CHAPTER- 5

BARRIERS TO ADOPTION

ADVOCACY:

COUNTRY SPECIFIC CASE STUDIES
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COUNTRY SPECIFIC CASE STUDIES

5.1 EUROPEAN UNION

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5.1 ADOPTION IN EUROPEAN UNION
The European Union (EU) is an economic and political union between 27 member countries, located primarily in Europe. Committed to regional integration, the EU was established by the Treaty on 1 November 1993 upon the foundations of the European Communities. The movement of children from Europe to distant lands has a long history, notably in the 160,000 “child migrants” sent by the UK to Australia, Canada and New Zealand and the United States between 1618 and 1967\(^8^9\), but inter-country adoption as a legal phenomenon involving formal agreements between sending and receiving countries is usually seen as developing in the aftermath of the second world war “primarily as a North American philanthropic response to the devastation of Europe in World War II that resulted in thousands of orphaned children\(^9^0\)”. Although during the war itself there were movements of children within Europe – e.g. from Finland to Sweden – and the widespread “adoption” in Germany of children fathered by German soldiers.

5.1.1 CHILD ADOPTION PARADIGM IN RESPECT TO THE EUROPEAN UNION AND INTERNATIONAL ADOPTION

In Europe, where traditions also vary from country to country, inter-country adoption has become entangled in the complicated process by which countries accede to the European Union, the supranational organization of states forming the world’s largest single market. While Europe explicitly proclaims the rights of children among its extensive list

\(^{89}\) Bean & Melville 1989; Parker 2007
\(^{90}\) Altstein & Simon 1991
of human rights, the welfare of abandoned children remains caught between the imperatives of, on the one hand, helping as many children as possible, and, on the other, ensuring that best practices are followed, protecting the child and respecting the laws of all states involved—making the process lengthy, cumbersome and expensive.

The European Union (EU), formed in the 1950s to integrate the economies of Western Europe, has become a dominant force in European life. Though foreign and defence policies have proven to be exceptionally challenging to integrate, the EU has been highly successful economically, and it holds out the prize of membership and, presumably, prosperity to the relatively poor former East bloc countries that can meet its stringent social, political and economic standards. Among the ten states that joined in 2004, eight states were either countries or parts of countries that lay behind the “iron curtain” during the Cold War. They remain poor by western European standards. One of them, Poland has been since 1996, among the twenty leading countries of origin for children receiving immigrant visas to enter the United States. Two countries that have been even more prominent as countries of origin, Bulgaria and Romania, expect to join the European Union in 2007\(^{91}\). Of these two, Romania has been among the top countries of origin for U.S. and European adoptions since 1990, along with China, Russia, South Korea and Guatemala.

\(^{91}\)On 1 January 2007, Romania and Bulgaria became the EU’s newest members. In the same year Slovenia adopted the euro,[31] followed in 2008 by Cyprus and Malta, and by Slovakia in 2009.
In 2001, Romania placed a ban on Inter Country adoptions of its children after massive corruption was discovered within these kinds of adoptions. Ever since the ban came into place the Country has been unjustly pressurized by the leading Countries involved in Inter- Country Adoptions. France, Italy, Spain, Israel and the US and UK all have lobbied to get this ban lifted.

The politicians in these Countries involved have interests in adoption agencies and in many cases adoptive parents too. If their interests were in the actual child they would see clearly that Inter-Country adoptions was not in the child’s best interest.\(^92\)

\(^{92}\)“Romanian is still being pressured to export children”. - Romanian-Reporter, Mon, 2010-03-22 19:48
For Bulgaria and Romania, the European Commission and European Parliament have been monitoring progress toward improvement in child welfare. For example, the Commission, in its 2000 Regular Report on Progress towards Accession, applauded the new provision in Bulgaria.

Child Protection Act that children could be placed in institutions only after all possibility of remaining in a family environment had been exhausted. In 2002 the Regular Report noted that the Hague Convention for Inter-country Adoption (HCIA) had come into force in the country and urged Bulgaria to reduce the number of children institutions and to ensure that they were used only as a last resort.

The 2003 Report supported an amendment to the Child Protection Act affirming the last-resort status of institutions. The Commission also noted a change in Bulgaria’s adoptions law providing that international adoption was allowed only if all options for domestic placement or adoption had been exhausted and three Bulgarian candidates had declined to take the child within a six-month period. The Commission also stated that,

"Inter-country adoptions should remain an exception in order to ensure to a maximum extent the continuity of a child’s upbringing in line with the child’s ethnic, religious, cultural and linguistic background."

The European Parliament, however, has taken a more negative stance on the question of international adoption. On March 11, 2004, it passed a resolution, based on a draft by the Committee on Foreign Affairs, Human
Rights, Common Security and Defence Policy, identifying areas where Bulgaria needed to make progress prior to accession. The resolution expressed concern about the large number of children sent for international adoptions, and insisted that the Bulgarian Government take urgent action to ensure that international adoptions be used only as a last resort and that the welfare of children be the primary concern, not the financial revenue accruing to a family, institution or intermediary.

Romania came under even closer scrutiny. In 1999 the European Commission required that Romania address all issues identified as priorities, which included that its government “guarantee adequate budgetary provisions for the support of children in care and undertake a full reform of the child care system.” In 2001 the Regular Report, issued after Romania itself declared a moratorium on international adoptions in June, expanded this requirement to include a reform of Romania’s inter-country adoption laws, which were incompatible with Romania’s obligations under the Committee on the Rights of the Child (CRC) CRC and risked children becoming the victims of trafficking and other abuses. The Commission demanded that, before international adoptions could resume, the laws be reformed to ensure that adoption decisions be made exclusively in the best interest of the child. The European Parliament’s Resolution of March 11, 2004 identified areas where Romania needed to make progress before accession. It praised the progress made but urged that reforms continue to focus on protecting the interests of children and ending the corruption. It also recognized the rights of families currently
engaged in the process – pipeline cases” – to receive responses. However, the Resolution passed did not include language that the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy had included in the draft resolution, mentioning children’s rights, especially those of children living in institutions, as issues needing to be addressed for Romania to join the EU in 2007. It also made no mention of the Committee’s allegations that EU institutions had been misled as to the process used to identify children as suitable for adoption, and that Romanian authorities are responsible for depriving numerous children of a suitable family.

The new law certainly reflects that lack of distinction, by banning adoption outright instead of criminalizing the abusive practices that can be associated with it. While Baroness Nicholson and the British government supported the moratorium, fellow EU members Italy, Spain and France lobbied hard for the adoptions to resume⁹³. The ban, however, appeared to consolidate the victory for the foes of international adoption. Yet the Hague Convention, to which all these nations adhere, explicitly places international adoption above both foster care and institutionalization as a solution to the plight of abandoned or orphaned children. According to the Joint Council on International Children’s Services, which unsuccessfully petitioned President Iliescu to veto the legislation banning international adoptions, 37,000 Romanian children still live in institutions. With a ban

on inter-country adoption in place, and continued scrutiny from the European Union as accession nears, Romania will have difficulty concealing its enduring problem. European leaders, including Italian Minister for Equal Opportunity Stefania Prestigiacomo, have publicly asserted the right of Romania’s children to a family either in Romania or abroad, in accordance with the Hague Convention. The European Union appears to have facilitated an easy solution to Romania’s adoption predicament. But a ban on inter-country adoption, while relatively harmless in a country like Finland that can take care of its own, does a terrible injustice in Romania, where thousands of children remain abandoned in every sense but legally by their parents. For now, the law of the land likewise protects this interests – or lack thereof – of parents rather than children, and it seems intended to allow the country to once again hide the plight of its abandoned children from the scrutiny of the rest of Europe and the world. Romania’s transition away from communism in 1989 was different from that of all the other East European states that transformed themselves that year. Romania’s claim to embrace the economic, social and political values considered normative by European Union members is open to question.

94 Romania’s moratorium and subsequent ban on international adoptions have received relatively little press attention in the United States. For a report on the 2001 moratorium, see CNN.com

5.1.1.2 ROMANIA’S CORRUPTION AND BAN

In 2004, under pressure from the European Union to which it hopes to accede in 2007, Romania banned adoption by foreigners of Romanian children. The law, which took effect in 2005, aimed to crack down on the corruption that existed in a highly flawed system, but in doing so it consigned thousands of children to years of institutional life. For families hoping to adopt one or more of these children, the situation reveals a terrible void between European human rights declarations and enforceable national laws that actually ensure the welfare of children. Since the Second World War, international adoption has been a small but significant aspect of international relations. Modern communications and transportation have brought the plight of abandoned or orphaned children to a global audience and facilitated the formation of families with diverse and far-flung origins. Initially, mostly American families adopted orphans from war-torn Europe, but since the 1940s it has become a global phenomenon in which families from developed countries adopt children from impoverished or developing countries, especially in Asia and Latin America.

Since the end of the Cold War, Eastern European countries, including the former Soviet Republics (USSR), also have become major countries of origin. China and Russia have become the leading countries of origin for U.S., Canadian and European adoptive families. Shaped by the social, cultural, legal and political environments of every country involved,
international adoption is a highly complex process involving many participants with a variety of interests, including a powerful emotional element. For reasons both good and bad, the process of adopting internationally is challenging for individual families and for governments responsible for protecting and promoting the welfare and interests of all their citizens, including children. The laws are complex, the procedures are long and cumbersome and the costs (including travel and legal fees) are prohibitive for many families who might otherwise be in a position to provide a good home. But without laws aimed at ensuring the welfare of children, and a respect by all parties for those laws, the process has been subject to exploitation and corruption, including what amounts to the sale of children. Initially the primary continent of origin for children adopted internationally, Europe today is made up of states ranging generally from highly affluent in the north and west to poorer in the south and east.

During the Communist era in Romania, dictator Nicolae Ceausescu\(^96\) outlawed abortion and biological control; after his ouster and execution, one of the most wrenching results of his policies became apparent first in 1990, then repeatedly through the decade for a total of nine reports, the ABC-TV newsmagazine 20/20, presented to North American audiences the plight of tens of thousands of abandoned children living in large, dirty and soulless institutions\(^97\).

\(^96\)Romanian politician who was the Secretary General of the Romanian Communist Party from 1965 to 1989, President of the Council of State from 1967, and President of Romania from 1974 to 1989.

\(^97\)The European Union and International Adoption, Maarten Pereboom, Salisbury University.pdf
5.1.1.3 THE PSYCHOLOGICAL BASIS OF ROMANIA: EFFECTS AND REACTIONS

U.S., Canadian and European families responded by making Romania one of the leading countries of origin for inter-country adoptions in the 1990s. From 1989 to 2003, the United States issued immigrant visas to over 8,300 Romanian orphans – with 2,594 in the peak year of 1991, when Romania surpassed South Korea to top the list of countries from which American families adopted. Unfavourable reports about health issues, including HIV infection and developmental delays, contributed to a decline in numbers, but Romanian adoptions continued through the decade; though numbers fluctuated, in 2000 U.S. families adopted 1,122 Romanian children. Canadian families adopted Romanian children in similar proportions to U.S. families – 600 between 1995 and 2001 -- and, among the Europeans, French and Italian families were among the leading adopters. However, poor regulation in Romania led to widespread reports of corruption. The European Union charged that Romania was selling children to foreign families. In fact the laws were highly problematic, leaving as many as 200,000 children in legal limbo, unadoptable as long as their parents had not surrendered their legal rights. Orphanage directors resisted the attempts of the government to regulate their affairs, and, because of widespread prejudice, Gypsy children in particular faced little hope of escaping the sadness of institutional life. Would-be adoptive parents found a bizarre and chaotic
situation without any real process in place for ensuring order, let alone the welfare of the children.

For the country as a whole, the world-famous orphanages were a source of shame. Though the country had its own motives for doing so, Romania, with pressure from the European Union, issued and extended a series of moratoria. The United States and EU members Italy, Spain and France individually pressured Romania to lift the temporary bans. However, after a parliamentary vote and signature by President Ion Iliescu in June 2004, a new law banned permanently the international adoption of Romanian children, except by a child’s grandparents. The ban has had the effect of abandoning again tens of thousands of children who remain institutionalized. The current Romanian legislation by limiting inter-country adoptions to the grandparents of the Romanian child effectively eliminates inter-country adoptions as an option for the care of abandoned children and thereby prefers domestic foster care and institutional care over inter-country adoptions, in violation of Articles 20 and 21 of the UNCRC as interpreted by UNICEF and the CRC\textsuperscript{98}.

In response the United States Government took the position that the new law “imposes serious obstacles to all adoptions and creates a system in which children remain for years in state care without parents.” In July 2004, senior U.S. Government officials met with Romanian officials in Washington to express their disappointment and to urge “an expeditious

\textsuperscript{98}Adoption Law in Romania-In the Best Interests of the Children? www. adoption-policy.org
solution to the remaining adoptions in progress so that children can be placed in a permanent family environment.”

France and Romania established an international committee to handle “pipeline” cases before the law was to take effect in 2005, but estimates suggested that 37,000 children still lived in large-scale orphanages, and a similar number lived in homes run either by the state or by non-governmental organizations (NGOs). With 200 U.S. families still engaged but stuck in the adoption process, inter-country adoption was a major issue in U.S.-Romanian relations as a new Romanian president, Traian Basescu, took office. In Europe, however, the new law removed from the table an issue that might complicate Romania’s accession to the European Union in 2007. EU enlargement commissioner Guenther Verheugen, focusing on the law’s intent to stop corruption, congratulated the Romanian government.

Lady Emma Nicholson, a Member of the European Parliament from the United Kingdom, herself an adoptive parent, had campaigned vigorously against the adoption of children from Romania: as she wrote in The Guardian on July 1, 2004: “Supporters of this trade claim it provides loving couples with a child whose life would otherwise be miserable. While this can be true in some cases, the reality for many Romanian children is far less positive.”
5.1.2 THE GREAT BRITIAN LAWS IN SYNC WITH OTHER COUNTRIES

In Britain, where international adoption is far less common than either the United States or continental Europe, the term is associated with tabloid-friendly stories of children purchased on the Internet. Other affluent European countries families do adopt children internationally, some of them in greater proportion than the United States. Compared to the United States, which in FY 2003 issued 21,616 immigrant visas to orphans entering the country, France’s Mission de l’Adoption Internationale recorded a number of 3,995 for that country, a figure that, proportional to the overall population, is only slightly smaller than the American figure; both countries recorded substantial increases over the previous year.

Germany and Italian families adopt in smaller proportions, with German international adoptions numbering in the range of 1,700-1,900 children annually between 1999 and 2002, while Italian families adopted between 1500 and 2300 children annually from 2001-2003. Adoption in general is much less common in the United Kingdom, where only 329 home studies for international adoptions were conducted in 2002, suggesting that the adoption rate is about one-tenth that of France.

5.1.2.1 ADOPTIONS IN SWEDEN – ACCOMPLISHMENTS AND CONSEQUENCES

Sweden lays claim to the highest international adoption rate in the world, with about 1,000 adoptions per year. The reasons behind such high
numbers of adoption can be different. The start of international adoptions in Sweden came about when the domestic adoptions decreased dramatically because of the changing status of unmarried women. Prostitution in Sweden was at its highest in 19th and 20th Century. Earlier, it had been synonymous with bad behaviour to give birth to a child without being married and it was also very difficult for these mothers to survive economically. Therefore, families adopted children from unmarried Swedish women.

In the 60's the Welfare State began to take root in the Swedish society. Women were demanded in the labour market and if they were to work, the government had to provide the families with child care facilities. Once the women had entered the labour market, they got economic independence and earned money of their own. Therefore, the Welfare State laid the ground for unmarried women to keep their child instead of giving the baby up for adoption.

Other parts of the Swedish welfare system, which made it easier for unmarried women with children, are the introduction of child allowance and parental leave, the housing subsidies for the ones in low income brackets, unemployment insurance etc. All these factors paved the way for unmarried mothers not to give their children up for adoption. Family planning was another important factor.
With the unmarried mothers keeping their babies, the attitudes also changed. They were no longer seen as a disgrace for their families, but as ordinary citizens.

Since an increasing number of children stayed with their biological mother, the conditions for domestic adoptions changed. The families wanting to adopt a child had to turn to other countries, and since some adoptions from Korea had started in the late 50's it was natural to continue on the same path.  

It is worth noting, in light of the Romanian case, that the affluent countries of Europe for the most part do allow adoption by foreign families from their own countries, though cases are rare today.

5.1.2.2 A COMPARATIVE STUDY WITH UNITED STATES

Looking at the numbers in a different way suggests that in some parts of Europe inter-country adoption is more common even than in the United States.

Measured in numbers of adoptions per 1,000 live biological, the U.S. inter-country adoption rate (4.2) in 1997-1998 was actually lower than that of six European countries and Canada, according to one source:

Norway (11.2)
Sweden (10.8)

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99 Adoptions to Sweden – accomplishments and consequences. Statement by Fredrika Ornbrant, Embassy of Sweden, on February 12, 2002
Denmark (9.9)
Switzerland (9.2)
France (5.3)
Canada (5.2) and the Netherlands (4.6)

Italy’s rate of 3.9 inter-country adoptions per 1,000 live biologicals was close to that of the United States, and Germany followed with 2.4 adoptions. These measures again put the United Kingdom in a strangely anomalous position, with only 0.4 adoptions. While the reasons for Britain’s particular disposition toward adoption are difficult to assess, historical and cultural attitudes toward adoption vary significantly across cultures and across time.

### 5.1.3 PRESENT SITUATION DERIVED BY THE PAST TRACES: ANCIENT, MODERN & RELEVANT CONVENTIONS

As mentioned earlier also in ancient Rome, adoption was practiced as a means of securing an heir, with a focus on the interests of the adults; the emperor Trajan, for example, adopted Hadrian, who succeeded him as emperor.

Only in more recent times has the process come to focus on the interests of children. The belief that adoption disappeared from Europe in the sixteenth century, based on historians’ reading of early modern legal commentaries that pronounced it illegitimate and unnatural, has been proven wrong by social historians who have found that, while the commentaries referred to adoption in the more traditional, Roman, sense,

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100 Center for Adoption Policy The European Union and International Adoption, Maarten Pereboom, Salisbury University
the modern form of child adoption was emerging. While other countries on the European continent had preserved adoption law from earlier times, England did not have an adoption act until 1926.

Today adoption usually involves infants and young children, motivations vary greatly and, while the interests of parents and children can and should be mutually beneficial, it is not always so. Though the individual inter-country adoptions are intimate family matters, on a larger scale they represent migrations from poorer to wealthier countries and as such become subject to political interpretation. Given the economic, social, political and cultural diversity of Europe, EU can also develop policies and law on international adoption consistent with its generous pronouncements on human rights, particularly the rights of children. While the law banning Romanian adoptions might be a means to end chaos and corruption, which do threaten the interests of children, it arguably does more harm by denying Romanian children the right to a family – a right that other European children enjoy – and perpetuates the unresolved crisis that brought Romania to the world’s attention fifteen years ago.

5.1.3.1 EU: SCENERIO POST COLD-WAR

The European Union has been much more expansive in its definition of individual rights than has the United States. The extensive social welfare

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programs developed in most European countries after the Second World War, far from being abandoned in the post-Cold War world as a hindrance to global economic competitiveness, have become enshrined in constitutional law.

Prior to the formation of the EU, the Council of Europe, founded in 1949 “to defend the principles of democracy, human rights and the rule of law,” passed the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), proclaiming fundamental rights that state parties had to respect, protect and guarantee. Accession to the ECHR has become a requirement for EU membership. Rights proclaimed that are relevant to international adoptions including the right to respect for family life (Article 8) and the right to education (Article 2 of Protocol 1). Individuals, groups of individuals, organizations or states may bring complaints of rights violations to the European Court of Human Rights in Strasbourg.

In 1967, the European Convention on the Adoption of Children aimed to harmonize the adoption laws of ratifying states, though it did not establish a hierarchy of solutions for un-parented children. The main principles of the Convention were that adoption must be granted by a judicial or administrative authority, that the parents must freely accept the decision to authorize and adoption, and that the adoption must be in the best interest of the child. It set forth minimum requirements member states had to incorporate into their laws as well as a supplementary set of
principles they were free to include. However, it is not in effect in all EU member states (though it is in Romania), and it established no individual or interstate complaint mechanism. A state that has acceded to the Convention cannot be brought either before the European Court of Human Rights or any EU court on a complaint about failure to comply. The Convention is not part of the *acquis communautaire*, the body of legislation to which all EU members submit as they join.

In 1996 the European Social Charter expanded upon the ECHR and the 1961 European Social Charter, proclaiming economic and social rights that all members had to respect guarantee and protect. Though again no language specific to international adoption appears in the document, it expanded the definition of children’s rights in a number of areas, including:

- **Article 11** – A general right to the protection of health
- **Article 13** – The right to social and medical assistance
- **Article 15** – The right of persons with disabilities to independence, social integration and participation in the life of the community
- **Article 16** – The right of the family to social, legal and economic protection
- **Article 17** – The right of children and young persons to social, legal and economic protection
In an Information Document the Secretariat of the European Committee of Social Rights interprets Article 16 to mean that states are required to ensure an adequate standard of living, and Article 17 to require that states set up procedures to establish parentage and adequately regulate adoptions. With respect to children not being raised by their parents, the documents states that,

"the care of children outside their home should take place primarily in foster families suitable for their upbringing and only if necessary in institutions. Institutional care should be organized in small units and should be as close to a family setting as possible."

All EU members and aspirants have ratified the European Social Charter, and there is a reporting system for violations and a protocol for handling complaints, though not complaints by individuals. The European Committee on Social Rights reviews these reports and found Romania, for example, to be in violation of several provisions. Also in 1996 the Council of Europe’s European Convention on the Exercise of Children’s Rights, without proclaiming any new rights, aimed to harmonize the laws of state parties with respect to procedures allowing children to express their views in family proceedings of concern to them. Though ratified by seven EU members, it has no complaint mechanism and accession is not required for EU members.
5.1.3.2  CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Charter of Fundamental Rights of the European Union, proclaimed in Nice in December 2000, is set to become legally binding with the ratification by member states of the European Constitution. It defines a set of rights that is both broad and specific, including labor rights, the rights of individuals to reconcile work and family life, the right to health care, social security and social assistance, the right to a safe environment, the right to good administration. It promotes equality between the sexes and bans human cloning and eugenics practices. It addresses the rights of children in Article 24, stating that the best interest of the child must be the primary consideration in all actions relating to children. It reaffirms rights stated earlier, such as the right to care and protection necessary for the child’s well being, the right for the child to express his or her views and the right to maintain contact and relationships with both parents. EU law does not, however, include provisions specifically addressed to the protection of children’s rights. Those, along with specific regulations on adoptions domestic and international, remain the province of the member states. No EU institution, including the European Court of Justice, would handle specific cases related to international adoption.

In the broader international environment, the United Nations’ Convention on the Rights of the Child (CRC), which took effect in 1990, states in its preamble that for “full and harmonious development, a
child “should grow up in a family environment in an atmosphere of happiness, love and understanding.” Article 20(30) states, that alternative care for a child deprived of family “shall include inter alia, foster placement, kafalah of Islamic law, adoption, or if necessary, placement in suitable institutions for the care of children,” with due regard to “the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.” Article 21 addresses the matter of inter-country adoption specifically: states party to the Convention are to ensure that the best interest of the child shall be the paramount consideration and “they shall recognize that inter-country adoptions may be considered as an alternative means of the child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.” The CRC does not have a mechanism for handling complaints by individuals or states, but it does have a reporting system for which the Committee on the Rights of the Child is responsible. In 1993 the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoptions became the most significant attempt to date to harmonize the laws of states with specific regard to international adoption. It introduced a core of essential provisions governing adoptions that must be incorporated into the law of each signatory state. They must, for example, identify the duties and obligations of central authorities and accredited bodies, procedural requirements and requirements for the recognition and effects of inter-country adoptions. It also has established, for the first
time, a clear hierarchy of solutions for the care of children, from best to worst: family of origin; suitable permanent family in the country of origin; inter-country adoption; foster care (non-permanent family) in the country of origin; and, finally, institutional care.

The Convention does not have any complaint mechanism or redressal forum, nor does it provide for a reporting system, but it does allow for problems to be reported to the central authority of the state concerned. Though not part of the *acquis communautaire*\(^\text{102}\), it has been ratified by most EU members and by Bulgaria and Romania. The establishment of a hierarchy of solutions provoked some debate as to whether the Hague Convention contradicted the CRC by placing inter-country adoption above domestic foster care and domestic institutionalization.

The January 2004 UNICEF position on inter-country adoption clarified the meaning of CRC Articles 20 and 21 as follows:

> “an appropriate family environment should be sought in preference to institutional care, which should be used only as a last resort and as a temporary measure.” It also states, “Inter-country adoption is one of a range of care options which may be open to children and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution.”

\(^{102}\) The term *acquis communautaire*, or (EU) *acquis* (French pronunciation: [aki]), is used in European Union law to refer to the total body of EU law accumulated thus far. The term is French: *acquis* means “that which has been acquired”, and *communautaire* means “of the community”. During the process of the enlargement of the European Union, the *acquis* was divided into 31 chapters for the purpose of negotiation between the EU and the candidate member states for the fifth enlargement (the ten that joined in 2004 plus Romania and Bulgaria which joined in 2007)
While the document does not mention the desirability of keeping the child in the country of origin, it does stress the desirability of a permanent family setting. However, it uses the words “may be the best solution” and asserts that “the best interests of the individual child must be the guiding principle in making a decision regarding adoption.” Though these Conventions in the abstract support the right of a child to a family, reality they do not provide much legal support for individuals or groups hoping to clear obstacles in the way of international adoption. The Conventions fall into one of two categories: those that identify inviolable human rights and those that aims to harmonize the laws of states that have signed on to them. The human rights Conventions, with their established complaint mechanisms and reporting systems, are too vague in reference to international adoption to be of much help. But the harmonization Conventions, while clearly identifying the norms of international adoption to be enshrined in the laws of member states, have no complaint mechanisms or reporting systems. Thus, while Romania’s law banning international adoption outright would appear to violate a number of Conventions to which it has acceded, there is no clear way to challenge it legally.

The Copenhagen Criteria is a set of rules that define whether a country is eligible to join the European Union or not. The criteria require that a state has the institutions to preserve democratic governance and human rights, has a functioning market economy, and accepts the obligations and intent
of the EU. These membership criteria were laid down at the June 1993 European Council in Copenhagen, Denmark, from which they take their name.

Throughout the process the European Commission monitors the state’s progress towards full political, legal and economic compliance.

The Copenhagen Criteria expand on the importance of human rights considerations in all of these areas. The applicant country must have achieved stability of its institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities. Economically, it must have a functioning market economy and the capacity to cope with the competitive pressures and market forces within the EU. And it must harmonize its own laws with the body of European Union Law, the *acquis communautaire*\(^{103}\), which includes the human rights Conventions. The process of acceding to the European Union is lengthy and thorough. After a state applies to join, the European Commission (made up of leading EU civil servants recommends to the European Council (the EU executive branch) whether or not to proceed. If yes, the applicant state must submit its position on each of the thirty-one chapters of the acquis communautaire. In response, the Council prepares a common EU position (drafted by the Commission) on each chapter and opens negotiations with the relevant cabinet ministers of the applicant

\(^{103}\) During the process of the enlargement of the European Union, the acquis was divided into 31 chapters for the purpose of negotiation between the EU and the candidate member states for the fifth enlargement (the ten that joined in 2004 plus Romania and Bulgaria which joined in 2007)
state. The Commission is active in this process as well, and the European Parliament is kept abreast of the negotiations until the Council and Commission are satisfied that the acquis communautaire has been fully integrated into the laws of the applicant state. The Council then drafts the Accession Treaty, to be submitted to the European Parliament. With majority approval, the Accession Treaty is to be approved unanimously by the Council, then signed and ratified by all the current EU states and the acceding states.

While the European Parliament’s role in the accession process appears small, it can affect the process in a number of ways. During the process it can adopt numerous resolutions addressing aspects of the negotiations, of which it is being kept informed. Though these resolutions do not compel anyone to do anything legally, they are a means of subjecting the negotiations to public scrutiny and exposing problems. The Parliament’s Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy is also closely involved in the accession process, appointing a rapporteur to monitor events in each applicant country. This committee can meet with the European Commission and the chief negotiator of the applicant country to raise issues of concern. Thus while the acquis communautaire contains no law specifically related to adoption, which remains largely a national issue, international adoption has become an issue in the accession negotiations for several of the ten states that joined
in 2004 – the Czech Republic, Slovakia and Lithuania -- and the two
slated to join in 2007, Romania and Bulgaria.

5.2 CHILD ADOPTION IN USA

5.2.1 INITIAL STEP TOWARDS ADOPTION: FOSTER CARE SYSTEM

The United States has a system of Foster care by which adults care for
minor children who are not able to live with their parents. Most adoptions
in the U.S. are placed through the foster care system. The enactment of
the Adoption and Safe Families Act in 1997 has approximately
doubled the number of children adopted from foster care in the United
States. If a child in the U.S. governmental foster care system is not
adopted by the age of 18 years old, they are "aged out" of the system on
their 18th birthday. These youth in transition needs support and services
and several foster care alumni studies show that without a lifelong
connection to a caring adult, these older youth are often left vulnerable to
a host of adverse situations\textsuperscript{104}.

\textsuperscript{104} http://www.cwla.org/programs/fostercare/factsheet.htm, as visited on 18 feb 2011
5.2.2 VIOLATION OF RIGHT TO EQUALITY - ACCEPTANCE OF TRANS RACIAL AN ASSAULT ON THE CULTURE

The term transracial adoption means the joining of racially different parents and children together in adoptive families. While this term is sometimes reserved for the adoption of black children by white families, here it is understood to include also the adoption of Native American, Asian, and Hispanic children by white families. Research on transracial adoption indicates that most minority children in transracial placement adjust very well to their mixed-race environments.\textsuperscript{105} Delay in placement and pre-placement physical and emotional problems have a negative impact on the development and adjustment of these children. Most transracial adoptees have a sense of identity with their racial heritage, but the strength of this identity depends, to a large degree, on the commitment of the adoptive parents to foster it. In view of the growing number of minority children in need of permanent homes, it is urged that transracial adoption be retained as one viable alternative. Americans have adopted more than 200,000 children from overseas in the past 15 years, half of which come from Asia. This trend has helped lower the resistance to trans-racial adoptions in the United States, at least for Asian and Hispanic children, although there is still high demand for Caucasian children, who usually come from Eastern Europe.

Adoption is changing the way people form families, as well as affecting the way society perceives the fundamental concepts of life such as nature

\textsuperscript{105}Arnold R. Silverman, The Future of Children ADOPTION Vol. 3 • No. 1 - Spring 1993 Outcomes of Transracial Adoption
vs. nurture and the role of relations with an adoptive family member. Because of changes in adoption over the last few decades – changes that include open adoption, gay adoption, international adoptions and trans-racial adoptions, and a focus on moving children out of the foster care system into adoptive families – the impact of adoption on the basic unit of society, the family, has been enormous.

In the United States, the first transracial adoption placements in substantial numbers were of Japanese and Chinese children following World War II. During the 1950s, after the Korean War, Korean children were adopted by American families in large numbers. In the late 1960s and early 1970s, more than 10,000 African-American children were adopted by white parents. Subsequently, however, this practice decreased dramatically in response to strong condemnation by many African-American social workers and others.

Adoption agencies can range from government-funded agencies that place children at little cost, to lawyers who arrange private adoptions, to international commercial and non-profit agencies. The desire for parents to adopt children of the same race is the cause of some controversy within the United States, especially in the African-American community.

There are more European American families seeking to adopt than there are minority families; conversely, there are more minority children available for adoption. This disparity often results in a lower cost to adopt
children from ethnic minorities - usually through special adoption grants rather than fee discrimination. Critics claim this cost disparity implies that minority babies are of less value than white ones. This situation is morally difficult because the adoptive families see adoption as a great benefit to trans-racially adopted children, while some minorities see it as an assault on their culture.

In 2004, 26 percent of African-American children adopted from foster care were adopted trans-racially. Government agencies have varied over time in their willingness to facilitate trans-racial adoptions. "Since 1994, white prospective parents have filed, and largely won, more than two dozen discrimination lawsuits, according to state and federal court records."

There is also a great need to place these children; in 2004 more than 45,000 African-American children were waiting to be adopted from foster care.

5.2.3 REFORM LAWS OF THE UNITED STATES

The Inter Country Adoption Reform Act of 2007 (ICARE) is designed to reform United States laws and practice governing inter-country adoptions and to establish an Office of Inter-country Adoptions within the U.S. Department of State. The purposes of the Act are to ensure that international adoptions are carried out in a manner that is in the best interests of the child, that foreign-born children adopted by U.S. citizens are treated in the same way as foreign-born children of U.S citizens, and
to improve the inter-country adoption process so that it is more “citizen
friendly and focused on the protection of the child.”

In brief, ICARE seeks to consolidate and streamline the federal
government processes involved in foreign adoptions by American citizens
while maintaining safeguards to protect biological families, orphans and
adoptive families from fraud and abuse. Beyond these process changes,
the bill establishes that children adopted in a foreign country by
Americans will receive the same treatment and documentation as do
children born to American parents abroad. In other words, the
Government will no longer view adoption as an immigration process but
rather as an American family adding a dependent child or children and
then returning home. In practical terms, this means the end to the
practice of attaining an immigration visa for an adopted child. Instead,
each child will be issued a U.S. passport and consular report of biological
(equivalent to a biological certificate) by the nearest U.S. Embassy, which
is what, is currently done for children of American parents who give
biological overseas.

5.2.3.1 SEPARATE OFFICE FOR ADOPTION CASES
The Act would establish an Office of Inter-country Adoptions (OIA) in the
U.S. Department of State. The Act would remove the Department of
Homeland Security, specifically Citizenship and Immigration Services,
from the process of inter-country adoption and transfer these functions to
the OIA in the Department of State. Foreign-born adopted children are
not immigrants, but children coming to the United States as immediate family members of U.S. citizens. The Act would have several effects that would reform U.S. laws governing inter-country adoption. Like children born to U.S. citizens while in a foreign country, foreign-born adopted children of U.S citizens would automatically acquire U.S. citizenship on the date of the full and final adoption, provided that the adoptive parent is a U.S. citizen, that the child is determined to be an adoptable child by the U.S. government, that the child’s adoption has been fully and finally decreed by a foreign government or a U.S. court, and the child is under the age of 18 years.

Under ICARE, citizenship would attach immediately when the aforementioned criteria is met rather than when the adopted child enters the U.S. as is required under current law. Therefore, under ICARE, children who have been fully and finally adopted by U.S. citizens would receive a U.S. passport and a Consular Report of Biological, and would not require a visa, affidavit of support, or immigration medical exam to enter the U.S. (Agencies would be required to allow prospective adoptive parents to conduct an independent medical examination and review medical records and to provide for full disclosure of any medical conditions of the child.) Since children of U.S. citizens are not denied entry because of medical reasons, neither should adopted children be denied.
5.2.4 INTERNATIONAL SAFEGUARDS: LEGAL PROTECTIONS FOR INTERNATIONALLY ADOPTED CHILDREN IN THE UNITED STATES

In the mist of so many scams and frauds in modern times it has become essential now to take preventive measure especially when delicate and intense issues like child adoption are concerned. There are a lot of preventive measures or safeguards undertaken by the US before giving or receiving child for adoption. In order to complete an international adoption and bring a child to the United States, U.S. citizens prospective adoptive parents must fulfill the requirements set by the United States Citizenship and Immigration Service (USCIS) in the Department of Homeland Security (DHS), the U.S. Department of State, the foreign country in which the child resides and any additional requirements of the U.S. state in which the prospective adoptive child will live. This two-step process, first petitioning to classify an orphan as an immediate relative, and then applying for that child’s immigration to the United States, is designed to protect the child, the birth parents and the adoptive parents. Simply locating a child in a foreign country and going to the U.S. embassy to apply for a visa for the child will not meet these requirements\textsuperscript{106}.

United States law establishes that in order to obtain an Immigrant visa for the child to live in the U.S., the U.S. Citizenship and Immigration Services in the Department of Homeland Security must determine that the prospective adoptive parents are suitable to adopt. A lengthy screening

\textsuperscript{106}U.S. Department of State, http://adoptiondashboard.com/international-adoption/adoption-fraud/international-safeguards as visited on 30 July 2010
process is required before such a determination can be made. Parents must submit to CSI a home study, or report based on interviews and meetings with a social worker licensed in their state, which assesses the family’s ability to parent an adoptive child.

All prospective adoptive parents must submit copies of birth, divorce and marriage certificates and proof of citizenship. Each prospective adoptive parent, and all other adult members within the household, must be fingerprinted, and those fingerprints must be checked for any criminal record by state and United States Federal police authorities (i.e. the Federal Bureau of Investigation- FBI). Police authorities must confirm that the prospective adoptive parents have no record of child abuse. Prospective adoptive parents typically must submit a physician’s report concerning each parent’s medical condition and letters verifying their employment and moral character. Furthermore, additional documentation bearing on the parent’s fitness to adopt may be required by the state governments and the adoption agency as well. Much of the parent’s screening can be done prior to identifying a specific child for adoption by filling an Advance Processing Petition (I-600A) with USCIS.

After demonstrating that they are qualified to adopt, parents may submit a petition (I-600) to have an Immigrant visa issued to an adoptive child. Additionally, as a part of the Immigrant visa application process, a legally binding Affidavit of Support (I-864), complete with specific, mandatory-
supporting documents is required in cases where a child is immigrating to the United States to be adopted in a state court.

The Government of the United States has specific requirements regarding the status of the adoptive child which ensure that the child is an orphan under U.S. law, or that the child has been legally and irrevocably released for emigration and adoption in a manner provided for under local foreign law. The U.S. Government is particularly concerned with the identity of the child; that the child meets the U.S. definition of an orphan (see below); and that any release by a sole surviving parent is unconditional and voluntary. Most important, U.S. immigration law includes a specific prohibition against granting a visa for an adoption if any individuals received payment for the child or as an indictment to release the child. This provision is designed to provide a strong check against child buying and to ensure that a child adopted abroad and planning to enter the U.S. is truly a child eligible for adoption.

The U.S. Government abhors fraudulent adoption procedures and the harm they cause children and families. The Department of State consistently takes a strong stand against fraudulent inter-country adoption procedures. This policy flows from our general obligation to respect host country laws, to discourage any illegal activities and to facilitate the appropriate international movement of adoptive children. The Department of State has unfailingly expressed its support for measures taken by foreign states to reduce adoption abuse.
5.2.5 CHILD PROTECTION LAWS IN THE USA

In many cases, the adopted child of U.S. citizen parents automatically becomes a U.S. citizen upon entry into the U.S, with all of the rights and protection of citizenship. In other cases, the child is granted legal permanent residency upon entry, and becomes a citizen when the adoption is finalized in the U.S. In any case once the child enters the U.S. he/she enjoys a right of residency. He/she also automatically benefits from a variety of child welfare laws.

Child protection laws in the U.S., at both Federal and State levels, apply to all children whether they are U.S. citizens or not, and whether they are in the U.S. for the purpose of being adopted or they have already been adopted. Although child protection laws vary from State to State, they all provide certain basic protections.

These protections include:

1. Persons in specified occupations are identified as “mandated reporters” meaning that they must report to the local authorities any evidence or reasonable suspicion of either child neglect or child abuse. Typically, mandated reporters include: nurses, physicians and other medical personnel; school teachers and guidance counselors; law enforcement personnel; and others who regularly come in contact with children and may be expected to observe abuse if it occurs or to learn of neglect or abuse. The reports are made to the local public child welfare agency or, in some instances, to the police. Reporters’ names are kept confidential.
2. Local public child welfare agencies maintain a 24 hour-a-day, 365 day-a-year capacity to receive allegations of child abuse or neglect. They publish the agency’s phone number or special “hotline” numbers and ensure that the phones are staffed around the clock or that calls are forwarded to a designated person after hours. Child abuse investigators are designated to be on call after hours and on weekends. In some jurisdictions the police receive calls of child abuse, or abuse or neglect.

3. Allegations of abuse are acted on promptly; if there is danger of harm to a child agency will respond to a report immediately. It is not uncommon for police and social services officials to go together to visit the family. As appropriate, children are taken to medical facilities for examination and necessary treatment. All jurisdictions in the U.S. have a minimum period of time — usually 48 to 72 hours — in which non-emergency investigations are to begin. Not all reports of abuse or neglect actually require a field visit, of course, but agencies take every report seriously and analyze each for its urgency.

4. When social workers/child abuse investigators get involved in a case, they first determine whether the allegation is “founded” or “unfounded”. Where it is determined that there is no basis for the allegation of neglect or abuse, the case will be closed without action. If the allegation is determined to be founded, the local public child welfare agency may decide on one of a number of options. These include: 1) Counseling the family and closing the case; 2) Providing in-home services to assure the child’s safely while working with the family to resolved the underlying problem(s); 3) Removing the
perpetrator from the family; or 4) Removing the child from the family and placing the child in foster care.

5. When a child is removed from his/her family, efforts are made to work with the family to resolve problems and correct dangerous behaviors or situations, in order to reunite the child with his/her family. In cases in which the child cannot be reunited with his/her family, the agency may then seek to terminate the parents’ legal rights, in order to free the child for adoption. Children whose adoptive parents are found to be unfit may be placed for adoption.

These same procedures apply to protect all children - both biological children and adopted children (regardless of where they were adopted). In the U.S. every placement in foster care must be approved by a court, and the public agencies must return to court periodically so that the child’s case may be reviewed and a judge may determine whether the child is being well cared-for, and whether there are other actions the agency should take to hasten the time a child will be returned home or another permanent placement found.

5.2.6 POST-ADOPTION SERVICES IN THE UNITED STATES

Post-adoption services, which States are encouraged to provide, are among the child welfare services for which Federal funds may be expended. In certain cases, children are eligible for post-adoption financial subsidies and medical assistance.
If an adopted child is seen to be at risk of harm or neglect, public child welfare agencies will respond without regard to whether the child was adopted domestically or internationally, and without regard to whether an adoption has been completed. If it is necessary to remove a child from the custody of his family or other legal custodians, and the child is not a U.S. citizen, the child welfare agency will seek the best placement for the child, usually in the U.S. (In some cases, the child’s relatives are in another country and the best placement for that child is with his relatives in that other country.)

Similarly, in the event an adoptive placement disrupts, the local public child welfare agency will take responsibility for the child, and provide a safe environment, whether the child is a U.S. citizen or not. If the child cannot be reunited with his/her adoptive parent(s), the agency that placed the child is encouraged to take responsibility for finding another placement home for that child. Since the child benefits from legal permanent residence or citizenship upon entry to the U.S. he/she is entitled to remain in the U.S. even if the adoption is disrupted.

There are many public and private nonprofit post adoption services available for children and their families. There are also numerous adoptive family support groups and adoptee organizations that are active in the United States and provide a network of options for adoptees who seek out other adoptees from the same country of origin.
5.2.7 VISA NORMS FOR THE ADOPTED CHILD IN THE UNITED STATES

Before issuing a non-immigrant visa for a child coming to the U.S. to be adopted, or prior to a full and final adoption decree being issued, the OIA—office of inter-country adoption—will obtain from the competent authority of the country of the child’s residence certification, with documentary support, that the child sought to be adopted is an adoptable child as defined in this bill. This determination must be made within 30 days of receipt of the certification. The OIA will work with the authorities of the child’s country of residence to establish a uniform, transparent and efficient process for the exchange of the certification and documentary support required. If the OIA finds that the certification or the documentary support is not sufficient and additional information or investigation is necessary, the Office will notify the competent authority of the Office’s intent to deny the adoption and allow the competent authority an opportunity to address the insufficiencies.

The overall purpose of the Inter-Country Adoption Reform Act (ICARE) is to provide clear accountability and oversight of the inter-country adoption process, to streamline the process for children and families, and to treat foreign-born children adopted by U.S. citizens the same way as foreign-born children of U.S. citizens.

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5.2.8 AGENCY ADOPTIONS IN THE UNITED STATES

In the U.S., inter-country adoption is largely the province of international adoption agencies. While many adoption agencies in the U.S. are public, international agencies are usually private, nonprofit organizations licensed by the state (or states) in which they operate. U.S. adoption agencies often maintain direct relationships with foreign adoption agencies or orphanages, and place foreign-born children either directly with U.S. parents, or with domestic adoption agencies that in turn place the children with parents. An international adoption agency's counterpart in a foreign country will identify the orphan, obtain legal custody, arrange for a passport and immigrant visa, and escort the child to the U.S. for adoption by the U.S. parents. If under the biological country's law, parents must be present to complete the adoption process, the foreign agency will obtain a power of attorney to begin the process and accompany parents through its finalization.

The U.S. adoption agency will perform pre- and post-adoption services, and will advise the prospective adoptive parents about U.S. immigration requirements. In cases where the prospective adoptive parents do not obtain a final adoption abroad, a series of custody transfers may take place involving the foreign agency, the U.S. agency, and the adoptive parents. The U.S. agency may retain conservatorship for the child until a final adoption decree is entered, and will place the child with other U.S. parents if the initial adoption fails.
Frequently, prospective parents who do not use an agency either already have a particular child in mind to adopt, or are looking for a representative who can cut through bureaucracy and will allow them to choose among several adoptable children.

5.2.9 “MADONNA CHILD ADOPTION CASE”- A PRECEDENT FOR THE SOCIETY AT LARGE

Madonna, American Pop Star’s second child adoption was one of the better known examples known internationally where child adoption is concerned. Sake of her popularity as pop sensation across the world, this issue gained lot of mileage and also brought into sharp focus the issues of inter-country child adoption. Madonna was refused child adoption on the grounds of she been a single parent and not resident of Malawi residing even for a year as it the prime requisite for inter–country child adoption laws.
As observed by the court, there is a need felt to open a window for inter-country adoption, there is a need to exercise caution and clearly also, some conflict between the rights of the child to adequate welfare and the need to protect the subject of the adoption and courts do not make law by the process of precedents, and Madonna might not be the only international person interested in adopting the so-called poor children of Malawi.

The potential ramifications in ruling in Madonna’s favour might have on adopted children’s human rights. By removing the very safeguard of adoptive parent been resident Minimum for 1 year, that is supposed to protect children, the courts, by its pronouncements, could actually facilitate child trafficking by some unscrupulous individuals.

5.3 REPUBLIC OF GUATEMALA – CHILD ADOPTION LAWS

In Guatemala, the majestic ancient Mayan city of Tikal was inhabited for nearly 2,000 years (from 800 B.C. to 900 A.D.). At the height of its glory, Tikal occupied more than 72 square miles and is believed to have had more than 100,000 residents. Included among the many amazing
achievements of the ancient Mayans of Tikal is the construction of the largest stone pyramid in Central America – a pyramid that is still standing proudly today.

Those considering adopting a child might overlook a wonderful place for adoption: Guatemala. Because of the economical status of the country, many families cannot afford to keep their children, and are forced to surrender them to foster care where they await adoption. The children from Guatemala are beautiful with varied skin tones, usually with full or part Mayan Indian ethnicity. Infants and newborns of both sexes are more available than older children; however most parents want their adoptee to be young so they can be a part of their development from the very beginning.

International adoption in Guatemala arose after the end of their dreadful 36-year civil war (the civil war in Guatemala officially ended in 1996). After claims arose of babies being kidnapped and sold to adoption agencies, many countries (including the U.S.) began mandating that DNA tests be performed to ensure that the woman relinquishing the baby for adoption was in fact the biological mother. All international adoptions in Guatemala occur through private attorneys or through orphanages, since there are no state-run social service programs.

In the twenty-first century, Guatemala is America’s third most popular choice for international adoptions. In 2002, Americans adopted 2,219
children from Guatemala. Mayan Indians comprise about 55 percent of the Guatemalan population, with Latinos (mostly of mixed Hispanic and Mayan origin) making up the rest of the population.

5.3.1 GUATEMALA & U.S LEGAL REQUISITES

The U.S. Embassy in Guatemala provided the following to the Office of Children’s Issues. It is a guide for U.S. citizens who are interested in adopting a child in Guatemala and who are applying for an immigrant visa for the child to live in the United States. This process involves satisfying complex Guatemalan and U.S. legal requirements. U.S. consular officers carefully consider each petition on a case-by-case basis to ensure that the legal requirements of both the U.S. and Guatemala have been met. This diligence is for the protection of the prospective adoptive parent(s), the biological parents(s) and the child. Interested U.S. citizens are strongly encouraged to contact the consular section at the U.S. Embassy in Guatemala before formalizing an adoption to ensure that appropriate procedures have been followed.

I. GUATEMALA ADOPTION PROCEDURES

Adoptions by U.S. citizen parents in Guatemala are processed under a “notarial system.” Guatemalan attorneys receive and refer potential orphans to parents desiring to adopt a child. If the parents accept the referral, they will provide the attorney with a power of attorney to act on their behalf to complete an adoption. In most cases the attorney
represents the biological parent(s), the adopting parents and the child(ren) in the Guatemalan Government proceedings. After obtaining clearance from a social worker under the supervision of a family court to proceed with a potential adoption case, and upon receipt of “pre-approval” from the Department of Homeland Security Office (DHS) in Guatemala, the attorney submits the case for review by the Guatemalan Solicitor General’s Office (Procuradoria General de la Nacion, PGN). The PGN scrutinizes the adoption case for signs of fraud or irregularities before providing its approval of the adoption. Upon receiving PGN approval, the adoptive parents in the U.S. are legally responsible for their children. The attorney obtains final approval from the Guatemalan biological mother and then requests a biological certificate listing the adoptive parents as the parents of the adopted child. With these final documents, the attorney submits the complete case file, including the I-600 orphan visa petition, to DHS in Guatemala. DHS reviews the case and either approves the I-600 or notifies the attorney in writing if any further problems prevent approval of the case. Once DHS approves the I-600, the case is sent to the Embassy’s Consular Section and a visa interview is scheduled, usually within a few days. Note that the PGN does not charge fees for adoptions.

II. RESPONSIBILITIES OF AGENCY & GUATEMALAN ATTORNEYS:

The U.S. adoption agency serves as the adopting family’s agent, and the Guatemalan attorney serves as an agent for your agency, acting on your
behalf. Therefore adoptive parents should be kept informed of all aspects of the identification, care, and adoption process of their prospective adoptive children by the agency or agent. Your adoption agency and/or attorney are your sole contacts for the progress of your adoption in the Guatemalan legal proceedings. One should be aware that the U.S. Embassy does not have information regarding the status of specific cases in the Guatemalan adoption process or Guatemalan passport process nor does the Embassy have authority to intervene in court or in the legal processes in Guatemala adoption process. Come in contact with adoption agency or Guatemalan attorney for information on case status. The Guatemalan attorney, or other accredited representative, must bring the final adoption documents to DHS/ at the Embassy upon completion of the Guatemalan portion of the process.

5.3.2 HAGUE CONVENTION IN GUATEMALA

Prior to 2008, and attempts to enforce the Hague Convention in Guatemala, a high number of international adoptions took place. One of the reasons why these adoptions were so popular was that there was no regulation of international adoptions by the Guatemalan government. Instead what had been in place was a system where by the adoption agencies took care of most of the process. The problem with this type of anarchical system gives the opportunity for unethical, greedy, dishonest, uninformed and irresponsible agencies to thrive. Some of these adoption agencies can be seen as industries whose can provide a service for
reasons of profit. With this system there was the possibility of improper financial gain and that parental consents could be induced by payment. In these circumstances the adoption may not be in the interest of the child- but rather it is driven by want of profit. However, whether we choose to allow these adoptive agencies to continue requires a judgement call about a matter that is neither black nor white. Although these adoptive services may sometimes be driven by profit, they are still performing a service. With the enforcement of the Hague Convention a compromise must be made in which there is proper practice but at the same time there is a way of supporting the country and making it practical for prospective adoptive and biological parents.

5.3.3 A NEED FOR NEW LAW: IN THE BEST INTEREST OF ADOPTED CHILD

Since December 31st 2007 a new system in America has succeeded the old, with all adoptions subject to the Hague Convention. As such no international adoptions from Guatemala may take place until Guatemala passes legislation that implements the Hague Convention. Other countries that have signed the Hague Convention may follow suit and require Guatemala to conform fully to the Hague Convention. This puts these children at risk, and will cost the country financially. As the number of children in institutions or families that are not good enough rises more damage to the children may be done and the cost of the problem will increase. In the past countries such as Romania and Cambodia have severely limited the amount of adoptions allowed because of accusations
of baby trafficking and in these situations their conditions for its orphaned children to sharply decline and disintegrate. This may have been a direct result of the closure of their inter-country adoption borders, for if some of these children had been rescued not only could those children have benefited but there may have been more resources for the other children. However, if adoptions continue without a treaty in place to regulate them, richer countries may put the poorer countries in a situation whereby the circle is made perpetual and countries like Guatemala become dependent on the finances gained by putting children up for adoption. What is needed here is a long-term solution in which the children that need a family are given one, but at the same time the country is made more able to care for such children independently in the future. This would prevent the country from becoming financially dependent on the funds acquired by the adoption funds, stopping the vicious cycle, yet still in the short term helping the children with the best intervention available at the moment.

The country is made more able to care for such children independently in the future. This would prevent the country from becoming financially dependent on the funds acquired by the adoption funds, stopping the vicious cycle, yet still in the short term helping the children with the best intervention available at the moment. It also provided good example in the world at large.
5.4 ASIA- INDIA, CHINA, CAMBODIA, JAPAN, NEPAL

5.4.1 ADOPTION IN INDIA

Today India is considered as hot spot for child adoption. Even celebrities like Angelina Jolie, Brad Pitt and known Indian film actress like Sushmita Sen are also going in for adopting children, it seems to have cut off from its initial apprehensive stage. Now, more and more couples and even single parents are coming forward to adopt kids. There is a certain procedure to adopt a child and it is recommended that you follow it in order to have a problem-free adoption and also avoid any future hassles.
The procedure is a bit time consuming due to immense number of applications from interested couples. There is specific procedure followed before the adoption takes place. In India strict CARA guidelines are followed.

5.4.1.1 LEGAL RIGHTS DWELLS WITH NATURAL PARENTS OR ADOPTIVE PARENTS

There are certain instances when rights of adoptive parents are higher than right of natural parents. Adoption is for the welfare of the child so keeping that consideration adoptive parents’ rights are higher at times. In an important case of *Bengt Ingmar Eriksson vs. Jamnibai Sukharya Dhangda*¹⁰⁸, Bombay high court has stated that, natural mother had a legal right to the custody of the children and that right could not be deprived for any reason whatsoever was totally untenable. It was well settled that whenever a question arose before a court, pertaining to custody of a minor child, the matter had to be decided not on considerations of legal rights of parties but on the sole and predominant criteria of what would best serve the interest and welfare of the minor. In this case two minor girls were given in adoption to one couple from Sweden from the orphanage. Later natural mother find out whereabouts of her daughters and plea for getting them back. But these girls had forgotten their mother tongue, parents or anything about their life before adoption as at that time they were very young and were happy in Sweden with adoptive parents. Looking to the situation, Honorable held that

¹⁰⁸ (1987) 89 BOM LR 263
inspite of the sympathy one might feel for the natural mother, the effect of removing the girls from the care and control of the adoptive parents would lead to disastrous consequences which roust be avoided and that it was not in the interest of the children to grant any relief sought in the motion. The two girls were no longer Indian nationals and had acquired Swedish nationality after passing of the adoption decrees by the Swedish Court. That an adoptive child must be treated in law as it had been bora to the adopters in wedlock and since an adoption affected status traditionally the law of the domicile had a paramount controlling influence over the creation of status. Consequently, on adoption-decree being passed, the rights of care and custody in respect of the two girls would be determined by the law of their domicile and that was the Swedish law.

That in view of those developments it was not possible for the High Court to have any control over the two girls and it was not permissible to pass any order directing adoptive parents who are Swedish nationals, to bring back the two girls who were also Swedish nationals. No directions could be issued to the adoptive parents in respect of upbringing of the daughters or making them learn any Indian language and it would be appropriate to leave it to the good sense of the adoptive parents to determine whether the girls should maintain any contact with the natural parents in India and in what form.

A reference can be usefully made in this connection to two English cases. In the decision in *In re E. (D) an infant (1967) Ch. Div. 761* a girl was
born in United States of America in the year 1959 and the parents were both American citizens. The mother obtained a divorce in the year 1960 and the custody of the minor girl was given to the father in the year 1962 on the ground that mother was not fit and proper person to have custody. In the year 1965 the mother married again and went to live at a distance of about 3000 miles from where the child lived with the father. Within a few months the father was killed in a motor accident and the child was removed surreptitiously by her aunt to England. The child was removed in spite of an order by the American Court restraining removal of the child from United States. The mother followed the child to England and the aunt filed proceedings in English Court restraining the mother from removing the child from her custody. The trial Judge held on evidence that it would be disastrous to the ward to take her away from her aunt, with whom she had built up a good relationship and had settled down happily, and that she should continue to be brought up in England in the care and control of the aunt. The appeal preferred by the mother was dismissed holding that the English Court should pay regard to the orders of the proper foreign court unless satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. The Appeal Court upheld the order of retaining custody with the aunt by holding that the welfare of the child demands that she should remain in custody of her aunt in England even though the aunt was guilty of removing her from the jurisdiction of the American Court in spite of the restraint order.
The other decision is of House of Lords in J. v. C. In the case before the House of Lords, the infant, a boy, was born in England out of Spanish parents in May 1958 and because of mother's illness was taken care of by English foster parents. The natural parents returned to Spain in February 1960 and the child went with them, but as his health suffered the natural parents requested that the child should be returned to England and stay with foster parents for indefinite duration. After a couple of years, natural parents asked for the return of the child and the foster parents sought an order for keeping custody, care and control of the infant. The trial Judge held that it was for the welfare of the child to remain in England as the foster parents had a good home and happy and united family with which the infant had become well integrated. The appeal was dismissed with the observation that the growing experience has shown that serious harm will be caused even to young children by change in custody.

The child's future, happiness and sense of security are always important factors and the effect of a change of custody requires close and anxious attention. It was also observed that in case of a happy and normal infant, general evidence of the psychiatrist on the change of custody may be valuable and can be used to support the general knowledge and experience of the Judge.

5.4.1.2 MEDICAL TOURISM-DIFFICULTIES AHEAD FOR INDIA

One of the vital problems adoption can face is surrogacy as laws gets complex with involvement of more than two parties and especially when it
is inter-country. Now a day surrogacy has becomes a lucrative business which Gujarat’s Anand is in great demand. But it seems India’s Non-Conformity with International Laws Might Devalue its Medical Tourism Tag. Controversies like the case of Baby Manji from Japan, twins of Jan Balaz from Germany and now Israels Dan Goldberg could impact medical tourism in the short term.

India has moved from the second to the seventh most preferred country of origin for adoptive parents in the developed world. These are among the findings of a first of-its-kind analysis of 30-year trends in adoption across 195 countries by the United Nations Department of Economic and Social Affairs population division. Domestic adoption far outnumbers inter-country adoption and is declining in developed countries where fewer children are available every year for adoption, but rising in developing countries. The United States, France and Spain are the major destination countries for inter-country adoptions. Canada, Germany, the Netherlands, Italy and Sweden are the other countries that now record over 1,000 foreign adoptions annually.

More than half of all internationally adopted children originate from five countries: China, Guatemala, the Republic of Korea, the Russian Federation and Ukraine. This is a radical change from the 1980s, when the top five countries of origin were the Republic of Korea, India, Colombia, Brazil and Sri Lanka. In the immediate aftermath of the Second

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109 Times of India May 2, 2010, pg-1, “India no more adoption hot spot”
World War, Germany, Greece and Japan were the main sources of children adopted by foreigners. In the early 1950s, with the onset of the Korean War, the Republic of Korea emerged as a major country of origin. During the 1980s, as inter-country adoptions shifted from being mainly a humanitarian response to protect children victimized by war to being a means of helping children deprived of parental care because of extreme poverty, countries such as India, the Philippines and Sri Lanka in Asia or Brazil, Chile and Colombia in South America gained prominence as countries of origin of children adopted by foreigners, the study notes.

As a result of major geo-political changes in the early 1990s, the set of main countries of origin of children adopted through an inter-country procedure has once more undergone major changes. Despite a recent surge of celebrity adoptions, however, Africa remains far and away the least favoured area of origin for North American and western European adoptive parents.

**a. Surrogacy**

Israeli citizen Dan Goldberg has had to delay his return home with his newborn after an Israeli court declined to grant permission for a paternity test, vital for the child to get citizenship. The controversy could bring about a dip in the number of gay couples from that country travelling to India to have children by surrogate mothers. Such controversies could hit hard as seen it happen before also. A temporary psychological lull does become visible every time negative publicity about surrogacy goes out in
the media of one particular country. Indian can also expect a short-term dip in tourist arrivals from that country. The Australian government is now contemplating a ban on commercial surrogacy from India. Several nations are also witnessing a moral churning of sorts as far as the gestation of their future generations is concerned. Germany, Norway, Spain, Japan, France, Hungary and Saudi Arabia either do not recognize surrogacy or are not amenable to the idea of gay couples raising babies.

b. German Couple’s adoption trauma

German freelance writer Jan Balaz, who had sought Indian passports for his twins Nikolas and Leonard, born to an Indian surrogate mother, Martha Khristi. Balaz and his wife, Sussane Lohle, had come to India to seek assistance from well-known Anand-based surrogacy expert Nayana Patel. Sussane was unable to conceive, so under Patel’s supervision an unnamed Indian woman donated eggs, which were fertilized with Balaz’s sperms and planted in Martha’s womb. She gave birth to the twins on Jan 4, 2008. Surrogacy is banned in Germany. Balaz, who shifted to the United Kingdom, sought Indian passports to take his sons to Britain. The passports were initially issued but subsequently withdrawn by the Ahmedabad passport office on the ground that the column of mother’s name carried that of Sussane, who had technically not borne the children. German freelance writer Jan Balaz’s twin boys turned two years old in Jaipur as they wait for that country to process their entry. The Gujarat
High Court has ruled that children born to surrogate mothers on Indian soil are Indian citizens by biological, irrespective of the nationality of their fathers. It has urged the central government to immediately frame laws to clear the confusion. In a landmark judgement, a division bench of Chief Justice K.S. Radhakrishnan and Justice Anant Dave ruled that immediate legislation is necessary to provide clarity in the situation created by advances in reproductive science and genetics as the existing legal system lacked clear answers to issues arising on the matter. The court directed restoration of the Indian passports to the twin sons of a German father, who were given biological to by an Indian surrogate mother. The situation contravened the Biologicals and Deaths Registration Act 1969.

The court pointed out that,

“many legal, moral and ethical issues arise for our consideration in this case, which has no precedents in this country. We are primarily concerned with the rights of two new born innocent babies, much more than the rights of the parents, surrogate mother, or the donor of the ova. Emotional and legal relationship of the babies with the surrogate mother and the donor of the ova is also of vital importance.”

The court upheld the citizenship rights of the two children and noted that, 

“We, in the present legal framework, have no other go but to hold that the babies born in India to the gestational surrogate are citizens of this country and, therefore, entitled to get the passport, and therefore direct the passport authorities to release the passports withdrawn from them forthwith.”
It, however, also underlined the urgent need for a comprehensive legislation defining the rights of a child born out of surrogacy agreement, the rights and responsibilities of a surrogate mother, the egg donor, legal validity of the surrogacy agreement, and all the intricacies emerging therefrom, including the parent-child relationship and the responsibilities of Infertility Clinics.

Israel even pays for IVF treatment and surrogacy for heterosexual couples who are unable to have children. But there is a bias against homosexual couples doing so. Yet overall, India’s *laissez faire* approach to commercial surrogacy as compared to other countries continues to make it an inviting destination for gay couples, apart from the cost which is a fourth of similar treatment in the US. The problem does not lie here it is with the respective countries whose citizens arrive in India for surrogacy. For instance, it is not as if Germany permits its citizens to go to the US and not India, its just that parents should become more proactive about adhering to the requirements of their specific countries before they arrive in India. The only way out is for agencies to complete the paperwork before the actual pregnancy rather than wait for the baby to be born.

5.4.1.3 **SURROGACY LAWS IN INDIA AND LEGAL AND MORAL ISSUES- BOON OR BANE**

Commercial surrogacy, which is banned in Australia, New Zealand and Most European countries and is a subject to a wide spectrum of regulation in U.S. states, was legalized in India in 2002. Under guidelines issued by
the Indian Medical Council, surrogate mothers sign away all their rights to the child. In cases where the surrogate provides a womb for an embryo formed from the sperm and egg of the prospective parents, it is only the names of these genetic parents that appear on the biological certificate.

1. Legal and moral issues of surrogacy

The moral issues associated with surrogacy are pretty obvious, yet of an eye-opening nature. This includes the criticism that surrogacy leads to commoditization of the child, breaks the bond between the mother and the child, interferes with nature and leads to exploitation of poor women in Underdeveloped countries who sell their bodies for money. Sometimes, psychological considerations may come in the way of a successful surrogacy arrangement.

As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article 16.1 of the Universal Declaration of Human Rights 1948 says, inter alia, that “men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family”.

The Judiciary in India too has recognized the reproductive right of humans as a basic right. For instance, in B. K. Parthasarthi v. Government of Andhra Pradesh, the Andhra Pradesh High Court upheld “the right of

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110 Government of India law commission of India need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy report no. 228, august 2009
111 AIR 2000 A. P. 156
reproductive autonomy” of an individual as a facet of his “right to privacy” and agreed with the decision of the US Supreme Court in *Jack T. Skinner v. State of Oklahoma*, which characterised the right to reproduce as “one of the basic civil rights of man”. Even in *Javed v. State of Haryana*, though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained from stating that the right to procreation is not a basic human right.

Now, if reproductive right gets constitutional protection, surrogacy which allows an infertile couple to exercise that right also gets the same constitutional protection. However, jurisdictions in various countries have held different views regarding the legalization of surrogacy. In England, surrogacy arrangements are legal and the Surrogacy Arrangements Act 1985 prohibits advertising and other aspects of commercial surrogacy. In the US also, commercial surrogacy seems prohibited in many states. In the famous Baby M case, the New Jersey Supreme Court, though allowed custody to commissioning parents in the “best interest of the child”, came to the conclusion that surrogacy contract is against public policy. It must be noted that in the US, surrogacy laws are different in different states.

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112 316 US 535
113 (2003) 8 SCC 369
5.4.2 ADOPTION IN CHINA

Historically adoption has been somewhat of a taboo subject in China, and consequently the first Chinese Adoption Legislation was passed only in April 1992. Since then the inter-country adoption program has grown considerably. The one child policy has a direct influence on the numbers of children abandoned in the Peoples Republic of China (PRC). The policy varies from province to province. However, it is reasonable to say that in the major cities it is strictly observed. In some provinces families are allowed two children and in others families may have girls until the first son is born. This result combined with a cultural preference to have a son and to maintain bloodlines means that many children are abandoned at biological - mainly girls or children with a disability. Neighbouring country Vietnam also remains significant firstly because of its strategic location, it is bordered by China to its north and Cambodia to its Southwest. Both the countries play pivotal role in child adoption all over the globe. America is one of Vietnam’s largest recipients of adopted children, but the two countries have yet to renew an adoption agreement. Adoption from Vietnam remains closed to U.S. citizens, although work on some form of
bilateral agreement acceptable to both sides is said to be ongoing. The US embassy has reflected upon that Vietnam had failed to police its adoption system, allowing corruption, fraud and baby-selling to flourish.

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The China Centre for Adoption Affairs indicates that the majority (about 90%) of children in children’s welfare institutions have a disability and are not placed for adoption. Many families in the PRC pay for their disabled child to be cared for by children’s welfare institutions. Some domestic adoptions are done in the PRC. Recent changes to Chinese adoption law make it easier for domestic adoptions to occur. The China Centre for Adoption Affairs believes numbers of domestic adoptions will increase in the future. It is difficult to establish reliable statistics for domestic adoption in China, however various sources state that domestic adoption
levels are currently equal to Inter-country Adoption levels, and that the PRC aim toward undertaking domestic adoptions to each International adoption. The PRC is sensitive about public criticism of their management of children’s welfare institutions. The screening of a 60 Minutes program in 1995 and a report on the Shanghai Children’s Welfare Institution released in 1996 resulted in the Children’s Welfare Institutions being closed to foreigners. Conditions in orphanages are reported to have improved significantly over the past decade, although the standard of care across welfare institutions varies quite broadly in line with regional wealth and poverty. Whilst some Welfare Institutions permit visits by Adoptive parents, it may not be possible to gain permission to visit others.

China has been at the top of that list for child adoption for years. Beijing is generally assumed to run a clean program orphanages that are above board and children who've actually been abandoned. But a scandal in 2005, in which 6 orphanages were found to be buying babies, threw that in doubt. When Americans adopt babies from China, most assume they've been abandoned. Six orphanages were found to have been buying babies who were then adopted by families from other countries.

In 2005, the government decided to approve more adoption requests than ever before. Nearly 8,000 hopeful families came from the U.S. alone that year. For each baby, an orphanage gets $3,000 from the adopting parents. That's Chinese policy. Foreign money created a lucrative baby
market in China. This all ended in late 2005, when one of the culprit and his family were arrested and convicted on charges of trafficking 85 infants\textsuperscript{114}.

Procedure and Legal position of China for child adoption laws\textsuperscript{115}.

1. In accordance with the Adoption Law of the People's Republic of China, foreigners may adopt children in China. Applicants for child adoption shall be:

   A. Childless;
   
   B. Capable of rearing and providing education to the adopted child;
   
   C. Thirty years old or above;
   
   D. Where an adoptive parent has a spouse, the couple shall adopt the child together. In case of a spouseless male adopting a baby girl, he has to be at least 40 years older than the adopted child;
   
   E. An adopter could only adopt one child.

Notwithstanding the above conditions, adopting an orphan or a handicapped child need not be subject to the restrictions A, C and E as specified above as per Chinese child adoption procedure.

2. To adopt a child in China, the necessary documents required are as follows:

\textsuperscript{114} The dark side of Chinese adoptions, Scott Tong , American Public Media
\textsuperscript{115} www.Chinaembassycanada.org
A. Written application for adoption (including the pledge of not maltreating and deserting the adopted child)

B. Personal identifications (including birth and citizenship certificates)

C. Certificate of marital status

D. Certificate of occupation and financial status

E. Health certificate

F. Certificate of non-criminal record

G. Document which testifies that the adoption accords with the current laws applied to adoption in Canada.

H. Family investigation report

During the process of adoption, either party of a couple may act on behalf of the other in case of absence and subject to the power of attorney signed by the absentee.

3. All documents mentioned above shall be notarized by a notary public and be legalized by the Department of Foreign Affairs Canada or provincial authorities and then be authenticated by the Chines Embassy or Consulates-General.

4. A written agreement shall be reached between the adopting parents and the person putting the child up for adoption. The parties shall register in the local Chinese civil affairs department in person, complete notarial
procedures at the designated notarial agency. Adoptive relations shall come into force on the day of the notarization.

5.4.3 ADOPTION IN CAMBODIA

United States also had to face similar problem like EU with Cambodia where, the U.S States (INS) Immigration and Naturalization Service had taken the unprecedented step of refusing to grant further visas to Cambodian children adopted by American parents, thereby effectively shutting down the Cambodian adoption system. There were conflicting views expressed as to whether or not there was any genuine evidence of child trafficking, and most conceded that there were few accusations relative to the total number of adoptions. Tragically, a number of Cambodian children became sick and even died while carrying forward its investigation of corruption in the Cambodian adoption system.

On December 3, 2009 new laws intended to create nationwide child welfare system in Cambodia and an inter-country adoption procedure in conformance with The Hague Inter-country Adoption Convention was
implemented in Cambodia. The process of adoption petitions for Cambodia was suspended on December 21, 2009 due to concerns relating to fraud, lack of legal framework, and lack of safeguards in Cambodia to protect children’s best interests. The new law seeks to create a country-wide comprehensive child welfare system and an inter-country adoption process in compliance with The Hague Inter-country Adoption Convention (the Convention) to which Cambodia is a party. This is an important first step in Cambodia’s expressed commitment to reform its child welfare system and meet its treaty obligations under the Convention.

In order to be able to establish necessary regulations and standard procedures to implement the new Law on Inter-country Adoption, the Cambodian Ministry of Social Affairs, Veterans and Youth Rehabilitation has announced a temporary suspension of the receipt of all new inter-country adoption dossiers until March 2011.

This will not adversely affect any U.S cases since no new cases have been submitted in the last several years. It is difficult to gauge when adoptions will resume between the United States and Cambodia. In order to implement the new law in full, Cambodia is in first need to establish the necessary government structures to support it, draft and finalize Ministerial procedures, and determine and fill vacancy and training needs. Issues related to transparency in procedure, procedural safeguards, and determination of a child’s eligibility for inter-country

adoption, criminal penalties and the creation of a strategy to formalize and strengthen the domestic adoption system will all need to be addressed effectively. The United States continues to support Cambodia's desire to create a child welfare system and an inter-country adoption process that fulfills its obligations under the Hague Inter-country Adoption Convention and welcomes Cambodia’s efforts to fully implement the new law on inter-country adoption.

5.4.4 ADOPTION IN JAPAN

Japan has a long tradition of formal adoptions, which have served the primary purpose of ensuring the perpetuation and prosperity of the household. The interests beyond the private world of the family to incorporate social concerns about economics and inheritance, so that while a child may well benefit materially from an adoption, it is far less certain that they will gain a love that previously they lacked. The child involved may also not actually need adopting, so that the extent to which these placements outside the biological family promote the child’s welfare is questionable.
Alongside these formal adoptions, there has been a second informal practice in which unmarried mothers, to avoid economic hardship and social discrimination, have secretly relinquished their babies to childless couples. The new parents have then claimed the child as their natural offspring on their family registration record, or koseki. Although illicit, this informal form of adoption is otherwise comparable contemporary western expectations about the role of the family in promoting child welfare in adoptive placements. The child can be said to need adopting and the motivations and feelings of the new parents are more likely to be directed towards caring for the child rather than promoting the interests of the household.

5.4.4.1 “KIKUTA” – LANDMARK CASE WHICH OPENED THE LINE FOR ADOPTION REFORMS

In 1973 a controversy arose over the activities of Noboru Kikuta, a physician who was openly arranging these informal and illegal adoptions. The Kikuta case sparked a debate that resulted, eventually, in adoption reform through legislation that came into force in 1988.

The reform aimed to incorporate informal adoptions into a formal legislative framework by distinguishing between two forms of adoption:

1. ‘ordinary adoption’ of the type already allowed,

2. ‘special adoption’—a new legal route to the full adoption of a baby or young child to replace the practice of informal and covert adoptions.
Ordinary adoption and special adoption have somewhat different rules. A special adoption must be for a child under the age of 6 (or 8 if they have previously been in the long term foster care of the adopting family). A special adoption requires adopters to be a married couple; ordinary adopters can be single. A special adoption imposes an absolute break with biological parents, which are assumed to be unknown to the adoptive parents. In an ordinary adoption links with biological parents may be maintained, particularly when these adoptions are arranged between relatives. An ordinary adoption can be for a person of any age, including an adult. Furthermore, special adoption has been based, explicitly, on an ethos that placed the welfare of the child as its central concern. The expectation is not just that the adoption will be in the interests of the child, the legal test of ordinary adoption, but that the child will positively need adopting.

There are now about 440 court applications for special adoptions each year\(^\text{117}\). These numbers suggest that special adoption has had a modest success in increasing the options for children in need of new families by creating open legal placements to replace informal secret ones.\(^\text{118}\) This has been achieved in the face of three problems that are found in many states but which are particularly acute in Japan.

\(^{117}\text{Hayes and Habu, 2006: 135}\)

\(^{118}\text{Japan HIT Case Study Haruo Shimada, President, Chiba Commerce University James Kondo, President, Health Policy Institute, Japan}\)
The first problem is the desire by both biological and adoptive parents to hide the fact of the adoption. The second is the highly selective attitudes of potential adoptive parents. The third is the strong reliance by the state on institutional care.

It is possible that greater provision for secrecy in adoption would help to increase the number of parents willing to adopt. Under the current system it is difficult for biological mothers and adoptive parents to maintain secrecy, as it is fairly easy to gain access to family registration records. Stratagems that have been used by biological and adoptive parents to obscure koseki records include biological mothers moving away from one’s home prefecture to give biological and adoptive parents moving residence after a child has been placed.

There is a further incentive to secrecy for biological mothers who are undocumented migrants, and who want their children to be adopted and to grow up as Japanese citizens, as parentage not place of biological confers citizenship in Japan. In response to these concerns over secrecy, at least one private agency facilitates anonymous relinquishment by biological mothers.

Parents who put themselves forward as adopters have a strong prior preference for a healthy, sweet baby girl of ‘good’ background. Matching children who do not fit into this preconceived ideal is difficult and many are hard to place. One practice that can offset the skewed preference of parents for a narrow range of children is to place children with adoptive
parents on a trial basis even if they do not conform to a preconceived ideal. A second response has been to look beyond Japanese parents by placing children with couples in mixed marriages, foreign residents of Japan and in inter-country adoptions. Children of a mixed background are particularly likely to be chosen for such placements. The proportion of children in institutional care is high compared to the numbers adopted or fostered. This is partly due to the difficulties in making family placements whether for adoption or for fostering. However, it may also be partly due to the interests of private children’s homes in perpetuating their role, and in an excessive legal concern with the rights of abusive or neglectful biological parents. The state has, however, made modest efforts to tackle the over-reliance on institutional care through policies designed to reverse the long-term decline in fostering. These are some of the questions that need to be addressed if special adoption in Japan is to help more children in need to find suitable families.\textsuperscript{119}

\section*{5.4.5 Adoption in Nepal}

Nepal is a country where exports are down, tourism is stagnant but the international adoption business is booming. Children are often put up for adoption without their parents' knowledge or consent. The racket thrives in part because there are no laws governing financial transactions in the process. In addition to hefty 'donations' to orphanages and financial support for the upkeep of their 'allotted' child while they wait for their file to be processed, parents also pay hefty sums to 'facilitators' or agencies in Nepal and back home. The whole shady business is lubricated with bribes to offices and individuals. The high stakes are driving a market in which an increasing number of children are being falsely declared orphans, or taken away from their parents on false pretexts to be handed over to adoptive parents for a hefty fee.

Nepal is not a party to the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (the Convention). Procedures for foreign adoptions in Nepal are unpredictable and the Nepalese government requirements are not enforced uniformly. The Nepalese government frequently changes requirements with little notice. Under Nepalese law, single mothers or married mothers who have been left by their husbands must meet stringent requirements regarding the relinquishment of their children for adoption. Fathers have twelve years from the child’s biological to claim the child and assert custody rights. Unless a mother identifies the father
and he agrees, in writing, to the child’s adoption, the child will not be eligible for adoption.

In many countries, especially in South-Asian countries, adoptions are done for different reasons, rather than due to the natural feeling and want of a child or children. Then there are own reasons for adopting a boy and a girl. Generally, in these countries, adoptions of boys were more common and preferred than the girls because of some age-old traditions, customs and beliefs. In case of absence of own son, wealthy and rich people often adopted male children as their rightful heir to protect their properties and carry on their family business.

Gradually, adoption of children outside from owns family members and relatives also became acceptable. Since last few decades, the practice of adoptions of Nepalese children by people from different parts of the world has also started. People in the country have different opinions about the adoption of Nepalese Children by foreigners. Some say it is good for the children as they think that such children will have a better future and better life. On the other hand there are also people who think adoption of Nepalese children by foreigners should be discouraged and stopped as they think that often such children are either ill treated or abused in different ways. In fact, there have been few cases where adopted children have been ill treated and abused, but then such incidents take place even inside own country and by the adopting Nepalese parents and families. It is a natural phenomenon that where there is good, there is bad too.
Hence, a few such incidents and discouraging acts by some section of people should not be taken as obstacles for the works of good cause. Adoptions are the result of human instinct, and therefore, perhaps will continue as long as human beings exist in this universe. It existed in ancient times, exists in present day and will continue to exist in the future too.

Nepal is one of the least developed countries in the world. Almost 60% of the population lives under the poverty line. Due to extreme poverty, in most of the cases, the babies are abandoned by their parents and these little God’s Gift get into an orphanage and they wait for someone loving and caring to get them into their sweet homes to let them enjoy their fundamental rights.

There are lots of destitute children of both the sexes available for adoption in Nepal like in Bal Mandir – a state run orphanage. According to the adoption rules of the Government in Nepal, infertile couples married for four years or even single women, widow, divorcee are eligible to adopt a child. The age difference between the adopted child and the parent should be not less than 35 and not more than 55 years.

Only one child of each sex is allowed for adoption except in the cases of twins. If the willing adoptive parent has his/her own offspring, in that case, acceptance to adopt a child of another sex can be granted and in this case the adopted child should age less than the offspring.
An application has to be submitted to adopt a Nepali son or a daughter. In case of married couples, the application should also include the infertility report, marriage certificate, family and economic condition statement, health, character certificates, copies of passport and visa and a letter of consent to adopt a Nepali child authorized by the officer of the concerned country.

In the case of unmarried, divorced, windowed single parent, a guarantee letter written by the government of his/her country or the Embassy of his/her country in Nepal has to be submitted confirming that he/she who is taking the child in adoption shall bear the whole responsibility including nourishment and education of the child including the authorized evidence.

Upon the approval of adoption, the child could travel to the country of the adoptive parents. Until the adopted child attains majority, the adoptive parent should inform the concerned orphanage, Royal Nepalese Embassy or Mission located in the concerned country and Ministry of Women Children and Social Welfare of His Majesty’s Government, in writing, on the child’s growth, diet, education and health every year.

The Royal Nepalese Embassy or Mission will also, on the basis of the documents submitted by the adoptive parents and information sent by the Government of Nepal, submit a monitoring report confirming the growth, diet, education and health of the adopted son/daughter, until he/she
attains majority, is in accordance with the conditions to the Ministry of Women, Children and Social Welfare.

When visiting the orphanages in Nepal, the number of children available for international adoption is overwhelming. In general, Nepalese themselves do not usually adopt. Being very poor it is difficult for most families to financially support children. In addition, their culture has not yet become accustomed to adopting. Those Nepalese who are unable to have children due to medical reasons will sometimes adopt a relative’s child, but even this is considered a rarity.

For parents travelling to Nepal to bring their child home, it will be impossible not to be affected by the rich culture and breathtaking landscapes that Nepal has to offer. This makes the opportunity to adopt a wonderful way to bring this nobility and beauty into your home, making it a part of your family’s heritage as well.

5.4.6 OUTCOME OF ALL THE AFORESAID COUNTRIES ADOPTION TRENDS

Whether it is Nepal or China or India, all the developing south Asian countries have history of adoption scams behind them. One of the possibilities for ill treatment of children is poverty and hunger for money. Other most important possibility is lack of governance or effective laws. Government does not feel important to make stringent laws to stop such prevalent malpractices.
Population opulence in China and India makes human life less important or one can say carefree attitude of people. Internationally these countries are potential market for child adoption. Clean, clear and classified laws are needed to make it a happy and satisfying experience for all.

Indians to should adopt methodology of USA where, more emphasis is given on ground work done before the adoption and even after the adoption. More laws in favour of the adopted child should come out. This will not only encourage people within the country but also internationally. Better legal framework promises better life and better goodwill all over the world. To protect abandoned and destitute children, goal is to find a family for as many orphan children as possible and to safeguard their interest as visualized in the UN Convention on child rights and Hague Convention on Inter country adoption ratified by India government. The ‘Best Interest of the Child’ is the guiding principle behind all adoption laws in India and social awareness programmes has helped to change the attitude of society and people towards adoption in India.