SEPARATE OPINION OF SIR PERCY SPENDER

Whilst concurring in the decision of the Court I deem it appropriate to deal individually with and to make certain additional observations upon certain aspects of this case.

I propose to confine my remarks firstly to the interpretation of the Convention in relation to the facts of this particular case, and secondly to the submissions by the Government of the Kingdom of Sweden on *Ordre public* (Public Policy).

Is "Protective Upbringing" in conformity with the obligations binding upon Sweden vis-à-vis *the Netherlands by virtue of the Convention of 1902?*

The task with which the Court is confronted may I think be expressed thus:

(a) Is the Swedish Child Welfare Law 1924 as amended or any provision thereof inconsistent or incompatible with the Convention?

(b) Are the measures of protective upbringing taken and maintained in respect of the child under the provisions of such law inconsistent or incompatible with the Convention?

These questions will be determined primarily by the proper construction to be given to the Convention. It is also necessary to consider the terms of the Swedish law under which the measures sought to be impugned by the Netherlands were taken and to do this in the light of the interpretation to be accorded the Convention.

The aim in the interpretation of the Convention must be to determine whether the particular case with which we are called upon to deal, is or is not within its ambit. Our task does not require us to go further.

The Convention, expressed as it is in general terms, must in my opinion be interpreted and understood according to its subject-matter. The occasion for the Convention, its purpose, the object sought to be obtained are important considerations. Its subject-matter determined in the light of these considerations will mark out its scope and operation.

What was the situation before the Convention? What were the defects in that situation with which it sought to deal? In what manner was it sought to remedy these defects and for what reasons? These are all pertinent enquiries in the task of interpretation. The answers do not admit of much dispute.

The Convention was one of a number entered into about the same time dealing with *conflict of laws*. It dealt with problems there-

tofore existing when such conflict occurred in relation to the administration of the guardianship of minors, as between the different States. It sought to formulate rules which would resolve difficulties inherent in this state of affairs and to achieve agreement as between the contracting States as to the proper law which should be applied in order to do this. The task of the drafters was directed to a problem of *conflict of laws* in relation to *guardianship* and its administration. This and this alone was the nature of their task.

The Convention accordingly sought to lay down rules and to impose obligations upon the contracting States to achieve this end. Its aim was to bring to an end the state of affairs where the law to be applied to the administration of the property and to the custody and control of an infant was the subject of competing and conflicting laws between such States. Its provisions were designed to assimilate within the respective national legal systems of the contracting States certain provisions, in conformity with one another, where a conflict of laws in relation to the administration of guardianship occurred.

Where previously this conflict of laws was left to operate according to the separate laws of each State, the aim of the Convention was to introduce certain uniform legal rules and provisions and to substitute in cases of conflict of laws thereafter arising these rules and provisions on the administration of guardianship for the national laws of each State thereon.

In the light of these observations, it is at once obvious that the purpose of the Convention was to resolve a conflict of laws existing at the time of, or which might arise during, its currency between one contracting State and another, in respect of the law to govern guardianship and its administration where a child, the national of one country, was habitually resident in the country of another contracting State, and that in order to accomplish this purpose, it provided, subject to the provisions elsewhere appearing therein, that the proper law to govern the guardianship should be the national law of the infant.

It contemplated the contingency of a conflict between the laws of two States—on the subject-matter of guardianship in each State. It was not directed to the laws of States generally. It was confined and limited to a conflict of the laws on guardianship and its administration. It was concerned with that subject-matter and with none other.

Is *any* limitation or restriction on the guardian's right to custody and control resulting from the operation of a law of a contracting State where the child is habitually resident, which is not a law of or on or dealing with guardianship incompatible or inconsistent with the Convention?

The answer must turn upon the scope and operation of the Convention and this in turn depends upon its subject-matter.

The characterization or subject-matter of the Convention must be determined by looking at it as a whole. The fundamental questions are: what is its essential character; to what subject-matter in substance does it relate? The answers are not to be found in any abstract formulation of a general test or criterion but by the considerations to which I have already referred.

Its essential character is in my opinion clear enough. It is that of guardianship: its administration, and conflict of laws in respect of guardianship and its administration. That is its subject-matter. And that in my view marks out its scope and operation. The Convention must be construed accordingly. So construed it does not confer upon the guardian any such immunity. His exercise of the right to custody and control may be restricted even in a major degree by the effects of other laws dealing with entirely different subject-matters, without any conflict of laws within the contemplation of the Convention arising.

But are the provisions of the Swedish Child Welfare Law of 1924 as amended, by virtue of which the protective upbringing was brought into being, laws on the subject-matter of guardianship?

A law may produce an effect in relation to a subject-matter without being a law on that subject-matter. The substance of the relevant law is to be determined by what it does—not by the effects in relation to other matters of what the law does.

The Swedish Child Welfare Law forms a composite whole. Its provisions are interrelated. Its subject-matter is child welfare and delinquency in the content of the social problem they create, and the protection and welfare of society in relation thereto.

Child welfare and delinquency recognized increasingly as a vital social problem is of concern to the State not only in the interest of children but primarily in the interest of the community, so that young people may become useful members of society and not a burden upon it. In my opinion, the main purposes of the Swedish law, which gives direction to our enquiry, are:

(a) the prevention of the creation and the continuance of corrupting homes, and the prevention and reformation of child delinquency, and

(b) the protection of society against the consequences of the bad upbringing of the young.

Whatever is the subject-matter of the Swedish law, it is *not* a law of or in relation to "guardianship". I would hardly think any nation that has comparable legislation would itself ever think so.

It cannot be disputed that the Swedish law does in certain circumstances produce *effects* which bear on guardianship. In the

present case Sweden does not deny that these effects are such as to interfere in a major degree with the guardian's exercise of the right of custody and control. That, however, does not, in my opinion, make it a law on or in relation to or in respect to or of guardianship. Its essential character is *not* determined by the *effects* of the law operating on particular facts and circumstances; or by the acts which may properly be done pursuant to it and their bearing or effect on a guardian's right to custody and control. No conflict of laws with which the Convention is concerned accordingly arises in principle between the Netherlands law on guardianship and those of the Swedish law on child welfare. They relate to different subject-matters. Their scope and operation are separate and distinct. The Convention was concerned with and its scope and operation was limited to conflicts of laws arising in relation to the one subject-matter, namely guardianship. In principle the Swedish law is outside the domain of the Convention.

But this does not complete our enquiry. A State, party to the Convention, may not, *whatever* the subject-matter of the law under which it acts, do anything which contravenes the provisions of the Convention.

Is then the protective upbringing established in this case a rival guardianship?

Is its maintenance inconsistent with **the** Convention or any specific provision thereof?

As to the first question, the answer must in my view be "no" and for the reasons given in the opinion of the Court.

And if this be so, the answer to the second question must depend upon some specific provision of the Convention, for apart therefrom, for reasons already advanced, no incompatibility between the measure of protective upbringing and the Convention could be said to exist.

Is there then any specific provision of the Convention with which the protective upbringing may be said to be inconsistent? The only specific provision which I think needs to be adverted to is Article 7.

Does this Article mean that all other measures which may be said to protect the person of the infant are precluded irrespective of the subject-matter or context of the law under which or the circumstances in which those measures are taken? In particular does it on its proper construction preclude the measure of protective upbringing?

I think not. The Article certainly in terms does not so provide. It is in my opinion solely directed to the protection of the person of the child in the contingencies stated therein. It must be read within the scope and operation of the Convention of which it is part. On its proper construction it was never intended to preclude other measures such as protective upbringing which have no relation whatever to guardianship.

Article 22 *(a)* of the Swedish law taken together with the associated articles thereof must be read also within the scope and operation of that law of which it is an integral part. They cannot be lifted out of their context. These provisions of the Swedish law and Article 7 of the Convention operate in different fields altogether. Neither the relevant provisions of the Swedish law nor the protective upbringing established thereunder have anything to do with guardianship as such or with its administration; they lie wholly outside the provisions of Article 7 of the Convention. There is no inconsistency or incompatibility.

One further observation needs to be made.

If in a particular case it could be shown that a law comparable to the relevant provisions of the Swedish law had been used by a contracting State not *bona fide* to carry out that law but for a purpose *aliunde*, for example to interfere with and restrict a guardian in the exercise of his right of custody and control as such, other and quite different considerations would arise. But that is not the instant case. The Netherlands has very properly conceded that Sweden acted in complete good faith under the provisions of its law. Nor does any question of denial of justice arise. The challenge of the Netherlands has been exclusively directed to whether the measure of protective custody is itself in conformity with the Convention.

In my opinion the Netherlands has failed to make out any case that Sweden has not observed the provisions of the Convention.

Ordre public (Public Policy)

The principal issue to which the Parties to this case directed their attention was whether the Convention should be interpreted as containing an implied reservation authorizing on the ground of *ordre public* or public policy the overruling of the application of the foreign law recognized as normally the proper law to govern the guardian's right to custody and control of the infant. Whilst the opinion of the Court does not pronounce in any way upon this, nor is it necessary to do so, I think it proper, having regard to the manner in which each Party has conducted its case and the importance attached to the issue, that I should express my views on it. For I would not wish any silence on my part to admit of any reason for thinking that the case for Sweden might have successfully rested upon the submissions made by it under this heading.

The Swedish Government contended that *ordre public* or "public policy" is reserved from the Convention, that the Swedish Child Welfare Law, 1924, as amended, is a law of *ordre public*, that accordingly the "protective upbringing" established by the Swedish authorities is not a breach of the Convention of 1902.

Consideration of this branch of the argument raises questions which may be of not inconsiderable importance. Whilst we are concerned with a Convention which relates to a conflict of laws within what may be referred to as the field of private law, none the less it is in every sense an international convention between sovereign States. Were support given to the Swedish contention that such a reservation should be read into the Convention it could provide a basis for arguments that similar reservations should be read into other and quite dissimilar conventions and treaties.

The maxim *pacta sunt servanda* is of special significance in considering this contention of the Government of Sweden. One should be constantly alert lest anything that might be said—or, indeed, fail to be said—should give any currency to a view that nations, under "public policy", may fashion their own yardstick to determine their obligations under international treaties or conventions (cf. Greco-Bulgarian Communities, P.C.I.J., Series B, No. 17, p. 32).

Sweden's submissions as formally presented to the Court at the conclusion of argument were as follows:

> "That the rules pertaining to conflict of laws which form the subject-matter of the 1902 Convention on the guardianship of infants do not affect the right of the High Contracting Parties to impose upon the powers of foreign guardians, as indeed of foreign parents, the restrictions called for by their *ordre public* (public policy).
>
> That these rules leave unaffected in particular the competence of the administrative authorities reponsible for the public service of the protection of children.
>
> That the measure of protective upbringing taken in respect of Elisabeth Boll cannot accordingly in any way have contravened the 1902 Convention relied upon by the Netherlands."

The argument to substantiate these submissions was developed as follows. Two premises were sought to be established.

The first was that the application of the personal law of a foreigner must yield before those provisions of the *lex fori* which are within the domain of *ordre public* (public policy), or at least of international *ordre public.*

The second was that the provisions of Swedish law relating to protective upbringing in fact have that character.

It is to be noticed that the first premise advanced by Sweden does not state that it is *every* law of the *lex fori* before which the personal law of the foreigner must yield. It is only such laws as are within the domain of *public policy,* or at least within the domain of international public policy.

Nor is it contended that *every* rule or law of public policy must have priority over the personal law of children nationals of States signatories to the Convention. It is *only* that *part* of *ordre public* (public policy) to which the legislatures clearly attach such impor-

tance that, not only do they make it applicable to foreigners upon their territory, but they will not suffer the application of the foreign law. This part of public policy *(ordre public)* is referred to as international *ordre public* or private international *ordre public.*

I refrain from making any examination of these descriptive words, or any determination whether they do or do not involve any definable concept of law, or are merely indicative in a general sense of certain kinds of laws to which others may attach different descriptive labels. It is important however to understand the sense in which these terms are used by Sweden.

This the Swedish argument proceeded to indicate. A judgment of the Belgian Cour de Cassation of 4th May, 1950 (*Pas.* 1950, I. 624) was quoted as follows:

> "A law of domestic *ordre public* is only of private international *ordre public* in so far as it was the intention of the legislature to lay down by means of its provisions a principle which the legislature regards as essential to moral, political or economic order and which, on that ground, must necessarily, in its eyes, exclude the application, in Belgium, of any rule to the contrary or any different rule in the personal law of the foreigner."

So it was argued that public policy *(ordre public)* is applied to cases where:

(a) the application of foreign law is prevented—the negative effect;

(b) the application of territorial law is made compulsory—the positive effect.

Further, it was submitted that territorial measures which are made binding in the public interest, so as to prevail over the foreign law, may in some cases result in complete elimination of the foreign law, and the substitution or enforcement of the *lex fori;* in others the application of the foreign law may be only partially affected.

It is hardly necessary to refer to the many instances where, in accordance with domestic law of a country, the Courts of that country have, apart from obligations imposed by treaty, refused to recognize foreign laws or judgments or rights arising out of foreign laws, on the grounds of *ordre public* or public policy. Each nation does so to the extent to which it deems its fundamental principles of public policy demand.

Public policy in every country is in a constant state of flux. It is always evolving. It is impossible to ascertain any absolute criterion. It cannot be determined within a formula. It is a conception. The varying legal approaches made by the different domestic or municipal courts of different countries in the cases on which they have been called to adjudicate, and the wide differences of views on various and important aspects of public policy *(ordre public)*

expressed by learned authorities are fairly evident. The truth of the matter is whether *ordre public* (public policy) is based upon considerations analogous to Article VI of the French Civil Code, or on broad principles of moral or political or economic order, or on the imperative nature of domestic laws, or on their territorial application to all people within the State whether foreigners or nationals, or on differences or supposed differences between positive and negative laws, or whether they are public or private laws, administrative or non-administrative laws, or *ordre public* as such or international *ordre public* (or private international *ordre public*), etc.; decisions giving effect to public policy within the municipal domain are based either upon the specific terms of legislative law or upon a more or less elastic conception of what public policy demands or permits in relation to the particular case under consideration.

It is difficult to ascertain, if indeed that is possible, any common thread or line of reasoning to bind all the different cases together, or to harmonize them one with another, other than the general conception of public policy as developed in each municipal system from law to law, from case to case, and from time to time. Cases, no doubt, may be said to fall within general principles or into wide and somewhat unspecific categories. It is, for example, within one's knowledge that the domestic courts of the same country may vary in their application of principles of public policy to new and evolving sets of circumstances. Some are reluctant to assert any new head of public policy or to extend existing principles to new sets of circumstances. Others are not so reluctant.

Attempts have been made to discern some definable principle or principles to explain or harmonize the different cases so decided in different countries, and to elevate these principles to the level of rules of international law. For myself, I am bound to say that I do not find them convincing. This is at least understandable. In each country, however or in reliance upon what domestic laws or general principles it may call in aid *ordre public* or public policy, is determining for itself, by its legislation, by its administrative agencies, or through its courts, the extent to which, if at all, it will admit or exclude foreign laws, or foreign rights otherwise applicable. It is, in each case, no doubt for good and sufficient reasons in the view of the State concerned, an assertion of national sovereignty.

It is not, therefore, to be wondered that, in attempts to enunciate some rules of guidance, laws described as of an absolute and imperative character are divided into two categories (Savigny, English translation by Guthrie, p. 78): those "enacted merely for the sake of persons who are the possessors of rights", and those that are

not so enacted but rest on moral grounds or on the public interest "where they relate to politics, police or political economy".

We find Brocher describing these two categories as "*Lois d'ordre public interne*" and "*Lois d'ordre public international*", respectively. This distinction is presented for the purpose of indicating that laws within the first category are applicable only where the internal law of the forum applies, whilst the second imperatively demands application even in the sphere of private international law of the country.

Niboyet has other ideas, and so has Bartin and so has Mancini. The many authorities quoted during the course of the argument on both sides at least should satisfy one, if that were necessary, that *ordre public* (public policy) is but a general description of the operation by which nations reject or refuse to accept foreign laws in the pursuance of, or presumed pursuance of, its fundamental principles of "public policy" as understood from time to time (see Dennis Lloyd, Public Policy: A Comparative Study on English and French Law, 1953, and cf. Serbian Loans Case, P.C.I.J., Series A, Nos. 20/21, p. 46).

But whatever may be the position in any municipal system at any given time, once an international agreement or convention or treaty comes before this Court, then the considerations which, in my opinion, are applicable to the problem, are completely different.

The difficulties in applying public policy *(ordre public)* to treaties and conventions were not underestimated by the Swedish Government. This appears particularly in Sweden's Rejoinder to the Netherlands Reply. The latter had advanced what are, in my opinion, powerful arguments against *ordre public* being invoked against State conventions on conflict of laws. No useful purpose can, I think, be served by referring to the learned authors quoted by each side to support their respective submissions. On the one hand Sweden claims that practically all authors on conflict of laws support their contention that *ordre public* (public policy) can override—or is excepted from—private law conventions, whilst the Netherlands contend the position is the reverse. It seems to me that Sweden felt obliged in its Rejoinder to meet the force of the observations of Wolff (*Das internationale Privatrecht Deutschlands*, p. 70) and Melchior (*Grundlagen*, p. 359), quoted in the Netherlands Reply. These observations are, in my opinion, of such persuasive force that they should be quoted in full:

> "Lewald rightly emphasizes the dangers that arise, once *ordre public* is upheld in respect of State conventions. This would enable any State practically to restrict the application of the convention

ad libitum and, in such manner, to divest the convention of practically its entire value." (Wolff, *l. c.*)

"In my opinion it should be held, in case of doubt, that within the realm of State conventions on conflict of law, application of *ordre public* cannot be allowed. Normally the States that are parties to the international conventions will intend to create obligations of an equable and predictable character. If, however, one admits exceptions by virtue of *ordre public*, one must interfere considerably with the State convention, and this in a manner that can hardly be foreseen on contracting, since *ordre public* is less clearly defined than other conflict principles. And if one is to permit the courts to apply *ordre public* within the realm of State conventions, one must necessarily also approve such ulterior laws of a contracting State as undermine the convention in the name of *ordre public*." (Melchior, *l.c.*)

Whilst not retreating from the position it had taken up in its Counter-Memorial, Sweden in its Rejoinder presented its argument somewhat differently and within limits which, no doubt, it thought were less susceptible to attack. Having stated the issue as follows:

"The issue is whether the Swedish Government has been guilty of a breach of the 1902 Convention in applying to a Dutch child its law relating to the protection of children, in spite of the Dutch law relating to guardianship which is recognized as being applicable to that child",

the Swedish case went on to say that the law for the protection of children, being part of the *public* law, is applicable throughout the territory to any foreign child there; that no national or foreign law can stand in the way of its application, and that the 1902 Convention was in no way intended to alter this situation.

Rules of public (or of administrative) law are, it was submitted by it, absolutely mandatory.

It seems unnecessary to argue that if a domestic law has been validly passed which, either expressly or by necessary implication, is made clearly to apply, in terms obligatory upon the judicial and administrative organs of that country, to all persons or things within the territorial limits of a sovereign and independent State, the mandatory nature of the law upon all persons, foreigners or nationals, within the territorial limits of the State must, within its municipal system, be observed by those judicial and administrative organs. Indeed, assuming the constitutionality and validity of the Act within the domestic legal system of the State concerned, it is competent for a State party to any treaty or convention to pass a law binding on its *own* authorities to the effect that, notwithstanding anything in the treaty or convention, certain provisions thereof

binding on that State shall not apply, or to legislate in terms clearly inconsistent with, and intending to override, the terms of an existing treaty (cf. Sanchez *v.* United States, U.S. Supreme Court, Reports, Vol. 216, at p. 167). Whether described as mandatory or otherwise, public or otherwise, that law would have full force and effect within the territorial limits of the State in question. But that in no way would be relevant to the question whether that legislation—or an act done pursuant to it—is or is not in breach of or incompatible with obligations binding upon the State by virtue of a treaty or convention.

The argument of the Swedish Government on this aspect, as stated in its Rejoinder and as applied to this case, may be stated thus:

(1) There is a distinction between *public policy* and *public law* as a justification for the application of the *lex fori*.

(2) This is more than a difference in legal approach.

(3) *Public policy* may be relied upon as a ground for excluding foreign law otherwise applicable and for applying the territorial law, *by way of exception*.

(4) On the other hand, the obligatory rules of *public law* are normally and mandatorily applicable to all those resident in the territory, *regardless of any foreign law whatsoever*.

It is to be observed that Sweden's case is that, whereas "public policy" may be invoked by way of exception, the obligatory rules of "public law" apply to all resident in the territory regardless of any foreign law whatever, whether arising under convention or treaty or otherwise; "public law" does not even admit the *principle* of the applicability of the foreign law. But if either "public policy" or "public law" may be invoked in respect of the present Convention, it is, I think, clear—however the argument is presented—that this may only be done on the basis of an implied reservation from or exception to the Convention. In my opinion such a reservation should not be implied in the absence of clear necessity that it must be so implied in order to give effect to the intentions of the parties.

What is the character or definition of a "public law"? Opinions are varied. There is no agreement.

In a wide sense, legislative laws are often conveniently categorized as public or private, the former being of general application, directed to the organization of society and applicable to all within the domain of the State concerned, the latter rather directed to special interests of individuals, etc., as distinct from society as a whole.

But "public law", in the context of the present dispute, needs to be more definitively indicated. The Rejoinder of Sweden left me in

some doubt as to whether the concept of "public law" was claimed to be part of, or separate from, that of "public policy". In Sweden's final submissions this is still somewhat unclear. But whether it is one or the other, it is reasonably clear that "public law", as the term is used by Sweden, is a law which by its terms applies to nationals and foreigners alike within the territorial limits of a State, and which is made obligatory upon all persons and upon all instrumentalities called upon to enforce it. It includes rules of constitutional law, of procedure and of administrative law.

"Public law" is described, if not defined, by others sometimes in similar, sometimes in different, senses. To some it is synonymous with a "social law". Others give it the specific role of providing for the political structure of a State and include within it the Constitution of a country, electoral laws, criminal laws and *certain* administrative and fiscal laws. In this context the field occupied by "public law" is different from that occupied by "public policy". The two are seen by some as separate concepts whose domains may touch but never overlap.

Others consider "public law" as a special branch of the law whose boundaries are fairly precise and which may be defined "as the collection of rules—legislative, departmental and Judge-made—which fix, or ought to fix, the relation between the authorities and the different administrative organizations or public authorities as well as with one another as with individuals. It comprises, therefore, constitutional and administrative law." (*Droit public* and *ordre public*, Transactions of Grotius Society, 1929, Vol. 15, pp. 83 *et seq.*)

"Public law", so described, seems to me not only to overlap but to occupy a substantial part of the area generally considered as within that of "public policy". It presumably would include a public law of the kind indicated by Sweden, but it clearly enough includes very many others. I would think that "public law" in the sense used by Sweden is either part of the concept of "public policy" or, if a separate concept, occupies with it a substantial area of the same field. It is not, however, for the purpose of this case necessary in my opinion to determine this one way or the other. For, in either case, in whatever words the argument is put, what the Court is being asked to do is to read into the Convention a reservation—in other words, to imply a clause or proviso—excepting from the terms and operation of the Convention all laws of "public policy" and/or "public law". On this basis, the arguments presented by Sweden on each stand or fall together, for that on the one is, in my view, indistinguishable in principle from that on the other.

If, indeed, "public law" is to be considered as a concept separate and distinct from "public policy" and in no way part of it, the argument for Sweden is, in my judgment, clearly unsound (cf. Polish Nationals in Danzig, P.C.I.J., Series A/B, No. 44, p. 24). For, irrespective of *anything* which might appear in this (or any) Convention dealing with conflicts of laws, it would be permissible and consistent with the Convention for some contracting State to pass a "public law" of the character indicated by Sweden which provided, notwithstanding anything to the contrary contained in any such convention, that certain provisions of the "public law" should take effect. Even suggested safeguards to keep the invocation of the reservation of "public policy" within reasonable or governable limits could hardly find a place where what is done under a reservation, exception or exclusion of "public law" *may* be done "regardless of *any* foreign law whatsoever".

I cannot regard a proposition that could lead to such results as sound (cf. Advisory Opinion concerning the Polish postal service in Danzig, P.C.I.J., Series B, No. 11, pp. 37 and 39).

Moreover, Sweden appears to have disregarded or paid insufficient attention to the fact that measures which might be made the subject of "public" laws in some countries are in others governed by the Civil Code.

I think the issue in this case would have been clearer had less attention been directed to "*ordre public*" (public policy) and "public law", and more to consideration of the subject-matter, purpose and scope and operation of the Convention having regard to the terms in which it was drafted and agreed to.

It is understandable however that the latter received less specific attention than the former since the submissions in favour of a reservation or exclusion of "public policy" or "public law" depend on considerations which lie largely outside the terms of the Convention. Assuming such a reservation or exclusion exists—which it was the aim of the Swedish case to establish—the terms of the Convention in this particular case were, for the purposes of the argument, of secondary importance. On the submissions of Sweden, all that is necessary to be established is that the law under which the disputed action is taken is one of "public policy" or of "public law"; *that*, in the absence of any allegation of denial of justice, concludes the matter, whatever may be the terms of the Convention.

Public policy is principally and primarily a concept of municipal law. When, however, an international obligation is involved upon which this Court is called upon to pronounce, as in the present case, we are in a different field altogether. Treaty and convention obligations, whatever they are, must be faithfully observed. The provisions of municipal law cannot prevail over those of a treaty or

convention (Greco-Bulgarian Communities, P.C.I.J., Series B, No. 17, p. 32).

It should be repeated that what the Court is here being asked to do is to read into, or in legal terms to imply, a reservation—in what precise terms has never been made clear—excepting from the operation of the Convention all laws of contracting States which fall within "public policy" or within "public laws". The strongest of cases would have to be made out to justify the Court in doing so, for to do so permits States to determine for themselves the extent of their obligations under the Convention. It would permit this to be done even in derogation of what otherwise are obligations the Convention imposes. This could reduce the Convention to a shell. It is difficult to imagine what value the Convention in those circumstances would have, or why, having regard to the problem with which it sought to deal, it was ever entered into.

Before the Court would be justified in implying a clause of reservation, it would need to be quite satisfied that this was essential to be done in order to preserve the intention of the Parties. For otherwise there would be imposed a new and different agreement upon the contracting States.

No evidence was forthcoming that this was the intention. Reliance, however, was placed upon a so-called principle that such a reservation or exclusion must be read into conventions dealing with private law. Put in another way, "public policy" operates retroactively, and even definitively acquired rights cannot be invoked against such a Convention.

It was open to the Parties expressly to stipulate such a reservation. Indeed in Sweden's case it was urged that a reservation of public policy is expressly stipulated in almost all treaties and those that do not do so are the exceptions. The Parties to the present Convention did not so stipulate. It is not I think for the Court to speculate as to why they did not. The minds of the drafters were clearly directed during the preparatory work to the question whether some clause to that effect should or should not be included. They deliberately refrained from including one. It would in my opinion be going against all rules of construction as I understand them to imply such a reservation now.

It is, I think, proper at this point to offer some general observations on the exercise of having recourse to preparatory work in seeking the proper interpretation to be accorded to treaties and conventions. Recourse to preparatory work of treaties or conventions may, in certain cases, be necessary. But whenever it is permissible it should, I think, be done with caution and restraint. For there is always the danger that, instead of interpreting the relevant treaty or

convention, one will find oneself tending to interpret the preparatory work and then transferring that interpretation across to the treaty or convention which is the sole subject of interpretation.

The case before us presents, in my view, an example of this possibility. Some find nothing in the preparatory work of any real value, one way or the other. Others claim that it clearly supports the view that "public policy" is excepted from the Convention. Others are equally satisfied that the preparatory work just as clearly supports the opposite view. For my part, I would think this somewhat unsafe ground upon which to base any reasoning.

Those who contend that such a reservation should be implied are obliged, I think, to concede that—subject to any review by this Court—it is at the discretion of States, applying within their territorial limits their own ideas of public policy, to determine to what extent it will permit the Convention to operate. It is suggested that a State invoking the reservation is under some kind of duty to show that its public policy has been applied reasonably—whatever this in the present context means—and in good faith. The State should be ready to submit its actions to examination. In cases of dispute it is further urged that the acts of the States are subject to review by this Court provided it has jurisdiction. But what if the Court in any given case has not jurisdiction? Moreover, if we are to determine, as we must, the meaning of the Convention at the time it was entered into—1902—any consideration that in event of dispute this Court would be available as a reviewing tribunal, to mitigate the consequences of, or control the unreasonable use by a contracting State of, the reservation, is irrelevant. And what is to be the test or standard of reasonableness that is to be applied? (Cf. Serbian Loans, P.C.I.J., Series A, Nos. 20/21, p. 46.)

Were such a reservation implied it would be a reservation of an indefinable character and there would be little left in any legal sense of any obligations under the Convention. For their content would be variable, quite indefinite, quite unpredictable, depending on the will of different parties. I find it difficult to understand legal obligations so undefined and indefinite.

In my opinion, the submissions of Sweden on these issues are without substance.

The views which I have earlier expressed on the proper interpretation of the Convention reject any reservation, exception or exclusion of "public policy" or "public law".

In this case—and the decision must, of course, be limited to this case in its surrounding facts and circumstances—the *result* at which

I arrive is the same as that reached by those who support such a reservation, exception or exclusion.

But the *grounds* on which we reach our conclusion are, in my judgment, not immaterial. They represent not mere methods of approach; they are fundamentally different.

A reservation or exception of "public policy" would, in my judgment, set the Convention at large. What is given by one hand may be taken away by the other. Obligations clearly enough intended thereunder to be imposed upon all contracting States would have no constant—if, indeed, any predictable—meaning. Such obligations could never be defined or ascertainable in terms reciprocally understood and binding on the parties.

The judgment of the Court, however, in which I have concurred, in my view leaves the Convention unimpaired and intact. It preserves within the domain of the administration of guardianship, to which its scope and operation is limited, the full force and integrity of its provisions and of the obligations thereunder undertaken by the Contracting Parties.

(Signed) Percy SPENDER.