

## CORRESPONDENCE

TO THE EDITOR-IN-CHIEF

December 11, 1976

Professor Lissitzyn in his review of my book *Jurisdiction over Crimes on Board Aircraft* in this *Journal*, (70 AJIL 601-02 (1976)) faults me on three grounds. First, he maintains that my interpretation of Article 3 of the Tokyo Convention is unconvincing. He states that "particularly unconvincing [is the author's] position that Article 3 of the Convention excludes all jurisdictions other than that of the state of registration of the aircraft (with a qualified exception of the jurisdiction of the subjacent state under Article 4) doing away even with such a universally accepted basis of jurisdiction as the nationality of the alleged offender" (p. 601). While this author has raised the possibility of interpreting the provision without excluding the latter jurisdiction (p. 64), he preferred the interpretation cited by the learned reviewer because he considers it more in line with the objective and purpose of the Convention, *viz.* the unification of rules on jurisdiction. The latter is well explained on pp. 19-24 of the work. In this interpretation, the author relied on Article 31(1) of the Vienna Convention on the Law of Treaties (1969), Lord McNair and Sir Gerald Fitzmaurice (pp. 62-63), as well as the *travaux préparatoires*. The author maintains that the Tokyo Convention is intended to create a new regime of jurisdiction over crimes on board aircraft and the statement of the U.S. representative at the meeting of the ICAO Legal Committee 1962 is particularly relevant (quoted by author, pp. 22 and 60) but the following statement may be cited ". . . The principal purpose of Article 3(1) . . . had been to provide international recognition for the extraterritorial exercise of jurisdiction by one State over an event that might occur in the airspace of another. This was not a commonly accepted principle of international law."

Secondly, the learned reviewer states that the author's "statement that a signatory to the Tokyo Convention had the right to object to the admission of new parties to the Convention (p. 312) is justified neither by any provision in the Convention nor by anything in the law of treaties" (pp. 601-02). In putting forward the proposition concerning the right of signatory states prior to ratification, to object to reservations or the admission of new parties, the author relied on the Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951) and the statement of Sir Gerald Fitzmaurice, the Special Rapporteur, in his Report on the Law of Treaties (1956) (pp. 311-12). The International Court said:

. . . [Signature] establishes a provisional status in favour of that State [which has signed]. . . This status would justify more favourable treatment being meted out to signatory States in respect of objections [to reservations] than to States which have neither signed nor acceded. . . Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character ([1951] ICJ REP. 28.

On the other hand, Sir Gerald Fitzmaurice said:

. . . while a merely "concluding" signature can confer no substantive rights under the treaty, it may confer certain rights in connexion with it. . . Certainly sig-

nature confers a status, and with it the rights inherent in that status. The whole balance of a treaty is capable of being altered after signature by the admission of reservations, or of other acceding parties, so that a signatory State may find that the treaty it has signed . . . is, in effect, no longer the same treaty. ([1956] 2 Y.B. INT. L. COMM. 122, para. 59.)

The absence of any indication in the review to the author's basis may distort the picture and can only mislead the reader.

Thirdly, the learned reviewer maintains that the author's ". . . view (pp. 324, 325) that a state would automatically cease to be a party to the Convention if it ceased to be a member of the United Nations and of any specialized agency because only a member of one of these organizations may become a party to the Convention is highly questionable" (p. 602). The author's interpretation is based on the *travaux préparatoires* of the Tokyo Convention and the circumstances prevailing at the Tokyo Conference of 1963. The origin of the final clauses of the Tokyo Convention is the final clauses of the Guadalajara Convention (1961), Supplementary to the Warsaw Convention 1929 (see International Conference, Tokyo, Vol. II, ICAO Doc. 8565-LC/152-2, Doc. No. 4, at 21) which contained, at first, the "all States clause" but were amended to limit partnership in the Convention to members of the United Nations and those of the specialized agencies, on the basis of a U.S. proposal (see International Conference on Private Air Law, Guadalajara (1961), ICAO Doc. 8301-LC/149-1, at 225-228 and 8301-LC/149-2, at 51). Moreover, statements made at the Tokyo Conference by some of the participants from both the Western and Socialist states, *e.g.*, those of the delegations of the Federal Republic of Germany, the United States and the USSR, together with the fact that the invitation to attend the Tokyo Conference was limited to members of the United Nations and the specialized agencies, would seem to provide some basis, in the author's opinion, for his interpretation in this respect (see pp. 300-02 of the work and Tokyo Conference, ICAO Doc. 8565-LC/152-1, at 7-9 and 353-55). Furthermore, the author used a cautious terminology such as "it is possible to argue," "it is feasible to maintain" and "the question is not crystal clear under the Convention" (p. 323), which the reviewer might perhaps have failed to notice. Again, the absence of any reference to this page could convey a wrong impression even to the careful reader.

Finally, I would like to state that the book is the edited and updated thesis accepted for the degree of Doctor of Philosophy at Cambridge University. It had been supervised by Professor R. Y. Jennings and was examined by Mr. John Collier and Professor David Johnson.

SAMI SHUBBER

*Professor Lissitzyn responds:*

Below is my reply to the three points in Dr. Shubber's letter:

First, the objective and purpose of a treaty are certainly relevant to its interpretation, but the Tokyo Convention contains no statement of its objective and purpose. They are inferred by Dr. Shubber mainly from some passages in the records of the Legal Committee of ICAO whose work laid the foundation for the Tokyo Conference. These inferences should not be allowed to render meaningless a specific provision of the Convention, Article 3(3) quoted in full in my review, which explicitly preserves "any criminal jurisdiction exercised in accordance with national law."