

# The Hague's Online Child Abduction Materials: A Trap for the Unwary\*

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## I. Introduction

The Hague Conference on Private International Law maintains a website that provides practitioners with access to international child abduction materials, including foreign case law. Its goal is to provide “to courts and other authorities responsible for putting the [1980 Hague Child Abduction Convention<sup>1</sup>] into effect . . . ready access to reliable information about what is occurring in other States.”<sup>2</sup> Elsewhere the website provides links to documents that pertain to the work of the Conference, its committees and staff (the Permanent Bureau), and the intergovernmental meetings known as Special Commissions that the Conference convenes to draft conventions and to review their operation.<sup>3</sup>

This article deals with two important difficulties with the website and

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1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 11343 U.N.T.S. 89 [hereafter the Convention]. Any reference to an Article is to the Convention unless otherwise stated.

2. Fourth Special Commission into the Operation of the 1980 Hague Abduction Convention, Preliminary Document No. 7 of March 2001—The Hague Conference on Private International Law International Child Abduction Database (INCADAT) [hereafter Preliminary Document No. 7].

3. The chair of a 1993 Special Commission meeting, for example, welcomed participants by noting that the meeting was “concerned with monitoring and improving the operation of the Convention . . . .” *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction Held 18–21 January 1993* ¶ 7, <http://hcch.e-vision.nl/upload/abdrpt93e.pdf> [hereafter 1993 *Special Commission Report*].

its use that became evident in *Abbott v. Abbott*, No. 08-645, which is pending in the United States Supreme Court. Each threatens to hamper, rather than assist, the Supreme Court's deliberations, and each poses comparable dangers for litigants and judges in other Convention cases. We examine them here to increase sophistication—and caution—on the part of those who cite and read Hague website materials, and to underline the need for refinements to this resource.<sup>4</sup>

After setting forth the issue in *Abbott*, we begin with the first difficulty—a citation that suggested undeserved significance to a Special Commission document, then turn to inaccuracies in the website's materials on foreign cases that are relevant to the Supreme Court's review in *Abbott*.

*Abbott* is the first United States Supreme Court case to deal with the Child Abduction Convention. It addresses a narrow but important question—whether a child will be returned to its former habitual residence if the child was removed by a sole custodial parent in violation of a statutory travel restriction (*ne exeat* provision), and the person seeking the child's return holds visitation rights.<sup>5</sup> The issue arises because the Convention returns wrongfully removed children to custodial parents and to those who hold joint custody rights, but has a different rule for non-custodial parents. These parents are expected to address their custody and visitation claims to authorities at the child's new location.<sup>6</sup>

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4. Their description may assist the website revision that is currently underway and also the Conference's exploratory work on a more general project to provide access to the content of foreign law. See Projects Concerning the Children's Conventions, Maintenance, Adults and Cohabitation—Planning for 2010–2011, Preliminary Document No. 5 of February 2010 for the attention of the Council of April 2010 on General Affairs and Policy of the Conference 9 (2010), available at <http://www.hcch.net/upload/wop/genaff2010pd05e.pdf>. [hereafter Website Project]; *Report of the Council on General Affairs and Policy of the Conference of 31 March to 2 April 2009*, available at [http://www.hcch.net/upload/wop/genaff2009rpt\\_e.pdf](http://www.hcch.net/upload/wop/genaff2009rpt_e.pdf).

5. The Convention employs "rights of custody" and "rights of access," terms, that are defined in Article 5. Although Mr. Abbott had also asked the lower courts for a return order on the basis of a court-imposed travel restriction (a "stay-put" order), that claim was not pursued in his Supreme Court pleadings. This may have happened because to retain it would have highlighted the potentially pernicious effects of treating travel restrictions as custody rights under the Convention. A "stay-put" order requires that the person to whom it applies (in this case, the parties' son) remain in the jurisdiction. Although the order may be entered at the request of one parent to avoid an abduction by the other (as had been the case in *Abbott*, when the sole-custody mother feared the visiting father was about to remove the child from Chile), the order prevents anyone (including the mother) from removing the boy. In this case, the father initially claimed that the mother's removal violated that court order and that the child must therefore be returned to Chile. Had the claim been successful, however, it would have resulted in the boy's removal from his mother, the very harm the court had sought to avoid when the stay-put order was entered.

6. This is so even if the taking was wrongful under the law of the place that was the child's habitual residence immediately prior to the child's removal. Article 3*a*.

In *Abbott*, the British noncustodial father, who lives and works in Chile, claims that a Chilean statute required his consent or that of a court before the child's American mother, who had sole custody, could move to Texas with their son. The statute, he argues, confers custody rights on him for Convention purposes, and he is therefore entitled to the child's return, because she failed to secure consent. The lower federal courts in the case held to the contrary, and the Supreme Court granted certiorari.<sup>7</sup>

## **II. Citation to a Post-meeting Staff Report for a Proposition Beyond the Competence of the Experts Who Attended the Meeting**

A brief introduction to the practices that attend Special Commissions will clarify why a document cited in *Abbott* should not be read to establish a binding agreement among nations.

Special Commission meetings to discuss the practical operations of the Abduction Convention have been convened from time to time since the Convention entered into force.<sup>8</sup> In preparation, the Permanent Bureau prepares a questionnaire directed to States Parties, collects their responses,<sup>9</sup> and prepares a summary. It may also provide one or more background reports on matters that are likely to be addressed at the meeting.<sup>10</sup> In addition, States Parties may submit proposals for the Commission's attention.

A typical questionnaire is disseminated well in advance of the meeting and addresses the country's experience under the Convention, with topics ranging from administrative matters to decisions in Convention cases. Particular emphasis may be placed on issues of special concern. Responses to the questionnaire are then collected in a Preliminary Document that is given a number and date. Documents prepared by the Permanent Bureau or submitted before the meeting by States Parties are identified in the same fashion. All of these documents are posted online.

Materials that are, instead, first circulated during a Special Commission meeting—for example, delegation proposals and draft documents—are known as Working Documents. They, too, are numbered sequentially.<sup>11</sup>

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7. 495 F. Supp. 2d 635 (W.D. Tex. 2007); 542 F.3d 1081 (5th Cir. 2008); 129 S. Ct. 2859 (2009) (argued Jan. 12, 2010).

8. "From time to time, Special Commissions are held at The Hague to monitor the practical operation of Hague Conventions. . . . [as has occurred in respect to] the Child Abduction Convention . . . ." [http://hcch.e-vision.nl/index\\_en.php?act=text.display&tid=4](http://hcch.e-vision.nl/index_en.php?act=text.display&tid=4).

9. Responses to questionnaires from 2000, 2001, 2002, 2003, 2004 and 2006 are available at [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=33&cid=24](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=33&cid=24).

10. See, e.g., Preliminary Documents 4–10 for the fifth meeting of the Special Commission (Oct.–Nov. 2006), available at [http://www.hcch.net/index\\_en.php?act=progress.listing&cat=7](http://www.hcch.net/index_en.php?act=progress.listing&cat=7).

11. See, e.g., HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 3 ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION (Child Abduction) 262 (1980) (Working Document No. 5, an unsuccessful Canadian proposal to provide return orders upon the request of parents with

Unlike Preliminary Documents, however, their language is not included in subsequent reports of the Commission,<sup>12</sup> nor are they made available online.<sup>13</sup>

Following each of these post-promulgation Commission meetings, the staff prepares a report to summarize what took place. The 1993 Special Commission Report, for example, states that it was written by the Permanent Bureau and that its “synthesi[s of] discussions and conclusions” was not voted upon by the Commission.<sup>14</sup> It also reveals that the “Conclusions” include some that were added by the Bureau after the meeting.<sup>15</sup> This informality is possible because Special Commission meetings on operations are not diplomatic sessions at which international agreements are concluded.<sup>16</sup> This distinction is revealed by use of the term “expert” to refer to participants rather than “delegate,” the designation for those who represent their countries at diplomatic meetings.<sup>17</sup> The distinction is particularly apt for these post-promulgation meetings on adminis-

visitation orders) [hereafter ACTES ET DOCUMENTS].

12. Working Documents from diplomatic sessions are, in contrast, set forth in official reports. *See, e.g., Procès-verbaux et Documents de travail de la Première commission, ACTES ET DOCUMENTS* (Minutes and Working Documents of the First Commission), *supra* note 11, at 253, 256. These reports, again in contrast to those of Special Commissions, also include a summary of each speaker’s remarks, which are given in the original language, whether French or English (the official languages of the Hague Conference). *See Notice by the Permanent Bureau, id.*, at 252 (explaining this practice and the similar linguistic one for Working Documents, which also appear only in the original French or English, except for those provided by the Chairman, the Rapporteur, the Secretariat and the Drafting Committees, which are distributed in both languages).

13. *See, e.g.,* [http://www.hcch.net/index\\_en.php?act=progress.listing&cat=7](http://www.hcch.net/index_en.php?act=progress.listing&cat=7), where links to Preliminary Documents, but not Working Documents, related to the 2006 Special Commission meeting are available. *See Notice by the Permanent Bureau in ACTES ET DOCUMENTS, supra* note 11, at 159 (explaining this practice).

14. *See 1993 Special Commission Report, supra* note 3, at ¶ 9.

15. *See id., supra* note 3, at ¶¶ 6–10. Paragraph 10 of the report explains:

An effort was made [apparently by the Permanent Bureau] to crystallize the Special Commission’s “Conclusions on certain important points discussed by the Special Commission” (Commission Working Document No. 12 E and F). *There was no vote on this text* but the Permanent Bureau was authorized to edit the draft presented to the Special Commission during the last day of its discussions and *add, as might be necessary, conclusions* on the points reserved in the Working Document.

Emphasis added.

16. *See generally* More About HCCH (*Methods of Operation* ¶ 1), at [http://hcch.e-vision.nl/index\\_en.php?act=text.display&tid=4](http://hcch.e-vision.nl/index_en.php?act=text.display&tid=4) (discussing another kind of special commission, one that undertakes initial drafting of a document that will later be taken up in negotiations. The titles for these commissions do not include the words “on the operation of.”):

After preparatory research has been done by the secretariat, preliminary drafts of the Conventions are drawn up by the Special Commissions made up of governmental experts. The drafts are then discussed and adopted at a Plenary Session of the Hague Conference, which is a diplomatic conference.

17. Compare, for example, the exclusive use of “expert” in the 1993 *Special Commission Report, supra* note 3, *passim*, with the consistent use of “delegate” to refer to participants in the Hague Conference’s fourteenth diplomatic session, *ACTES ET DOCUMENTS, supra* note 11, at 257–397 & 409–11. *See also supra* note 16.

trative matters, which find their genesis in an innovative meeting that was held just before the Abduction Convention was drafted “for the purpose of bringing administrators together to discuss the operation of an existing treaty. It was seen that this type of meeting could have a very positive effect on cooperation among authorities in the carrying out of a Hague Convention. . . .”<sup>18</sup>

Indeed, those who attended the first such operational meeting for the Abduction Convention agreed that periodic meetings on the operation of the Convention would be particularly useful *as a means of improving the co-operation and effectiveness of Central Authorities* and would thereby help to ensure the appropriate operation and implementation of the Convention.<sup>19</sup>

In a footnote, the Permanent Bureau elaborated:

Information received during and after the October 1989 Special Commission meeting indicates that the opportunity for the personnel of Central Authorities designated under the Convention to meet each other in person and to engage in both formal and informal discussion of problems arising in practice has contributed to a greatly improved set of working relationships.<sup>20</sup>

The Central Authorities to which the Report refers are established under Article 6 of the Convention to carry out duties imposed by Articles 7 and 21, such as locating the child, exchanging information, and initiating or facilitating legal proceedings to secure a child’s return.<sup>21</sup> Depending on the staffing policies of their countries, they are not necessarily trained as lawyers.<sup>22</sup> As these sources make clear, the early Special

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18. Adair Dyer, *Report on international child abduction by one parent legal kidnapping*, ACTES ET DOCUMENTS, *supra* note 11, at 12, 16 (discussing the first such Special Commission, held to discuss the operation of the Convention of 15 November 1956 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters).

19. Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ¶ 62 (1989) (setting forth Conclusion VII) (emphasis added). The seven conclusions addressed administrative and educational matters; no case decisions were mentioned. The sole legal point concerned an expressed desire for access to government information and the ability to pass it to those who were searching for a child. *Id.* at *Conclusions on the Main Points Discussed by the Special Commission—adopted on 26 October 1989*.

20. *Id.* at n.5.

21. See generally Carol S. Bruch, *The Central Authority’s Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35 (1994).

22. Professor Bruch has attended every operational Special Commission meeting as an observer for the International Society of Family Law. See the final list of participants for each of the Special Commission meetings on the operation of the Abduction Convention, which were held in 1989, 1993, 1997, 2001 and 2006; Bruch also observed the Special Commission of 2002, which dealt with Guides to Best Practice and other specialized topics. She recalls discussions at the early Special Commission meetings on important, yet clearly practical, matters, such as which languages were spoken by the Authority’s staff, whether facsimile machines were left on and equipped with an ample paper supply outside normal business hours, whether it was possible to reach Central Authority or law enforcement personnel at those times to assist, for

Commission meetings were not convened to resolve legal matters and, in any event, were not diplomatic sessions at which delegates would have been empowered to negotiate on behalf of their governments.

Their nature has taken on importance in *Abbott*, because Mr. Abbott argues that at the 1993 Special Commission meeting, a consensus was reached that a French trial court decision controls the meaning of the Abduction Convention.<sup>23</sup> As the above discussion reveals, his argument misconstrues the nature of a Special Commission meeting of this character. The meeting is intended as a relatively informal venue to improve Convention operations and not as a negotiating or lawmaking session. The participants who attend are those responsible for Convention administration, who may not be the same as those who would attend a diplomatic meeting as delegates. As contrasted with a negotiating or lawmaking session, there is no formal decision-making mechanism. In this instance, moreover, the record does not even suggest that the Commission reached a controlling interpretive decision. The page in the Report that he cites in support of his argument provides only a cryptic staff summary of a discussion about a question in a premeeting questionnaire that had asked merely whether the country's courts had interpreted language in Article 3 concerning the holders of sole and joint custody rights.<sup>24</sup> Indeed, the Report's *Conclusions on Certain Important Points Discussed by the Special Commission*, set forth as Part II, does not even mention the issue, implying that the discussion summarized in Part III was merely that—a discussion—and not a significant agreement between nations.

Specifically, the Report, set forth in Part III, says only that “The discussion made it clear that . . . practical problems have arisen in several cases,” then mentions a “British Columbian case cited in the Checklist

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example, in intercepting abducted children who were on flights that would arrive after hours, and whether the Authority would begin work upon receipt of faxed papers if a Central Authority gave assurances that the original documents were en route. In later years, meetings also addressed legal issues, and the Permanent Bureau sometimes encouraged countries to include judges among their experts.

23. His reply brief, for example, reasons as follows:

Notably, the 1993 Special Commission report reflected the consensus among the delegates [sic] that a *ne exeat* right [i.e., a right based on a travel restriction] is a right of custody, as it noted that the French trial court decision on which Mrs. Abbott relies garnered no support.

Reply Brief for the Petitioner at 12 n.7, *Abbott v. Abbott*, No. 08-645 (U.S. Dec. 17, 2009), available at 2009 WL 4951312. Mr. Abbott makes the same argument in his opening brief, where he says that the 1993 report “confirmed the delegates’ [sic] understanding that a *ne exeat* right constitutes a right of custody.” Brief for the Petitioner at 31, *Abbott v. Abbott*, No. 08-645 (U.S. Sept. 15, 2009), available at 2009 WL 2978245. These references to “delegates” rather than “experts” are surprising, as Mr. Abbott’s counsel provided the Permanent Bureau’s staff support for the 1993 meeting. See Hans van Loon, *Preface*, in *THE GLOBALIZATION OF CHILD LAW* vii, vii (S. Dietrick & P. Vlaardingbroek eds., 1999).

24. The discussion refers to question five in the questionnaire.

involving the removal from California to British Columbia of a child of Aleut Indian descent.” It goes on to discuss whether a person who had been awarded custody “under the obligation not to remove the child from the territory of that State without consent of the court, constituted a specially-limited right of custody” as had been held by “the English court in the case cited in the Checklist.”

Under the reasoning of the English court, according to the Report, a custodial parent who violated the limitation could be held to have wrongfully breached “his or her own ‘rights of custody’” under Article 3. The Report then concludes, “No definitive viewpoint was reached on this point.”

Next, the Report summarizes what it calls a converse position that was advanced by a French court in another case that is cited in the Checklist. That court held that a custody order that also imposed a travel restriction “constituted only a ‘modality’ attached to the right of custody and not a situation of joint custody.” This reasoning, the Report says, “garnered no support.”<sup>25</sup> What is probably best seen as a caveat to this remark is set forth elsewhere in the Report—an expressed view “that joint custody rights had been abused in some cases.”<sup>26</sup>

As is perhaps painfully evident, the Report’s summaries are scarcely capable of being understood without citations for the cases and ready access to them and to the Checklist to which the Report refers. These citations were contained in Preliminary Document No. 1 of November 1992, which also included a detailed commentary by the Permanent Bureau. That document, a “Checklist of Issues to be Considered,” was fifty-one pages long. In addition, Preliminary Document No. 5 for the same meeting (“Lists Country-by-Country of Court Decisions on the [Abduction Convention]”) provided more complete citations for some of the cases mentioned in the Checklist.

Unfortunately, unlike Preliminary Documents for later Special Commission meetings, Preliminary Documents for the 1993 meeting,

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25. It refers to

[T]he view expressed by the *Tribunal de Grande Instance de Périgueux* in the case cited in the Checklist. This view had been rejected by the *Cour d’appel d’Aix-en-Provence*, as well as by courts in Austria, Australia, the United Kingdom and the United States of America.

1993 *Special Commission Report*, *supra* note 3, at unnumbered p. 11. Stated affirmatively, the Report implies that meeting participants thought that a parent who is protected by a travel restriction is *ipso facto* a parent with joint custody—not visitation—and is, therefore, entitled to a return order if the provision is violated. *But see supra* and *infra* notes 23–26 & *accompanying text*, questioning this conclusion.

26. The Report does not reveal how many countries’ experts expressed this opinion, but notes skepticism on the part of the Permanent Bureau, which it says “awaits supporting documentation on this point, since the reported cases do not seem to show such abuse.” It is possible, of course, that the staff’s subjective view of the cases differed from those (unidentified) experts who noted the problem. *See infra* text following n.29.

including these two important ones, are not made available at the Hague Conference's website. Further, the Checklist, as supplemented by topics proposed in Working Documents 1 through 3 from the Norwegian, French and Austrian Central Authorities, respectively, became the meeting's agenda. Those additional sources, as is customary for Working Documents, are also unavailable online, and typical users of the Hague website will have only the posted thirty-two-page summary Report, not the fifty-one-page Checklist, as supplemented to consult.

This means that the Supreme Court, unless it has obtained those documents from the Hague, cannot properly evaluate Mr. Abbott's claims, and any other court requiring information from these or similar unposted documents is placed in a comparably unsatisfactory position. Indeed, because the Convention mandates expedition in return proceedings,<sup>27</sup> in practice assertions of this sort will usually be beyond opposing counsel's and the court's abilities to evaluate.

Professor Bruch's copies of the Checklist and of the Country-by-Country case list, including her notes of the discussion, are available<sup>28</sup> and cast significant doubt on the position Mr. Abbott urges. Because it will illuminate the need for improved Hague materials, we now address the 1993 Special Commission Report.

The case involving the removal of a child of Aleut Indian descent is commented upon in the Checklist, which notes a 1990 decision by a trial court in British Columbia to return an infant to California and the Court of Appeal's grant of a stay pending appeal. The trial court had ordered the child returned to California, but almost a year before the Checklist was written and the Special Commission met, the British Columbia Court of Appeal reversed, reasoning that the tribe had no right to secure custody of the child under U.S. law, but rather only potential jurisdiction to determine its placement. The appellate court therefore held that only the parents had custody rights when they brought the child to British Columbia, and because there was no wrongful taking, the Abduction Convention did not apply.<sup>29</sup>

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27. See Article 11. If a decision is not reached within six weeks from commencement of proceedings, the Article also authorizes the person seeking return or the Central Authority of either country to request a statement of the reasons for delay.

28. They are among her collection of Convention materials, which now belongs to the Law Library of the University of California, Davis.

29. See *S. (S.M.) v. A. (J.P.)* [1992] 64 B.C.L.R.2d 344 (Can.) (trial court), [1991] 43 B.C.L.R.2d 155 (Can.) (stay pending appeal), [1992] 64 B.C.L.R.2d (Can.) (reversal). Unwed teenage parents had placed the child for adoption with a Canadian couple, but asserting rights under the U.S. Indian Child Welfare Act, an Alaskan indigenous tribe, to which the mother was related, objected and sought the child's return under the Abduction Convention. It then sought to intervene in a Canadian action for a declaratory judgment that was brought by a public official who asked whether her decision on a requested adoption must take the tribe's position into account.

Two troubling facts are revealed by the relevant Preliminary Documents: (1) an appellate reversal that had been entered in February 1992 did not appear in the Checklist produced in November 1992, and (2) the Country-by-Country list of cases, dated January 1993, revealed only that an appellate decision had been entered on the merits almost a year earlier, but not that it had reversed the lower court's decision.

It is possible, of course, that there was a lengthy delay in the transmission of case information to the Permanent Bureau in 1992—a problem that modern technology may already have remedied in the years since. More worrisome is the possibility that staff members (whether at Central Authorities or the Permanent Bureau) might overlook or underestimate the significance of decisions of interest to readers.

Some of the relevant documents in the British Columbian case made clear that an appeal had been pursued, noting the grant of a stay by the court of appeal, and the Country-by-Country list cited what it called an “appeal on the merits,” but the Special Commission Report referred to the case without mentioning that a reversal had taken place—a point that was also omitted in the Checklist. These omissions and the absence of the singularly important fact of reversal in the only document that revealed the entry of an appellate decision (the Country-by-Country list) are unfortunate errors for a secretariat that must secure and maintain the confidence of those who rely on its materials.<sup>30</sup>

The implications of this exercise reach beyond *Abbott*. Of course, the Permanent Bureau cannot anticipate every use litigants, courts, advocates, and law reformers may make of materials even decades later. It need not do so. Instead, with relatively minimal effort, it can now enhance the quality (and hence fairness) of future use by making every Preliminary and Working Document available online, including those from past Special Commission meetings. And the challenges of keeping case information up to date can be eased with reforms to the Hague's database of cases, as the following discussion explains.

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30. Professor Bruch's notes from the Commission meeting, which appear on her copy of the Checklist, reveal that the reversal was indeed mentioned, but not by whom—a member of the Permanent Bureau staff or, perhaps, an expert from Canada or the United States. In any event, the fact of reversal does not appear in any meeting document. Because it is unrealistic to expect readers around the world to cite check and track the history of every cited source, including those in languages they do not read or from legal systems in which they are not trained, it is important that Convention materials be as accurate as possible as of their publication dates. A similar failure to provide subsequent histories in INCADAT summaries is noted, *infra*, note 51 & accompanying text.

### III. Inadequacies of the INCADAT Database

We begin with information about the International Child Abduction Database (INCADAT) and its use, then turn to *Abbott*, where assertions that parallel inaccurate INCADAT materials, suggest the damage that inaccuracies in the Hague database can cause. To the extent that this happens, a resource that was designed to aid research into foreign legal sources,<sup>31</sup> falls short and—should poor judicial decisions result—becomes counterproductive.

The database is available free of charge at the Hague Conference website, <http://www.incadat.com>.<sup>32</sup> It provides access to summaries of significant decisions of national courts construing the Abduction Convention, which can be viewed in English, French, and Spanish. These summaries may include a Comments section. Generally, the section consists of a sentence identifying a legal issue that is dealt with in the decision, for example, *What Is a Right of Custody for Convention Purposes?*, followed by a list of citations to other decisions in the database that the Bureau believes are relevant to that issue. Citations to academic commentaries on the summarized decision may follow, as well as links to full-text versions of the decision (both official and unofficial), if they are available. Informal translations may, for example, have been prepared by counsel for their clients' use and made available to the Permanent Bureau.

Although INCADAT does not link to commercially published databases, it does include citations to legal journals such as *Zeitschrift für das gesamte Familienrecht* (FamRZ) and *Revue critique de droit international privé*. Links are also provided to materials on child abduction in non-Convention states and on inter-American child abduction issues. The database can be browsed by country or searched using various additional fields: case name, court, judge, date, legal basis, keyword or INCADAT record number.<sup>33</sup>

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31. The database was established in 1999 to facilitate the dissemination of decisions and to aid in the consistent interpretation of the Convention by the various jurisdictions. As a former member of the Permanent Bureau explained, "Availability of court decisions is a sine qua non for obtaining reasonable uniform global application of a treaty that has no supreme court to provide internationally binding interpretations of its provisions." Adair Dyer, *To Celebrate a Score of Years!*, 33 N.Y.U. J. INT'L L. & POL. 1, 1 (2000).

32. An alternate access route is available through the Conference's webpage at <http://www.hcch.net>. The site is also useful for other searches, for example, for documents and bibliographies. To reach INCADAT from this address, click "Welcome" on the initial screen. This will take you to the homepage, where—in the left column of the middle portion of the screen—there is a link labeled simply, INCADAT, which will take you to the initial INCADAT screen. By clicking on "Case Law Search" in the left navigation area of this screen, you will reach the INCADAT search screen.

33. It is, however, undergoing a major revision that is scheduled for release shortly. See Website Project, *supra* note 4.

According to a Guide for use by “Correspondents” who prepare INCADAT summaries of decisions, they follow a standard format set by the Permanent Bureau.<sup>34</sup> The INCADAT Guide was designed to introduce Correspondents to the database and to give guidance on how to select decisions and prepare summaries. It states that the Correspondents should be Central Authority officials, or individuals, academics or graduate students nominated by the local Central Authority, but does not detail the appointments process.<sup>35</sup>

A second important document for anyone who must evaluate the accuracy of INCADAT summaries is the report of a 2003 Correspondent’s meeting<sup>36</sup> and its two Annexes: Annex 1 discusses the linguistic and analytical aspects of the summaries and is framed in terms of the differences between common law and civil law jurisdictions,<sup>37</sup> while Annex 2 is a guide to preparing summaries that contains examples from the INCADAT database.<sup>38</sup>

These materials reveal that INCADAT is not a comprehensive database. The cases it includes are selected by the Correspondents, who are instructed to choose significant cases from their jurisdictions. Despite the importance of their task, their authorship is not identified in the summaries they prepare, and their names are not listed on the Hague’s website. These practices prevent users from evaluating their training, linguistic skills, education in comparative law, and legal experience—all relevant information.

According to the Guide,

[O]nce a body of case law from a particular State has been included on INCADAT our approach [i.e., that of the Permanent Bureau] is generally to concentrate on and add subsequent *appellate decisions* as quickly as possible. However, if new cases are merely repeating points that have previously been made by courts in the same jurisdiction they will not necessarily be added.<sup>39</sup>

The Permanent Bureau retains editorial control over the text of the summaries that are written by the Correspondents. However, due to the linguistic constraints of the Permanent Bureau’s INCADAT team, it acknowledges that its staff is unable to read each summary and compare the case descrip-

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34. Hague Conference on Private International Law, INCADAT Guide for Correspondents (2002) [hereafter INCADAT Guide], available at [http://www.hcch.net/upload/incadat\\_guide.pdf](http://www.hcch.net/upload/incadat_guide.pdf).

35. *See id.* at 5.

36. *See* Hague Conference on Private International Law, *The International Child Abduction Database (INCADAT) Correspondent Meeting: Report and Recommendations* (2003) [hereafter *Correspondent Report*], available at [http://hcch.e-vision.nl/upload/incadat\\_rpte.pdf](http://hcch.e-vision.nl/upload/incadat_rpte.pdf).

37. *Id.* at 10.

38. *Id.* at 14.

39. INCADAT Guide, *supra*, note 34, at 6 (emphasis added).

tion to its full text in the original language. Instead, it recognizes,

[I]t will be necessary to have an INCADAT Correspondent to rely upon in each country. While useful, it is not imperative that a translated version (into English or French) of the decision be sent with each summary when an experienced INCADAT Correspondent has constructed the summary.<sup>40</sup>

Although one can understand the financial and time constraints that dictated these arrangements, they spell danger to those from other legal traditions who have limited linguistic abilities and lack research skills in foreign legal systems—the very audience the database is intended to serve. A translation (albeit informal) should always be required, as it permits a reader to glean potentially useful information that the Correspondent did not consider worth reporting. Further, impartiality and skill on the part of an unknown Correspondent should not be assumed. The person may, for example, be a lawyer who actively litigates Convention cases and is, therefore, quite naturally inclined to read decisions (and write summaries) in a manner most helpful to current or anticipated clients.<sup>41</sup> For common law database users, relying on summaries of cases from another system that have not been reviewed by an independent authority with skill in the relevant legal system and language, who is also trained in the common law, is, in essence, a gamble. Similar concerns apply equally to those from civil law systems who are unfamiliar with English and research in the common law. Commentators have noted the difficulties in translating national legal language and concepts into terms understandable to a larger audience. As Professor Weiner puts it,

[P]arties to the Hague Convention recognize that national legal concepts can cause problems for non-nationals. Difficulties have arisen in individual cases because country-specific legal concepts are relevant to the Convention's application. A petitioner seeking to invoke the Convention's remedy of return must have "rights of custody" under the law of the [place that was the] child's habitual residence [at the time of the wrongful event]. The various national meanings of "rights of custody" have caused confusion and delay. In fact, the Fifth [Special Commission] Meeting mentioned in its very first conclusion that legal concepts are "mistranslated" and "misunderstood."<sup>42</sup>

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40. *Correspondent Report*, *supra* note 36, at 7.

41. In Professor Bruch's experience, the circle of foreign practitioners with Convention expertise who serve as observers for international nongovernmental groups is small, and it is likely that these lawyers will provide a pool of potential Correspondents. Just as is common domestically, they may also tend to represent those with ample financial resources—a demographic group that is more likely to include noncustodial parents who, for example, will benefit from decisions that can be read to blur the distinction between visitation rights and joint custody rights.

42. Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221,

In *Abbott*, the question Mr. Abbott presented to the Court was:

Whether a ne exeat clause (that is, a clause that prohibits one parent from removing a child from the country without the other parent's consent) confers a "right of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.<sup>43</sup>

In searching for decisions in the INCADAT database in support of Professor Bruch's research while she prepared an amicus curiae brief in the case,<sup>44</sup> we (Ms. Durkin and her staff) found that certain search techniques brought better returns than others.<sup>45</sup> Our work also identified areas in which improvements to INCADAT are needed if the database is to provide reliable information for counsel and courts in international child abduction cases.

For cases that were cited in the briefs of the parties, essentially known items, we usually had the case name, the "states" that were involved and a date. State (i.e., country) is used for the search choice "Search by State," where the search template allows one to search by Requesting State or Requested State. If searching for United States decisions, INCADAT provides a choice between "United States, Federal (USf)" and "United States, States (USs)." For Canadian decisions, however, the search is for the "state" (country) of Canada and not for individual provinces.

We had a particularly difficult time locating one Canadian decision cited in Mr. Abbott's brief that is contained in INCADAT.<sup>46</sup> The case was a decision of the Court of Appeal of British Columbia that was cited as *S.T. v. J.D.H./J.T.* [1997] 1997 BCAC 35 (Can.). We searched every variation on initials and failed to find the case by name. Relying on language in the petitioner's brief, "a court order provided that the children live with the mother, while the father had a ne exeat right,"<sup>47</sup> we next searched for "ne exeat" and again failed to find the case. We then ran searches in the Lexis and Westlaw Canadian case databases and finally came to the conclusion that the case of *Thorne v. Dryden*, 93 B.C.A.C. 35 (1997), was, in

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227–28. See also, Rose Kennedy, *Much Ado About Nothing: Problems in the Legal Translation Industry*, 14 TEMP. INT'L & COMP. L.J. 423 (2000).

43. Petitioner's Brief at i, *Abbott v. Abbott*, No. 08-645 (U. S. Supreme Court Sept. 15, 2009), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-645\\_Petitioner.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-645_Petitioner.pdf).

44. See Brief of Eleven Law Professors as Amici Curiae in Support of Respondent, *Abbott v. Abbott*, No. 08-645 (U.S. Nov. 24, 2009), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-645\\_RespondentAmCullLawProfs.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-645_RespondentAmCullLawProfs.pdf) (Professor Bruch was Counsel of Record) [hereafter Law Professors' Brief].

45. The reference librarians who assisted Ms. Durkin were Marissa Andrea, Susan Llano, Elizabeth McKechnie and Erin Murphy.

46. See Petitioner's Brief, *supra* note 43, at 40.

47. *Id.*

fact, the case we were looking for, although the term “ne exeat” appears neither in the decision nor in the INCADAT summary.<sup>48</sup> As this suggests, we ran into considerable difficulties in searching by “case name.” The extensive use of initials to preserve parties’ anonymity, and the inconsistencies in how those initials appear in sequence in different documents, often made searching by name difficult. We also usually found keyword searching to be inadequate, achieving only a small number of “hits.” Searching by legal issue also proved problematic at times, but for the opposite reason—too many decisions might result.

Usually, the most efficient search was by state (country) and then by date. Once we had narrowed the field in this fashion, we would check the facts as described in the briefs against the INCADAT summary to determine whether it was the decision we wanted. When searching by legal issues or keywords, we were more likely to use Lexis or Westlaw for common law jurisdictions. The search capabilities of the commercial databases are much more sophisticated for searches that combine conceptual and factual elements, such as “rights of custody” and “Aleut.”

For cases in foreign languages, if they were summarized in INCADAT, we would first check for a link to a full-text version or look for any references to “academic commentaries” in the Comments section and check those sources for citations to the decision. Another technique was to search the full-text legal journals that we have access to on Lexis and Westlaw, using the decision name as the search term, to see if any journal articles provided a citation to the decision. We were able to recognize cases even though there were typographical errors or misconceived translations of case names into English. These mistakes, however, would make the case name useless when searching for cases in the relevant foreign language database.<sup>49</sup> Although we do not have online access to many foreign language reporters or legal journals, we subscribe to many of the leading journals in paper. We also have subscriptions to certain foreign language reporters, such as that of the German Constitutional Court.

We have also made use of the Internet when searching for cases in foreign languages. Once we have located a citation, we will check to see whether the court that decided the case has a website at which it posts its

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48. This complication arises because the term “ne exeat” has become more popular than the term common to U.S. family law—travel restrictions. When the Convention was drafted, English language references were exclusively to “travel restrictions.” See, e.g., ACTES ET DOCUMENTS, *supra* note 11, *passim*.

49. See, for example, a non-INCADAT case that was cited in the Petitioner’s Brief at vii & 37 as Attorney for the Republic at Périgueux v. Mrs. S, T.G.I. Périgueux, Mar. 17, 1992, that was, in fact, Ministère Public v. Mme. Y, T.G.I. Périgueux, Mar. 17, 1992. Both parties’ names were translated into English, the location of the Ministère Public was added to the case name, the mother’s initial was changed from Y to S, and accents were removed.

decisions. If that fails, we look for academic websites that collect and offer access to a variety of jurisdictions, such as, the World Legal Information Institute (WorldLII), (<http://www.worldlii.org>), a joint initiative of six university-based Legal Information Institutes.<sup>50</sup>

At both extremes—as a starting point, and, if all else fails—Google and Bing searches can be done with the case name. It cannot hurt and may in fact lead to a more authoritative source.

Once a decision is located, U.S. lawyers are usually anxious to learn whether or not it is still “good” law. That is, they will ask whether the decision has been overruled by a subsequent appeal or decision, or if it has been affected by the later enactment of a statute. To secure the up-to-date information they need, lawyers in this country typically rely on commercial services such as Shepards and Keycite. INCADAT, in contrast, was a poor source for this purpose, as we found it difficult to determine the current status of cases, for example, when using the database’s summaries of United States decisions.<sup>51</sup>

Our search experiences prompt several suggestions for improvements to INCADAT that would significantly enhance its value for users. First, whenever more than one legal expression is used commonly for the same concept—for example, “ne exeat” and “travel restriction”—it would be helpful to include all the terms in the INCADAT summary; a simple “see also” reference would suffice. Next, many users who speak other languages and practice in other legal cultures may lack the skills and resources (such as library materials, commercial search engines and reference librarians) that are needed to find the full language of a common law decision and track its history. And U.S. counsel will face similar difficulties when confronted with a foreign language decision from a civil law source. It is, therefore, important that INCADAT summaries provide a case name and citation that will lead to the case in print reporters, commercial databases, and court websites, even if these become available only after the summary is posted. This information should be readily available to Correspondents, and their duties should expressly require that they promptly update their case summaries once citations become available or a decision is appealed or set aside, particularly if the decision is reversed or is overruled by statute. Finally, an INCADAT glossary of terms would

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50. The Australasian Legal Information Institute, British and Irish Legal Information Institute, Canadian Legal Information Institute, Hong Kong Legal Information Institute, Legal Information Institute (Cornell) and Pacific Islands Legal Information Institute. WorldLII also hosts databases from East Timor, Cambodia, Viet Nam, the Philippines, and South Africa.

51. If the subsequent history of a case will not be provided, it is essential that a caveat to this effect appear in the body of the summary. For a discussion of comparable problems with other Hague materials and the difficulties this practice poses for users, who are left to conduct research in foreign materials, *see supra* note 30 & accompanying text.

be useful for users, as would brief memoranda that Correspondents might provide on the court structure, proper legal citations, and means of locating subsequent history in each country for which INCADAT contains case summaries. Citations to online materials and a bibliography of helpful print materials in the country's language(s) and in translation should be included if they exist.

Distinct from these search difficulties are problems that are posed by boilerplate Comments such as the one INCADAT apparently includes in every summary involving a travel restriction, whether or not a right to return depends on the clause: *What Is a Right of Custody for Convention Purposes?*. So, for example, a child's return may be ordered in a joint custody case that contains a travel restriction. Here, because Article 3 expressly provides the same relief for a holder of joint custody that it does for a person with sole custody, the travel restriction is irrelevant. Return would be ordered even without the travel restriction. Yet many cases of this sort are improperly listed to support the Comment's overly enthusiastic claim that "Courts in an overwhelming majority of Member States have accepted that a right of veto over the removal of the child from the jurisdiction amounts to a right of custody for Convention purposes . . ."<sup>52</sup>

Close reading reveals that this proposition is both inaccurate and carelessly argued. An "overwhelming majority" of the Convention's 82 Contracting States<sup>53</sup> would require conforming decisions in well over 40 nations, something the Comment surely does not mean to suggest. Yet not even a list of the intended countries is provided. And there is an odd choice of words ("Member States"—a phrase that ordinarily refers to members of the Hague Conference and is, therefore, inapt here). Both errors suggest that the Comment may have been written by someone outside the Permanent Bureau.<sup>54</sup>

Also troubling is the Comment's carefully worded assertion, which actually states only that one or more courts in each of the tallied countries agree with its proposition, not that it is the prevailing or controlling view in each. Indeed, it is clear, for example, that French courts disagree,

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52. See, e.g., the two German decisions that the Comment, *What Is a Right of Custody for Convention Purposes?*, lists. Both required joint decision-making for important questions, i.e., were joint legal custody cases. See BVerfG, NJW 1997, 3301 (2BvR 1126/97); OLG Dresden FamRZ 2002, 1136, which are discussed in the Law Professors' Brief, *supra* note 44, at 23–24. See also *infra* note 57 & accompanying text.

53. See the Convention's Status Table, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24).

54. They are errors that a Permanent Bureau staffmember seems unlikely to have made. Indeed, as the text reveals, the Comment's quality is poor throughout. But whoever wrote the Comment, the fact that its content is deficient brings into question the quality of the Bureau's reserved editorial supervision. See *supra* notes 38–39 & accompanying text.

although that fact is not revealed in the Comment.<sup>55</sup> Further, the list mischaracterizes the holdings of the U.S. Circuit Courts of Appeal.<sup>56</sup> Finally, the list and many case summaries leave much to be desired from the standpoint of common law reasoning, which pays close attention to the difference between holdings and dicta.<sup>57</sup>

It is, moreover, seriously misleading to imply, as the Comment does, that there is a need to catalogue and study decisions to learn whether joint custody constitutes a right of custody for Convention purposes. No such doubt exists, as the Convention makes clear and it is surprising that the INCADAT Comment would be inconsistent with the Convention on the point. In contrast, an important question does exist as to whether the breach of a travel restriction in a sole custody case confers a custody right for Convention purposes on a noncustodial parent. This is *Abbott*, and many INCADAT users would want to know which courts had accepted Mr. Abbott's reasoning and which courts had refused it. It is truly unfortunate that they might be misled rather than enlightened by the website's materials.

#### IV. Conclusion

Providing "ready access to reliable information about what is occurring in other States" remains an important goal of the Hague Conference. Yet, as this discussion reveals, it is an elusive one. Cryptic meeting reports that were intended simply to assist participants' memories are subject to misunderstanding when they are made available to the public on the Conference's website, absent Working Documents or Preliminary

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55. See the discussion in the Law Professors' Brief, *supra* note 44, at 23.

56. The Comment states that courts "have accepted that a right of veto over the removal of the child from the jurisdiction amounts to a right of custody for Convention purposes" and directs the reader to see the cases that follow. Rather than provide a simple statement that the U.S. Circuit Courts of Appeal decisions are to the contrary, the list is preceded by an assertion that their decisions are divided on the "appropriate interpretation to give." The supposed division of opinion is supported by a citation to *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), a case in which the father had joint parental responsibility in addition to the benefit of a travel restriction. In other words, he held joint legal custody, which gave him on that basis alone a custody right under Article 3. This is but another inappropriate citation in the Comment. One wonders whether the supposed split in the circuits that has been presented to many courts since may trace to this inaccurate INCADAT Comment, which seems to appear in every summary of a case containing a travel restriction.

57. So, for example, several INCADAT cases were analyzed or listed as though they involved decisions that recognized travel restrictions as conferring custody rights, although there was an independent legal ground (the applicant's joint or sole custody) that would have required return. In two cases from Israel, for example (only one of which appears in INCADAT), the High Court said it was ordering children returned because of travel restrictions, but each father also held joint custody rights that, as such, required the children's return. Supposed reliance on the travel orders was, therefore, superfluous. See Law Professors' Brief, *supra* note 44, at 24–25; see also *supra* note 52 & accompanying text (where the same flaw is noted in the analysis of German decisions).

Documents. Fortunately, this problem is easily resolvable, because missing materials as to past meetings can be uploaded and posting customs for future meetings can be revised. Understanding could be further enhanced by the addition of a glossary of terms to the Conference website and greater detail about Conference operations and documents.

The identified difficulties for INCADAT users can be alleviated in several ways. The easiest have to do with ensuring that full decisions can be located in their original language and that subsequent events, such as appellate decisions and statutory revisions, are included in the website's summaries. These tasks—providing accurate citations and updating postings—should be accomplished without difficulty by the Correspondents who wrote the summaries. Next, full decisions should be provided in French or English to permit review by the Permanent Bureau and INCADAT readers. And those who produce materials or make decisions about what cases will be included and how they will be portrayed should be identified. Further, proposed Comments of general significance, such as the one on travel restrictions, should be vetted to ensure accuracy and objectivity.<sup>59</sup>

Finally, a more active role by the secretariat in ensuring the quality of INCADAT content is needed. Although this will undoubtedly require greater resources, it is the only way the Conference can prevent serious errors and reduce the incidence of potentially prejudicial lacunae, for example, as to subsequent history. Above all, summaries and Comments that are accurate and impartial, both at the date of posting and thereafter, are the sine qua non of “reliable information about what is occurring in other States.”<sup>60</sup>

58. See Preliminary Document No. 7, *supra* note 2.

59. Similarly, staff decisions to advance specific interpretations of the Convention should be vetted. Otherwise, as had happened with travel restrictions, the staff may promote a poorly reasoned early opinion, seeking uniform decisions, for example, through INCADAT comments, judicial education courses, or even amicus briefs that States Parties have not authorized. See, e.g., the English Court of Appeal decision in *C v. C (Minors: Abduction Rights of Custody Abroad)* [1989] 1 W.L.R. 51; Brief of the Permanent Bureau of the Hague Conference on Private International Law as Amicus Curiae in Support of the Petitioner, *Abbott v. Abbott*, No. 08-645 (U.S. Sept. 22, 2009), available at <http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-645PetitionerAmCuHagueConference.pdf>. The English Court of Appeal decision was later received with consternation by a court in the country whose travel restriction *C v. C* had interpreted (Australia). See [http://www.incadat.com/ref:HC/E.AU257\[22/05/1991](http://www.incadat.com/ref:HC/E.AU257[22/05/1991); Full Court of the Family Court of Australia (Perth); Appellate Court] *In the Marriage of R. v. R.*, 22 May 1991 (Fogarty, J.) (“For my own part I must say that when I first read [*C v. C*] I thought it amounted to something of a quantum leap from what had hitherto been the understood interpretation of [‘rights of custody’].”). Yet, by the time the *R. v. R.* court had an occasion to decide on the same issue, sufficient case law following *C v. C* had intervened to persuade the court to decide in favor of uniformity, rather than legal accuracy, in the uncontested appeal before it. It nevertheless expressly reserved the question for further consideration should it later arise in a contested appeal. See *id.*

60. See Preliminary Document No. 7, *supra* note 2. As the Conference considers expanding its role in providing access to foreign legal materials, these observations may also assist its assessment of possibilities, constraints, and costs. See *supra* note 4.