SEPARATE OPINION OF JUDGE MORENO QUINTANA

[Translation]

To my great regret, although I am fully in agreement with them concerning the judgment at which they arrive in this case, I am unable to share the opinion of the majority of my colleagues who give as the sole determining reason for their decision the fact that the Swedish law of June 6th, 1924, on the protective upbringing of children is of a different nature from the Convention of 1902 which governs the guardianship of infants as between the Netherlands and Sweden.

The chief consideration in my mind is that a question of principle has to be settled, namely, the question whether the *ordre public* of one of the Parties in the case can be invoked against an international Convention which is binding on both Parties. The Applicant in this case attaches fundamental importance to this question, as also does the Respondent. Decisive as it is for the settlement of this dispute, the reason first mentioned above does not, in my view, furnish sufficient ground for a decision on a dispute relating to a fundamental question of law. I hold a very definite view on this question, and I must also point out that, far from ruling one another out, the two grounds supplement each other quite logically. For, though the Convention in question is not infringed in this case, because legally it is of a different nature from the law on protective upbringing, it is the *ordre public* character of that law which marks the difference. A law of an entirely different nature could never, even in an incidental way, impede the complete accomplishment of an international convention.

Side by side with its function of deciding "in accordance with international law such disputes as are submitted to it", as mentioned in Article 38, paragraph 1, of its Statute, the International Court of Justice has also—notwithstanding the limitation which Article 59 prescribes for its decisions—a doctrinal function of the greatest importance. The Court can and must discharge this function in the present case with a view to the progressive development of international law on the question submitted for its consideration concerning the principle of the relationship between *ordre public* and an international Convention. Paragraph 1 *(d)* of Article 38 of the Statute moreover enjoins the Court to apply "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

For these reasons, I shall furnish grounds for my separate opinion, which is in favour of the contention advanced by the Respondent, by analyzing the legal scope of the said principle in this case.

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The case before the Court is one which relates to questions within the domain of private international law. Such a situation was dealt with by the Permanent Court in its judgment in the Serbian Loans Case in the following terms:

> "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law, or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law." (*Collection of Judgments*, Series A, Nos. 20/21, p. 41.)

These are notions that are applicable to the present case since treaties which, like that with which it is concerned, are designed to achieve unification of the rules deriving from the application to private persons of particular State laws, undeniably have the character of private international law treaties. The original title: "Case concerning the guardianship of an infant" was subsequently, and very wisely, changed to "Case concerning the application of the Convention of 1902 governing the guardianship of infants", and this new title is undoubtedly much more in accord with the scope of the judgment to be given by the Court in this case.

We are confronted with an intervention of what may properly be described as *public* international law in the matter of the interpretation of an international Convention. And it is for the Court, as a judicial organ, to decide the matter. The Court's jurisdiction is clearly established by Article 38, paragraph 1, of the Statute—to which I have already referred—the imperative character of which is beyond doubt. A conversion of private international law into public international law has occurred and this enables the Court to exercise its judicial powers.

The Court has to adjudicate upon the case of an infant. This infant was the subject of a measure of protective upbringing taken by the competent Swedish authorities which, it is argued, falls outside the legal framework of the Convention and, furthermore, falls within the *ordre public* of Sweden. To this the Applicant has replied that the Respondent is in breach of the Convention which constitutes the legal norm applicable to the guardianship of infants of both countries. It is not precisely a denial of justice that the Applicant alleges against the Respondent, but rather the fact that a measure deriving from the law of Sweden has been applied to a

child whose guardianship is governed by the law of the Netherlands. In other words, the Netherlands consider that Sweden has violated her international obligations under the Convention, which provides that the national law of the infant is the norm applicable to its guardianship. Without disputing this view, the Respondent contends that the measure adopted is not covered by the Convention, and that since, in any case, it comes within the domain of *ordre public*, it constitutes a bar to the application of the foreign law.

A wise rule on the subject which must serve as a point of departure for the decision in the present case is supplied by the great Savigny, in his *Système du droit romain actuel*. The judge, he says, must apply to each legal relationship the norm which is most in conformity with the specific and essential nature of that relationship. This law may be the law of a person's own country or it may be that of a foreign State. But this principle, which establishes a uniformity of law between the different States, is subject to an important restriction—the restriction based upon the existence of several species of laws of a special nature, including laws which are positive and strictly compulsory in character, such as those which are dictated by reason of general interest *(publica autoritas)* (see French translation, Paris, 1860, Vol. 8, para. CCCXLIX).

In the present proceedings, the crux of the case is constituted by the question whether *ordre public* may validly be invoked against an international convention. That is to say, the question at issue is that of the relationship between the application of the 1902 Convention which governs the guardianship of infants and which is law as between the Netherlands and Sweden, and the measure of protective upbringing taken by Sweden in respect of Marie Elisabeth Boll. Both Parties attribute cardinal importance to this, devoting to it the greater part of their arguments. While the Netherlands claim that the maintenance of the measure is contrary to the Convention on the ground that it impedes the full exercise of guardianship, Sweden contends that she has merely applied her *ordre public* in the present case. However, what are involved are procedures which are of different scope, which are carried out in two different national legal spheres but which affect one and the same situation, the custody of the infant. It is on that point that there is conflict between two laws, the Dutch law on guardianship and the Swedish law on protective upbringing. Sweden has in no wise challenged the legal existence of the guardianship instituted under Netherlands law in accordance with Article 1 of the Convention. In its decision of September 16th, 1954, the Norrköping court rejected the application to this case of the Swedish law on guardianship. Sweden maintains that her law on the protective upbringing of infants, of June 6th, 1924, is quite different in object and in scope from the institution of guardianship, a typical institution of family law, to which the 1902 Convention relates. But the difference of the Swedish Law in relation to the 1902 Convention will not

of itself enable the Law to override the Convention. To do so it must fall within the *ordre public*, a concept which confers upon it the validity which enables it to extend its legal effects on the international plane.

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The concept of *ordre public* which is so clear and well defined in the legal systems derived from the so-called *continental* law in the latin countries, does not seem always to be understood in the same way in other legal systems. As a result, certain of the interpretations given by the Parties in the present case have become somewhat distorted. In order to arrive at a legal solution, there is, I think, no need to construct theories and draw distinctions which merely confuse the issue. I understand *ordre public* to be the whole body of laws and legal instruments whose principles cannot be set at naught either by special conventions or by a conflicting foreign law. Its provisions have retrospective effect and definitively acquired rights cannot be invoked against it. The judges should apply it in spite of any international convention. It finds its basis in the need of each State to provide itself with fundamental institutions in the field of its political and social organization. Those institutions, in particular, which govern the family, child welfare, inheritance and public morals, indubitably have this character.

The Swedish Government contends in its Rejoinder (pp. 11 *et seq.*) that its law on protective upbringing falls within the sphere both of public law and of *ordre public*. But although the effect of these two elements may be the same in regard to its invocation as against the application of a foreign law, what are involved are different legal concepts. Indeed, public law has a very specific role: that of providing for the political structure of the State by adjudicating upon interests that are supremely collective. In this connection, the constitution of a country, its economic system or its social organization are manifestations of the activity of its public law. But it is not always easy to draw a hard and fast line between the two branches of law. A single law, such as that of Sweden on protective upbringing of children, may reveal aspects of public law and aspects of private law. It belongs to public law in so far as it protects children in general; it belongs to private law when it affects the position of individuals. The concept of *ordre public*, being much broader, embraces that of public law. That is why it is unnecessary in the present case to invoke the scope of public law in order to show that the protective upbringing of children is one of the primary institutions of *ordre public*.

In relations which are derived from private international law there is a principle of the limitation of the authority of a foreign law. This principle comes into play whenever the foreign law is in conflict with the *ordre public* of the country where it is to be applied. Each State interprets it by virtue of its national legislation according to the principles which may at a given moment govern its social organization. This concept may vary considerably from State to State, but one common feature is always recognized: the feature which identifies it with the permanent interests of a nation when that nation provides for its State function of securing respect for individual rights. In those circumstances, the full force of the *lex fori* which has the character of a law of *ordre public* remains unimpaired in the relations flowing from private international law. In its judgment, which I have already cited, in the Serbian Loans case the Permanent Court referred to the difficulty of defining *ordre public* "a conception the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself..." (*Collection of Judgemnts*, Series A., Nos. 20/21, p. 46). The well-known Cuban international lawyer, Antonio Sanchez de Bustamente, the author of the code of private international law which bears his name, agrees that laws which he calls of domestic *ordre public*, such as those governing the status and capacity of persons, family relationships, inheritance, etc., in a State are peremptory in character; they are binding both on persons having their residence in the State and on the nationals of the State, and prevent the application of a foreign law (Art. 3, para. 1).

It has also been suggested that there is a difference between national *ordre public* and international *ordre public* on the ground that the latter is of wider scope with regard to its invocation against a foreign law. Many writers recognize that this is so. Others, including myself, consider that only national *ordre public* may constitute a bar to the application of a relationship of private international law. International *ordre public* operates within the limits of the system of public international law when it lays down certain principles such as the general principles of the law of nations and the fundamental rights of States, respect for which is indispensable to the legal co-existence of the political units which make up the international community. The natural society of nations, to which Francisco de Vitoria looked forward, in the 16th century, the society which involved the co-existence of perfect communities within a universal community as propounded by Francisco Suarez in the following century, the *Civitas Maxima* described by Christian Wolff in the 18th century, as constituted by all States on the basis of a tacit covenant, and the legal community of States bound by the performance of certain duties, as defined in the last century by Friedrich Karl von Savigny, are all necessarily based on these principles and these rights. These principles—we are all quite familiar with them because they are very limited—and these rights,

too, have a peremptory character and a universal scope. On the one hand, the freedom of the seas, the repression of piracy, the international continuity of the State, the immunity of jurisdiction and the rules governing warfare; and on the other hand the inviolability of treaties, the independence and legal equality of States. But, in any event, what is involved is a conception that is entirely different from the one laid before the Court by the Parties in this case.

Even in the absence of an express reference, any international agreement laying down rules of private law necessarily runs up against the concept of national *ordre public*. No foreign law is applicable when the principle of the extraterritoriality of laws comes up against a case that is specifically governed by a local law. And, by virtue of their sovereignty, States possess at all times the power to regulate their own *ordre public*. Authors enjoying universal authority assert that this is so beyond any doubt. The decisions of several national courts are also quite decisive on this point. Teachings in this matter are to be drawn from these authors and from these decisions. *Ordre public* is indissolubly bound up with the general principles of law recognized by civilized nations which, under Article 38, paragraph 1 *(c)* of the Statute, the Court is required to apply as a main source of law in discharging its function of deciding in accordance with international law such disputes as are submitted to it. This means that the application of these principles is the subject of an international undertaking by all Members of the United Nations and by those States which have adhered to the Statute of the Court. *Jus posteriori derogat priori* says the well-known Roman maxim in accordance with which Article 103 of the Charter of the United Nations prescribes that, in the event of a conflict between the obligations imposed on Member-States by the Charter and obligations arising from any other international agreement, it is the former obligations that shall prevail. The national *ordre public* of Sweden consequently prevails over the provisions of the 1902 Convention which governs the guardianship of infants as between that country and the Netherlands. Moreover, none of the provisions of that Convention, and none of the opinions expressed in the course of the preparatory work for it justify the view that the application of the principle of *ordre public* was excluded.

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Is the Swedish law on the protection of infants a law of *ordre public* or is it not? It regulates in great detail the practical methods to be employed in the upbringing of infants who fall within the various categories contemplated in Article 22. In particular, Articles 1, 20 and 21 which relate to the protection of children in each commune, the supervision by the provincial governments

with a view to ensuring the welfare of children, and the functions of the Director-General of Social Affairs, are all provisions of *ordre public*. In itself and in so far as the Court is concerned, the Swedish law in question is no more than a fact. In its Judgment on German interests in Upper Silesia, the Court said: "From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures" (*Collection of Judgments*, Series A, No. 7, p. 19). Consequently the origin of the law, the intention of the draftsman and the possible results to which it may lead are questions which do not fall within the jurisdiction of the Court. It is sufficient for the Court to scrutinize the text of the law in order to ascertain whether or not it is a law of *ordre public*.

However, before the *ordre public* of a country may be validly invoked against an international convention there must exist a substantive connection between the person concerned and the territory. The Parties to this case agree—and rightly so—that permanent residence by a person in a territory can constitute such a substantive connection. But the Applicant contended that, in the case of the infant Boll, her residence in Sweden is a forced residence through the application of the measure of protective upbringing. No proof however has been brought forward by the Applicant to show that the residence of the infant in Sweden is contrary to her personal wish. The Applicant has thought it sufficient to invoke its national law, according to which the domicile of a ward is chosen by its guardian. No reference has been made to any expression of a personal desire. In any case, it is to be presumed —and this is a presumption *juris tantum*—in the absence of any proof to the contrary, that the child's living with her grandparents, her mother's parents, in the place where she was born, where she grew up and where her affections are centred, by no means constitutes a forced residence. *Ubi bene, ibi patria*, says the well-known maxim.

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The facts and the law in this case appear to be as follows. An infant born in Sweden, but of Netherlands nationality because of the nationality of her father and of the nationality acquired by her mother who was originally Swedish, is placed under a measure of protective upbringing in the country which she has not left since her birth. The guardianship of this infant must be governed by her national law in accordance with a convention between Sweden and the Netherlands. This guardianship has been duly established by decisions of a Swedish court in the first place and subsequently by a decision of a Dutch court, but the right of custody of the infant is impeded by the adoption of this measure of *ordre public*. Is this contrary to international law? I do not consider that it is so. The consequences flowing from legal situations produced

by the application of territorial laws are not in opposition to the obligations flowing from international treaties. This is the special feature of the present case: it is concerned with a territorial law the application of which does not debar the application of a convention but affects a *de facto* situation constituted by the custody of an infant.

Any appraisal of *ordre public* in international relations is necessarily a matter for interpretation by a court, provided that such an interpretation does not—to use the words of the Permanent Court in its advisory opinion concerning Polish postal service in Danzig—"lead to something unreasonable or absurd" (see *Judgments*, etc., Series B, No. 11, p. 39). And would the Court's decision be unreasonable or absurd if the result of it was to obviate the transplantation and the suffering of a child who would otherwise be torn from the arms of her grandparents, carried away far from the country of her birth and obliged to live in a foreign atmosphere? The law is not a metaphysical creation, a consequence of cold and abstract reasoning of the human mind, which has no regard for social reality. And States like the Netherlands and Sweden, which have incorporated rules of private international law in their international law, surely do not contemplate the application of inhuman solutions. Our own Court stated in the Anglo-Iranian case that it could not base itself on a purely grammatical interpretation of the text and that it must seek the interpretation which is in harmony with a natural and reasonable way of reading the text (see *I.C.J. Reports 1952*, p. 104).

The specific facts of the case, which led the Swedish authorities to take the measures objected to by the Netherlands Government, are not a subject of disagreement between the Parties. That is why the Court decided to adopt no position with regard to them. Knowledge of them might, however, have been extremely useful in determining whether in this particular case Sweden has acted justifiably in putting Marie Elisabeth Boll under protective upbringing. For, if this was not the case, I wonder whether the Respondent would be able, before a judicial organ, to sustain its *ordre public* to impede the effects of a foreign law derived from an international convention. The decision of this Court in the Nottebohm case, in which it wisely dissociated the questions of nationality and of diplomatic protection as regard their capacity for functioning independently in different national judicial systems, allows me to think that they would (see *I.C.J. Reports 1955*, p. 26). Not being cognizant of the facts, and no denial of justice having been alleged against the Respondent, I must logically assume that the latter has made a proper use of its *ordre public*.

(Signed) Lucio MORENO QUINTANA.