Regulations in so far as they affect air transport.

6. The formulation and execution of civil aviation policies in Nigeria, which, since independence, have been carried out by Administrative Officers with no qualifications whatsoever in aviation need to be revised or looked into afresh. In this regard, we suggest the appointment of a Director-General of Civil Aviation in Nigeria and Ghana respectively as is the practice in Australia. Such an officer would be responsible for formulating and supervising the execution of civil aviation policies, maintain liason with I.C.A.O. and ensure in the respective territories prompt implementation of the decisions of the I.C.A.O. Council.

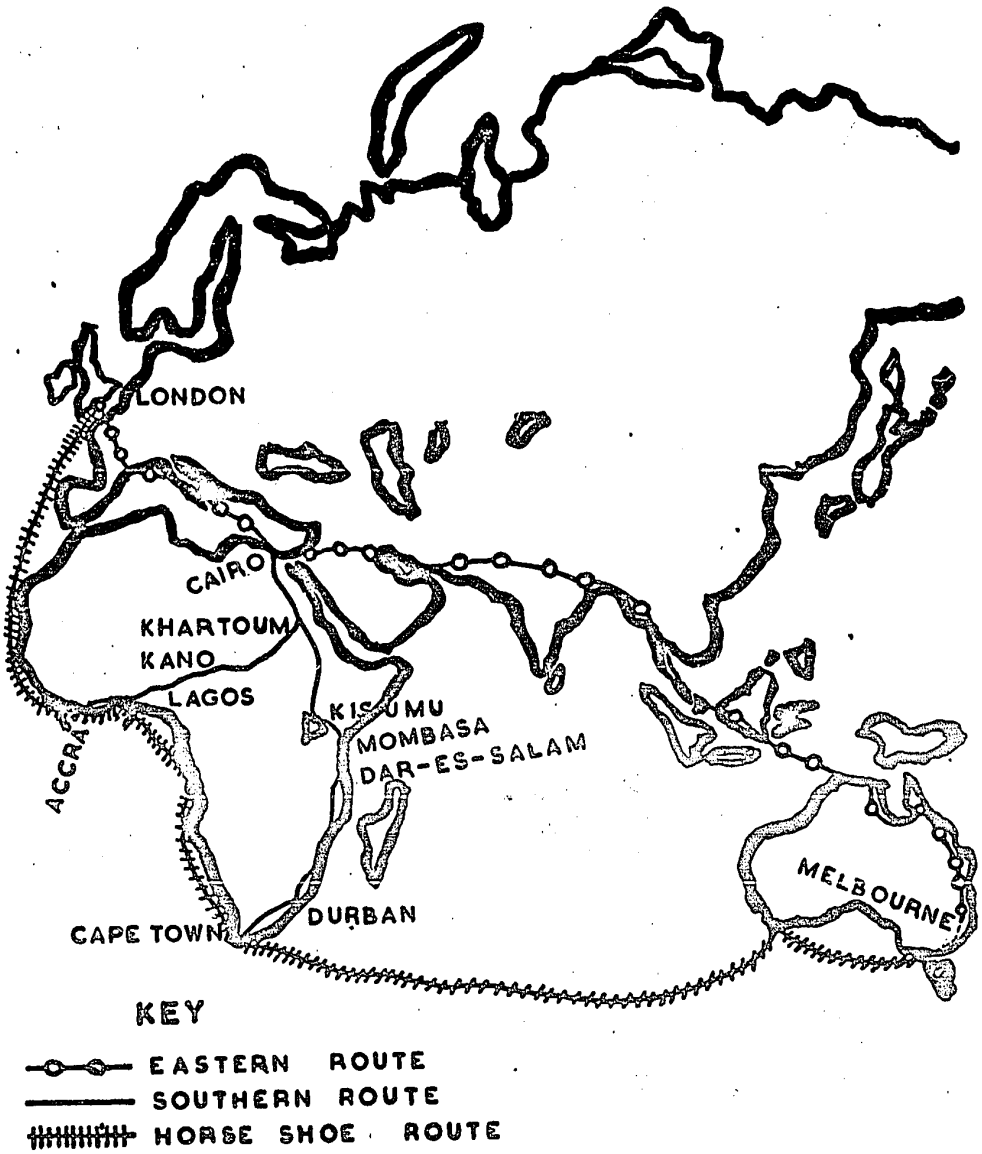
7. We suggest the resuscitation of the idea of a joint multinational airline for West Africa on the lines of E.A.A.C. or the Air Afrique. Such a venture might in the initial stages be confined to the countries that were partners in the old West African Airways Corporation. However, care must be taken to ensure that control of any airline which

might be set up would be exercised by all the states jointly and fairly, but not by any one individual state as was the unjustifiable control and overriding influence exercised by Nigeria in the affairs of W.A.A.C. Ultimately, membership of such a joint multinational airline might be open to all states in the West and Equatorial African region extending from Mauretania to Zaire. Such an enterprise will, in our submission, give some meaning and practicality to the desire for economic unity in West Africa along the lines of the East African Community or the European Economic Community.

The future prospects of civil aviation in Commonwealth Africa is bright if only the policy makers in the respective states would borrow a leaf from experiences of other states, and adapt these experiences to suit local conditions.

APPENDICES

BRITISH COLONIAL AIR ROUTES
1920 - 1950



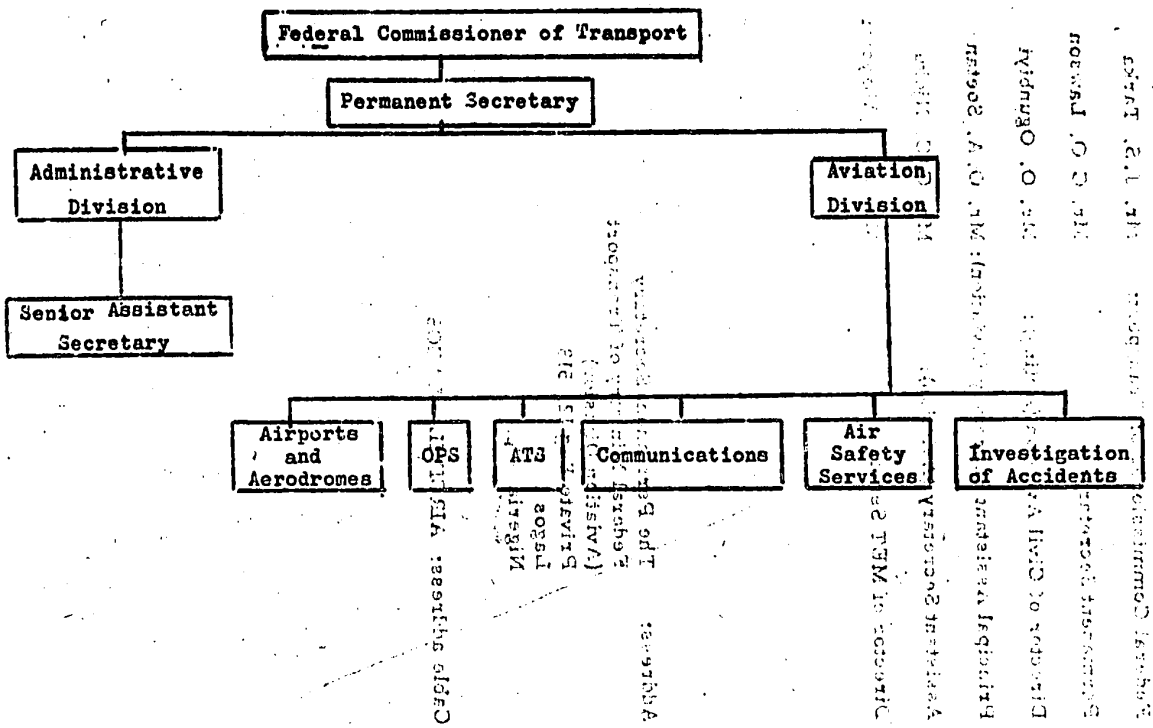
ORGANIZATIONAL CHARTS

OF

CIVIL AVIATION DEPARTMENTS

IN COMMONWEALTH AFRICA

NIGERIA

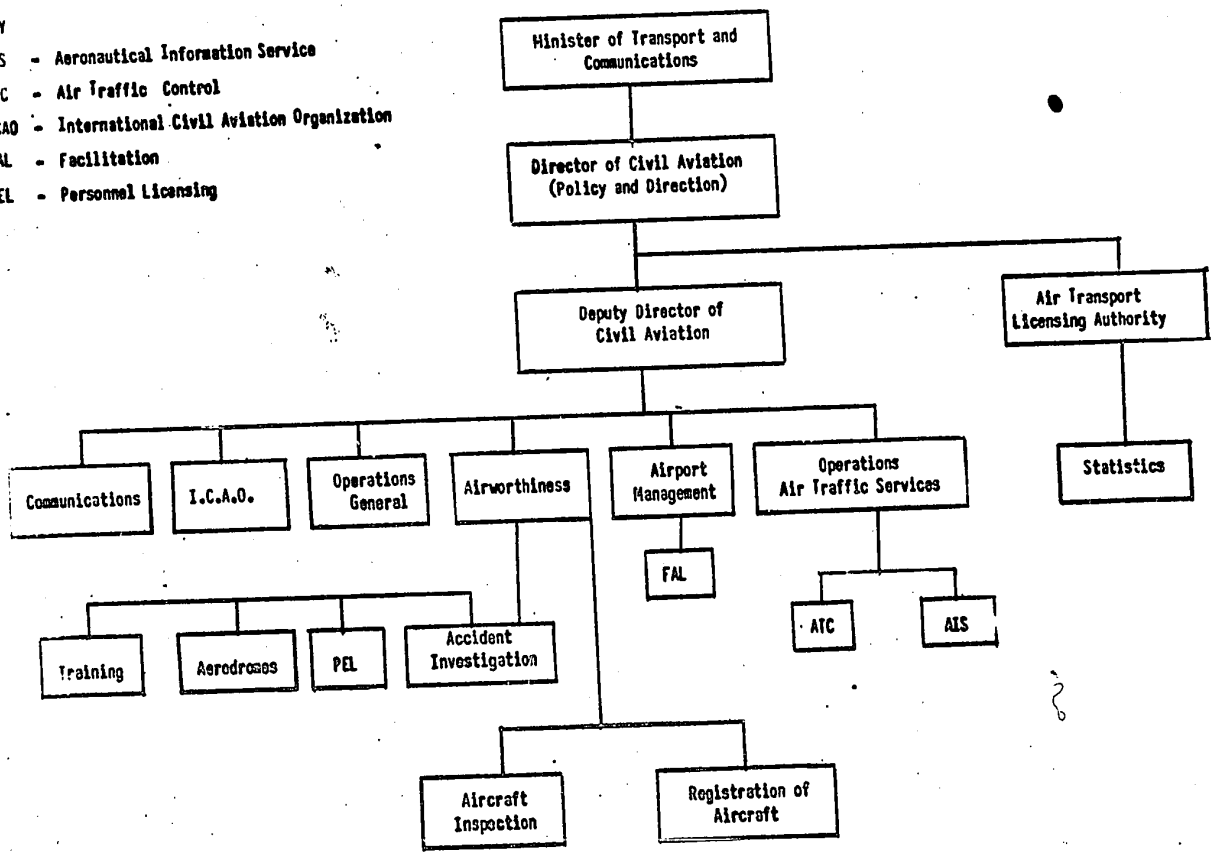

Federal Commissioner of Transport
Permanent Secretary
Administrative Division
Senior Assistant Secretary
Aviation Division
Airports and Aerodromes
OPS
ATS
Communications
Air Safety Services
Investigation of Accidents

GHANA

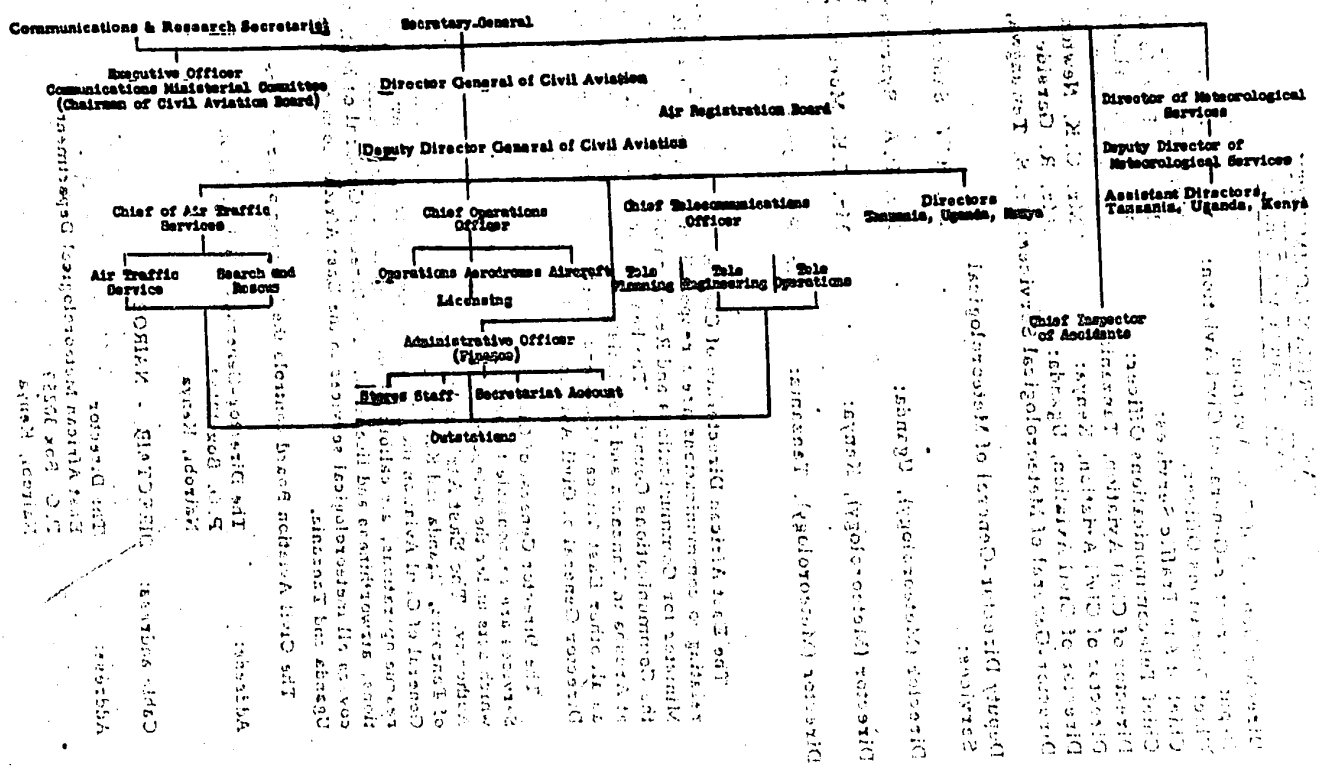
DEPARTMENT OF CIVIL AVIATION-STRUCTURE

KEY

AIS - Aeronautical Information Service
ATC - Air Traffic Control
ICAO - International Civil Aviation Organization
FAL - Facilitation
PEL - Personnel Licensing



THE EAST AFRICAN COMMUNITY



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