DISSENTING OPINION OF JUDGE CÓRDOVA

Much to my regret, I have to disagree with both the reasoning and the conclusion reached by the Court in this case.

The judicial authorities of Sweden set up the guardianship of Marie Elisabeth Boll, a minor living in Sweden but of Dutch nationality, on March 18th, 1954. This 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. The same authorities put an end to this guardianship on July 2nd, 1955, when the Supreme Court of Sweden discharged finally the *god man* appointed by the inferior judicial authorities.

The Swedish administrative authorities, on April 26th, 1954, applying Article 22 *(a)* of the Swedish Law for the Protection of Children and Young Persons (Child Welfare Law) of June 6th, 1924, put Marie Elisabeth Boll under the system called *skyddsuppfostran*, which, according to both Agencies, should be translated into English as "protective upbringing", and as "*éducation protectrice*" into French.

This protective measure—which the Swedish authorities still maintain after four and a half years—according to the Swedish Law gives the custody and control of the infant to the Swedish Infants' Bureau.

On their side, the judicial authorities in Holland, applying the Dutch laws, set up the guardianship of the same infant, and on August 5th, 1954, appointed Mrs. Catharina Postema as her guardian. According to Dutch law, the guardian has the right, as well as the duty, to take custody and control of the infant.

Neither the judicial authorities of Sweden which first set up and afterwards terminated the guardianship, nor the administrative ones which instituted the protective upbringing, in the whole of their proceedings, made the slightest reference to the Convention governing the Guardianship of Infants, signed by their country and Holland on June 12th, 1902, notwithstanding the fact that this Convention was called to their attention (para. 5, Swedish Counter-Memorial).

In putting an end to their own guardianship, the Swedish authorities applied their own law of 1904 (Counter-Memorial, Annex D *a*). They have, therefore, recognized the Dutch guardian, Mrs. Catharina Postema, with full rights to the administration of the infant's interests, but in fact made it impossible for her to exercise her right of custody and control of the infant's person on account of the infant being subject to the protective upbringing.

Counsel for Sweden tried to justify this disregard of the Convention—among others of lesser importance with which I do not

consider it necessary to deal here—on the main contention that the Convention of 1902 should not be considered as applicable, because the Swedish Law of Protective Upbringing of 1924, being a public law and relating to the public order of the State, may be applied to all infants, Swedish and foreign alike, notwithstanding the provisions of the Convention.

The decision of the Court, although based on different grounds, reaches the same conclusion that the Convention of 1902 is not applicable to the present case.

Without rejecting expressly the *ordre public* theory relied upon by Sweden, the Decision is predicated upon the theory that the Law for the Protection of Children and Young Persons of 1924—under the authority of which the "protective upbringing" was instituted and is still maintained—having a different aim and scope than that of the Convention does not violate the provisions of the latter, even though, in fact, it makes it impossible for the Dutch guardian to fully exercise her rights and fulfil her duties as derived from the Dutch laws and the Convention itself, in so far as it denies her the custody and control of the person of Marie Elisabeth Boll.

The two theories, that of *ordre public* and public law and that of the different aim and scope, have the same effect with regard to a Convention; they both make it possible for the State, party to the Treaty, to avoid the fulfilment of its obligations as prescribed in the international contract by relying on its own laws. The theory upheld by the Court is nothing less than the same theory of *ordre public* under a different guise; but perhaps still more dangerous in its implications. It is true that the decision does not require of the national law to be a public law or one related to public order, but, as far as giving to a State signatory of a Convention the possibility of infringing its provisions and its natural, logical and expected legal consequences, it opens the door still wider than the theory of *ordre public* to the possibility of raising the national laws as exception against the binding force of treaties.

In my opinion there is no national law, whatever its classification might be, either common or public or with different aim and scope, which in the face of a treaty dealing with the same subject-matter can juridically claim priority in its application. Laws of procedure, substantive criminal law, political or fiscal legislation, passport regulations, and even laws related to the sovereignty of a State over its own territory, are sometimes put aside and suspended by treaty provisions and, what is more—in some cases—by international law and by international courtesy alone, even in the absence of any treaty stipulation. Such is the case of the regime of capitulations, of diplomatic criminal immunities and fiscal exemptions, and of transfer of territory by treaty provisions. In all these cases the stipulations of a treaty or convention are binding upon the parties, notwithstanding the public character of their affected national legislations. Therefore, in my opinion, there is not much juridical

value in the proposition that *ordre public*, or a law with a *scope and aim different* from that of a treaty, can, by themselves alone, be opposed to the application of a convention or treaty, thus making negatory its intended juridical and practical effects. It seems clear to me that the legislation of a State party to a treaty dealing specifically with a subject-matter otherwise normally regulated by its own laws has to yield before the provisions of such treaty.

It has been said that treaties and conventions cannot be set up as a barrier to the power to legislate in the future of a State party to such international contract. The argument is not valid, because treaties and conventions usually may be denounced, leaving the parties in complete liberty to change again their legislative principles and laws; and, even when, as in certain cases of transfer of territory, a treaty may not be considered as subject to denunciation, this restriction upon the legislative power which results for a State party to such treaty should be deemed as a consequence agreed upon of its own will by such State. It has also been argued that there is a well-known principle of interpretation of treaties dealing with conflicts of national laws, the so-called Convention of Private International Law, which gives to the parties to such treaties the right to disregard its provisions relying on their own public laws or on their laws relating to public order. I do not believe that there is such principle of Public International Law—the only law between nations; on the contrary, I have always known the time-honoured and basic principle of *pacta sunt servanda*, which makes it impossible for the States to be released by their own unilateral decision from their obligations according to a treaty which they have signed.

The place to be given to the national laws of *ordre public* and to those with a different scope and aim, whatever their classification might be, depends upon the interpretation of the treaty; but when such interpretation clearly includes within its provisions a subject-matter otherwise normally regulated by those kinds of national laws, the provisions of the treaty should be considered as having priority over them. To decide differently would mean complete anarchy in the relations of States, would leave the binding force of treaties in the unilateral hands of the legislative, judicial and administrative authorities of the States parties to such treaties and, finally, would completely destroy the indispensable hierarchy of the laws of the States and that of the international legislation.

An international jurisdiction, in the interpretation of a treaty or convention, must determine the extent of the consent of the parties to such instrument. In so doing it must take into consideration the real will of the signatory States as determined by the text of the treaty itself, by the antecedents of the international contract, or by any other means at its disposal.

I agree with the Court in that the parties to the Convention of 1902 had mainly in mind questions of the conflict of laws with regard to guardianship; and also that they implicitly excluded generally all national laws, either public or common, dealing with subject-matters different from that of guardianship, like criminal laws, those organizing the judiciary and the political structure of the government, passports, and even perhaps the correction of delinquent infants. But I do believe that all matters relating to the guardianship of infants, including all the legal as well as practical effects of guardianship, such as the custody and control of minors, measures relating to the protection and welfare of infants, should be considered as falling within the terms of the Convention, although they might be dealt with by national public laws, laws relating to the public order of the State or by laws with a different aim and scope from that of guardianship. The decision of the Court, although putting aside the theory of *ordre public*, and basing its reasoning on the theory of the aim and scope differing from that of the treaty, nevertheless tries to interpret the Convention of 1902, stating that it was only intended to regulate the conflicts of national legislations regarding guardianship, a subject-matter alien and completely different from the protection of children and young persons, which is the only aim and scope of the Swedish Law of June 6th, 1924. With this basic proposition, I cannot agree.

In my way of thinking, the 1924 Swedish Law—at least as far as its Article 22 *(a)* is concerned—is far from having an aim and scope different from that of the Convention.

In substance, guardianship and the 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. As far as the intention of both is concerned, the guardianship dealt with in the Convention and the "protective upbringing" have one and the same objective: the protection of infants. Guardianship fulfils its purpose by giving the custody and control of the child to the individual parent or guardian, and only when this method of protection fails does this system of State protection intervene by means of the "protective upbringing" and other similar measures, taking away from the parent or guardian such custody and control.

In spite of the Netherlands' own admission and Sweden's allegation to the contrary, it is my understanding that Article 7 of the Convention clearly comprehends the protective measures included in Article 22 *(a)* of the Swedish Law of 1924, when it refers to the possibility of the local authorities to take "in all cases of urgency" measures "required for the protection of the person" of the infant. In order to prove the contrary, it has been argued that the national laws of all parties to the Convention, dealing with the protection of infants, were enacted a long time

after the signing of the Convention, but that is not the case, at least with regard to the two States before the Court, the Netherlands and Sweden. I believe that the reference to protective measures included in Article 7 was not accidental and meaningless. Its inclusion strongly suggests that the necessity to introduce a provision making it possible for the States of residence to apply measures of protection to the foreign infant, according to their present or future legislations, in "cases of urgency", was clearly present in the minds of the framers of the Convention. This is the natural and, perhaps, the only reasonable interpretation of Article 7. Moreover, although the Dutch law introducing the system of protection of infants was enacted after the year 1902, such legislation was already contemplated and prepared since 1901, and Sweden enacted its own law regarding protective upbringing in the year 1902, which makes it evident that the Netherlands and Sweden had already in mind the application of protective measures. It seems to me that the framers of the 1902 Convention, seeking only the good of the infants, although mainly referring to guardianship, 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 and measures by giving priority to the former (Articles 1 and 6) over the latter (Article 7).

I hold the above view in spite of the position of both Parties to the litigation before the Court which, as I have pointed out, believe that Article 7 of the Convention is not applicable. If the 1902 Convention had been a bilateral treaty, their common interpretation with regard to one of its Articles—Article 7—would have been enough for me to consider such a construction as final; but the 1902 Convention being a multilateral treaty, it is possible, I believe, to hold a different opinion from that of the two Parties before the Court with reference to the applicability of its Articles.

Since according to the laws of the Netherlands, this right of custody and control belongs to the guardian, there is sufficient legal reason to decide that Catharina Postema, according to the Convention itself, may rightfully claim the custody and control over Marie Elisabeth Boll, the basic principle of the Convention being that guardianship shall be governed by the national law of the infant (Articles 1, 2, 4 and 8 of the Convention). That is undoubtedly the reason why the Netherlands Court of First Instance of Dordrecht, August 5th, 1954, when appointing Madame Postema as guardian, ordered at the same time that the girl should be handed over to her. But if this were not enough, Article 6 of the Convention will take away the slightest doubt when it says: "the administration of the guardian extends to the person..." of the infant.

Therefore, I feel safe in concluding that the Convention does regulate both the right to custody and control and the protective measures in general, including, of course, the protective measure called "protective upbringing" referred to in Article 22 *(a)* of the Law for the Protection of Children and Young Persons of June 6th, 1924. As a corollary it necessarily follows that the Convention should have been applied by the Court, and the case of Marie Elisabeth Boll should have been decided exclusively according to its terms. The task of the Court should thus have been very much simplified, and its decision should have been, in my opinion, the right one.

Even if the Swedish authorities, on April 26th, 1954, when they instituted the "protective upbringing", did not know about the Dutch nationality of the infant Boll, and even also if they did not take into account the terms of the 1902 Convention, I believe that the protective measure taken by them to put the Dutch girl under the regime of protective upbringing was a legal act according to the terms of the Convention. Thinking their action urgent, as they must necessarily have judged it, this measure is perfectly justified in the light of Article 7 of the Convention, which makes it possible for the local authorities to take, in "all *urgent cases*, the measures required for the protection ... of a foreign infant...". Therefore, the setting up of the protective measure does not constitute in itself a violation of the Convention. I go as far as to believe that the Swedish authorities seem to have been under a moral as well as a legal obligation to take such protective measure judging from the meagre knowledge the Court has of the real situation of the minor Boll.

It only remains to decide if, according also to the terms of the Convention, the maintenance of such protective measure can be considered compatible to the provisions of the Treaty of 1902. In my opinion this question should have been answered in the negative. An urgency of four and a half years is inconceivable, specially having, as I do, the understanding that the urgency contemplated in Article 7 of the Convention requires 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.

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 Madame Postema showed herself legally and practically able to take charge of the infant Boll and to exercise her rights and duties as a guardian according to the Dutch laws. I cannot understand the object of Article 6 of the Convention in any other sense than to make obligatory for the local authorities, should they be judicial or adminis-

trative, to release the foreign child to the custody and control of the guardian appointed in compliance with the national laws of the infant; therefore, only in the case that the child Boll will remain in Sweden after having been turned over to the Dutch guardian, and the future facts warrant again the State intervention in favour of the child and against the legally appointed guardian, shall the Swedish authorities be entitled—by their own laws and entirely independent of the Convention with which they had already complied—to set up a new "protective upbringing", but the provisional one now in existence should be at once discontinued.

I refuse to accept the idea that the Convention is not applicable in this case, and also the interpretation of the Swedish law of protective upbringing, as giving right to the State of residence to keep a foreign minor—in this case Marie Elisabeth Boll—indefinitely in its territory in order to impose upon her its protection by means of denying the release of the child to the legally appointed guardian —Madame Postema—which is the logical, juridical, intended and expected effect of Article 6 of the Convention.

The most strange effect of the law of protective upbringing, to keep a foreign child within the country of residence against the expressed will of the legally appointed foreign guardian, seems to me unwarranted and illegal according to the general principles of international law, even in the absence of a Convention as the one of 1902.

Such would be the case, for instance, of a so-called public law, or law of *ordre public* which would impose forced labour in the fields upon infants, native and foreign alike, in order to collect the needed crops for the community. This law would certainly have an aim and scope completely different from that of the Convention dealing with guardianship, but could one say that the foreign guardian cannot avoid such forced labour being imposed upon this foreign ward by taking him or her out of the country of residence? Could the local law impede the taking out of the country of the foreign infant because it is a public law or related to the public order, or because it has a different aim and scope than that of the Convention?

I would reach the same conclusion, I believe, even in the absence of any treaty or convention in the case of any national law different from the penal ones, which would have the effect of denying the right to a foreigner, adult or minor, to leave the country of residence.

From all that I have said, it is my considered opinion that the Second Final Conclusion of the Dutch Government, which the Agent for the Netherlands included in its Submissions of October 3rd last, that Sweden is under the obligation to end the protective upbringing, should have been granted by the Court.

(Signed) R. CÓRDOVA.