Hague convention on child abduction

What is the Hague Convention?

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- The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty that **establishes procedures that provide for the prompt return of children wrongfully retained** or removed from their habitual residence.
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- Although the minister for women and children, took a decision not to have India sign the treaty for good reasons, there is now some reported rethinking.
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When does the Hague convention enters the picture?

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- The first point to note is that **this is a gendered issue,** which concerns women who live in what has come to be known as NRI marriages.
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- Often a male Indian migrant who is a green card holder comes to India to marry an Indian woman, not a green card holder, who he takes back on a dependent visa. They settle for example in the US and have children.
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- Trouble erupts between them, the matter is taken to a US court and decisions in relation to child custody are made there, or perhaps ex-party decisions when she has had to leave the country with her children.
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- It is here the Hague Convention will enter the picture and require that if there was a court order in a foreign jurisdiction, and woman has returned to her country of origin with the child, her **husband can apply to an executive authority for the return of the child** based only on an order of a freight court which could be an ex-parte order (temporary order) or if the husband is “entitled “ to custody under a foreign law.
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- **The mother, will be a “child abductor”** and an application can be made to the authority in India for the return of the child to the place of: “habitual residence”, that is the US or any other reciprocal country who has signed the convention.
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Why it would be disastrous for India to sign?

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- The Convention deals with what has come to be known as “international child abduction”. The Law Commission of India has recently addressed the issue, and the first and most important point made by the Commission is that the word “abduction” when used by a parent is misplaced as **no parent can ‘abduct’ her own child.**
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- The Commission recommends the passing of a domestic law and the signing of the Convention. The recommendation is surprising since the report itself notes that it is mainly women who are compelled to return to a foreign country to fight lonely battles for custody with no support.
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- There are number of cases where women fleeing a violent marriage with the children, with no desire to return. To compel such a child to return to the foreign country, who would obviously go with her mother, would be **compounding the original problem.**
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- It is argued that the mother can go to the foreign court and convince that court that she should be allowed to take the child back.
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- To deny a woman to apply in a foreign court for a variation of a custody order in favour of the husband means returning to a foreign land with no support structure in place - would virtually mean a separation between mother and child.
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- Often such litigation is carried only by husbands with a view to **compel a woman to give up her claims to alimony and any separation settlement.**
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- It is a known fact that when faced with such a choice, custody of children or alimony, women choose to exit a bad marriage with custody of the children with no alimony.
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What is the solution?

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- The solution lies in a reverse law on protection of children found in the jurisdiction of the Indian courts. Our courts exercise ***'parens patriae'*** jurisdiction over children - they are the ultimate guardians of children in their jurisdiction.
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- When faced with a claim from a father who says that the child has been removed from his custody in the face of a court order granting him custody, **the court must decide whether it is in the best interest of the child to be sent back to a foreign land.**
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- Indian law does not automatically recognise foreign judgments. Now by signing the Hague Convention, we will be compelled to recognise a foreign judgment regardless of the justness of the decision on custody under Indian law or whether was delivered ex-parte.
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Concluding remarks:

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- We have moved from the father being the sole guardian of the child to joint guardianship, we must now recognise that there is a rational way of resolving the problems of children when a cross-country marriage breaks.
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- It does not mean that the father must have no contact with the children; **there are ways in which the non-custodial parent can develop a genuine caring relationship** with the child, like through sharing vacations, provided there is trust between the divorced coupless.
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- It is here that the law must focus its attention rather than on its authoritarian and coercive role in punishing mothers who flee bad marriages.
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