

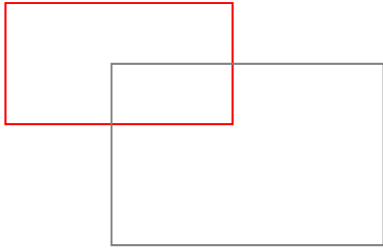
***CamMiNo – Camera Nazionale Avvocati per la Famiglia e per i Minorenni  
(National Chamber Attorneys for Family and Juvenile Law)***

## **International Abduction of Minors Reference Standards and Practical Aspects**

Meeting 11/02/2015

Interests of Minors and Judicial Protection

**Att. Patrizia Giannini**



# International Abduction of Minors

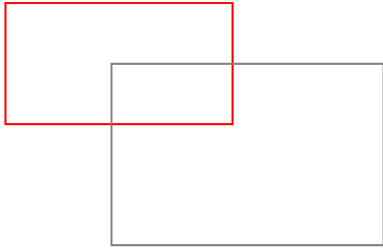
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When are we faced with IA of a minor?

A.the child has been **taken abroad unlawfully** by the guardian parent who does not have exclusive authority, **taking the minor away from his place of habitual residence.**

B.the minor **is not returned to** his country of **habitual residence** by the non-guardian parent who does not have exclusive authority, in breach of custodial or visitation rights.

The abduction and detention abroad of a minor constitutes offenses under art. 574 bis C.P.



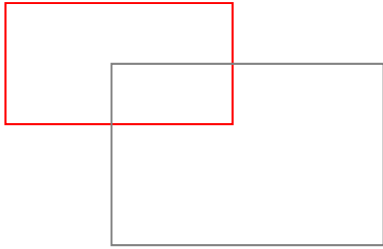
## **International and European Law**

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**Convention on the Civil Aspects of International Child Abduction (The Hague October 25, 1980).** Provides an opportunity for the parent who has suffered the abduction to file for return of the child (e.g. when one parent abducts or wrongfully restrains the child in another country) or to restore the exercise of visitation rights. Objective is the protection of the child against the uprooting caused by a removal or retention without returning him to the country of habitual residence.

**Convention on the recognition of decisions concerning custody of children and re-establishing custody (Luxembourg May 20, 1980).** Objective is the protection of the child through the recognition of decisions concerning custody also in the country to which the child has been taken.

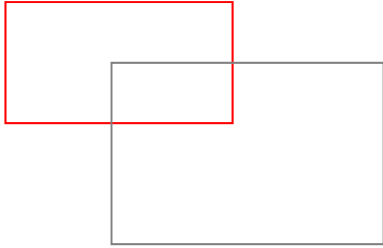
**United Nations Convention on the rights of the adopted child, New York, 20 November 1989.** The Convention represents the most comprehensive protection and promotion of children's rights. Relationship with both parents



**European Convention of Strasbourg, 25 January 1996, on the exercise of the rights of the child.** Aims to promote broad participation of the child in family proceedings that concern him, recognizing his right to always be heard, to be represented in court by his own representative and to take on, in some cases, the role of a party in proceedings that affect his person.

Additionally:

**Regulation Brussels II BIS - EC n. 2201/2003, 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.** The Regulation establishes, in the field of child abduction, the enforceability of decisions issued by the courts of the country of habitual residence of the child. Also, it does not provide for any declaration of enforceability of decisions by Authorities of a Member State, on the rights of the child. The Brussels IIa Regulation, unlike the Brussels II Regulation, applies to all decisions concerning parental responsibility regardless of the legitimacy status of minors and the connection of the orders with the annulment, divorce and separation in order to ensure equal treatment of all minors.



# Central Authority

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CA= The body that must implement the goals of the Conv  
Administrative Authority

Has NO decision-making power

Has power:

- to initiate,

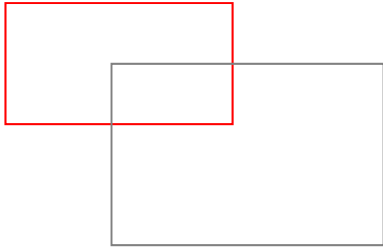
- to direct and

- information exchange

with different powers in the case of IA

- Active: from ITA v. foreign

- Passive: from foreign v. ITA



# Central Authority

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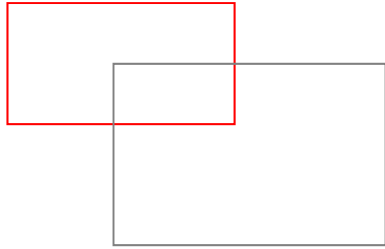
**Active IA:** CA accepts the demand for repatriation by the instant party (parent who has suffered the abduction or applicant parent) and all the necessary info provided by Hague Conv. Article 8 and forwards the application to the corresponding Court of the foreign CA where the child was taken, to allow the AG of that state to decide on repatriation.

**Passive IA:** CA receives the request for repatriation from the corresponding CA of the foreign country from which the child was abducted, gathers information, locates the child and forwards the application to the Prosecutor of the Republic at the Juvenile Court to make the application for the return of the child.

**CA ITA has no power of legal representation** of the instant party, political choice of ITA law (different in England which has power of repr. party), the CA has several tools, relies on Min Soc Serv, Public Admin Org's, State Police etc.

**CA Cooperates with other CAs** to achieve the purpose of the convention.

**The ACs come together** to find new practices, develop new procedures, to create a common language to accelerate the procedures for repatriation that for the Hague should last six weeks of that fact (e.g. the East, South America) lasting even years to the detriment of the minor.



# 1980 Hague Conv.

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Only for contracting countries (EU and non)

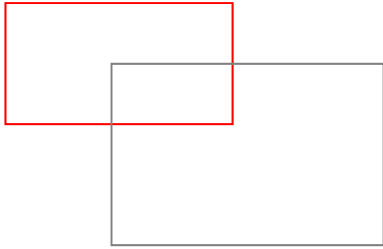
Ratified with Law 64/94

Attn.: Islamic and Asiatic Countries

(Japan ratified Apr 2014)

The protection is limited to diplomatic activity.

The procedure under Hague Conv is a mixed nature, as an admin. proc. between CAs but then passes to the CT for dec., repatriation and its enforceability.



Purpose of the Hague Convention

**To ensure the immediate return of the child removed or retained and to ensure that the rights of custody and visitation under a Contracting State are respected in all countries.**

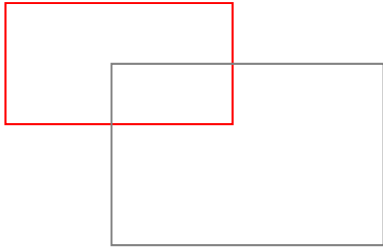
Pursuant to the Hague Conv.

Custody rights: the right of parents to decide on the place of habitual residence of the child.

Visitation rights: includes the right of the parent to decide on the place of residence of the child different from the usual, for a limited time.

The parent who suffered the abduction (applicant parent) may apply to the CA or to the CT of the place where the child has been taken.



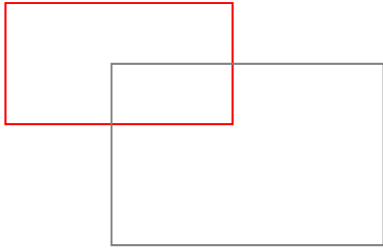


# Hague Conv. Req'mnts

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To apply the Hague Convention, you must meet the following 8 requirements:

1. Violated custodial rights must come from the law or from a CT or agreement approved by the Court following the separation;
2. Custodial rts. must be effectively exercised by the parent who suffered the abduction;
3. The minor must not be older than 16 yrs (the Reg Brux II bis applies to all minors)
4. The parent who complains of abduction must not have given consent for the minor's removal;
5. It cannot be more than 1 yr since the abduction;
6. No moral or material damage to the minor should occur as a result of his repatriation;
7. The minor cannot be opposed to the repatriation;
8. Repatriation must not violate the Fundamental Principles of Human Rts Article 8 (ref Campanella Judgment ECtHR 12/07/2011)



Procedure in case of passive IA:

Minor abroad in ITA, parent who suffered abduction brings the matter before the CA;  
CA ITA receives request for repatriation by foreign CA, locates the child and provides for the mediation attempt with abducting parent;

international mediation is important, even if there is a repatriation provision;

CA sends the acts to the juvenile prosecutor (JP) where the minor is located;

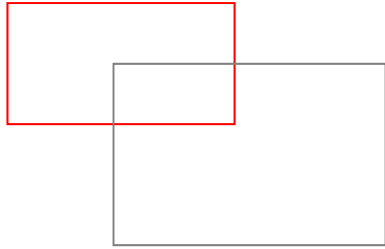
The JP shall ask for recourse with the fixing of a hearing at the Urgent Chamber of the Juv. Ct. where the minor is found and the Ct fixes the hearing by decree;

Time from the appeal to the hearing *should* run no more than 6 weeks;

Pro.: urgent, audience in chambers, possessory type, the Juv. Ct. should decide on the *status of fact*, and issue a decree of repatriation ONLY to be appealed to the Supreme Court;

The appeal to the S. Ct. does not suspend the enforcement of the decree;

(a year can pass for the hearing! Chk important Ordinance Ct. of Florence suspends the 'ex. of dec. repatriation);



# Hague Conv. Critical Issues

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THREE critical points of the Hague Convention

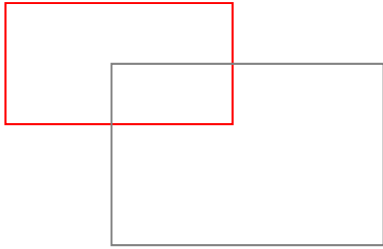
1. Habitual Residence: concept *of fact* and not juridical, which must emerge from the trial papers and elements of the preliminary investigation to be carried out in the conventional procedure.

For application of the Hague Conv. and the reg Brux II bis the concept of citizenship **is not relevant**, but only the habitual residence.

Cass. 3798/2008: *the place where the child, in consideration of a durable and stable residence, also in fact, is the center of his emotional ties, not only parental, arising from the daily life of relationship.*

Difficult to determine with minors of tender years

Cass. 16864/11 1984/12 1527/13



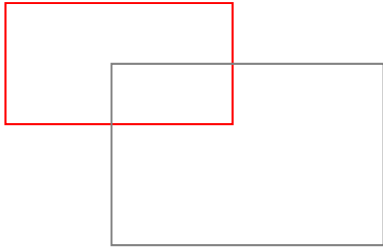
2. Minor's rt to be heard: in ITA law 64/94 the minor must be heard *where necessary*; instead, the conv. - first and foremost the NY Conv Rts of the Child, Strasbourg, our Supreme Court – to be heard as ESSENTIAL PROCEDURAL ACT in all proc. concerning minor and IA.

The minor MUST be willing to be heard, if not prejudicial to minor or for psycho-physical reasons, such as age or because it would be contrary to his interests.

Cardinal principle of Brux II bis art 11

On the one hand there is an obligation to listen but on the other the CT retains discretion as to the results of the hearing.

When CT goes against *the wishes* of the child, it must justify very promptly.



### 3. Art. 13 of the Hague Conv.

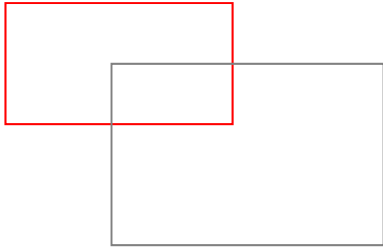
Letter A: despite the presence of IA, the CT must deny the order of repatriation because the parent who suffered the abduction did not actually exercise his custodial rts. Probs with shared custody: law is unambiguous: with shared custody, even if parent is non-resident, he can apply for repatriation.

Letter B: also in case of IA, the CT should not accept the request of repatriation when for the minor there is a well-founded risk of being exposed to physical or psychological harm or being placed in an intolerable situation.

In many cases, foreign CTs found themselves judging parent's capability in order to decide whether to repatriate; in a streamlined conventional process, complex psych. exams are imposed with parents found in another state.

Certainly not a streamlined procedure! Abuse of the standard 13/B

Att.ne: Art 13 Letter B has been weakened by Art.11 Brux II bis



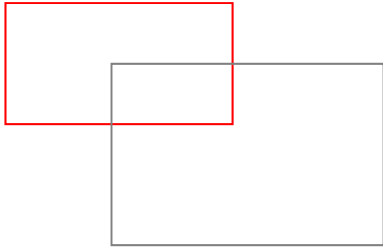
## Hague Conv. art 16

Facing a request for repatriation, the CT of the place where the minor was brought must suspend any assessment on the merits of custody.

What happens?

Ex. in a case of active abduction: the minor is abducted to a foreign country (if European we have Brux IIa, but e.g. S. America the situation is complicated); parent who started the abduction starts a procedure in his country to determine custody reg. of the minor; if the CT should issue a order which then entrusts the child to the parent starting abduction would complicate the situation,

which is why Article 16 provides that the CA receiving the application of the parent who has suffered the abduction urge the CA of the foreign state to require the CT to whom the case is eventually referred not to decide on the merits of custody until the proc. concerning Conv. have been concluded.



Art 29 Hague Conv: cases in which the parent who suffered the IA, who directly, not through the CA, asks the CT to submit the application for repatriation.

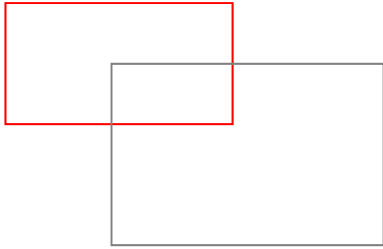
The Hague Conv legitimizes the CT in the place where the minor was taken to decide on the question of repatriation.

The reg Brux II bis has introduced a revolution in the field of IA; it has given the final word to the CT of the usual place of residence before the IA occurred

Regulation Brux II bis, Art. 11, **integrates and replaces** Hague Conv, therefore the reg has decided to confirm the reference to the Hague Conv

BUT

has introduced a revolution giving the last word to the CT where the child was a resident.



### Art 11 Reg Brux II bis

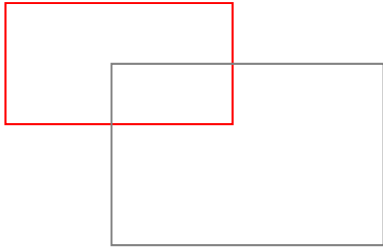
The parent who has suffered the IA may, if he so considers, submit a claim to the CT on the basis of the Hague Conv.; the CT decides under Hague Conv., the child and the instant must be heard.

#### **Critical Issues:**

when the former CT refers to the Hague, or to the foreign CT, considers rejecting repatriation under Article 13 letter B, you must not do it if in the country of the child's habitual res. measures have been taken to protect the said child.

Ex.: active abdctn: minor in ITA is abducted to Rumania/Poland/Croatia, here the CT applies 13 letter B; Parent starting the abdctn says she suffered violence, sometimes also the minor, you do a psychological exam which shows that the parent suffering the abdctn could be a violent parent and then the CT requests of ITA, through the CA, what measures have been taken to protect the child in ITA; the CA addresses the CT of the place where the minor was a res. but most times the CT, because the minor is not present on ITA territory, has not issued an order to protect the child, he can adopt it when he returns but not when he is not here. The Foreign CT will not remand the child because 11 Brux II bis applies.





**The jurisdiction of the Ministry of Foreign Affairs (DGIT - Directorate General for Italians abroad) and the diplomatic-consular missions in the event of Italian minor unlawfully taken abroad:**

•a) **Primary**, if the State in which the child has been taken does **not adhere** to the Hague Convention of 1980 and/ or **is not the recipient** of Regulation (EC) No. 2201/2003. In this case the Ministry: identifies the lines of action best suited for its solution;

provides information and assistance to the Italian citizen;

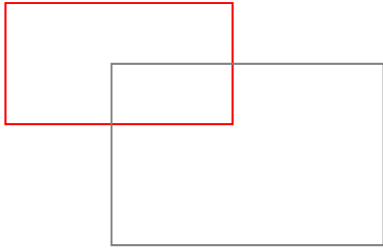
activates diplomatic-consular representations in order to bring about actions on site (Italian consular visit with the Italian minor, dialogue with local authorities and representation of the case);

•b) **to support** the action of the Ministry of Justice, if the state in which the child has been taken **adheres** to the Hague Convention of 1980 and/or is a recipient of Reg (EC) No. 2201/2003. In this case the 1<sup>st</sup> jurisdictional level is the Juvenile Justice Dept of the Ministry of Justice, as the **Italian Central Authority**, responsible for running down the reported case to its counterpart foreign CA.

The Central Authority, with which the DGIT maintains constant cooperation, can be activated by the citizen to initiate:

•the restitution process of the minor;

•the procedure of the rights of the child taken away by the non-custodial parent.



## How can a parent prevent the abduction of a minor child?

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Above all in cases of couples from different countries it is appropriate to:

**learn about** the provisions relating to custody and visitation rights in force in the State where the other parent belongs;

**recognize**, where possible, in the State where the other parent belongs, any provision for custody of the child in the parent's own favor;

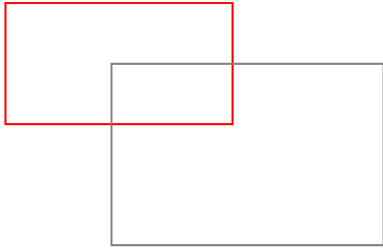
if for some reason the minor is to travel abroad, **sign a commitment** from the other parent for his return to Italy on the date set;

**ask** a competent judge to issue specific order prohibiting expatriation of minor;

**verify** that the travel ban is registered on the border control lists;

**revoke** the act of consent to ensure that the passport issued to the child becomes withdrawn;

**ensure**, in connection with the performance of visitation rights granted to the non-custodial parent, that said parent can not wrongfully restrain the child beyond the indicated period.



# What can the parent who suffered the abduction do?

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## **The parent can:**

in agreement with the other parent, **apply to the Ombudsman of the European Parliament** in cases of international child abduction in order to initiate family mediation proceedings;

**inform the Directorate General for Italians Abroad and Migration Policies** (DGIT - Office IV at the Ministry of Foreign Affairs) in order to activate the competent diplomatic-consular representations;

**apply to the Central Authority at the Ministry of Justice.**

**file a timely complaint** with the Police or Prosecutor's Office responsible for the territory where the child's habitual residence was ;

**resort to the Court** responsible for the area where the child's habitual residence was, in order to obtain sole custody via urgent proceedings .

**ask the Court of competent jurisdiction** to suspend the parental rights of the parent who has committed the crime of abduction.