SEPARATE OPINION OF JUDGE WELLINGTON KOO

I am in agreement with the operative part of the Judgment of the Court, but I find more direct justification for it in Article 7 of the Convention of 1902 governing the guardianship of infants and I propose to develop the reasons for my opinion.

I

The Swedish measure of protective upbringing applied to Marie Elisabeth Boll by the Child Welfare Board of Norrköping is based upon Article 22 *(a)* of the Swedish Law of June 6th, 1924, as amended, for the protection of children and young people. Paragraph *(a)* provides that the Child Welfare Board will take measures concerning

> "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".

The application was ordered in respect of Marie Elisabeth Boll for the protection of her mental health as affirmed in the successive decisions of the Child Welfare Board, the Östergötland Provincial Government and the Supreme Administrative Court.

Article 7 of the Convention of 1902 authorizes the application of such protective measures by the local authorities. It reads:

> "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."

Although the laws for protection of children in several countries, including Sweden, have been enacted after the conclusion of the Convention on Guardianship in 1902, the general subject of child protection had been discussed in the national legislatures, as in the case of Sweden, before the third Hague Conference on private international law in 1900. It appears, therefore, reasonable to presume that the authors of Article 7 of the Convention were not unaware of this legislative interest in the subject of child protection as a function and responsibility of the State.

II

The question of the justifiability of the measure of protective upbringing applied to Marie Elisabeth Boll is the crux of the dispute

in the present case and comprises two aspects: its adoption and its maintenance. Are they both compatible with the obligations binding upon Sweden *vis-à-vis* the Netherlands by virtue of the Convention of 1902 governing the guardianship of infants?

Marie Elisabeth Boll was placed under protective upbringing on April 26th, 1954, by order of the President of the Norrköping Child Welfare Board, and this order was confirmed by the Board at its meeting on May 5th, 1954. It was stated in the "Extracts from the Minutes of the Meeting" placed before the Court that Marie Elisabeth Boll had been placed on April 26th, 1954, in the care of her teacher, Mrs. Birgit Berg, and that she would remain there pending an examination in a psychiatric clinic for children. In confirming the action taken by its President, the Board also resolved to make Marie Elisabeth Boll a ward of the Board pursuant to Article 22 *(a)* of the Swedish Law of June 6th, 1924, for the protection of children and young people. No reference was made to the Convention of 1902, and understandably so, because it was considered at the time as purely a case of a Swedish ward since the father had been registered as her guardian in accordance with Swedish law on guardianship on March 18th, 1954, by the Norrköping Court on his own application without mentioning his Dutch nationality.

There can be no doubt that the protective measure was adopted and confirmed as a case of urgency, for the President of the Board took the initial action by virtue of Article 31 of the said Swedish Law, which reads as follows:

> "If, in cases covered by Articles 22 or 29, the need for protective upbringing or for transfer to public care is thought to be so urgent that action cannot be postponed until the Infants' Bureau (that is, the Child Welfare Board) has taken a decision, the President will have the right, pending a decision by the Infants' Bureau, to take the person in question in charge."

Likewise, the Child Welfare Board, in confirming forthwith the decision of its President to place the minor under protective upbringing, also acted on the ground of urgency by virtue of Article 25, paragraph 3, of the said Law, as amended by the Law of May 31st, 1934, which provides:

> "If the Infants' Bureau considers that the execution of the decision concerning protective upbringing cannot be postponed without risk, it has the right to decree that the decision will be executed without delay." (Annex E to the Counter-Memorial.)

Even the plaintiff State in the case, in its Reply to the Counter-Memorial, appears to have acknowledged the element of urgency in regard to the initial adoption of the measure of protective upbringing, for it is therein stated on page 16:

"Soon after the decease of his wife Mr. Boll was accused, in Sweden, of having committed an infamous crime against his little daughter, then eight years old.

Now, as long as this accusation was pending, one can well understand and appreciate that the Swedish authorities felt extremely reluctant to abandon the child to a father-guardian whose possible depravity might seriously and permanently endanger its physical and mental health."

It is clear that the application of the protective measure to Marie Elisabeth Boll was based upon an urgent need. The fact that no reference was made to Article 7 of the Convention of 1902 is immaterial. The important point is that the measure in question was in fact ordered and applied on the ground of urgency, and as such it clearly falls within the meaning and scope of "measures required for the protection of the person of a foreign infant" provided for in the said Article 7. The initial application of the measure of protective upbringing to the infant was therefore clearly compatible with the Convention.

III

Is the maintenance of this protective measure justifiable in the face of the Convention of 1902, particularly in view of Articles 1 and 6 thereof?

It was contended by the plaintiff State that this measure should have been discontinued after the accusation against the father was dropped "by the end of 1954 or the beginning of 1955" and, in any case, after he had been released of his guardianship and replaced by Mrs. Postema, because Sweden is under the obligation to discontinue it in view of the Convention of 1902.

Now the initial application of the protective measure has been shown to be compatible with the Convention. Whether its maintenance is justifiable in view of the Convention obviously depends upon the question whether the original urgent need which had called for it still continues. If it still exists, clearly the measure cannot be terminated without prejudice to the health of the infant.

It may be said that Article 7 of the Convention is ancillary to Article 1 and Article 6, which are the predominant provisions of the instrument. But it is also to be noted that the language of Article 7 makes it clear that the effective operation of these two Articles may be retarded for a period of time in an exceptional case when the urgent need for protection of the person or interests of a foreign infant calls for action on the part of the local authorities for the purpose of such protection. The right of the national guardian to custody in the present case is not denied, but its exercise is only incidentally impeded. It is open to the guardian to make a

fresh application to the Swedish local authorities to end the protective measure, at which time presumably the need for continuing it will be reconsidered in the light of the prevailing facts and circumstances.

An examination of the text of Article 7 shows that it authorizes necessary protective measures to be taken by the local authorities for the benefit of the foreign infant in two kinds of circumstances: *(a)* pending the organization of the guardianship; and *(b)* "in all cases of urgency". Any measure taken under *(a)* must obviously be ended as soon as the guardianship is organized and known to be organized, thus indicating a time-limit, whereas in the case of a measure taken under *(b)*, there is no indication as to when it should be ended, except the tacit implication that it should be ended when the urgency which has called it into being comes to an end. If this interpretation is sound—and there is no valid reason to doubt this—the continuance of the measure may be justified even after a guardianship based on the national law of the infant has already come into existence. For, unlike the circumstance in *(a)*, the test here is the continuing need of an urgent character.

In this connection, the plaintiff State contended (Memorial, pp. 4-8) that Article 7 permits only special measures for the protection of the infant and "does not and cannot permit general measures virtually amounting to guardianship". As a general proposition this is correct. But it is to be observed that the Swedish measure of protective upbringing does not deal with guardianship, and it does not amount to a virtual guardianship. The Dutch guardianship of Johannes Boll, the father, and his subsequent replacement by Mrs. Postema in accordance with the decision of the Dordrecht Court, was clearly recognized by the judgments of the Court of First Instance of Norrköping, the Court of Appeal of Göta, and finally the Supreme Court of Sweden. To attempt to draw a distinction between special and general measures of protection and to declare that the former is permissible under Article 7 and the latter is not, does not clarify the issue in law. The reason is simple. Although the measure of protective upbringing applied to Marie Elisabeth Boll is part of a general law for the protection of children and young people, it is, nevertheless, one of several kinds of measures prescribed in the law and, as such, it can well be considered as a measure of special character chosen to meet the requirements of the particular case.

Moreover, the Swedish measure in question is aimed at the protection of the person of the infant. For this purpose the nature and degree of the protection must necessarily correspond to the requirements of each case. If it is a matter of protecting the health of the infant, as it is in the present case, appropriate measures must be taken, whether they may be described as general or special in character.

Finally there remains the argument advanced by the plaintiff State that the concept of urgency must not be confused with the concept of desirability, since a measure is urgent only as far as it is desirable and as far as it cannot suffer any delay. This is undoubtedly correct. The question to consider in the light of this definition, however, is whether the circumstances which called for the application of the measure of protective upbringing continue to exist and whether, in these circumstances, there still persists an element of urgency for the continuance of the measure.

On the face of things the protective measure applied to Marie Elisabeth Boll appears to have been maintained over an unusually long period. It is four and a half years since it was first ordered by the Child Welfare Board on May 4th, 1954, and more than two and a half years since it was again confirmed by a decree of the Supreme Administrative Court of February 21st, 1956. The important point to determine, however, is whether the need of protection for the infant continues to exist and whether the element of urgency in the need remains. These are questions of fact, and the limited information available to the Court gives no indication as to the present state of the minor's health or as to how or why a change from the existing régime would affect her mental well-being. What is known is the undisputed fact that all of the decisions of the Child Welfare Board, the resolutions of the Provincial Government, and the decrees of the Supreme Administrative Court, acting on application or appeal of the father-guardian, the legal guardian and the deputy-guardian for ending the measure of protective upbringing, alluded to the consideration of the health of the infant and stressed the need of protection from danger to her mental health, with one exception, i.e. the Resolution of the Provincial Government of October 28th, 1955, which was, however, overruled by the Supreme Administrative Court by a decree of February 21st, 1956. Thus the minutes of the Child Welfare Board Meeting of May 5th, 1954, mentioned an examination in a psychiatric clinic for children; the resolution of the Provincial Government of June 22nd, 1954, spoke of an opinion on Marie Elisabeth Boll, rendered by Dr. Eberhard Nyman, M.O. of the Lund Hospital Psychiatric Clinic, Infants' Division; the decree of the Supreme Administrative Court of October 5th, 1954, stated that "the removal of the child to a wholly strange environment would at present seriously endanger her mental health"; the minutes of the Child Welfare Board Meeting on June 3rd, 1955, indicated that the Board "resolved to obtain further expert medical advice before deciding whether the girl should be removed from her present home"; and finally the decree of the Supreme Administrative Court of February 21st, 1956, after reviewing the evidence produced before the Provincial Government and the Child Welfare Board, rescinded the resolution of the former and confirmed the decision of the latter to continue the protective

measure, because, "according to the evidence in the case, the child is still in need of wardship".

As to the present situation concerning the health of the infant, the point is left obscure by both Parties. However, it is unnecessary for the Court to appraise this situation. Since no charge of any abuse of power in applying and maintaining the measure of protective upbringing has been made against the Swedish authorities, nor has their good faith in so acting been impugned in any way, it is reasonable to presume, on the basis of the decisions of the Swedish authorities referred to above, that the protective measure relating to Marie Elisabeth Boll has been maintained because of the existence of a continuing necessity for the protection of her mental health, and that it will, on review or on application of her guardian, be ended as soon as this necessity ceases to exist.

IV

For the reasons stated, I am of opinion that the application of the Swedish measure of protective upbringing falls within Article 7 of the Convention of 1902 as a right of permissible exception, even though its exercise affects for the time being the exercise of the rights of guardianship provided for by Articles 1 and 6 of the Convention, and that, as of the present moment, the maintenance of the measure cannot be said to be in contravention of the Convention.

(Signed) WELLINGTON KOO.