OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 31 JANUARY 1980

My Lords,

I hope that I shall not be thought lacking in regard for the arguments of Counsel if I say that I do not in this case need time to consider my opinion.

There cannot be the slightest doubt that the Convention of 1968 applies to maintenance orders. That is plain from Article 5 (2) of the Convention itself. Counsel for Monsieur de Cavel sought to escape from that conclusion by invoking the judgment of the Court in Case 143/78, the first *de Cavel* case. But that case was not about a maintenance order. It was about an order affecting property of the spouses. As I ventured to point out in my opinion in that case a maintenance order and an order relating to property are different things. The relevant passage was read to us by Counsel for Madame de Cavel this afternoon. (The reference to it is [1979] ECR at p. 1075). The Court could not and did not hold in Case 143/78 that maintenance orders were outside the scope of the Convention.

That being so, the only substantial question is whether the Convention can apply to an ancillary order made in proceedings in which the main claim is outside the scope of the Convention; more particularly it is whether the Convention can apply to a maintenance order made in divorce proceedings? I considered that question very fully in my opinion in Case 143/78 and came to the conclusion that the answer was "Yes" (see [1979] ECR at pp. 1070-1073). I need not, I think, repeat what I there said, nor has anything put forward in argument in the present case persuaded me that it was wrong.

In the result I am of the opinion that Your Lordships should, in answer to the Bundesgerichtshof, rule that the Convention applies as regards the enforcement in one contracting State of a maintenance order, whether interlocutory or otherwise, made by a court of another contracting State, even though that order was made in divorce proceedings.

If Your Lordships adopt that formula, the problem of the admissibility of the Bundesgerichtshof's second question will disappear. That problem exists because the proceedings at present pending before the Bundesgerichtshof are only about the enforcement in Germany of the order for maintenance pending suit made by the Tribunal de Grande Instance of Paris in Madame de Cavel's favour on 18 May 1977. Those proceedings are not concerned with the order for interim periodical payments incorporated by the Tribunal in its decree of divorce dated 27 June 1978. One can understand of course that the Bundesgerichtshof should wish, in an endeavour to save time and costs, to have the Court's ruling in relation to that order too, in anticipation of the question of its enforceability coming up for decision. None the less, for the reasons that I gave recently in my opinion in Case 104/79 *Foglia* v *Novello*, I do not think that, strictly speaking, the Court has jurisdiction to answer the question.

Nor does it appear to me from the order for reference that the Court is thereby invited to define the concept of "maintenance" for the purposes of the Convention. Much less is it for this Court to rule on the effect or on the validity of any judgment of the Tribunal de Grande Instance of Paris.