DISSENTING OPINION OF JUDGE WINIARSKI

[Translation]

To my great regret, I am unable to concur in the Judgment and I believe I must state as briefly as possible the reasons for my dissent.

The Court is confronted with a specific and particularized case which I have every reason to regard as exceptional. In order to ascertain whether the Submissions of the applicant Party are well-founded in law, the Court must, as it has always done, carefully scrutinize the facts which are at the origin of, and characterize, the disputed situation; it must examine all the facts in the case, including the national laws of the Parties and their application, in order to decide whether these laws, as applied by the national authorities, are or are not inconsistent with the international obligations of the State.

The decision of the Swedish administrative authorities of April 26th, 1954, is based on Article 22 *(a)* of the Swedish Law of 1924 on the protection of children and young persons. Paragraphs *(b)*, *(c)* and *(d)* contemplate much more serious cases of juvenile delinquency and pre-delinquency. On the other hand, paragraph *(a)* refers to the case of 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". Since the documents in the case do not disclose ill-treatment or serious neglect in respect of the infant, it follows that the only reason why the Child Welfare Board took the infant in charge is constituted by "the danger affecting its physical or mental health". Indeed, the same reason is to be found in the decision of the Supreme Administrative Court of October 5th, 1954: "It is obvious that the removal of the infant to a wholly new environment would at present seriously endanger her mental health."

1. The administrative decision of April 26th, 1954, was taken during the brief period of the Swedish guardianship organized on the application of the father of the infant. It is common ground that the Swedish administrative authorities acted correctly in applying the measure of protective upbringing at the time to the infant; the same must be held with regard to the maintenance of the measure during the confused period of transition when, along with the Swedish guardianship, there existed the guardianship of the father-guardian organized in the Netherlands.

But the situation changed entirely following two judicial decisions: on August 5th, 1954, the Dutch Court of First Instance of Dordrecht released the father from the guardianship, appointed a woman guardian and "orders the said infant to be handed over to the said guardian"; on September 16th of the same year, the Swe-

dish Court of First Instance of Norrköping, having regard to the Dordrecht judgment, "orders that the guardianship ... shall cease to be regulated in conformity with Swedish law"; it thus made way for guardianship within the meaning of the 1902 Convention.

From that time onwards, the position is clear: by the concurring judicial decision of Dordrecht and Norrköping, the second following the first, the guardianship of the infant is governed by Dutch law in accordance with the Convention.

2. Article 1 of the Convention should here be recalled:

> "The guardianship of an infant shall be governed by the national law of the infant",

as well as Article 6, paragraph 1:

> "The administration of a guardianship extends to the person and to all the property of the infant, wherever situated."

Paragraph 2 provides that this rule may admit of an exception in respect of a certain type of immovable property; no exception, however, is provided with regard to the person. No effort of interpretation could make these clear provisions say what they do not say. The Convention was open only to States represented at the Third Conference of Private International Law and the members of this little family of nations who are bound by this Convention have, with regard to guardianship, a very old common fund of ideas and principles which was formulated in Roman law: *Tutor non rebus dumtaxat, sed et moribus pupilli praeponitur.* And furthermore: *Personae non rei vel causae datur tutor.*

It should also be noted that Article 6, paragraph 1, does not constitute a rule regarding conflicts of laws. It contains a common substantive rule, in accordance with the intention of the contracting States as expressed in the preamble:

> "Desiring to lay down common provisions to govern the guardianship of infants."

3. The legality of the Dutch guardianship is not disputed by Sweden; however, it is respected only as regards the administration of the property and legal representation. On the other hand, the fact is—as has been recognized by the Respondent—that the Dutch guardian is unable to obtain the delivery of the infant to which she is undoubtedly entitled by virtue of Dutch law which is binding on both Parties by virtue of the Convention; her right is confronted by the Swedish administrative measure, taken and maintained by an authority which, as has been said, holds "a portion of the public power". The Respondent has recognized in its Counter-Memorial that the measure taken at Norrköping "constitutes an obstacle" to the exercise of the right of custody by the regularly instituted guardian. The concurring judicial decisions

of the two countries cannot be executed by reason of the Swedish administration with regard to the essential question of rights relating to the person: the right to custody, by virtue of which the guardian may determine where she shall reside with the ward or may send her elsewhere, and necessarily the right of education as well.

However, although the taking in charge of the infant for protective upbringing was legitimate at the time when it was applied, its legality may be challenged from the moment when: (1) the Swedish Court, informed of the institution of the Dutch guardianship, recognized this guardianship as regularly instituted and cancelled the Swedish guardianship, and (2) the guardian asked for delivery of the infant.

It might possibly be argued that if the Swedish authorities had wished to find a provision in the Convention to justify the measure taken, it could have sought it in Article 7 which is in the following terms:

> "Pending the institution of a 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 the local authorities."

However, the Swedish Government has not relied on Article 7. Indeed, the character of the measure as maintained for four and a half years excludes any idea of urgency, even though protective upbringing could otherwise be regarded as fulfilling the conditions laid down in Article 7.

4. Like the Court, I do not regard the Swedish administrative measure as a rival guardianship constituting a direct and deliberate violation of the Convention; I am however unable to regard it as constituting no more than a certain temporary restriction on the exercise by the guardian of her right—and duty—of custody and education. The measure encroaches deeply upon the attributes of national guardianship which are guaranteed by the Convention and in the circumstances of the present case, is not compatible with the Convention.

The infant was nine years old when she was taken in charge by the Swedish administrative authorities. As the Court is giving its decision in the present case, she is thirteen and a half years old. The measure has therefore already lasted four and a half years. There is nothing in the file to indicate that the ending of the measure is in imminent contemplation by the authorities which took it; the last decision in the matter, in which the Supreme Administrative Court briefly found that the infant is still in need of protective upbringing, is dated February 26th, 1956; it was therefore taken two years and eight months ago. In other words, protective upbringing is being applied to the infant at an age when the measure must necessarily and irrevocably impart to the child a definitive

personal, family, professional and national orientation. That is what constitutes the essence of guardianship, the principal duty and right of the guardian.

5. I am unable to content myself with the finding that the Convention was designed to settle conflicts of civil laws, that the case referred to the Court is not a case of a conflict of laws, and that the measure maintained by the Swedish authorities cannot therefore be regarded as incompatible with Sweden's international obligations.

In the first place, I would recall what I have just said, that Article 6, paragraph 1, does not constitute a rule regarding conflicts of laws but rather a common substantive rule. Furthermore, 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. It cannot be asserted at the very outset that since a law has a different aim or purpose, it cannot be inconsistent with the Convention when, in fact, the law paralyzes the effects of the Convention and renders its execution impossible. I am not referring to cases in which a State, without violating a treaty directly, holds it in check by indirect means of enacting or utilizing laws and regulations which appear to have a different purpose but which in practice make the provisions of a treaty inoperative. The Swedish Law of 1924 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.

6. Of course the effect of the Convention cannot be to confer upon the infant or the foreign guardian immunity from the whole of the local legislation. Without referring to police and security laws, laws relating to the entry and residence of foreigners, foreign exchange regulations, etc., which are not in any way related to guardianship and which extend indiscriminately to all persons who find themselves, even briefly, in the territory of the State, there is no doubt that certain legislative provisions considered to be in the public interest in respect of infants may be applicable to foreign infants residing in the country. Like the Court, I agree that the Swedish Law of 1924 belongs to this category of laws. But the conditions in which these laws are applied to foreign infants are not a matter of indifference and it is the application of these laws which makes it possible to decide whether they are in conformity with the international obligations of the State.

Some of the decisions of the Supreme Court of the Netherlands which have been cited in the proceedings emphasize one of these conditions which is directly relevant to the case before this Court. Those decisions stress the necessity of protecting society "whenever

children living within its territory are endangered by the acts of the parents"; "the interest which society has that children shall not grow up in Holland in such a way as to be threatened with moral or physical harm." Völlmar carefully specifies and repeats: children *residing in the country*, a situation which may arise *here*.

But it is one thing to apply the administrative measure as long as the infant resides in the country for one reason or another, for example, the will of the father or of the guardian; it is a different thing to retain the infant in the country in order to maintain the measure. One example will help to illustrate the problem.

Let us suppose that the law of the State of residence can overrule the *lex tutelae* by making the infant subject to compulsory primary education until an age that is greater than the one provided in his national law, i.e. sixteen years instead of fourteen. The infant has just reached his fourteenth birthday. If the guardian sought to return with his ward to his national country because primary education there is not compulsory beyond the age of fourteen and the ward could therefore begin to work, the local authorities would certainly not be entitled to prevent the departure of the infant in order to make him enjoy two further years of the compulsory education already initiated; they could not legitimately prevent them from changing their residence.

It is abundantly clear from the file that the Swedish administrative authorities are not applying the measure of protective upbringing to the infant *because* she has her residence in Sweden but that they are retaining this foreigner in Sweden *in order to* subject her to protective upbringing. This manner of applying the law must be held to be clearly incompatible with the obligations assumed by Sweden under the Convention.

It appears to be likewise clear from the file that the measure in question is not based upon the supposed insufficiency of the Dutch guardianship (Article 22 *a)* in case the infant were handed over to her guardian, with whom she already has her legal domicile. Indeed, Dutch guardianship, functioning under the effective control of the national authorities, does not provide fewer guarantees with regard to the protection of the interests of the infant than Swedish protective education; the question of the application of Swedish protective education by the Dutch authorities or *vice versa* clearly does not arise. The Netherlands, moreover, possess legislation on the protection of children and young persons that is generally similar to that of Sweden.

7. It should be noted that in the Swedish judicial decisions concerning the infant, the question of *ordre public* never arose. The Judgment of the Court of Norrköping which cancelled the registration of the Swedish guardianship and maintained the *god man* referred to the interests of the infant; the Court of Appeal of Göta

which confirmed the decision of the Court of First Instance considered the interests of the infant and reached its decision "having regard, in particular, to the close links between Elisabeth and Sweden". The Supreme Court, which removed the last traces of the Swedish guardianship by releasing the *god man* from his duties, merely held that the case could not be reduced to one of major necessity as the Court of First Instance had considered.

The interest of the infant is the *ratio legis*, the purpose and the aim of the legislative or treaty provision. The Swedish courts, which alone were entitled to do so, have not applied the exception of *ordre public*. This Court cannot substitute itself for a national court in order to decide what is required by the *ordre public* of the country of that court.

In the Rejoinder, the Respondent partially modified its position and contended that the Applicant wrongly referred to *ordre public* in the specific meaning of the term in private international law.

> "Nothing of the sort is involved in the present case... The Swedish case is that the law for the protection of children, being part of the public law, is applicable throughout the territory and to any foreign child there, that no national or foreign law relating to the status of the child can stand in the way of its application, and that the 1902 Convention was in no way intended to alter this situation. The Government of the Netherlands has clearly lost sight of this absolutely mandatory character of *the rules of public law*, or of administrative law, which perhaps the Swedish Government itself has failed sufficiently to stress."

In itself, the distinction is well taken. With regard to the contention, I shall revert to it before I conclude.

8. Although the 1902 Convention regulates matters of private law, it is a convention of public international law and like all international conventions, creates rights and duties in respect of the States which entered into it. The Convention is binding upon the States, of which the courts and administrative authorities are the organs. By signing the Convention, the contracting States could regard it as certain that the decisions of their courts would be in conformity with the rules laid down by the Convention and that execution of these decisions would be effectively secured by the State of the courts concerned.

It is natural that the Government of the Netherlands should have adopted the cause of its nationals for it thus defends its own right which is guaranteed by the 1902 Convention and which has been disregarded by the Swedish authorities.

By the Convention, the Netherlands have acquired the right that the guardianship of infants shall be governed by the national law of the infant and in particular that the right relating to the person, right of custody and education should be treated inseparably from guardianship. The Netherlands have acquired this right,

not *vis-à-vis* the Swedish Courts but *vis-à-vis* the Swedish State which must prevent the manner in which its national law is applied by its administrative organs from rendering inoperative the decision which it has taken, in accordance with the Convention, through its Courts. The decisions of the Courts were in conformity with the Convention; in the event of the administrative authorities hesitating between two possible manners of applying the law, the State must prefer the manner which does not bring it into conflict with its international obligations.

9. The solution which has my preference does not involve either an interpretation or a criticism of the Swedish Law. In one of its first judgments, the Permanent Court adopted an attitude in this connection from which it never subsequently departed:

> "The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Convention." (*Case concerning certain German Interests in Polish Upper Silesia*, Series A, No. 7, p. 19.)

With regard to the relationship between an international undertaking and the municipal law, the Permanent Court expressed its view on several occasions:

> "It is a generally accepted principle of international law that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty." (*Greco-Bulgarian Communities*, Series B, No. 17, p. 32.)

And again:

> "It is certain that France cannot rely on her own legislation to limit the scope of her international obligations." (*Free Zones*, A/B, No. 46, p. 167.)

It has been argued before the Court that the Swedish Law is an enactment of public law. In this connection, the Permanent Court has expressed the following view:

> "A State cannot adduce as against another State its Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." (*Treatment of Polish Nationals in Danzig*, Series A/B, No. 44, p. 24.)

The Constitution is a classic example of public law.

I therefore reach the conclusion that the Court ought to have adopted the first Submission of the Government of the Netherlands.

The second Submission of the Government of the Netherlands merely constitutes a legal consequence of the first Submission. The Government which has created an irregular situation by its administrative measure is under an obligation to end the measure.

(Signed) B. WINIARSKI.