Cross-border child protection: Legal and social perspectives
1996 Hague Convention – Art 32
Children’s Placement abroad

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Article 33

(1) If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by kafala or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

(2) The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.
Explanatory Report (Paul Lagarde)

**Article 33 (transborder placements)**

143 This article, already mentioned in connection with Article 23, paragraph 2 f, institutes the only procedure for obligatory consultation provided by the Convention. This arises when the authority which has jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by kafala, where such placement or provision of care is to take place in another Contracting State. This consultation gives a power to review the decision to the authority of the receiving State, and allows the authorities to determine in advance the conditions under which the child will stay in the receiving State, in particular in respect of immigration laws in force in that State, or even in the sharing of the costs involved in carrying out the placement measure. The text sets it out that the consultation will be with the Central Authority or other competent authority of the receiving State, and that it will be demonstrated by the furnishing to that authority of a report on the child’s situation and by the reasons for the proposed placement or provision of care. Paragraph 2 of Article 33 provides that the decision on the placement or provision of care may be made in the requesting State only after it has been approved by the Central Authority or other competent authority of the requested State. Failure to follow this procedure for consultation in advance is sanctioned by refusal of recognition of the placement measure (Art. 23, paragraph 2 f, see above).
C Foster care, *kafala* and institutional placements across borders

13.31 Decisions regarding the placement of a child in a foster family or in institutional care, or the provision of care by means of *kafala* or an analogous institution come within the definition of measures directed to the protection of children and fall within the scope of the Convention. Jurisdiction to make such placements or decisions is therefore governed by the jurisdictional provisions in the Convention and placements or decisions made in one Contracting State will have to be recognised and enforced in other Contracting States, in the absence of a ground for non-recognition.
Requirements in advance

• Transfrontier placement
• Under conditions
• Following the rules of the Convention
13.32 Importantly, the Convention also provides for co-operation between States in relation to the growing number of cases in which children placed in alternative care move abroad, for example under fostering or other long-term arrangements falling short of adoption. This includes arrangements made by way of the Islamic law institution of *kafala*. 
13.33 If an authority is contemplating the placement of the child in a foster family or institutional care, or the provision of care by kafala or an analogous institution, and such care is to take place in another Contracting State, the Convention sets down strict rules which must be complied with before this placement can be put into effect. These rules involve co-operation between the authorities of both Contracting States and ensure that the best interests of the child are secured. If these rules are not respected, the placement may not be recognised abroad under the Convention.
The rules are set out in Article 33 of the Convention. This article applies if:

- an authority has jurisdiction under Articles 5 to 10 of the Convention; and

- the authority contemplates the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution in another Contracting State.
13.35 The authority wishing to make the placement must transmit a report to the authority in the other Contracting State with details of the child and the reasons for the proposed placement or provision of care. The decision to place the child abroad by the authority having jurisdiction under Articles 5 to 10 may not be made unless the authority from the other Contracting State has consented to the placement or provision of care, taking into account the child’s best interests. If this procedure is not followed, it means that the measure may be refused recognition under the Convention.
13.36 Each Contracting State may designate the authority to which requests under Article 33 should be addressed, see paragraph 11.15, supra.
The Scope

• Placement as exercise of Care and Upbringing
  – Without consent of the parents
  – With consent
Underlying interest

- State
  - Sovereignty aspects
  - Financial burden
  - Information interest

- Parents

- child
There is some question about which measures of protection fall within the scope of Article 33 of the Convention (and thus require the procedure in Art. 33 to be undertaken). In particular there is a question as to whether a measure of protection taken by a competent authority determining that a child should reside in another Contracting State with extended family members (e.g., grandparents or an aunt or uncle) falls within the scope of Article 33.

There is no definitive answer to this question provided in the proceedings of the Eighteenth Diplomatic Session. The idea behind Article 33 was originally suggested in Working Document No 59 submitted by the Netherlands, suggesting by explanation that: “Whenever the child’s placement outside its family of origin involves its removal to another Contracting State, a procedure similar to that provided for by the Convention of 29 May 1993, should be followed.” However, this leaves open the question as to whether the phrase “family of origin” was intended to refer simply to the child’s “nuclear” family with which he / she had been previously residing, or more broadly intended to include any familial relatives.
During the 2011 Special Commission (Part I) there was some discussion of the scope of Article 33. Some experts expressed concern that including such measures of protection within the purview of Article 33 would create unnecessary hurdles when placing children with relatives in other Contracting States. Other experts expressed concern that, should such measures fall outside the scope of Article 33, there would be no obligatory safeguards in place to ensure that the Contracting State in which the child is to be placed is aware, in advance, of the child’s relocation to that State and to ensure that matters such as immigration issues or access to public services have been considered and resolved in advance of the child’s move. Further, the relevant public authorities in the Contracting State in which the child is to reside may remain unaware of important matters such as the background of the child (e.g., any child protection concerns which led to the alternative care) and the nature of the placement – matters which may necessitate the ongoing monitoring of the child’s situation. There is no settled practice on this issue as yet.
How to proceed?

• No provision in details
• Left to national Law
It should be noted that the Convention itself does not provide the exact details of how the procedure under Article 33 is to operate in practice, but rather gives only basic rules. It is for the Contracting States themselves to establish a procedure to implement these basic rules. They may want to consider establishing clear and efficient rules and procedures, which may, in particular, enable the authority contemplating the placement to identify easily the competent authority in the other Contracting State to whom the request for consent must be addressed.
Differences and analogies to Adoption

- Foster Care is transitorial
- No legal bounds are created
- Basic communication requirements may be similar
13.40 While the 1996 Convention expressly excludes adoption from its material scope, the 1993 Hague Intercountry Adoption Convention provides a similar procedure in intercountry adoption cases that may assist with the understanding (and / or implementation) of Article 33 of the 1996 Convention. Further, although the legal effects and requirements differ as between adoption and other forms of care, the co-operation mechanisms and some of the general principles of the 1993 Convention may still prove useful in relation to the cross-border provision of care. The Guide to Good Practice on the 1993 Hague Intercountry Adoption Convention525 gives a clear explanation of these mechanisms and principles.
Exempli gratia: the Netherlands implementation Act:

- See the national Dutch rules outlined in the Practical Handbook
13.41 One example in which the procedure in the 1993 Hague Intercountry Adoption Convention provided some guidance in terms of establishing rules regarding the operation of Article 33 of the 1996 Convention is the implementing legislation of the Netherlands, which devotes a chapter to setting out the procedure involved in cases where a child from the Netherlands is to be placed in another Contracting State, or a child from another Contracting State is to be placed in the Netherlands. Under these rules, the Central Authority of the Netherlands is the competent authority to make the decision to place a child habitually resident in the Netherlands in a foster family or in institutional care or otherwise provide the child with care in another Contracting State. Before this decision is made it must transmit a reasoned application, accompanied by a report on the child to the Central Authority, or other competent authority, of the Contracting State where the placement or provision of care should take place.

The Central Authority must then enter into consultation with this other authority. Before making the decision, the Central Authority must receive:

- a written declaration of consent from the persons with whom, or the institution with which, the placement is to be made or by whom or which the care is to be provided;
- if desired, a report drawn up by the Central Authority or other competent authority in the country of placement showing the suitability of the foster parent to provide foster care for the child;
- the consent of the Central Authority or other competent authority in the other State;
- if applicable, documents showing that the child has or will receive permission to enter the other Contracting State and has been or will be granted residence rights in that Contracting State.
If the placement in the Netherlands is of a child from outside the Netherlands, it is for the Dutch Central Authority to give the consent required. Before giving this consent, the Central Authority has to have received a reasoned request, accompanied by a report on the child. It also has to have gathered the equivalent documents mentioned above and transmitted them to the competent authority of the country of origin of the child. The Dutch legislation also provides what is to happen if this procedure is not complied with. The public prosecutor or Central Authority may apply to the children’s judge for provisional guardianship of the child to be awarded to a foundation as provided in other legislation. In general, this provisional guardianship will last for six weeks while the Child Protection Board obtains a ruling on the custody of the child.
Thank you for your Attention