The Case for Judicial Activism

The Rt. Hon Lord Justice Thorpe*

A. Globalisation of Family Disputes

Technical achievements in my lifetime, almost in my professional lifetime, have transformed the world. The wide-bodied jet, the cell-phone and the internet have in concert created a reality of the old ideal of one international community. The freedom to communicate worldwide itself contributes to the freedom to move across countries and continents. Conversely, as these technical developments have become available to such a substantial percentage of the world population a renewed surge of nationality has seen the disintegration of Empires and Unions with the consequence that the world is now divided into approximately two hundred autonomous states.

Thus the laws and courts of those autonomous states are no longer sufficient to meet the needs of the world population. International trade, international crime, international families all require laws and legal systems that extend beyond the two or more autonomous states from which the synthesis has developed. Legislatures are now as active in providing for international as well as domestic needs. International institutions provide conventions and frameworks in recognition of the rapid development of internationality. Judges have a separate responsibility to make their contribution.

Judges are prone to parochialism. The judge's education, training and experience is more likely to be national than international. He is steeped in the laws of his own land and may well be convinced of their superiority. He may have an equal faith in the beliefs and values of the society within which he works. It follows that most judges bring to their work their prejudices as an individual compounded by the prejudices of the society to which they belong. But every judge is not only an individual and a citizen of the state which has appointed him to exercise judicial authority, he/she is also a citizen of the world. That last citizenship imposes upon him the responsibility to uphold values which should be universal throughout the community of nations. It also obliges him to recognise and respect the laws and the values of other societies. This last obligation is how I understand the label 'comity '.

Judicial activism in combating the ills of international child abduction might be thought to be self evidently desirable. However, experience shows that in many

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European Journal of Law Reform, Vol. IX, no. 1, pp 1-16.

jurisdictions the concept is alien: in some it is actively opposed. Even in common law jurisdictions, where perhaps it can most readily root, there are academic purists ready to contend that it is unconstitutional for the judges to do more than determine, in accordance with the law, the cases listed before them.[1] The contrary, and plainly correct, position is ably argued by Mr Justice Baragwanath of the High Court of New Zealand in his publication *Who Now is my Neighbour*, reviewing the development of judicial activism in international disputes in civil, criminal and family law fields.

However, it would be wrong to assume that the slow development of international judicial collaboration to combat child abduction is to be understood in terms of ideological conflict. Much more commonly, the impediment to progressive development is to be found in culture, tradition, or the structure of the family justice system within the individual jurisdiction. Accordingly, I will give you a brief outline of the history of the development of judicial activism since 1990 both within my jurisdiction of England and Wales and within the community of jurisdictions which have adopted the Hague Convention as the instrument by which the wrongful removal or retention of children from their place of ordinary residence is controlled. There is an obvious unity between these two spheres. The United Kingdom did not implement the 1980 Hague Convention on the Civil Aspects of International Child Abduction by legislation until the 1985 Child Abduction and Custody Act commencing on 1 August 1986. Furthermore, the number of jurisdictions that had ratified or acceded to the Convention at that date was only five: Canada, France, Hungary, Portugal and Switzerland. Judicial familiarity with the Convention and its effective operation grew with experience, the pace of which accelerated with the growth of the size of the Hague community in the ensuing years. Twenty years on, seventy-five other states co-operate with us through the medium of the Convention. Take a classroom globe and colour the acceding states orange. The result illustrates the phenomenal success of the 1980 Convention. It also demonstrates the imperative need for judicial activism in an ever-expanding international judicial community.

B. The History of Judicial Activism

I. Anglo-German Developments

There is a discernable genesis to judicial activism in England and Wales with the formation of the President's International Family Law Committee, composed of judges, practitioners, academics and officials from the relevant Departments of State. The minutes of the first meeting of the Committee in October 1993 record its early aspirations as well as an inevitable sense of uncertainty as to its remit and future development.

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[1] *See* J. Young, *The Constitutional Limits of Judicial Activism: Judicial Conduct of International Relations and Child Abduction*, 66 Modern Law Review (MLR) 823 (2003).

At a relatively early stage the Committee concluded that regular London meetings, often addressed by distinguished guest speakers from the world of international family law, held little potential beyond our own education. Achievement and progress depended upon direct judicial contact. At that time our jurisdiction, in common with a number of other jurisdictions, was experiencing considerable difficulty in achieving the return of children wrongfully taken to, or retained in, Germany. That experience directed our focus to an Anglo-German Judicial Conference.

The proposal badly needed the support of the Department of State responsible for the administration of justice, then the Lord Chancellors Department (LCD). Plainly we would need their aid in the implementation of whatever might emerge from the conference. More immediately we needed finance: a residential conference in a suitable venue with simultaneous translation represented a major item of expenditure. The LCD was extremely guarded in its response. The proposal was unprecedented and government departments are extremely reluctant to create precedents that require financing, particularly from a budget prepared without any warning of such a call. The situation required creative thinking. The academic members of the President's Committee drew on existing links with family law academics in Frankfurt. An application for part funding to a generous charity succeeded. The demonstration of resilience was enough to persuade the LCD to endorse and underwrite the conference.

It was held at Dartington Hall in Devon in May 1997. Both jurisdictions contributed generously and openly to the debate. It became clear that it was not the law but the practice in our respective jurisdictions that accounted for the disparity between the UK's statistics for returns and the German statistics. Whilst in the UK applications invoking the Hague Convention are given the highest priority and elevated to the highest level of trial tribunal (namely the High Court judge in the Family Division in London), in Germany the cases were given no such priority with the consequence that they might be heard in a local domestic court by a judge with no experience or understanding of the Hague Convention. This practice was compounded by the readiness of the German judiciary to discuss the issues directly with the children at the heart of the case. This tradition inevitably risked leading the judge into a discretionary conclusion that reflected the expressed wishes of the children rather than an objective application of the Convention.

Apart from the experience of the German judges we had impressive contributions from academics and practitioners. The German Ministry of Justice was represented by Andrea Shultz, whose profound interest in this topic subsequently found expression in her continuing distinguished work for the Hague Permanent Bureau.

Shortly after this historic conference the German Legislature confined the jurisdiction in Hague abduction cases from the previous total of over three hundred courts to less than thirty superior courts of trial. There can be no doubt that our discussions at Dartington contributed to this beneficial reform. It is a measure of the generosity of our German colleagues that we were invited to return to

Wustrau in September 1998 for a further exchange. At this second conference the focus shifted away from child abduction to a broader spectrum of family law issues, each jurisdiction probing what could be learned from the other.

The third conference hosted in Edinburgh in September 2000 marked an important development from the bilateral to the multi-lateral model. England and Wales had expanded into the UK, with its three independent jurisdictions. We were also joined by the Republic of Ireland. The language had become the link. The conference was expanded to embrace any jurisdiction where either English or German was the language of the court.

This evolution saw Austria represented at the fourth conference in Trier in September 2002. Furthermore, Sweden attended as a guest of the German ministry, opening the possibility of further expansion to include jurisdictions ready to participate at conference in either language. An important development achieved at the conclusion of the Trier conference was an accord to elevate our ad hoc tradition of regular meetings into a standing conference with an executive committee charged with the responsibility to plan and develop family law judicial collaboration in the Anglo-German field.

This standing committee was responsible for the detailed development of the 2004 conference held in Cardiff in September. The Austrian Government formally accepted the invitation to join the standing conference and, for the first time, was represented by a full delegation. Switzerland also attended, with representatives from the judiciary and the Ministry of Justice. Invited judges also attended from four of the five Scandinavian jurisdictions.

The 2006 conference was hosted by the Irish Republic in Dublin in early September. The 2008 conference will be hosted by Austria in Vienna. The standing conference has developed into an institution to which the governments of the participating jurisdictions are completely committed. The strongly forged relationships that have developed are particularly valuable as the European Union proposes more and more legislation in the family law field. The processes by which EU Regulations are evolved puts a premium on negotiating positions agreed in advance amongst like minded Member States. We have natural alliance with the other common law states of Europe and a pattern of alliance amongst the northern states of Europe reduces what often seems to be our position of isolation within the European community.

II. Anglo-French Developments

Let me turn now to record the development of the Franco-British multi-lateral family law judicial exchange. Using the Anglo-German model, the President's Committee obtained Government support to initiate an exchange with our nearest neighbour. Dartington was again the chosen venue and the date June 2001. Madame Colcombet, a presiding judge of the Court of Appeal in Paris, was nominated to lead the French team. Whilst I had the responsibility to engage representatives from each of the jurisdictions in the UK and from the Irish Republic, Madame Colcombet sought representation from Switzerland, Belgium, Luxembourg and Monaco. A great deal of work resulted, both on the programme and on the

practical administration. All proceeded extremely harmoniously at a number of meetings which I attended in Paris with the Ministry of Justice and with Madame Colcombet. The success of the ensuing conference was in considerable measure due to Madame Colcombet's tireless efforts to match whatever steps we took on our side. France subsequently hosted the return conference in Beaulieu-sur-Mer in June 2005. There the judges of all jurisdictions present committed to a standing conference on the Anglophone Germanophone model. Our next conference in June 2007 will be hosted by Scotland in Edinburgh.

The Committee has also made overtures to our Scandinavian friends with the suggestion of a judicial conference between the English speaking courts and the courts of the Nordic League. I am doubtful whether it is feasible to develop three separate relationships simultaneously and ultimately I suspect that a more practical solution will be to engage the jurisdictions of the Nordic League in the Anglo-German standing conference.

I turn now from Europe to record initiatives which we have taken to build bridges with states from the Islamic legal tradition. Since almost all states with an Islamic legal framework are not parties to the Hague Convention the management of family problems arising from abduction or retention are handled by the Consular Division of the Foreign and Commonwealth Office (FCO). For some years James Watt, an Arabist, was head of the Consular Department. With his encouragement I attended meetings with the Ministers of Justice of the leading states within the United Arab Emirates. Discussion centred upon the possibility of bilateral agreements between governments and judicial exchanges. Nothing has yet come of these initiatives, partly because of a lack of confidence in the value of bilateral agreements and partly because the jurisdictions in question have yet to develop a judiciary that is not largely dependent upon imports from other Islamic states with better established legal traditions and institutions. More successful has been our approach to Pakistan and Egypt, as set out below.

III. Anglo-Pakistani Developments

In 2002 the President visited Islamabad and Lahore at the invitation of the Chief Justice of Pakistan and at the request of the FCO. The cordiality of her meetings with the Chief Justice resulted in two conferences in 2003 between the judges of the two jurisdictions. The first was in London in January, the second in Islamabad in September. From these two meetings practices were agreed that reflect the fundamental concepts underlying the Hague Convention. The agreements reached both in January and in September are both original and practical. The agreements are published in [2003] IFL 56, 172. They focus directly on jurisdiction and enforcement, they are infinitely more effective than wordy bilaterals negotiated between governments. However, too much optimism must not be invested in this precedent. The agreements were only possible given the principles applied in Pakistan's family courts and given the power of the judiciary in that country. First in Pakistan the family courts do not, in the main, apply strict shariah law: rather they apply an 1890 Ordinance dating back to the days of British Colonial Rule. Under the terms of the Ordinance the courts look to the best interests of the

child, naturally construed by reference to Islamic culture and tradition. Second under the current Constitution the Chief Justice holds an elevated status that enables him to bind the judges without parliamentary or presidential ratification. Although our President of the Family Division does not carry such authority she had the authority of the then Lord Chancellor to commit the judges of England and Wales to the accord which emerged.

However, after four years of operation it is apparent that the Pakistan Protocol now requires a statutory foundation. Its application in Azad Jammu Kashmir has been questioned. In March 2006 a judicial conference was convened in London to review the operation of the Protocol. The Chief Justice clearly expressed his desire to see the Protocol incorporated within the statutory code. The recent and ongoing case of Molly Campbell/Misbah Rana has resulted in media focus on the Protocol.

IV. Anglo-Egyptian Developments

A conference with the Egyptian judiciary was first discussed during the course of a visit which Chief Justice Fathy Naguib paid to London in May 2002. Following correspondence with the Ministry of Justice, I visited Cairo in January 2003 for discussions with the Deputy Minister of Justice and with the Chief Justice. Agreement in principle was reached that a family law judicial conference would be convened in either London or Cairo in due course. In the event the conference took place in London in January 2004. The outcome was expressed in the agreement published at [2004] IFL 2. It heralded the much more comprehensive accord, the Cairo Declaration, negotiated and drafted on our return visit to Egypt in January 2005. It is to be hoped that the Cairo Declaration will influence the course of future Egyptian legislation and equally that it will form the foundation for further collaboration between our judges. The appointment of myself as United Kingdom Liaison judge and Justice Omar Sherif as Liaison judge for Egypt provides the channel for continuing efforts. The Cairo Declaration, and the history of its development, has been celebrated in a book published in 2005 by the Constitutional Court in Cairo, demonstrating the importance that Egypt attaches to the achievement.

C. The Growth of Judicial Activism

I have recorded the history of the work of the President's Committee as a distinct and undiluted stream. But that is only for simplicity of narrative. In reality what we have achieved over the years since 1993 has been interwoven with the important work of the Permanent Bureau at The Hague in encouraging judicial activism. The 1980 Convention requires each participating state to set up a Central Authority with the responsibility to implement the Convention. The Convention itself places no requirements on participating states in relation to the training or the use of its judiciary. Accordingly in the first decade of the life of the Convention meetings of the Special Commissions convened by the Permanent Bureau brought together

only representatives of the Central Authorities. However, it is not hard to see that successful outcomes in individual cases depend not only upon the scheme of the Convention and the work of the Central Authorities in preparing the cases for trial, but also upon the calibre of the judges who bear the responsibility for decision making in individual cases. Ideally judges before whom such cases are listed should be specialist, experienced, independent and guaranteed the opportunity for continuing professional development in their particular speciality. All these ingredients are enhanced by bringing judges together to exchange their knowledge and experience and also to develop their trust and confidence in their professional colleagues in other jurisdictions.

D. The Work of the Permanent Bureau

This perception inspired the Permanent Bureau to invite representative judges from each of the fifty-seven jurisdictions then participating in the application of the 1980 Convention to a residential conference in de Ruwenberg in June 1998. Judges from some thirty jurisdictions attended this conference; this event was important at the time but even more so in retrospect. The enhancement of its importance is explained by four crucial developments from the conference.

First, I successfully proposed, with the support of the Chief Justices of the Family Courts of Australia and New Zealand, the creation of an international network of liaison judges, the subsequent development of which I will trace later in this article. Second, the conference led to the initiation of the Judges' Newsletter on International Child Protection, a topic to which I will also return. Third, the conference resulted in the expansion of the regular meetings of the Special Commissions to review the operation of the 1980 Convention to include judges as well as Central Authorities. Fourth, the conference provided both a precedent for, and experience of, multi-lateral judicial conferencing. With the advantage of hindsight it is plain that the example of de Ruwenberg has subsequently been followed, not only in a number of notable instances by the Permanent Bureau itself, but also by jurisdictions convening judicial conferences.

I. The Liaison Judge Network

Let me now expand on each of those four products of the de Ruwenberg conference. The growth of the global network of liaison judges has been slow. On the positive side, it is encouraging that at a number of judicial conferences (such as the European conference in June 2000 and the Washington Common Law conference in September 2000) in a variety of jurisdictions have unanimously endorsed the concept of the liaison judge network. The resolution reached by the four jurisdictions at the European conference (France, Germany, the Netherlands and Italy) provides a useful precedent:

> 5. The need for more effective methods of international judicial co-operation in respect of child protection is emphasised, as well as the necessity for direct communication between judges in different jurisdictions in certain cases. The idea

> of the appointment of liaison judges in the different jurisdictions, to act as channels of communication in international cases, is supported. Further exploration of the administrative and legal aspects of this concept should be carried out. The continued development of an international network of judges in the field of international child protection to promote personal contacts and the exchange of information is also supported.

The same general expression of support is mirrored in the resolutions passed at Special Commissions at The Hague in March 2001 and September/October 2002. Despite support for the principle, implementation by designating a judge or judges has been steady rather than spectacular. To-date the network includes formal and informal designations from some 20 jurisdictions: Argentina, Australia, Canada (civil and common law designations), China (Hong Kong Special Administrative Region), Cyprus, Denmark, Iceland, Malta, New Zealand, Sweden, United Kingdom (England and Wales, Northern Ireland and Scotland), the United States of America, Ireland, Norway, Italy, Greece, Austria and Germany.

I remain extremely confident that a truly global network will ultimately be achieved. This confidence is based partly on the obvious proposition that novelty is not automatically attractive to Ministries of Justice and in part to my observation that the use of liaison judges is expanding in other spheres. In the case of jurisdictions that do not operate the 1980 Convention, our experience with Pakistan demonstrates the great practical utility of the use of liaison judges. Since January 2003 I have acted as liaison judge for England and Wales and developed an excellent collaboration with my opposite number in Pakistan, first Justice Munir Sheikh and then, after his retirement, with Justice Mian Ajmal then, after his retirement, Justice Kokhar. Not only have we communicated (by letter, fax, email and telephone) on individual cases with extremely beneficial outcomes for the children of the families involved, but also we routinely report all orders made in either jurisdiction concerning children wrongfully abducted to or retained in either jurisdiction. This routine exchange will in due course permit a statistical analysis that will inform future decisions on judicial collaboration.

The second relevant development is the European Union's initiation of a European Judicial Network from December 2002. Although initially designed to promote judicial collaboration in civil and commercial litigation, with the advent of the family law regulation, commonly known as Brussels II, in March 2003, the European Commission has an obvious responsibility to develop an effective European Judicial Network for family cases, the more so since the arrival of the instrument of wider application, Brussels IIA, in March 2005. It is my hope that the encouragement to European Member States to appoint specialist family judges to strengthen the European Judicial Network will encourage the appointment of those same judges to the Hague Judicial Network.

Since March 2005 the European Member States have shown a real commitment to direct judicial communication and the designation of specialist liaison judges. Twenty-four Member States are bound by the Revised II Regulation, Denmark having opted out. 11 states have designated specialist liaison judges and three more are in the process of doing so. This is a very significant development since prior to the introduction of the regional instrument, the principal deficit in the

Hague network was the absence of any of the civil law jurisdictions. The EU Commission is currently seeking details of liaison judge designations to enable it to compile and then maintain a directory of family law specialist judges with responsibility for trans-national cases.

The third factor that encourages optimism is the Permanent Bureau's commitment to the development of judicial networks in other significant regions. The Monterey Conference involving the United States and many South American jurisdictions created an impetus in that very important region that is bearing fruit with the designation of liaison judges and their subsequent participation at the 5th Special Commission. The Permanent Bureau's latest, and for us most relevant, concentration is upon the Hague Project for International Co-operation and the Protection of Children in the Southern and Eastern African Region. This project is fully supported by the African Union and by UNICEF. In the development of the Project the Permanent Bureau convened a conference in September 2006 for judges and experts from Cameroon, Ethopia, Kenya, Lesotho, Malawi, Mauritius, the Netherlands, Nigeria, Rwandan, South Africa, Tanzania, Uganda, Zambia and Zimbabwe. The participants recorded important conclusions under the head of a recognised need to develop among African countries effective interstate structures focusing on the protection of children at risk across borders. The first agreed structure is judicial co-operation by:

1. Developing a judicial network on the African continent focusing on the international protection of children;
2. The training of judges in international child protection law;
3. Holding regular international and regional meetings for judges concerned with cross border child protection cases.

These are extremely significant conclusions and I only hope that the recommendations of specialist judges and experts will be duly noted and implemented by the authorities in their respective countries. Like the Malta Process, the African Project is ongoing and the Permanent Bureau intends to convene a major follow-up conference in 2007 either in Addis Ababa, Kenya or Cape Town. Both in its regional context and its potential to contribute to the expansion of global judicial collaboration, this is work of the highest importance and provides a continuing illustration of the expertise and commitment of the Hague Conference in the field of International Child Protection.

Before leaving the topic of the liaison judge I must acknowledge that appointments are manifestly easier for jurisdictions in which the function of the judiciary is separate from the function of the executive and in which the family justice system is both specialist and centralised. My jurisdiction of England and Wales is a prime example of the former: the High Court Bench has a specialist Family Division of eighteen judges doing little else but family work. Hague Convention applications are exclusively reserved to them. My appointment in 2005 as Head of International Family Law is an acknowledgement of the increasing importance of the work and the consequential need to identify a senior specialist judge to be responsible for present standards and future innovations. We face none of the practical difficulties that are inherent in a jurisdiction

operating a non-specialist and federal justice system, such as Germany or the United States of America. However, for the latter category, unofficial designation may produce precisely the same practical benefits. Judge Garbolino (Superior Court of California) has proved the point by his commitment to the development of the operation of the Convention and by his great assistance to judges from other jurisdictions in specific conflicted international cases. The same valuable contribution has been made by Judge Eberhard Carl in Germany.

I will not in this article consider in any depth the function of the liaison judge or the many concerns that were initially expressed as to the possibility of corruption of the judicial process resulting from liaison judge communication in specific cases. These issues have been fully debated at Special Commissions at The Hague and appropriate safeguards against abuse defined. The Special Commission in March 2001 specifically considered the issue of direct international judicial communication and the development of a network of liaison judges. It is worth recording in full the relevant recommendation adopted by the Commission after full debate:

> **Direct Judicial Communications**
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> 5.5 Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority.
>
> 5.6 Contracting States should actively encourage international judicial cooperation. This takes the form of attendance of judges at judicial conferences by exchanging ideas/communications with foreign judges or by explaining the possibilities of direct communication in specific cases.
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> In Contracting States in which direct judicial communications are practiced, the following are commonly accepted safeguards:
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> - Communications to be limited to logistical issues and the exchange of information;
> - Parties to be notified in advance of the nature of proposed communication;
> - Record to be kept of communications;
> - Confirmation of any agreement reached in writing;
> - Parties or their representatives to be present in certain cases, for example via conference call facilities.
>
> 5.7 The Permanent Bureau should continue to explore the practical mechanisms for facilitating direct international judicial communications.

In furtherance of the direction signalled in 5.7 the Permanent Bureau subsequently issued a questionnaire to Member States to ascertain where each stood on the issue of direct judicial communication and the appointment of liaison judges. An analysis of the sixteen responses led to an important preliminary report which suggests that there are no fundamental objections or legal barriers to the nomination of liaison judges and encourages the hope that this is a waxing rather than a waning enterprise.

At the 5th Special Commission so recently held in the Hague Philippe Lortie, First Secretary, presented as preliminary document No. 8 of 2006 the Report on Judicial Communications in relation to International Child Protection together with its appendices. This is a masterly review of recent developments and it is available on the Permanent Bureau's website. The subsequent debate at the Special Commission adopted the report and requested the Permanent Bureau to set up an expert group, primarily consisting of judges, in order to report on future developments in this important field.

II. The Judges' Newsletter

The considerable development of the Judges' Newsletter from its modest beginning is an achievement for which the Permanent Bureau is entitled to claim the major credit. Nonetheless I believe it is in significant part a product of judicial activism. It is written by judges for judges. Its international board of advisers is composed of judges representing the constituent parts of the Hague community. Its readability and its appeal are dependent upon judges giving time to reflection and to writing creatively on fresh aspects of the construction or implementation of the Convention. This is a conception of a judge's responsibility that would probably have been rejected by many of my predecessors in office.

III. The Special Commissions

The warm invitation to Member States to send judicial representatives to the Special Commissions at The Hague has met with a range of responses. I am in no doubt that the quality of debate and the breadth of resolutions achieved has been enhanced by judicial contribution. States that have been reluctant to respond positively to the invitation tend to be states where specialism is discouraged, where family work is not undertaken by the senior judiciary and where the career judge may fluctuate between periods of service as an official within the Ministry of Justice and periods of active judicial sitting.

I am pleased to report that the contribution of the international judiciary to the debate at the 5th Special Commission significantly exceeded the contribution made in 2001 and 2002. When I speak of the international judiciary I speak only of sitting judges (or judges known in the civil law jurisdictions as *Juges de Siege*) and not magistrates on secondment to work in the Ministry of Justice. During the course of the second week there were more than 30 sitting judges at the Special Commission representing 20 different jurisdictions.

However, 30 judges were a small component of a huge congregation. As well as the member states many other jurisdictions attended as observers. Then, round the perimeter, space was found for a diverse range of NGOs. The EU Commission were frequent interveners. Since nothing can be resolved without unanimity, the larger the congregation the slower and the more uncertain progress becomes. If those were not sufficient impediments, this Special Commission, unlike its predecessors, was dominated by a single member state, namely Switzerland. The

Swiss delegation was led by a distinguished academic specialising in private international law, Professor Andreas Bucher, from Geneva University. He had submitted a formal proposal which he relentlessly pursued to the detriment of the agenda set by the Permanent Bureau. Whilst due adherence to the Convention has become a major political issue in Switzerland, and accordingly all at the Commission were alive to the need to support Switzerland's continuing adherence, the interventions and argument were those of an academic theorist. It is unfortunate that there were no judges in the Swiss delegation to contribute the practical perspective. When the decisions of the Swiss courts are under public and political criticism, it is particularly important for the Swiss judges to be aided and supported by the international judicial community. That aid does not flow if judges are excluded from the delegation, almost as though they were the problem rather than a potential solution to the problem. There is unlikely to be a further Special Commission until 2010 and consideration needs to be given, in my opinion, to possible reforms and revisions to ensure that the Special Commission remains an effective working model for an ever expanding community of Member States. My own view is that separate Special Commissions would in future be more effective: one confined to all the administrative processes that precede and follow the judicial process and the other focusing on the judicial proceedings alone. In that event academic theorists would be valuable contributors at each separate Commission but at each Commission there would be a clear emphasis on the contribution either of those responsible for the administrative processes or those responsible for the judicial processes.

IV. Judicial Conferences

The history of multi-lateral judicial conferencing in the wake of the de Ruwenberg conference is rich. A number of these conferences have been either initiated or administered by the Permanent Bureau. Some have been driven by inter-jurisdictional child abduction cases that have risen onto the political agenda. In Europe problems between France and Germany have been high on the political agenda and have accordingly generated judicial conferences at which other jurisdictions also participated. Similarly problematic cases between the United States and Germany have risen to the highest political level and have engendered multi-lateral judicial conferences organised and administered by the Permanent Bureau in The Netherlands in 2001 and 2003.

V. The Islamic Nations

Perhaps the most obvious global fault line in family litigation is between the jurisdictions operating the 1980 Convention and Islamic states operating Sharia law. This problem has been addressed by both the European Union and the Permanent Bureau. The European Union convened the Rome Conference bringing together jurisdictions around the Mediterranean. In March 2004 Malta hosted and the Permanent Bureau organised and administered a conference to which seven

Arab jurisdictions and seven European jurisdictions were invited. Significant progress was made towards common understanding and common standards. The agreed resolutions are published at [2004] IFL 60. This gathering was of historic significance and a milestone in the Permanent Bureau's quest for the achievement of a global norm responsive to the wrongful removal or retention of children.

The 2004 Malta Conference has evolved into a continuing search for solutions, appropriately described by the Permanent Bureau as "The Malta Process". In March 2006 a further judicial conference was convened in Malta on a much more extensive basis. Twenty-four jurisdictions attended, twelve Islamic and twelve non-Islamic. Furthermore, the range was extended from Mediterranean and European jurisdictions to global proportions with the inclusion of Australia, Canada and the United States on the one hand and Malaysia and Indonesia on the other. A report of the conference is to be found at (2006) 1IFL 57. These two conferences have created the Malta Declaration which records many important areas of agreement. The Declaration carries the participants a long way towards the next stage, which must be the recognition that the habitual residence of the child determines jurisdiction and that resulting orders are to be reciprocally recognised and enforced.

The product of these conferences has been a series of drafted Resolutions and Declarations which have made an enduring contribution to international collaboration and the better understanding of best practice guidance for the application and enforcement of the Convention. What the history amply demonstrates is that judicial activism, expressing itself through the medium of multi-lateral judicial conferences, has made an important contribution to international collaboration in the fight against child abduction. Plainly, the Permanent Bureau acknowledges the benefits of judicial activism, as do a significant proportion of the States Parties to the 1980 Convention. I draw your attention to the Permanent Bureau's recent publication *The Guide to Good Practice*. In "Part II: Implementing Measures" paragraph 10.1.1 is headed "Judicial Education". This citation encapsulates the findings:

> International judicial conferences are to be encouraged as a means of improving knowledge and facilitating the developments of suitable networks. Such seminars provide an excellent opportunity for judges from different jurisdictions to reflect on and discuss current developments in international child protection. They also provide a unique opportunity to bridge some of the differences in legal cultures and to promote the mutual understanding and confidence between judges which is necessary for the effective operation of international instruments.

E. The Benefits of Judicial Activism

This review of the origins and development of judicial activism in the field of family justice could be simply said to establish a practice, whether good or bad, now too far developed to reverse. But the case for judicial activism does not rest upon uncertain benefits. The benefits are proven and unqualified. The benefits

have been achieved at comparatively trifling costs to Member States, thanks in no small measure to the judicial culture which does not gib at undertaking assignments over and above those that appointment to office demands.

I would also emphasise that judicial activism is equally, if not further, advanced in international insolvency. The International Insolvency Institute in Toronto has undertaken, in conjunction with the American Law Institute (ALI), to publish and circulate to judges and courts around the world guidelines applicable to court-to-court communications in cross-border cases. The guidelines were developed during the ALI's work on its Transnational Insolvency Project. That insolvency specialists are well ahead of family specialist is easily illustrated by the date of the ALI Guidelines, namely 16 May 2000. It is worth quoting the first paragraph of the introduction to the guidelines:

> One of the most essential elements of co-operation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganisation proceedings, it is even more essential that the supervising courts be able to co-ordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

Very little amendment would be required to render that paragraph of equal application to cross-border family proceedings.

The guidelines themselves are seventeen in number, very detailed and specific. According to a report which I have seen from the International Insolvency Institute they have been applied in a number of cross-border cases involving the Ontario Court with very satisfactory results. The same report records that the guidelines are in the process of being translated into ten different languages which should allow the guidelines to be used between courts in almost any international situation.

Of course language may be a practical barrier to direct judicial communication in cross-border family cases but the dual languages of the Convention in practice meet most challenges. Furthermore the use of email as a medium of communication enables the recipient to obtain a translation into his or her own language before responding. Where there is no common language each judge must use his own depending on the recipient to arrange translation.

What are the qualities required of a liaison judge? Ideally the individual will be a family justice specialist of considerable seniority within his own jurisdiction. He/she will have a particular interest in and experience of international family law. It goes without saying that he/she must have much experience of deciding contested applications under the 1980 Convention. What resources does he require to perform effectively? Good secretarial and administrative support is the primary requirement. Again it goes without saying that he must have effective fax, telephone and email facilities. He needs the support of his Chief Justice, who must recognise the importance of this international role. He needs the support of his government in making funds available to ensure his attendance at international conferences. He needs a government that will keep him informed of policy developments in the international family law field and that will listen to his advice in the formulation of such policy. All this is a statement of ideals. Minimal

requirements for effective operation will be less and will vary from jurisdiction to jurisdiction. However, it is important that his role and his availability are widely publicised within his own jurisdiction. He will achieve little unless specialist practitioners and fellow judges understand the function of the liaison judge and do not need to ask how to reach him when they require him.

What then are the demands on the liaison judge? They will obviously prove variable dependent upon the volume of family litigation in his jurisdiction (which in turn is likely to depend upon the size and composition of its population) as well as upon the particular characteristics of the justice system. If my experience be any guide the volume of specific case communication is likely to be small. At the trial level England and Wales manages approximately 200 Hague cases per annum. At the appellate level we manage approximately ten Hague cases per annum. This is a small volume of cases but they are cases of high significance. Even if a relatively significant percentage of the cases required direct international judicial communication it would remain an occasional demand. Needless to say, response to any demand must be urgent and authoritative.

Of course, the work of the liaison judge is not confined to Convention litigation. His responsibility extends to the entire field of international child protection and international family proceedings. Within our region the dominant international instrument is the European Regulation Brussels II revised. It explicitly demands a high level of judicial collaboration and direct communication, particularly in the operation of Articles 11 and 15. Equally there is an obvious need for judicial collaboration with the jurisdictions that are not parties to the Hague Convention. Cross border cases between the United Kingdom and Pakistan are very numerous and the Pakistan Protocol requires communication and collaboration between the liaison judges.

So, in my experience the main function of the liaison judge is general rather than case specific. He must be a point of reference for the Permanent Bureau. He must ensure that groundbreaking decisions in his jurisdiction on the limits or the application of the 1980 Convention are made available to the Permanent Bureau, even if there is a separate academic correspondent for International Child Abduction Database (INCADAT) within his jurisdiction. He must be ready to contribute to the Judges' Newsletter and to ensure that it is available to the specialist judges within his jurisdiction. He must respond positively to invitations from the Permanent Bureau for assistance with work in hand that requires a judicial contribution. Perhaps the single most vital responsibility of the liaison judge is to represent his jurisdiction either at Special Commissions convened at The Hague or at judicial conferences to which his jurisdiction has been invited. Ministries of Justice and Chief Justices increasingly recognise the importance of this responsibility and are prepared to release the liaison judge from sitting and fund his attendance. I hope that the example set by my Government and Chief Justice will persuade any others in doubt of the importance and value of the policy.

There is at present no global institute to parent and support a universal network of liaison family law judges. The nearest approach is the Hague standing conference with its membership of about eighty jurisdictions. The European

Union provides a regional group of twenty-five jurisdictions. Other groups are developing on the basis of a region or a common language: English, French or Spanish being obvious instances. But there is another fertile possibility. The fifty-three countries of the Commonwealth hold the obvious option, and I would argue a responsibility, to encourage direct judicial communication and collaboration in cross border child cases involving two or more Commonwealth jurisdictions. Of course, many are members of the Hague Conference but others are not. Participation in more than one network increases effectiveness at no additional cost. Perhaps we could plant a seed here in Cape Town that would thrive and spread to the benefit and relief of families torn by cross border child litigation.