COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE A L'APPLICATION DE LA CONVENTION DE 1902 POUR RÉGLER LA TUTELLE DES MINEURS

(PAYS-BAS c. SUÈDE)

ARRÊT DU 28 NOVEMBRE 1958

1958

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE APPLICATION OF THE CONVENTION OF 1902 GOVERNING THE GUARDIANSHIP OF INFANT

(NETHERLANDS *v.* SWEDEN)

JUDGMENT OF NOVEMBER 28th, 1958

Le présent arrêt doit être cité comme suit :

« *Affaire relative à l'application de la Convention de 1902 pour régler la tutelle des mineurs (Pays-Bas c. Suède), Arrêt du 28 novembre 1958 : C. I. J. Recueil 1958, p. 55.* »

This Judgment should be cited as follows:

"Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. *Sweden), Judgment of November 28th, 1958: I.C.J. Reports 1958, p. 55."*

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November 28th, 1958

CASE CONCERNING THE APPLICATION OF THE CONVENTION OF 1902 GOVERNING THE GUARDIANSHIP OF INFANTS

(NETHERLANDS *v.* SWEDEN)

Hague Convention of 1902 governing the Guardianship of Infants.—Guardian's right to custody.—Swedish Law of June 6th, 1924, on the protection of children and young persons.—Placing and maintenance under the regime of protective upbringing of a Dutch infant residing in Sweden.—Impediment on the exercise of the guardian's right to custody.—Protective upbringing and guardianship.—National law of the Infant.—Local law.—Ordre public.—*The 1902 Convention and the Law on the protection of children and young persons.*

JUDGMENT

Present: President KLAESTAD; *Vice-President* ZAFRULLA KHAN; *Judges* BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, Sir Hersch LAUTERPACHT, MORENO QUINTANA, CÓRDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER; *Judges ad hoc* STERZEL and OFFERHAUS; *Acting Registrar* AQUARONE.

In the case concerning the application of the Convention of 1902 governing the guardianship of infants,

between

the Kingdom of the Netherlands,
represented by
M. W. Riphagen, Legal Adviser to the Ministry for Foreign Affairs,

as Agent,
assisted by
M. I. Kisch, Professor of the Faculty of Law of the University of Amsterdam,
as Counsel,
and by
M. J. G. Sauveplanne,
as Expert,

and

the Kingdom of Sweden,
represented by
M. Sven Dahlman, Ambassador of Sweden at The Hague,
as Agent,
assisted by
M. Sture Petrén, Ambassador, Director of Legal Affairs at the Royal Ministry for Foreign Affairs,
M. Henri Rolin, Professor of International Law at the Free University of Brussels,
as Counsel,

THE COURT,

composed as above,

delivers the following Judgment:

In a letter of July 9th, 1957, received in the Registry on July 10th, 1957, the Minister for Foreign Affairs of the Netherlands transmitted an Application dated July 9th, 1957, instituting proceedings in a dispute with the Government of the Kingdom of Sweden concerning the application of the Convention of 1902 governing the guardianship of infants. At the same time, the Minister for Foreign Affairs of the Netherlands notified the Registry of the appointment of M. W. Riphagen as Agent for the Netherlands Government in the case.

The Application thus filed in the Registry on July 10th, 1957, expressly refers to Article 36, paragraph 2, of the Statute of the Court and to the acceptance of the compulsory jurisdiction of the International Court of Justice by the Kingdom of Sweden on April 6th, 1957, and by the Kingdom of the Netherlands on August 1st, 1956. It refers to a measure taken and maintained by the Swedish authorities in respect of the infant Marie Elisabeth Boll, a Dutch national, born at Norrköping on May 7th, 1945, of the marriage of Johannes Boll, of Dutch nationality, and Gerd Elisabeth Lindwall, who died on December 5th, 1953, and who was of Swedish nationality before her marriage. The Application alleges that the Swedish authorities acted contrary to the provisions of the Convention of 1902 governing the guardianship of infants, which provisions are based on the principle that the national law of the infant is applicable and the national authorities are competent.

Pursuant to Article 40, paragraph 2, of the Statute, the Application was communicated to the Government of the Kingdom of Sweden and, pursuant to paragraph 3 of the same Article, other Members of the United Nations as well as non-member States entitled to appear before the Court were notified of it.

Since the Application referred to the provisions of the Convention governing the guardianship of infants, signed at The Hague on June 12th, 1902, the States other than those concerned in the case which are parties to the Convention were notified in accordance with Article 63, paragraph 1, of the Statute.

Time-limits for the filing of the Memorial and Counter-Memorial were fixed by an Order of the President of the International Court of Justice of August 19th, 1957, and time-limits for the filing of the Reply and the Rejoinder were fixed by an Order of the Court of April 17th, 1958.

The pleadings having been filed within the time-limits fixed by these Orders, the case was ready for hearing on the date of the expiry of the last time-limit, namely, August 28th, 1958.

M. Fredrik Julius Christian Sterzel, former Judge of the Supreme Court of Sweden, and M. Johannes Offerhaus, Professor of Private International Law at the University of Amsterdam, were respectively chosen, in accordance with Article 31, paragraph 3, of the Statute, to sit as Judges *ad hoc* in the present case by the Government of the Kingdom of Sweden and the Government of the Kingdom of the Netherlands.

At the opening of the hearing on September 25th, 1958, the Court heard the solemn declarations made, in accordance with Article 20 of the Statute and Article 5 of the Rules of Court, by MM. Sterzel and Offerhaus, Judges *ad hoc*.

In the course of hearings held on September 25th, 26th, 29th and 30th, and October 1st, 3rd and 4th, 1958, the Court heard the oral arguments and replies of M. Riphagen and Professor Kisch, on behalf of the Government of the Netherlands, and of M. Dahlman,

Professor Rolin and M. Petrén, on behalf of the Government of Sweden.

During the written and oral proceedings the following Submissions were presented by the Parties:

On behalf of the Government of the Netherlands, in the Application:

"May it please the Court:

To take note that for the purpose of all notifications and communications relating to the present case, the Agent for the Government of the Kingdom of the Netherlands selects as his address for service the Ministry for Foreign Affairs at The Hague;

To notify the present Application, in accordance with Article 40, paragraph 2, of the Statute of the Court to the Government of the Kingdom of Sweden;

To adjudge and declare, whether the Government of the Kingdom of Sweden appears or not, and after such time-limit as, subject to proposals made by agreement between the Parties, it will be for the Court to fix:

That the measure taken and maintained by the Swedish authorities in respect of Marie Elisabeth Boll, namely, the 'skyddsuppfostran' instituted and maintained by the decrees of May 5th, 1954, June 22nd, 1954, October 5th, 1954, June 3rd, 1955, and February 21st, 1956, is not in conformity with the obligations binding upon Sweden *vis-à-vis* the Netherlands by virtue of the 1902 Convention governing the guardianship of infants;

That Sweden is under an obligation to end this measure."

On behalf of the Government of the Netherlands, in the Memorial:

"The Netherlands Government submit that the Court should adjudge and declare:

That the measure taken and maintained by the Swedish authorities in respect of Marie Elisabeth Boll, namely, the 'skyddsuppfostran' instituted and maintained by the decrees of May 5th, 1954, June 22nd, 1954, October 5th, 1954, June 3rd, 1955, and February 21st, 1956, is not in conformity with the obligations binding upon Sweden *vis-à-vis* the Netherlands by virtue of the 1902 Convention governing the guardianship of infants;

That Sweden is under an obligation to end this measure."

On behalf of the Government of Sweden, in the Counter-Memorial:

"The Swedish Government respectfully prays the Court to declare that the claim of the Government of the Netherlands is unfounded."

On behalf of the Government of the Netherlands, in the Reply:

"The protective education in respect of Marie Elisabeth Boll is not in conformity with the obligations binding upon Sweden *vis-à-vis* the Netherlands by virtue of the 1902 Convention governing the guardianship of infants, on the following grounds:

I. that the protective education affects Netherlands guardianship, fully covered by the Convention;

II. that *ordre public* cannot prevail against the Convention, because

A. *ordre public* generally cannot overrule conventions, and

B. even if *ordre public* could overrule conventions, the conditions for *ordre public* have not been complied with, since, in the present case,

1. there is no substantive connection between the situation and Sweden;

2. no facts have been stated that warrant and bear out a departure from the normal application of conflict rules.

Therefore, Sweden is under the obligation to discontinue the protective education."

On behalf of the Government of Sweden, in the Rejoinder:

"That it may please the Court

To declare that the measure of protective upbringing decreed in respect of Marie Elisabeth Boll has in no way contravened the obligations binding upon Sweden *vis-à-vis* the Netherlands under the 1902 Convention governing the guardianship of infants

1. because the rights to custody and control, the exercise of which has been temporarily impeded as a result of the said measure, are rights outside the scope of guardianship as understood in the said Convention:

(a) in the case of the right of M. Johannes Boll to custody and control, because that right was his independently of the said guardianship,

(b) in the case of the right of Mme Postema to custody and control, the right having devolved upon her in consequence of a judicial decision in the Netherlands which was concerned with the right of M. Johannes Boll to custody and control and which was accordingly not covered by the Convention;

2. because the protective measure decreed in respect of a foreign child on Swedish territory was decreed by virtue of a Swedish rule of public law, the application of which is outside the scope of the rules of conflict of laws contained in the 1902 Convention.

In the premises, to hold that the Submissions of June 18th, 1958, of the Agent for the Government of the Netherlands are inadmissible and ill-founded.

To hold inadmissible the Submission of the Government of the Netherlands seeking a declaration that the Swedish Government has not established the existence of circumstances which would justify the measure complained of.

In the alternative on the last point

If the Court should deem it necessary to take cognizance of the reasons for the Swedish administrative decisions concerned with the measure in dispute, to place on record that the Agent for the Swedish Government should be prepared to produce the administra-

tive file in this case in such manner and subject to such conditions as the Court may prescribe."

On behalf of the Government of Sweden, at the hearing of October 1st, 1958:

"May it please the Court

As to admissibility:

to hold

(1) that the rights pertaining to custody and control, to upbringing and all other rights exercised by Johannes Boll over the person of his daughter until August 5th, 1954, derived from his *puissance paternelle* and not from guardianship within the meaning of the 1902 Convention; that this was more particularly so in the present case inasmuch as on his application his guardianship was originally instituted in accordance with Swedish law which does not regard as falling within this institution rights relating to the person of the child; that the decision of May 5th, 1954, could accordingly not infringe any rights protected by the Convention;

(2) that when the Dutch authorities had subsequently instituted the guardianship of Johannes Boll in accordance with the law of the Netherlands and later released Johannes Boll from his functions, replacing him by Catherine Postema, the Swedish Courts terminated the guardianship instituted by them;

(3) that notwithstanding, Sweden not being bound by the 1902 Convention to recognize the validity of the Dutch decision putting an end to the *puissance paternelle* of Johannes Boll, nor consequently of the transfer of these rights to Catherine Postema, any breach of those rights would not constitute a violation of the Convention;

As to the merits:

to hold

that the rules pertaining to conflict of laws which form the subject-matter of the 1902 Convention on the guardianship of infant children 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;*

that these rules leave unaffected in particular the competence of the administrative authorities responsible 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;

that it is furthermore not for the Court, in the absence of any allegation of denial of justice, to judge the grounds on which the competent Swedish authorities decided to decree or to maintain the said measure;

In the premises,

May it please the Court

to declare that the claim is neither admissible nor well-founded;

in the alternative,

before adjudication, to invite the Respondent to produce the file of the administrative enquiries which led to the disputed decisions."

On behalf of the Government of the Netherlands, at the hearing of October 3rd, 1958:

"May it please the Court

to declare:

I. that the 'skyddsuppfostran' (protective education) curtails Netherlands guardianship as protected by the 1902 Convention governing the guardianship of infants;

II. that *ordre public* cannot prevail against the Convention, because *ordre public* generally cannot be invoked against conventions;

III. that, even if *ordre public* could be invoked against the Convention:

A. the Court, in virtue of its powers under the Statute, is fully competent to appreciate, in the light of all the relevant facts and circumstances and the nature of the municipal legal provisions applied thereto, whether or not the conditions for *ordre public* have been complied with;

B. in the present issue *ordre public* is not warranted,

i. either by the character of the case,

ii. or by the character of the provision of Swedish law as applied to the case.

Therefore

May it please the Court

to adjudge and declare:

that the measure taken and maintained by the Swedish authorities in respect of Marie Elisabeth Boll, namely the 'skyddsuppfostran' instituted and maintained by the decrees of May 5th, 1954, June 22nd, 1954, October 5th, 1954, June 3rd, 1955, and February 21st, 1956, is not in conformity with the obligations binding upon Sweden *vis-à-vis* the Netherlands by virtue of the 1902 Convention governing the guardianship of infants;

That Sweden is under an obligation to end this measure."

The Submissions of the Parties, in the form in which they were presented on October 1st and 3rd, 1958, respectively, constitute their final Submissions.

* * *

The dispute upon which the Court is called on to adjudicate has been clearly defined by the Parties in their Pleadings and oral arguments. The Court has before it a concrete case: did the Swedish authorities, by applying the measure of protective upbringing *(skyddsuppfostran)* to the Dutch infant, Marie Elisabeth Boll, fail to respect obligations resulting from the 1902 Convention on the guardianship of infants? The task of the Court is thus limited. It is not concerned with the correctness of the application of the Swedish Law of June 6th, 1924, on the protection of children and young persons, nor has it to pass upon the proper appreciation of the grounds on which the challenged decisions are based, or on the circumstances to which those grounds are related. These questions are not within the terms of the present dispute and would raise points which are outside the proceedings.

* * *

The final Submissions of the Government of the Netherlands, before asking the Court to adjudge and declare that Sweden, in taking and maintaining the measure complained of, is in breach of its obligations under the 1902 Convention, ask it to "declare" certain propositions relating to the effect of protective upbringing and to *ordre public*. These propositions are, in reality, the essential considerations which, in the view of the Government of the Netherlands, must lead the Court to adjudge and declare that Sweden is in breach of its obligations. In a less categorical form, the Submissions of the Government of Sweden are set out in a similar way. The Court has to adjudicate upon the subject of the dispute; it is not called upon, as it pointed out in the *Fisheries* case, to pronounce upon a statement of this kind (I.C.J. Reports 1951, p. 126). 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.

* * *

The essential and undisputed facts underlying the present case are as follows: Gerd Elisabeth Lindwall, the wife of Johannes Boll and mother of Marie Elisabeth Boll, having died on December 5th, 1953, Johannes Boll, the latter's father, thereupon became her guardian by the operation of Article 378 of the Civil Code of the Netherlands. On March 18th, 1954, on the application of the father and without any reference then being made to the Dutch nationality of the infant, the Second Chamber of the Court of First Instance at

Norrköping in Sweden registered the guardianship of the father and appointed Emil Lindwall as *god man* of Marie Elisabeth, pursuant to Swedish law of guardianship.

On May 5th, 1954, the Child Welfare Board at Norrköping, confirming the decision made on April 26th, 1954, by the President of the Board, decided to place the infant under the regime of protective upbringing under Article 22 *(a)* of the Swedish Law of June 6th, 1924.

The Amsterdam Cantonal Court, on June 2nd, 1954, appointed Jan Albertus Idema, of Dutch nationality, residing at Dordrecht, deputy-guardian of the infant, Marie Elisabeth Boll, her father being her guardian by operation of law.

The latter, jointly with the deputy-guardian, appealed against the institution of protective upbringing to the Provincial Government of Östergötland, which, by decision of June 22nd, 1954, confirmed the decision of the Child Welfare Board.

On August 5th, 1954, the Court of First Instance of Dordrecht, upon the application of the Guardianship Council of that town and with the consent of Johannes Boll, discharged the latter from his functions as guardian of Marie Elisabeth Boll and appointed Catharina Postema as guardian. The same judgment ordered that the child should be handed over to the guardian.

The Second Chamber of the Norrköping Court of First Instance, on September 16th, 1954, cancelled the previous registration of the guardianship of Johannes Boll and ordered that guardianship should no longer be administered according to Swedish law. In the same decision the Court dismissed an application for the removal of Emil Lindwall as *god man* of the infant Marie Elisabeth. The Court of Appeal of Göta, by decision of January 21st, 1955, maintained the *god man*, but a judgment of the Supreme Court of July 2nd, 1955, quashed this decision and discharged the *god man* of his functions.

An appeal having been lodged by Johannes Boll, Jan Albertus Idema and Catharina Postema, against the decision of the Provincial Government of Östergötland of June 22nd, 1954, the Supreme Administrative Court of Sweden, by a judgment of October 5th, 1954, maintained the measure of protective upbringing.

The Child Welfare Board of Norrköping, having before them a letter from the father of the infant Marie Elisabeth Boll, and an application by Jan Albertus Idema, decided on June 3rd, 1955, to obtain a further medical report before reviewing the measure of protective upbringing. On October 28th, 1955, the Provincial Government of Östergötland, on appeal by Catharina Postema and Jan Albertus Idema against this decision, ordered the measure of protective upbringing to be terminated. On appeal by the Child Welfare Board against that decision, the Supreme Administrative Court, by a judgment of February 21st, 1956, maintained the measure adopted by that Board on June 3rd, 1955.

These decisions given in Sweden and in the Netherlands relate to the organization of guardianship and to the application of the Swedish Law on the protection of children. The Court is not concerned with the decisions relating to the organization of guardianship. The dispute relates to the Swedish decisions which instituted and maintained protective upbringing. It is of these decisions that the Government of the Netherlands complains, and it is only upon them that the Court is called upon to adjudicate.

The Government of the Netherlands submits that these decisions are not in conformity with the provisions of the 1902 Convention. The institution of protective upbringing in the case of Marie Elisabeth Boll prevents the infant from being handed over to the guardian for the exercise of her functions. The 1902 Convention provides that the guardianship of an infant shall be governed by his national law, and the Government of the Netherlands draws the conclusion that the Swedish authorities could take no measure once the national authorities had taken decisions organizing guardianship of the infant. The limitation on the principle of the national law contained in Article 7 of the Convention, according to the Government of the Netherlands, is not applicable to the present case because Swedish protective upbringing is not a measure permitted by that Article and because the condition of urgency required by that provision has not been satisfied.

The Government of Sweden does not dispute the fact that protective upbringing temporarily impedes the exercise of custody to which the guardian is entitled by virtue of guardianship under Dutch law; this fact, however, does not constitute a breach of the 1902 Convention or a failure by Sweden to fulfil her obligations thereunder. In support of its contentions the Government of Sweden relies upon the following grounds:

(1) The right to custody, at the time when the infant was placed under the regime of protective upbringing, belonged to her father, and it was in his case an attribute of the *puissance paternelle*, which is not governed by the 1902 Convention on guardianship. In the circumstances in which guardianship and the right to custody were conferred on Mme Postema, the 1902 Convention is equally inapplicable to that right which was merely the continuation of the father's right to custody.

(2) The Swedish Law for the protection of children of June 6th, 1924, applies to every infant residing in Sweden, and the jurisdiction which that Law confers upon the Swedish authorities remains outside the Convention, which governs only conflicts of law and of jurisdiction in respect of the guardianship of infants and which does not extend to the settlement of other conflicts of law. The Law for the protection of children being a law within the category of *ordre public*, the protective upbringing decreed by the Swedish authorities does not constitute a breach of the 1902 Convention, the Conven-

tion being incapable of affecting the right of the contracting States to make the powers of a foreign guardian, as indeed foreign parents, subject to the restrictions required by *ordre public*.

With reference to the first ground relied upon by the Swedish Government, the Court observes that in the written and oral proceedings a distinction appears to have been made between the period during which Johannes Boll was invested with the guardianship of his daughter under Dutch law, the law applicable in accordance with Article 1 of the 1902 Convention, and the period after he had been released from guardianship when the latter was entrusted to Mme Postema. That may lead to a distinction being drawn between the original institution of the regime of protective upbringing in respect of the infant and her maintenance under this regime in face of the guardianship conferred upon Mme Postema. The Court does not consider that it need be concerned with this distinction. The grounds for its decision are applicable to the whole of the dispute.

The Court has before it a measure taken in pursuance of the Swedish Law of June 6th, 1924, on the protection of children and young persons. It has to consider this 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 the maintenance of the measure in respect of an infant whose guardianship falls within that Convention involve a breach of the Convention.

It has been contended that the measure is one "virtually amounting to guardianship", that it constitutes a "rival guardianship" in competition with the Dutch guardianship so that the latter, as a result of the measure, "is completely absorbed, whittled away, overruled and frustrated".

To judge of the correctness of this argument it is necessary to consider the attitude adopted with regard to the Dutch guardianship by the judgments given in Sweden.

So far as the administration of property is concerned, the judgment of the Norrköping Court of September 16th, 1954, and the judgment of the Supreme Court of July 2nd, 1955, both proceeded on the basis of recognition of the Dutch guardianship. With regard to the capacity of the guardian to concern herself with the person of the infant, that capacity was recognized in the decision of the Supreme Administrative Court of October 5th, 1954, given on an appeal lodged by the guardian; reference was there made to the fact that the decision of the Dordrecht Court, appointing Mme Postema as guardian, extended to the custody of the child and to the claim of the guardian that the regime of protective upbringing should be terminated; this claim was dismissed, not on the ground that it was inadmissible, but after it had been considered on the merits and because it appeared to the Court that to uphold it would,

at that time, have constituted a serious danger to the mental health of the ward.

The judgment of the Supreme Administrative Court of February 21st, 1956, merits particular attention. This judgment was given on an appeal against a decision of the Provincial Government of Östergötland which had held that the measure of protective upbringing should be terminated: if matters had ended there, there would have been no subject for dispute. There is a subject for dispute only as a result of the judgment of February 21st, 1956, which decided that the measure should be maintained. That judgment was given, as the decision appealed against had been, in the light of and taking into account the desire expressed by the guardian, Mme Postema, to entrust the infant to M. and Mme Törnquist, at Norrköping. The Supreme Administrative Court did not question Mme Postema's capacity to take proceedings before it, and it thereby recognized her capacity as guardian and her right to concern herself with the person of the infant; it did not raise protective upbringing to the status of an institution, the effect of which would be completely to absorb the Dutch guardianship; it confined itself, for reasons outside the scope of the Court's examination, to finding that the desire of the guardian and the satisfactory information which she gave with regard to the household which enjoyed her confidence did not constitute sufficient grounds for terminating the regime of protective upbringing applied to the infant. Finally, under the regime thus maintained, the person to whom the Child Welfare Board has entrusted the infant has not the capacity and rights of a guardian. He receives her, watches over her, provides for the care of her health: the infant is entrusted to his care as she would have been entrusted to the care of the Törnquist family if the guardian's wish had been carried out.

The protective upbringing applied to the infant, as it appears in these decisions, i.e. according to the facts in the present case, cannot be regarded as a rival guardianship to the guardianship established in the Netherlands in accordance with the 1902 Convention.

The Swedish measure of protective upbringing, as instituted and maintained in respect of Marie Elisabeth Boll, placed obstacles in the way of the full exercise by the guardian of her right to custody. Before the Supreme Administrative Court she relied, as has been recalled, upon her intention to entrust the infant to a home of her choice: that intention clearly corresponded to an exercise by the guardian of her right to custody. The guardian was not, however, asking that her intention should simply be acted upon; she relied upon it as a reason for terminating the regime of protective upbringing. The Supreme Administrative Court, by its judgment of February 21st, 1956, dismissed her claim. In dismissing it, the Court limited itself no doubt to adjudicating upon the maintenance of protective upbringing, but, at the same time, it placed an

obstacle in the way of the full exercise of the right to custody belonging to the guardian. Does this constitute a failure to observe the 1902 Convention, Article 6 of which provides that "the administration of a guardianship extends to the person... of the infant"?

In order to answer this question, it is not necessary, as has already been said, for the Court to ascertain the real or alleged reasons which determined or influenced the decisions complained of. It is called upon to pronounce only on the compatibility of the measure with the obligations binding upon Sweden under the 1902 Convention. It has before it a measure instituted pursuant to a Swedish law which impedes the exercise by the guardian of the right to custody conferred upon her by Dutch law in accordance with the 1902 Convention. Are the imposition and maintenance of such a measure incompatible with the 1902 Convention?

The Court is not confronted by a situation in which it would suffice for it to say that a national law cannot override the obligations assumed by treaty. It is asked to say whether the measure taken and impugned is or is not compatible with the obligations binding upon Sweden by virtue of the 1902 Convention. To do that, it must determine what are the obligations imposed by that Convention, how far they extend and, especially, it must determine whether, by stipulating that the guardianship of an infant is governed by the national law of the infant, the 1902 Convention intended to prohibit the application to a foreign infant of a law such as the Swedish Law on the protection of children.

The 1902 Convention, as indicated by its preamble, was designed to "lay down common provisions to govern the guardianship of infants". It provides for the application of the national law of the infant for the institution and operation of guardianship by expressly extending in Article 6 the administration of a guardianship to the person and to all the property of the infant. It goes no farther than that, and indeed it has been pointed out that it does not make complete provision for guardianship, which should serve as a warning against any construction which would extend it beyond its true scope. In providing that guardianship and, in particular, that the guardian's right to custody should be governed by the national law of the infant, the Convention was intended to determine what law should be applied to settle these points. It was intended, in accordance with the general purpose of the Conferences on Private International Law, that it should put an end to the divergences of view as to whether preference ought to be given in this connection to the national law of the infant, to that of his place of residence, etc., but it was not intended to lay down, in the domain of guardianship, and particularly of the right to custody, any immunity of an infant or of a guardian with respect to the whole body of the local law. The local law with regard to guardianship is in principle excluded, but not all the other provisions of the local law.

There may be some points of contact between matters governed by the national law of the infant which is applicable to guardianship and matters falling within the ambit of the local law. 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. 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.

If, in a country in which a foreign infant, to whom the 1902 Convention applies, is living, laws relating to compulsory education and the sanitary supervision of children, professional training or the participation of young people in certain work, are applicable to foreigners, in circumstances assumed to be in conformity with the requirements of international law and of treaties governing these matters, a guardian's right to custody under the national law of the infant cannot override the application of such laws to a foreign infant. In adopting the national law of the infant as the proper law to govern guardianship, including the guardian's right to custody, the 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 same must be true of the Swedish Law on the protection of children and young persons. Considered in its application to children of Swedish nationality, the Law is not a law on guardianship, it does not relate to the legal institution of guardianship. It is applicable whether the infant be within the *puissance paternelle* of the parents or under guardianship. Protective upbringing which constitutes an application of the Law is superimposed, when that is necessary, on either, without bringing either to an end but paralyzing their effects to the extent that they are in conflict with the requirements of protective upbringing.

Is the 1902 Convention to be construed as meaning—tacitly, for the reason that it provides that the guardianship of an infant shall be governed by his national law—that it was intended to prohibit the application of any legislative enactment on a different subject-matter the indirect effect of which would be to restrict, though not to abolish, the guardian's right to custody? So to interpret the Convention would be to go beyond its purpose. That purpose was to put an end, in questions of guardianship, to diffi-

culties arising from the conflict of laws. That was its only purpose. It was sought to achieve it by laying down to this end common rules which the contracting States must respect. To understand the Convention as limiting the right of contracting States to apply laws on a different topic would be to go beyond that purpose.

The 1902 Convention determines the domain of application of the laws of each contracting State in the matter of guardianship. It does this by requiring each contracting State to apply the national law of the infant. If the 1902 Convention had intended to regulate the domain of application of laws such as the Swedish Law on the protection of children and young persons, it would follow that that Law should be applied to Swedish infants in a foreign country. But no one has sought to attribute such an extraterritorial effect to that Law. The 1902 Convention is therefore not concerned with the determination of the domain of application of such a law.

A comparison between the purpose of the 1902 Convention and that of the Swedish Law on the protection of children shows that the purpose of the latter places it outside the field of application of the Convention.

The 1902 Convention did not seek to define what it meant by guardianship, but there is no doubt that the legal systems, as between which it sought to establish some harmony by prescribing what was the proper law to govern that situation, understood and understand by guardianship an institution the object of which is the protection of the infant: the protection and guidance of his person, the safeguarding of his pecuniary interests and the fulfilling of the functions rendered necessary by his legal incapacity. Guardianship and protective upbringing have certain common purposes. The special feature of the regime of protective upbringing is that it is put into operation only in respect of children who, for reasons inherent in them or for causes external to them, are in an abnormal situation—a situation which, if allowed to continue, might give rise to danger going beyond the person of the child. Protective upbringing contributes to the protection of the child, but at the same time, and above all, it is designed to protect society against dangers resulting from improper upbringing, inadequate hygiene, or moral corruption of young people. The 1902 Convention recognizes the fact that guardianship, in order to achieve its aim of individual protection, needs to be governed by the national law of the infant; to achieve the aim of the social guarantee which it is the purpose of the Swedish Law on the protection of children and young persons to provide, it is necessary that it should apply to all young people living in Sweden.

Protective upbringing is not, as is guardianship, applied for a pre-ordained period during which it is maintained. The public service of the protection of children is much more flexible, just because the measures taken depend upon the circumstances, and

can be modified in accordance with alterations in those circumstances. Its functions correspond to preoccupations of a moral and social order. The Swedish Law being designed to provide a social guarantee, it was presented, on behalf of the Government of Sweden, as a law of *ordre public* which, as such, is binding upon all those upon Swedish territory. The consequences to be drawn from such a characterization were argued at length before the Court. It was contended that a proper interpretation of the 1902 Convention must lead to recognition that this Convention, bringing about the unification as between the contracting States of certain rules for the settlement of conflicts of law, must be understood as containing an implied reservation authorizing, on the ground of *ordre public*, the overruling of the application of the foreign law recognized as normally the proper law to govern the legal relationship in question. It has been argued that such an exception is recognized in the systems of private international law of those countries which joined in the partial codification of this branch of the law. The Court does not consider it necessary to pronounce upon this contention. It seeks to ascertain in a more direct manner whether, having regard to its purpose, the 1902 Convention lays down any rules which the Swedish authorities have disregarded.

The 1902 Convention had to meet a problem of the conflict of private law rules. It presupposes the hesitation which was felt in the choice of the law applicable to a given legal relationship: the national law of an individual, the law of his place of residence, the *lex fori*, etc. It gave the preference to the national law of the infant and thereby prescribed to the courts of each contracting State that they should apply a foreign law when the infant involved was a foreigner. It is perfectly conceivable that the courts of a State should in certain cases apply a foreign law.

Very different is the sense of the question if it be asked what is the domain of the applicability of the Swedish Law or of the Dutch law on the protection of children. The measures provided for or prescribed by Swedish law are applied, at least in the first stage as was done in the present case, by an administrative organ. Such an organ can act only in accordance with its own law: it is inconceivable that the Swedish Child Welfare Board should apply Dutch law to a Dutch infant living in Sweden and equally inconceivable that the competent Dutch organ should apply Dutch law to such an infant living abroad. What a Swedish or Dutch Court can do in matters of guardianship, pursuant to the 1902 Convention, namely apply a foreign law—Dutch law or Swedish law as the case may be—the authorities of those countries cannot do in the matter of protective upbringing. To extend the 1902 Convention to such a situation would lead to an impossibility. It is not permissible so to construe the Convention as to bring about such a result.

The 1902 Convention was designed to put an end to the competing claims of several laws to govern a single legal relationship. There are no such competing claims in the case of laws for the protection of children and young persons. The claim of each of these laws is that it should be applied in the country in which it was enacted: such a law has not and, as has been seen, cannot have any extraterritorial aspiration, for that would exceed its social purpose as well as the means of which it disposes. The problem which was at the basis of the 1902 Convention does not exist in respect of these laws, and the only danger which could threaten them would lie in the negative solution which would be reached if, as a result of an extensive construction which has not heretofore been considered justified, the application of Swedish law was refused to Dutch children living in Sweden; since Dutch law on the same subject could not be applied to them, the protection of children and young persons, desired both by Swedish law and by Dutch law, would be frustrated. The 1902 Convention never intended that a negative solution should be reached in the domain with which it is concerned: this confirms that what is understood by the protection of children and young persons does not fall within the domain of the Convention.

It is scarcely necessary to add that 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, a purpose of which the importance was felt in many countries particularly after the signature of the 1902 Convention. The social problem of delinquent or even of merely misdirected young people, and of children whose health, mental state or moral development is threatened, in short, of those ill-adapted to social life, has often arisen; laws such as the Swedish Law now in question were enacted in several countries to meet the problem. The Court could not readily subscribe to any construction which would make the 1902 Convention an obstacle on this point to social progress.

It thus seems to the Court that, in spite of their points of contact and in spite, indeed, of the encroachments revealed in practice, the 1902 Convention on the guardianship of infants does not include within its scope the matter of the protection of children and of young persons as understood by the Swedish Law of June 6th, 1924. The 1902 Convention cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly the Court does not in the present case find any failure to observe that Convention on the part of Sweden.

This finding makes it unnecessary to examine a further submission put forward by the Government of the Netherlands after the main submission which is not upheld by the Court. Furthermore, in view of the reply given to the main submission put forward by

the Government of Sweden, it is unnecessary to examine its alternative submission.

For these reasons,

THE COURT,

By twelve votes to four,

rejects the claim of the Government of the Netherlands.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-eighth day of November one thousand nine hundred and fifty-eight, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of the Kingdom of the Netherlands and to the Government of the Kingdom of Sweden, respectively.

(Signed) Helge KLAESTAD,
President.

(Signed) S. AQUARONE,
Acting Registrar.

Judge KOJEVNIKOV states that he is unable to concur either in the reasoning or in the operative clause of the Judgment because, in his opinion, on the basis of the principle *pacta sunt servanda*, having regard to the fact that the rights and obligations of the Parties under the 1902 Convention governing the guardianship of infants are abundantly clear, having regard to the character of the case and the available facts, as well as the legitimate interests of the infant concerned—who is of Dutch nationality—the Court ought to have held that the measures taken by the Swedish administrative authorities in respect of the said infant, which impede the exercise of the right of guardianship based on the treaty, are not in conformity with the obligations binding upon Sweden *vis-à-vis* the Netherlands by virtue of the aforementioned 1902 Convention, in particular Articles 1 and 6 of the Convention.

Judge SPIROPOULOS states that, although he shares the opinion of the Court that Sweden cannot be held to have failed to respect her obligations under the 1902 Covention in this case, he considers that the rejection of the claim of the Government of the Netherlands ought rather to be based upon the character of *ordre public*

of the Swedish Law on the protection of children and young persons. In his opinion, this character enables the Law to override the 1902 Convention, since the 1902 Convention must be understood 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, in accordance with the Convention, to govern the legal relationship in question.

Judges BADAWI, Sir Hersch LAUTERPACHT, MORENO QUINTANA, WELLINGTON KOO and Sir Percy SPENDER, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their separate opinions.

Vice-President ZAFRULLA KHAN states that he agrees generally with Judge WELLINGTON KOO.

Judges WINIARSKI, CÓRDOVA and M. OFFERHAUS, Judge *ad hoc*, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their dissenting opinions.

(Initialled) H. K.

(Initialled) S. A.