DISSENTING OPINION OF JUDGE "AD HOC" OFFERHAUS

[Translation]

1. In this case, which concerns the application of the Convention of 1902 on guardianship, the question is one of an infant of Dutch nationality, born on May 7th, 1945, in Sweden, the daughter of a father of Dutch nationality and of a mother Swedish by birth, who had acquired Dutch nationality by her marriage. The mother died on December 5th, 1953, and the father became, by operation of law, guardian of the infant, in virtue of his national law (Art. 378, B.W. Netherlands).

The Convention of 1902 governing the guardianship of infants is applicable in this case because according to its Article 9 it applies to the guardianship of infants nationals of one of the contracting States who have their habitual place of residence in the territory of another of those States.

The organization of the national guardianship in this case passed through various phases before reaching its present state. A deputy-guardian, in the person of M. Idema, was appointed only on June 2nd, 1954. Then, on August 5th, 1954, the Dordrecht Court relieved the father, Johannes Boll, of his functions as guardian, and appointed instead Mme Catharina Trijntje Postema, widow Idema, hereinafter called Mme Postema.

Meantime, in Sweden, the Swedish authorities had taken measures of "protective upbringing" which at once made apparent a conflict with the organization of the national guardianship. On May 5th, 1954, evidently not yet being aware that Dutch nationals were involved, the Child Welfare Board of Norrköping approved the taking in charge of Marie Elisabeth Boll by its President pursuant to Article 22 *(a)* of the Swedish Law of June 6th, 1924, a measure which was confirmed and therefore maintained in the proceedings of June 22nd and October 5th, 1954, and again, on a fresh application, maintained in the first and the last of the three decisions in 1955. After a provisional phase, the child was entrusted to her maternal grandfather, M. Lindwall.

The decision of June 22nd, 1954, to maintain the measure was taken in full knowledge of the nationality of the parties and of the appointment of M. Idema as deputy-guardian, and that of October 5th, 1954, in full knowledge of the appointment of Mme Postema as guardian in place of the father. Clearly, when the measure of protective upbringing was taken on May 5th, 1954, the Swedish authorities were unaware of the foreign nationality of the infant—which was perhaps also due to the fact that, by mistake, Johannes Boll had, on March 18th, 1954, had himself registered as guardian in Sweden, that is to say as guardian in the limited sense of adminis-

trator of the child's property, according to Swedish law, in addition to the custody which Sweden allowed him according to Swedish law. This mistake, although regrettable, in my opinion did not prejudice the father's rights. Moreover, the father's Swedish guardianship was revoked on September 16th, 1954, and the *god man* who had been appointed, was discharged on July 2nd, 1955. Only the custody is in issue.

2. In the six decisions regarding protective upbringing, no mention was made of an accusation brought against the father, except in the resolution of the Government of the Province of Östergötland of October 28th, 1955, the allusion to a suspicion which existed at the time of the first taking in charge by the Child Welfare Board. In all the decisions, even in the first one, allusion is only made to a danger to the moral or mental health of the child and, after the appointment of the female guardian, to the fear that notwithstanding her powers, the child would remain under her father's influence. Even this fear was based only on negative data, that is on the lack of information regarding the circumstances in which guardianship was being exercised in the Netherlands, and on the presumed ignorance of the Dordrecht Court as to the reasons for the Swedish measures.

In the Swedish law of June 6th, 1924, on protective upbringing, Article 22 enumerates the cases in which such measures are permissible. The text of Article 22 runs:

> "In conformity with Articles 23-25, the Child Welfare Board will take measures concerning:
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> *(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;
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> *(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;
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> *(c)* a child under eighteen whose delinquency is so serious that special educational measures are required to correct it; and
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> *(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 (law of April 14th, 1944)."

Under Article 34, a non-delinquent child will, in the absence of special circumstances, be placed in a suitable family.

The one case which, in the view of the Swedish authorities, arose in the present instance was that mentioned in paragraph *(a)*. There was no question of the infant's being ill-treated or exposed to serious negligence, the question was of a danger regarding her physical or moral health. Article 22 *(a)* requires that this danger should be one threatening her in the family home. The Swedish authorities

based the measures which they took on the existence of such a danger. This comes under the title of the Law which, according to the French text, concerns "la protection des enfants et la protection de la jeunesse" ["the protection of children and young people"].

It is certainly to be regretted that the Court only knows the decisions and the facts which these bring to light. For whatever reason, neither Government has given the Court more detailed information, and the mystery of incomplete reports and statements has been maintained—marked in the decisions by dots. One does not know whether the child is familiar with her national language nor how she is getting on in the family where she is placed. Following the exhaustion of the local remedies, and pending the Judgment on the Application of the Netherlands Government, the present situation has continued.

However, the Court had to decide whether at the moment of the institution of the protective upbringing and of its maintenance, these measures were compatible with the Convention, and, if not, whether they should be ended. Therefore, in my view, one must adjudicate on the facts advanced by the Parties which, however incomplete they may be, show that the protective upbringing has only been instituted and maintained for reasons connected with the moral or mental health of the infant. It is the right of the Parties in the case to ask the Court to give its Judgment on these facts alone.

3. Although in the Judgment of the Court the measure of protective upbringing is considered as outside the scope of the Convention—an opinion with which I cannot agree—the Court accepts that, in particular in the decision of the Supreme Administrative Court of October 5th, 1954, the capacity of the Dutch female guardian to concern herself with the person of the infant was recognized. This is the starting point for the ensuing considerations in which the Court holds that the protective upbringing cannot be regarded as a rival guardianship to the guardianship instituted in the Netherlands.

Next, it is said of the protective upbringing that it impedes the exercise by the guardian of the full right to custody which is hers by Dutch law in conformity with the Convention.

It may indeed be said that the whole dispute concerning the question whether protective upbringing has an object other than the organization of the guardianship presupposes the recognition of the Dutch guardianship.

None the less, I should have preferred a categorical declaration in which the Court held that the guardianship of the parental guardian and that of Mme Postema or at least the latter, constituted guardianship within the meaning of the Convention. The Court would thereby have rejected the Swedish Government's contention that Mme Postema's guardianship was based on the *puissance*

paternelle of Johannes Boll and that it could not, for that reason, be recognized. Furthermore, by such a formal declaration, the Judgment would have interpreted the Convention in a strict and clear fashion. However, in my view, the Judgment will none the less have the same effects.

For the interpretation of the Convention in this sense, I attach great importance to the indications to be found in the Acts of the Hague Conferences of 1893, 1894 and 1900 which, in this respect, are more important than the representatives of the two Governments have indicated. In particular, it appears that the application of the national law of the infant, as regards the *reasons* for guardianship, mentioned in Article 5, is equally valid for Article 1. For example, if the death of one of the parents deprives the infant of the care of both its parents, there is then a "guardianship" in an "autonomous" sense acceptable for other countries.

4. If it be accepted that the guardianship of the two successive guardians instituted in the Netherlands is wholly governed by the Dutch law of the infant, this means in the first place that the national law is to be applied in the contracting States as regards everything that concerns the exercise of guardianship until that is finally terminated. In the Acts of the Second Hague Conference of 1894 (p. 112, Report of the Fourth Commission), mention is made of the difficulties which the application of a foreign law involves, and the Commission therefore proposed to regulate the matter in such a way that the competence of the courts and of the authorities and the law applicable should coincide. The Commission clarified its point of view by stating that the difficulties were already most embarrassing and that "those involved in the organization of a complete juridical situation, *in all its phases and with all its complications*, would be even more so". This same expression "guardianship in all its phases" recurs in the commentary on Article 1, also on page 112. Apparently, the aim was to regulate the whole organization of guardianship, in conformity with the Preamble to the Convention, which refers to "common provisions to govern guardianship".

In the second place, for the father-guardian or the mother-guardian, and also as regards the non-parental guardian, guardianship within the meaning of the Convention includes the custody of the person of the infant. This is also recognized by the Court. If the content of the notion of "guardianship" is determined by the national law, and if the national law includes custody, the contracting States are bound to recognize this right of custody. Moreover, in the original text of the Swedish law of July 8th, 1904, which was intended to make possible the accession of Sweden to the Convention (Kosters and Bellemans, p. 723), Article 5 of Chapter 4 regulates the appointment of a delegate to look after the property *and* the person of the infant (cf. also the present text in Annex D *(a)* of the Counter-Memorial).

Guardianship, 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. It follows that one may not say that the Convention was only meant to regulate conflicts of laws. Above all, what is important is to determine the scope of the provisions comprised in such a conflict.

Now, the scope of the Convention is fairly wide. Guardianship formed part of a whole system of international conventions which was in contemplation at The Hague, including the guardianship of adults, which became the Convention concerning interdiction and similar measures of protection—as, in the 1893 programme, a convention was planned on *puissance paternelle* as well.

In the Acts of 1894 (pp. 111-112), the Fourth Commission expressed the view that what was involved was protection through guardianship—the word "protection" was used three times—and this is asserted in Article 6, which provides that the administration of a guardianship extends to the person and to all the property of the infant, and also in Article 7, which allows measures for the protection of the person and interests of a foreign infant to be taken by the local authorities.

As regards the extrinsic scope of guardianship, this institution could in no way and nowhere exist or function without intervention and permanent supervision by the courts or the administrative authorities, or both. Literally, *tutela* means protection. The institution of guardianship does not fall exclusively within the domain of private law. From the outset, the public interest was involved and it is so at present in an even larger measure, in all the contracting States.

The present regulation of Dutch guardianship includes the removal or discharge of a guardian if he neglects his obligations (Art. 419, para. 1, No. 2, *Burgerlijk Wetboek*)—the right of the Department of the Public Prosecutor to entrust the infant to a Guardianship Council (*Voogdijraad*, since 1955 *Raad voor Kinderbescherming*) in case of the removal of the guardian (Art. 421 *a*)—the discharge of the guardian at the request of the Department of the Public Prosecutor or the Guardianship Council (Art. 423 j° 374 *a*, B.W.)—supervision by the deputy-guardian—various rights of the Guardianship Council and the Children's Judge—guardianship exercised by bodies, as ordered by the Court (Art. 396). There is always a competent court in the Netherlands, by virtue of the requirement that the deputy-guardian should reside within the territory, as well as a Guardianship Council dealing with infants residing abroad (Art. 461 *a*).

Further, there are the provisions concerning the placing under supervision of a child in danger of moral or physical harm which are applicable both in the case of the exercise of parental power and also in that of the exercise of guardianship (Arts. 365 to 373, recently

amended by the Law of July 20th, 1955, j° 418 B.W.). A family guardian is appointed by the Children's Judge. The latter may place the infant in an establishment or elsewhere. The whole of this institution was described by the Applicant Party as a measure for the assistance of the guardian in the matter of the upbringing of the infant. The guardian may be removed by the Court should he seriously neglect the directions of the family guardian or prevent the application of measures for the placing of the infant (Art. 419, para. 1, No. 7).

Ever since the entry into force of the codification of 1838, the surviving father or mother has had the guardianship; there has been a deputy-guardian (except in the irrelevant case of Art. 421 B.W.); the court has had the right to remove the guardian; the guardian has had the duty of taking care of the person of the infant and, if he had serious misgivings as to the latter's conduct, the guardian could apply to the court for the detention of the infant (Arts. 422, 423, 437, 441, 442, B.W., French translation by G. Tripels, 1886). Thus there was already a system of protective rules which have gradually been increased and improved.

Sweden, like other contracting States, was in a position to know of this system of protection, as also of the draft law of February 6th, 1901, which came into force on December 1st, 1905, by which the protection of children was modernized.

In Sweden the first law on protective upbringing dates from 1902. The consequences of all these laws must have been foreseen before Sweden ratified the Convention in 1904—and afterwards the Convention was not denounced.

In all the contracting States, legislation on the protection of children, which in the beginning was little developed, has gradually progressed and, as was mentioned in the Swedish arguments, national organizations are, in conferences at Stockholm and elsewhere, still right up to the present concerning themselves with measures to be taken in common agreement.

The question whether these rules are to be found in the Civil Code or in a special law is, in this connection, quite formal and secondary. In the Netherlands they are to be found in the Civil Code, both as regards *puissance paternelle* and guardianship. In Sweden, where codification is of another kind and where custody and guardianship are distinguished, they have been dealt with separately, although in the 1949 law there are various provisions whereby custody is entrusted to the guardian.

5. From these considerations I draw the conclusion that the Convention governs the organization of guardianship in its totality, with the aim of protecting children. In principle, it refers to the national law, but this law gives way to the law of the place of residence, as far as may be necessary. As an exception, if guardianship is not or cannot be set up in accordance with Articles 1 and 2,

it is instituted and administered in conformity with the law of the place of habitual residence of the infant abroad (Art. 3). As an exception also, Article 7 provides that pending the institution of a guardianship, and in all cases of urgency, measures required for the protection of the person and interests of the infant may be taken by the local authorities.

As soon as the nationality of the child became known to them, why did the Swedish authorities not study the Convention and, in compliance with Article 8, inform the Dutch authorities of the situation "as soon as it was known to them"? According to the Swedish law of July 8th, 1904 (Chapt. 4, Art. 2), a letter to the Swedish Ministry of Foreign Affairs would have sufficed.

The Swedish authorities might have considered the application of Article 7 as a measure of urgency. But in their decisions there is no allusion to the 1902 Convention.

I do not share the view that in cases of urgency Article 7 only concerns special or partial measures. Article 7 allows temporary measures of urgency, even if they cover the whole intrinsic sphere of guardianship.

As to the decisions of the Dutch courts, the applicability of Article 7 has, in my opinion, been affirmed by the Judgment of the Supreme Court *(Hoge Raad)* of May 1st, 1958 (N.J. 1958, 432), concerning an infant of German nationality, placed under temporary guardianship in virtue of Article 391 B.W. The Supreme Court added—*obiter dictum*, moreover—that, even in the case of a well-founded fear of the interests of the infant being neglected (Art. 391, para. 2), the temporary guardianship should give way to the authority appointed by the national law of the infant, that is to say, that it is for that authority to judge whether, having regard to the child's interests, the measures laid down in the national law of the country to which the child belongs should be *modified*.

As to the question whether the measure of protective upbringing taken on May 5th, 1954, should, after the event, be described as urgent in the sense of Article 7, I would reply in the affirmative. If there could be any hesitation on this point, it would be for a reason of quite another kind: if one admits that the Child Welfare Board was aware of the foreign nationality of the child, it should have applied Article 8 of the Convention and should then have taken action on the basis of the obligations laid upon it by this Convention.

Article 7 cannot, after the event, be regarded as applicable to the decision of the Government of the Province of Östergötland of June 22nd, 1954, and to the decisions which followed, because the nationality of the father and the appointment of the deputy-guardian were then known. The Government of the Province should have abstained from taking any such decisions and should have left the child to the care of her guardian and the supervision

of the deputy-guardian. After the change of guardian, moreover, it was only the child's health which was regarded as a reason for the decisions. Hence, the situation was thenceforward completely governed by the national law. In the Swedish decisions there is to be found no reproach or fear as regards the guardian Mme Postema, except the fear that the child would remain under the influence of the father. Nothing in these decisions justifies any urgent measure for the moral health of the child.

6. The second and the more important conclusion that I draw from a comparison of the two systems, the Dutch and the Swedish, for the protection of infants is the following: the provision of Article 22 *(a)* of the Swedish Law of June 6th, 1924, and the measures taken in execution of this single provision are of the same nature as those laid down in the Dutch law applicable according to the Convention. Obviously, they are directed towards the interest of the infant. The situation before the Child Welfare Board was one for which the rules regarding Dutch guardianship would have offered a similar solution. The care of the physical and moral health of the child, as also for her intellectual and religious education, the choice of schools, the selection of the place of residence for the child best adapted to her interests, are in the hands of the person who has the child's custody under the supervision of the authorities. Once the Convention is involved, it is not the local law but the national law which prevails. In this case, the application of Article 22 *(a)* has, in fact, in contravention of the Convention, prevented the exercise of the guardian's rights and, consequently, of the rights of the Dutch authorities.

Thus, it is not permissible to put children who are in a vulnerable condition outside the scope of the Convention. How many children of the present day are so vulnerable! It is a subject of anxiety for all parents. It would be interesting to examine the percentage of such cases among children under guardianship.

It should not be said that the removal of the infant constitutes a danger in the sense of Article 22 *(a)*. It is for the national guardian and for the national authorities to see whether, in the circumstances, a removal is possible or whether, temporarily, the child should stay in Sweden. As we know, the guardian had already made arrangements in this sense.

For these reasons, I am of opinion that the application of Article 22 *(a)* of the Swedish Law of June 6th, 1924, should, in this case, be judged incompatible with the Convention, with the exception of the first taking in charge of the child in so far as that falls under Article 7.

7. It follows from the foregoing that no obstacle can be placed in the way of the application of the Convention of 1902, on the ground that the whole subject of the Swedish law on protective

upbringing is outside the scope of the Convention, because of the aim of this law to provide a social guarantee.

In considering the object of the whole of this law, the different cases in which it may be applied are no longer distinguished. The Swedish authorities had in view only the protection of the infant against a danger concerning her physical or moral health, and this in the family home. They applied Article 22 *(a)* only.

If one views the four cases enumerated in Article 22 according to the same criterion, there is a whole legislative sphere which is much larger than that involved in the present case. Delictual and quasi-delictual situations are included. There is a risk, therefore, of the social guarantee aspect imposing itself imperatively in cases where the interest of the infant prevails. For the same reason also there is reluctance to admit the apparently unacceptable consequences of a Swedish law which has an extraterritorial effect and which would have to be applied to Swedish infants in a foreign country. But these consequences do not arise because the Swedish law is confined to children "within a (Swedish) commune" and because if the Convention was applied to such Swedish infants, this would merely mean that the local authorities tolerate the handing over of such an infant to the person who is in charge of him.

Without making any imputations as to the aims of the Swedish legislators, I think that it might be an attractive policy to include in local legislation rules governing a whole series of matters which, without such rules, would be covered by the Convention, or to unite in one law provisions of a penal and a civil nature, or to pass legislation covering the whole question of the custody of children from the point of view of a social guarantee—and this in opposition to the legislation of those States which, with a view to the protection of children, have included provisions covering the same matter in their Civil Code. Merely by means of the label affixed to a law, the aim of the Convention could thus be defeated.

It is not, indeed, a question of another subject, but of another purpose in the legislator's mind. In this connection, the English word "purpose" is more indicative than the French word "*objet*". The subject-matter is the legal relationship in question and the rules which are applicable to it. In the present case, the legal relationship is constituted by the personal situation of an infant who is not under the *puissance paternelle* or the parental power of her two parents; the legal rules are the provisions governing the custody of such an infant. This subject-matter is the same in all States.

What is different is the purpose aimed at by the rules. Here the legislators and the courts are guided by "pre-occupations of a moral and social order".

In fact, what is being done is to make an exception for the application of public law enactments or the principles of inter-

national *ordre public*, which thus come in again in disguise by the window after having been chased out of the door.

The Applicant has rightly made an objection with regard to the category of public law enactments. If indeed such a category exists, it has by its absolute and static character a much wider scope than the exception based on international *ordre public*, which is relativist and dynamic and which, in any case, should be applied with great prudence. This exception does at least allow an examination of the question whether, in a concrete case, the points of attachment to the juridical system of the country of residence are strong enough.

In the case of the Convention on guardianship, I would reject the general exception based on international *ordre public* because in the Hague Conventions which were drawn up at the Conferences of 1893, 1894 and 1900 the general formula of *ordre public* was deliberately rejected and the system of individual treatment of special cases was adhered to—cases in which, for reasons of public or social interest, a different conflict rule seemed necessary. (Actes 1893, I, pp. 37-38, 41, 46-47, 74 *et seq.*; Actes 1894, pp. 15, 48, 118, 125 *et seq.*).

8. It cannot be denied that there are other subjects which are not included in the Convention, such as *puissance paternelle* and the interdiction of adults. It is a question of terminology and phrasing for the draftsmen of conventions. The laws on compulsory education, vocational training and health supervision, regulate other matters, but that does not mean that the guardian of an infant of foreign nationality does not retain the right to decide the residence of the infant and that he may not, by such decision, put an end to the application of such laws. And if these laws had to be complied with, the guardian would remain in personal contact with the infant to look after his welfare. Everything here depends on the circumstances of the case, and one must not generalize.

The distinguishing of the competence of administrative organs, to show the powers of local tribunals, is not decisive. The designation as an administrative or a judicial organ is often accidental or secondary. The Swedish Government has described the decision of its Supreme Administrative Court as a judicial one. In the Netherlands it is the Court which appoints the guardian and directs the supervision of the guardianship.

Also, the application of the Convention does not lead to negative conflicts of jurisdiction. Clearly, the measures of local supervision are not enforceable in other States, but the institution of guardianship, as a whole, as it is regulated by the national law, meets the needs. With regard to the Dutch institutions, I would refer to the provisions enumerated above, which include the measures to be taken by the courts, as well as the action of the Guardianship

Council, the Amsterdam Council being competent as regards every infant of Dutch nationality not residing in the Netherlands (compare Arts. 460 to 461d, B.W.). These provisions apply in the case of a Netherlands infant residing in Sweden or elsewhere. The guardian is responsible for the care of the infant's health and well-being and he can be removed or other measures can be applied should he fail to discharge his obligations. The local authorities must respect this application of the national law. Inversely, in the case of a Swedish infant who is in the Netherlands or elsewhere, the local authorities are obliged to respect the measures of guardianship ordered in Sweden. In the "juridical community" between the contracting States, which has been invoked as far back as the Acts of 1893, it is the rules of the national law which must be observed, in conformity with that reciprocity which is at the basis of the Convention.

I conclude that only Article 22 *(a)* of the Swedish Law of June 6th, 1924, is in issue and that the maintenance of the measures of protective upbringing is not in conformity with the obligations binding upon Sweden by virtue of the 1902 Convention.

(Signed) J. OFFERHAUS.