SEPARATE OPINION OF JUDGE SIR HERSCH LAUTERPACHT

While, for reasons which I deem it incumbent upon me to state, I am unable to accept some of the contentions advanced by the defendant Government and upheld by the Court, I arrive on other grounds at the same results as does the Judgment. I do so by reference to considerations of public policy, of *ordre public*—a question which occupied the main part of the written and oral pleadings, which figures exclusively in the formulation of the legal issue in the final Conclusions of both Parties, and which I feel therefore bound to examine in the present Opinion.

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The facts underlying the controversy between the Parties are stated in detail in the Judgment of the Court. For the purpose of this Opinion it is sufficient to recapitulate briefly the crucial aspect of the dispute: The Hague Convention of 12th June, 1902, on Guardianship of Infants, to which both Sweden and the Netherlands are Parties, provides in Article 1 that the guardianship of an infant shall be governed by the national law of the infant. It is clear from the various articles of the Convention, and it is not disputed by the Parties, that such guardianship extends normally to the custody of the person of the minor. In accordance with the provisions of the Convention, a Dutch guardian was appointed in 1954 by a Dutch Court over Elisabeth Boll who, although born in Sweden and permanently resident there since her birth, is of Dutch nationality. In the same year, various Swedish authorities, in a series of decisions and in circumstances which appear from the Judgment, applied to Elisabeth Boll the Swedish Law of 1924 concerning the Protection of Children and Young Persons (Child Welfare Act)—which will be referred to in this Opinion as the Law on Protective Upbringing. By one of these decisions the custody of the person of Elisabeth Boll was taken over in 1954 by the Child Welfare Board at Norrköping, the place of residence of Elisabeth Boll. The Board, in turn, entrusted the custody of Elisabeth to her maternal grandfather—such custody to be exercised on behalf of the Board. That measure was finally confirmed by the Supreme Administrative Court of Sweden. It must be noted that in a series of decisions the Swedish courts and authorities otherwise recognized the guardian appointed by the Dutch court.

The principal justification which the Swedish Government adduced for the action taken by the Swedish authorities was that

the Law on Protective Upbringing is a measure of *ordre public* and that the reliance on it, far from being in violation of the Convention, is implied in it. In the course of the written and oral pleadings subsidiary arguments were relied upon by the Swedish Government. One of them was the contention that the Convention of 1902, being a Convention on Guardianship, does not cover the Swedish Law on Protective Upbringing said to pursue a different object and to lie in a different field. It is that line of argument which has acquired prominence in the present case and which must be examined in the first instance.

That manner of approach, as expressed in or as underlying the Swedish argument, may be summarized as follows: There is no incompatibility between the Guardianship Convention and the Law on Protective Upbringing. The Convention, which is concerned with guardianship, does not cover protective upbringing. The latter is outside the Convention. This is so although the effect of the Law on Protective Upbringing is such as to render impossible, for the time being, the exercise by the Dutch guardian of the right of custody of the person of Elisabeth Boll. The object and purpose of the Law on Protective Upbringing is wholly different from that of the Guardianship Convention. The Court is not concerned with the incidental effects of the Law on Protective Upbringing but with its nature and purpose. Guardianship and protective upbringing are wholly different institutions. The former is concerned with the interests of the minor, the latter with the interests of society. Guardianship is in the sphere of private law. Protective upbringing is in the sphere of public law. The Convention, which is one on *private* international law, can be violated only by legislation in the sphere of private international law. From the point of view of their nature and purposes, the Convention and the Law on Protective Upbringing operate on wholly different planes and there is, therefore, no question of the Law and the measures taken thereunder being incompatible with the Convention.

The reasoning underlying these contentions raises important questions, transcending the issue immediately before the Court, of interpretation and observance of treaties. If a State enacts and applies legislation which, in effect, renders the treaty wholly or partly inoperative, can such legislation be deemed not to constitute a violation of the treaty for the reason that the legislation in question covers a subject-matter different from that covered by the treaty, that it is concerned with a different institution, and that it pursues a different purpose? I have considerable difficulty in answering that question in the affirmative. The difficulty is increased by the fact that the conflict between the treaty and the legislation in question may be concealed, or made to be concealed, by what is no more than a doctrinal or legislative difference of classification. An identical provision which in the law of one country forms part of a law for the protection of children may, in

another State, be included within the provisions relating to guardianship. That, as will be shown, is no mere theoretical possibility. It is in fact a conspicuous feature of the present case.

What is the meaning of the expression: "The Convention of 1902 does not cover a system such as that set up in the Swedish Law on Protective Upbringing"? It is admitted that guardianship under the Convention covers the right to decide on the residence and education of the minor—a right claimed and exercised by a Swedish authority and, on its behalf, by the Swedish maternal grandfather acting in pursuance of the Law on Protective Upbringing. If that is so, then the Convention does cover, in one of its essential aspects, the same powers and functions which are now exercised by Swedish authorities in pursuance of the Law on Protective Upbringing. The substance is the same although the purpose of the Convention and of the Law may be different. It may be said that what matters is not the substance of these functions but their object. It is not easy to follow that distinction. When a State concludes a treaty it is entitled to expect that that treaty will not be mutilated or destroyed by legislative or other measures which pursue a different object but which, in effect, render impossible the operation of the treaty or of part thereof.

The treaty covers every law and every provision of a law which impairs, which interferes with, the operation of the treaty. It has been said that the Law in question may have an adverse effect upon subject-matter of the treaty without being covered by the treaty. However, what the Court must be concerned with is exactly the effect of the Law inasmuch as it impairs the operation of the treaty, and not the notional identity or otherwise of the objects pursued by the Law and the treaty. The treaty prohibits interference with its operation unless there is a justification for it, express or implied, in the treaty; that justification cannot be found in the mere fact that the Law pursues an object different from the object pursued by the treaty. It can be found only in the fact that that particular object is expressly permitted by the treaty or implicitly authorized by it by virtue of some principle of public or private international law—a principle such as stems from public policy or from a cognate, although more limited, principle, which is often no more than another formulation of public policy, namely, that certain categories of laws, such as criminal laws, police laws, fiscal laws, administrative laws, and so on, are binding upon all the inhabitants of the territory notwithstanding any general applicability of foreign law.

The following example will illustrate the problem and the consequences involved: States often conclude treaties of commerce and establishment providing for a measure of protection from restrictions with regard to importation or export of goods, admission and residence of aliens, their right to inherit property, functions of consuls, and the like. What is the position of a State which has concluded a treaty of that type and then finds that the other Party

whittles down, or renders inoperative, one after another, the provisions of that treaty by enacting laws "having a different subject-matter" such as reducing unemployment, social welfare, promotion of native craft and industry, protection of public morals in relation to admission of aliens, racial segregation, reform of civil procedure involving the abolition of customary rights of consular representation, reform of the civil code involving a change of inheritance laws in a way affecting the right of inheritance by aliens, a general law codifying the law relating to the jurisdiction of courts and involving the abolition of immunities, granted by the treaty, of public vessels engaged in commerce, or any other laws "pursuing different objects"? It makes little or no difference to the other Party that the treaty has become a dead letter as the result of laws which have so obviously affected its substance, but which pursue a different object. As stated, some of these laws may be justified as being within the domain of public policy or for some cognate reason. However, the argument here summarized does not proceed on these lines. It is based on the allegation of a difference between the treaty and the Law which impedes its operation.

Another example, directly relating to the Convention of 1902, will illustrate the problem from a different point of view. Article 2 of the Convention lays down that in some cases the diplomatic or consular agents authorized by the law of the State of which the infant is a national may make provision for guardianship in accordance with the law of that State. What is the position if a Contracting Party enacts a general law—a law of public character on a quite different plane—relating to the immunities and functions of foreign diplomatic and consular representatives providing that in the future foreign diplomatic and consular representatives shall not perform any act affecting private rights in the territory of that State? Can that State plead that, as the Convention and the Law pursue a quite different purpose, it does not matter that the effect of the Law is to frustrate one of the provisions of the Convention?

The conspicuous fact in the present case is that the Dutch guardian acceptable to the father of the infant and appointed under Dutch law in accordance with the Convention was replaced, in respect of the exercise of the right of custody, by the Swedish maternal grandfather of Elisabeth Boll acting on behalf of the Children's Bureau. The Dutch authorities and the Dutch guardian may not unnaturally hold the view that the custody exercised by the Swedish grandfather is, in fact and in the circumstances of the case which reveal some dissension between the Dutch and the Swedish branches of the family, to a large extent a rival guardianship. They may find it difficult to appreciate the suggestion that there is no conflict between the Convention and the measures taken

seeing that they lie on a different plane and pursue different objects. The situation is not affected by the continuing right of the Dutch guardian to administer the property of the child or to institute proceedings for the restoration of her functions of custody. So long as the exercise of the right of custody is vested in the hands of the Swedish authority and the Swedish maternal grandfather of Elisabeth Boll acting on its behalf, there is a nullification of the essential attributes of the guardianship as instituted by the Convention. There may be—and as will be suggested later on, there is—a full justification for that measure in considerations of a different character. That justification cannot be found in the allegation, which is controversial, that the Dutch guardianship and the Swedish protective upbringing are wholly different institutions.

A State is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty. There is a disadvantage in accepting a principle of interpretation, coined for the purposes of a particular case, which, if acted upon generally, is bound to have serious repercussions on the authority of treaties. As stated, the Convention and the particular provision of the Law on Protective Upbringing cover, in relation to the present dispute, the same ground and the same subject-matter. It has been said that there is a technical difference, inasmuch as they lie on different planes, between the Convention and the Law on Protective Upbringing. Assuming that there is a technical difference, it may still be considered undesirable that a dispute between two Governments shall be decided by reference to a controversial technicality in a case relating to significant issues of substance—a technicality which, if acted upon generally, would introduce confusion, or worse, in the law of the operation of treaties. Once we begin to base the interpretation of treaties on conceptual distinctions between actually conflicting legal rules lying on different planes and for that reason not being, somehow, inconsistent, it may be difficult to set a limit to the effects of these operations in the sphere of logic and classification.

The view has been put forward that there can be no conflict between a Convention on Guardianship and the Law on Protective Upbringing for the reason that the Convention of 1902 is a convention of private international law and that guardianship with which it is exclusively concerned is an institution of private law, in particular of family law, while the Law on Protective Upbringing and the various measures authorized therein are in the sphere of public law seeing that they are concerned with safeguarding the interests of society. Even if these reasons were otherwise acceptable, an essentially doctrinal classification and distinction provides a doubtful basis for judging the question of the proper observance of

treaties. However, there is in the present case a particular difficulty in acknowledging the force of that distinction.

An examination of the main systems of municipal law in the matter of guardianship does not corroborate the view that it is a mere family institution of a purely private law nature. The principal justification for that view is that, by way of traditional classification, guardianship finds a place in codes of private law and that it creates numerous rights and duties in the sphere of private law. However, at the same time guardianship can rightly be described as an institution in which the guardian acts as an organ of the State, as it were, and therefore partakes of the nature of an institution of public law. He acts under the active supervision of the State which may step in at any time—in the interest both of the child and society—and supplant the guardian, wholly or in part. There are very few countries the law of which is based exclusively upon a private law and family conception of guardianship. The law of the majority of States, including Holland and Sweden, on this matter is characterized by an active intervention of the State as an organ of control and supervision at every stage. In some countries, such as Germany, the protection of minors is entrusted mainly to the State which acts through a special tribunal—the Guardianship Court—and it is only by way of exception that these functions are delegated to the family council. It is of interest to note that prior to the Hague Conventions which examined the various drafts of the Convention on Guardianship, the difference between the two systems—*"tutelle de famille"* (family guardianship) and *"tutelle d'autorité"* (authority guardianship)—was clearly recognized. That distinction was, for instance, elaborated in 1902 by M. Lehr, Secretary of the Institute of International Law, which had a substantial share in the preparation of the first drafts of the Convention (Lehr, "De la tutelle des mineurs d'après les principales législations de l'Europe", *Revue de droit international et de législation comparée*, 2nd series, Vol. 4 (1902), pp. 315 *et seq.*). He classified both the Dutch and Swedish systems of guardianship as belonging to the group of *"tutelle d'autorité"* (pp. 320, 326, 329).

In view of this, it does not seem to me possible to accept the argument based on the notion of a purely private law and family character of guardianship. How artificial are the distinctions between the supposed private law character of guardianship and the assumed public law character of systems of protective supervision or upbringing of children, apart from the normal operation of guardianship, may be gauged from the fact that the matter is entirely a question of legislative technique and drafting. That may be seen, for instance, from the provisions of the Dutch Civil Code relating to guardianship and contained in Part XV of Book I of the Code. Section A 1 of Part XV covers Paternal Power; Section B 2 covers Paternal Guardianship; while Section B 3, which according to Section B 9 is applicable to guardianship, embodies largely the same

provisions as are embodied in that part of the Swedish Law on Protective Upbringing which was applied in the case of Elisabeth Boll. That Section, in language almost identical with that of the above-mentioned Swedish Law, provides, in paragraph 365, for the taking of certain steps "if a child grows up in any such a way as to be threatened with moral or physical harm". These steps may be taken at the instance of Guardianship Councils, for which provision is made in the same part of the Law and which, under the authority of courts of law, fulfil functions similar to those of the Children's Bureau under the Swedish Law of 1924 (Sections 461 *et seq.*). The same Section A 3 makes provisions for children in that situation being placed by the Judge of the Children's Court in an observation centre for mental or physical examination, or, if the child needs special observation, in an institution selected for that purpose (paragraph 372 *a* and *b*). The German Civil Code, in the Section on Guardianship, provides in a single Article—Article 1838—that the Guardianship Court can order the placing of the minor with an appropriate family or in an educational or reformatory institution—a kind of provision which is found in the Swedish Law of 1924. It is a matter of legislative technique and drafting whether the provisions for the protection of children in relation to whom normal guardianship has proved insufficient are, as in Holland, made part of the legislation relating to guardianship or whether, as in the case of Sweden, they are embodied in a separate enactment. In both instances they are intended to protect both the child and the society.

For it is clear that the distinction between the protection of the child and the protection of society is artificial. Both the laws relating to guardianship and those relating to protective upbringing are laws intended primarily for the protection of children and their interests. At the same time, the protection of children—through guardianship or protective upbringing—is pre-eminently in the interests of society. They are part of it—the most vulnerable and most in need of protection. All social laws are, in the last resort, laws for the protection of individuals; all laws for the protection of individuals are, in a true sense, social laws. There is an element of unreality in making these two aspects of the purpose of the State the starting-point for drawing legal consequences of practical import. It is wholly unreal to insist that the measures taken under the Law on Protective Upbringing for the safety, health and happiness of Elisabeth Boll were not measures taken primarily in the interest of that child—and therefore not measures of guardianship of her person—but primarily in the interest of society at large and therefore falling within a quite different category. It is in the light of these considerations that it is necessary to judge the view that as the Guardianship Convention of 1902 is concerned only with a private law institution of family relationship devoid of any public element, there can be no conflict between it and an enactment

of an exclusively public law character such as the Swedish Law on Protective Upbringing. Even if every link of that proposition could be substantiated by reference to national law as operating in most countries—and that does not appear to be the case—there would still remain the difficulty of assessing the content of the statement that there can be no conflict between a treaty regulating a sphere of private law and national enactment in the realm of public law.

Undoubtedly, the Convention of 1902 was intended to regulate conflicts of law in the sphere of guardianship. But there is no persuasive reason for accepting the suggestion that the relevant provisions of the Swedish Law on Protective Upbringing, under which the custody of Elisabeth Boll was entrusted to the care of her maternal grandfather in his home under the authority of the Children's Board, has nothing to do with guardianship, seeing that they are of a public law nature. Similarly, it is difficult to accept the suggestion that guardianship, instituted in the private interest of the child, is devoid of a substantial public element of social purpose. The rights of the parties, especially in an international dispute, ought not to be determined by reference to the controversial mysteries of the distinction between private and public law. The fact that the purpose of the Convention of 1902 is to establish rules for avoiding conflicts of laws in the sphere of guardianship does not mean that that sphere is confined to laws *described* as guardianship; it covers all laws, however described or classified, which fulfil an essential function of guardianship. It is part of the firmly established jurisprudence of this Court that with regard to national laws bearing upon treaty obligations what matters is not the letter of the law but its actual effect.

However, it is not necessary to labour this point. The preceding considerations are, in my view, sufficient to show the decisive difficulties inherent in the proposition that a State can properly claim to depart from the obligations of a treaty by enacting laws which, although they impair the operation of the treaty, are said not to conflict with it on the ground that they lie on different planes or are concerned with a different subject-matter.

Clearly, the guardian does not enjoy immunity from the operation of local law, such as criminal law, which may deprive him of the custody of the minor placed in a penal or reformatory institution. The guardian is subject to laws relating to education, health, revenue and so on. However, although, in the absence of a more substantial justification than differences of classification, the guardian enjoys no immunity from local law, he is entitled, in principle, to immunity from being deprived permanently or semi-permanently of

some of the main attributes of guardianship such as custody of the child—especially if such custody is made the subject of what, in the circumstances of the case, is apt to give the impression of a rival guardianship. There may be a justification for such deprivation but that justification cannot properly be based upon factors which are essentially of a technical character. In my view, the more accurate approach to the question is not that the system of protective upbringing is outside the Convention or that it pursues a different object but, rather, that it is not inconsistent with the Convention. In other words, that it is both covered and permitted by the Convention by virtue of public policy—*ordre public*—or some similar reason based on the right, conceded by international law, of a State to apply a particular law impairing or preventing the operation of the Convention.

In fact, it is in that sense that I understand—and concur in—that part of the Court's Judgment which stresses the beneficent social objects, of an urgent character, of the Swedish Law in question. That is a consideration closely related to those underlying the notion of *ordre public*. It is this aspect of the question which I deem it incumbent upon me to examine in some detail in the present Opinion.

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Prior to that, reference must be made to an ancillary submission of Swedish Counsel bearing upon the possible effects of a ruling that the Swedish Law on Protective Upbringing does not apply to children of Dutch nationality. It was pointed out on behalf of the Swedish Government that any such interpretation of the Convention would result in a dangerous legal vacuum. It was urged that as Dutch administrative authorities are responsible for giving effect to the provisions of the Dutch law in the sphere of the protection of children and that as, according to international law, no State can perform administrative acts in the territory of another State, the result would be that Dutch children in Sweden who are in need of care outside guardianship would remain altogether without protection.

It must be conceded that, if only possible having regard to the intention of the Parties, a treaty ought to be interpreted so as to permit rather than to impede desirable measures of social protection. However, it appears to me that the spectre of a legal vacuum, as pictured on behalf of the Swedish Government in this connection, is illusory. Normally, the Dutch guardian would, in such cases, take the necessary steps to remove the child to Holland. In cases when that is not possible, the Dutch guardian would place the child in an appropriate home (as was, in fact, contemplated for a time by the Dutch guardian of Elisabeth Boll) or take other steps required by the physical or mental condition of the child

such as placing it in an institution for observation or treatment. In exceptional cases in which, for one reason or another, the guardian fails to act or to act satisfactorily, necessary measures would be decreed by the Dutch authorities. However, according to Dutch law these are not administrative authorities. They are judicial authorities applying Dutch law which Sweden, by virtue of the Convention, is bound to recognize and the respect for which she is bound to ensure in good faith without requiring any additional treaty arrangements for that purpose. Thus the above-mentioned Article 365 of the Dutch Civil Code provides that if the child grows up in such a way as to be threatened with moral or physical harm the Judge of the Children's Court may place it under supervision. It is also upon the Judge of the Children's Court that Articles 372 *a* and 372 *b* of the Code confer the power to place the child in an observation centre or, if it needs special discipline, in an appropriate institution. Under Article 461 *c* it is for the Judge, on the initiative of the Guardianship Council, to order the necessary steps when the infant is not under required legal authority or in other cases of urgency. It must be added that such exceptional measures of protection with regard to a child remaining in Sweden would, in practice, be the same as would be taken by Swedish authorities in similar circumstances and that therefore no considerations of Swedish *ordre public* would stand in the way of their execution.

Undoubtedly, the task of Dutch judicial authorities in taking the measures in question might be rendered somewhat more difficult than would otherwise be the case seeing that they might have to obtain the necessary information with regard to a situation in a foreign country. But these difficulties—which lie wholly outside any legal problem of the applicability of foreign administrative law—are inherent in a Convention which sanctions and prescribes the operation of the national law of the infant. In days of rapid travel, which makes possible visits by the interested parties or representatives of Guardianship Councils or other institutions, and facilities of postal communication, these difficulties are considerably reduced. In any case, as stated, they refer to a wholly exceptional situation; as such they appear somewhat unreal when adduced as a decisive factor with regard to the interpretation of the Convention. They seem to me an unsubstantial ground for permitting a departure from its language and purpose. For these reasons, I cannot accept that particular argument advanced on behalf of the Government of Sweden.

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As already stated, reliance upon *ordre public*—public policy—constitutes the main feature in the written and oral pleadings of the Parties. This is the only submission, in the nature of legal prin-

ciple, in the final Conclusions of the Parties. The Court is not rigidly bound to give judgment by exclusive reference to the legal propositions as formulated by the Parties in their Conclusions. However, I consider that I ought not to disregard the Conclusions of the Parties formulating exhaustively the legal issue between them. The position is analogous to that in which the Parties have concluded a special agreement defining the legal issue between them and asking the Court to pronounce upon it as part of its operative decision. It is only when it is abundantly clear that the formulation, adopted by the Parties, of the legal issue cannot provide a basis for the decision and that there is another legal solution at hand of unimpeachable cogency, that I would feel myself free to disregard the Conclusions of the Parties. Neither of these conditions seems to me to obtain in the present case. (It may be pointed out in this connection that the position is here different from that in the *Fisheries* case in which the Court declined to render judgment by reference to general "definitions, principles and rules" formulated by *one* Party. *I.C.J. Reports 1951*, p. 126.) Admittedly, the legal issue as thus expressed by the Parties in their pleadings and Conclusions in the present case touches directly upon a difficult and controversial question which has constituted one of the crucial problems in the sphere of private international law and which brings into prominence the relation between private and public international law.

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Does the Guardianship Convention of 1902, which contains no express exception of *ordre public*, permit reliance upon it? This seems to be the crucial question. However, before an attempt is made to answer it, there are two preliminary observations which must be made in this connection.

The first is that caution must be exercised with regard to the manner in which the question is put in the present context. It seems incorrect to put the problem in some such form as: "Shall the Court apply the Convention or shall it apply *ordre public?* Which comes first?" For there is no question here of choosing between the Convention and *ordre public*. If that were the alternative, clearly the Court would have no option but to apply the Convention. The question is whether the Convention, viewed in its entirety and in the light of relevant principles of interpretation—and not merely by reference to its bare letter—permits the exception of *ordre public*. For these reasons no assistance can be derived from the various pronouncements of the Permanent Court of International Justice to the effect that national legislation cannot be validly invoked as a reason for non-compliance with an international obligation. The problem now for the Court is, exactly, what is the international obligation at issue.

The second preliminary question is whether legislation relating to protective upbringing of children is properly comprised within the sphere of *ordre public*, that is to say, whether, notwithstanding any apparent treaty provision to the contrary, *ordre public* covers exceptional measures for the protection of minors in addition to and to the exclusion of guardianship operating in normal circumstances. That question must clearly be answered in the affirmative. Apart from criminal law, it is difficult to conceive of a more appropriate and more natural object of *ordre public*, as generally understood, than the protection by the State of infants, especially when they are helpless, ill, an actual or potential danger to themselves or to society, a legitimate object of its compassion and assistance, and an occasion for public resentment whenever the State fails to measure up to its responsibilities in this respect. There are, in that wide and highly controversial province of *ordre public*, matters which are the object of uncertainty and occasional exaggerations of national prejudice reluctant to apply foreign law. But there is a hard core within that field which is not open to reasonable challenge. The protection of children, in the sense indicated above, is an obvious particle of that hard core. Mention may be made in this connection, as emphasizing this aspect of guardianship (which is exemplified, in its wider sense, in the system of protective upbringing), of the fact that in English law the Crown as the *parens patriae*—the parent of the country as a whole—is the supreme guardian of infants and, through its Courts, exercises its authority in this respect, at every stage, with total disregard of any artificial formalities of the law. The Guardianship Act of 1925 provides in Section 1 that, when in proceedings before any court custody or upbringing of an infant are in question, the Court in dealing with the matter "shall regard the welfare of the infant as the first and paramount consideration" and shall not decisively take into account any claim, based on any particular rule of law, of the father or the mother to a superior right of custody and control.

The notion of *ordre public* is generally used in two meanings: It is either applied as referring to specific spheres of the law, such as territorial laws, criminal laws, police laws, laws relating to national welfare, health and security, and the like; from this point of view, protective upbringing clearly comes within the notion of *ordre public*. Secondly, it is resorted to as embracing, more generally, fundamental national conceptions of law, decency and morality. From this point of view, too, the protection of the interests of the minor through measures such as protective upbringing falls naturally within the notion of *ordre public*. (It may be stated in the present context that although in this Opinion the French term *ordre public* is mainly used, it is not used as implying a substantial difference

between it and the notion of public policy in common law countries such as the United Kingdom or the United States of America—although probably the conception of *ordre public* is somewhat wider. It is used here for the reason that it is current in the law of two States which are parties to the dispute.)

Admittedly, in answering the question as here put we are confronted with the following dilemma: Is it the Swedish *ordre public* by reference to which that question must be answered? If that is so, is the Court competent and in the position to examine a matter of Swedish *ordre public*, of Swedish municipal law? It is clear that that question must be answered in the affirmative. The examination of municipal law, wherever that is necessary, is a proper function of the Court; it has undertaken it on repeated occasions. Neither do the intricacies of *ordre public* set a limit to that legitimate function of the Court. In the *Serbian Loans* case the Court examined the French law and the French judicial practice in the sphere of *ordre public* in relation to currency legislation (*P.C.I.J.*, Series A, Nos. 20/1, pp. 46, 47). However, the question that must be answered in this connection is not only whether protective upbringing of children falls, according to Swedish law, within the Swedish *ordre public* but also whether it can properly be included as falling within that sphere. That question cannot be answered by reference to Swedish law only. It can be answered in reliance on a notion of *ordre public* conceived as a general principle of law—an aspect of the question referred to below.

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If protective education of children falls legitimately within the sphere of public order, then—and only then—there must be considered the main question, namely, whether public order, if not expressly permitted by the Convention, can be invoked at all; whether it has been properly invoked in the present case; and, if so, whether the Law on Protective Upbringing has been applied by the Swedish authorities in a manner which is reasonable and not manifestly contrary to the object and the principles of the Convention.

Does the conception of *ordre public* operate at all in the present case? This is the central issue before the Court. It can be examined here only in brief outline:

In the first instance, the Convention now before the Court is a Convention of public international law in the sphere of what is generally described as private international law. This means: *(a)* that it must be interpreted, like any other treaty, in the light of the principles governing the interpretation of treaties in the field of public international law; *(b)* that that interpretation must take

into account the special conditions and circumstances of the subject-matter of the treaty, which in the present case is a treaty in the sphere of private international law.

Secondly, in the sphere of private international law the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally—or, rather, universally—recognized. It is recognized in various forms, with various degrees of emphasis, and, occasionally, with substantial differences in the manner of its application. Thus, in some matters, such as recognition of title to property acquired abroad, the courts of some countries are more reluctant than others to permit their conception of *ordre public*—their public policy—to interfere with title thus created. However, restraint in some directions is often offset by procedural or substantive rules in other spheres. On the whole, the result is the same in most countries—so much so that the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law. If that is so, then it may not improperly be considered to be a general principle of law in the sense of Article 38 of the Statute of the Court. That circumstance also provides an answer to the question as to the nature and the content of the conception of public policy by reference to which there must be judged the propriety of the Swedish legislation in the matter. Clearly, it is not the Swedish notion of *ordre public* which can provide the exclusive standard in this connection. The answer is that, the notion of *ordre public*—of public policy—being a general legal conception, its content must be determined in the same way as that of any other general principle of law in the sense of Article 38 of the Statute, namely, by reference to the practice and experience of the municipal law of civilized nations in that field. It is by reference to some such considerations that I have, in an earlier part of this Opinion, attempted to answer the question whether the Swedish Law on Protective Upbringing can properly be regarded as falling within the domain of *ordre public*.

For these reasons the correct interpretation of a convention on private international law must take that general recognition of public order fully into account. The same result is reached by way of another, no less cogent, principle of interpretation: In a case concerned with the interpretation of a treaty relating to a particular matter with regard to which the law and practice of both parties recognize the applicability of certain principles, due weight must be given to those principles. To give an example: If the law and practice of Sweden and Holland were to recognize that the distance of twenty miles is the proper limit of territorial waters, and if these two States were to conclude a treaty laying down that their vessels shall be bound to submit to certain restrictions within their res-

pective territorial waters, then the expression "territorial waters" would have to be interpreted in the sense attached to it by the law and practice of those two States, namely, as extending to twenty miles. By the same token, if the law of Sweden or Holland recognizes the exception of public order in the sphere of private international law, then that factor must be considered as relevant to the interpretation, as between them, of the treaty in question. It is well known, and it is admitted by both Parties, that both in Sweden and Holland *ordre public* constitutes a valid reason for the exclusion of foreign law. Accordingly, the fact that a particular subject of private international law is covered by a convention does not, in the absence of an express prohibition to the contrary, in itself exclude the operation of *ordre public*, even if the convention is otherwise silent in the matter—provided always that the State invoking *ordre public* is, if its decision to invoke it is challenged, willing to submit to an impartial judicial or arbitral determination of the issue. The latter condition follows inevitably from the principle that a State which invokes an exception not expressly recognized by the treaty cannot claim the right to determine unilaterally whether that exception applies.

At the same time, and this is the third main consideration in the present context, the circumstance that the Parties are bound by treaty in relation to a particular subject of private international law sets a limit to the application of *ordre public*. It does so in three respects:

In the first instance, the existence of the treaty imposes upon municipal courts an obligation of restraint in invoking *ordre public* —a restraint additional to that which they impose upon themselves in matters of private international law generally. This is admitted by both Parties. In fact, it is one of the objects of a treaty bearing upon private international law to set some further limit to reliance upon *ordre public*.

Secondly, the existence of a treaty limits the discretion of national courts in determining whether a particular subject is within the domain of *ordre public;* it limits it in the sense that in case of a dispute, and provided that an international tribunal is endowed with the requisite jurisdiction, it is for that tribunal to determine the matter. This, too, is in substance admitted by both Parties.

Thirdly—a view contended for by Holland but denied by Sweden —in the case of a dispute as to the manner in which the national authority has applied the exception of *ordre public*, that question is subject to review and determination by an international tribunal, if otherwise competent in the matter. That aspect of the question is examined later in this Opinion.

Applied to the present case, these principles mean, in general, that the exception of public order is admissible within proper limits

and that, there being a dispute as to whether these limits have been observed, it is for the Court to decide whether the notion of public order has been properly invoked and applied. As stated, I have come to the conclusion that reliance on *ordre public* in relation to a Law on Protective Upbringing is fully justified and that, therefore, *ordre public* has been properly invoked. I will revert presently to the question whether the proper *application* of *ordre public* has been satisfactorily proved in this case.

* * *

Reference must be made in this connection to certain views expressed during the written and oral proceedings with regard to *ordre public*, in particular the opinion that reliance upon it is inconsistent with the purpose of treaties on private international law and that *ordre public* ought to be interpreted restrictively in that sphere or refused recognition altogether. In particular, it was argued that because of its comprehensiveness and elasticity it has been the cause of uncertainty and confusion, that it has been a disturbing element in that field, and, more emphatically, that it has been destructive of private international law. There is some substance in these considerations. However, they cannot in any way be decisive.

Admittedly, the notion of *ordre public*—like that of public policy—is variable, indefinite and occasionally productive of arbitrariness and abuse. It has been compared in this respect, not without some justification, with the vagueness of the law of nature. Admittedly also, it has often been the instrument or the expression of national exclusiveness and prejudice impatient of the application of foreign law. Yet these objections, justified as they are, do not alter the fact that the principle permitting reliance on *ordre public* in the sphere of private international law has become—and that it is—a general principle of law of most, if not all, civilized States. More than that: It is, on its own merits, part and parcel of the entire doctrine and practice of private international law almost from its very inception; the two are inseparable, not only as a matter of history but also of necessity; they have grown together in a mutual interaction and compromise. The purpose of private international law is to make possible the application, within the territory of the State, of the law of foreign States. This is an object dictated by considerations of justice, convenience, the necessities of international intercourse between individuals and indeed, as has occasionally been said, by an enlightened conception of public policy itself. But there is an obvious element of simplification in the view that the law of a State should be deemed to have consented or that it should reasonably be expected to consent in advance to the application of foreign law without any limitations, in any circumstances whatsoever, without

a safety valve, without a residuum of contingencies in which, because of the very nature of its structure and the fundamental legal, moral and political conceptions which underlie it, it should be able to decline to apply foreign law.

Within the State, the judicial use of public policy—of *ordre public*—has often been exposed to criticism. But it is seldom, if ever, suggested that it is not an indispensable instrument of the interpretation, application and development of the law. If that is so in relation to the national law of the State which may be changed by ordinary legislative processes, it is particularly so in relation to foreign law over which the State has no control and which, in certain circumstances, its courts may find it inconceivable to apply. History—modern history—has occasionally produced examples of legislation manifesting eruptions of malevolent injustice, or worse, to which courts of foreign countries may find it utterly impossible to give effect and with regard to which the right to denounce the treaty may not provide a timely or practicable remedy.

It is that residuum of discretion, it is that safety valve, which has made private international law possible at all, and which, if kept within proper limits, is one of the principal guarantees of its continued existence and development. It is significant that an important part of the contribution of the most illustrious exponents of private international law—such as Story, Savigny and Pillet—lay in their effort to formulate the notion of *ordre public* and the limits, often wide and general, of its application. *Ordre public* is, and ought increasingly to be, subject to reasonable limitations in accordance with the main purpose of private international law. But the problem cannot be solved by the device of shelving it. It can be alleviated by the existence of international remedies of judicial control and review whenever there exists the requisite jurisdiction of an international tribunal. The present case afforded an opportunity for acting in that way.

* * *

The preceding considerations may also offer assistance in answering the question whether the existence of a treaty sets a limit to reliance on public policy in the sense that the latter cannot be properly invoked unless the treaty contains an express exception to that effect. That question must be answered in the negative. Obviously, the treaty may expressly, or by implication, prohibit recourse to *ordre public*. Thus it is occasionally maintained that the Hague Convention of 1902 on the Conclusion of Marriage contained such prohibitive implication by enumerating exhaustively the

reasons for which the *lex fori* could disregard the impediments to marriage established by foreign law. (Yet it is significant that, in spite of the Convention, practically all parties to it refused to recognize, prior to the Second World War, the impediments established by the German Nuremberg Laws. Although Dutch Courts applied the Convention in this respect, they often found circuitous means of defeating the Nuremberg Laws in question.)

However, apart from an express or clearly implied prohibition, the correct principle seems to be that a convention in the sphere of private international law does not exclude reliance on *ordre public*. Nothing short of an express prohibition can rule out reliance on a firmly established principle of private international law. This seems to me to be the fairly unanimous view of writers. They include authorities of the calibre of Professors Batiffol and Niboyet. This is also the emphatic view of an author who has devoted special attention to questions of private international law in relation to treaties (Plaisant, *Les règles de conflit de lois dans les traités*, 1946, pp. 91-94). Professor Lewald, a balanced and authoritative writer to whose views I attach importance, provides no clear exception to that virtual unanimity. In 1928, writing in the *Revue de droit international privé* (pp. 164 *et seq.*), he stated, though with very considerable hesitation, that, *a priori*, if the treaty is silent on the question of *ordre public*, the latter cannot be invoked. In 1930, when writing in the *Répertoire de droit international* (Vol. 7, p. 308), he expressed a different view, namely, that in such cases the answer to the question depends on the interpretation of a particular treaty and that it is impossible to give an answer *a priori*. There is little judicial practice directly applicable to this matter.

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In this connection reference may also be made to the preparatory work of the Convention of 1902. The study of that preparatory work shows that there was opposition—effective opposition—to incorporating in the Hague Conventions any general clause permitting reliance on *ordre public* (though no discussion on the subject took place with regard to the Convention on Guardianship). Does that mean that there was an intention to exclude altogether recourse to *ordre public* unless in cases expressly authorized? It may be doubted whether that was so. The authors of the Conventions wished to avoid the complications of a general and express authorization, of a general blank cheque, with regard to a notion so elastic and so comprehensive as *ordre public*. It is natural that they did not wish to inject into the Conventions, in express terms, a potential source of controversy or abuse. But does that mean that, by mere silence, the authors of the Conventions excluded indirectly from the operation of the Convention a firmly-established principle of private

international law? That is not probable. It is doubtful whether Governments would have signed and ratified these Conventions if they had expressly denied the right to invoke, in any circumstances, their *ordre public* as a reason for excluding foreign law.

* * *

There is one factor of importance which is directly relevant to the question whether *ordre public* can be invoked by the Parties in the present case in relation to the Convention of 1902. That factor is that in this respect the Court is confronted with a substantial measure of agreement between the Parties. The Dutch Government has repeatedly, although in a highly qualified manner, given an affirmative answer to that question—subject to the obligation of the parties to the Convention to proceed with particular caution, with special restraint and with exacting meticulousness in limiting the operation of the treaty by reference to *ordre public*. That attitude was maintained in Conclusion II of the Netherlands, in which the denial of the right to invoke *ordre public* is qualified by the word "generally" and, even more so, in Conclusion III, A and B, which asserts the power of the Court to determine whether the conditions of *ordre public* have been complied with, having regard to the character of the case and the provisions of the Swedish Law on Protective Upbringing—a conclusion which can be understood only on the assumption that there was no intention to deny, in principle, the right to invoke *ordre public*. This—the agreement of the parties on a matter of basic principle—is a significant legal aspect of the situation; it makes it difficult to maintain that public order cannot be invoked unless specifically provided for in the Convention.

Admittedly, the Dutch Government denies that in the *present case* there is room for resort to *ordre public*. It does so for two reasons: The first is that the obligation of caution and restraint binds the Parties not to invoke it unless there is a requisite element of close territorial connection, and that there is no such connection in the present case. It is difficult to follow that contention. It is not easy to imagine a closer connection between the minor in question and the country which relies on *ordre public*. Elisabeth Boll was born in Sweden; so far as is known, she speaks Swedish only; she has resided permanently in Sweden since her birth. I do not find convincing the argument that, according to Dutch law, Elisabeth Boll shares the legal Dutch domicile of her Dutch guardian or that, if she is not domiciled in Holland, it is only because the Swedish measure of protective upbringing, said to be in violation of the Convention, prevents her from being brought to Holland. The question of domicile, which is a question of fact and intention, is not properly answered by arguments of this nature.

Neither is it easy to follow the second reason advanced by the Dutch Government in the sense that the necessary territorial connection is lacking, seeing that this is a "transfer case", namely, that if only the transfer of the child to Holland were made possible, in accordance with the Convention, then there would be no question of anything happening on Swedish territory which is contrary to Swedish *ordre public*. There is no more force in this argument than in the suggestion that a State has no reason to refuse to hand over a political refugee to prosecution and persecution in a foreign country considering that such prosecution and persecution will take place in foreign territory. Yet it is apparent that in cases such as these the very fact of intended transfer is decisive for the purpose of relying upon *ordre public* seeing that the transfer is deemed contrary to the fundamental notions of public law of that State and that it may be productive of a revulsion of public opinion as being flagrantly offensive to national conceptions of decency. Public opinion is not easily reconciled to the view that the moral and social responsibility of the State has been discharged by the simple device of removing to a foreign country the object of possible persecution and suffering. This would be too easy a means of salving the conscience. When, therefore, it is argued that a "removal case" is not sufficiently connected with the country of the forum to warrant the application of *ordre public*, the correct answer is probably that there are very few occasions in which the connection is more obvious.

These, then, are the two main grounds—the two only grounds—which the Netherlands have adduced against the application of *ordre public* in this case: the absence of connection and the character of a "removal case". Neither of these grounds seems to be acceptable. If they are not acceptable, then there are no grounds which, on the Dutch submission, prevent reliance upon *ordre public*.

* * *

There must now be considered the question of the extent to which the Court is called upon to examine the issue of the propriety of the appeal to and of the manner of application of *ordre public* in the present case. It is upon the answer to a question of this kind that there must, to a substantial degree, depend the position of *ordre public* in the development of this branch of the law.

Both Parties are in agreement that the Court is competent to decide whether the Swedish Law on Protective Upbringing comes within the sphere of *ordre public* and whether it has been properly invoked for that purpose. In particular, the Government of Sweden does not deny that the Court is competent to determine whether in principle the Swedish Law on Protective Upbringing belongs to the category of *ordre public*. In its Conclusions it asked the Court to

hold that the Convention of 1902 does not affect the right of the Parties to impose upon foreign guardians the restrictions called for by their public order. The agreement of the Parties on this question removes to a large extent the ground from the criticism directed at reliance on public order by reference to its disintegrating effect as opening wide the floodgates of wholesale nullification of this and similar Conventions by the simple means of asserting unilaterally that a particular law under which the measure was taken is in the domain of *ordre public*. For both Parties agree that it is for the Court, and not for them, to decide that issue.

At the same time, the Parties are not in agreement on the question whether the Court is entitled to examine the grounds on which, by reference to the Law on Protective Upbringing, the Swedish authorities decided to decree and to maintain the measure which they had taken. Sweden denied such competence in her Conclusions and in the course of the written and oral proceedings. On the other hand, the Government of the Netherlands repeatedly asserted the competence of the Court in that respect. This it did both in the Conclusions and by way of a formal intervention in the course of the oral proceedings. The Agent for the Netherlands insisted that the Court was competent to examine "every fact, every circumstance, every motive" pertaining to the application of the Swedish law and that this being a case of a treaty obligation no reliance on a charge of denial of justice was necessary for that purpose.

I accept the Dutch Conclusion III A, according to which the Court is competent to appreciate, in the light of the relevant facts and circumstances, whether the conditions of *ordre public* have been complied with. The Court is competent to decide not only whether the Law on Protective Upbringing falls within the notion of *ordre public*, but also whether it has been applied reasonably and so as not to defeat the true objects of the Convention. I am unable to accept the Swedish view that the Court, not being a court of appeal, is not entitled to examine that aspect of the question. Suppose the Swedish authorities had decided to apply the Law of Protective Upbringing to a child of Dutch nationality, born in Holland and speaking Dutch only, and who had been resident in Sweden only for one month. Would this Court be precluded from taking these facts into consideration? Recourse to *ordre public*, especially if not expressly authorized by the Convention, is in the nature of an exception. It is a permissible exception. But it is an exception which must be justified with some particularity. If a State takes action which, on the face of it, departs from the language of the Convention, then it cannot confine itself to proving generally that the Law under which it acted falls within the permissible exception; it must show that that exception was applied reasonably and in good faith.

When there is no treaty binding upon a State, it has very considerable—although not unlimited—discretion in applying its system of private international law in relation to *ordre public*. But when that State is bound by a treaty in relation to a particular subject-matter, it can invoke public order only if, in case its action is challenged, it is prepared to submit the legality of its action to impartial decision. It is that jurisdiction which removes the notion of and recourse to *ordre public* from the orbit of uncertainty, pure discretion and arbitrariness and which endows the treaty with the character of an effective legal obligation. It is that subjection to judicial or arbitral determination, as the very condition of legitimate reliance on *ordre public* in cases not expressly provided by the treaty, which saves *ordre public* in such cases from the reproach of being a cover for a unilateral repudiation of the treaty and which gives it the character of an attempt to secure a just and reasonable interpretation of treaty obligations. The present case provided an opportunity for asserting and giving effect to that principle. The task of such factual examination may be difficult, and, occasionally, invidious. Nevertheless, it constitutes a proper exercise of the judicial function in relation to a dispute which is one both as to the law and fact in the meaning of Article 36 of the Statute of the Court.

In the present case the Parties have not laid before the Court the facts which would enable it to decide with any assurance on this aspect of the question. The Government of Sweden did not act upon the offer, formally made by it in the final Submissions in the Counter-Memorial and repeated during the oral proceedings, to lay before the Court the relevant documents. It is true that it was open to the Court, at any stage of the proceedings, to ask for their production. In particular, Article 49 of the Statute provides that "the Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanation". However, it is not necessary in this connection to consider the problem of the function of the Court, under that and other Articles of the Statute and the Rules, as an agency called upon to clarify and substantiate the basis of its decisions by active initiative in the elucidation of the relevant factors both before and during the oral proceedings. For there was no reason why the Government of Sweden should not have supplied the necessary information of its own accord, in the event that the Court should find that it could properly examine it. A State invoking an exception cannot be too forthcoming in producing evidence in justification of it. It ought not to limit itself to vague—and, from the point of view of ordinary rules of evidence, probably inadmissible—allusions as to the possible contents of the evidence which, by its own decision, it has failed to produce. At the same time, in the exercise of its jurisdiction of review, a legal tribunal must attach importance to the appreciation of the facts by local authorities—of the authorities of the State

where the child was born and is domiciled. Their decision must not be lightly disturbed. This is so in particular if the applicant Government, while inviting the Court to decide upon the factual aspects of the issue and the motives underlying the decision of the local authorities, has failed to bring to its notice any facts suggesting that the discretion of the Swedish authorities has not been exercised properly and in good faith. In all the circumstances, on such evidence as there is, I am bound to assume that the action of the Swedish authorities was not such as to constitute a misapplication of the Law on Protective Upbringing on which they were clearly entitled to rely as part of their *ordre public*.

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The above considerations explain why, subject to differences of approach and reasoning, I concur in the operative part of the Judgment rejecting the demand of the Government of the Netherlands.

(Signed) Hersch LAUTERPACHT.