

ARTICLE

PONDERING THE POLITICIZATION OF INTERCOUNTRY ADOPTION: RUSSIA'S BAN ON AMERICAN "FOREVER FAMILIES"

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This Article explores and assesses the Russian discontinuance of intercountry adoptions to the United States, in light of international and regional child rights laws and the broader political context. Part II describes the history of Russia-U.S. adoptions up to and including the 2012 adoption ban. Part III sets forth international laws and principles relevant to Russia's adoption laws and practices. Part IV assesses Russia's ban on adoptions to America in light of domestic and international law and politics. It is argued, as a corrective to a common assumption in existing scholarship that children have a right to be adopted, that Russia's long-term aim of eradicating the need for intercountry adoption is legitimate. Russia has the prerogative to strive to meet her children's best interests domestically and international law places no obligation on states to partake in the institution of international adoption. However, the Adoption Ban undoubtedly represents a largely politically-motivated response to the Magnitsky Act. Further, an American-targeted Adoption Ban is a disproportionate and cumbersome means of achieving in-country child welfare. The subordination of the best interests of the child to state-centric political considerations is problematic, in terms of the short-term interests of Russian children currently without parental care. Russia should be encouraged to reconsider the Adoption Ban and to pursue the dual goals of (i) eradicating the need for intercountry adoption and (ii), in the interim, allowing intercountry adoption to the U.S. to continue, in accordance with the subsidiarity principle, where it can best serve the welfare needs of children without

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families.

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I. INTRODUCTION

Between 1995 and 2011, approximately 58,000 Russian children were adopted by American citizens.¹ During this time, over seventy percent of Russian children adopted to families² outside of Russia were adopted by Americans.³ However on December 28, 2012, the movement of Russian infants and children to American families came to an abrupt halt when the President of Russia signed a federal law, “*On Sanctions Against Persons Involved in Violations of Fundamental Human Rights and Freedoms of Citizens of the Russian Federation*” [hereinafter Adoption Ban].⁴ Its measures include sanctions for “those guilty of violating the fundamental human rights and freedoms” and those “who committed crimes against citizens of Russian Federation in a foreign country.”⁵ Among other provisions, the law prohibits American citizens from adopting Russian children,⁶ thereby bringing to an end, at least for now, the longstanding and generally robust history of Russia-U.S. adoptions. The Russian law is known colloquially as the Dima Yakovlev Bill,⁷ named for a 21-month-old Russian boy adopted to American parents in 2008 and re-named Chase Harrison.⁸ Fewer than six months after his adoption, Chase died of hyperthermia after

¹ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, INTERCOUNTRY ADOPTION: STATISTICS, available at <http://www.adoptionknowhow.com/russia/statistics> (last visited Mar. 2, 2014) (listing statistics on Russian adoptions from 1999-2012, totaling 45,861); *Russian Adoption Statistics*, ADOPTIONKNOWHOW.COM, <http://www.adoptionknowhow.com/russia/statistics> (last visited Mar. 2, 2014) (showing the number of Russian adoptions to the U.S. from 1995 to 1998 totaling 12,657).

² Adoptive families are commonly called “forever families” in intercountry adoption circles, referencing the permanent nature of adoption as compared to transient institutional or foster care. See, e.g., Marlou Russell, *Forever Families*, ADOPTING.ORG, <http://www.adopting.org/adoptions/forever-families-adoption-and-adoptive-parenting.html> (last visited Mar. 2, 2014); CHRISTINE ADAMEC & LAURIE C. MILLER, THE ENCYCLOPEDIA OF ADOPTION 107 (2007) (definition of forever family).

³ *International Adoption Statistics*, AUSTRALIAN INTERCOUNTRY ADOPTION NETWORK, <http://www.aican.org/statistics.php?region=0&type=birth> (last visited Mar. 2, 2014) (showing the number of Russian children adopted by U.S. citizens as compared to other countries).

⁴ О Merah Vozdeistviia na Lits, Prichastnyh k Narusheniiam Osnovopolagaiushchikh Prav i Svobod Cheloveka, Prav i Sbobod Grazhdan Rossiiskoi Federatsii [On Sanctions Against Persons Involved in Violations of Fundamental Human Rights and Freedoms of Citizens of the Russian Federation] [SOBRANIE ZAKONODATEL’STVA [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 272, Item F-3.

⁵ *Id.* arts. 1.1(a), 1.1(b).

⁶ *Id.* art. 4.1.

⁷ Tim Ecott, *Putin Signs Dima Yakovlev Bill*, VOICE OF RUSSIA (Dec. 27, 2012), http://ruvr.co.uk/2012_12_27/Putin-says-he-will-sign-Dima-Yakovlev-Bill/.

⁸ Ellen Barry, *Russian Furor over U.S. Adoptions Follows American’s Acquittal in Boy’s Death*, N.Y. TIMES (Jan. 3, 2009), http://www.nytimes.com/2009/01/04/world/europe/04adopt.html?_r=0.

unintentionally being left in a car by his adoptive father.⁹ In a case that became highly politicized in Russia, Miles Harrison was acquitted of involuntary manslaughter by a Circuit Court judge in Fairfax County, Virginia, in December 2008.¹⁰ The Russian Ministry of Foreign Affairs shortly thereafter issued a statement on the acquittal, expressing deep anger at the “flagrantly unjust ruling” and implying a connection between Chase Harrison’s status as a Russian adoptee and the lack of adequate punishment for the tragedy of his death.¹¹

Thousands of Russian children have been welcomed into American families over the twenty years of Russia-U.S. adoption history.¹² Of those children, Russia claims that twenty have been killed (whether intentionally or otherwise) by their American adoptive parents over the years, both prior to and following Chase Harrison’s death in 2008.¹³ In addition to deaths, a number of high-profile cases of abuse have also been reported in the Russian and U.S. media, leading to occasional temporary suspensions of Russia-U.S. adoptions, and negotiations between sender (Russia) and receiver (U.S.) on how best to safeguard Russian adoptees without rendering an already cumbersome and costly

⁹ *Id.*

¹⁰ *Id.* (reporting on Judge Ney’s ruling that although Mr. Harrison’s actions were “‘plainly negligent,’ he had not shown ‘callous disregard for human life,’ the legal standard for involuntary manslaughter”); see, further, Marc Fisher, *Why Was Father Who Killed Son in Car Acquitted?*, WASH. POST (Dec. 19, 2008), http://voices.washingtonpost.com/rawfisher/2008/12/why_was_father_who_killed_son.html (quoting the state prosecutor as saying “The fact that [Mr. Harrison] disregarded his duties . . . when these circumstances are likely to cause injury or death, shows callous disregard”).

¹¹ Press Release, The Ministry of Foreign Affairs of the Russian Federation, Russian MFA Information and Press Department Commentary on the Acquittal Handed Down by an American Court for Miles Harrison Who Had Been Charged with Involuntary Manslaughter in the Death of His Russian Adoptee Dima Yakovlev (Dec. 18, 2008), http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b4325699005bcbb3/a8cbc288c5d50da6c3257527002206ae!OpenDocument.

Serious doubts arise as to the legitimacy of the practice of transferring our children for adoption to a country where their rights, primarily the right to life, turn out to be unprotected. And where adequate and . . . inevitable punishment is absent for those guilty of such tragedies on, apparently, the sole ground that they are “full-fledged” citizens, whereas their adoptees are not.

Id.

¹² Wm. Robert Johnston, *Historical International Adoption Statistics, United States and World*, JOHNSTON’S ARCHIVE (May 20, 2012), <http://www.johnstonsarchive.net/policy/adoptionstatsintl.html> (showing the first adoption taking place in 1991).

¹³ *Russia Slams US Child Abuse ‘Double Standards,’* RIA NOVOSTI (Dec. 13, 2012, 12:50 PM), <http://en.rian.ru/russia/20121213/178128109.html>; see also *Russian Adoption Ban Not Linked to Magnitsky Act—Medvedev*, RIA NOVOSTI (Jan. 27, 2013, 7:22 PM), <http://en.rian.ru/russia/20130127/179061848.html>. The number is twenty if the recent death of Max Shatto (*infra* note 174 and accompanying text) is included in the count.

process more cumbersome and costly.¹⁴ These negotiations culminated in a bilateral treaty on adoption [hereinafter “Russian-American Agreement”],¹⁵ which entered into force on November 1, 2012¹⁶ following approval given by Russia’s two parliamentary bodies and President Putin.¹⁷ The Russian-American Agreement addressed Russian concerns over failed adoptions by providing, *inter alia*, for parent screening and training,¹⁸ and mandatory post-adoption reporting to the Russian authorities.¹⁹ However, before there had been any opportunity to meaningfully gauge the success or otherwise of the bilateral treaty in these endeavors, the November 1st Russian-American Agreement was rendered all but obsolete by the December 28th Adoption Ban.²⁰

This dramatic turnaround should be considered in light of an intervening event. On December 14, 2012, the U.S. Congress passed the Magnitsky Act.²¹ The Adoption Ban, at first glance a policy response to Russia-U.S. adoptions gone wrong, has also been dubbed

¹⁴ See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, INTERCOUNTRY ADOPTION: FAQs: BILATERAL ADOPTION AGREEMENT WITH RUSSIA (Oct. 15, 2012), *available at* http://adoption.state.gov/content/pdf/Russia_Bilateral_Adoption_Agreement_FAQs1012.pdf.

¹⁵ Agreement Regarding Cooperation in Adoption of Children, U.S.-Russ., July 13, 2011 (entered into force Nov. 1, 2012), *available at* http://adoption.state.gov/content/pdf/us-russia_adoption_agmt-713%2011-signed_english.pdf.

¹⁶ Press Release, U.S. Dep’t of State, United States-Russia Bilateral Adoption Agreement (Oct. 18, 2012), *available at* <http://www.state.gov/r/pa/prs/ps/2012/10/199322.htm>.

¹⁷ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, INTERCOUNTRY ADOPTION: PRESIDENT PUTIN SIGNS THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE RUSSIAN FEDERATION REGARDING COOPERATION IN ADOPTION OF CHILDREN (July 31, 2012), *available at* http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=russia_7 (noting the procedure for the Agreement to enter into force).

¹⁸ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15, art. 10(1)(b) (providing the steps prospective adoptive parents shall undergo before being deemed suitable and eligible to adopt).

¹⁹ *Id.* arts. 5(1)(a), 5(1)(b) (noting required post-adoption actions, including monitoring of adoptee’s living conditions and upbringing, to be carried out by authorized agencies).

²⁰ The Russian-American Agreement provides that it is valid for one year after a party terminates it. See *id.* art. 17(5). However as discussed below, Russia has indicated that only adoptions court-approved prior to the ban would proceed. See *infra* note 31 and accompanying text.

²¹ Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat. 1496 (2012) [hereinafter Magnitsky Act]; see, e.g., Ecott, *supra* note 7 (stating that the Adoption Ban is “widely seen inside and outside Russia as retaliation” for the Magnitsky Act); Will Englund, *Russians Say They’ll Name Their Magnitsky-retaliation Law After Baby who Died in a Hot Car in Va.*, WASH. POST (Dec. 11, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/11/magnitsky-retaliation-man-baby/> (referring to the Adoption Ban bill as retaliation for the Magnitsky Act).

the “Anti-Magnitsky Law.”²² The Magnitsky Act repeals a Cold War trade sanction imposed on Russia in 1974; however, this is coupled with the Sergei Magnitsky Rule of Law Accountability Act.²³ Sergei Magnitsky, an auditor working for an American firm in Moscow, accused Russian police and tax officials of involvement in a state-sanctioned \$230 million tax fraud.²⁴ He was subsequently arrested, and died in custody after being held for almost a year without trial, apparently having been tortured and beaten.²⁵ The Magnitsky Act includes Congressional findings on Sergei Magnitsky’s death;²⁶ references other unresolved murders, disappearances, torture cases and deaths in custody in Russia;²⁷ professes the United States Government’s concern regarding the “deterioration of economic and political freedom inside Russia”;²⁸ and blacklists Russians who are connected with Magnitsky’s death, or responsible for other human rights violations in Russia, from receiving a visa to enter the United States.²⁹

Russia has denied a reactionary nexus between the Magnitsky Act and the Adoption Ban.³⁰ The Russian Supreme Court has indicated that adoptions that had been court-approved prior to January 1, 2013 will be completed, notwithstanding the ban.³¹ Thousands of demonstrators have turned out for rallies in Russia, both in favor of and opposing the

²² Yekaterina Kravtsova, *Duma Stalls on Petition Opposing Anti-Magnitsky Law*, MOSCOW TIMES (Jan. 15, 2013), <http://www.themoscowtimes.com/news/article/duma-stalls-on-petition-opposing-anti-magnitsky-law/474002.html> (referring to the Adoption Ban as the “Anti-Magnitsky Law”).

²³ Kathy Lally & Will Englund, *Russia Fumes as U.S. Senate Passes Magnitsky Law Aimed at Human Rights*, WASH. POST (Dec. 6, 2012), http://www.washingtonpost.com/world/europe/us-passes-magnitsky-bill-aimed-at-russia/2012/12/06/262a5bba-3fd5-11e2-bca3-aadc9b7e29c5_story.html.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Magnitsky Act §§ 402(a)(7)-(12).

²⁷ *Id.* § 402(a)(15).

²⁸ *Id.* § 402(b).

²⁹ *Id.* § 404.

³⁰ Maria Young, *Adoption Ban: Children Russia’s Top Priority, Says Envoy*, RIA NOVOSTI (Feb. 14, 2013, 08:00 AM), <http://en.rian.ru/russia/20130214/179458523.html> (citing Ambassador Sergei Kislyak stating that the ban was not a reaction to the Magnitsky Act); *see also Russian Adoption Ban Not Linked to Magnitsky Act—Medvedev*, *supra* note 13 (quoting Prime Minister Dmitry Medvedev as saying that the Adoption Ban is “neither in fact nor in law” linked to the Magnitsky Act).

³¹ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, INTERCOUNTRY ADOPTION: RUSSIAN SUPREME COURT LETTER ON IMPLEMENTATION OF FEDERAL LAW NO. 272-FZ (Jan. 24, 2013), [available at http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_10](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_10).

ban.³² The Adoption Ban, the circumstances surrounding its enactment, and the subsequent impassioned debate about Russia-U.S. adoptions past, present and future, is the most recent illustrative example of the intersection of intercountry adoption law and practice with politics.

This Article explores and assesses the Russian discontinuance of intercountry adoptions to the United States, in light of international and regional child rights laws and the broader political context. It is argued, as a corrective to a common assumption in existing scholarship that children have a right to be adopted, that Russia's long-term aim of eradicating the need for intercountry adoption is legitimate. Russia has the prerogative to strive to meet her children's best interests domestically, and international law places no obligation on states to partake in the institution of international adoption. However, the Adoption Ban undoubtedly represents a largely politically-motivated response to the Magnitsky Act. Further, an American-targeted Adoption Ban is a disproportionate and cumbersome means of achieving in-country child welfare. The subordination of the best interests of the child to state-centric political considerations is problematic, in terms of the short-term interests of Russian children currently without parental care.

Part II describes the history of Russia-U.S. adoptions up to and including the 2012 adoption ban. Part III sets forth international laws and principles relevant to Russia's adoption laws and practices. Part IV assesses Russia's ban on adoptions to America in light of domestic and international law and politics. The Article concludes with recommendations for Russia's child welfare system moving forward.

II. THE HISTORY: THE UNITED STATES, RUSSIA AND INTERCOUNTRY ADOPTION

Part II introduces Russia-U.S. intercountry adoption. Specifically, Part II.A traces the history of intercountry adoption generally and the evolution of the driving forces and motives behind its expansion. Part II.B describes Russia's changing role as a sending country in the intercountry adoption picture, including domestic policy debates and

³² Sonia Elks & Steve Gutterman, *Russian Demonstrators Rally in Support of U.S. Adoption Ban*, REUTERS (Mar. 2, 2013), <http://www.reuters.com/article/2013/03/02/us-russia-adoption-idUSBRE92107D20130302> (reporting on a 12,000-strong pro-ban rally in March 2013, and a 'tens of thousands' march protesting the ban, in January 2013); see also *Most of Russian Cabinet Against U.S. Adoption Ban—Deputy PM*, RUSSIAN LEGAL INFO. AGENCY (Mar. 20, 2013), http://rapsinews.com/legislation_news/20130320/266774715.html (referring to pro- and anti-ban marches, and citing the Deputy Prime Minister's assertion that the majority of Russian ministers are against the Adoption Ban).

examples of politicized failed adoptions, such as that of Chase Harrison. Part II.C focuses on the December 2012 ban and the accompanying domestic policy measures aimed at improving in-country care for Russian orphans.

A. *The History and Motives of Intercountry Adoption*

1. *The “Child-Rescue” Approach*

The United States is the largest receiver of intercountry adoptees,³³ with 9,319 such adoptions in 2011,³⁴ and has historically always been so.³⁵ Intercountry adoption³⁶ is not a new phenomenon; however, the rhetoric surrounding its functions and objectives has shifted throughout its evolution. The earliest manifestation of intercountry adoption was as a humanitarian “child rescue” effort—for example, in the late 19th century, the practice arose of sending abandoned or neglected children from the U.K. to the British colonies.³⁷ Many of these early international adoptees were seen as needing to be rescued from the stigma of illegitimacy.³⁸ Around the same time, a parallel child rescue movement, focused on child poverty, was taking place in America. Concerned by the numbers of vagrant or impoverished children in New York, many of whom were the children of newly-arrived immigrants, the New York Children’s Aid Society organized the controversial “orphan train movement.”³⁹ Between 100,000 and 200,000 children were put on trains between 1854 and 1929; heading west, the trains would stop at more than forty-five states, locating placement families

³³ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ANNUAL ADOPTION STATISTICS FORMS (Apr. 2010), available at http://www.hcch.net/upload/wop/adop2010pd05_us.pdf.

³⁴ *Statistics, Intercountry Adoption, Bureau of Consular Affairs*, U.S. DEP’T OF STATE, http://adoption.state.gov/about_us/statistics.php (last visited Mar. 20, 2013).

³⁵ Johnston, *supra* note 12 (Intercountry Adoptions by Receiving Countries, 1970-2011).

³⁶ Intercountry adoption is also known as international adoption or transnational adoption. The terms are used interchangeably herein.

³⁷ KERRY O’HALLORAN, *THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY & PRACTICE* 132 (2d ed. 2009).

³⁸ See generally MIKE MILOTTE, *BANISHED BABIES: THE SECRET HISTORY OF IRELAND’S BABY EXPORT BUSINESS* (2d ed. 2011) (on children born to unmarried young women in secret Catholic charity homes, and then sent to the U.S., often without the mother’s approval); see also *Julia Gillard Apologises to Australian Mothers for Forced Adoptions*, THE GUARDIAN (Mar. 20, 2013, 9:28 PM), <http://www.guardian.co.uk/world/2013/mar/21/julia-gillard-apologises-forced-adoptions> (noting the Australian Prime Minister’s recent national apology to unwed mothers forced by the government to give up their babies for adoption between World War II and the 1970s).

³⁹ *Orphan Trains*, THE ADOPTION HISTORY PROJECT, <http://darkwing.uoregon.edu/~adoption/topics/orphan.html> (last visited Mar. 25, 2013).

for these “children of unhappy fortune.”⁴⁰ As a forerunner to the foster care system, the orphan trains were to some a means of furthering the interests of unfortunate children, and to others a source of cheap labor.⁴¹

Modern intercountry adoption, “signifying the movement of children from institutional care in impoverished or conflict ravaged countries into the middle-class homes of adopters in western societies,”⁴² is generally traced to the end of World War II⁴³ and, shortly thereafter, the Korean War.⁴⁴ The “child rescue” mindset has continued to permeate intercountry adoption to date, from “Operation Baby-lift” at the conclusion of the Vietnam War,⁴⁵ to heightened interest in adoption following high-profile exposés on conditions in foreign orphanages.⁴⁶ More recently, since the 1990s, increasing numbers of evangelical church organizations have advocated intercountry adoption as a faith-based response to the needs of “orphans

⁴⁰ *The Orphan Trains* (PBS television broadcast Feb. 25, 1997) (transcript available at <http://www.pbs.org/wgbh/amex/orphan/orphants.html>).

⁴¹ *Id.*

⁴² O’HALLORAN, *supra* note 37, at 132.

⁴³ *Id.*

⁴⁴ JEAN NELSON ERICHSEN, *INSIDE THE ADOPTION AGENCY* 6 (2007) (relating the story of the first North American international adoption agency, established in response to the institutionalization of Ameri-asian children in Korean orphanages following the Korean War). For a discussion of the qualitative differences between the adoption of European children following World War II, and the American response to Korean War orphans, see Kathleen Ja Sook Bergquist, Symposium, *International Asian Adoption: In the Best Interest of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 346 (2004).

⁴⁵ *Agency for International Development, Operation Babylift Report, 1975*, THE ADOPTION HISTORY PROJECT, <http://pages.uoregon.edu/adoption/archive/AIDOBOR.htm> (last visited Mar. 5, 14) (citing a Washington Report on the acceleration of inter-country adoption processing of Vietnamese children due to the emergency war situation). In some cases, adopted children were subsequently returned to their birth-parents, after it emerged they had not in fact been relinquished. See ERICHSEN, *supra* note 44, at 55.

⁴⁶ ADAMEC & MILLER, *supra* note 2, at 166 (referring to documentaries on orphanage conditions in Romania in the late 20th century); see also Steven W. Mosher, *The Dying Rooms: Chinese Orphanages Adopt a ‘Zero Population Growth Policy’*, 6 POPULATION RESEARCH INST. REV. 1 (1996), available at <http://www.pop.org/content/the-scandal-of-chinas-orphans-304>.

in distress.”⁴⁷

2. A “Market” for Children? Parent-driven Objectives

The rhetoric of “child rescue” remains prevalent in modern intercountry adoption; however, over time, a number of parent-driven or family-driven objectives and arguments in favor of the practice have also emerged.⁴⁸ Where the initial primary concern of modern international adoption was to provide permanent families for children orphaned by conflict,⁴⁹ adoption is increasingly seen as a mutually beneficial means of providing persons who are childless (whether due to infertility, or an inability or unwillingness to adopt domestically) with children.⁵⁰ Thus, while there are many older and special needs children in need of family care within receiving countries, including the U.S.,⁵¹ intercountry adoption has received increased attention in recent decades as a means of acquiring a younger as opposed to older child and as an alternative to domestic adoption for individuals or couples whose prospects of adopting in the U.S. are limited due to age, marital status,

⁴⁷ See James 1:27 (New International Version) (“Religion that God our Father accepts as pure and faultless is this: to look after orphans . . . in their distress . . .”); see, e.g., *Who We Are*, SHOW HOPE, <http://showhope.org/about/#who-we-are> (last visited Feb. 21, 2014) (describing Shaohannah’s Hope, a non-profit organization founded in 2003 by Christian singer-songwriter Steven Curtis Chapman, that provides financial aid to prospective adoptive parents); see also KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION* xiii (2013) (“Across the United States a much wider spectrum of evangelical churches . . . had begun to view adoption as a perfect storm of a cause: a way for conservative churches to get involved in poverty and social justice issues that they had ceded years before to liberal denominations, an extension of pro-life politics and a decisive rebuttal to the taunt that Christians should adopt all those extra children they want women to have, and, more quietly, as a window for evangelizing, as Christians get to ‘bring the mission field home’ and pass on the gospel to a new population of children, effectively saving them twice.”).

⁴⁸ See Ruth-Arlene W. Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 *FAM. L.Q.* 677, 680 (1999) (discussing a corresponding paradigm shift in domestic U.S. adoptions, in which the “traditional child welfare agency focus” is often eclipsed by “efforts to satisfy the desires of adults who wish to parent”).

⁴⁹ See O’HALLORAN, *supra* note 37, at 133.

⁵⁰ *Id.*

⁵¹ See generally Madelyn Freundlich, *The Future of Adoption for Children in Foster Care: Demographics in a Changing Socio-Political Environment*, THE EVAN B. DONALDSON ADOPTION INST. (1999), <http://www.adoptioninstitute.org/policy/polfos.html> (estimating that 15-20% of children in U.S. foster care need families through adoption); Jeanne Howard & Stephanie Berzin, *Never Too Old: Achieving Permanency and Sustaining Connections for Older Youth in Foster Care*, THE EVAN B. DONALDSON ADOPTION INST. 27-28 (July 2011), http://www.adoptioninstitute.org/publications/2011_07_21_NeverTooOld.pdf (noting that age is the strongest predictor of whether an adoptable child in the foster system will be adopted); see also Erika Lynn Kleiman, *Caring for our Own: Why American Adoption Law and Policy Must Change*, 30 *COLUM. J.L. & SOC. PROBS.* 327, 334 (1997).

race or sexual orientation.⁵² Kathleen Ja Sook Bergquist argues that another parent-focused need that has historically underpinned international adoption is the “pseudo-altruistic need to make a social statement about participation in and responsibility to crossing racial boundaries” in a society (the U.S.) trying to redress historic racism.⁵³ More pragmatically, Alison Fleisher lists a number of parent-centric advantages to intercountry adoption over domestic adoption, including avoiding the rights of birth mothers and biological fathers and avoiding disclosure requirements.⁵⁴

The steady increase of international adoption in recent decades is frequently explained by reference to the decreased “availability” of adoptable infants and children in developed countries due to contraception, abortion and the reduced stigmatization of out-of-wedlock parents.⁵⁵ A “market” for children has emerged in which countries with high birthrates and many children in need of care tend to become sending countries and countries with low birthrates and small numbers of such children becoming receiving countries.⁵⁶ On the “supply” side of the market, there are a multitude of factors behind the high numbers of children in institutional care, and eligible for

⁵² JOSEPHINE A. RUGGIERO, EASTERN EUROPEAN ADOPTION: POLICIES, PRACTICE, AND STRATEGIES FOR CHANGE 21-22 (2007) (noting the attraction of intercountry adoption to single, elderly and same-sex couples, and the relative speed of international adoptions as compared to domestic adoption); Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL L. 181, 182 (1996) [hereinafter Bartholet, *Propriety*] (noting the shortage of babies available for adoption domestically, and the use of international adoption for singles and over-40 couples who may not be able to adopt in the U.S.); Elizabeth Bartholet, *Where do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1179-80 (1991) (describing historic in-racial adoption placement preferences in the U.S., following opposition in the 1970s from the National Association of Black Social Workers and Native American leaders to transracial domestic adoptions, leading to low availability of adoptable infants and children for Caucasian parents); Alison Fleisher, Note, *The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171, 189 (2003) (discussing intercountry adoption as a means of avoiding America's stringent adopter criteria).

⁵³ Bergquist, *supra* note 44, at 346-47; *see also* Shani M. King, *Challenging MonoHumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT'L L. 413, 424 (2009) (postulating that a “react[ion] against the inhumanity of racist and divisive ideology” may be a related motivating factor).

⁵⁴ Fleisher, *supra* note 52, at 190-91.

⁵⁵ Bartholet, *Propriety*, *supra* note 52, at 181.

⁵⁶ *Id.* (noting that the “world divides into essentially two camps for adoption purposes”).

adoption,⁵⁷ in sending countries. These include poverty,⁵⁸ insufficient welfare/health-care support for parents, particularly of special-needs children,⁵⁹ political ideology relating to birth rates⁶⁰ and local cultural norms on adoption.⁶¹

Parent- or family-driven objectives (to be a parent or to establish a family) do not, of course, necessarily exclude a co-existing child-driven objective of providing a loving home to a child otherwise going without;⁶² however, at times the discourse surrounding adoption comes uncomfortably close to casting adoptees as objects or commodities

⁵⁷ The question of whether an adoptee is, in fact, a “true” orphan or foundling is complicated by the evidence put forward by opponents of intercountry adoption (at least in its current form) that the “market” for international adoptees is itself contributing to the number of apparent adoptees available in sending countries, due to the incentivization of baby stealing practices. *See generally* David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practice of Buying, Trafficking, Kidnaping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006) (hereinafter Smolin, *Child Laundering*).

⁵⁸ *See* O’HALLORAN, *supra* note 37, at 137 (using the experience of Korea to illustrate the significance of poverty on the availability of adoptees).

⁵⁹ *See, e.g.*, Kay Johnson et al., *Infant Abandonment and Adoption in China*, 24 POPULATION & DEV. REV. 469, 504 (1998) (noting the financial burden on parents of children with disabilities as a cause behind abandonment in China due, in part, to lack of state support).

⁶⁰ *See, e.g.*, KAY ANN JOHNSON, WANTING A DAUGHTER, NEEDING A SON: ABANDONMENT, ADOPTION, AND ORPHANAGE CARE IN CHINA 57 (2004) (citing a local Chinese government report explicitly acknowledging the connection between abandonment and the one child policy campaign); O’HALLORAN, *supra* note 37, at 137 (reporting a nexus between the Romanian Ceauseacu regime’s policy that families have a minimum of four children each, and abandonment of Romanian children due to an inability to provide for them).

⁶¹ *See, e.g.*, Bong Joo Lee, *Adoption in Korea: Current Status and Future Prospects*, 16 INT’L J. SOC. WELFARE 75, 76 (2007) (noting the Confucian emphasis on blood-ties and associated stigma with adoption historically evident in Korea); *cf.* Johnson et al., *supra* note 59, at 483 (noting that some strains of Confucianism support adoption outside bloodlines to build kinship).

⁶² O’HALLORAN, *supra* note 37, at 135 (noting that the supply/demand nature of adoption does not detract from the compassionate, altruistic motives of prospective adopters).

rather than subjects,⁶³ (something frequently pointed out by opponents of intercountry adoption⁶⁴). The development of a “market-place” is evident at the adoption agency selection stage of intercountry adoption when prospective parents must choose from among hundreds of registered adoption agencies competing to provide services for would-be adoptive parents.⁶⁵

3. *Best Interests—of the Child, of the Sender*

The other facet of the “supply/demand” model of intercountry adoption is the assertion sometimes made that the practice is a rational, burden-relieving solution for sending countries that find themselves overwhelmed in their care of “orphaned” institutionalized children.⁶⁶ Apart from the fact that this rather naively assumes that the market for

⁶³ Andrew Bainham, *International Adoption from Romania—Why the Moratorium Should Not Be Ended*, 15 CHILD & FAM. L. Q. 223, 226 (2003) (“Under [Romania’s 1990’s international adoption] regime children were treated as commodities in breach of all international obligations.”); Bergquist, *supra* note 44, at 346 (“Motivation for adoption had shifted from the altruistic, finding a home for a parentless child, to the supply and demand economics of finding children for childless couples.”). For example, there have been frequent references to the “supply” of children from sending countries as an obvious solution to the high “demand” for [desirable] adoptable children in receiving countries. *See, e.g.*, Bridget M. Hubing, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 655, 659 (2001) (“Here, the greatest desire is for healthy, white children; however, the number of preferred children available in the United States does not meet this demand”); Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT’L & COMP. L.J. 187, 190 (1994) (referring to the “imbalance of supply and demand for ‘healthy white babies’ in the United States”); Rachel J. Wechsler, *Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT’L L. REV. 1, 6 (2010) (“Currently in the U.S., the demand for healthy infants to adopt outstrips the supply”).

⁶⁴ King, *supra* note 53, at 448. *See also* Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 254 (2003) (noting that “many of the evils attributed to intercountry adopters alone—i.e., seeking a young infant to resemble the adoptive parents—may also be characteristic of in-country adoptive parents.”).

⁶⁵ *See, e.g.*, ERICHSEN, *supra* note 44, at 16 (noting the visual aids such as “banners featuring pictures of beautiful babies” used by adoption agencies at adoption fairs to attract potential clients).

⁶⁶ Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT’L & COMP. L. REV. 119, 125 (2007) (referring to the post-war burden of poverty partially lessened by intercountry adoption between 1953 and 1981); Colin Joseph Troy, Comment, *Members Only: The Need for Reform in U.S. Intercountry Adoption Policy*, 35 SEATTLE U. L. REV. 1525, 1528 (2012) (arguing that intercountry adoption is mutually beneficial as the “poverty burden” of sending countries are thereby reduced).

adoptees does not itself contribute to an increase in the “baby supply” in sending countries,⁶⁷ the counter-assertion is that intercountry adoption, rather than beneficial for sending countries, is inherently neocolonialist, or, in other words, a modern form of imperialism. Intercountry adoption invariably involves the movement of children from under-resourced birth parents and birth countries to comparatively well-off Western families in the first world, which Bergquist argues is strikingly neocolonial.⁶⁸ To others, this movement of children represents the exploitation of “unjust social structures in the ‘sending’ countries” for the benefit of receivers.⁶⁹ Through this lens, intercountry adoptions are characterized as an “exercise of influence and control by the more powerful nations who are seen as ‘robbing’ Third World countries of their children whilst confirming their inferiority and inadequacy”⁷⁰

In response to “imperialist” objections, adoption advocates argue that ethically and legally, the paramount issue is whether international adoption serves the best interests of potential adoptees,⁷¹ regardless of the “neo-colonialist hue”⁷² that the exchange may entail. The “best interests” principle, found, *inter alia*, in the Convention on the Rights of the Child,⁷³ the Hague Convention on Intercountry Adoption⁷⁴ and

⁶⁷ See generally Smolin, *Child Laundering*, *supra* note 57, at 127-31 (discussing the incentivization of stealing, kidnapping and buying children by the demand of the intercountry adoption market).

⁶⁸ Bergquist, *supra* note 44, at 349.

⁶⁹ Leslie Doty Hollingsworth, *International Adoption among Families in the United States: Considerations of Social Justice*, 48 SOC. WORK 209, 209 (Apr. 2003).

⁷⁰ John Triseliotis, *Inter-country Adoption: In Whose Best Interest?*, in INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES 119, 131 (Michael Humphrey & Heather Humphrey eds., 1993), cited in Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 325-26 (2000); cf. Saralee Kane, *The Movement of Children for International Adoption: An Epidemiologic Perspective*, 30 SOC. SCI. J. 323 (1993) (arguing that the movement of children via international adoption “is not significantly affecting the human resources of most countries of origin”).

⁷¹ See, e.g., Bartholet, *Propriety*, *supra* note 52, at 184 (arguing that controversies such as the imperialism issue have little to do with the “best interests” of children, despite the supposed paramountcy thereof).

⁷² King, *supra* note 53, at 425.

⁷³ Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter UNCRC] (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration); *id.* art. 21 (“State Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration”).

⁷⁴ Hague Conference on Private International Law, Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption art. 4(b), May 29, 1993, 1870 U.N.T.S. 182 (entered into force May 1, 1994) [hereinafter Hague Convention] (providing for adoption to be in the best interests of the child).

bilateral adoption treaties, provides that the best interests of the child shall be the primary concern in all decisions, actions and procedures relating to intercountry adoption. An assumption evident in much pro-adoption scholarship is that the “best interests” card self-evidently and invariably requires family care, the pursuit of which trumps concerns relating to imperialism and the related issue of the removal of children from their culture.⁷⁵ As David Smolin eloquently puts it, “[f]rom this perspective, ethical or political objections to intercountry adoption lack legitimacy, since they sacrifice the concrete good of children to ideological idols.”⁷⁶ This may often be the case (although “best interests” is necessarily an individualized inquiry),⁷⁷ but the imperialist argument also sheds light on a related issue of concern in international adoption. Frequently in humanitarian, child-centered discourse on adoption, the “best interests” standard masks an underlying ideological inconsistency—are we saving children from being family-less/institutionalized, or saving them from third-world countries?⁷⁸ The latter is rarely espoused publicly, lying, as it does, “perilously close to controversial notions of cultural or national superiority,”⁷⁹ but is not absent from adoption rhetoric.⁸⁰

The “best interests” standard is frequently employed on both sides of the intercountry adoption debate. Intercountry adoption—assuming an ideal system that “only includes adoption of those children who would have been in the system [without the family of origin] in any

⁷⁵ See, e.g., Wechsler, *supra* note 63, at 15 (“In contrast to opponents of intercountry adoption, supporters prioritize the children . . .” (internal quotation marks omitted)).

⁷⁶ David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 283 (2004).

⁷⁷ O’Halloran gives the example of two (unrelated) Romanian girls, who were subject to international adoption orders but issued proceedings in the Romanian District Court to have the orders revoked as they did not want to leave their native country. O’HALLORAN, *supra* note 37, at 162.

⁷⁸ See, e.g., King, *supra* note 53, at 423 (referring to past motives in intercountry adoption of saving children from third-world countries); *id.* at 439-40 (“Invariably, legal scholars describe the opportunities for adoptive children as improved in the United States, and in doing so, imply the superiority of upper- and middle-class parents to poor birth parents. Scholars routinely explain that intercountry adoption offers hope to children of improving their life chances, often of escaping a life ‘marred by poverty’” (internal citations omitted)).

⁷⁹ Smolin, *Child Laundering*, *supra* note 57, at 116.

⁸⁰ See, e.g., David M. Herszenhorn & Erik Eckholm, *Putin Signs Bill that Bars U.S. Adoptions, Upending Families*, N.Y. TIMES (Dec. 27, 2012), http://www.nytimes.com/2012/12/28/world/europe/putin-to-sign-ban-on-us-adoptions-of-russian-children.html?pagewanted=all&_r=0 (referring to criticism that the Adoption Ban will deny Russian children a better standard of living).

event,”⁸¹ i.e. does not contribute to baby stealing practices⁸²—is commonly seen as serving a child’s best interests by removing her from institutionalization or foster care, and fulfilling her right to a family⁸³ and a nurturing environment.⁸⁴ On the other hand, critics argue that intercountry adoption is contrary to adoptees’ best interests, unnecessarily denying them their cultural identity and a “sense of group heritage.”⁸⁵ A softer cultural argument is that intercountry adoption in some cases unnecessarily under-privileges a child’s right to culture because in-country care in non-Western family-style social networks is too readily dismissed in favor of out-of-country care.⁸⁶ A related concern is the monetization of adoptions, and the oft-overlooked fact that the “humanitarian” intercountry adoption effort spends tens of thousands of dollars per adoptee “to divide families that could have been kept intact for a hundred dollars or less.”⁸⁷

Other common arguments against international adoption are less individualized, and seem to focus more on the best interests of *children* (generally) as opposed to specific cases. For example, some commentators express concern that the ready supply of foreign adoptive parents may discourage in-country initiatives aimed at reducing

⁸¹ Dillon, *supra* note 64, at 187-89. Dillon refers to the difficulty of identifying those children with certainty as the “adoptability conundrum.” *Id.* at 188.

⁸² See generally Smolin, *Child Laundering*, *supra* note 57.

⁸³ See, e.g., Dillon, *supra* note 64, at 186-87.

⁸⁴ Bartholet, *Propriety*, *supra* note 52, at 185 (arguing that the law should afford children the “right to grow up in a nurturing environment”); see also Dillon, *supra* note 64, at 238-39 nn.201-02 (discussing the harms of long-term institutionalization).

⁸⁵ Bartholet, *Propriety*, *supra* note 52, at 202 (noting the culture argument, but arguing that international adoption is an “extraordinarily positive option for the homeless children of the world, compared to all other realistic options.”); see also Linda J. Olsen, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT’L L. REV. 483, 510 (2004) (noting that “[t]here is little argument from adoption proponents that it is important for intercountry adoptive families to affirm a child’s culture and heritage.”).

⁸⁶ King, *supra* note 53, at 466-69 (discussing “non-traditional” caregiving in non-Western countries and the need to ensure that the intercountry adoption system is not “removing children from what they would describe as family.”).

⁸⁷ Smolin, *Child Laundering*, *supra* note 57, at 181. “It is ethically questionable to spend thousands of dollars (or tens of thousands of dollars) to arrange an intercountry adoption, when aid of less than a thousand dollars would have kept the child with their birth family.” *Id.* at 127; see also JOHN TRISELIOTIS ET AL., *ADOPTION THEORY, POLICY AND PRACTICE* 181 (1997) (“The legitimacy of in-country or intercountry adoption will continue to be questioned until such time as adequate income maintenance schemes and preventive type services are developed to provide real choice for all birth parents.”); Bainham, *supra* note 63, at 226 (referring to “orphans” from Romania whose “birth parents and families all too obviously existed but lacked the resources to remain involved.”).

abandonment and keeping birth families intact.⁸⁸ Jena Martin characterizes this as a pessimistic view of adoption, which does not necessarily deny the current value of the practice, but sees it as a short-term solution that should complement a long-term aim of rendering international adoption obsolete.⁸⁹ She contrasts this to a more optimistic view of adoption, which subscribes to the win/win theory as far as ideal adoption goes, but acknowledges the abuses that an imperfect adoption system commonly entails.⁹⁰ Those abuses are well documented by David Smolin, who argues that the adoption system, at least as it exists in very poor sending countries, “both legitimizes and incentivizes stealing, kidnapping, trafficking, and buying children,”⁹¹ thereby “reduc[ing] the humanitarian rationale for intercountry adoption into a cruel façade”⁹²

It is, of course, overly reductionist to describe the debate over intercountry adoption as one of “for or against,” as most commentators concede both the potential merits of the practice in at least some circumstances and the undeniable need for reform to move closer to the ideal of corruption-free, child-focused adoption. The complexity of the debate is reflected in the differing prioritizations of out-of-country care vis-à-vis in-country options, evident in commentary and international legal instruments relevant to child welfare. The first adoption-specific U.N. Declaration, for example, embodies a preference for domestic foster (temporary) or, indeed, other “suitable” domestic placements, over foreign (permanent) adoptions.⁹³ The 1989 U.N. Convention on

⁸⁸ See Bergquist, *supra* note 44, at 349-50 (arguing that international adoption may allow sending countries to “abdicate responsibility for enacting sociopolitical change to secure the well-being of all children”; Jonathan Dickens, *The Paradox of Inter-country Adoption: Analysing Romania’s Experience as a Sending Country*, 11 INT’L J. SOC. WELFARE 76, 82 (2002) (“[a]s long as the door of inter-country adoption remains open, there are powerful organisational and personal reasons to use it, and these logics decrease the chances of urgent and concerted efforts being made to develop in-country alternatives.”); cf. Bartholet, *Propriety*, *supra* note 52, at 198 (arguing that such efforts are “not inconsistent with supporting foreign adoption,” and that foreign adoption may in fact increase awareness within sending countries of the need to address child welfare problems).

⁸⁹ Jena Martin, *The Good, the Bad & the Ugly? A New Way of Looking at the Intercountry Adoption Debate*, 13 U.C. DAVIS J. INT’L L. & POL’Y 173, 188 (2007).

⁹⁰ *Id.* at 187-88.

⁹¹ Smolin, *Child Laundering*, *supra* note 57, at 115.

⁹² *Id.* at 116; see also Dillon, *supra* note 64, at 188 (acknowledging that the “profitability of intercountry adoption has probably tended in some jurisdictions to bring children into the system who would not otherwise have been there”).

⁹³ Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, art. 17, U.N. Doc. A/RES/41/85 (Dec. 3, 1986) [hereinafter Declaration on Adoption].

the Rights of the Child takes the same approach, in effect casting international adoption as a measure of last resort.⁹⁴ UNICEF embraces three principles to guide adoption decisions—first, that family-based solutions are preferable to residential placements; secondly, that permanent solutions are preferable to temporary ones; and thirdly, that domestic solutions are preferable to international solutions.⁹⁵ Because intercountry adoption cannot fulfill the third condition, UNICEF views it as “‘subsidiary’ to any foreseeable solution that corresponds to all three.”⁹⁶ The 1993 Hague Convention,⁹⁷ a multilateral treaty designed to regulate intercountry adoption, is somewhat more “pro-adoption,”⁹⁸ although, as a political necessity,⁹⁹ is ultimately also deferential to the views of national governments as to the merits or otherwise of intercountry adoption over in-country institutional or foster care.¹⁰⁰

B. *Russia as a “Sending Country”*

1. *Post-U.S.S.R. Growth*

While modern international adoptions date to World War II and the Korean War, adoptions from Eastern European countries to America only developed more recently.¹⁰¹ Prior to its fall in 1991, the Soviet Union was not a significant participant in international adoptions.¹⁰² In the years following the Soviet Union dissolution, Americans began to adopt Russian children in increasing numbers, with 695 adoptions in

⁹⁴ UNCRC, *supra* note 73, art. 21(b).

⁹⁵ UNICEF, GUIDANCE NOTE ON INTERCOUNTRY ADOPTION IN THE CEE/CIS REGION 4 (Sept. 2009), *available at* http://www.unicef.org/ceecis/UNICEF_ICA_CEE_Guidance_WEB.pdf.

⁹⁶ *Id.*

⁹⁷ Hague Convention, *supra* note 74.

⁹⁸ Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243, 255 (1994) (“A common criticism in the U.S. is that the Convention is not bold enough in encouraging intercountry adoption. However, to say that the Convention merely tilts in favor of intercountry adoption is to understate the importance of the Convention’s gains.”); *see also infra* notes 244-252 and accompanying text.

⁹⁹ Carlson, *supra* note 98, at 262-64 (discussing the drafting negotiations over whether to move away from the U.N.’s prior stance on intercountry adoption).

¹⁰⁰ Dillon, *supra* note 64, at 215 (“The Hague Convention leaves a good deal of discretion in the hands of national bureaucracies, and does not clearly address the human rights implications of institutionalization.”).

¹⁰¹ RUGGIERO, *supra* note 52, at 3.

¹⁰² *Id.* at 5 (noting that two U.S.S.R. children were adopted to America between 1957 and 1963, and an absence of adoptees from the Soviet Union to the U.S. until 1991); Johnston, *supra* note 12 (showing the first adoption from Russia taking place in 1992).

1993 leading to a peak of 5878 adoptions a decade later in 2004.¹⁰³ By 1995, China and Russia had taken over from Colombia and Korea as the top countries sending adoptees to the U.S.¹⁰⁴ Russia has consistently ranked in the top three sending countries since then.¹⁰⁵ Of the Russian children adopted internationally between 1995 and 2012, over seventy percent have been received by American families.¹⁰⁶ A marked contrast between Russian adoptees and adoptees from other sending countries is their age. Between 1993 and 2005, fifty-two percent of Russian adoptees to the U.S. were between one and four years old, and twenty-one percent were five years old or older.¹⁰⁷

The increased attention to intercountry adoption generally in the 1970s and 1980s has already been noted.¹⁰⁸ Similarly, Russia came to be viewed as an attractive sending country for adoptive parents in the 1990s for a variety of reasons. Like many sending countries, Russia had relatively relaxed adoption policies at the outset of its intercountry adoption program as compared to the U.S. In addition to shorter processing times,¹⁰⁹ looser eligibility criteria meant that unmarried

¹⁰³ RUGGIERO, *supra* note 52, at 5 (noting annual adoptions from Russia to the U.S. between 1993 and 2005).

¹⁰⁴ HEATHER JACOBSON, *CULTURE KEEPING: WHITE MOTHERS, INTERNATIONAL ADOPTION, AND THE NEGOTIATION OF FAMILY DIFFERENCE* 21-22 (Vanderbilt Univ. Press 2008); *International Adoption Facts: China and Russia have Replaced South Korea as the Primary Countries from which U.S. Citizens Adopt*, EVAN B. DONALDSON ADOPTION INST., <http://www.adoptioninstitute.org/old/FactOverview/international.html> (last visited Apr. 1, 2013) (providing a comparison of top sending countries in 1990 and 2001).

¹⁰⁵ Johnston, *supra* note 12 (table of adoptions to the U.S. by sending region/country, 1991-2011); see also *Top Countries of Origin for U.S. International Adoptions, 2001-2006*, INFOPLEASE, <http://www.infoplease.com/ipa/A0881281.html> (last visited Apr. 1, 2013) (showing top twenty sending countries from 2001-2006).

¹⁰⁶ *International Adoption Statistics*, *supra* note 3 (showing the number of Russian children adopted by U.S. citizens as compared to all other receiving countries).

¹⁰⁷ RUGGIERO, *supra* note 52, at 10-11 (also noting that the majority of adoptees from China and Korea were under the age of one).

¹⁰⁸ *Supra* note 52 and accompanying text. Russia, like many sending countries, had relatively relaxed adoption policies at the outset of its intercountry adoption program, as compared to the U.S. In addition to shorter processing times, looser eligibility criteria meant that unmarried persons, same-sex couples and over-60s couples, ineligible to adopt in the U.S., were often successful in adopting from Russia. RUGGIERO, *supra* note 52, at 21-22.

¹⁰⁹ JACOBSON, *supra* note 104, at 39-40, cited in Cheryl L. Allen, Note, *The US-Russian Child Adoption Agreement: An End to Failed Adoptions?*, 35 *FORDHAM INT'L L.J.* 1690, 1700, 1700 n.41 (2012) (noting that Russian paperwork processing and adoption procedure times were fairly quick during the early 1990s); cf. Mary Hora, Note, *A Standard of Service that All Families Deserve: The Transformation of Intercountry Adoption between the United States and the Russian Federation*, 40 *BRANDEIS L.J.* 1017, 1021 (2002) (discussing the difficulties of Russian adoptions due to corruption and "nationalistic rhetoric").

persons, same-sex couples¹¹⁰ and over-60 couples, all of whom struggle to adopt in the U.S., were often successful in adopting from Russia.¹¹¹

Dr. Josephine Ruggiero points to two other factors behind the increase in Russian intercountry adoptions in the 1990s: racial congruity¹¹² and international concerns over child welfare in post-Soviet Eastern Europe.¹¹³ Racial preference is commonly cited as a factor drawing prospective adoptive parents to Russia¹¹⁴ due to the posited preference of adoptive parents for white infants.¹¹⁵ Of course, the top sending countries to the U.S. have historically been notably “other” in terms of ethnicity.¹¹⁶ However, racial congruity is arguably a factor behind both the choice to pursue international, as opposed to domestic, adoption¹¹⁷ and the choice of sending country.¹¹⁸ To the extent that

¹¹⁰ Cf. *Putin Orders Ban on Adoptions by Foreign Same-Sex Couples*, RUSS. TODAY (Mar. 28, 2013, 09:53 AM), <http://rt.com/politics/gay-couples-report-foreign-973/> (reporting that Russia plans to prohibit inter-country adoption to same-sex couples in response to France’s approval of same-sex couple adopters in February 2013); Phil Black & Alla Eshchenko, *Russia Enacts Anti-Gay Adoption Ban*, CNN (Feb. 14, 2014, 12:38 AM), <http://www.cnn.com/2014/02/13/world/europe/russia-same-sex-marriage-adoption-ban> (reporting passage of a decree banning foreign same-sex couples, and single people from countries where same-sex marriages are legal, from adopting Russian children).

¹¹¹ RUGGIERO, *supra* note 52, at 21-22.

¹¹² *Id.* at 22 (referring to Russia as a “pipeline to Caucasian children.”).

¹¹³ *Id.* (noting wide publicity of the plight of children in Eastern European orphanages).

¹¹⁴ See, e.g., Hora, *supra* note 109, at 1021 (noting that “some white Americans have turned to Russia because they prefer to adopt a child that physically resembles them”); Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 374 (2007) (referring to the desire of some prospective adoptive parents to adopt “children whose physical characteristics resemble the family’s racial and cultural background.”).

¹¹⁵ Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 137 (1998) (stating that “white infants” are the “most sought after children for adoption”). The racial preference aspect of intercountry adoption is related to the arguable commodification of potential adoptees (discussed *supra* in text accompanying note 63) and feeds into a broader debate on the merits or otherwise of interracial adoption both domestically and internationally—the seminal work is by Elizabeth Bartholet: *Where do Black Children Belong? The Politics of Race Matching in Adoption*. Bartholet, *supra* note 52.

¹¹⁶ Johnston, *supra* note 12 (table of adoptions to the U.S. by sending region/country, 1991-2011) (China, South Korea, Guatemala and Ethiopia are among the top five sending countries to the U.S. for the 1991-2011 period).

¹¹⁷ HAWLEY GRACE FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* 12 (Cornell Univ. Press 2002) (“The reality is that adoption is a last resort for most, and that very few whites want to adopt black children. Most whites prefer healthy white infants, and when they discover that such babies are in short supply they are more likely to adopt children of Colombian, Korean, and American Indian ancestry than to adopt African American children.”); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1418 (2006) (“[A]nother reason many Americans opt to adopt internationally [is] race. Although the majority of children available for international adoption are not white, they are not Black either.”).

racial congruity does factor into adoptive parents' choice of sending country, some commentators have expressed concern that a child's accessibility to intercountry adoption is at least partially determined by his or her race.¹¹⁹

The aforementioned considerations are somewhat parent-centric, although not exclusively so (an altruistic drive to adopt may lead parents to prioritize efficient programs and racial congruity is seen by some as an aspect of ensuring a child's best interests).¹²⁰ Another main factor behind Russia's appeal as a sending country, concern over child welfare, is more obviously humanitarian. Since the fall of the Iron Curtain, relinquishment has been a significant social problem in Russia,¹²¹ with over 100,000 children entering the State orphanage system annually since 1996.¹²² Stories and images of neglected and abused children in overcrowded Russian orphanages became

¹¹⁸ Barholet *supra* note 52, at 1167 ("Racial thinking dominates the world of international adoption"); Maldonado, *supra* note 117, at 1415 ("The racial hierarchy in the adoption market places white children at the top, African American children at the bottom, and children of other races in between, thereby rendering Asian or Latin American children more desirable to adoptive parents than African American children."); *see also* Peter Selman, *Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004*, 23 J. POPULATION RES. 183, 200 (2006) (noting that until the 1990s, the number of children adopted from "African countries was very low"); *but cf.* Howard Altstein & Rita J. Simon, *Introduction to INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 3 (Howard Altstein & Rita J. Simon eds., 1991) (noting that African countries have generally not approved of intercountry adoption of their children).

¹¹⁹ O'HALLORAN, *supra* note 37, at 159.

¹²⁰ Position Statement on Trans-Racial Adoption, NAT'L ASS'N OF BLACK SOC. WORKERS (Sept. 1972), *reprinted in* Barholet, *supra* note 52, at 1180 ("Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future."); *see also* Fleisher, *supra* note 52, at 179-80.

¹²¹ *See generally*, CLEMENTINE K. FUJIMURA ET AL., *RUSSIA'S ABANDONED CHILDREN: AN INTIMATE UNDERSTANDING* (2005).

¹²² Allen, *supra* note 109, at 1701. *See further, infra*, text accompanying notes 124-134. By way of comparison, around 250,000 children enter the U.S. foster care system annually, of which more than half remain in the system. *Meet the Children*, ADOPT U.S. KIDS, <http://www.adoptuskids.org/meet-the-children> (last visited Mar. 6, 2014). Fifteen percent of children in U.S. foster care live in institutions and group homes. *Facts about Foster Care: Too Many Children are Trapped in Foster Care*, CHILDREN'S RIGHTS, <http://childrensrights.org/issues-resources/foster-care/facts-about-foster-care/> (last visited June 6, 2013).

commonplace in the Western media,¹²³ at a time when increasing numbers of Americans were looking to adopt internationally.

2. *Russian Voices on Children without Families*

The problem of children without parental care is a significant challenge for the Russian Federation. There were over 700,000 such children in Russia as of 2009,¹²⁴ an estimated 2.79% of the total child population.¹²⁵ Children without parental care are often designated orphans (especially in adoption discourse) but it is estimated that the majority are “social orphans,” meaning they have at least one living parent who has voluntarily or involuntarily relinquished them to the state.¹²⁶ A number of factors account for this, including economic

¹²³ RUGGIERO, *supra* note 52, at 22 (referring to “stark images” in the media of abandoned children and the “bleak, institutional settings” in which many were growing up); *see, e.g.*, KATHLEEN HUNT, HUMAN RIGHTS WATCH, ABANDONED TO THE STATE: CRUELTY AND NEGLECT IN RUSSIAN ORPHANAGES (Dec. 1998), *available at* <http://www.hrw.org/sites/default/files/reports/russ98d.pdf>; Mareike Aden, *US Couple Battles Russian Adoption Ban*, DEUTSCHE WELLE (Feb. 18, 2013), <http://www.dw.de/us-couple-battles-russian-adoption-ban/a-16596137> (“The biggest wave of adoption took place during the 1990s, when pictures of starving children in overcrowded Russian orphanages shocked people in the West.”); Melissa Akin, *New Study Lists Abuses in Russia’s Orphanages*, MOSCOW TIMES (Dec. 17, 1998), <http://www.themoscowtimes.com/news/article/new-study-lists-abuses-in-russias-orphanages/282152.html>.

¹²⁴ UNICEF, UNICEF ANNUAL REPORT FOR RUSSIAN FEDERATION 2 (2010), *available at* http://www.unicef.org/about/annualreport/files/Russian_Federation_COAR_2010.pdf [hereinafter UNICEF 2010 Report] (referring to the 130,000 children who live in Russian state institutions as eighteen percent of the population of children without parental care); *see also What’s the Matter Here?—Russian Orphans & American Adoption*, THE ACCIDENTAL RUSSOPHILE (Mar. 2, 2006), <http://accidentalrussophile.blogspot.com/2006/03/whats-matter-here-russian-orphans.html> (estimating the number of orphans in Russia in 2005 as 700,000). The number may be conservative, as it fails to take into account homeless children living on the streets. UNICEF, SITUATION ANALYSIS OF CHILDREN IN THE RUSSIAN FEDERATION 2007 71-72 (2007) http://www.unicef.org/sitan/files/ru_en_situation-analysis_170907.pdf [hereinafter UNICEF 2007 Report] (noting the difficulty of ascertaining the precise number of street children, but citing Ministry of Interior statistics that in 2004, around 90,000 children had either left home or were missing).

¹²⁵ UNICEF 2010 Report, *supra* note 124, at 2.

¹²⁶ Max Fisher, *The Real Reason Russia wants to Ban Adoptions by ‘Dangerous’ American Families*, WASH. POST (Dec. 28, 2012, 11:19 AM), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/28/the-real-reason-russia-wants-to-ban-adoptions-by-dangerous-american-families/> (stating that eighty percent of Russian orphans are “social orphans”); Michael Schwirtz, *An Experiment in Orphan Care in Russia*, N.Y. TIMES (Oct. 1, 2008), http://www.nytimes.com/2008/10/01/world/europe/01iht-russia.4.16620179.html?pagewanted=all&_r=3& (stating that the majority of classified orphans in Russia have been “abandoned or taken from parents because of neglect or abuse”).

hardship associated with Russia's transition to federation,¹²⁷ alcohol abuse,¹²⁸ and a lack of state support particularly for parents of children with disabilities.¹²⁹ Further, Russia's guardianship system is "mainly punitive," or more focused on deprivation of parental rights than assisting parents to keep or regain custody of their children.¹³⁰ Although the annual number of children deprived of parental care is declining,¹³¹ a significant number of children are removed from their parents by court order due to abuse or neglect annually and only a small number of such children are returned to their parents within a year of removal.¹³²

Faced with very large numbers of children needing state care,

¹²⁷ UNICEF 2007 Report, *supra* note 124, at 70; David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 467 (2010) [hereinafter Smolin, *The Future and Past of Intercountry Adoption*] (noting that the economic collapse which followed the fall of communism "aggravated" the problem of abandonment); *see also* President Vladimir Putin, Annual Address to the Federal Assembly (May 10, 2006) (transcript available at http://archive.kremlin.ru/eng/speeches/2006/05/10/1823_type70029type82912_105566.shtml) (noting the ongoing difficulties faced by families in feeding their children).

¹²⁸ UNICEF 2007 Report, *supra* note 124, at 78 (noting references to alcohol abuse as a significant factor behind abandonment in studies of the issue); Kate Pickert, *Russian Kids in America: When the Adopted Can't Adapt*, TIME MAGAZINE (June 28, 2010), <http://www.time.com/time/magazine/article/0,9171,1997439-1,00.html> (noting that Russian orphans are more likely to have fetal alcohol syndrome than orphans from other sending countries).

¹²⁹ UNICEF 2007 report, *supra* note 124, at 78 (noting the "ease with which a mother may abandon a child at birth" and the lack of economic support for parents of children with disabilities or special medical needs); Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 127, at 467 (noting the significant incidence of abandonment of disabled children).

¹³⁰ Svetlana Smetanina, *Protecting Russia's Orphans*, RUSSIA BEYOND THE HEADLINES (Apr. 13, 2011), http://rbth.ru/articles/2011/04/13/protecting_russias_orphans_12692.html (noting the punitive nature of the Russian guardianship system, as contrasted with a regional approach in Tyumen, Russia, which is more "positive"—"[m]ost importantly, there is no talk of depriving these parents of their parental rights and putting their children in orphanages"); *see also*, Boris Altshuler, *Russia and the UN Committee on the Rights of the Child*, RIGHT OF CHILD (Oct. 6, 2010), available at <http://pravorebenka.narod.ru/eng/docs.htm> (arguing that preventive systems are not developed in Russia).

¹³¹ Letter from Boris Altshuler, Head of the "Right of the Child" NGO, to the U.N. Committee on the Rights of the Child 12 (Apr. 3, 2013), available at <http://pravorebenka.narod.ru/eng/docs.htm> [hereinafter Altshuler, *Alternative Report—2013*] (noting a decline from 127,000 in 2006 to 83,000 in 2012); *see also* [Family Code of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1996, No. 11, Item 939 [hereinafter Russian Family Code], art. 69 (providing that children can be removed from their parents if, inter alia, the parents suffer from chronic alcoholism or drug addiction); UNICEF 2007 Report, *supra* note 124, at 79-80 (calling for a reduction in judicial termination of parental rights).

¹³² Altshuler, *Alternative Report—2013*, *supra* note 131, at 12 (noting a figure of less than ten percent).

Russia traditionally prioritized institutional care over foster care.¹³³ Domestic adoption was likewise underdeveloped.¹³⁴ However, in the 2000s, partly in response to criticism in the 1990s of the quality of care in its institutions,¹³⁵ domestic Russian policy began to increasingly acknowledge the problem of social abandonment¹³⁶ and to accept and promote domestic foster care and adoption programs as alternatives to institutionalization.¹³⁷ For example, federal programs were put in place providing financial incentives for foster parents¹³⁸ and the Russian Family Code was amended to expressly enshrine a preference for family-style care (such as adoption and foster care) over institutionalization.¹³⁹ Today, the majority of Russia's designated

¹³³ UNICEF 2007 Report, *supra* note 124, at 79 (referring to the “paradigm of [the Russian] child welfare system” as involving a “relatively large network of institutions for childcare and long-term residence”); Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 127, at 466-67 (noting the government’s failure to “develop appropriate alternatives, such as foster care or other family-based care, for children who could not remain with their families”).

¹³⁴ *Id.* at 467; *see also*, Putin, *supra* note 127 (calling for increased domestic adoptions); Boris Altshuler, *Russian Domestic Adoption: Hopes for Future Development*, RIGHT OF CHILD (Oct. 15, 2002), available at <http://pravorebenka.narod.ru/eng/index.htm> (arguing that the Russian government has not effectively advocated family placement of orphans over institutionalization).

¹³⁵ *See* HUNT, *supra* note 123 (a widely publicized 1998 Human Rights Watch report on the conditions in Russian orphanages); *Russian Orphanages Struggle amid Economic Crisis*, CNN (Dec. 28, 1998, 1:24 PM), <http://www.cnn.com/WORLD/europe/9812/28/russia.orphans/index.html?s=PM:WORLD>.

¹³⁶ UNICEF 2007 Report, *supra* note 124, at 70 (noting the government’s 2002 pledge to fight the “social abandonment of children” and related policy measures).

¹³⁷ *Id.* at 80-81; *see* Putin, *supra* note 127 (calling for financial incentives for placing orphans in “family care”); Transcript of the President of Russia Meeting with his Cabinet (Feb. 5, 2007), available at http://archive.kremlin.ru/eng/text/speeches/2007/02/05/1855_type82913type82917_117804.shtml (noting the 2007 federal “Children and the Family” program aiming (inter alia) to “increase the number of orphaned children living in families rather than in state children’s homes”); Vladimir Putin, President of Russia, Speech at the Opening Ceremony for the Year of the Family in Russia (Dec. 24, 2007) (transcript available at http://archive.kremlin.ru/eng/text/speeches/2007/12/24/1039_type82912type84779_155422.shtml) (referring to legislation aimed at improving the foster care and guardianship process, and stating that the state cannot replace the family); Schwirtz, *supra* note 126 (reporting on an experimental orphan community near Moscow, established as a “model of reform” for Russia’s institution-focused welfare system); *Life in the Orphanage*, RUSS. ORPHANAGE OPPORTUNITY FUND (Nov. 14, 2011), http://www.roofnet.org/orphanage_life (noting that adoption and foster care system initiatives are “steadily gaining acceptance in Russia”).

¹³⁸ UNICEF 2007 Report, *supra* note 124, at 81 (noting increased financial support for foster families following President Putin’s 2006 call for enhanced aid for children without parents); *see generally Information for Adoptive Parents*, RUSS. FEDERATION MINISTRY OF EDUC. AND SCI., <http://www.usynovite.ru/> (last visited Mar. 7, 2014) (providing support and information for current and prospective foster and adoptive families within Russia).

¹³⁹ Russian Family Code, *supra* note 131, art. 123(1).

orphans are cared for in family settings,¹⁴⁰ but there are still a large number—100,000 as of 2012¹⁴¹—resident in institutions.¹⁴² Additionally, despite some state measures aimed at reducing the incidence of abandonment and involuntary deprivation of parental rights, UNICEF reported in 2010 that “the inflow of children into state care has not declined,”¹⁴³ meaning that there is a constant turnover of parentless children and social orphans into and out of the system.

In this context, intercountry adoption is one aspect of Russia’s gradual push away from institutionalization and towards family care. However, intercountry adoption as a partial solution to Russia’s child welfare problems is controversial and divisive. Nationalist sentiment speaks against the care of Russian children by foreigners as denigrating to Russian pride.¹⁴⁴ Some have gone so far as to analogize it to “cultural genocide.”¹⁴⁵ Adding fuel to popular anti-adoption feelings are occasional rumors of corruption and of Westerners “buying”

¹⁴⁰ *The Number of Children without Parental Care, Statistics—2011*, RUSS. FEDERATION MINISTRY OF EDUC. AND SCI., <http://www.usynovite.ru/statistics/2011/1/> (reporting that of 82,117 children reported to be without family care in 2011, 67,500 were transferred to family-based care including through adoption, paid and unpaid foster placements, and trusteeships); *see also*, UNICEF 2010 Report, *supra* note 124, at 2 (noting that of children without parental care, the majority live in family settings); UNICEF 2007 Report, *supra* note 124, at 70 (noting that seventy-four percent of orphans had been placed in family placements as of 2004).

¹⁴¹ *Most Orphanages to be Closed in Russia, Children to be Adopted*, ITAR-TASS NEWS AGENCY (Feb. 28, 2012, 11:31 AM), <http://www.itar-tass.com/en/c154/353743.html>.

¹⁴² UNICEF 2007 Report, *supra* note 124, at 70-71 (noting that institutional care grew by 4.8% between 2000 and 2004); Schwirtz, *supra* note 126 (reporting that as of 2008, over 200,000 “orphans” lived in institutions in Russia, the quality of which varied widely; noting recent abuse scandals at a Yekaterinburg hospital); UNICEF 2010 Report, *supra* note 124, at 2 (stating that 130,000 “orphans” live in state institutions); *see also* Altshuler, *supra* note 130 (arguing that there are strong anti-reform interest groups in Russia who are financially interested in preserving the traditional orphan-producing structure).

¹⁴³ UNICEF 2010 Report, *supra* note 124, at 2; *cf.* Altshuler, *Alternative Report—2013*, *supra* note 131 (noting a decline in the number of children in institutions from 2003 to 2009, but attributing this to the decline of Russia’s child population generally).

¹⁴⁴ Hora, *supra* note 109, at 1022 (“The Russians are deeply sensitive to any suggestions that they cannot look after their own needy children.”); Donovan M. Steltzner, Note, *Intercountry Adoption: Toward a Regime that Recognizes the “Best Interests” of Adoptive Parents*, 35 CASE W. RES. J. INT’L L. 113, 125 (2003); Michael Mainville, *Prospective Parents Flock to Russia to Adopt, But Some Balk at Westerners ‘Buying’ Children*, N.Y. SUN, Nov. 16, 2004, available at <http://www.nysun.com/foreign/prospective-parents-flock-to-russia-to-adopt-but/4877/> (referring to the “deep embarrassment many Russians feel that the country is exporting its children”).

¹⁴⁵ Steltzner, *supra* note 144, at 125.

Russian children.¹⁴⁶ Russia's Children's Ombudsman, Pavel Astakhov, is a particularly vocal opponent of intercountry adoption¹⁴⁷ who has repeatedly voiced a nationalist-sounding view that "Russia's children" should be kept in Russia¹⁴⁸ and, in 2011, addressed the Supreme Court with a request to introduce a moratorium on foreign adoptions.¹⁴⁹ Prime Minister Dmitry Medvedev, on the other hand, has expressed the view that foreign adoptions are not of themselves problematic, given the extent of Russia's child welfare problems.¹⁵⁰ The Russian Family Code provides that the adoption of children by foreigners shall only occur when it is impossible to bring a child into a Russian family,¹⁵¹ thus apparently prioritizing in-country (temporary) foster care over intercountry adoption.

3. Failed Adoptions and Subsequent Reform

The international adoption regime has been beset over the years by various scandals and controversies, primarily relating to stealing, kidnaping and buying babies.¹⁵² Russia has remained fairly free of the taint of these scandals because it is widely accepted that Russian

¹⁴⁶ Mainville, *supra* note 144 (noting, in 2004, of politicians making such claims—"[i]t's a dirty country that sells its children" (citing Communist Party deputy, Nikolai Kondratenko)); Hora, *supra* note 109, at 1022 ("Media accounts of international adoption in Russia and the United States are permeated with suspicion and mistrust."); Joan Oleck, *Adoptions: From Russia—With Red Tape*, BLOOMBERG BUSINESSWEEK (May 18, 1998), <http://www.businessweek.com/1998/20/b3578146.htm> (noting "wild rumors such as one about Americans selling adopted babies' organs, have touched off a backlash against foreigners").

¹⁴⁷ See generally, David M. Herszenhorn, *Russian Who Led U.S. Adoption Ban has Flair for Celebrity and Controversy*, N.Y. TIMES (Feb. 22, 2013), <http://www.nytimes.com/2013/02/23/world/europe/pavel-astakhov-the-man-behind-us-adoption-ban.html?pagewanted=all>.

¹⁴⁸ *Quotes of the Day*, TIME MAG. (Apr. 16, 2010), <http://www.time.com/time/quotes/0,26174,1982523,00.html> ("We must, as much as possible, keep our children in our country.").

¹⁴⁹ Maria Domnitskaya, *Pavel Astakhov: Russia with No Orphans—Such It Will Be*, THE VOICE OF RUSSIA (Dec. 29, 2011, 3:43 PM), <http://english.ruvr.ru/2011/12/29/63119494/>.

¹⁵⁰ *Working Meeting with Pavel Astakhov and Yury Chaika*, PRESIDENT OF RUSSIA WEBSITE (Dec. 3, 2011), <http://eng.kremlin.ru/news/3160>.

¹⁵¹ Russian Family Code, *supra* note 131, art. 124(4) ("The adoption of children by foreign citizens or by stateless persons shall be admitted only in cases when it is impossible to give these children for upbringing into the families of citizens of the Russian Federation, who permanently reside on the territory of the Russian Federation, or for adoption to the children's relatives, regardless of the citizenship or the place of residence of these relatives.").

¹⁵² See generally, Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 127 (describing the incidence of child buying, stealing, kidnaping and trafficking within the international adoption system, with particular attention to Cambodia, India and Guatemala).

adoptees are in fact “legitimately eligible for adoption.”¹⁵³ However, while thousands of Russian adoptions have by all reports been successful, a smaller number of well-publicized adoptions have ended horrifically. Russia claims that at least twenty Russian children have been killed, whether intentionally or otherwise, by their American parents over the years.¹⁵⁴ Further, as David Smolin points out, these deceased children “represent the extremes of a much broader phenomenon of post-institutionalized Russian children doing very poorly in their new environments.”¹⁵⁵ A much larger number of Russian adoption placements to the U.S. have failed, with children being re-institutionalized, hospitalized, surrendered to the U.S. foster care system or privately re-adopted.¹⁵⁶

Such failed adoptions have been well-documented elsewhere.¹⁵⁷ A few examples will serve to illustrate the variety of cases that have sparked concern and outrage in both Russia and the U.S.:

- In 1996, David Polreis, Jr. died at the age of two, six months after his adoption by a Colorado family. His adoptive mother was sentenced to twenty-two years in prison for child abuse resulting in David’s death. Her

¹⁵³ Smolin, *Child Laundering*, *supra* note 57, at 125 (dividing sending nations into three groups—those with consistently clean reputations, such as China and South Korea; those such as Russia with few problems relating to child laundering, but ongoing issues with bribery; and those with significant child laundering issues); *see also* Hora, *supra* note 109, at 1021 (noting, as of 2002, issues with bribery and corruption in Russian intercountry adoption); *but see* UNICEF 2007 Report, *supra* note 124, at 74 (noting general human trafficking problems in Russia, as an “origin, transit and destination country for women, men, and children trafficked for sexual and labour exploitation”).

¹⁵⁴ *Russia Slams US Child Abuse ‘Double Standards’*, RIA NOVOSTI (Dec. 13, 2012, 12:50 PM), <http://en.rian.ru/russia/20121213/178128109.html> (citing Russia’s children ombudsman Pavel Astakhov); Andrew Hiller, *Russia Awaits Investigation into Adopted Boy’s ‘Shocking’ Death in Texas*, VOICE OF RUSSIA (Feb. 19, 2013), http://voicerrussia.com/radio_broadcast/70924886/105272181/ (transcript of interview with Konstantin Dolgov, special representative for human rights in the Russian Foreign Ministry: “If they find that the boy [Max Shatto] was killed by his American parents, it’ll be number twenty [of Russian adoptees killed in America]!”); *see also* *Russian Adoption Ban Not Linked to Magnitsky Act—Medvedev*, *supra* note 13. According to Moscow, between 1991 and 2005, 1,220 children have died while in the care of Russian adoptive parents. Anna Arutunyan, *Who Supports the Ban—And Why*, MOSCOW NEWS (Dec. 24, 2012, 9:52 PM). These equally tragic incidents are beyond the scope of this paper.

¹⁵⁵ Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 127, at 474.

¹⁵⁶ *Id.* (noting the large number of Russian adoptees in the U.S. who have been “institutionalized, hospitalized, placed into the United States foster care system, or otherwise have failed to adapt to their adoptive placements”); Megan Twohey, *The Child Exchange*, REUTERS (Sept. 11, 2013), <http://www.reuters.com/investigates/adoption/#article/part1>; *see also* Pickert, *supra* note 128.

¹⁵⁷ *See* Allen, *supra* note 109, Part I(B); Pickert, *supra* note 128; Smolin, *The Future and Past of Intercountry Adoption*, *supra* note 127, at 474.

defense, that David suffered from Reactive Attachment Disorder which caused him to inflict pain on himself, was refuted by evidence that his mother had routinely beat him. The sentencing judge acknowledged David's illness but commented that society "cannot accept any less protection for its troubled children' than for those who develop normally."¹⁵⁸

- In 2001, Viktor Matthey died at the age of seven, ten months after his adoption by a New Jersey family, of cardiac arrest due to hypothermia, after being "imprisoned" in an unheated and damp pump room by his adoptive parents.¹⁵⁹ He also suffered malnutrition and physical beatings.¹⁶⁰ His parents' defense was that Viktor "self-injured."¹⁶¹ They were sentenced to ten-year prison terms for child abuse and four year sentences after pleading guilty to reckless manslaughter.¹⁶²
- In 2003, Jessica Hagmann died at the age of two from smothering. Her mother, who claimed she accidentally smothered Jessica while trying to calm a tantrum, was sentenced to probation and two suspended terms.¹⁶³
- In 2003, Masha Allen was rescued from her adopter, Matthew Mancuso, who had adopted Masha at the age of four and had been raping and sexually exploiting her via the Internet for nearly five years.¹⁶⁴ Mancuso, a divorced father who (it was later discovered) had molested his own

¹⁵⁸ Katharine Q. Seelye, *Woman Sentenced to 22 Years in Death of Adopted Son*, N.Y. TIMES (Sept. 23, 1997), <http://www.nytimes.com/1997/09/23/us/woman-sentenced-to-22-years-in-death-of-adopted-son.html?pagewanted=all&src=pm&pagewanted=print>.

¹⁵⁹ Matthew Reilly & Saed Hindash, *The Short Life of Viktor Matthey*, STAR-LEDGER (Oct. 28, 2001), <http://dartcenter.org/content/short-life-viktor-matthey#.UVzYvJNJM1I>.

¹⁶⁰ Elizabeth Evans, *Adopted Child's Death a Familiar Tragedy*, YORK DISPATCH (Aug. 3, 2010), http://www.yorkdispatch.com/local/ci_14633756.

¹⁶¹ *Id.*

¹⁶² Laura Craven, *Mattheys Sentenced to 4 Years for Viktor's Death*, NJ.COM BLOG (May 10, 2007), http://blog.nj.com/ledgerupdates/2007/05/mattheys_sentenced_to_4_years.html.

¹⁶³ Russell Working, *Adoptee Deaths Rare, Experts Say*, CHI. TRIB. (May 21, 2004), http://articles.chicagotribune.com/2004-05-21/news/0405210350_1_adoptive-families-adam-pertman-emotional-disorders/2.

¹⁶⁴ *Heroic Young Girl Tells of her Child Porn Ordeal*, ABC NEWS (Dec. 1, 2005), <http://abcnews.go.com/Primetime/LegalCenter/story?id=1364110#.UVzjjJNJM1I>.

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daughter,¹⁶⁵ had found Masha through an American adoption agency after requesting a “5- or 6-year-old Caucasian girl.”¹⁶⁶

- In 2005, Nina Victoria Hilt died at the age of two. Her adoptive mother admitted punching and kicking the girl to death because “she was not behaving and not listening and just crying.”¹⁶⁷
- In 2009, Nathaniel Craver died at the age of seven from a severe head injury. His parents said he had serious mental and emotional problems that caused him to repeatedly injure himself. They were acquitted of murder but convicted for involuntary manslaughter and released on account of time already served.¹⁶⁸
- In 2010, Justin Hansen, age seven, was sent back to Moscow, alone, with a letter from his adoptive mother stating both that she no longer wished to parent him¹⁶⁹ and that he had severe psychological problems. Ms. Hansen claimed that the Russian orphanage authorities had misled her regarding the child’s “mental stability and other issues.”¹⁷⁰ Ms. Hansen was subsequently ordered to pay \$150,000 in child support for Justin (now Artyom) who

¹⁶⁵ David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 22 (2007); *Sexual Exploitation of Children Over the Internet: Follow-up Issues to the Masha Allen Adoption: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 109th Cong. 106-13 (2006), available at <http://poundpuplegacy.org/files/SexualExploitationHearing.txt>.

¹⁶⁶ *Heroic Young Girl Tells of her Child Porn Ordeal*, *supra* note 164.

¹⁶⁷ Theresa Vargas, *Mother Admits Killing Daughter*, WASH. POST (Mar. 2, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01/AR2006030102380.html>.

¹⁶⁸ David M. Herszenhorn, *Russia Attacks Sentence of Adoptee’s Parents*, N.Y. TIMES (Nov. 19, 2011), http://www.nytimes.com/2011/11/20/world/europe/russia-angry-at-penalty-against-dead-adopted-boys-parents.html?_r=0; Rick Lee, *Cravers Sentenced in Death of Adopted Russian Son*, YORK DAILY RECORD (Nov. 21, 2011, 12:09 PM), http://www.ydr.com/ci_19365008.

¹⁶⁹ Will Stewart, *Fury as U.S. Woman Adopts Russian Boy, 7, Then Sends Him Back Alone with Note Saying: ‘I Don’t Want Him Anymore’*, DAILY MAIL (Apr. 9, 2010, 7:29 PM), <http://www.dailymail.co.uk/news/article-1264744/American-sends-adopted-Russian-boy-behavioural-problems.html> (including a picture of the accompanying letter).

¹⁷⁰ *Id.* See also Damien Cave, *In Tenn., Reminders of a Boy Returned to Russia*, N.Y. TIMES (Apr. 10, 2010), <http://www.nytimes.com/2010/04/11/us/11adopt.html> (noting that the Hansens have “portrayed themselves as victims,” claiming that Justin had threatened to kill family members).

now lives in a Russian group home.¹⁷¹

- In 2012, Daniel Sweeney, age eight, ran away from his adoptive parents, Matthew and Amy Sweeney, five years after his adoption. Authorities found signs of severe beatings on his body.¹⁷² His parents were indicted in January 2013.¹⁷³
- In 2013, Max Shatto, age three, died after being delivered to a hospital with multiple injuries.¹⁷⁴ Russia's child rights ombudsman, Pavel Astakhov, accused Max's parents of beating him to death.¹⁷⁵ A Texas grand jury ruled that there was insufficient evidence to bring any charges, and the District Attorney noted that Max's pre-existing bruises appeared to be self-inflicted.¹⁷⁶

Some failed adoptions, such as the Masha Allen case, clearly represent gross cruelty and deviance on the part of adoptive parents. However, the majority of failed adoptions are less black-and-white, and involve a multitude of intersecting contributing factors. These include: problems with parental screening;¹⁷⁷ incomplete disclosure of the

¹⁷¹ *Tennessee Woman Appeals Court Order to Pay \$1,000-a-month Child Support for Adopted Son She Sent BACK to Russia*, DAILY MAIL (Aug. 17, 2012, 8:19 PM), <http://www.dailymail.co.uk/news/article-2189797/Tennessee-woman-appeals-court-ordered-child-support-adopted-boy-sent-BACK-Russia.html> (noting that the adoption agency who processed Justin's adoption brought the action "to deter others from doing anything similar" and to send a message to Russia that accountability systems are in place). Note that the (subsequent) Russian-American Agreement, discussed *infra*, expressly provides that an adoptive parent is obligated to "bear full responsibility for the care of the child and for his or her upbringing." Agreement Regarding Cooperation in Adoption of Children, *supra* note 15, art. 11(1).

¹⁷² Justin Karp et al., *Matthew and Amy Sweeney Arrested, Accused of Repeated Abuse of Son*, ABC NEWS (July 19, 2012, 1:21 PM), <http://www.wjla.com/articles/2012/07/matthew-and-amy-sweeney-arrested-accused-of-repeated-abuse-of-son-78001.html>.

¹⁷³ *Americans to Stand Trial for Abusing Russian Child*, VOICE OF RUSSIA (Jan. 8, 2013, 4:12 PM), http://english.ruvr.ru/2013_01_08/Americans-to-stand-trial-for-abusing-Russian-child/.

¹⁷⁴ *U.S. Court Convinced Maxim Kuzmin's Death Accidental*, PRAVDA.RU (Mar. 19, 2013, 3:19 PM), http://english.pravda.ru/news/hotspots/19-03-2013/124102-maxim_kuzmin-0/.

¹⁷⁵ *Kremlin's Child Advocate 'Upset' as US Parents Cleared*, RIA NOVOSTI (Mar. 19, 2013), <http://en.rian.ru/world/20130319/180106575.html>.

¹⁷⁶ Betsy Blaney, *Prosecutors: No Charges in Adopted Russian Boy's Death*, USA TODAY (Mar. 18, 2013, 4:46 PM), <http://www.usatoday.com/story/news/nation/2013/03/18/adopted-russian-boy-texas/1997631/>.

¹⁷⁷ See generally Allen, *supra* note 109, at 1704 (noting the Masha Allen case as an example of "the system's failure to discover red flags in a prospective adopter's background"); *New Adoption Rules Urged after Murder*, CHI. TRIB. (July 13, 2005), http://articles.chicagotribune.com/2005-07-13/news/0507130076_1_adoptions-russian-middlemen (reporting the Russian call for psychological testing for prospective adoptive parents of Russian children, in the wake of the Nina Hilt case).

special needs of (especially older) institutionalized children;¹⁷⁸ and inadequate pre-adoption training¹⁷⁹ and post-adoption support¹⁸⁰ for parents in light of those needs. As a result, a disproportionate number of intercountry adoptions from Russia, as compared to other sending countries, have resulted in dissolution¹⁸¹—primarily due to behavioral and attachment issues relating to institutionalization—or death.¹⁸²

The Russian government has responded to various incidents of adoption failures with political statements of condemnation. The repeated rhetoric is that Russian children in America are not adequately

¹⁷⁸ Vargas, *supra* note 167 (noting that the high number of Russian adoptee deaths “could be in part because many of the Russian children who are adopted have behavioral and developmental problems either passed to them from parents with poor prenatal care, including fetal alcohol syndrome, or the result of their growing up in orphanages. Adoptive parents . . . are given little preparation for what to expect.”); Cindi Lash, *Overwhelmed Families Dissolve Adoptions: More American Parents Find They Can’t Cope with Troubled Russian Children*, POST-GAZETTE (Aug. 14, 2000), <http://old.post-gazette.com/headlines/20000814russiadaytwo1.asp> (noting a growing incidence of dissolution of Russian and Eastern European adoptions due to psychological problems associated with institutionalization).

¹⁷⁹ Deborah Tedford, *Russian Case Spotlights Potential Adoption Risks*, NAT’L PUB. RADIO (Apr. 13, 2010, 2:42 PM), <http://www.npr.org/templates/story/story.php?storyId=125903954> (noting that [untrained] adoptive parents can exacerbate the “wounds of institutional kids” by overstimulation); *New Adoption Rules Urged after Murder*, *supra* note 177 (reporting the Russian Education Ministry’s call for mandatory training programs for prospective adoptive parents, in the wake of the Nina Hilt case).

¹⁸⁰ See Seelye, *supra* note 158 (case of David Polreis Jr.); Working, *supra* note 163 (case of Jessica Haggman); Vargas, *supra* note 167 (case of Nina Hilt); see generally Diane Mapes, *It Takes More than Love: What Happens with Adoption Fails*, NBC NEWS TODAY (Aug. 1, 2012, 6:14 AM), <http://www.today.com/moms/it-takes-more-love-what-happens-when-adoption-fails-918076> (discussing the dissolution of adoptions due to parents’ inability to cope with the special psychological needs of older adopted children).

¹⁸¹ CHILD WELFARE INFO. GATEWAY, *Adoption Disruption and Dissolution* (June 2012), available at https://www.childwelfare.gov/pubs/s_disrup.pdf (defining dissolution as the severance of the legal relationship between adoptive parent and adopted child after the adoption is legally finalized). Dissolution results in privately- or state-arranged foster care or adoption by new care-givers. On the disproportionate number of Russian adoption dissolutions, see Lash, *supra* note 178 (reporting “a much higher incidence of problem cases’ that lead to failed adoptions among Russian and Eastern European children”); see also *Russian Orphans Present Unique Challenges: One Family’s Story*, RIA NOVOSTI (Dec. 14, 2012, 4:37 AM), <http://en.ria.ru/russia/20121214/178147175.html> (“Adoption experts say Russian orphans are more likely to exhibit [self-soothing] behaviors because they are generally kept in state care for longer periods of time than children in some other countries. They also are institutionalized, rather than being housed in smaller, foster care homes . . . and are more often removed from their homes by authorities rather than being abandoned at birth . . . ‘[T]here is a higher incidence in Russia of things like exposure to drugs, abuse, neglect, and fetal alcohol syndrome.’”).

¹⁸² Vargas, *supra* note 167 (“Adoption experts said they could not point to as many deaths among children adopted from any other country.”).

protected from negligence and abuse, in part due to lenient sentences.¹⁸³ Failed adoptions have also prompted occasional threats of a moratorium on intercountry adoptions to American parents,¹⁸⁴ which have at times resulted in delays in processing adoption orders¹⁸⁵ and regional bans.¹⁸⁶

¹⁸³ Barry, *supra* note 9 (quoting the first deputy chief of the pro-Kremlin United Russia party, responding to the acquittal of Miles Harrison, as saying, “When we give our children to the West and they die, for some reason the West always tells us it was just an accident.”); Herszenhom, *supra* note 168 (citing the Russian Foreign Ministry describing the Craver verdict as “amazingly and flagrantly irresponsible”); *Russian Orphans Present Unique Challenges*, *supra* note 181 (“[T]here is still frustration among many in the Russian Federation about what they see as a double standard that allows adoptive US parents who harm their Russian children to dodge the harsher penalties many Russian officials feel they deserve.”); Press Release, The Ministry of Foreign Affairs of the Russian Federation, *supra* note 11 (referring to the Miles Harrison acquittal as “repulsive and unprecedented,” and inferring a connection between Chase Harrison’s status as a Russian adoptee, and the lack of adequate punishment for the tragedy of his death); Letter from Konstantin Dolgov, Russian Foreign Ministry’s Special Representative on Human Rights, to Senator Mary Landrieu (Jan. 14, 2013), available at [http://assets.nationaljournal.com/pdf/Dolgov-Landrieu%20\(Russian\).pdf](http://assets.nationaljournal.com/pdf/Dolgov-Landrieu%20(Russian).pdf) (English translation available at http://www.ccaainstitute.org/images/stories/pdf/international_adoption/english%20translation%20-%20russian%20response%20to%20dec%2021%20congressional%20letter.pdf) [hereinafter *Letter to Senator Landrieu*] (“We cannot accept outrageous cases of lawlessness, when the murderers of Russian children were released directly in the courtroom or when they got away with probation, while we learnt from the mass media that the U.S. justice can demonstrate due severity in cases of abuse against minor U.S. citizens.”).

¹⁸⁴ Shannon Thompson, *The 1998 Russian Federation Family Code Provisions on Intercountry Adoption Break the Hague Convention Ratification Gridlock: What Next? An Analysis of Post-Ratification Ramifications on Securing a Uniform Process of International Adoption*, 9 *TRANSNAT’L L. & CONTEMP. PROBS.* 703, 705 (1999) (noting legislation considered by the Russian Duma in 1998 to “restrain or practically restrict international adoption of Russian children”); John Kass, *No Returns or Exchanges: Case of Boy Sent Back to Moscow Alone Reopens Debate on Russian Adoptions*, *CHI. TRIB.* (Apr. 13, 2010), http://articles.chicagotribune.com/2010-04-13/news/ct-met-kass-0414-20100413_1_adoptive-parents-alex-pavlis-russian-orphanage (reporting the Russian foreign minister’s response to the 2010 Hansen case: “We have taken the decision to suggest a freeze on any adoptions to American families until Russia and the U.S. sign an international agreement[.]”); Anna Redyukhina, *Saving Foreign Adoption*, *WASH. POST* (June 22, 2010), <http://russianow.washingtonpost.com/2010/06/saving-foreign-adoption.php>; Vargas, *supra* note 167 (noting “Russian officials initially called for a moratorium on U.S. adoptions [following Nina Hilt’s 2006 death] although they have eased back on the threat”); *Russia to Halt U.S. Adoptions Amid Domestic Violence Claims*, *USA TODAY* (Feb. 11, 2012), <http://usatoday30.usatoday.com/news/world/story/2012-02-11/Russia-US-adoptions/53048064/1> (discussing a February 2012 call for suspension of American adoptions following an “incessant string of crimes”).

¹⁸⁵ See, e.g., U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *INTERCOUNTRY ADOPTION, Notice: Regional Suspensions on Adoption Processing in Russia* (Mar. 1, 2012) (noting that the Department of State has received reports of a “de facto freeze” on adoptions to the U.S. from some parts of Russia); *Judge Upholds Child Support in Russian Adoption*, *COLUM. DAILY HERALD* (July 13, 2012), <http://columbiadailyherald.com/sections/news/state/judge-upholds-child-support-russian-adoption.html> (noting that the Hansen case “contributed to a decision by Russia in 2010 to delay some adoptions by U.S. parents”).

More substantively, a number of legislative revisions of the Russian intercountry program have taken place. For example, in 1998, partly in response to a 1997 incident involving alleged abuse of Russian adoptees by their American parents on the flight from Russia to the U.S.,¹⁸⁷ the Russian Family Code was amended to increase state control over adoptions, and ban the involvement of intermediaries or “facilitators”¹⁸⁸ in light of problems relating to corrupt intermediary practices and charges.¹⁸⁹ In 2000, a Presidential decree required Russian government accreditation of foreign adoption agencies.¹⁹⁰ In 2005, the length of time a child must remain in the state orphan database before adoption by a foreigner increased from three months to six months.¹⁹¹ Partly as a result of these measures, adoptions of Russian children to America peaked in 2004, and have been steadily declining since then;¹⁹² however, this decline has not been accompanied by an increase in Russian domestic adoptions.¹⁹³

The most significant overhaul of Russia-U.S. adoptions took place in 2012. Precipitated by the Justin Hansen incident,¹⁹⁴ a year of

¹⁸⁶ *Siberians Ban Americans from Adopting Russian Children*, THE VOICE OF RUSSIA (July 5, 2012), http://english.ruvr.ru/2012_07_05/Siberians-bar-Americans-from-adopting-Russian-children/ (reporting a Kemerovo Region bill preventing Americans from adopting children on the territory of the region, in response to three deaths of Kemerovo Region children in American families since 1990).

¹⁸⁷ Kleem, *supra* note 70, at 331.

¹⁸⁸ Russian Family Code, *supra* note 131, art. 126.1(1) (enacted by Federal Law No. 94-FZ of June 27, 1998) (“Any intermediary activity in the adoption of children, that is, any activity of third parties with the purpose of selecting and transferring children for adoption in the name and in the interest of persons wishing to adopt children shall be impermissible.”); *see also*, Thompson, *supra* note 184, at 710 (discussing the amendments).

¹⁸⁹ Allen, *supra* note 109, at 1713-14 (discussing problems relating to corrupt facilitators).

¹⁹⁰ Hora, *supra* note 109, at 1019 (“On March 29, 2000, Russian President Vladimir Putin signed a decree . . . [that] requires that foreign adoption agencies be accredited by the Russian government and establish offices in Russia.”); *cf.* Anna Arutunyan, *Foreign Adoptions Down in Russia as Foster Care Grows*, MOSCOW NEWS (Nov. 27, 2008, 11:55 PM), <http://themoscownews.com/news/20081127/55359067.html> (noting new accreditation rules for foreign adoption agencies coming into effect in 2007).

¹⁹¹ Laura Ashley Martin, Comment, “*The Universal Language Is Not Violence. It’s Love[:]*” *The Pavlis Murder and Why Russia Changed the Russian Family Code and Policy on Foreign Adoptions*, 26 PENN ST. INT’L L. REV. 709, 724-25 (2008); Russian Family Code, *supra* note 131, art. 124.4.

¹⁹² *Statistics: Russia*, U.S. DEP’T OF STATE, INTERCOUNTRY ADOPTION, http://adoption.state.gov/about_us/statistics.php (showing a peak of 5,862 adoptions in 2004, down to 1,079 in 2010).

¹⁹³ Arutunyan, *supra* note 190 (noting that the decline in Russian adoptions to the U.S. “do[es] not indicate that Russians are adopting more children” but rather that the number of children cared for in alternative in-country foster care initiatives has increased).

¹⁹⁴ Allen, *supra* note 109, at 1693.

negotiations¹⁹⁵ between Russia and the U.S. resulted in the signing of the Russian-American Agreement¹⁹⁶ on July 13, 2011, which entered into force on November 1, 2012.¹⁹⁷ The Russian-American Agreement aimed to “strengthen procedural safeguards” in the U.S.-Russia adoption process,¹⁹⁸ and addressed many of the screening, training and monitoring concerns arising from aforementioned cases of failed adoptions.¹⁹⁹ Moreover, the Agreement acknowledges Russian concerns about the equal treatment of Russian children in America, by expressly emphasizing the equality of adopted children regardless of their origin.²⁰⁰

¹⁹⁵ *FAQs: Bilateral Adoption Agreement with Russia*, U.S. DEP'T OF STATE, INTERCOUNTRY ADOPTION (Oct. 15, 2012), http://adoption.state.gov/content/pdf/Russia_Bilateral_Adoption_Agreement_FAQs1012.pdf (noting that negotiations began in April 2010).

¹⁹⁶ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15.

¹⁹⁷ *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 195.

¹⁹⁸ *Id.*

¹⁹⁹ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15, arts. 8(1), 10(1)(b) (pre-approval state screening of adoptive parents' suitability and eligibility, taking into account “all information available about the child matched with the prospective adoptive parents” including medical and special needs); *id.* art. 10(1)(b) (psycho-social preparation of prospective adoptive parents that takes into account “detailed information about the child’s social situation and health, and his or her cultural and social environment in the Country of Origin”); *id.* arts. 14, 5 (requiring that the Sending Country be informed and consulted on post-adoption dissolutions and consent to subsequent placements); *id.* art. 5(1) (post-adoption monitoring, including the submission of reports to the Country of Origin); *see generally* Allen, *supra* note 109, at 1727-31 (discussing the major changes to the Russia-U.S. adoption process proposed by the treaty); *see also* *Russia to Halt U.S. Adoptions Amid Domestic Violence Claims*, *supra* note 184 (reporting that after the signing of the U.S.-Russia Agreement, but prior to its ratification, Russia briefly called for a further bilateral accord allowing Russian monitors to carry out post-adoption inspections in American homes).

²⁰⁰ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15, art. 13(2) (“[A child adopted in accordance with this Agreement] shall have the same rights and protections as any other adopted child who has the status of a citizen in the territory of the Receiving Country.”); *see also id.* pmb. (“Recognizing that a child adopted in accordance with the procedures established by this Agreement should be provided with the same advantages and the same rights that are guaranteed to him or her as a citizen or lawful permanent resident of the Receiving Country (whichever applies).”).

C. January 1, 2013: The Adoption Ban

The Russian government expressed its commitment to continued cooperation on improving the intercountry adoption process as recently as September 2012.²⁰¹ However, before the Russian-American Agreement had been fully implemented,²⁰² and before its impact on the adoption process had been felt or tested,²⁰³ Russia-U.S. adoptions came to an abrupt halt with the passing of the Adoption Ban on December 28, 2012,²⁰⁴ which took effect on January 1, 2013.²⁰⁵ The Russian-American Agreement, according to its terms, will remain in force for one year from Russia's notification of its termination.²⁰⁶ There was some speculation that because of this provision, Russia would be obliged to allow adoptions to continue until 2014,²⁰⁷ but the Kremlin

²⁰¹ Press Release, Embassy of the U.S., Moscow, Russia, Joint Statement of the U.S.-Russian Consultations on the Bilateral Agreement Regarding Cooperation in Adoption of Children (Sept. 28, 2012) ("The United States and the Russian Federation confirm their mutual preparedness to continue cooperation on an intercountry adoption process that provides better safeguards for adoptive children[.]"); see also *The Russia-USA Child Adoption Agreement Successfully Went Through the Ratification Process*, CHILDREN'S RIGHTS COMMISSIONER FOR THE PRESIDENT OF THE RUSSIAN FEDERATION (2011), <http://english.rfdeti.ru/display.php?id=4226> (Children's Ombudsman Pavel Astakhov praising the Agreement as "offer[ing] more guarantees" of Russian-born children adopted abroad).

²⁰² *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 195 (noting that the Russian government expected adoption agency authorization procedures to become effective on or about March 1, 2013).

²⁰³ See generally Allen, *supra* note 109, at 1737-40 (discussing U.S.-Russia Agreement's likelihood of success).

²⁰⁴ O Merakh Vozdeistviia na Lits, Prichastnykh k Narusheniiam Osnovopolagaiushchikh Prav i Svobod Cheloveka, Prav i Svobod Grazhdan Rossiiskoi Federatsii [On Sanctions Against Persons Involved in Violations of Fundamental Human Rights and Freedoms of Citizens of the Russian Federation] [SOBRANIE ZAKONODATEL'STVA [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 272, Item F-3.

²⁰⁵ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, INTERCOUNTRY ADOPTION, *Alert: Legislation to Ban Intercountry Adoption by U.S. Families, Intercountry Adoption* (Jan. 3, 2013), available at http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_8 (noting that the Adoption Ban went into effect on January 1, 2013).

²⁰⁶ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15, art. 17(5) ("This agreement shall remain in force until one year from the date that one of the parties informs the other party through diplomatic channels of its intention to terminate this agreement.").

²⁰⁷ Ellen Barry, *Russia to Let a Few U.S. Adoptions Go On*, N.Y. TIMES (Jan. 10, 2013), http://www.nytimes.com/2013/01/11/world/europe/russia-to-allow-some-us-adoptions.html?_r=0 (quoting a prominent Russian lawyer as stating that adoptions should continue due to the precedence of the international treaty over the Adoption Ban); *Moscow: Americans can Adopt Russian Kids Until 2014*, CNN (Jan. 11, 2013, 11:10 AM), <http://www.cnn.com/2013/01/10/world/europe/russia-us-adoptions>; *Russia-U.S. Adoption Deal to Last Till 2014—Putin Spokesman*, RIA NOVOSTI (Jan. 10, 2013, 8:10 PM), http://en.rian.ru/russia/20130110/178694199/Bilateral_Russia-US_Adoption_Agreement.html.

has refuted this.²⁰⁸ According to the U.S. State Department, there were 884 adoptions in process that were interrupted by the ban, 337 of which involving parents who had already met the prospective adoptee.²⁰⁹ In the wake of the ban, the U.S. expressed hope that cases that had begun to be processed would be seen to completion “in the spirit of the original agreement and out of humanitarian concern.”²¹⁰ Russia’s Supreme Court issued a letter in January 2013 stating that adoptions that had been court-approved²¹¹ prior to the New Year would be completed, notwithstanding the ban, and around twenty-five such adoptions were

²⁰⁸ Barry, *supra* note 207 (quoting Kremlin press secretary: “There is no direct link between [the bilateral treaty] and the ban on adoption The agreement is not something that makes adoption obligatory. It regulates the practice.”); *Kremlin Comment Unlikely to Change Russian Adoption Ban*, RIA NOVOSTI (Jan. 10, 2013, 11:11 PM), <http://en.ria.ru/russia/20130110/178697643.html> (“[T]he Russian Foreign Ministry emphasized that the agreement was now ‘terminated,’ not suspended as stated by the US State Department a day earlier.”).

²⁰⁹ Candice Ruud, *Local Family Skirts by Ban on Russian Adoption*, NEWSDAY (Mar. 11, 2013), <http://www.newsday.com/long-island/towns/local-family-skirts-by-ban-on-russian-adoption-1.4794922>; *see also* Olga Belogolova, *Russian Adoption Ban is Personal for Some U.S. Lawmakers*, NAT’L J. (Jan. 29, 2013), <http://www.nationaljournal.com/congress/russian-adoption-ban-is-personal-for-some-u-s-lawmakers-20130129> (“[A]s many as 1,000 American families had already begun the adoption process when the Russian law passed. Many families have already traveled to Russia and met the children they were hoping to adopt.”). Note that Russia requires international adoptive parents to travel to Russia to spend time with their prospective adoptive child once a match has been made, but prior to the final court order. *Traveling to Russia*, EUROPEAN CHILDREN ADOPTION SERVS., <http://www.ecasus.org/Site.Programs.AdoptionfromRussia.TravelingtoRussia.go> (last visited Mar. 2, 2014); *cf.* Barry, *supra* note 207 (“Russian officials have said that there are 46 children whose adoptions by American families have been partially processed, but that not all of them have court orders.”).

²¹⁰ *Id.* (quoting Victoria Nuland, a spokesperson for the State Department).

²¹¹ Russian Family Code, *supra* note 131, art. 125(1) (“The adoption shall be effected by the court upon the application of the persons wishing to adopt the child.”); *see generally* Barry, *supra* note 207 (“The court decree comes late in the process, after parents have been matched with a child and orphanage workers have begun preparing the child to join a new family. After court approval, there is a 30-day waiting period, and only then can parents return and make final arrangements to take the child to the United States.”).

completed in the following months.²¹²

Public response to the ban in Russia was mixed. A 10,000-strong “march against scoundrels,” protesting the ban, took place in Moscow in January.²¹³ An equally large pro-ban rally took place in March, a day after Texan authorities found that Max Shatto’s²¹⁴ death was an accident.²¹⁵ In the U.S., the ban caused a “sharp reaction in Washington.”²¹⁶ Both houses of Congress passed resolutions expressing disappointment, urging reconsideration and calling for the conclusion of adoptions of children who had already been matched with adoptive parents.²¹⁷ The ban brought uncertainty and grave disappointment to adoptive parents at various stages of completing a Russian adoption, including those who had already traveled to Russia

²¹² Jim Maceda, *Outrage, Sadness as Americans Barred from Adopting Russian Children*, NBC NEWS (Mar. 30, 2013), http://worldnews.nbcnews.com/_news/2013/03/30/17504450-outrage-sadness-as-americans-barred-from-adopting-russian-children?lite (referring to a Minnesota couple who adopted their Russian daughter in February as the “last lucky couple to leave Russia with an adopted child”); Ruud, *supra* note 209 (stating that twenty-five American families have completed the adoption of a Russian child since the Adoption Ban took effect); cf. Blake Ellis, *Russia’s Adoption Ban Costs Families their Tax Credit*, CNN MONEY (Mar. 15, 2013), <http://money.cnn.com/2013/03/15/pf/taxes/russia-adoption-tax-credit/> (“The State Department estimates that only around 50 families [had already received a court ruling and final adoption decree.]”); Jerry Votava, *Russia Delays Enforcement of U.S. Adoption Ban Law*, JURIST (Jan. 10, 2013), <http://jurist.org/paperchase/2013/01/russia-delays-enforcement-of-us-adoption-ban-law.php> (“46 adoptions . . . were in process when the [Adoption Ban] was scheduled to take effect.”).

²¹³ Ellen Barry & Andrew Roth, *Russians Rally Against Adoption Ban in a Revival of Anti-Kremlin Protests*, N.Y. TIMES (Jan. 13, 2013), <http://www.nytimes.com/2013/01/14/world/europe/thousands-of-russians-rally-against-adoption-ban.html> (noting that the city authorities estimated a turnout of 9,500, while activists reported a turnout of 24,000); see also *Russian Lawmakers Reject Petition Against Adoption Ban*, RIA NOVOSTI (Jan. 14, 2013, 6:16 PM), <http://en.ria.ru/politics/20130114/178770385.html> (noting a petition to repeal the ban, which garnered more than 100,000 signatures, but that was rejected by a Russian Duma committee).

²¹⁴ *Supra* notes 173-175 and accompanying text.

²¹⁵ Elks & Gutterman, *supra* note 32. According to polls, “about half of Russians approve of the Dima Yakovlev Act . . . while about 30 percent disapprove.” Fred Weir, *Emotions Intensify over U.S.-Russia Adoption Ban*, CHRISTIAN SCI. MONITOR (Mar. 4, 2013), <http://www.alaskadispatch.com/article/20130304/emotions-intensify-over-us-russia-adoption-ban>.

²¹⁶ David Herszenhorn & Andrew E. Kramer, *Russian Adoption Ban Brings Uncertainty and Outrage*, N.Y. TIMES (Dec. 28, 2012), <http://www.nytimes.com/2012/12/29/world/europe/russian-adoption-ban-brings-uncertainty-and-outrage.html>.

²¹⁷ S. Res. 628, 112th Cong. (2012); H.R. Res. 24, 113th Cong. (2013).

and bonded with their matched child.²¹⁸ An appeal has been filed with the European Court of Human Rights on behalf of prospective American adoptive parents whose applications were interrupted by the Adoption Ban.²¹⁹

III. SETTING THE FRAMEWORK: INTERNATIONAL LAWS OF CHILD WELFARE AND ADOPTION

The effect of Russia's ban on adoptions to American families has yet to play out, but will certainly involve a significant decrease in Russian intercountry adoptions generally, due to the high proportion of Russian international adoptees historically adopted to the U.S.²²⁰ Part III considers the international laws and principles relevant to Russia's prioritization of in-country care over American adoptions. Part III.A traces the development of international legal principles and instruments relating to intercountry adoption, including the Hague Convention and alternative bilateral treaties. Part III.B introduces the Council of Europe approach to international adoption, including European Court of Human Rights case law.

A. *The International Approach: Shifting Prioritization of Intercountry Adoption*

1. *Best Interests and Subsidiarity Principles*

The incidence of intercountry adoption steadily grew in the latter half of the 21st century; however, an international framework to regulate the practice was lacking until promulgation of the 1993 Hague Convention on Intercountry Adoption.²²¹ A number of preceding

²¹⁸ Herszenhorn & Kramer, *supra* note 216; *see also* Belogolova, *supra* note 209 (“[A]s many as 1,000 American families had already begun the adoption process when the Russian law passed. Many families have already traveled to Russia and met the children they were hoping to adopt.”); Ellis, *supra* note 212 (noting the financial cost of interrupted adoptions); Ruud, *supra* note 209.

²¹⁹ Yulia Ponomareva, *Americans Challenge Adoption Ban in European Court*, *RUSSIA BEYOND THE HEADLINES* (Jan. 27, 2013), http://rbth.ru/society/2013/01/27/americans_challenge_adoption_ban_in_strasbourg_22251.html (noting a complaint filed with the ECHR by lawyers from the Center of International Protection, asking the ECHR to allow in-process adoptions to proceed, and to oblige Russia to overturn the law); Vera Vasilieva, *International Law Experts Discuss “Anti-Magnitsky” Legislation*, *RIGHTS IN RUSSIA* (Jan. 24, 2013), <http://hro.rightsinrussia.info/archive/european-court/cip/adoptions>.

²²⁰ *International Adoption Statistics*, *supra* note 3 (stating that in 2011, 38.66% of Russian international adoptees were adopted to the U.S.; 38.29% in 2010; 41.57% in 2009).

²²¹ Hague Convention, *supra* note 74; *see generally* Carlson, *supra* note 98, at 247 (noting that prior to the Hague Convention, “international adoption law consisted of vague, hortatory declarations of little practical value and bilateral or regional agreements of limited scope.”).

international instruments are also relevant to intercountry adoption practice and policy. The U.N. Declaration on the Rights of the Child set forth the principle that the “best interests of the child shall be the paramount consideration” in all laws enacted for the protection of minors.²²² It was not until the 1980s that the subject of international adoption was specifically addressed, with the U.N. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (hereinafter Declaration on Adoption).²²³ The Declaration on Adoption affirms the predominance of the “best interests” principle in adoption matters,²²⁴ and sets out the first basic international framework for intercountry adoption practices.²²⁵ Importantly, the Declaration establishes that intercountry adoption is subject to the subsidiarity principle: it prioritizes in-country (temporary) foster or other “suitable” care (the term seems wide enough to cover institutionalization) over intercountry (permanent) adoption,²²⁶ and thereby evinces a preference for keeping children in their home countries as much as possible.²²⁷ In line with this neutrality towards intercountry adoption, the Declaration is deferential to national governments regarding the decision of whether or not to participate in intercountry adoption. In short, it does not speak in favor of, or impose an obligation to establish, intercountry adoption.²²⁸ This permissive, “last resort” approach to intercountry adoption is replicated in the 1989

²²² Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., 841st plen. mtg., Supp. No. 16, U.N. Doc. A/RES/14/1386 (Nov. 20, 1959) [hereinafter Declaration of the Rights of the Child], princ. 2.

²²³ Declaration on Adoption, *supra* note 93, ¶ 2.

²²⁴ *Id.* art. 5 (“In all matters relating to the placement of a child outside the care of the child’s own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.”).

²²⁵ See generally Liu, *supra* note 63, at 195-97.

²²⁶ Declaration on Adoption, *supra* note 93, art. 17 (“If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.”).

²²⁷ Liu, *supra* note 63, at 197.

²²⁸ Declaration on Adoption, *supra* note 93, pmb. (“[T]he principles set forth hereunder do not impose on States such legal institutions as foster placement or adoption[.]”); *id.* art. 17 (“[I]ntercountry adoption *may* be considered as an alternative means of providing the child with a family” [emphasis added]); *id.* pmb. (“Recognizing that under the principal legal systems of the world, various valuable alternative institutions exist, such as the Kafala of Islamic Law, which provide substitute care to children who cannot be cared for by their own parents, [and] [r]ecognizing further that only where a particular institution is recognized and regulated by the domestic law of a State would the provisions of this Declaration relating to that institution be relevant[.]”).

United Nations Convention on the Rights of the Child (UNCRC),²²⁹ to which Russia is a state party.²³⁰ The UNCRC emphasizes a child's right to grow up in the context of his/her family and culture.²³¹

More recently, a shift has taken place in United Nations' discourse on the prioritization of intercountry adoption vis-à-vis in-country institutionalization. In 2004, the United Nations Children's Fund (UNICEF), which monitors the UNCRC, issued a "clarifi[cation] that institutionalization was to be used only as a last resort and as a temporary measure until a family could be found," listing intercountry adoption as "one of a range of care options" that may be optimal for "individual children who cannot be placed in a permanent family setting in their countries of origin."²³² The most recent UNICEF position on intercountry adoption avoids explicit references to the comparative value of institutionalization and intercountry adoption.²³³ Rather, it emphasizes children's rights—"to know and be cared for by his or her parents" as far as possible;²³⁴ and to grow up in a family environment²³⁵—and provides that "appropriate and stable family-based solutions should be sought" for children not in the care of their parents.²³⁶ The "stable" qualifier seems to imply a preference for intercountry (permanent) adoption over in-country (temporary) foster-care; the former is expressly listed as one possible "stable care

²²⁹ UNCRC, *supra* note 73, art. 21 ("State Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: . . . (b) Recognize that inter-country adoption may be considered as an alternative means of 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[.];"); *see also id.* art. 20(3) (listing foster placement, kafalah of Islamic law, adoption and institutionalization as possible types of "alternative care" for children deprived of their family environment).

²³⁰ UNICEF, *THE STATE OF THE WORLD'S CHILDREN 2012: THE CONVENTION ON THE RIGHTS OF THE CHILD* (2012), available at <http://www.unicef.org/sowc2012/pdfs/SOWC-2012-The-Convention-on-the-Rights-of-the-Child.pdf> (the UNCRC has been ratified by every country except the United States, Somalia and South Sudan).

²³¹ UNCRC, *supra* note 73, art. 8(1).

²³² Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J.L. & FAM. STUD. 303, 318-19 n.87 (2004).

²³³ Press Release, UNICEF Press Centre, UNICEF's Position on Inter-country Adoption (July 22, 2010), available at http://www.unicef.org/media/media_41918.html.

²³⁴ UNCRC, *supra* note 73, art. 7(1).

²³⁵ *Id.* pmbl. ("Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."); UNICEF's Position on Inter-country Adoption, *supra* note 233 (stating that the UNCRC "clearly states that every child has the right to grow up in a family environment.").

²³⁶ *Id.*

option.”²³⁷

2. *The Hague Convention*

In 1987, the Permanent Bureau of the Hague Conference noted the desirability of a new international convention on intercountry adoption cooperation.²³⁸ Preparation of the convention was included in the agenda of the Seventeenth Session of the Hague Conference as a matter of priority, in recognition of “insufficient existing domestic and international legal instruments, and the need for a multilateral approach.”²³⁹ Russia was a participant in the final of three drafting sessions.²⁴⁰ The Hague Convention was adopted in 1993, and applies to international adoptions between contracting states.²⁴¹ Russia signed the Convention in 2000, but has not ratified it.²⁴² Consequently, Russia is not legally bound by the Hague Convention but is obliged “not to defeat [its] object and purpose.”²⁴³

The Hague Convention represents a shift in international discourse away from the absolute last resort approach to intercountry adoption. Like the UNCRC, the Hague Convention draws short of declaring that children have a “right to a family,” although the (non-binding) preamble, echoing the UNCRC, does recognize “that the child, for the

²³⁷ *Id.* (“Inter-country adoption is among the range of stable care options. For individual children who cannot be cared for in a family setting in their country of origin, inter-country adoption may be the best permanent solution.”). The ECtHR case of *Pini v. Romania* demonstrates that foster care has the potential to provide a stable, family environment. *See infra* note 345.

²³⁸ Hans van Loon, *Note on the Desirability of Preparing a new Convention on International Co-operation in Respect of Intercountry Adoption*, Prel. Doc. No. 9 of December 1987 (for the attention of the Special Commission of January 1988), in *the Hague Conference on Private International Law, Proceedings of the Sixteenth Session*, Tome I, “Miscellaneous Matters”, 165-85.

²³⁹ Gonzalo Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 3, <http://www.hcch.net/upload/expl33e.pdf> [hereinafter Hague Convention Explanatory Report].

²⁴⁰ *Id.* at 6 n.19 (listing the non-Member States that participated in the third meeting of the Special Commission on Intercountry adoption, 3-14 February 1992).

²⁴¹ Hague Convention *supra* note 74, art. 2(1).

²⁴² *Status Table: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Apr. 16, 2013).

²⁴³ Vienna Convention on the Law of Treaties art.18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (“A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty[.]”).

full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”²⁴⁴ Professor Dillon thus concludes that the Hague Convention “strongly implies—though this might have been made clearer—that in-country institutional care and non-family care are not superior alternatives to intercountry adoption.”²⁴⁵ The Preamble also recognizes that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found” in the state of origin.²⁴⁶

This formulation—“children for whom a suitable family cannot be found”—replaced an earlier draft, which referred instead to “children who cannot in any suitable manner be cared for in his or her country of origin.”²⁴⁷ The modification, which was initially met with some resistance in the drafting process,²⁴⁸ is significant. Although the Hague Convention’s formulation of the subsidiarity principle does not expressly prioritize intercountry adoption over in-country foster-care and institutionalization,²⁴⁹ the Explanatory Report states that that was the intended and preferred interpretation of the substantive provisions in

²⁴⁴ Hague Convention, *supra* note 74, pmb1. According to international law, preambles do not establish binding legal obligations, but do have “legal force and effect from the *interpretative* standpoint.” Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT’L L. 1, 25 (1951).

²⁴⁵ Dillon, *supra* note 64, at 213.

²⁴⁶ Hague Convention, *supra* note 74, pmb1.

²⁴⁷ Hague Convention Explanatory Report, *supra* note 239, ¶ 45.

²⁴⁸ *Id.* (noting that Colombia had unsuccessfully requested the modification in Working Document No. 2. The modification was subsequently “approved by a clear majority, without discussion of the substance.”).

²⁴⁹ Hague Convention, *supra* note 74, art. 4(b) (“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin . . . have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests.”); *see generally* Carlson, *supra* note 98, at 261-63 (describing the cautious approach of the Hague’s Special Commission on Intercountry Adoption on this point, and noting reactive concern among the U.S. delegation and observers, “some of whom questioned whether the U.S. could agree to a Convention that perpetuated the U.N.’s potentially pernicious attitude toward intercountry adoption”).

light of the Preamble.²⁵⁰ Ultimately, however, the Hague Convention is deferential, as a political necessity,²⁵¹ to national governments in their choice to pursue, or not pursue, intercountry adoption as an option for their family-less children.²⁵²

3. *Alternative Regulation: Bilateral Treaties*

The U.S. government encourages participation in the Hague Convention as the preferred international instrument for governing intercountry adoption.²⁵³ However, like many sending and receiving countries, Russia has declined to ratify the Hague Convention,²⁵⁴ claiming that the instrument does not sufficiently protect adoptee rights and interests.²⁵⁵ Instead, Russia has pursued bilateral treaties with Italy,²⁵⁶ France²⁵⁷ and the U.S.²⁵⁸ Similar bilateral treaties with the

²⁵⁰ Hague Convention Explanatory Report, *supra* note 239, ¶ 46 (“The idea behind the amendment [of the Preamble] is that the placement of a child in a family, including in intercountry adoption, is the best option among all forms of alternative care, in particular to be preferred over institutionalization.”); *see also* HAGUE CONFERENCE ON PRIVATE INT’L LAW, THE IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION GUIDE TO GOOD PRACTICE, GUIDE NO. 1 30 (2008) (“It is sometimes said that the correct interpretation of ‘subsidiarity’ is that intercountry adoption should be seen as ‘a last resort.’ This is not the aim of the Convention. National solutions for children such as remaining permanently in an institution, or having many temporary foster homes, cannot, in the majority of cases, be considered as preferred solutions ahead of intercountry adoption. In this context, institutionalization is considered as ‘a last resort.’”).

²⁵¹ Carlson, *supra* note 98, at 262-64 (discussing the drafting negotiations over whether to move away from the U.N.’s prior stance on intercountry adoption).

²⁵² Dillon, *supra* note 64, at 215 (“The Hague Convention leaves a good deal of discretion in the hands of national bureaucracies, and does not clearly address the human rights implications of institutionalization.”).

²⁵³ Helsinki Comm’n Testimony, Before the Comm’n on Security and Cooperation in Europe Helsinki Commission, U.S. Dep’t of State (Sept. 14, 2005) (statement of Maura Harty, Assistant Secretary of State for Consular Affairs), *available at* <http://2001-2009.state.gov/r/pa/ei/othertstmy/54301.htm> (“[W]e encourage other nations to become parties to the Hague Convention. The U.S. government considers this instrument to be most effective in establishing a set of internationally agreed requirements and procedures to govern intercountry adoptions.”).

²⁵⁴ O’HALLORAN, *supra* note 37, at 161 (“The Hague Convention does not apply to many countries currently participating in intercountry adoption.”); *see generally* *Status Table 33: Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Mar. 9, 2014) (significant non-member sending nations include Ethiopia, South Korea, and Ukraine).

²⁵⁵ *Russian-Italian Bilateral Adoption Treaty*, BLOG—RUSSIAN ADOPTION HELP (Oct. 9, 2009), <http://blog.russianadoptionhelp.com/2009/10/russian-italian-bilateral-adoption.html>.

²⁵⁶ Rossiiskie deti—italiianskie usynoviteli [Russian Children—Italian Adoptive Parents], ZAKONIA (Oct. 5, 2009), <http://www.zakonia.ru/news/30/49668>.

²⁵⁷ Yelena Kovachich, *Russia, France Sign Agreement on Child Adoption*, VOICE OF RUSSIA (Nov. 18, 2011, 7:49 PM), <http://english.ruvr.ru/2011/11/18/60645603/>.

United Kingdom, Holland, Spain and Germany are in progress.²⁵⁹

The first bilateral treaty was concluded with Italy in 2008,²⁶⁰ in response to concerns over child trafficking.²⁶¹ The Russian-Italian Adoption Treaty goes further than the Hague Convention in some respects, providing for “a higher possibility of enforced intervention in cases of disruption, abuse or neglect of adopted Russian children.”²⁶² This agreement was used as a template for the subsequent agreements with France and the United States.²⁶³

In terms of the subsidiarity principle, taking the Russian-American Agreement as an example, the Preamble reflects the language of the Hague Convention, referring to intercountry adoption as a possible solution where a “suitable family” cannot be found in the child’s country of origin.²⁶⁴ Article 3 provides that the treaty covers adoptions where child cannot be brought up in his or her birth family, and “it does not appear to be possible to settle him or her for upbringing or place him or her with a family that could provide for his or her upbringing or adoption in the Russian Federation.”²⁶⁵ This provision defers the decision of whether or not in-country care is available to the sending country, without taking a clear position on whether institutionalization is to be preferred or not to intercountry adoption. Domestic Russian law appears to prefer international adoption to institutionalization.²⁶⁶

²⁵⁸ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15.

²⁵⁹ *Russia to Sign Adoption Agreement*, UPI (Nov. 14, 2011, 12:11 PM), http://www.upi.com/Top_News/World-News/2011/11/14/Russia-to-sign-adoption-agreement/UPI-73961321290713/ (citing Children’s Rights Ombudsman Pavel Astakhov). Pavel Astakhov has stated that intercountry adoption should only take place if bilateral agreements are in place. *Id.*

²⁶⁰ Rossiiskie deti—italiianskie usynoviteli [Russian Children—Italian Adoptive Parents], *supra* note 256.

²⁶¹ Smetanina, *supra* note 130 (“[T]hat agreement was concluded only after a scandal erupted over the illegal export of Russian children.”).

²⁶² *Russian-Italian Bilateral Adoption Treaty*, *supra* note 255; cf. O’HALLORAN, *supra* note 37, at 161 (arguing that bilateral treaties “undermine the international effort to build a principled framework for regulating this form of adoption”).

²⁶³ Anna Redyukhina, *Saving Foreign Adoption*, WASH. POST (June 22, 2010), <http://russianow.washingtonpost.com/2010/06/saving-foreign-adoption.php>.

²⁶⁴ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15, pmbl. (“Recognizing that intercountry adoption of a boy or girl . . . may offer the advantages of a permanent family to a child if a suitable family cannot be found for the child in the Country of Origin.”).

²⁶⁵ *Id.* art 3(4).

²⁶⁶ Russian Family Code, *supra* note 131, art. 124(4) (“The adoption of children by foreign citizens or by stateless persons shall be admitted only in cases when it is impossible to give these children for upbringing into the families of citizens of the Russian Federation, who permanently reside on the territory of the Russian Federation, or for adoption to the children’s relatives, regardless of the citizenship or the place of residence of these relatives.”).

B. The Council of Europe Approach: Ambiguity and Caution

There is a strong tradition of both sending and receiving children via intercountry adoption in Europe.²⁶⁷ A number of regional instruments are relevant to the practice. The European Convention on the Adoption of Children,²⁶⁸ which was revised in 2008,²⁶⁹ sets minimum standards for adoption laws in member states.²⁷⁰ The European Convention for Human Rights²⁷¹ is not a child-specific instrument, but enshrines the right to respect for family life,²⁷² and the right to start a family.²⁷³ Given the lack of strong enforcement mechanisms in the Hague Convention and the European Adoption Convention, Magdalena Forowicz observes that the European Court of Human Rights [hereinafter EctHR] “has been able to play a fundamental role by enforcing these instruments within the framework of the ECHR.”²⁷⁴ The ECtHR has applied the ECHR to a number of adoption-related cases,²⁷⁵ including one relating to intercountry adoption.²⁷⁶ Ingi Iusmen notes that “[u]nder the ECHR framework, [intercountry adoption] has been interpreted as an extreme measure.”²⁷⁷

²⁶⁷ O’HALLORAN, *supra* note 37, at 138 (“Europe in general and Scandinavia in particular has also over many decades accepted children from other countries for adoption placements.”).

²⁶⁸ European Convention on the Adoption of Children, Apr. 24, 1967, 634 U.N.T.S. 256.

²⁶⁹ European Convention on the Adoption of Children (Revised), Nov. 27, 2008, C.E.T.S. 202 [hereinafter ECAC].

²⁷⁰ *Factsheet: Towards a European Adoption Procedure*, COUNCIL OF EUROPE (Sept. 7, 2009), <https://wcd.coe.int/ViewDoc.jsp?id=1496717&Site=DC>.

²⁷¹ European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 [hereinafter ECHR].

²⁷² *Id.* art. 8 (“(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”).

²⁷³ *Id.* art. 12 (“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”).

²⁷⁴ MAGDALENA FOROWICZ, *THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS* 121 (2010).

²⁷⁵ *See, e.g., List of Judgments Concerning Adoption (non-exhaustive)*, COUNCIL OF EUROPE FAMILY LAW, http://www.coe.int/t/dghl/standardsetting/family/Case_law_en.asp.

²⁷⁶ Pini et al. v. Romania, App. Nos. 78028/01; 78030/01, 2004-V Eur. Ct. H.R. 297 [hereinafter Pini v. Romania]; *see also* Nigar Gozum v. Turkey, App. No. 4789/10, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113208#{"itemid":\["001-113208"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113208#{) (application lodged Jan. 12, 2010) (currently pending).

²⁷⁷ Ingi Iusmen, *The EU and International Adoption from Romania*, 27 INT’L J.L. POL’Y & FAM. 1, 6 (2013); *see also* Bainham, *supra* note 63, at 233 (arguing that for intercountry adoption to be justified under the ECHR, it must be demonstrated “that *no other solution* can adequately meet the needs of the child”).

Russia, although a member of the Council of Europe, has yet to sign the ECAC,²⁷⁸ but is subject to the ECHR.²⁷⁹

The Council of Europe Parliamentary Assembly has affirmed both the best interests principle, and the subsidiarity principle, although without being clear on whether intercountry adoption should be subsidiary to in-country foster care and/or institutionalization.²⁸⁰ In 2005, some delegates to the Parliamentary Assembly signed a motion regarding the “less than positive attitude to international adoptions” expressed by a number of Eastern European countries, including Romania and Russia, and calling for ascertainment of whether restrictions on intercountry adoptions are consistent with the “overarching interests of the child, considering the very high number of children living in institutions”²⁸¹

On the other hand, the Council of Europe has also expressed concern about the rise in intercountry adoptions from Russia in the 1990s,²⁸² and the practice generally:

The purpose of international adoption must be to provide children with a mother and a father in a way that respects their rights, not to enable foreign parents to satisfy their wish for a child at any price; there can be no right to a child. The Assembly therefore fiercely opposes the current transformation of international adoption into nothing short of a market regulated by the capitalist laws of supply and demand, and characterized by a one-way flow of children from poor states or states in transition to developed countries. . . . It wishes to alert European public opinion to the fact that, sadly,

²⁷⁸ *Chart of Signatures and Ratifications: European Convention on the Adoption of Children (Revised)*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=202&CM=8&DF=&CL=ENG> (last visited Mar. 9, 2014).

²⁷⁹ *Chart of Signatures and Ratifications: ECHR*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG> (last visited Mar. 9, 2014).

²⁸⁰ EUR. PARL., RECOMMENDATION 1443: INTERNATIONAL ADOPTION: RESPECTING CHILDREN'S RIGHTS ¶¶ 1-3 (2000) [hereinafter *Recommendation 1443*] (“[I]nternational adoption may be considered only if domestic solutions are not available.”); *cf.* EUR. PARL. DOC. 9377: REPLY FROM THE COMMITTEE OF MINISTERS: RECOMMENDATION 1443, 785TH MTG. OF THE MINISTERS’ DEPUTIES (Mar. 1, 2002) (noting the subsidiarity principle, but further opining that “international adoption can, nevertheless, have the advantage of providing a permanent family home to a child for whom no suitable family can be found in the country of origin.”).

²⁸¹ EUR. PARL. DOC. 10617, INTERNATIONAL ADOPTION: MOTION FOR A RECOMMENDATION, PRESENTED BY MRS. PAOLETTI TANGHERONI (June 28, 2005).

²⁸² EUR. PARL. DOC. 8600, INTERNATIONAL ADOPTION: RESPECTING CHILDREN’S RIGHTS, COMM. ON MIGRATION, REFUGEES AND DEMOGRAPHY (1999) (“International adoption was unknown in the countries of the former eastern bloc. These countries in transition, in particular Albania, Romania, Bulgaria and Russia, have seen a worrying increase in adoption.”).

international adoption can lead to the disregard of children's rights and that it does not necessarily serve their best interests. In many cases, receiving countries perpetuate misleading notions about children's circumstances in their countries of origin and a stubbornly prejudiced belief in the advantages for a foreign child of being adopted and living in a rich country.²⁸³

This statement was accompanied by a number of recommendations, including that member states ratify the Hague Convention and develop bilateral cooperation necessary for the effective application thereof.²⁸⁴

IV. EVALUATING THE BAN: RIGHTS AND DUTIES RELEVANT TO INTERCOUNTRY ADOPTION

Part IV evaluates Russia's ban on adoptions to America in light of international law and Russia's duties to its children. Part IV.A considers the political aspects of the Adoption Ban and intercountry adoption generally. Part IV.B examines whether Russian children have a right to be adopted, and whether the Russian state has a duty to repeal the Adoption Ban. Russia has the prerogative to strive to meet her children's needs domestically, without resorting to intercountry adoption—there is no right to intercountry adoption *per se*, and no obligation under international law to recognize the institution of adoption. However, it is argued that the Adoption Ban represents the subordination of the best interests of children to state-centric political considerations. This is problematic, in terms of the immediate needs and interests of Russian children currently in need of families. Russia should be encouraged to reconsider the Adoption Ban, and pursue the dual goals of eliminating the need for intercountry adoption, and allowing the practice to continue, including to American families, in the interim.

A. *The Politicization of Orphan Welfare – in Russia and Beyond*

Russia's ban on adoptions to America has been variously defended as a proportionate response to deaths and other failed adoptions,²⁸⁵ and criticized as Magnitsky Act retaliation that uses children as “political

²⁸³ *Recommendation 1443*, *supra* note 280, ¶¶ 1-3.

²⁸⁴ *Id.* ¶¶ 5(i), 5(iii).

²⁸⁵ Dolgov, *supra* note 183 (“The decision taken . . . to ban the adoption of Russian children to the U.S. was a difficult but necessary measure provoked by a consistently non-constructive position of the U.S. federal and local authorities.”).

pawns.”²⁸⁶ On the one hand, Russia has expressed concern on many occasions over failed adoptions and the number of Russian adoptees to have died in America, and threatened moratoriums or bans on intercountry adoption in response.²⁸⁷ Some Russian politicians have also expressed discomfort with intercountry adoption generally,²⁸⁸ due to the imperialist/national pride concerns discussed above.²⁸⁹ Russia of course has the prerogative to define its child welfare system as it pleases, in accordance with the international law principle of the best interests of the child. However on the other hand, it would be wrong to characterize the ban as a simple continuation of a movement away from intercountry adoption—it pertains only to American adoptions, and there are clearly other non-child-centric political factors, both domestic and international, behind the adoption ban.

The Russian President,²⁹⁰ Prime Minister,²⁹¹ U.S. Ambassador,²⁹²

²⁸⁶ *Russia: Reject Adoption Ban Bill*, HUMAN RIGHTS WATCH (Dec. 21, 2012), <http://www.hrw.org/news/2012/12/21/russia-reject-adoption-ban-bill> (“It’s wrong to make vulnerable children pawns in a cynical act of political retribution.”); Elks & Gutterman, *supra* note 32 (“Critics . . . accuse the Kremlin and lawmakers of using particularly vulnerable children as political pawns.”); Laura Jean, *Russia’s Adoption Ban Harms Kids*, CNN (Jan. 17, 2013), <http://www.cnn.com/2013/01/17/opinion/jean-russia-adoption/> (“Children living in orphan institutions need world leaders who do not use them as political pawns, but rather work to protect them. Russia’s adoption ban must be lifted.”).

²⁸⁷ Kass, *supra* note 184; *Judge Upholds Child Support in Russian Adoption*, *supra* note 185; *Siberians Ban Americans from Adopting Russian Children*, *supra* note 186; cf. Susan Alvarado, *Dima Yakovlev Bill, Russian Adoptions, and Dissolutions by Death*, ADOPTION THERAPIST BLOG (Dec. 29, 2012), <http://adoptiontherapist.org/blog/2012/12/29/dima-yakovlev-bill-russian-adoptions-and-dissolutions-by-death> (arguing that if failed adoptions/deaths were “truly the motivation for [the Adoption Ban] Russia[] most certainly would not have entered into a new negotiation on international adoptions with the United States as recently as November 2012 and this ban would have been enacted years ago”).

²⁸⁸ *Russia May Ban All Foreign Adoptions*, RUSS. TODAY (Jan. 11, 2013), <http://rt.com/politics/ban-foreign-adoptions-duma-773/> (quoting Russian MP Evgeny Fyodorov: “In fact, [adoptions of Russian orphans by foreign families] is a purchase. None of the civilized countries are involved in slave trade, or sell their children abroad.”); Aden, *supra* note 123 (quoting Pavel Astakhov: “It’s a natural step for any normal state. The time has come for us to take care of our orphans ourselves.”).

²⁸⁹ Steltzner, *supra* note 144, and accompanying text.

²⁹⁰ Vladimir Putin, President of Russia, News Conference at the World Trade Centre on Krasnopresnenskaya Embankment (Dec. 20, 2012) (transcript available at <http://eng.kremlin.ru/news/4779>) (“The issue at hand concerns official liability for these tragedies. People are exempt from criminal liability, and sometimes the judicial system does not even want to consider these cases. That’s what bothers Russian legislators, and this is what they are reacting to in the well-known draft [Adoption Ban] that triggered such a reaction.”).

²⁹¹ *Russian Adoption Ban Not Linked to Magnitsky Act—Medvedev*, *supra* note 13 (quoting Prime Minister Medvedev as saying that the Adoption Ban “expresses the concerns of Russia’s parliament, the Russian State Duma and the Federation Council, by the fate of our children,” and is an “emotional” move that is “neither in fact nor in law” linked to the Magnitsky Act).

and Children's Ombudsman²⁹³ have denied that the Adoption Ban is politically motivated, maintaining an official position that the ban was necessary in light of failed adoptions. The shortcomings and problems relating to those Russia-U.S. adoptions were very recently addressed, by the 2012 Russian-American Agreement.²⁹⁴ However, Russia contends that the Russian-American Agreement had already been proven ineffective. In a January 2013 letter responding to U.S. Senators' concerns over the Adoption Ban, Russia's Foreign Ministry human rights envoy, Konstantin Dolgov, argued that since November 2012, American courts had "regularly" refused to allow Russian consular representatives access to Russian adoptees in America in cases of alleged abuse and neglect, and that the U.S. had thereby sabotaged the bilateral treaty²⁹⁵ and ignored its general obligation to allow consular access to Russian citizens²⁹⁶ in the U.S.²⁹⁷

²⁹² Young, *supra* note 30 ("Russia's ban of adoptions by US [sic] parents was enacted solely with the welfare of Russian children in mind, [Ambassador Kislyak] said this week.").

²⁹³ Aden, *supra* note 123 (Pavel Astakhov: "The ban is not an action taken against Americans").

²⁹⁴ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15.

²⁹⁵ Dolgov, *supra* note 183; *see also* Vladimir Putin, President of Russia, News Conference, *supra* note 290 (stating that the Adoption Ban was a response to the "fact that when a crime is committed against an adopted Russian child . . . Russian representatives are denied any access, even as observers, in these legal processes"); Natalya Kovalenko, *US Failing to Honor Adoption Agreements—Exclusive Interview with Russian Diplomat*, VOICE OF RUSSIA (Dec. 23, 2012, 7:37 PM), http://english.ruvr.ru/2012_12_23/US-failing-to-honour-adoption-agreements-exclusive-interview-with-Russian-diplomat/; *Russia Demands Explanations from U.S. on a Recent Child Adoption Incident*, RUSSIA BEYOND THE HEADLINES (Sept. 26, 2012, 8:45 PM), http://rbth.ru/articles/2012/09/26/russia_demands_explanations_from_us_on_fresh_child_adoption_incident_18586.html (reporting Russia's most recent complaint on lack of consular access post-adoption).

²⁹⁶ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15, art. 13(2) (Russian adoptees with American parents, in addition to acquiring American citizenship, retain Russian citizenship).

Russia's concern to be apprised of post-adoption situations is understandable, particularly in light of previous instances of appalling abuse and negligence. However, instead of relying on usual consular access rules in relation to adoptees, post-adoption follow-ups and reporting were key issues addressed by the bilateral adoption treaty. The treaty itself does not expressly require Russian access to adoptees post-adoption, although there is a general good faith provision requiring Russian and American authorities to cooperate with one another.²⁹⁸ Post-adoption reports are to be collected by authorized adoption agencies,²⁹⁹ and parents are to be informed of their obligation to provide access to agency officials for this purpose.³⁰⁰ This cooperative approach, which leaves post-adoption accountability primarily in the hands of the receiving country, had not been fully tested or gauged when Russia announced the ban, and arguably any bumps in its implementation could have been smoothed over with continued negotiation and practice. Given this, any contention that the ban was a necessary and proportionate measure to protect adoptees is somewhat undermined.

Turning to the political dimensions of the discontinuance, the

²⁹⁷ Consular Convention and Protocol art. 12(1), June 1, 1964, U.S.-U.S.S.R., 19 U.S.T. 5018, ("A consular officer shall have the right within his district to meet with, communicate with, assist, and advise any national of the sending state and, where necessary, arrange for legal assistance for him. The receiving state shall in no way restrict the access of nationals of the sending state to its consular establishments."); Dolgov, *supra* note 183 ("This contradicts the obligations assumed by the U.S. side under the aforementioned Agreement and the 1964 bilateral Russian-U.S. Consular Convention."); *see also* Young, *supra* note 30 ("[Russian Ambassador to the U.S.] Kislyak said Russia considers its adoptees to be Russians with dual Russian-U.S. citizenship, a status that typically entitles a country to have consular access to its citizens when they are on foreign soil."). Note that The Vienna Convention on Consular Relations requires receiving States to inform sending States "without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor . . . who is a national of the sending State." The Vienna Convention on Consular Relations art. 37(b), Apr. 24, 1963, 596 U.N.T.S. 261. However, the provision does not cover cases of abuse/dissolution of Russian adoptees, because "[a] person who is a U.S. citizen and a national of another country may be treated exclusively as a U.S. citizen when in the United States." U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 14 (3rd ed. Sept. 2010). In response to Dolgov, U.S. Ambassador Michael McFaul tweeted that the U.S. would continue to honor all international agreements with Russia, including the bilateral consular convention. Michael McFaul, TWITTER (Jan. 22, 2013), <https://twitter.com/McFaul>. This was reported in the Russian media as acknowledgement of a right of unrestricted access by Russian diplomats to adopted children in the U.S., although McFaul's statement did not go that far, and nor does the Russian-American Agreement. *U.S. will Honor 1964 Consular Convention on Diplomatic Access to Adopted Children*, RUSSIAN LEGAL INFO. AGENCY (Jan. 23, 2013, 11:44 PM).

²⁹⁸ Agreement Regarding Cooperation in Adoption of Children, *supra* note 15, art. 4(1).

²⁹⁹ *Id.* art. 5(1)(b).

³⁰⁰ *Id.* art. 5(1)(a).

Adoption Ban was clearly a political reaction to the finger of blame the U.S. pointed at Russia by passing the Magnitsky Act.³⁰¹ It is important to note who the Adoption Ban law was named for—Chase Harrison. This is significant because the controversy for Russia relating to Chase's death was not about post-adoption reporting or parental screening (issues addressed by the Russian-American Agreement); rather, Russia took issue with what it saw as leniency towards Miles Harrison due to Chase Harrison's status as a Russian-born adoptee.³⁰² In this respect, the Adoption Ban is a "tit for tat" response to the Magnitsky Act,³⁰³ in which America objected to Russia's failure to hold anyone accountable for Sergei Magnitsky's death. Just as Senator John McCain, in introducing the Magnitsky Act, referred to a "culture of impunity" in Russia in relation to human rights,³⁰⁴ so, too, Russia, through the Adoption Ban, has pointed out a culture of impunity in

³⁰¹ It has been widely portrayed in the media as such. See, e.g., Herszenhorn & Kramer, *supra* note 216 ("The adoption ban . . . was included in a broader law retaliating against the United States for an effort to punish Russian human rights violators."); Laurie Penny, *Russia's Ban on US [sic] Adoption Isn't About Children's Rights*, THE GUARDIAN (Dec. 28, 2012, 4:00 PM), <http://www.theguardian.com/commentisfree/2012/dec/28/russia-ban-us-adoption-children-rights>; *Magnitsky Case: Putin Signs Russian Ban on US [sic] Adoptions*, BBC (Dec. 28, 2012), <http://www.bbc.co.uk/news/world-europe-20857068> ("The law is a reaction to the US Magnitsky Act."). The U.S. State Department, and a number of members of the Council of Europe, have likewise characterized the ban as politically motivated. EUR. PARL. DOC. 13113, INTERCOUNTRY ADOPTION: CHILDREN AS HOSTAGES OF INTERNATIONAL RELATIONS (Jan. 29, 2013) (written declaration that the Adoption Ban renders Russian children hostage to transatlantic diplomatic tensions); Richard Solash, *U.S. 'Regrets,' NGOs Slam Russian Adoption Ban*, RADIO FREE EUROPE RADIO LIBERTY (Dec. 28, 2012), <http://www.rferl.org/content/us-regrets-ngos-slam-russia-adoption-ban/24811326.html> ("State Department spokesman Patrick Ventrell called the Russian move 'politically motivated.'").

³⁰² Press Release, The Ministry of Foreign Affairs of the Russian Federation, *supra* note 11, and accompanying text. See Gene Weingarten, *Fatal Distraction: Forgetting a Child in the Backseat of a Car Is a Horrifying Mistake. Is it a Crime?*, WASH. POST (Mar. 8, 2009) (it is worth noting that forty percent of car-hypothermia cases are not prosecuted).

³⁰³ Press Release, Vladimir Putin, President of Russia, A Law on Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of Russian Citizens has been Signed (Dec. 28, 2012), <http://eng.kremlin.ru/acts/4810> (The Adoption Ban law mirrors the structure and substance of the Magnitsky Act—in addition to prohibiting U.S. adoptions, it "provides for sanctions for those guilty of violating the fundamental human rights and freedoms of Russian citizens," bans entry for "U.S. citizens involved in such violations," and allows Russia to "freeze the financial and other assets of U.S. citizens banned from entering its territory.").

³⁰⁴ Jeremy W. Peters, *U.S. Senate Passes Russian Trade Bill, with a Human Rights Caveat*, N.Y. TIMES (Dec. 6, 2012) (Senator John McCain: "This culture of impunity in Russia has been growing worse and worse." Response from Russia: "This is an attempt to interfere in our internal affairs, in the authority of Russia's investigative and judicial organs, which continue to investigate the Magnitsky case.").

America in relation to the lack of justice for Russian adoptees.³⁰⁵

There is a further, domestic, political dimension to the discontinuance. President Putin has been accused of adopting “aggressive foreign policy positions [such as the Adoption Ban] to strengthen his own legitimacy in the eyes of Russians.”³⁰⁶ Ania Viver has similarly argued that “the public discourse on international adoption has . . . served as a tool of Russian domestic policy to strengthen control over Russians and to spread anti-American attitudes.”³⁰⁷ By highlighting the minority of adoptions to America that end tragically, an “outside enemy” is created which is useful in domestic politicking.³⁰⁸ This promotion of nationalism relates to Russia’s desire to transform its self-presentation, from a country that shamefully exports its children due to an inability to care for them,³⁰⁹ to one which is better able to care

³⁰⁵ See, e.g., Vladimir Putin, President of Russia, News Conference, *supra* note 290 (“It is a fact that when a crime is committed against an adopted Russian child, the American justice system often does not react at all and releases the people who have clearly committed a criminal offense against a child, of any criminal responsibility.”); Dolgov, *supra* note 183 (“Recently . . . local resident Elizabeth Escalona was sentenced to 99 years in prison for abusing her own daughter, who had to be taken to the intensive care as the result. At the same time, in cases of Russians [sic] children Ivan Skorobogatov, Ilya Kargyntsev [Isaac Dykstra], Dmitry Yakovlev, who were tortured to death by their U.S. adoptive parents, the perpetrators have not received just punishment.”); see *supra* text accompanying note 168 (Nathaniel Craver); see also text accompanying *supra* note 11 (Dmitry Yakovlev); see also Jonathan Earle, *Russians Not Lining Up to Adopt Americans*, ST. PETERSBURG TIMES (Jan. 30, 2013), http://www.sptimes.ru/index.php?action_id=100&story_id=36905 (noting that the Russian Investigative Committee has launched a symbolic criminal case against American parents of abused/deceased Russian adoptees).

³⁰⁶ Weir, *supra* note 215.

³⁰⁷ Ania Viver, *Blame Them, Not Us: Adoption as a Political Tool*, FOREIGN POL’Y ASS’N (Jan. 31, 2012), <http://foreignpolicyblogs.com/2012/01/31/blame-them-not-us-adoption-as-a-political-tool/>.

³⁰⁸ *Id.*; see also Altshuler, *supra* note 130 (referring to the Adoption Ban as an “inhuman manifestation of the ‘Anti-West’ bias”); Penny, *supra* note 301 (“This is about Russia thumbing its nose at America.”).

³⁰⁹ See, e.g., Anthony D’Amato, *Cross-Country Adoption: A Call to Action*, 73 NOTRE DAME L. REV. 1239, 1245 (1998) (discussing generally the propensity for sending country media to promote a discourse of shame pertaining to intercountry adoption).

for its children than “negligent and abusive” American parents.³¹⁰

The politicization of child welfare is admittedly troubling, and the Russian Adoption Ban arguably mirrors the politicization of intercountry adoption generally. Intercountry adoption concerns a nation’s ability to care for its most vulnerable, and whether it is culturally, socially and economically appropriate to look to other (more advanced and powerful) nations for support in that task. This strikes at the heart of a nation’s self-presentation, and is a highly emotive issue. International law is accordingly deferential to state determinations of what is in the best interests of children without parents. At the same time, due to confusion about the purpose of intercountry adoption—which is to give children families, not to give families children³¹¹—and the resultant commodification of children, there can be untoward political pressure from the demand side of the market on sending countries to continue to “send.”³¹²

B. A Right to Adoption? Long-term and Short-term Perspectives

1. Russia’s Long-term Aim: Ending Intercountry Adoption

Despite the obvious political nature of Russia’s American-targeted Adoption Ban, Russia’s rhetoric of moving away from intercountry adoption may also reflect a general belief that the best interests of Russian children are best served by raising them in Russia. The Adoption Ban was accompanied by apparent renewed vigor on the part of the Russian State in promoting and improving domestic adoption

³¹⁰ See, e.g., Aden, *supra* note 123 (quoting Pavel Astakhov: “The time has come for us to take care of our orphans ourselves.”); Fisher, *supra* note 126 (“This view of the world, in which Russia is portrayed as safe and prosperous while life in the U.S. is seen as dangerous and undesirable, just happens to be good for both Putin’s approval and the national self-esteem of millions of Russians, a sort of psychological escape hatch from two decades of stalled development and national humiliation.”); Weir, *supra* note 215 (quoting Irina Bergset, founder of Russian Mothers NGO: “We have a different attitude toward children here in Russia, perhaps due to cultural differences, we don’t treat them like cats and dogs.”); Michael Weiss, *The Anti-Kremlin History of the Man Behind Putin’s Adoption Ban*, THE ATLANTIC (Mar. 11, 2013, 8:52 AM), <http://www.theatlantic.com/international/archive/2013/03/the-anti-kremlin-history-of-the-man-behind-putins-adoption-ban/273886> (“Astakhov is prickly about the condition of children in Russia, a notorious stain on the country’s modernized self-presentation and the reason that so many orphans have been adopted by overseas parents.”); see also Earle, *supra* note 305 (noting that in April 2012, Pavel Astakhov “encouraged Russians to get in line to take in American orphans ‘out of principle.’”).

³¹¹ D’Amato, *supra* note 309, at 1242 (“We don’t give a child to a family; we give a family to a child.”).

³¹² See generally Bainham, *supra* note 63, at 225 (noting pressure on Romania to resume international adoption); Iusmen, *supra* note 277.

programs. On the same day the ban was promulgated, a Presidential decree aimed at improving domestic adoption procedures and efficiency was passed.³¹³ Instructions were issued in January 2013 towards fulfillment of the Decree, requiring various federal ministries to: implement increased assistance for prospective Russian adoptive parents; simplify the adoption procedure; provide post-placement state support; reduce the required number of post-placement reports from adoptive parents to the state; provide tax incentives for adoptive and foster parents; increase pensions to children with disabilities; increase the adoption allowance; and to provide for monthly payments to adoptive and foster parents dependent on the age and disabilities of the child.³¹⁴ Draft laws were submitted to the Duma on February 26, 2013.³¹⁵ In February, Children's Rights Ombudsman Astakhov announced a five- to eight-year aim of shutting down all orphanages and boarding schools.³¹⁶

There are obvious advantages to a long-term strategy of promoting in-country adoption over intercountry adoption. Given the importance of continuity of culture and identity rights,³¹⁷ as recognized by the subsidiarity principle,³¹⁸ providing appropriate, family-based in-country

³¹³ Ukaz Prezidenta RF "O Nekotorykh Merakh po Realizatsii Gosudarstvennoi Politiki v Sfere Zashchity Detei-Sirot i Detei, Ostavshikhsia bez Popecheniia Roditelei" [Decree of the RF President "On Measures Concerning the Implementation of Government Policy on Orphaned Children and those without Parental Care"], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 1688, *available at* <http://graph.document.kremlin.ru/page.aspx?1645431>; *see also* Herszenhorn & Eckholm, *supra* note 80 (reporting President Putin referring to the decree as "changing the procedure of helping orphaned children, children left without parental care, and especially children who are in a disadvantageous situation due to their health problems").

³¹⁴ Instruktsiia "Ob obespechenii vypolneniia Ukaza Prezidenta Rossii, napravlenogo na zashchitu detei-sirot i detei, ostavshikhsia bez popecheniia roditelei" [Instructions "On Ensuring the Fulfillment of the Presidential Executive Order to Protect Orphans and Children Left Without Parental Care"], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2013, *available at* <http://archive.government.ru/eng/docs/22372/>.

³¹⁵ Proekt zakona ob oblegchenii protsessu usynovleniia v RF vnesen v Gosdumu [Draft Law on the Facilitation of the Adoption Process in the Russian Federation Submitted to the Duma], DEP'T OF FED. POL'Y IN THE SPHERE OF CHILDREN RIGHTS PROT. (Feb. 26, 2013), *available at* <http://www.usynovite.ru/massmedia/cb289af99e.html>.

³¹⁶ *Most Orphanages to be Closed in Russia, Children to be Adopted*, ITAR-TASS NEWS AGENCY (Feb. 28, 2012), <http://www.itar-tass.com/en/c154/353743.html>.

³¹⁷ *See, e.g.*, UNCRC, *supra* note 73, art. 8 (right to preservation of identity, including nationality); Bainham, *supra* note 63, at 231 ("[I]nternational adoption poses a much more severe threat to the preservation of the child's identity rights because of the geographical problems of maintaining contact. It also represents a threat to the child's right to knowledge of his or her cultural, religious and linguistic background.").

³¹⁸ Declaration on Adoption, *supra* note 93, art. 17.

care is a laudable aim.³¹⁹ Russia's desire to shed the label/role of sending country, with its attendant overtones of imperialism and shame,³²⁰ is understandable. Russia is also concerned over low fertility rates—halting intercountry adoption could have a positive demographic impact (albeit a minor one).³²¹ Finally, a long-term in-country aim could provide the impetus for a change in the general Russian approach to child welfare. As noted above, a large proportion of children in the Russian state system are “social orphans,”³²² as opposed to “true” orphans with both parents deceased.³²³ Russia should be encouraged to develop positive measures aimed at assisting parents facing substance addictions or poverty so that families can stay together³²⁴ and pursuing reunification of relinquished children when it is in their best interests.³²⁵ This would provide better protection of parental rights, and the right of the child not to be unduly deprived of his or her family.³²⁶ It would also redress ethical concerns about the propriety of allowing intercountry adoptions to take place for very large sums of money, when smaller upstream sums would have been sufficient to keep children with their

³¹⁹ This is recognized by the Hague Convention, which recalls that “each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family or origin,” and recognizes that “intercountry adoption may offer the advantage of a permanent family to a child *for whom a suitable family cannot be found in his or her State of origin.*” Hague Convention, *supra* note 74, pmb1. (emphasis added).

³²⁰ See *supra* text accompanying notes 67-69.

³²¹ Cheryl Wetzstein, *Russia's Adoption Ban may be Way to Boost Population*, WASH. TIMES (Jan. 13, 2013), <http://www.washingtontimes.com/news/2013/jan/13/adoption-ban-may-be-way-to-boost-population>.

³²² *Supra* text accompanying note 126.

³²³ Bainham, *supra* note 63, at 223 n.3 (“The normal understanding of an orphan is of a child both of whose parents have died.”).

³²⁴ Declaration of the Rights of the Child, *supra* note 222, princ. 6 (“Payment of State and other assistance towards the maintenance of children of large families is desirable.”); UNCRC, *supra* note 73 art. 27(3); see also Comm. on the Rts. of the Child, Consideration of Reports of the State Parties Under Article 44 of the Convention, Concluding Remarks of the Committee on the Rights of the Child: Italy, U.N. Doc. CRC/C/15/Add.41 (Nov. 27, 1995), *cited in* King, *supra* note 53, at 457 n.160. For a discussion of similar initiatives in the U.S., see King, *supra* note 53, at 465.

³²⁵ See, e.g., Smetanina, *supra* note 130 (noting a draft Ministry of Education law which would make assistance to families in need of work, and provide treatment for parents with alcohol or drug dependence, without threat of deprivation of parental rights).

³²⁶ Russian Family Code, *supra* note 131, art. 54(2) (“Every child shall have the right to live and to be brought up in a family insofar as it is possible.”); Declaration on Adoption, *supra* note 93, art. 3 (“The first priority for a child is to be cared for by his or her own parents.”); see also Bainham, *supra* note 63, at 224 (arguing that the UNCRC and ECHR require countries to “use . . . best endeavors to reunite children with their families, to arrange substitute care where necessary and to stimulate the availability of [domestic] foster parents and domestic adopters”); King, *supra* note 53, at 443 (pointing out the unfortunate emphasis in intercountry adoption literature on intercountry adoption over supporting birth families).

birth families.³²⁷

2. *Short-Term Pain: Implications of the Adoption Ban on Russia's Waiting Children*

A long-term goal of eradicating the need for intercountry adoption is legitimate. International law places no obligation on states to partake in the institution of international adoption: the Declaration on Adoption expressly states that it does “not impose on states such legal institutions as foster placement or adoption”;³²⁸ the UNCRC takes an equally permissive approach.³²⁹ The instruments thus embody deference to local cultures and belief systems, some of which prohibit adoption and/or intercountry adoption.³³⁰ Even the Hague Convention, which goes further than previous instruments in promoting intercountry adoption, does not oblige signatories to make children available for adoption³³¹ (Russia is not, in any event, a party). Further, it is axiomatic that international adoption does not represent a solution to the overall plight of vulnerable children in sending countries, given that international adoptees represent only a very small number of the children without parents in sending countries.³³²

In recent years, Russia has increasingly evinced a strong preference for in-country care. As discussed, there are legitimate child-centered and political factors underlying this preference. The Russian government has indicated a desire to close orphanages, and increase the quality and quantity of in-country family-based care. As the experience

³²⁷ Smolin, *Child Laundering*, *supra* note 57, at 188. This relates to the proportionality of intercountry adoption as a child welfare outcome. *See generally* O’HALLORAN, *supra* note 37, at 62.

³²⁸ *Supra* text accompanying note 228.

³²⁹ *Supra* text accompanying note 229; *cf.* Dolgov, *supra* note 183 (“[UNCRC’s] provisions do not include any international legal obligations with regard to inter-country adoption of children.”); D’Amato, *supra* note 309, at 1243 (arguing that the UNCRC grants children the right to a family, which requires governments not to “block or impede adoption initiatives in the private sector.” I would argue that, given the potential for corrupt practices to evolve in the absence of state regulation, there is no such duty of restraint.).

³³⁰ *See, e.g., Fact Sheet No. 50—Kafalah*, INT’L SOC. SERV. (Dec. 2007), <http://www.iss-ssi.org/2009/assets/files/thematic-facts-sheet/eng/50.Kafala%20eng.pdf> (noting that some Islamic schools prohibit international adoption as a matter of Shariah law; “The prohibition of adoption, as a means to create new filiation bonds, is based on an interpretation of two verses of Sura . . . of the Koran and is seen by Sharia law as a falsification of the natural order of society.”).

³³¹ Bainham, *supra* note 63, at 230.

³³² Bergquist, *supra* note 44, at 349 (internal citation omitted).

of Romania demonstrates,³³³ these are long-term objectives,³³⁴ which will take time. Changing the domestic adoption framework and culture such that the demand for families for these children can be met will also take time.³³⁵ The problem with the Adoption Ban is that it cuts off a significant source of potential adoptive families for currently-institutionalized Russian children *before* sufficient suitable in-country alternatives have been made available.³³⁶ This subordinates the best interests of children currently waiting for families to political abstracts and ideals.

It could be argued that the Adoption Ban thus conflicts with Russia's international and domestic³³⁷ obligation to prioritize the best interests of children in all laws pertaining to their protection, including adoption laws.³³⁸ That is, so the argument would go, while children without parental care do not necessarily have a right to be adopted internationally, Russia, as a participant in intercountry adoption, must make laws and decisions that prioritize the best interests of Russian children,³³⁹ and the Adoption Ban contravenes this obligation. However, such an argument is not well-founded, in light of international law's express deference to states on the question of whether to partake in international adoption. Sara Dillon questions whether this deference continues to be valid, given our understanding of the psychology of institutionalization, and whether international law "adequately addresses the human rights needs of children."³⁴⁰ She persuasively argues that the

³³³ See generally Bainham, *supra* note 63, at 227-28 (discussing Romanian policies aimed at preventing institutionalization and stimulating domestic policy, and how, after some years, those policies had "begun to bear fruit").

³³⁴ See Barcholet, *Propriety*, *supra* note 52, at 197 ("Solutions lie in reallocating social and economic resources both among countries and within countries, so that more children can be cared for by their birth families. But, given the fact that social reordering on a grand scale is not on the immediate horizon, international adoption clearly can serve the interests of at least those children in need of homes for whom adoptive parents can be found.").

³³⁵ *Id.*

³³⁶ See Triseliotis, *supra* note 70, at 131 ("To wait for improved social conditions before acting to give parents and countries a real choice [of adopting,] would be tantamount to sacrificing an existing generation of children who need families now.").

³³⁷ KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 38(1) (Russ.), available at <http://www.constitution.ru/en/10003000-03.htm> ("Maternity and childhood, and the family shall be protected by the State."); Russian Family Code, *supra* note 131, art. 54(2) ("Every child shall have the right to live and to be brought up in a family insofar as it is possible."); *id.* art. 124(1) (providing for adoption as a "priority form of placement of children who have remained without parental care").

³³⁸ Declaration of the Rights of the child, *supra* note 222; Declaration on Adoption, *supra* note 93, art. 5.

³³⁹ UNCRC, *supra* note 73, art. 3(1); Declaration on Adoption, *supra* note 93, art. 5.

³⁴⁰ Dillon, *supra* note 64, at 206, 208.

UNCRC should include, in a separate protocol, a clear statement against institutional living on human rights grounds.³⁴¹ However, as it currently stands, international law remains “undefined on this critical point.”³⁴²

Nonetheless, the Adoption Ban is at least ethically, if not legally, problematic from the perspective of children presently in institutions who are unlikely to be moved to a family setting in the short-term. There are many more Russian children eligible for adoption than there are prospective Russian adoptive families.³⁴³ Despite a move towards family/group-based settings,³⁴⁴ an estimated 100,000 designated orphans remain residents in non-family-based³⁴⁵ institutions. It is almost universally recognized that institutionalization in non-family-based settings is not in the best interests of children, and that family-based care best serves children’s physical, mental and emotional needs.³⁴⁶ In the long-term, the ban may also be detrimental for certain populations, such as children with special needs, who may never be

³⁴¹ *Id.* at 255; *see also id.* at 235-36 (comparing “the right not to be institutionalized with the right not to be tortured, not of course in the literal sense, but rather in that we can identify common negative effects on the human psyche—quite apart from cultural differences—which allow us to articulate an absolute prohibition on such treatment”).

³⁴² *Id.* at 239 (“The fact that the existing law remains undefined on this critical point tends to transfer discretion to individual countries such that law-making is vulnerable to nationalistic political pressures, particularly in countries with larger numbers of ‘waiting’ children.”).

³⁴³ *Top Court to Issue Adoption Guidelines ‘Within Weeks’*, RIA NOVOSTI (Jan. 18, 2013, 6:48 PM), <http://en.rian.ru/russia/20130118/178868227/Top-Court-to-Issue-Adoption-Guidelines-Within-Weeks.html> (citing Deputy Prime Minister Olga Golodets—more than 100,000 children eligible for adoption, but only 18,000 prospective domestic families).

³⁴⁴ *Supra* text accompanying notes 132-136.

³⁴⁵ Iusmen, *supra* note 277, at 6, rightly points out that “the stigma of ‘institutions’ as referring only to orphanages is misleading. Although orphanages with appalling conditions still exist, international institutions and child rights experts have been promoting the development of ‘institutional care’ providing family-like environment,” which is to say that not all institutional care is the polar opposite of a family setting. *See also* Pini v. Romania, App. Nos. 78028/01, 78030/01, ¶ 153 (the ECtHR noting the “social and family environment” of a foster home in which two adopted Romanian girls have grown up, and where they wished to remain, rather than being adopted to Italy).

³⁴⁶ *See, e.g.*, JOHNSON, *supra* note 60, at 151; Bartholet, *Where do Black Children Belong?*, *supra* note 52, at 1224; Dillon, *supra* note 64, at 236-37. Further research is required on the suitability of family-type settings, such as group homes with parental-type care-givers; it is often assumed that permanent family adoption is uniformly preferable to foster/group home settings. In fact, this will depend on a variety of child-specific factors. *See, e.g.*, Pini v. Romania App. Nos. 78028/01, 78030/01 (a case concerning two Romanian girls who were adopted to Italy but expressed a desire to remain in the foster home in which they had grown up). It should also be noted that it appears that a significant number of Russian children adopted to the U.S. end up being cared for in group/foster-home settings, such as the Montana Ranch, which is widely regarded as an excellent provider of specialized care for adoptees with special mental health needs. *See* Kirk Johnson, *Russian Adoptees Get a Respite on the Range*, N.Y. TIMES (Apr. 26, 2010), <http://www.nytimes.com/2010/04/27/us/27ranch.html>.

“adoptable” domestically even in the long-run,³⁴⁷ and whose prospects of being adopted internationally are likely to decline dramatically now that Americans are banned from adopting.³⁴⁸ A blanket rule prohibiting international placements (to America or generally) is too rigid to accommodate the individual and unique needs of all the children in need of family care.³⁴⁹

The ban is particularly problematic for Russian children who have already been matched with American parents. Russia requires international adoptive parents to travel to Russia and spend time with their prospective adoptive child once a match has been made, but prior to the final court order.³⁵⁰ Over three hundred Russian children who have met and bonded with their prospective American parents subsequently have had their adoptions interrupted by the Adoption Ban.³⁵¹ In addition to causing great personal hardship to both children and parents, and possibly violating the best interests principle in relation to those individual children, these interruptions arguably constitute a contravention of the ECHR right to family life,³⁵² due to the parent-child bonding that has already taken place. The ECtHR has previously recognized that *intended* family life may be included in the scope of Article 8.³⁵³ A number of parents affected by the Adoption Ban are

³⁴⁷ Thompson, *supra* note 184, at 707 (noting that Americans have adopted many disabled Russian children, whom “[f]ew Russians are willing to adopt”); Aden, *supra* note 123 (noting the difficulty of finding adoptive parents for children with disabilities in Russia); Herszenhorn & Kramer, *supra* note 216 (noting that a lawmaker from the United Russia party, which put forward the Adoption Ban, thought there should be an exception to the ban for children with disabilities).

³⁴⁸ While firm statistics on the proportion of children with disabilities adopted to American families are unavailable, anecdotally, American parents have historically been more willing to adopt children with special needs, largely due to the evangelical church adoption movement advocating adoption as a response to disability. See David M. Herszenhorn, *In Russia, Ban on U.S. Adoptions Creates Rancor and Confusion*, N.Y. TIMES (Jan. 15, 2013), <http://www.nytimes.com/2013/01/16/world/europe/in-russia-ban-on-us-adoptions-creates-rancor-and-confusion.html>.

³⁴⁹ Carlson, *supra* note 98, at 258; Molly S. Marx, *Whose Best Interests Does it Really Serve? A Critical Examination of Romania’s Recent Self-Serving International Adoption Policies*, 21 EMORY INT’L L. REV. 373, 408 (2007).

³⁵⁰ *Supra* text accompanying note 209. William Pierce notes that this requirement was “implemented because Russian officials were concerned about children in orphanages being ‘advertised’ on internet websites.” William L. Pierce, *Finding American Homes*, NAT’L REV. (Oct. 24, 2002, 9:00 AM), <http://old.nationalreview.com/comment/comment-pierce102402.asp>.

³⁵¹ *Supra* text accompanying note 209.

³⁵² ECHR, *supra* note 271, art. 8.

³⁵³ *Pini v. Romania*, App. Nos. 78028/01, 78030/01, ¶ 143 (holding, in the case of international adoptive parents matched with Romanian adoptees, that although “Article 8 presupposes the existence of a family . . . this does not mean, in the Court’s opinion, that all *intended family life* falls entirely outside the ambit of Article 8” (emphasis added)).

arguing as much before the ECtHR in a pending case.³⁵⁴

3. *Moving Forward, Dual Goals: In-country Care and Intercountry Adoption in the Interim*

Admittedly, it is sometimes the case that despite the short-term detriment to waiting children and families, moratoriums and bans on intercountry adoption are necessary to address systemic flaws in child protection and the adoption process.³⁵⁵ Such actions are never without controversy,³⁵⁶ but may in some cases be the most effective means of cleaning up an intercountry adoption system for the benefit of future participants. However Russia's intercountry adoption system, especially in the wake of bilateral treaties with three major receiving countries, has a positive reputation.³⁵⁷ Given this, and given the availability of the Hague Convention and/or bilateral treaties to regulate and improve the intercountry adoption process, there is no long-term payoff or rationale for a premature ban on intercountry adoptions from Russia, much less an American-specific ban.

Some opponents of intercountry adoption have argued that the practice discourages in-country initiatives aimed at reducing abandonment, and promoting adoption.³⁵⁸ Pavel Astakhov has argued that the Adoption Ban will force Russia to "take care of our orphans ourselves," by "burning the bridge" to America.³⁵⁹ Other supporters of

³⁵⁴ Ponomareva, *supra* note 219 ("The lawyers contend that familial relations between adoptive parents and a child arise when the latter begins to consider them as parents, not after a court decision.").

³⁵⁵ See, e.g., Dillon, *supra* note 64, at 244-52 (discussing moratoriums on adoptions from Cambodia, Vietnam, Romania and Guatemala); Iusmen, *supra* note 277, at 8-9 (on the reasons behind Romania's moratorium); Maarten Pereboom, *The European Union and International Adoption*, CTR. FOR ADOPTION POL'Y, 1 (Apr. 28, 2005) (noting that in 2005, in response to EU concerns over child trafficking, Romania banned intercountry adoptions, aiming to "crack down on the corruption that existed in a highly flawed system"); Sara R. Wallace, Note, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT'L & COMP. L. 689, 715 (2003) (noting that in 1993, China suspended all international adoptions for ten months, to overhaul procedural requirements in light of concerns over black market adoptions and baby-selling); Lisa M. Yemm, Note, *International Adoption and the "Best Interests" of the Child: Reality and Reactionism in Romania and Guatemala*, 9 WASH. U. GLOBAL STUD. L. REV. 555, 571 (2010) (outlining the U.S.-imposed moratorium on adoptions from Guatemala due to non-compliance with the Hague Convention).

³⁵⁶ See, e.g., Marx, *supra* note 349; Wechsler, *supra* note 63, at 3 ("[Romania's] prohibition is not in the best interest of Romania's many children living in institutions, but rather is a self-serving political policy enacted in an attempt to gain European Union membership.").

³⁵⁷ *Supra* text accompanying note 153.

³⁵⁸ *Supra* text accompanying note 88.

³⁵⁹ Aden, *supra* note 123.

the ban have argued it will attract public attention to the issue of Russian orphans and increase domestic adoptions.³⁶⁰ Certainly, more research on the impact of intercountry adoption on domestic child welfare systems is needed. However, as Sara Dillon points out, “[e]xpressing commitment to investment in long-term solutions to the problem of abandonment has no logical corollary in disregarding the immediate matter of children presently in institutions.”³⁶¹ In the long-term, Elizabeth Bartholet argues that it is “unlikely that adoption of a relatively small number of . . . homeless children will interfere with efforts to assist those other children who remain in their native countries.”³⁶² On the contrary, foreign adoption may “increase awareness in . . . receiving countries of the problems of children in the sending countries” and thus create a more sympathetic international climate.³⁶³ In contrast, in the wake of the Adoption Ban, Russia stands to incur widespread international criticism and condemnation for subordinating the immediate interests of her children to long-term and/or political objectives.³⁶⁴

In light of the foregoing, Russia should be encouraged to reconsider the Adoption Ban, and to pursue the dual goals of (i) eradicating the need for intercountry adoption, and (ii) in the interim, allowing intercountry adoption (including to the U.S.) to continue, in accordance with the subsidiarity principle, where it can best serve the welfare needs of children without families. In relation to the former goal, Russia should pay particular attention to positive “upstream” measures aimed at keeping families together and pursuing reunification, within the best interests framework, in addition to existing initiatives

³⁶⁰ *Russian Government Drafts Fresh Bill Facilitating Domestic Adoptions*, RUSS. TODAY (Feb. 26, 2013, 12:13 PM), <http://rt.com/politics/russian-government-drafts-fresh-bill-facilitating-domestic-adoptions-459/>.

³⁶¹ Dillon, *supra* note 64, at 196.

³⁶² Bartholet, *Propriety*, *supra* note 52, at 198 (referring to intercountry adoption globally).

³⁶³ *Id.*

³⁶⁴ Catherine M. Bitzan, Note, *Our Most Precious Resource: How South Korea is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT’L L. 121, 143 (2008) (arguing, in relation to South Korea’s adoption policies, that “acting preemptively [to ban intercountry adoption] may raise a host of new troubles for which the country may be even more widely criticized.”); *see also* Will Englund & Tara Bahrapour, *Russia’s Ban on U.S. Adoptions Devastates American Families*, WASH. POST (Dec. 28, 2012, 11:00 AM), http://www.washingtonpost.com/world/europe/russia-set-to-ban-us-adoptions/2012/12/27/fd49c542-504f-11e2-8b49-64675006147f_story.html (“Senior members of the Russian cabinet had warned against the bill, saying that it . . . unavoidably draw[s] attention to the sorry state of Russian orphanages.”). For examples of criticism of the Adoption Ban, see Herszenhorn & Kramer, *supra* notes 216, 217 (U.S. criticism), *see also supra* note 301 (Council of Europe and U.S. State Department).

aimed at improving in-country foster care and adoption prospects. Regarding the latter goal, the U.S. and Russia could engage in negotiations, within the bilateral treaty framework, on how to address Russian concerns with consular/state access to Russian children adopted in America, particularly in cases of alleged abuse or neglect. These actions are not inconsistent with a longer-term objective of reducing the need for intercountry adoption. More generally, Russia should consider ratifying the Hague Convention, or completing as a matter of priority bilateral adoption treaties with other countries that receive Russian adoptees, in order to better safeguard children and families.

Intercountry adoption should continue to be a last-resort possibility wherever it serves the welfare needs of Russian children, for so long as the demand for families outstrips domestic supply. Of course, in encouraging Russia to reconsider the Adoption Ban, care must be taken to ensure that it is the interests of Russian children without parents, not American parents without children, which guide the discussion.³⁶⁵ It is also important that any assumptions about the suitability or otherwise of in-country alternatives to intercountry adoption (such as family-style group homes and foster care) are based, as far as possible, on social science evidence³⁶⁶ and a case-by-case assessment of each child's best interests.³⁶⁷ As Russian authorities attempt to make such assessments, adoption to the U.S. should continue to be one of a range of options open to Russian children without families.

³⁶⁵ See Bainham, *supra* note 63, at 225 (asking, in relation to the Romanian moratorium on intercountry adoption, whether “the enthusiasm for restarting the practice [is] about meeting the needs of childless adults outside Romania or . . . about providing for Romanian families and their children?”).

³⁶⁶ See generally Dillon, *supra* note 64, at 192 (contending that only social science evidence can assist in determining to what extent the UNCRC is flawed due to its failure to clarify the standard of care that meets a human rights standard); *id.* at 193-94 (noting that “[t]he inquiry into whether an orphanage can provide an adequate form of protection for children in human rights terms has little to do with the important, though separate, debate on cultural relativity and human rights generally.”); *id.* at 236 (noting the lack of empirical evidence as to what extent group family-style homes work as well as a family).

³⁶⁷ See, e.g., *Pini v. Romania*, App. Nos. 78028/01, 78030/01 (ECtHR noting the “social and family environment” of a foster home in which two adopted Romanian girls had grown up, and where they wished to remain); see also King, *supra* note 53, at 469 (arguing that intercountry adoption should be reformed to ensure children are not removed from “what they would describe as family.”).

V. CONCLUSION

There is a Russian saying that “[a]ll nations see the world from their own belltowers.”³⁶⁸ This Article has attempted to put forward the view from the Russian bell tower on intercountry adoption. It is not an attempt to apologize for the Russian ban on adoptions to American “forever families,” or to highlight the plight of Americans seeking to adopt from Russia.³⁶⁹ In the immediate context, with thousands of Russian children institutionalized, many of whom have already been matched, and bonded, with American parents, the ban subordinates the “best interests” principle to political considerations. The Adoption Ban represents a political reaction to a finger of blame (justifiably) pointed at Russia by the U.S., and is a reflection of the political nature of intercountry adoption generally. Beneath the “tit for tat” that the Adoption Ban embodies there may be genuine concerns about post-adoption care in America. These concerns inspired the Russian-American Adoption Agreement, which was heralded with great optimism on both sides. Although the agreement had not yet been fully rolled out, and although Russia apparently had continued concerns over post-adoption cooperation at the level of the U.S. states, these concerns could no doubt have been addressed with further negotiations and collaboration.

Intercountry adoption is frequently presented as a self-evidently logical solution to the demand for children in receiving countries, and the ready supply of family-less children in sending countries.³⁷⁰ This is a short-sighted perspective, which understates the understandable desire of states to move towards caring for their children domestically, and the need to comply with child and parental rights by ensuring that whenever possible children remain with their birth parents.³⁷¹ Russia’s aim of ultimately providing suitable in-country care for her children is a laudable one, with which receiving countries such as the U.S. can no

³⁶⁸ Thomas A. Ware, *The Other Side of the Hill*, VII J. U.S. ARMY WAR COLL. 32, 32 (1977), available at <http://www.carlisle.army.mil/usawc/parameters/Articles/1977/ware.pdf>.

³⁶⁹ See generally Perry, *supra* note 115, at 106 (noting the over-emphasis in intercountry adoption literature on the perspective of would-be adoptive parents).

³⁷⁰ See, e.g., Marx, *supra* note 349, at 374 (“The obvious solution to this global problem is a convergence of supply and demand, creating families for children and children for families.”); Wallace, *supra* note 355, at 723 (“The practice of international adoption does appear to be a logical solution to this disparity in the number of orphaned and abandoned children in some countries and the number of families and individuals wishing to adopt in others.”).

³⁷¹ Cf. Marx, *supra* note 349, at 376 (“Although the problems of children without families and families without children are distinct, one practice can solve them both: [international adoption].”). It is by no means a truism that “international adoptions are beneficial to all parties involved.” Cf. *id.* at 380.

doubt identify. As holders of *parens patriae* duties, states understandably are, and should be, concerned with providing, and being seen as able to provide, for the welfare of their most vulnerable populations. There is no obligation to partake in intercountry adoption *per se*. But an in-country welfare system will take time to develop, and a ban on adoptions to the U.S., historically a very significant receiver of Russian children, harms the best interests of children currently institutionalized who are unlikely to be moved to a family setting in the short-term. In the long-term, an intercountry adoption ban may also be problematic for certain populations, such as children with disabilities, who are less likely to be adopted or fostered domestically. A more appropriate and proportionate means of achieving in-country welfare, and ensuring that the subsidiarity principle and best interests principle are respected, is to vigorously reinvent the domestic welfare system, as Russia has shown signs of doing, but to retain intercountry adoption as a measure of last resort. Russia should be encouraged in its endeavors to improve in-country child welfare systems, and to consider reopening adoptions to America, at minimum as an interim, last resort option wherever it serves the best interests of the child in question.