SEPARATE OPINION OF JUDGE BADAWI

[Translation]

I am in agreement both with the operative clause of and the grounds for the Court's Judgment. As reasons for its decision, however, the Court did not think it necessary to pronounce upon the interpretation of the law on protective upbringing as a law of *ordre public* aiming to provide a social guarantee, nor of the Convention of 1902 as containing an implied reservation authorizing, on the ground of *ordre public*, the overruling of the application of the foreign law recognized as the proper law to govern the legal relationship in question. The Court confined itself to giving a careful and closely reasoned analysis of the differences between the purpose of the Convention and the purpose of the law. In view of these differences, the Court considered that the Convention could not overrule the law, quite apart from the fact that unless the law prevailed, a negative solution would be arrived at, according to which the infant would lose in Sweden, where she lives, both the benefit of the law on protective upbringing and of the corresponding Dutch system of placing under supervision, this system only being applicable in the Netherlands by the Dutch national organs.

For my part, I take the view that this justification alone is not decisive, since, apart from the differences between the Convention and the law, there is the fact that the application of the latter affects the effects of the former. There is thus opposition between the two, and it is necessary to make one prevail over the other.

Now, the law is a national instrument, while the Convention is an international instrument. In favour of the latter there is a presumption of primacy and it has been established by many judicial decisions that a State cannot evade the obligations imposed by an international convention by invoking its own law, or indeed even its own constitution.

It is not enough, therefore, that the subject-matter of the law should be different from the subject-matter of the Convention. One must further take the view, either that this particular law is superior to the Convention, or that the Convention should be interpreted as embodying a tacit reservation which authorizes in certain cases the preference being given to the *lex fori*—in other words, that the law constituting the *lex fori* is a law of *ordre public*.

The first alternative is clearly to be excluded. The second one remains. Now, despite its apparent incongruity in the case of international conventions, the concept of laws of *ordre public* is a common one in private international law.

It is universally recognized in national systems of conflicts of laws as inseparable from these systems, notwithstanding that this

general formula of *ordre public* is considered a vague, indefinite and relative concept and one that varies according to place and time.

Is the situation the same in international conventions relating to the system of the conflict of laws? International conventions on this subject are, in fact, simply designed to achieve the unification of the sytem, without creating specific obligations. They merely constitute an alignment of States upon a uniform solution, without changing the nature of this solution as it is generally adopted in national legal systems.

Some doubt however appears to have been cast upon the invariability of this conclusion in the case of international conventions. Some take the view that, in the Convention of 1904 on succession, signed by the representatives of a large number of States, Article 6 regarding *ordre public*, which was redrafted so many times, made the Convention abortive, for it was never ratified, and that in 1913 France denounced the three Conventions of 1902, also for a reason of *ordre public*.

However that may be, it is somewhat significant to note that recent conventions of private international law expressly provided for the exception of *ordre public*.

During the drawing up of the Convention of 1902 on guardianship, there were, indeed, lengthy discussions on the adoption of a general formula of *ordre public*. The trend of opinion opposed to its inclusion in the Convention prevailed by invoking its vagueness and generality, as well as the fear that national tribunals might reduce the Convention to nothing in giving the formula a broad interpretation. According to this view, the Convention adopted a system of special treatment by providing for the only cases which deserved to be regarded as exceptions to the general rule laid down by the first article of the Convention.

Articles 3, 6 and 7 of the Convention have been cited as cases in which, on the grounds of *ordre public*, the national law is excluded. According to this interpretation, a similar exception would not be justified in any other case.

But, leaving aside paragraph 2 of Article 6, the provisions of Article 3 and 7 are, in fact, concerned with details of application or with hypotheses in which the application of the national law cannot be contemplated, not on grounds of *ordre public*, but on account of factors inherent in those very hypotheses. Under Article 3, it is as a result of the failure of the national law that the local law will be applied, while Article 7 is concerned only with provisional measures taken pending the institution of guardianship under the national law or measures taken in cases of urgency.

Apart from this argument drawn from the Convention and on the basis of the discussions at the Hague Conferences, must one conclude that in the absence of an exception of *ordre public* expressly provided for in the Convention, no such exception should be ad-

mitted? But no special provisions for individual cases could be sufficient or adequate to meet the needs of every legal situation, since the cases of *ordre public* cannot be fixed and listed in advance. The human contingencies which may give rise to a divergence between a rule determined by the system adopted for conflict of laws and another rule of the *lex fori* are numerous and often unforeseeable, quite apart from the fact that new laws may give rise to cases in which similar divergencies may be revealed.

The absence of a general formula of *ordre public* cannot, therefore, be interpreted as a negation of this reservation. In fact, this tacit reservation forms part of the technical structure of private international law which, by settling a conflict between two systems of law by means of the all-inclusive acceptance of one of them, cannot obviate another conflict between a particular rule of the system chosen and a rule of the *lex fori*. And it is precisely the exception of *ordre public*, implied in any system of conflict of laws, that constitutes the criterion for the settlement of conflict, which can be foreseen but not determined in advance.

But, if the omission to provide for the exception of *ordre public* in a convention does not mean that the convention denies its existence, such an omission could, in the mind of its supporters, have served as a means of minimizing the violations of the convention which would result from an abusive use of the exception. Perhaps it was thought that, without an arbitration voluntarily agreed to by the contracting parties to the Hague Conventions, in case of the abusive use of the exception—a cumbersome, costly, and not very appropriate method—the parties would have been unable to obtain justice.

Notwithstanding this probable mental reservation, the fact that the Convention is silent with regard to the exception cannot properly be construed as a denial of its existence. The view that it would, in one form or another, be admissible has always been held, because the exception is inseparable from the system of conflict of laws.

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In fact, the exclusion of the exception of *ordre public* in the application of an international convention on the conflict of laws is only conceivable on the assumption that the contracting States impliedly intended to accept the obligation not to reserve for their own sovereign action any right to apply the rules of their own legislation which might directly or indirectly run counter to the effects of the application of the convention.

Such an interpretation is however neither admissible nor in conformity with the facts. It is not admissible because it would reject the implication of the exception of *ordre public* to substitute for it a more serious implication.

It is not in conformity with the facts because even the extremist opponents of the exception cannot deny that certain limitations to the application of the Convention do in fact exist, in particular in penal matters, notwithstanding that these limitations have not been expressly provided for and that they can only be the result of an interpretation by implication. Without attempting a definition of *ordre public*, which the Conferences were not able to establish, it is not difficult to admit that the limitations which may be justified on grounds similar to or as valid as the limitation mentioned above should benefit by the same treatment. They would involve a comparison between the obligation resulting from the Convention and the local law. If the courts of a contracting State, under the possible ultimate supervision of an international jurisdiction, hold that the law, in view of its importance and its serious nature, should not be applied only to nationals of the country, either as a right or a privilege, or as an obligation or duty, but to all the inhabitants of the country as being a law of *ordre public*, they cannot be held to be contravening the intentions of the contracting States in making the law prevail over the Convention. It is, in fact, a question to be decided in each case, having regard to the convention and the law involved.

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With regard to the present case, it is sufficient to recall that the Netherlands, notwithstanding the omission of any allusion in the Convention to the exception, recognize that the Convention cannot be invoked with regard to the custody of a child under guardianship against the carrying out of a penalty or of a measure of reformation pronounced against the child for an offence which it has committed, in the same way as they would recognize that the protective upbringing exercised in cases *(b)*, *(c)* and *(d)* referred to in Article 22 of the Swedish Law of June 6th, 1924, would override the application of the Convention, but not case *(a)*—which is that of Elisabeth Boll—because that case only relates to the private interests of the child and thus constitutes a case of guardianship and hence a rival guardianship to that provided for in the first article of the Convention.

But it is arbitrary, where the law has put the different grounds on a footing of equality, to consider that one of them is connected with the private interests of the child, while the others have in view the interests of society—especially bearing in mind the evolution that has taken place in ideas concerning children and young people.

How, moreover, on what basis, is the respective seriousness of the grounds laid down in Article 22 to be determined, when the law establishes and puts at the disposal of the Board measures which are not determined by the differences in those grounds—a certain measure being applied for a certain ground—but only by the appropriateness of the measure in regard to the specific case?

A case *(a)* may be more serious than a case *(c)*, and may call for a graver measure; and the contrary can also be true.

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In order to contest the exception of *ordre public*, the vagueness and generality of the concept have often been invoked, as also the fear that it may be abusively or arbitrarily applied; but, apart from the fact that that is a hypothetical and exaggerated danger, the objection is not valid to exclude a rule of law of which it postulates the truth in principle. At the most, the only value of the objection would be to call for greater circumspection in its application.

In the present case, the issue does not in reality bear on the principle of the exception of *ordre public*, nor on the fact that it constitutes an implied reservation to the first Article of the Convention of 1902, nor on the general scope of the law on protective upbringing, but on the application of one of its provisions to the case submitted to the Court, by detaching the first paragraph of Article 22 of the law of June 6th, 1924, from the system as a whole and by contesting its character of *ordre public*.

The presence of the element of a substantive link considered as a condition of the exception of *ordre public* has also been disputed, but the uninterrupted residence of the infant in Sweden leaves no doubt, in the present case, of the existence of such an element.

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From the foregoing considerations it may be concluded that the law on protective upbringing is a law of *ordre public* and that, as such, it overrides the application of the Convention of 1902.

This reason should therefore be added to the reasons adopted by the Court, of which it is a necessary complement.

The rejection of the Submissions of the Netherlands arrived at on the basis of the arguments of the Parties themselves would then be even more convincing.

(Signed) A. BADAWI.