

# WORLD LAW

A treaty, most often thought of as a contract between sovereign states, is frequently something more than that. Whenever a treaty establishes rights and duties for individuals which are enforceable in national courts it takes on the characteristics of a national law. When a conflict arises between such a treaty-law and an ordinary statute-law, how is it to be resolved by a national court—or by an international court? The answer to that question will differ for each court accordingly as each gives the greater emphasis to the treaty as a national law or as an international contract.

Although the United States Constitution declares that treaties, like federal statutes, are “the Law of the Land,”<sup>1</sup> it does not specify whether a treaty or a statute<sup>2</sup> will prevail in the event of a conflict between their provisions. It was not until 1855 that an importer of Russian hemp gave the federal judiciary an opportunity to settle that point. The duty on the hemp had been levied in accordance with the Tariff Act of 1842,<sup>3</sup> but the importer insisted that he should have been charged at a lower rate under the terms of an 1832 treaty with Russia.<sup>4</sup> The importer lost his case, however, for in *Taylor v. Morton*<sup>5</sup> it was decided that of the treaty and the statute, the later in time must prevail, *leges posteriores priores contrarias abrogant*. The doctrine of *posteriores priores*, which was approved by the Supreme Court in 1870,<sup>6</sup> is a rule of priority by which treaty-laws and statute-laws are given an approximately equal footing. Thus, the provisions of a treaty, so far as the treaty is self-executing,

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<sup>1</sup> “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. 6, § 2.

<sup>2</sup> The present discussion is concerned only with federal statutes. Article 6, section 2, *supra*, note 1, specifically provides that state statutes are superseded by treaties with contrary provisions. See Corwin, *Constitution of the United States of America, Annotated*, S. DOC. NO. 170, 82 Cong., 2d Sess. 413-417 (rev. 1952).

<sup>3</sup> 5 Stat. 548.

<sup>4</sup> Treaty With Russia, Dec. 18, 1832, 8 Stat. 444.

<sup>5</sup> 23 Fed. Cas. 784 (No. 13799) (Curtis, Circuit Justice), *aff'd*, 67 U.S. (2 Black) 770 (1855).

<sup>6</sup> The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

may supersede those of an earlier statute with which they conflict.<sup>7</sup> Conversely, a treaty may be abrogated by the conflicting provisions of a later statute, but only if Congress has expressed a clear intent to that effect.<sup>8</sup>

Recently, in the *Guardianship* case,<sup>9</sup> the International Court of Justice was faced with an apparent conflict between a treaty and a national law. A Dutch guardian based his right to custody of a minor living in Sweden on a Dutch treaty with that country. The Swedish authorities, who actually had control of the Dutch child, based their claim on a Swedish law. The Court decided that, because the national law and the treaty dealt with different subject matters, Sweden had retained the child without violating its treaty obligation. Unlike the doctrine of *posteriores priores*, the subject matter distinction is not a rule of priority. The question asked is not "Shall the treaty or the national law prevail?" Rather, it is "Has a country violated its obligations under the treaty by enforcing the provisions of its national law?" In an international court, where a treaty is regarded in its primary aspect as a contract between sovereigns, it is the duty of the court to determine what the international contract requires and whether the parties to it have met those requirements. Because a treaty is a contract between sovereigns, its unilateral abrogation by national law cannot relieve a party of its obligations under the treaty.

As with the parties to any contract, the parties to a treaty must have a reasonable basis for their belief that the obligations of the treaty will be observed. As with the enactors of any law, those who approve a treaty which will become part of their national law must have a reasonable opportunity to modify that law as changing circumstances demand. The problems which arise when the need for confidence in treaty obligations must be reconciled with the need for adjustment of national law are well illustrated in the *Guardianship* case which is reviewed in the following pages.

As Mr. Justice Curtis said in the *Taylor* case,<sup>10</sup> The foreign sovereign between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous faith . . . .

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<sup>7</sup> *United States v. Schooner Peggy*, 1 U.S. (1 Cranch) 358 (1801).

<sup>8</sup> *Cook v. United States*, 288 U.S. 102 (1933).

<sup>9</sup> *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*, [1958] I.C.J. Rep. 55.

<sup>10</sup> 23 Fed. Cas. at 785-786.

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But it cannot be admitted that these powers [to regulate commerce and to levy duties on imports] can be, or were expected to be exerted, under all circumstances, which might possibly occur in the life of a nation, in subordination to an existing treaty; nor that the only modes of escape from the effect of an existing treaty, were the consent of the other party to it or a declaration of war. To refuse to execute a treaty, for reasons which approve themselves to the conscientious judgment of the nation, is a matter of the utmost gravity and delicacy; but the power to do so, is prerogative, of which no nation can be deprived, without deeply affecting its independence.

In the middle of the nineteenth century, Mr. Justice Curtis could speak of the consent of the other party and of a declaration of war as alternative modes of escaping the effect of a treaty. Whether, in the shrinking but as yet divided world of the mid-twentieth century, the utter futility of one of those alternatives requires that the need for confidence in treaty obligations be given universal priority over the needs of national sovereignty is a question which is yet to be answered in the quest for world rule of law.

—The Editors

## THE GUARDIANSHIP CASE\*

IN A RECENT CASE decided by the International Court of Justice, the right to custody of a thirteen year-old child turned on the resolution of a conflict between a treaty and a national law. Upon the death of his Swedish wife in 1953, a Dutch national became the guardian under Dutch law of his daughter. Although the child was born in Sweden and had always lived there, her guardianship was defined by Dutch law as required by the Hague Convention of 1902 Governing the Guardianship of Infants, to which Norway and Sweden were signatories. The convention provided that, "The guardianship of an infant shall be governed by the national law of the infant."<sup>1</sup> However, the father's guardianship was registered under Swedish law by authorities who were apparently unaware of the child's Dutch nationality.<sup>2</sup> Shortly there-

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\* Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants, [1958] I.C.J. Rep. 55.

<sup>1</sup> Convention of 1902 Governing the Guardianship of Infants, June 12, 1902, art. 2, 95 British and Foreign State Papers 421.

<sup>2</sup> Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants, [1958] I.C.J. Rep. 55, 62-63. The father's application to the Swedish court was a "mistake," noted Judge Offerhaus. *Id.* at 146. He also indicated that un-

after, the father was accused in Sweden of committing an infamous crime against his daughter, who was then eight years old. To prevent the child's exposure "to serious neglect or . . . other danger affecting . . . [her] physical and mental health," she was placed in the custody of her maternal grandfather under the authority of the Swedish Protective Upbringing Law.<sup>3</sup> The father contested this action but the Supreme Administrative Court of Sweden twice upheld it,<sup>4</sup> even though a Dutch judgment,<sup>5</sup> entered while the appeals were pending in the Swedish court, had discharged him as guardian, appointed a successor, and ordered that the child be turned over to the new guardian. Nevertheless, the measures taken under the Swedish Protective Upbringing Law continued in force, and the Dutch guardian was denied the custody of the child for four and one-half years.

In 1957, the Netherlands, invoking the compulsory jurisdiction<sup>6</sup> of

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der the Swedish law the guardian was allowed the custody of the child and he acted as administrator of the child's property. *Id.* at 146-47. But compare that statement to Judge Córdova's: the "guardianship, according to Swedish law, only refers to the administration of the interests of the infant, but does not include the custody and control of her person." *Id.* at 139. The father's guardianship was cancelled on September 16, 1954, by the Swedish court in which it had first been registered on March 18, 1954. *Id.* at 63.

<sup>3</sup> The president of the Child Welfare Board at Norrköping, Sweden, acted under the authority of article 22(a) of the Swedish Protective Upbringing Law of June 6, 1924, which provides that the Child Welfare Board may take measures concerning: "(a) a child under sixteen who, in the family home, is ill-treated or exposed to serious neglect or any other danger affecting its physical or mental health . . ." The other provisions of article 22 are: "(b) a child of the same age who, by reason of the immorality or negligence of its parents or of their unsuitability for the duty of educator, is in danger of becoming a delinquent; (c) a child under eighteen whose delinquency is so serious that special educational measures are required to correct it; and (d) a person between eighteen and twenty-one who is found to be leading an irregular, idle, or immoral life or who exhibits other serious vices, the correction of which calls for special measures on the part of society . . ." *Id.* at 147. Judge Lauterpacht noted that under the protective upbringing system the custody and control of the infant was given to the Child Welfare Board. "The Board, in turn, entrusted the custody of . . . [the child] to her maternal grandfather . . ." *Id.* at 79.

<sup>4</sup> The Child Welfare Board affirmed the application of the protective upbringing measure on May 5, 1954. The measure was upheld by a decision of the Östergötland Provincial Government on June 22, 1954, to which the father and a deputy-guardian, appointed by the Amsterdam Cantonal Court (June 2, 1954), had appealed. That decision, in turn, was affirmed by the Supreme Administrative Court of Sweden, October 5, 1954, and, following subsequent appeals, by the same court on February 21, 1956. The present dispute arose as a result of the latter decision.

<sup>5</sup> Court of First Instance of Dordrecht, Netherlands, August 5, 1954.

<sup>6</sup> Article 36, paragraph 2, of the Statute of the Court provides that "The states parties to the present Statute may at any time declare that they recognize as compulsory

the International Court of Justice, applied for a ruling that the measures taken under the Swedish Protective Upbringing Law constituted a breach of Sweden's obligations under the Convention on Guardianship and that Sweden was obligated to end those measures. After a hearing on the merits, the Court upheld the application of the Swedish law, declaring that Sweden had not failed to observe its obligations under the convention.<sup>7</sup>

#### THE SUBJECT MATTER DISTINCTION

Because the application of the Swedish Protective Upbringing Law had interfered with the guardian's right to the custody of the child, had there been a failure to comply with article 6 of the convention, which provides that "the administration of a guardianship extends to the person . . . of the infant"?<sup>8</sup> The Court decided that it had "to consider this [protective upbringing] measure in the light of what it was the intention of the Swedish law to establish, to compare it with the guardianship governed by the 1902 Convention and to determine whether the application and maintenance of the measure in respect of an infant whose guardianship falls within that Convention involve a breach of the Convention."<sup>9</sup>

The Court found that the purpose of the convention, "in providing that guardianship and, in particular, that the guardian's right to custody should be governed by the national law of the infant," was to "determine what [guardianship] law should be applied to settle these

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*ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: [*inter alia*] a. the interpretation of a treaty . . ." The Netherlands, on August 1, 1956, and Sweden, on April 6, 1957, accepted the compulsory jurisdiction of the Court under article 36, paragraph 2. [1958] I.C.J. Rep. at 57.

<sup>7</sup> Judgment of November 28, 1958. The Judges stood 12 votes to 4. The Court consisted of: President Klaestad; Vice President Zafrulla Khan; Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Spiropoulos, and Sir Percy Spender; Judges *ad hoc* Sterzel and Offerhaus. Of the majority, Judges Badawi, Lauterpacht, Quintana, Wellington Koo, and Spender appended statements of their separate opinions. Judge Spiropoulos submitted a separate declaration. Judges Winiarski, Córdova, and Offerhaus appended dissenting opinions and Judge Kojevnikov submitted a dissenting declaration. See *The Norwegians Loans Case*, 1960 DUKE L. J. 418, footnote 14 (separate and dissenting opinions and declarations explained).

<sup>8</sup> Convention of 1902 Governing the Guardianship of Infants, June 12, 1902, art. 6, 95 British and Foreign State Papers 421, 422-423.

<sup>9</sup> [1958] I.C.J. Rep. at 65.

points"<sup>10</sup> in a conflict of laws situation. It concluded, therefore, that application of the local guardianship law of the infant's residence, as distinct from the foreign law of its nationality, was clearly excluded by the convention. The Court recognized that the foreign law might have points of contact with local laws other than the local guardianship law, but it observed,<sup>11</sup>

it does not follow that in such cases the national law of the infant must always prevail over the application of the local law and that, accordingly, the exercise of the powers of a guardian is always beyond the reach of local laws dealing with subjects other than the assignment of guardianship and the determination of the powers and duties of a guardian.

When, for example, national laws dealing with compulsory education or sanitary supervision of children are applicable to foreigners,<sup>12</sup>

a guardian's right to custody under the national law of the infant cannot override the application of such laws to a foreign infant. . . . [T]he 1902 Convention was not intended to decide upon anything other than guardianship, the true purpose of which is to make provision for the protection of the infant; it was not intended to regulate or to restrict the scope of laws designed to meet preoccupations of a general character.

The Court held that the Convention on Guardianship was not to be construed as prohibiting the application of any national law on a different subject matter, the indirect affect<sup>13</sup> of which was to restrict, though

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<sup>10</sup> *Id.* at 67. The subject of conflict of laws between nations is that branch of international law known as private international law. The rules of that branch of law may be common to several nations but they are, nevertheless, rules of national law. If however, those rules have been established by treaty or by international custom, then they take on the character of true or public international law. Case Concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J., ser. A, No. 20 and Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France, P.C.I.J., ser. A, No. 21, at 41 (1929).

<sup>11</sup> *Id.* at 68. The Court illustrated this point: "If, for instance, for the purposes of the administration of guardianship in respect of the person or the property of an infant, a guardian finds it necessary to travel to some foreign country, he will, so far as his journey is concerned, be subject to the laws relating to the entry and residence of foreigners. This is something outside the scope of guardianship as regulated by the 1902 Convention." *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> The Court had rejected the Netherland's contention that the Swedish Protective Upbringing Law was a "rival guardianship" or a measure "virtually amounting to guardianship" and, therefore, a direct restriction on the right to custody. It found that the Swedish courts, in upholding the protective upbringing measures, either "proceeded on the basis of recognition of the Dutch guardianship," [1958] I.C.J. Rep. at 65, or "did not question . . . [the Dutch guardian's] capacity to take proceedings be-

not to abolish, the guardian's right to custody. In the light of that holding the Court next turned to an examination of the convention and the Swedish Protective Upbringing Law to determine whether they differed in subject matter.

The Court noted that the purpose of guardianship was to protect the infant, whereas protective upbringing, though contributing to the protection of the child, "at the same time, and above all, . . . is designed to protect society against dangers resulting from improper upbringing, inadequate hygiene, or moral corruption of young people;" in short, to provide a "social guarantee."<sup>14</sup>

The Court also indicated that "the 1902 Convention was designed to put an end to the competing claims of several laws to govern a single legal relationship [guardianship]."<sup>15</sup> But such a conflict had never arisen with respect to the several national laws on protective upbringing, for each claimed to be applicable only in the country in which it was enacted and, indeed, could not have any "extraterritorial aspiration, for that would exceed its social purpose . . ."<sup>16</sup> Thus, reasoned the Court, unless protective upbringing laws fell outside the domain of the convention, neither the Dutch nor the Swedish law of protective upbringing could be applied, and the protection of the infant, desired by both countries, would be frustrated.<sup>17</sup> For these and other reasons,<sup>18</sup> the

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fore it, and . . . [that the Swedish courts] thereby recognized . . . [the guardian's] capacity as guardian . . ." *Id.* at 66. The Swedish courts had not raised protective upbringing to "the status of an institution, the effect of which would be completely to absorb the Dutch guardianship . . ." *Ibid.* Furthermore, the person given custody of the child under the Swedish law had not been given the capacity and rights of a guardian; he merely "receives her, watches over her, [and] provides for the care of her health . . ." *Ibid.* Three of the judges who wrote separate and dissenting opinions agreed with the Court's conclusion that the measures taken under the Swedish Protective Upbringing Law did not constitute a rival guardianship. Judge Quintana noted that Sweden had "in no wise challenged the legal existence of the guardianship instituted under Netherlands law . . ." [1958] I.C.J. Rep. at 104. Judge Winiarski, dissenting, agreed that the protective upbringing was not a rival guardianship but, nevertheless, felt that it was something more than a "temporary restriction" on the exercise of the guardian's right to custody. Because it encroached "deeply upon the attributes of national guardianship which are guaranteed by the Convention," the protective upbringing measures were incompatible with the convention. *Id.* at 134.

<sup>14</sup> *Id.* at 69.

<sup>15</sup> *Id.* at 71.

<sup>16</sup> *Ibid.*

<sup>17</sup> The Court continued: "to arrive at a solution which would put an obstacle in the way of the application of the Swedish law on the protection of children and young persons to a foreign infant living in Sweden would be to misconceive the social purpose of that law . . . . The Court could not readily subscribe to any construction which

Court concluded that the subject matter of the Swedish Protective Upbringing Law was different from that of the convention.

To summarize, the Court concluded that the convention was intended to prohibit the application of national guardianship laws but not necessarily all other national laws which might incidentally affect the operation of the convention. Specifically, it held that national laws which had a different subject matter from that of the convention could be applied although they interfered with a guardianship established under the convention. Because the convention was not intended to create obligations with respect to matters other than guardianship, Sweden, by applying its Protective Upbringing Law which had a different subject matter, in no way failed to observe its obligations under the convention.

Judge Sir Percy Spender concurred in the Court's decision. A guardian's exercise of his right to custody and control, he believed, "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."<sup>19</sup> "But this does not complete our enquiry," he continued, for "a State, party to the Con-

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would make the 1902 Convention an obstacle on this point to social progress." *Ibid.* In short, the Court indicated that unless protective upbringing laws were outside the scope of the convention, a vacuum would result which would leave the child unprotected. However, Judges Offerhaus, Winiarski, and Lauterpacht pointed out that, even if the Swedish Protective Upbringing Law was not applied, the child would not necessarily be left unprotected because the Dutch guardianship law provided for care of children in situations similar or identical to those designated in the Swedish law. The necessary measures could therefore be decreed by Dutch judicial authorities and applied by the Swedish authorities in accordance with their obligation under the convention. For the contrary view expressed by the Court, see the second point in note 18, *infra*.

<sup>18</sup> The Court noted three other differences between the convention and the Protective Upbringing Law. First, guardianship is maintained for a pre-ordained period, while protective upbringing is more flexible in that the measures taken depend upon the circumstances. Second, under the convention the foreign law of guardianship was to be applied by the national courts and "it is perfectly conceivable that the courts of a State should in certain cases apply a foreign law." [1958] I.C.J. Rep. at 70. On the other hand, protective upbringing was applied, at least in its first stage, by an administrative organ which could only act in accordance with its national law. "It is inconceivable that the Swedish Child Welfare Board should apply Dutch law to a Dutch infant living in Sweden . . ." *Ibid.* Third, the Court pointed out that the convention applied only to children under the care of a court-appointed guardian, whereas protective upbringing was applicable whether the infant was under legal guardianship or the natural guardianship of its parents and that it was superimposed on either form of guardianship without bringing either to an end.

<sup>19</sup> [1958] I.C.J. Rep. at 118.



vention, may not, *whatever* the subject-matter of the law under which it acts, do anything which contravenes the provisions of the Convention."<sup>20</sup> Thus, Judge Spender indicated that, while the Protective Upbringing Law might be consistent in principle with the convention, it might, nevertheless, be inconsistent with the convention in its application. The Court had not dealt with this aspect of the question. Judge Spender's examination, however, revealed that there was no specific provision in the convention that was incompatible with protective upbringing as applied in this case.<sup>21</sup> Judge Winiarski, dissenting, also questioned whether protective upbringing, as it had been applied, was inconsistent with the convention. He said,<sup>22</sup>

I find it difficult to agree that the subject-matter of the Swedish Law is outside the subject of the Convention and that, whatever the Swedish authorities may do in pursuance of that Law, cannot in any way contravene the Convention; for the common factor in the Law and the Convention is, in the final analysis, the infant. . . . The Swedish Law . . . is no doubt not incompatible as such with the 1902 Convention; but our case shows that the manner in which the law is applied in a specific case may bring it into conflict with the Convention.

Judge Offerhaus, the *ad hoc* judge from the Netherlands,<sup>23</sup> felt that the convention was meant to regulate something more than a conflict of laws in the field of guardianship. He indicated that the foreign law was to be applied to "everything that concerns the exercise of guardianship"<sup>24</sup> and that the content of the notion of guardianship was

<sup>20</sup> *Id.* at 119.

<sup>21</sup> Judge Spender believed that the only provision with which the application of protective upbringing could conflict was article 7, which allowed local authorities to take measures for an infant's protection "pending the institution of guardianship, and in all cases of urgency." 95 British and Foreign State Papers 423. He decided that there was, in fact, no conflict because article 7 was directed solely to the protection of a child for the contingencies stated therein and was not intended to preclude other measures, such as protective upbringing, which had no relation to guardianship.

<sup>22</sup> *Id.* at 135.

<sup>23</sup> Article 31(3) of the Statute of the Court provides that when the Court does not include a judge of the nationality of a party before the Court, that party may choose a person to sit as judge.

<sup>24</sup> *Id.* at 149. Judge Offerhaus based this conclusion on his examination of the following documents relating to the first and second Hague Conferences on private international law: *Rapport de la IVth Commission*, ACTES DE LA DEUXIÈME CONFÉRENCE DE LA HAYE CHARGÉE DE RÉGLEMENTER DIVERSES MATIÈRES DE DROIT INTERNATIONAL PRIVÉ 111, 112 (1894); *Procès-Verbaux des Séances*, *id.* 9, 15; *Rapport de la I<sup>st</sup> Commission*, *id.* 47, 48; *Procès-Verbal No. 9*, *id.* 117, 118; *Rapport de la II<sup>d</sup> Commission*, *id.* 125; *Procès-Verbal No. 4*, ACTES DE LA CONFÉRENCE DE LA HAYE

to be determined by the foreign law. Therefore, if the foreign law included the guardian's right to custody, a party to the convention was bound to recognize that right. "Guardianship," he said, "within the meaning of the Convention, must therefore include the national guardianship for the whole period of guardianship and for all the care that the person of the infant requires, so to speak, in extrinsic and intrinsic totality."<sup>25</sup> Judge Offerhaus went on to note that the scope of the convention was "fairly wide" and that it clearly included the idea of "protection."<sup>26</sup> Furthermore, because protective upbringing laws existed at the time the convention was adopted in 1902, the parties must have contemplated their effect upon the operation of the convention. Judge Offerhaus concluded that the convention covered the organization of guardianship in its totality and, therefore, all laws which served to protect children.<sup>27</sup>

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CHARGÉE DE RÉGLEMENTER DIVERSES MATIÈRES DE DROIT INTERNATIONAL PRIVÉ 37 (1893); *Procès-Verbal No. 5, id.* 39, 41; *Rapport de la 1st Commission, id.* 45, 46-47.

<sup>25</sup> [1958] I.C.J. Rep. at 150.

<sup>26</sup> Judge Offerhaus pointed out that the Fourth Commission of the Second Hague Conference of 1894 used the word "protection" three times, and, moreover, "expressed the view that what was involved was protection through guardianship . . ." *Id.* at 150.

<sup>27</sup> Judges Córdova and Lauterpacht also took issue with the Court's decision that the convention did not cover the system of protective upbringing set up by the Swedish law. The latter Judge noted that the parties had agreed that guardianship under the convention covered the right to decide on the residence and education of the child, but that, in this case, the right had been claimed and exercised by Swedish authorities in pursuance of the Protective Upbringing Law. Because the convention covered, "in one of its essential aspects," a power that had been exercised under protective upbringing, Judge Lauterpacht concluded, "the substance is the same although the purpose of the Convention and of the Law may be different." *Id.* at 81. Judge Córdova stated that "in substance, guardianship and laws for the protection of children are remarkably the same, and their means of realizing their purpose is identical: the custody and control of the person of the minor." *Id.* at 142.

Judge Lauterpacht also disagreed with the view advanced by Sweden that there could be no conflict between a treaty concerning guardianship, an institution of private law—particularly family law, and a national law of protective upbringing, an institution of public law. Such a distinction between private and public law was "an essentially doctrinal classification" which "provides a doubtful basis for judging the question of the proper observance of treaties." *Id.* at 83-84. Moreover, "an examination of the main systems of municipal [national] law in the matter of guardianship does not corroborate the view that it is a mere family institution of a purely private law nature." *Id.* at 84. Judge Lauterpacht observed that in a majority of states, including both Sweden and the Netherlands, guardianship is "characterized by an active intervention of the State as an organ of control and supervision at every stage." He also noted that the difference between family guardianship and court-appointed guardianship was clearly recognized prior to 1902. The distinction had, for example, been made by M. Lehr,

The distinction drawn by the Court between the protection of the child and the protection of society was artificial, said Judge Lauterpacht, for<sup>28</sup>

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.

“All social laws,” he added, “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.”<sup>29</sup>

Some of the judges not only criticized the reasoning on which the Court had based the subject matter distinction, but also objected to the decision on other grounds. Judge Córdova felt that the distinction opened wide the door to the assertion of national laws as a means of avoiding the binding force of treaties. As Judge Offerhaus pointed out, such a result was particularly to be avoided because “merely by means of the label affixed to a law, the aim of the Convention could thus be defeated.”<sup>30</sup> Judge Lauterpacht agreed:<sup>31</sup>

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.

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Secretary of the Institute of International Law, which had had “a substantial share” in preparing the Convention on Guardianship. Lehr, *De la tutelle telle des mineurs d'après les principales législations de l'Europe*, 4 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE 315 (2d ser. 1902). M. Lehr had also classified both the Dutch and Swedish systems of guardianship as court-appointed systems. *Ibid.* at 320, 326, 329. Finally, Judge Lauterpacht observed that the Dutch law on guardianship included provisions “largely the same” as the provisions in the Swedish Protective Upbringing Law which had been applied in this case. “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 . . . may be gauged from the fact that the matter is entirely a question of legislative technique and drafting.” [1958] I.C.J. Rep. at 84.

<sup>28</sup> [1958] I.C.J. Rep. at 85.

<sup>29</sup> *Ibid.*

<sup>30</sup> [1958] I.C.J. Rep. at 154.

<sup>31</sup> *Id.* at 81. Judge Lauterpacht continued: “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

Judge Winiarski, dissenting, pointed out that, contrary to the Court's conclusion, there were two grounds upon which the application of protective upbringing was incompatible with the convention. In the first place, article 6 of the convention, which provided that the "administration of guardianship extends to the person and to all property of the infant wherever situated,"<sup>32</sup> established a substantive rule of law which clearly determined who was entitled to custody of the child. Furthermore, he felt that the record made it clear that the Swedish authorities were not applying protective upbringing because the infant resided in Sweden; rather, they were retaining her in Sweden in order to subject her to protective upbringing.<sup>33</sup> That manner of applying the law, he concluded, was clearly incompatible with the convention.

Judge Badawi felt that the subject matter distinction was not alone decisive.<sup>34</sup> Because the application of protective upbringing had, in fact, interfered with a guardianship established under the convention, it was necessary to decide which was to prevail. Although he found that there

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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." *Id.* at 81-82.

<sup>32</sup> Convention of 1902 Concerning the Guardianship of Infants, June 12, 1902, art. 6, 95 British and Foreign State Papers 421, 422-23.

<sup>33</sup> Judge Córdova reached the same conclusion. [1958] I.C.J. Rep. at 145.

<sup>34</sup> Judge Lauterpacht also expressed the view that the subject matter distinction was insufficient: "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." *Id.* at 81.

was a "presumption of primacy" in favor of international instruments, Judge Badawi was able to agree with the majority by finding an implied reservation to the convention which, in certain cases, authorized preference to be given to national laws which could be classified as *ordre public*. Judge Quintana agreed that the "significant feature" that made the judgment plausible was the special character of the Swedish law, its character as a law of *ordre public*, which conferred upon protective up-bringing "the validity which enables it to extend its legal effects into the international plane."<sup>35</sup>

#### ORDRE PUBLIC—AN IMPLIED RESERVATION

*Ordre public* is widely recognized as a limitation upon national conflict of laws systems. That is, if a judge would normally be required to apply foreign law, he may nevertheless apply the *lex fori* if the foreign law would violate the *ordre public* of his country. The principle of *ordre public*, or public policy as it is known in common law countries,<sup>36</sup> does not readily lend itself to precise definition.<sup>37</sup> Judge Badawi indicated that the "general formula of *ordre public* is considered a vague, indefinite and relative concept and one that varies according to place and time."<sup>38</sup> *Ordre public* has been used in two senses:<sup>39</sup>

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 . . . [Or] it is resorted to as embracing, more generally, fundamental national conceptions of law, decency and morality.

Judge Quintana believed that, although the concept of *ordre public* may vary from state to state, it had one commonly recognized char-

<sup>35</sup> *Id.* at 105.

<sup>36</sup> According to Judge Lauterpacht, "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 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 [the] two States which are parties to the dispute." *Id.* at 90-91.

<sup>37</sup> In the *Serbian Loans Case*, the Permanent Court of International Justice, referring to the difficulty of defining *ordre public*, said that it was "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 . . ." *Case Concerning the Payment of Various Serbian Loans Issued in France*, P.C.I.J., ser. A, No. 20 and *Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France*, P.C.I.J., ser. A, No. 21, at 46 (1929).

<sup>38</sup> [1958] I.C.J. Rep. at 75.

<sup>39</sup> *Id.* at 90.

acteristic: "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."<sup>40</sup> *Ordre public* finds its basis, he indicated, "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."<sup>41</sup>

Sweden contended that its protective upbringing statute was a law within its *ordre public*. How that characterization of the statute affected its relationship to the convention was the principal subject of argument before the Court. Sweden maintained that the convention must be understood as containing an implied reservation that *ordre public* laws could supplant the foreign law which would normally be recognized as governing guardianship under the convention. The Netherlands, on the other hand, contended that *ordre public* "generally cannot overrule conventions," and that, even if it could, *ordre public* was not properly applicable in this case because "there is no substantive connection between the situation and Sweden . . . [and] no facts have been presented that warrant and bear out a departure from the normal application of conflict rules."<sup>42</sup> Because it had decided that the convention and the Protective Upbringing Law were not incompatible inasmuch as they dealt with different subjects, the Court did not find it necessary to consider the *ordre public* question.<sup>43</sup> However, three members of the

<sup>40</sup> *Id.* at 106.

<sup>41</sup> *Id.* at 105. Judge Quintana prefaced his discussion of *ordre public* with a rule which he derived from Savigny [8 SAVIGNY, SYSTÈME DU DROIT ROMAIN ACTUEL ¶ CCCXLIX (1860)]: "the judge . . . 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 the 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 . . ." [1958] I.C.J. Rep. at 104.

<sup>42</sup> *Id.* at 59.

<sup>43</sup> *Id.* at 70. The Court was asked by the parties to "declare certain propositions relating to the effect of protective upbringing and to *ordre public*." However, the Court stated that it "has to adjudicate upon the subject of the dispute; it is not called upon, as it pointed out in the *Fisheries* case [*Fisheries Case*, [1951] I.C.J. Rep. 116, 126], to pronounce upon a statement of this kind . . . It retains its freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose. [1958] I.C.J. Rep. at 62.

Judge Lauterpacht recognized that, although the "Court is not rigidly bound to

majority based their concurrence on an implied *ordre public* reservation and four other judges discussed the doctrine. Was the Swedish protective upbringing statute a law of *ordre public*?<sup>44</sup> Judges Lauterpacht, Quintana, and Badawi answered affirmatively.<sup>45</sup> Judge Lauterpacht believed that<sup>46</sup>

apart from criminal law, it is difficult to conceive of a more appropriate and more natural object of *ordre public* . . . than the protection by the State of infants, especially when they are helpless, ill, an actual or potential danger to themselves or to society . . . .

Protective upbringing obviously fell within that "hard core" of *ordre public* laws about which there is no uncertainty. Judge Badawi stated

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give judgment by exclusive reference to the legal propositions as formulated by the Parties . . . ,” nevertheless, when 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,” the conclusions of the parties ought not to be disregarded. *Id.* at 89. He indicated that the parties’ conclusions could be disregarded only if their formulation of the legal issue could not provide a basis for decision and, in addition, another solution of “unimpeachable cogency” was at hand. Neither condition obtained in the present case, said Judge Lauterpacht. He noted that “the position here is different from that in the *Fisheries* case, [*supra*,] in which the Court declined to render judgment by reference to general ‘definitions, principles and rules’ formulated by one Party.” *Ibid.*

<sup>44</sup> Judge Lauterpacht noted that “the examination of municipal [national] 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.” [1958] I.C.J. Rep. at 91. Judge Lauterpacht relied on Case Concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J., ser. A, No. 20 and Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France, P.C.I.J., ser. A, No. 21 (1929).

Judge Quintana pointed out that “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’ . . . [German Interests in Polish Upper Silesia and the Factory at Chorzów, P.C.I.J., ser. A, No. 7 at 19 (1926)]. 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*.” [1958] I.C.J. Rep. at 108. Judge Winiarski reached the same conclusion. *Id.* at 138.

<sup>45</sup> Judge Spiropoulos stated, in a separate declaration, his belief that the Swedish Protective Upbringing Law had the character of an *ordre public* law. *Id.* at 72-73.

<sup>46</sup> *Id.* at 90. Judge Lauterpacht referred to the common law doctrine of *parens patriae* to support his view that protection of infants was part of national public policy (*ordre public*).

that the Netherlands had recognized that the convention could not be invoked to prevent Sweden from taking custody of a foreign infant under guardianship when a penalty had been imposed on the child for an offense it had committed. Therefore, he reasoned, the Netherlands must also recognize that custody taken under the delinquency and immorality provisions of the Protective Upbringing Law might override the application of the convention. But, he noted, the Netherlands had contended that because the protective upbringing measure imposed upon the child was designed to prevent her exposure to danger affecting her physical and mental health, it was concerned only with the child's private interests and, therefore, did not fall within *ordre public*.<sup>47</sup> Judge Badawi concluded that the Netherlands' distinction was arbitrary because "the law [of protective upbringing] has put the different grounds [for its imposition] on a footing of equality."<sup>48</sup> In other words, if the other provisions of the Protective Upbringing Law were *ordre public*, the ground invoked by the Swedish authorities in this case must also be *ordre public*.

Having disposed of several other preliminary questions,<sup>49</sup> the judges turned to the central issue, characterized as a "question of principle" by Judge Quintana, "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."<sup>50</sup> The question, as stated by Judges Lauterpacht and Badawi, was whether there was an implied reservation

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<sup>47</sup> The Netherlands contended that, because the measure related only to the child's private interests, protective upbringing was, in effect, a guardianship and hence a rival guardianship to that provided for in the convention. See note 18, *supra*.

<sup>48</sup> [1958] I.C.J. Rep. at 77.

<sup>49</sup> Judge Lauterpacht considered whether *ordre public* had been reasonably applied. He believed that it had, although he was forced to assume that Swedish officials exercised proper discretion and acted in good faith because those facts which would allow the Court to decide the question "with any assurance" had not been produced.

Judge Quintana raised the question whether, if Sweden had not acted justifiably in placing the child under protective upbringing, it would have been able to sustain the *ordre public* contention. He answered by stating that "the decision of this Court in the . . . [Nottebohm Case, [1955] I.C.J. Rep. 4, 26], 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 . . ." [1958] I.C.J. Rep. at 109.

Three judges addressed themselves to the Netherlands' contention that *ordre public* was inapplicable because the requirement that there be a substantive connection between the child and Sweden had not been met. Judges Lauterpacht, Badawi, and Quintana agreed that the child's uninterrupted residence in Sweden fulfilled the requirement.

<sup>50</sup> *Id.* at 102.



in the convention authorizing the application of the *lex fori* rather than foreign law in matters of guardianship on the ground of *ordre public*. Judges Lauterpacht and Badawi believed that an *ordre public* reservation was implicit in the convention. International conventions relating to a system of conflict of laws, noted Judge Badawi, are designed to achieve a uniform solution "without changing the nature of this solution as it is generally adopted in national legal systems,"<sup>51</sup> which "universally" recognize the *ordre public* concept. Judge Lauterpacht believed that, because *ordre public* was a firmly established principle of conflict of laws, nothing short of an express prohibition in the convention could rule out reliance on *ordre public*.<sup>52</sup>

Did the silence of the convention with respect to *ordre public* forbid the implication of that reservation? The drafters had considered and rejected an express reservation, but this did not mean that recourse to *ordre public* was entirely excluded. They had done so, said Judge Lauterpacht, because they "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 . . . in express terms, a potential source of controversy or abuse."<sup>53</sup> Judge Badawi, supporting this point, observed that "no special provision 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 or listed in advance."<sup>54</sup> Judge Badawi further reasoned that to imply that the states had assumed an obligation not to apply any legislation which might conflict in effect with

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<sup>51</sup> *Id.* at 75.

<sup>52</sup> Judge Lauterpacht added that "this seems to me to be the fairly unanimous view of writers . . . and the emphatic view of an author who has devoted special attention to questions of private international law in relation to treaties . . ." *Id.* at 96. The latter reference was to PLAISANT, LES RÈGLES DE CONFLIT DE LOIS DANS LES TRAITÉS 91-94 (1946).

<sup>53</sup> *Id.* at 96. Judge Lauterpacht had previously noted that a treaty may by implication prohibit recourse to *ordre public*. "Thus it is occasionally maintained that the Hague Convention of 1902 on the Conclusion of Marriage [Hague Convention of June 12, 1902 on the Conclusion of Marriage, 95 British and Foreign State Papers 411] contained such prohibitive implication by enumerating exhaustively the reasons for which the *lex fori* could disregard the impediments to marriage established by foreign law." [1958] I.C.J. Rep. at 95-96. But to Judge Lauterpacht, it appeared "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." *Id.* at 97.

<sup>54</sup> *Id.* at 76.

the convention, would be to substitute for the implied *ordre public* reservation a more serious implication. Moreover, that conclusion would not be in conformity with the facts, for limitations on the operation of the convention, such as national penal laws, did exist, although not expressly provided for in the treaty.

Having concluded that the silence of the convention did not prohibit the implication of an *ordre public* reservation, Judges Badawi, Lauterpacht, and Quintana advanced reasons for allowing the implication. First, Judge Quintana pointed out that *ordre public* is a "general principle of law recognized by civilized nations" within the meaning of article 38 of the Statute of the Court.<sup>55</sup> Since the Court is bound to apply "general principles," then these principles are binding upon all members of the United Nations and adherents to the Statute of the Court. According to article 103 of the Charter of the United Nations, obligations of United Nations members take precedence over conflicting obligations arising under other international agreements.<sup>56</sup> Therefore, Judge Badawi concluded, if *ordre public*, a general principle of law, is in conflict with an obligation under the convention, the members are bound by the principle of *ordre public* and a law of *ordre public* can override the convention.

Second, Judge Lauterpacht thought that the *ordre public* reservation was justified because it was the "safety valve" that had made a system of conflict of laws "possible at all, and which, if kept within proper limits, is one of the principal guarantees of its continued existence and development."<sup>57</sup> Judge Badawi added that "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."<sup>58</sup> Third, Judge Lauterpacht pointed out that public policy, or *ordre public*, is an "indispensable instrument" in the interpretation of national law, although national law can be changed by the ordinary legislative process. *A fortiori*, this must be so "in relation to foreign law over which the State has no control and

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<sup>55</sup> *Id.* at 107.

<sup>56</sup> Article 103 of the Charter of the United Nations provides that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

<sup>57</sup> [1958] I.C.J. Rep. at 95.

<sup>58</sup> *Id.* at 76.

which, in certain circumstances, its courts may find it inconceivable to apply."<sup>59</sup>

Three dissenting judges and one member of the majority advanced arguments against implying *ordre public* as a reservation to the convention. First, Judge Spender called attention to the difficulty of applying *ordre public*. He declared that *ordre public*, as it had been applied in national law, was a conception 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."<sup>60</sup> He did not find convincing the attempts "to discern some definable principle or principles to explain or harmonize the different cases . . . decided in different countries, and to elevate these principles to the level of rules of international law."<sup>61</sup> *Ordre public*, he concluded, was essentially "an assertion of national sovereignty,"<sup>62</sup> and the concept ought to have a more definite content before the Court should allow it to prevail over an international agreement in violation of the universal concept of *pacta sunt servanda*.<sup>63</sup>

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<sup>59</sup> *Id.* at 95. Judge Quintana added a fourth reason for holding that *ordre public* was an implied reservation to the convention. He felt that this holding would enable the Court "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." *Id.* at 109. Judge Quintana added that "any appraisal of *ordre public* in international relations is necessarily a matter for interpretation by a court, provided that such an interpretation does not . . . 'lead to something unreasonable or absurd' . . . [Polish Postal Service in Danzig, P.C.I.J., ser. B, No. 11 at 39 (1925)]." [1958] I.C.J. Rep. at 109. He also relied on the present Court's statement "in the . . . [Anglo-Iranian Oil Co. Case, [1952] I.C.J. Rep. 93, 104.] 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 . . ." [1958] I.C.J. Rep. at 109.

A final reason for implying the *ordre public* reservation was supplied by Judge Lauterpacht, who stated that the Netherlands had agreed, in principle, to the right to invoke *ordre public*, albeit "in a highly qualified manner." The Netherlands had denied Sweden's right to invoke *ordre public* "generally," and had thereby acknowledged its applicability in some cases, reasoned Judge Lauterpacht. Moreover, the Netherlands had asserted the power of the Court to determine whether the conditions of *ordre public* had been complied with and this implied that it had no intent to deny the principle of the *ordre public* exception. *Id.* at 97.

<sup>60</sup> *Id.* at 122.

<sup>61</sup> *Id.* at 123.

<sup>62</sup> *Ibid.*

<sup>63</sup> According to Judge Spender, "the many authorities quoted during the course of the argument on both sides at least should satisfy one . . . 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 . . . [LLOYD, PUBLIC

Second, Judge Spender believed that the Court would not be justified in making an implied reservation to the convention unless satisfied that it was essential to the preservation of the intent of its signatories. To do otherwise would be to impose "a new and different agreement"<sup>64</sup> upon them. He found that there was no evidence that the signatories had understood that *ordre public* was an implied reservation to their obligations under the convention. Nor had they expressly reserved *ordre public* and, Judge Spender observed, the Court should not speculate on why they had not done so. If the reservation should be implied, he continued, 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."<sup>65</sup> In short, the convention would be reduced "to a shell."

Judge Lauterpacht made two observations that tended to rebut Judge Spender's notion that an implied reservation of *ordre public* would "set the Convention at large."<sup>66</sup> First, he noted that a state was not free to determine whether one of its national laws came within an implied reservation of *ordre public* solely by examining its own concepts of the content of *ordre public*. On the contrary, because an international agreement had laid down the rules for the resolution of conflicts of guardianship laws, a state must look to a "notion of *ordre public* conceived as a general principle of law . . ."<sup>67</sup> That is, a particular national law could properly be said to fall within the realm of *ordre*

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POLICY: A COMPARATIVE STUDY ON ENGLISH AND FRENCH LAW (1953)], and cf. . . . [Case Concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J., ser. A, No. 20 and Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France, P.C.I.J., ser. A, No. 21 (1929)]." [1958] I.C.J. Rep. at 124. Moreover, noted Judge Spender, "public policy is principally and primarily a concept of municipal [national] law. When, however, an international obligation is involved upon which this Court is called 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 Case, P.C.I.J., ser. B, No. 17 at 32 (1930)]." [1958] I.C.J. Rep. at 128-29. As additional authority for the proposition that an international undertaking must prevail over national law, Judge Winiarski cited: Free Zones Case, P.C.I.J., ser. A, No. 22 at 167 (1929) and Treatment of Polish Nationals in Danzig, P.C.I.J., ser. A/B, No. 44 at 24 (1932).

Judge Kojevnikov based his dissent from both the reasoning and the operative part of the judgment on the principle of *pacta sunt servanda*.

<sup>64</sup> [1958] I.C.J. Rep. at 129.

<sup>65</sup> *Id.* at 130.

<sup>66</sup> *Id.* at 131.

<sup>67</sup> *Id.* at 91.

*public*, for purposes of applying the convention, only if "civilized nations" would generally recognize that such a law was a law of *ordre public*. Second, Judge Lauterpacht stated that the *ordre public* reservation could not be invoked unless the invoking state was willing to submit its determination, that a particular law fell within *ordre public*, to an impartial review by an international body. This limitation saved *ordre public* "from the reproach of being a cover for the unilateral repudiation of the treaty and . . . [instead gave] it the character of an attempt to secure a just and reasonable interpretation of treaty obligations."<sup>88</sup>

Finally, Judge Córdova rejected the *ordre public* exception on the ground that there was no principle of international law which allowed a nation to rely on its own laws in derogation of a treaty. "The time-honoured and basic principle of *pacta sunt servanda* . . . makes it impossible for the States to be released by their own unilateral decision from their obligations according to a treaty . . . ."<sup>89</sup>

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<sup>88</sup> *Id.* at 100. The express decision by the drafters not to include an *ordre public* provision was advanced by Judges Offerhaus and Spender as a third reason for rejecting the implied reservation. Judge Spender felt that it would be going against all the rules of construction to apply the rejected reservation at a later time. Another reason for the denial of the *ordre public* reservation was mentioned by Judge Winiarski. The "Swedish courts, which alone were entitled to do so, have not applied the exception of *ordre public*." The Court, he said, could not "substitute itself for a national court in order to decide what is required by the *ordre public* of the country of that court." *Id.* at 137.

<sup>89</sup> *Id.* at 141. The Court did not discuss whether the application and maintenance of protective upbringing came within the meaning of article 7 of the convention which provided that "pending the institution of guardianship, and in all cases of urgency, measures required for the protection of the person and interests of a foreign infant may be taken by local authorities." 95 *British and Foreign State Papers* 423. However, Judge Wellington Koo concurred with the result of the Court's judgment solely because of article 7. Judges Córdova, Offerhaus, and Winiarski also considered the question. Though neither party had contended that article 7 was applicable, Judge Córdova declared that the Court could have based its decision on that ground. Had the convention been bilateral, the Court would not have been free to adopt a construction contrary to that upon which the signatories had agreed. However, because the convention was multilateral, the intent of all the signatories had to be taken into account and, therefore, the Court was not limited to an interpretation upon which only the parties to the present case had agreed.

Judges Wellington Koo and Córdova concluded that article 7 must be interpreted to allow the application of protective upbringing measures in this case. "[S]eeking only the good of the infants, although mainly referring to guardianship," observed Judge Córdova, the framers of the convention "tried to organize the adequate application of the different protective methods of the signatory States, guardianship as well as any other protective measures. They tried to make compatible the institution of national

guardianship with the local protective legislations by giving priority to the former . . . over the latter . . ." *Id.* at 143.

Whether the application of protective upbringing was permissible under article 7 was discussed with respect to its initial imposition and its continued maintenance. As initially applied, Judges Córdova, Offerhaus, and Wellington Koo agreed that the protective upbringing measures came within article 7. Judge Wellington Koo pointed out that the measures were initiated under article 31 of the Swedish law: "If, in cases covered by Articles 22 . . . the need for protective upbringing or for transfer to public care is thought to be so urgent that action cannot be postponed until the Infants' Bureau . . . has taken a decision, the President will have the right, pending a decision by the Infants' Bureau, to take the person in question in charge." *Id.* at 111. Furthermore, the Netherlands seemed to have acknowledged the existence of the element of urgency in its pleadings. The Netherlands, in its reply to the *counter-memorial*, stated that "soon after the decease of his wife . . . [the father] was accused, in Sweden, of having committed an infamous crime against his little daughter, then eight years old. Now, as long as this accusation was pending, one can well understand and appreciate that the Swedish authorities felt extremely reluctant to abandon the child to a father-guardian whose possible depravity might seriously and permanently endanger its physical and mental health." *Id.* at 112. Judge Wellington Koo felt that it was immaterial that article 7 of the convention was not specifically referred to in the Swedish decisions. It was only important that an urgency had, in fact, existed and that it fell within the meaning of article 7.

As to the continued maintenance of the protective upbringing measures, Judge Wellington Koo found that article 7 impliedly limited the application of protective upbringing in urgency cases to the duration of the urgency. However, he concluded that, since no charge of abuse of power had been made and the good faith of Sweden in applying the measure had in no way been impugned, protective upbringing must have been maintained "because of the existence of a continuing necessity for the protection of . . . [the child's] mental health, and that it will, on review or on application of her guardian, be ended as soon as this necessity ceases to exist." *Id.* at 115. On the other hand, Judges Winiarski, Córdova, and Offerhaus believed that it was inconceivable that an "urgency" could endure for four and one-half years and that, therefore, maintenance of the Swedish measure did not come within article 7. Protective upbringing should have been discontinued as soon as the Swedish authorities learned of the Dutch guardianship of the father, according to Judge Offerhaus. Judge Córdova understood that "urgency," as contemplated by article 7, required two elements, "one of fact and the other a legal one. That is to say, a practical need of the infant as well as the lack of an efficient protection, either because the guardian has not yet been appointed or, if already appointed, does not or cannot act efficiently." *Id.* at 144. He went on to say that "the practical need may extend for an indefinite period of time, but, once the aim of the Convention is fulfilled in the sense that the foreign infant can be considered as sufficiently protected according to the laws of its own nationality, the concept of urgency cannot any more apply; in the present case, as soon as . . . [the Dutch guardian] showed herself legally and practically able to take charge of the infant . . . and to exercise her rights and duties as a guardian according to the Dutch laws." *Ibid.*