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Christina Champenois

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DOES THE RUSSIAN ADOPTION BAN VIOLATE INTERNATIONAL LAW?

*Christina Champenois**

I. INTRODUCTION

Without surgery before the age of five, Ivan will die.¹ Ivan suffers from Apert syndrome, a rare cranial condition.² Ivan needs an operation to reshape his skull before he turns five years old or his skull will slowly crush his brain.³ Abandoned by his biological mother⁴ and living in an orphanage in Smolensk, Russia, Ivan has little chance of getting the life-saving operation in time.⁵

Fortunately for Ivan, Shana and Ron Pardue wanted to adopt him and take him home to Tennessee for the surgery he so desperately needs.⁶ Unfortunately for Ivan, however, Russia did not allow the Pardues to complete the adoption. Ivan was three years old when Russia banned U.S. citizens from adopting Russian orphans,⁷ beginning in January 2013.⁸ For Ivan, the adoption ban may prove to be a death sentence because two years later, Ivan still awaits the operation. The longer the delay, the greater the “danger . . . that his skull will cause permanent damage to his brain or kill him.”⁹ At this point, it may be too late for Ivan.

Time has already run out for Daria, who would have turned three in May 2013.¹⁰ The Russian adoption ban likewise cut off her adoption.¹¹ The ban was imposed when the Burrows family was still in the process of being approved for adoption, preventing them from taking her home.¹² Daria, who had Down syndrome, died in April 2013 at her orphanage in Nizhny Novgorod due to an undiagnosed heart ailment.¹³ Tatyana

* Juris Doctor, 2015, J. Reuben Clark Law School, Brigham Young University. I would like to thank Professor Eric Talbot Jensen for his support and helpful suggestions. Thank you also to the editors of the *BYU International Law and Management Review*.

¹ Times of London, *Russian Orphan Faces Death in Wake of Putin Adoption Ban*, N.Y. POST, Sept. 7, 2013, <http://nypost.com/2013/09/07/russian-orphan-faces-death-in-wake-of-putin-adoption-ban/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Olivia Ward, *Russian Adoption Ban Leaves 300 Orphans in Limbo*, THE STAR (Aug. 4, 2013), http://www.thestar.com/news/world/2013/08/04/russian_adoption_law_leaves_300_orphans_in_limbo.html.

⁶ *Id.*

⁷ *See id.*

⁸ *Dima Yakovlev Law*, RT (Dec. 28, 2012, 10:46), <http://rt.com/politics/official-word/dima-yakovlev-law-full-995/> (providing the full text of Dima Yakovlev’s law, translated to English by RT).

⁹ Times of London, *supra* note 1.

¹⁰ Kathy Lally, *Death of Russian Orphan Galvanizes Opponents of Adoption Ban*, WASH. POST, June 20, 2013, http://www.washingtonpost.com/world/orphan-sought-by-us-parents-dies-in-russia/2013/06/19/75b21dea-d5b1-11e2-a73e-826d299ff459_story.html.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Bezdenzhnykh, head of child protection for Nizhny Novgorod, responded to Russian media reports that claimed Daria would still be alive if not for the adoption ban.¹⁴ She acknowledged that “children with Down syndrome had died recently,” but asserted that “no one had wanted to adopt them.”¹⁵

Not only does the ban have potentially negative effects on the physical health of some of the children, but it may also have harmed their emotional well-being.¹⁶ Some claim that as many as 1,000 Russian children were in the process of being adopted by U.S. families—and that most of them had met their parents-to-be, some as many as three times—when the Russian adoption ban ended all U.S. adoptions of Russian children.¹⁷ Four-year-old Timofey, for example, had met his prospective

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Children who have experienced abandonment are at risk for attachment disorders. Laura Beck, Nancy D’Antonio, & Lynne Lyon, *Why Internationally Adopted Children Are at Risk for RAD*, Attach-China/International, Apr. 2014, <http://www.attach-china.org/whyinternational.html>. Symptoms of attachment disorders in children include manipulativeness, hostility, destructiveness, cruelty, lack of empathy, and inability to receive or give affection or love. *Find Answers About Attachment Issues*, Institute for Attachment and Child Development, <http://instituteforattachment.org/learn-about-attachment-disorder/common-questions/> (last visited May 1, 2015). Institutionalization and inconsistent caregivers also contribute to attachment disorders. Maureen E. Wood, *Reactive Attachment Disorder: A Disorder of Attachment or of Temperament?*, Mar. 2005, <http://www.personalityresearch.org/papers/wood.html>. Studies have shown that attachment disorders are more likely to be reversed if the child is placed in a family before the age of two. Meghan Collins Sullivan, *For Romania’s Orphans, Adoption Is Still a Rarity*, NPR, Aug. 19, 2012, <http://www.npr.org/2012/08/19/158924764/for-romania-orphans-adoption-is-still-a-rarity>. Because of the Russian adoption ban, children who were in the process of being adopted are now subjected to further institutionalization, thus increasing the risk for attachment disorders and decreasing the likelihood of successfully reversing attachment disorders. Aside from the additional institutionalization, the second abandonment may have harmed the children’s emotional well-being. According to Zia Freeman, an adoption counselor, when an adoption is disrupted or annulled, “[i]t can cause lifelong issues of distrust, depression, anxiety, extreme control issues and very rigid behavior. [The children] don’t trust anyone; they have very low self-esteem. They’ll push away teachers and friends and potential parents and if you put them in another placement and they have to reattach again and then if they lose that placement, it gets tougher and tougher.” Diane Mapes, *It Takes More than Love: What Happens When Adoption Fails*, TODAY PARENTS, Aug. 1, 2012, <http://www.today.com/parents/it-takes-more-love-what-happens-when-adoption-fails-918076>. The Russian adoption ban did not cause the dissolution of finalized adoptions or the disruption of adoptions where children had already been placed in adoptive homes. But it did prevent the finalizations of adoptions where children had already met their prospective adoptive parents and knew that they were being adopted. While the impact of this abandonment on the children’s risk for attachment disorders may not be as severe as that of an adoption disrupted after placement in the adoptive home, a negative impact on attachment nevertheless seems likely.

¹⁷ Meghan Collins Sullivan, *Painful Lessons from Romania’s Decade-Old Adoption Ban*, TIME, Mar. 15, 2013, <http://world.time.com/2013/03/15/painful-lessons-from-romania-decade-old-adoption-ban/>; cf. 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> (“Experts estimate that as 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.”); Sergei L. Loiko & Kim Murphy, *Orphans, Families in Agonizing Limbo*, L.A. TIMES, May 21, 2013, <http://www.latimes.com/great-reads/la-fg-russian-adoptions-20130521-dto-htm1story.html> (“Kunz said the ban immediately affected about 700 children who were in the process of being adopted by American families. Most wrenchingly, about 300 of the children had already met and were beginning to get to know their prospective new parents.”); Corrie MacLaggan, *Shock, Heartbreak for U.S. Families Adopting Russian Children*, CHI. TRIB., Dec. 28, 2012, http://articles.chicagotribune.com/2012-12-28/news/sns-rt-us-russia-usa-adoptions-familiesbre8br0mt-20121228_1_russian-children-sergei-magnitsky-gladney-center (“[S]ome 1,500 U.S. families . . . are in the process of adopting a child from

adoptive parents and knew them as “mama” and “papa.”¹⁸ The children whose adoptions the ban suddenly cut off have now been twice abandoned. Pavel Astakhov, the Kremlin’s ombudsman for children’s rights, claims that most of the children “have already forgotten any meetings with their prospective US parents.”¹⁹ According to him, the children experienced neither emotional attachment nor “moral suffering.”²⁰ But have they really forgotten?

The suffering, both of the children and of the families whose adoptions were cut off is, to most, undeniable. More debatable, however, is the legality of the adoption ban that caused this suffering. Does the Russian adoption ban violate international law?

Although the Russian adoption ban likely does not violate the Hague Convention, it constitutes a clear violation of the Agreement between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children. The adoption ban also potentially violates the European Convention on Human Rights and the Convention on the Rights of the Child. Because the Russian adoption ban violates at least one international treaty, it is illegal under international law. No simple solution exists, since the enforcement of an international treaty that has been violated is difficult and generally involves diplomatic channels. The most effective enforcement mechanisms likely include negotiations to ensure the safety of Russian children adopted into the United States, appeals to international courts, media efforts demonstrating the negative effects of the adoption ban, and media efforts showcasing Russian adoption success stories.

II. ORGANIZATION

Part III briefly reviews international adoptions from Russia; Part IV introduces Russia’s ban on the adoption of Russian children by American parents; Part V discusses possible motivations for the adoption ban; Part VI analyzes the legality of the Russian adoption ban under international law. This analysis of legality under international law considers whether the ban violates (1) the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption (“Hague

Russia, according to an estimate from the Alexandria, Virginia-based National Council For Adoption. Some of those families had just started paperwork, while others had already been matched with a child and, in some cases, had the chance to meet the boy or girl.”); Jake Rudnitsky & Stephen Bierman, *Russian Protest against U.S.-Adoption Ban Draws Thousands*, BLOOMBERG (Jan. 13, 2013, 9:25 AM), <http://www.bloomberg.com/news/2013-01-13/russian-protest-march-against-u-s-adoption-ban-starts-in-moscow.html> (“About 500 to 1,000 U.S. families are in various stages in the process of adopting Russian children, according to the U.S. State Department.”). *But see* Roger Wicker, *Russia’s Adoption Freeze*, WASH. TIMES, July 23, 2013, <http://www.washingtontimes.com/news/2013/jul/23/russias-adoption-freeze/> (“Approximately 300 U.S. families . . . were in the process of adopting children from Russia when the ban took effect in January.”).

¹⁸ Loiko & Murphy, *supra* note 17.

¹⁹ *US Hands Over List of 60,000 Russian Adoptees—Kremlin Ombudsman*, RIA NOVOSTI (Aug. 12, 2013, 9:23 PM), <http://en.ria.ru/russia/20130812/182726811.html> [hereinafter *U.S. Hands Over List*].

²⁰ *Id.*

Convention”); (2) the Agreement between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children (“U.S.-Russia Bilateral Adoption Agreement”); (3) the European Convention on Human Rights, specifically Article 3 (prohibiting torture), Article 8 (providing for protection of one’s private and family life), and Article 14 (protecting against discrimination); and (4) the Convention on the Rights of the Child. Finally, Part VII discusses recommendations for how to best enforce international law in this situation.

III. U.S. ADOPTIONS FROM RUSSIA

The recent Russian ban on adoptions to the United States will have significant repercussions. U.S. citizens have adopted more than 61,000 Russian children since the fall of the Soviet Union in 1991.²¹ Despite the recent decrease in international adoptions and the increasing difficulty of adopting children from Russia even prior to the ban, Russia has long been one of the main countries from which Americans have adopted children, and most Russian children adopted internationally have been adopted by American parents.

International adoptions have recently decreased, and the process to adopt children from Russia was growing increasingly complicated even before the adoption ban. Overall, international adoptions dropped by almost fifty percent since 2004, and the number of children adopted internationally by U.S. citizens has likewise dropped since its 2004 peak of 22,884 adoptions.²² The number of Russian adoptions to the United States has experienced a similar decrease in recent years: American parents adopted approximately 1,000 Russian children per year in 2010 and 2011, compared to more than 5,000 per year in 2003 and 2004.²³ The

²¹ *Id.* There is some variation in the estimates of the number of children adopted from Russia. See *Only “One of 33 Orphans” Denied U.S. Adoption Finds Russian Home*, MOSCOW TIMES, Nov. 7, 2013, <http://www.themoscowtimes.com/news/article/only-one-of-33-orphans-denied-us-adoption-finds-russian-home/489055.html> [hereinafter *Only “One of 33 Orphans”*] (“About 60,000 Russian children have been adopted by U.S. parents since the fall of the Soviet Union. . . .”); *Ban on US Adoptions “Won’t Be Canceled or Altered”*, RT (June 27, 2013, 10:46 AM), <http://rt.com/politics/canceled-altered-ombudsman-russian-314/> (“Astakhov said that the US Immigration and Customs Enforcement agency lists about 61,000 adopted Russian children in the country, while Russian consular services have only 37,338 adopted children on their US lists. Moreover, the Russian Education and Science Ministry (the body in charge of orphans in Russia) says that over 40,000 kids had gone to the United States.”); Richard Solash, *Russia’s Ban against U.S. Adoptions: The Human Cost*, THE ATLANTIC (Jan. 4, 2013, 7:28 AM), <http://www.theatlantic.com/international/archive/2013/01/russias-ban-against-us-adoptions-the-human-cost/266817/>, (“U.S. families have adopted 60,000 Russian children since 1992, including many with disabilities.”).

²² Kevin Voigt & Sophie Brown, *International Adoptions in Decline as Number of Orphans Grows*, CNN, Sept. 17, 2013, 6:52 AM, http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/index.html?iid=article_sidebar; See also Scott Hamilton, *Russian Ban Adds to Decline in Adoptions in Recent Years*, WINSTON-SALEM J., Jan. 6, 2013, http://www.journalnow.com/news/state_region/article_0399ae30-57ad-11e2-ab57-001a4bcf6878.html?mode=jqm (citing 22,991 as the number of international adoptions to American parents when the numbers peaked in 2004).

²³ *Russia*, INTERCOUNTRY ADOPTION, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, http://adoption.state.gov/country_information/country_specific_info.php?country-select=russia (last visited Dec. 31, 2013).

Russian adoption process has become increasingly complicated, requiring three trips to Russia for the prospective adoptive parents²⁴ and a cost of more than \$50,000.²⁵

Despite this decrease in international adoptions in general and the difficulty and expense of Russian international adoptions, Russia remained the third-most popular country from which children were adopted internationally in 2011.²⁶ Before the adoption ban went into effect, Russia was also one of the main “sending” countries for children adopted internationally to the United States: Russia has consistently been one of the countries from which Americans have adopted the most children each year since the early 1990s.²⁷

Not only has Russia long been one of the main “sending” countries for children adopted to the United States, the United States has been one of the main “receiving” countries for Russia: according to the Russian government, U.S. families adopted more Russian children than families from any other country in 2011.²⁸ Because so many Russian children have been adopted by American parents in the last decade and a half, because Russia has been among the most popular sending countries for children adopted to the United States, and because the United States has been the destination for more Russian children adopted internationally than any other country, a total ban on Russian adoptions to the United States can be expected to have significant repercussions.

IV. THE ADOPTION BAN

In December 2012, Russian international adoptions to the United States abruptly and unexpectedly halted when the Russian government enacted the law “[o]n measures against individuals involved in violations

²⁴ Rick Callahan, *Adoption from Overseas: U.S.-Russian Adoption Pact Met with Caution, Hope*, HUFFINGTON POST (Nov. 7, 2012, 5:24 PM), http://www.huffingtonpost.com/2012/07/12/adoption-from-overseas_n_1667453.html. Cf. *25 Factors to Consider When Adopting from Russia*, CREATING A FAMILY, <http://www.creatingafamily.org/adoption/charts/factors-to-consider-when-adopting-from-russia.html> (last visited Dec. 31, 2013) (“Many regions now require 3 trips, although it is possible in a few regions to still make only 2 trips.”); Shari Rudavsky, *Russian Adoption Ban Hits Families, Agencies*, NECN (Feb. 20, 2013, 11:45 AM), http://www.necn.com/02/20/13/Russian-adoption-ban-hits-families-agenc/landing_nation.html?&apID=e8d1b5e8a5b54516bcd59391d447d17 (“Russia required families to make three trips to the country. On the first trip, the family meets the child. On the second, about a month or so later, the family appears in court before a Russian judge who decides whether to approve the adoption. Then at least 30 days later, the family can return to bring the child home.”).

²⁵ Maura Ammenheuser, *Many U.S. Parents Left in Limbo as Status of Pending Adoptions Remains Uncertain*, USA TODAY, Jan. 28, 2013, 12:59 PM, <http://www.usatoday.com/story/news/nation/2013/01/28/russian-adoption-ban-frustrates-american-couples/1869961/>.

²⁶ Callahan, *supra* note 24.

²⁷ Cheryl L. Allen, Note, *The US-Russian Child Adoption Agreement: An End to Failed Adoptions?*, 35 FORDHAM INT’L L.J. 1690, 1697 (2012); Hamilton, *supra* note 22 (“Russia has served as the largest outlet for children to be adopted into the United States for more than two decades.”).

²⁸ David M. Herszenhorn, *Putin Evasive on Banning Adoptions by Americans*, N.Y. TIMES Dec. 20, 2012, <http://www.nytimes.com/2012/12/21/world/europe/putin-says-his-decision-on-us-adoption-ban-will-come-later.html> (“According to the Russian government, there were 956 Russian children adopted by families from the United States in 2011—the most of any country.”); *see also* Solash, *supra* note 21.

of fundamental human rights and freedoms, the rights and freedoms of citizens of the Russian Federation” (also known as Dima Yakovlev’s Law).²⁹ This law parallels the Sergei Magnitsky Rule of Law Accountability Act of 2012 (“Magnitsky Act”), a U.S. law that allows the creation of a list of Russian human rights violators who will be denied visas to the United States and whose assets in the United States, if any, will be frozen.³⁰ Dima Yakovlev’s Law calls for a similar list of U.S. citizens, banning persons on that list from entering Russia and providing for the “seizure of financial and other assets owned by the US citizens” on the list.³¹ Additionally, the Russian law “suspends the activity of all non-profit organizations that operate in Russia and receive support from U.S. entities (citizens or organizations) if the organization’s activities are deemed to threaten Russia’s interests”; prohibits U.S. citizens from “occupying leadership roles in nonprofit organizations”; and last but not least “suspends the activities of adoption organizations and prohibits the adoption of Russian children by U.S. citizens.”³²

Russian lawmakers rushed Dima Yakovlev’s Law through Parliament in December 2012, and President Vladimir Putin signed it into law on December 28, 2012,³³ less than twenty-four hours after he received the bill from Parliament.³⁴ The Russian adoption ban took effect on January 1, 2013, cutting off adoptions to U.S. families in the process of adopting children from Russia.³⁵ Russia has allowed only a few of these “pipeline families” (U.S. families in the process of adopting from Russia when the adoption ban took effect) to bring home the children they intended to adopt.³⁶

Following the ban, uncertainty surrounded the pending adoptions. Originally, Russia’s children’s rights ombudsman, Pavel Astakhov, said that if the bill took effect, forty-six children about to be adopted by U.S. families would remain in Russia.³⁷ These forty-six Russian orphans were

²⁹ Elizabeth Clark Hersey, Note, *No Universal Targets: Distinguishing between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 BROOK. J. INT’L L. 1231, 1246 (2013). Russia named the law after Dima Yakovlev, a toddler who had been adopted from Russia by an American couple and who died after his father left him in a hot car for nine hours; the father was later acquitted of involuntary manslaughter. Will Englund, *Russians Say They’ll Name Their Magnitsky-Retaliatory Law after Baby Who Died in a Hot Car in Va.*, WASH. POST, Dec. 11, 2012, 9:10 AM, <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/11/magnitsky-retaliatory-law-after-baby/>; Artyom Kobzev, *Dima Yakovlev Law Failed to Sour Russia-US Relations*, VOICE OF RUSSIA (Dec. 28, 2013, 1:14 PM), http://voiceofrussia.com/2013_12_28/Dima-Yakovlev-Law-fail-ed-to-sour-Russia-US-relations-5886/.

³⁰ Belogolova, *supra* note 17.

³¹ *Dima Yakovlev Law*, *supra* note 8.

³² Hersey, *supra* note 29, at 1247.

³³ Gabriela Baczyńska, *Russians Protest against Ban on Adoptions by Americans*, CHI. TRIB., Jan. 13, 2013, http://articles.chicagotribune.com/2013-01-13/news/sns-rt-us-russia-usa-adoptionbre90c069-20130113_1_dima-yakovlev-adoption-ban-russians-protest.

³⁴ *Putin Signs Bill Barring Adoptions of Russian Children by Americans*, CBS NEWS (Dec. 28, 2012, 12:44 PM), <http://www.cbsnews.com/news/putin-signs-bill-barring-adoptions-of-russian-child-ren-by-americans/> [hereinafter *Putin Signs Bill Barring Adoptions*].

³⁵ *Id.*

³⁶ *Russian Supreme Court Oks U.S. Adoptions before January 1*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 22, 2013), <http://www.rferl.org/content/russia-adoptions-supreme-court/24880718.html>.

³⁷ *Id.*

those furthest along in the adoption process, having received court approval for their adoptions but still in the thirty-day waiting period required before the adoptive parents were allowed to take the children home with them.³⁸ However, Russia's supreme court issued a letter on January 22, 2013, clarifying that all Russian children whose adoptions had been approved in court before January 1, 2013 should be given to their adoptive parents—even if the thirty-day waiting period would end after January 1, 2013—which allowed these forty-six adoptions to be completed.³⁹

The adoption ban cut off many other pending U.S. adoptions of Russian children, hundreds of whom had already met their prospective adoptive parents.⁴⁰ Sergei Zheleznyak, a deputy speaker in the State Duma, said that their goal was to find Russian families for the Russian orphans.⁴¹ However, as of November 7, 2013, Russian parents had adopted only one of the thirty-three St. Petersburg orphans who had already met their prospective American parents before the adoption ban.⁴² Three of the remaining thirty-two children were living with guardians, one was living with a foster family, and one had returned to his biological family; the report from the St. Petersburg social affairs committee did not provide any details on the remaining twenty-six orphans in the group.⁴³ The prospects for these children are not good after the adoption ban because more than half have serious diseases, seven are handicapped, four have Down syndrome, and others have serious health problems.⁴⁴ Most Russians are not interested in adopting disabled children.⁴⁵ Some American families who were trying to adopt Russian children hope that families from Canada will adopt the children

³⁸ Kirit Radia, *Limits of Russia Adoption Ban Unclear, Causing Anxiety for US Families*, ABC NEWS (Jan. 12, 2013, 10:26 PM), <http://abcnews.go.com/blogs/headlines/2013/01/limits-of-russia-adoption-ban-unclear-causing-anxiety-for-us-families/>.

³⁹ V. I. Nechayev, *Письмо заместителя Председателя Верховного Суда Российской Федерации от 22 января 2013 года № 7-BC-224/13* [Letter from the Deputy President of the Supreme Court of the Russian Federation] (Jan. 22, 2013) available at <http://www.vsrp.ru/index.php> (search for “усыновление сша 2013”; then follow “Письмо заместителя Председателя Верховного Суда Российской Федерации от 22 января 2013 года № 7-BC-224/13” hyperlink). See also *Russian Supreme Court Oks U.S. Adoptions before January 1*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 22, 2013), <http://www.rferl.org/content/russia-adoptions-supreme-court/24880718.html>.

⁴⁰ Loiko & Murphy, *supra* note 17.

⁴¹ *Id.*

⁴² Only “One of 33 Orphans,” *supra* note 21. A March 18, 2015, article reports that four of these thirty-three orphans came from the No. 13 orphanage and that three of those four children have now been placed with Russian families. Lyubov Chizhova, Tatyana Voltskaya & Claire Bigg, *Two Years After Russian Ban, “Taboo” Hangs over Children Denied U.S. Adoption*, RADIO FREE EUROPE RADIO LIBERTY (Mar. 18, 2015), <http://www.rferl.org/content/russia-united-states-adopt-ions-orphans-taboo-ban/26771310.html>.

⁴³ Only “One of 33 Orphans,” *supra* note 21.

⁴⁴ Konstantin Chalabov, *Seven Petersburg Adoptees to Beat US Adoption Ban*, RIA NOVOSTI (Jan. 18, 2013), <http://en.ria.ru/russia/20130118/178864912.html>.

⁴⁵ Andrea Roberts, *Russian Ban on U.S. Adoption Turns Children into Pawns*, WASH. TIMES, Jan. 8, 2013, <http://www.washingtontimes.com/news/2013/jan/8/russian-ban-on-us-adoption-turns-children-into-paw/>; *Adequate or Faulty? Russian Lawmakers Vote for US Adoption Ban amid Criticism*, RT (Dec. 19, 2012, 12:27 PM), <http://rt.com/news/russia-us-adopted-children-351/>.

they wanted to bring home, so the children will not remain in Russian orphanages without families.⁴⁶

V. POSSIBLE MOTIVATIONS FOR THE ADOPTION BAN

This Part will discuss three possible motivations for the adoption ban. First, evidence suggests that the ban is retaliation for the Magnitsky Act. Second, the adoption ban may be intended to protect Russian children. And third, the adoption ban may be an attempt to improve Russia's public image.

A. The Magnitsky Act

There is evidence that suggests that Russia banned adoptions in direct response to the United States' adoption of the Magnitsky Act. As discussed in Part IV, Congress passed the Magnitsky Act in November 2012 and President Barack Obama signed it into law a month later.⁴⁷ The

⁴⁶ Dave McGinn, *Plight of "Pipeline Children" Caught up in Russia's Adoption Ban Explored in TIFF Doc*, THE GLOBE AND MAIL (Sep. 12, 2013, 5:13 PM), <http://www.theglobeandmail.com/arts/awards-and-festivals/tiff/plight-of-pipeline-children-caught-up-in-russias-adoption-ban-explored-in-tiff-doc/article14293074/> ("Given the political tensions between Russia and the United States, many prospective parents of pipeline children have lost hope of ever adopting them. Instead, says McCarthy, 'most of the families I am working with are actually looking to Canadian families now to adopt [the children they were hoping to bring home].'" (alteration in original)); Adrian Humphreys, *Heartbroken Would-Be Parents Imploring Canadians to Save "Pipeline Babies" after Russia Bans U.S. Adoptions*, NATIONAL POST (Aug. 9, 2013, 8:43 PM), <http://news.nationalpost.com/2013/08/09/heartbroken-would-be-parents-imploring-canadians-to-save-pipeline-babies-after-russia-bans-u-s-adoptions/> ("It's a hard decision to make. Our first choice is to have her join our family. It's a child we love, but if she can't be with us then she needs someone to love her. We hope—and we want—someone from Canada to adopt her," Mr. Stephens said. "No child with Down syndrome has been adopted in her region before. Her prospects of being adopted within Russia are slim to none and she'll likely be sent to a mental institution where her future is very grim," he said."). However, Russian adoptions to Canada have since been halted; in September 2013, Russia's Supreme Court issued a memo interpreting a Russian ban on adoptions to same-sex couples and single people as applying to all adoptions to countries where same-sex marriage is recognized. Kelly Fox, *Russia Is Going Overboard on the Adoption Ban*, THE MOSCOW TIMES (Jan. 14, 2014), <http://www.themoscowtimes.com/opinion/article/russia-is-going-overboard-on-the-adoption-ban/492668.html> ("We were hopeful, excited and fully expected to bring little Dylan home. But we believe that the judge received a memo from the Supreme Court instructing all Russian judges not to approve Dylan or any other Russian child for adoption if the parents are citizens of countries like Canada that allow same-sex marriages."); Paola Loriggio, *Canadians Ask Harper to Help End Russian Adoption Boycott*, THE CANADIAN PRESS (Jan. 12, 2014, 9:46 PM), <http://globalnews.ca/news/1070174/canadians-ask-harper-to-help-end-russian-adoption-boycott/> ("[Russia's] highest court issued a directive in August that appears to apply the ban to all couples from countries—including Canada—that recognize same-sex marriage."); Kim Mackrael, *Russia's Gay-Marriage Memo Puts Canadian Adoptions at Risk*, THE GLOBE AND MAIL (Jan. 8, 2014, 6:00 AM EST), <http://www.theglobeandmail.com/news/politics/russias-gay-marriage-memo-puts-canadian-adoptions-in-doubt/article16239802/> ("But a memo issued by Russia's Supreme Court in late September suggests Russian judges should interpret the law as applying to all adoptions from countries where same-sex marriage is recognized, regardless of the adoptive parents' sexual orientation."); *Russia Quashes Halifax Couple's Hopes of Adopting a Child*, CBC NEWS (Oct. 22, 2013, 10:34 PM AT), <http://www.cbc.ca/news/canada/nova-scotia/russia-quashes-halifax-couple-s-hopes-of-adopting-a-child-1.2159683> ("Robin Pike, executive director of Choices Adoption and Counselling in Victoria, said there has been no official word that Russia has closed adoptions to Canada, but it is closing adoptions to countries that allow same-sex marriages.").

⁴⁷ Ruth Green, *Russia: Reforming or Unraveling*, 67(3) IBA GLOBAL INSIGHT 40 (2013), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f81c9310-243a-40a9-8a95-6506c6b7f96fe>.

Magnitsky Act allows the U.S. President to create a list of Russian citizens who have violated international human rights (starting with those officials associated with Magnitsky's imprisonment and death) and to both prohibit them from entering the United States and freeze any assets they have in the United States.⁴⁸

The Magnitsky Act is named after Sergei Magnitsky, a tax lawyer who uncovered massive tax fraud in Russia and whom Russian officials subsequently arrested, detained, mistreated, and denied medical care to until he died.⁴⁹ The Human Rights Council conducted an independent investigation into Magnitsky's death and found a number of suspicious circumstances, including that the arrest and detention was illegal, that Magnitsky was investigated by the law enforcement officers he had accused of tax fraud, and that the ambulance crew that had been called to treat Magnitsky were kept outside Magnitsky's cell for more than an hour until he was dead.⁵⁰ Russia's Presidential Human Rights Council also conducted an investigation and found that Magnitsky was severely beaten and denied medical care.⁵¹ Magnitsky's treatment was so severe that the Public Oversight Commission of the City of Moscow for the Control of the Observance of Human Rights in Places of Forced Detention concluded in a December 2009 report that it constituted a breach of the right to life.⁵² Despite the terrible treatment, Russia has not convicted any of those responsible.⁵³

Within two weeks after the Magnitsky Act was signed into law, President Putin signed the Russian adoption ban into law as part of Dima Yakovlev's Law.⁵⁴ The assertion that the Magnitsky Act prompted the adoption ban is much more than mere speculation based on the timing of the adoption ban. President Putin himself pointed to the Magnitsky Act as motivating the ban.⁵⁵ At a news conference held in Moscow prior to

⁴⁸ Elizabeth Clark Hersey, Note, *No Universal Target: Distinguishing between Terrorism and Human Rights Violations in Targeted Sanction Regimes*, 38 BROOKLYN J. INT'L L. 1231, 1232 (2013); Gregory L. White & Mike Esterl, *Russian Adoption Ban Sent to Putin*, WALL STREET JOURNAL (Dec. 26, 2012, 7:40 PM), <http://online.wsj.com/news/articles/SB10001424127887324669104578203132463233930>.

⁴⁹ Polina Levina, *Links between Criminal Justice Procedure and Torture: Learning from Russia*, 16 NEW CRIM. L. REV. 104, 119 (2013).

⁵⁰ Sergei Magnitsky Rule of Law Accountability Act of 2012, sec. 402, § (a)(8), Pub. L. No. 112-208, 126 Stat. 1503 (2012), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/pl112_208.pdf.

⁵¹ *Magnitsky Case: Putin Signs Russian Ban on US Adoptions*, BBC (Dec. 28, 2012, 9:54 AM), <http://www.bbc.co.uk/news/world-europe-20857068>.

⁵² Konstantinos D. Magliveras, *The Magnitsky Rule of Law Accountability Act: An Extraterritorial Instrument with a Good Cause?*, 29(3) INT'L ENFORCEMENT L. REP. 68 (Mar. 2013).

⁵³ *Id.*; *Putin Signs Bill Barring Adoptions*, *supra* note 34 (“[A] prison doctor who was the only official charged in the case was acquitted by a Moscow court.”); see also Levina, *supra* note 49 (“One of the investigators implicated in the death of Magnitsky, Oleg Silchenko, who is alleged to have prevented the administration of medical treatment, was promoted within the Interior Ministry.”).

⁵⁴ Radia, *supra* note 38.

⁵⁵ Herszenhorn, *supra* note 28; *Putin Calls US “Imperial” Over Magnitsky Act*, RIA NOVOSTI (Apr. 25, 2013, 6:13 PM), <http://en.ria.ru/russia/20130425/180845158.html> (“Russia responded to the [Magnitsky Act] with tit-for-tat sanctions against US officials, as well as a controversial ban on American families adopting Russian children. ‘We warned them we would respond,’ Putin said.”); Belogolova, *supra* note 17 (“At his annual press conference in December, not long before signing

the passing of the law, President Putin was questioned regarding whether he supported the proposed adoption ban.⁵⁶ In response, President Putin repeatedly criticized the Magnitsky Act, calling it a provocation and claiming the Act poisoned relations between the United States and Russia and that “Russia had no choice but to retaliate.”⁵⁷ Additionally, many news articles identify Dima Yakovlev’s Law (including the adoption ban) as retaliation for the Magnitsky Act.⁵⁸

[the adoption ban], Putin said that the bill is an ‘emotional’ but ‘appropriate’ response to the ‘unfriendly’ Magnitsky bill.”

⁵⁶ Herszenhorn, *supra* note 28.

⁵⁷ *Id.*

⁵⁸ See, e.g., Pavel Komarov, *Adoption of Russian Child by US Family Declared Illegal*, RIA NOVOSTI (Dec. 23, 2013, 11:00 PM), <http://sputniknews.com/news/20131223/185865230.html> (“But the ban is also widely seen as a response to Washington’s passage of the Magnitsky Act, introducing sanctions on Russian officials suspected of human rights abuses.”); *Russia to Ban Adoption of Children by People from Countries That Allow Same-Sex Marriage*, FOX NEWS (June 18, 2013), <http://www.foxnews.com/world/2013/06/18/russia-to-ban-married-foreign-gays-from-adopting-children/> [hereinafter *Russia to Ban Adoption*] (“Last year, Russia banned all adoptions by Americans. That ban came in retaliation for a U.S. law allowing sanctions on Russians deemed to be human rights violators. . . .”); Belogolova, *supra* note 17 (“Russia’s parliament passed the adoption ban in December in retaliation for a U.S. law aiming to punish those involved in human-rights violations in Russia. . . . Putin said that the bill is an ‘emotional’ but ‘appropriate’ response to the ‘unfriendly’ Magnitsky bill.”); Matt Hoffman, *Couple’s Russian Adoption Efforts Lead to Sorrow*, LA CROSSE TRIBUNE (Jan. 20, 2013, 12:00 AM), http://lacrossetribune.com/news/local/couple-s-russian-adoption-efforts-lead-to-sorrow/article_b1ebfcc8-62bf-11e2-9820-0019bb2963f4.html (“A Russian law banning adoptions by U.S. citizens was rushed through parliament in December, and sped to President Vladimir Putin’s desk in less than 10 days in retaliation over a U.S. law calling for sanctions on Russians identified as human-rights violators.”); Laura Jean, *Russia’s Adoption Ban Harms Kids*, CNN OPINION (Jan. 17, 2013, 3:43 PM), <http://www.cnn.com/2013/01/17/opinion/jean-russia-adoption/> (“Russia’s adoption ban was passed in retaliation for the United States’ passage of the Magnitsky Act, a human rights bill targeting Russian officials.”); Radia, *supra* note 38 (“The [adoption] ban was added in late December to a bill retaliating for a set of human rights sanctions that President Obama signed into law earlier that month.”); Solash, *supra* note 21 (“While the ban is nominally an attempt to protect Russian children from abuse they may face by U.S. parents, the measure is seen mainly as a response to U.S. legislation signed into law in December. That legislation imposes sanctions on Russian officials implicated in the 2009 prison death of anticorruption lawyer Sergei Magnitsky and other officials who have acted with impunity in committing alleged gross rights violations.”); MacLaggan, *supra* note 17 (“The Russian measure was passed in retaliation for a U.S. human rights law . . . that bars entry to Russians accused of involvement in the death in custody of anti-corruption lawyer Sergei Magnitsky and other alleged rights abuses.”); *Putin Signs Bill Barring Adoptions*, *supra* note 34 (“President Vladimir Putin on Friday signed a bill banning Americans from adopting Russian children, part of a harsh response to a U.S. law targeting Russians deemed to be human rights violators.”); Alissa de Carbonnel, *Putin Signs Ban on U.S. Adoptions of Russian Children*, REUTERS (Dec. 28, 2012, 2:52 PM), <http://www.reuters.com/article/2012/12/28/us-russia-usa-adoptions-putin-idUSBRE8BQ06K20121228> (“President Vladimir Putin signed a law . . . that bans Americans from adopting Russian children and imposes other sanctions in retaliation for a new U.S. human rights law that he says is poisoning relations.”); Nastassia Astrasheuskaya & Alissa de Carbonnel, *Children, Many Ill, Would Be Victims of Russia Ban on U.S. Adoption*, REUTERS (Dec. 26, 2012, 4:53 PM), <http://www.reuters.com/article/2012/12/26/us-russia-usa-adoption-idUSBRE8BP06120121226> (“The ban responds to a U.S. law known as the Magnitsky Act, which punishes Russians suspected of being involved in the death in custody of anti-graft lawyer Sergei Magnitsky in 2009, and of other human rights violations, by barring them from entering the United States.”); White & Esterl, *supra* note 48 (“The proposed adoption ban is part of a broader draft conceived as Russia’s response to a new U.S. law known as the Magnitsky Act, for Sergei Magnitsky, a hedge-fund lawyer who died in a Russian prison in 2009 after exposing alleged fraud and corruption among officials.”); Masha Lipman, *What’s Behind the Russian Adoption Ban?*, NEW YORKER (Dec. 21, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/12/whats-behind-the-russian-adoption-ban.html> (“This week, in a retaliatory move [after the Magnitsky Act was adopted], the Duma, Russia’s lower house, voted almost unanimously for further constraints on non-government organizations that have even the faintest connection to America. Another amendment in the same package introduced a flat ban on the adoption of Russian

B. Child Protection

A second reason considered for the adoption ban is to protect Russian orphans.⁵⁹ American adoptive parents have allegedly killed or caused the deaths of nineteen Russian children.⁶⁰ Astakhov claims these deaths show “that the actions of U.S. authorities in ensuring the safety of adopted children, introducing control over their living conditions and upbringing in adoptive families, selecting and training adoptive parents are insufficient.”⁶¹ The Russian adoption ban’s sponsors criticize U.S. courts for issuing “disproportionately mild” punishments to American adoptive parents accused of abusing their Russian children and complain that Russian diplomats were not allowed sufficient input in such prosecutions.⁶²

However, critics of the adoption ban respond that “the motivation for the ban was not so much concern over potential harm” since “far more

children by parents in the United States.”); Hamilton, *supra* note 22 (“The [adoption ban] has been charged as retaliation for United States criticism of Russia’s human rights record. President Barack Obama signed a bill on Dec. 14 that . . . includes language ordering punishment for Russian officials who allegedly commit human rights violations.”).

⁵⁹ Ilya Kharlamov, *Russia Answers to Magnitsky Act with “Dima Yakovlev Law”*, VOICE OF RUSSIA (Dec. 23, 2012, 2:28 AM), http://voiceofrussia.com/2012_12_23/Russian-children-sexually-abused-suffocated-by-US-adoptive-parents-exclusive-interview-with-Russian-diplomat/ (pointing to the Magnitsky Act as the main reason for the adoption ban but also citing concerns about mistreatment of Russian children by their U.S. adoptive parents: “‘The necessity to introduce a ban on adoption of Russian children by US citizens emerged already many years ago,’ Russian children’s ombudsman Pavel Astakhov believes”); *Putin Signs Bill Barring Adoptions*, *supra* note 34 (“A few lawmakers even claimed that some Russian children were adopted by Americans only to be used for organ transplants or become sex toys or cannon fodder for the U.S. Army.”); Nicholas Nehamas, *Russian Parliament Bans U.S. Adoption*, LATITUDE NEWS, <http://www.latitudenews.com/story/russian-parliament-bans-u-s-adoption/> (last visited Jan. 2, 2014) (“[T]he Russian government claims that American parents routinely abuse adopted Russian children, and the U.S. government does little to stop them. ‘The state has a responsibility to protect children from danger and from situations that might expose them to danger, a spokesman for President Vladimir Putin tells RIA Novosti, Russia’s state news agency.’). *But see* Lipman, *supra* note 58 (“Lawmaker Yekaterina Lakhova, one of the initiators of the adoption ban, was asked by a reporter if she thought Russian orphans would be worse off in America than in Russia. Her answer: ‘This is not the point. You’re asking a wrong question.’”).

⁶⁰ *Id.* Cf. Ellen Barry, *After Adopted Boy Dies in U.S., Russian Officials Accuse Texas Woman*, N.Y. TIMES (Feb. 19, 2013), http://www.nytimes.com/2013/02/20/world/europe/adopted-boys-death-in-us-stirs-outrage-in-russia.html?_r=0 (claiming Max Shatto, formerly Maksim Kuzmin, was “the 20th Russian child killed in the U.S.A. by his adoptive parents”); Greg Botelho, *Texas Investigator Found 30+ Bruises, Cuts on Dead Boy Adopted from Russia*, CNN (Mar. 28, 2013, 9:01 PM), <http://www.cnn.com/2013/03/27/us/texas-russian-adoption-death/> (reporting that the bruises on Max Shatto “were consistent with a ‘self-inflicted’ injury” and that “Max’s death had been deemed accidental”).

⁶¹ *Astakhov Confirms Commitment to Ban Adoption of Russian Children for U.S. Citizens*, RUSSIA BEYOND THE HEADLINES (Sep. 23, 2013, 3:16 PM), http://rbth.ru/news/2013/09/23/astakhov_confirms_commitment_to_ban_adoption_of_russian_children_for_us_30046.html [hereinafter *Astakhov Confirms Commitment to Ban*].

⁶² *Putin Approves Bill Banning US Adoptions of Russian Kids*, RT (Dec. 28, 2012, 9:45 AM), <http://rt.com/news/putin-bill-usa-adoption-992/>; *see also* Belogolova, *supra* note 17 (Russian officials accuse the U.S. of not doing enough to prosecute abuse and neglect cases and of not allowing Russian officials to keep tabs on children adopted from their country.); *Russia to Ban Adoption*, *supra* note 58 (“That [adoption] ban came in retaliation for a U.S. law [i.e., the Magnitsky Act] . . . and reflected Russian allegations that U.S. authorities have been negligent and shamefully lenient in investigating and prosecuting abuse and deaths of adopted Russian children.”).

orphans die after being adopted in Russian homes.”⁶³ Of about 60,000 U.S. adoptions from Russia in the last twenty years, there are only nineteen “documented cases of Russian children dying due to abuse or neglect in adoptive American homes.”⁶⁴ As tragic as these deaths are, far fewer Russian children have died at the hands of their U.S. adoptive parents than the number of Russian children who have died at the hands of their Russian adoptive parents.⁶⁵ Even taking into account the greater number of such adoptions to Russian adoptive parents, the relative U.S. death rate remains significantly lower.⁶⁶ In fact, Yulia Latynina, who hosts a political talk show in Russia, claims that “[a]ccording to official government statistics, a child adopted by Russian parents is 39 times more likely to die than one adopted by parents in the West” and suggests the real number is likely much higher.⁶⁷ Based on these numbers, banning adoptions to Russian parents would protect more children from harm than banning adoptions of Russian children to American parents.

Furthermore, the recent Agreement between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children had already addressed Russia’s concern about the welfare of Russian children in the United States. This bilateral adoption agreement took effect on November 1, 2012, and is intended to “strengthen procedural safeguards in the adoption process between the United States and Russia.”⁶⁸ The agreement specifically applies to children who are unable to be placed with families in their country of origin and aims to ensure that intercountry adoption of children between the United States and Russia “takes place with a view to ensuring the protection of the rights and best interests of the child.”⁶⁹ Provisions include requirements that the parties take “appropriate measures” to “suppress illegal activities involving children being adopted”⁷⁰ and that an Authorized Organization facilitate adoptions of Russian children (unless they are adopted by their relatives).⁷¹ Additionally, the “Executive Body of the Country of Origin” may require Authorized Organizations to submit various documents in order to be allowed to perform intercountry adoptions.⁷² This includes documentation that the Authorized Organization informed the adoptive

⁶³ Loiko & Murphy, *supra* note 17.

⁶⁴ Fred Weir, *As Emotions over US-Russia Adoptions Intensify, a Rift Widens into a Chasm*, CHRISTIAN SCIENCE MONITOR (Mar. 4, 2013), <http://www.csmonitor.com/World/Europe/2013/0304/As-emotions-over-US-Russia-adoptions-intensify-a-rift-widens-into-a-chasm>.

⁶⁵ *Id.* (claiming that “1,220 Russian children [have] died at the hands of adoptive Russian parents in Russia, out of approximately 170,000 adoptions in the same period”).

⁶⁶ *Id.* (calculated at 0.72% for Russian adoptive parents and 0.032% for U.S. adoptive parents).

⁶⁷ Yulia Latynina, *Child Abuse in Russia Is Routine*, THE MOSCOW TIMES (Dec. 26, 2012), <http://www.themoscowtimes.com/opinion/article/child-abuse-in-russia-is-routine/473633.html>.

⁶⁸ Media Note, U.S. Department of State, *United States—Russia Bilateral Adoption Agreement* (Oct. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/10/199322.htm>.

⁶⁹ Agreement Between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children, art. 3, subsections 1, 4, July 13, 2011, http://tsgsandbox.his.com/adoptions/content/pdf/us-russia_adoption_agmt-713%2011-signed_english.pdf (last visited Jan. 29, 2015 10:55AM) [hereinafter U.S.-Russia Bilateral Adoption Agreement].

⁷⁰ *Id.* at subsection 3.

⁷¹ *Id.* at art. 4, subsections 4, 5.

⁷² *Id.* at art. 5, subsection 1.

parents of post-adoption obligations such as “monitor[ing] the living conditions and upbringing of the child, submit[ting] reports, and ensuring registration of the child with a consular establishment of the Country of Origin.”⁷³ However, instead of allowing American families to adopt with those new safeguards in place, Russia banned all adoptions to U.S. families only two months after the bilateral adoption agreement took effect.

Additionally, if the adoption ban were intended to address child protection concerns, it failed to take into account the welfare of children with special needs, who are generally unlikely to find homes with Russian parents. According to Valeriy Panyushkin, a Moscow author and journalist who has spent more than fifteen years working with children’s charities, while domestic adoptions have increased in Russia, “most Russians are reluctant to take on children with special needs.”⁷⁴ He believes that for many such children “adoptive parents from abroad are the only hope.”⁷⁵ Valentina Rakova, who has worked as a child psychologist for thirty years in the Bryansk orphanage, indicated that the adoption ban is “terrible for children.”⁷⁶ Speaking about orphans with special needs, she pointed out that “[b]efore the ban, orphans were offered to Russian families but no one took them in.”⁷⁷ Americans, on the other hand, according to Rakova and U.N. statistics, “are far more likely to adopt children who are ill or suffer from a disability.”⁷⁸

Without adoption, Russian orphans with special needs face a bleak future. In Russian orphanages, these children suffer from lack of attention and proper medical treatment.⁷⁹ According to Panyushkin, unless adopted, Russian orphans who have special needs “will be in an orphanage until the age of 18, and then they are transferred to a home for the elderly or a neuropathic hospital—in short, to a madhouse. And then let’s say, for example, at 20 they will die of pneumonia. In those places, people don’t live for long.”⁸⁰

C. Public Image

A third possible rationale for the Russian adoption ban is Russia’s public image. Russia wants to portray itself as a strong, developed country that is willing and able to care of its children. Taking the Magnitsky Act as an insult, President Putin said, “If we are slapped, we

⁷³ *Id.*

⁷⁴ Mareike Aden, *US Couple Battles Russian Adoption Ban*, DW (Feb. 18, 2013), http://www.dw.de/us-couple-battles-russian-adoption-ban/a-16596137_

⁷⁵ *Id.*

⁷⁶ Jim Maceda, *Outrage, Sadness as Americans Barred from Adopting Russian Children*, NBC NEWS (Mar. 30, 2013, 4:24 AM), http://worldnews.nbcnews.com/_news/2013/03/30/17504450-outrage-sadness-as-americans-barred-from-adopting-russian-children?lite_

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Aden, *supra* note 74.

⁸⁰ *Id.*

need to respond. Otherwise we will be slapped all the time.”⁸¹ The Russian adoption ban is a serious “slap” in response to the Magnitsky Act, possibly intended to show Russia’s ability to respond strongly to any foreign measures and improve its public image.⁸²

Russia wants to be seen as a developed country that is willing and able to take care of its own children.⁸³ Yekaterina Lakhova, one of the ban’s initiators, said, “Normally economically developed countries don’t give up their children, not a single [one] of them.”⁸⁴ Astakhov has likewise expressed his support for the Russian adoption ban, saying that “it is shameful to export children” and that Russia should try harder to provide a “decent life and promising future” for its orphans.⁸⁵ In confirming the commitment to ban Russian adoptions to American parents, Astakhov stated, “As of today, we as a state and society are ready to take care of our children and help our families.”⁸⁶ According to him, normal parents want to bring up their own children and do not give them to orphanages or put them up for adoption.⁸⁷ Says Astakhov, “Russia, same as any loving mother, wants to bring up its children. And the United States, as the mother of its children, does not give away its babies.”⁸⁸ Clearly, Astakhov seeks to portray Russia as a developed country that is ready to step up and take care of the Russian orphans, rather than allowing them to be adopted into U.S. families. His additional comment about the United States not “giv[ing] away its babies” suggests that Russia aspires to be like the United States by retaining and caring for its own children. While Astakhov is mistaken in his belief that U.S. children are not adopted by parents in other countries,⁸⁹ it is true that most international adoptions involve children being adopted from developing countries into developed ones.⁹⁰

VI. THE ADOPTION BAN AND INTERNATIONAL LAW

The main question at issue in this Comment is whether the Russian adoption ban violates international law. The following sections will specifically consider the legality of the adoption ban in context of the

⁸¹ Lipman, *supra* note 58.

⁸² See *supra* note 58.

⁸³ MacLaggan, *supra* note 17 (“Putin has defended the Russian law by saying his country should care for its own children.”); *Putin Signs Bill Barring Adoptions*, *supra* note 34 (“Russians also bristled at how the widespread adoptions appeared to show them as hardhearted or too poor to take care of orphans.”).

⁸⁴ Lipman, *supra* note 58.

⁸⁵ Nehamas, *supra* note 59.

⁸⁶ *Astakhov Confirms Commitment to Ban*, *supra* note 61.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Sophie Brown, *Overseas Adoptions Rise—for Black American Children*, CNN (Sep. 17, 2013, 8:38 AM EDT), <http://www.cnn.com/2013/09/16/world/international-adoption-us-children-adopted-abroad/> (in 2010, “five countries—Canada, the Netherlands, Germany, Switzerland and Ireland—reported adoptions of 205 children born in the U.S.”).

⁹⁰ *International Adoption: Policy Brief*, 2010, SAVE THE CHILDREN, http://www.savethechildrean.org.uk/sites/default/files/docs/International_Adoption_FEBC_edit_18_01_10_1.pdf (last visited Nov. 6, 2013).

Hague Convention, the U.S.-Russia Bilateral Adoption Agreement, the European Convention on Human Rights, and the Convention on the Rights of the Child. While the ban likely does not violate the Hague Convention, it may violate the European Convention on Human Rights and the Convention on the Rights of the Child, and clearly violates the U.S.-Russia Bilateral Adoption Agreement.

A. The Hague Convention

The Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption, which entered into force on May 1, 1995,⁹¹ is a significant part of international law relating to international adoption. Russia signed the Hague Convention on September 7, 2000, but has not ratified it.⁹² Thus, questions arise about what obligations, if any, Russia has under the Hague Convention and whether Russia's adoption ban violates any obligations Russia may have under the treaty.

While Russia has not ratified the Hague Convention, Russia did sign it and has not denounced the treaty by written notification to the depositary.⁹³ According to the Vienna Convention on the Law of Treaties, a signatory party that has not yet ratified the treaty and has not "made its intention clear not to become a party to the treaty" is "obliged to refrain from acts which would defeat the object and purpose of [the] treaty."⁹⁴ Thus, based on the Vienna Convention, Russia has an obligation to not defeat the Hague Convention's object and purpose.

The Hague Convention's objects are delineated in its first article.⁹⁵ The Hague Convention is intended to (1) "establish safeguards to ensure that intercountry adoptions take place in the best interests of the child"; (2) establish a system to "ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children"; and (3) make sure adoptions in accordance with the Hague Convention are recognized.⁹⁶ From these objects and from the various requirements in the treaty, it is clear that the treaty's main concern is to ensure that safeguards are in place to prevent unethical adoption practices.

The Convention's first object is the one at issue here. This object could be read to indicate that having intercountry adoptions take place, but with proper safeguards, is one of the treaty's objectives. However, countries bound by the Hague Convention routinely shut down their

⁹¹ 33: *Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, Status Table*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Oct. 4, 2013).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Vienna Convention on the Law of Treaties, art. 18, Jan. 27, 1980, available at <http://www.worldtradelaw.net/misc/viennaconvention.pdf>.

⁹⁵ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 1, May 29, 1993, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69 [hereinafter *Convention on Protection of Children*].

⁹⁶ *Id.*

international adoption programs when unable to comply with the Convention's terms.⁹⁷ These closures or suspensions of countries' adoption programs are often measures to help the countries come into compliance with the Hague Convention's requirements regarding the designation of a Central Authority to discharge the various duties under the Convention.⁹⁸ The Central Authority's duties in each country include providing information about its country's adoption laws and statistics,⁹⁹ taking measures to "prevent improper financial or other gain in connection with an adoption,"¹⁰⁰ and taking measures to collect information about the child and prospective adoptive parents, facilitate adoption proceedings, "promote the development of adoption counseling and post-adoption services" in its country, and provide general evaluation reports about international adoption.¹⁰¹

Because continuing adoptions under a non-Hague Convention-compliant scheme would violate the Hague Convention, suspending such adoptions until compliance may be achieved would most likely not be considered a treaty violation. However, if the suspension of adoptions were of excessive duration, it might be considered a violation since it would show a failure to implement the Hague Convention in order to provide the opportunity for children to be adopted internationally with the required safeguards in place. Since temporarily suspending adoptions seems to be an accepted practice among Hague Convention states, Russia's decision to ban adoptions to the United States may likewise be acceptable under the Hague Convention, especially in light of safety concerns voiced by Russia as to the oversight of Russian adopted children in the United States.

B. The U.S.-Russia Bilateral Adoption Agreement

The bilateral adoption Agreement between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children is the area of international law that the Russian adoption ban most clearly violates. This agreement, an important piece of international

⁹⁷ *Adoption Information: Fiji*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/adoption/country-information/adoption-information-fiji> (last visited Jan. 2, 2014) (USCIS is unable to resume processing intercountry adoptions from Fiji because "the Department of State . . . has determined that Fiji does not yet have a fully functional convention process in place."); *Country Updates*, NATIONAL COUNCIL FOR ADOPTION, <http://www.adoptioncouncil.org/families/country-updates> (last visited Jan. 19, 2015) (Cambodia is closed to intercountry adoption because "it has not yet established the necessary infrastructure and authorities to come into compliance with the Convention"; Guatemala is closed to intercountry adoption because it "has thus far failed to comply with the Convention's regulations. There is no indication if or when Guatemala will be able to establish a Hague-compliant intercountry adoption program."); Laurel Morales, *International Adoption at Lowest Level in 10 Years*, FRONTERAS (Aug. 19, 2013), <http://www.fronterasdesk.org/content/international-adoptions-lowest-level-10-years> ("Several countries have shut down to address issues within their adoption programs. Some are working to comply with the new Hague Convention-compliant system.").

⁹⁸ Convention on Protection of Children, *supra* note 97 at art. 6.

⁹⁹ *Id.* at art. 7.

¹⁰⁰ *Id.* at art. 8.

¹⁰¹ *Id.* at art. 9.

law relating to U.S. adoptions from Russia, entered into force on November 1, 2012, only two months before the Russian adoption ban.¹⁰² Russia repudiated this bilateral adoption agreement by prohibiting U.S. citizens from adopting Russian children.¹⁰³ While repudiation is accounted for in the bilateral agreement, this repudiation of the bilateral adoption agreement with Russian adoptions being curtailed so speedily violates the agreement's "waiting period" terms and, hence, international law.

Russian officials themselves have indicated that the adoption ban may in fact violate the bilateral adoption agreement. Before the adoption ban was passed into law, President Putin indicated that "legal experts would have to review the proposed ban to see if it could be enacted given the agreement with the United States on adoptions."¹⁰⁴ Clearly President Putin himself realized that the adoption ban might violate the bilateral agreement.¹⁰⁵ Furthermore, Russia's deputy prime minister for social affairs, Olga Golodets, warned President Putin that the adoption ban would violate the bilateral agreement, as well as the Vienna Convention on the Law of Treaties, the Convention on the Rights of the Child, and, on the domestic level, Russian federal law.¹⁰⁶

The bilateral agreement provides for the possibility of termination by one party "inform[ing] the other party through diplomatic channels of its intention to terminate [the agreement]."¹⁰⁷ However, it requires that the agreement "shall remain in force until one year from the date" on which formal notice is given.¹⁰⁸ Russia gave formal notice to the U.S. embassy on January 1, 2013.¹⁰⁹ Thus, based on the terms of the bilateral agreement, Russian adoptions to the United States should not have been terminated until January 1, 2014. In fact, the Kremlin even announced in early January 2013 that the adoption ban would not go into effect until one year later.¹¹⁰

Had Russia actually postponed the adoption ban for one year, there would have been no violation of the bilateral adoption agreement. But

¹⁰² Konstantinos D. Magliveras, *The Magnitsky Rule of Law Accountability Act: An Extraterritorial Instrument with a Good Cause?*, 29(3) INT'L ENFORCEMENT L. REP. 68 (2013).

¹⁰³ *Id.*

¹⁰⁴ Herszenhorn, *supra* note 28.

¹⁰⁵ *Id.* See also Nehamas, *supra* note 59 ("Putin also says a bilateral agreement on adoption signed by Russia and the U.S. in November may make it illegal for Russia to ban adoption by Americans without a year's notice . . . 'We have an agreement with the State Department,' Putin tells *The Moscow Times*. 'I need to look at it. This is not an idle inquiry.'").

¹⁰⁶ David M. Herszenhorn, *Russian Says Ban on U.S. Adoption Flouts Treaties*, NEW YORK TIMES (Dec. 25, 2012), http://www.nytimes.com/2012/12/26/world/europe/russian-official-says-adoption-ban-violates-treaties.html?_r=1&.

¹⁰⁷ U.S.-Russia Bilateral Adoption Agreement, *supra* note 69 at art. 17, subsec. 5.

¹⁰⁸ *Id.* See also MacLaggan, *supra* note 17 ("A November agreement between Russia and the United States calls for a one-year transition period in the case of either country banning adoptions.").

¹⁰⁹ John R. Crook, ed., *Jackson-Vanik Amendment Repealed; Magnitsky Provisions Draw Russian Ire and Termination of Adoption and Anticrime Agreements*, 107 AM. J. INT'L L. 449, 451 (2013).

¹¹⁰ Will Englund, *Russia's Ban on American Adoptions Won't Go into Effect Until Next Year*, WASH. POST, Jan. 10, 2013, http://www.washingtonpost.com/world/europe/russia-to-wait-a-year-on-adoption-law/2013/01/10/80d14d8c-5b3a-11e2-88d0-e4cf65c3ad15_story.html.

despite the Kremlin's announcement, the adoption ban curtailed Russian international adoptions to the United States starting January 1, 2013. Therefore, Russia's adoption ban violates the bilateral adoption agreement and thus constitutes a violation of international law because it entered into effect immediately, failing to observe the one-year waiting period required by the bilateral adoption agreement.

C. European Convention on Human Rights

Russia's adoption ban may also violate four sections of the Convention for the Protection of Human Rights and Fundamental Freedoms, which Russia signed on February 28, 1996, and ratified on May 5, 1998.¹¹¹ Several American adoptive families and other concerned parties have filed claims with the European Court of Human Rights claiming that the Russian adoption ban violates Article 8 (right to respect for private and family life), Article 14 (prohibition of discrimination), Article 3 (prohibition of torture), and Article 13 (right to an effective remedy) of the Convention.¹¹² Each will be analyzed in turn.

First, lawyers from the Center of International Protection (CIP) argue that the adoption ban violates Article 8, the right to respect for private and family life.¹¹³ This Comment recognizes a right to respect for private and family life and stipulates that public authorities should not normally interfere with this right.¹¹⁴ However, the Russian adoption ban did not interfere with legally recognized family relationships but rather with the incipient familial relationships between Russian orphans and their prospective U.S. adoptive parents. Despite this, the CIP lawyers argue that the adoption ban does violate Article 8 because "familial relations between adoptive parents and a child arise when the latter begins to consider them as parents, not after a court decision."¹¹⁵

Logically, the violation of familial relations argument has merit: many of these children have been introduced to their prospective adoptive parents as "mama" and "papa."¹¹⁶ Because the Russian international adoption process requires parents to make three trips to Russia before the adoption may be finalized, many of the children and parents have not only met with each other but also built relationships and bonded with one another.¹¹⁷ In fact, the Russian adoption process, with its three required trips, is arguably designed to establish the beginnings

¹¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Office, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=06/11/2013&CL=ENG> (last visited Feb. 27, 2015).

¹¹² Yulia Ponomareva, *Americans Challenge Adoption Ban in European Court*, RUSS. BEYOND THE HEADLINES (Jan. 27, 2013), http://rbth.ru/society/2013/01/27/americans_challenge_adoption_ban_in_strasbourg_22251.html.

¹¹³ *Id.*

¹¹⁴ European Convention on Human Rights, art. 8, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited Feb. 27, 2015) [hereinafter European Convention on Human Rights].

¹¹⁵ Ponomareva, *supra* note 112.

¹¹⁶ See Loiko & Murphy, *supra* note 17.

¹¹⁷ See Rudavsky, *supra* note 24.

of “family life” before the adoption becomes legally complete. However, as long as the adoptions have not been finalized, there are no legal bonds between the parents and children, and Article 8 may not be able to protect the extra-legal incipient familial bonds.

While the adoption ban may not violate Article 8 generally, at least one case involves circumstances under which the ban very likely violated Article 8. This case involves the Thomases, an American couple that adopted a three-year-old boy from Russia in December 2008.¹¹⁸ When finalizing the adoption, they discovered that their new son had a baby brother, Nikoly, in Russia.¹¹⁹ Following the required waiting period after the finalization, the Thomases started the adoption process for the younger brother.¹²⁰ However, after experiencing many delays that caused the adoption process to drag out for years, their attempt to adopt their son’s younger brother was frustrated by the Russian adoption ban.¹²¹ While the lack of a legal parent-child relationship might prevent Article 8 from protecting the incipient family relations of Russian orphans and American parents, the adoption ban’s prevention of the reunification of these two biological brothers may well be considered a violation of Article 8.

Second, prospective adoptive parents argue that the adoption ban violates Article 14: prohibition of discrimination.¹²² This claim is tied up with the Article 8 claims, which require a legally recognized familial bond. Article 14 requires that the rights and freedoms enumerated in the Convention must be secured without discrimination based on such factors as national origin.¹²³ What the families are likely claiming is that, according to Article 14, their familial relations are entitled to protection regardless of national origin. The Russian adoption ban clearly discriminates based on national origin: parents of U.S. national origin may not adopt children of Russian national origin. If the ban were interfering with legally established parent-child relationships between Russian adoptees and U.S. adoptive parents, then both Article 8 and Article 14 would clearly be violated. However, because the familial relationships had not yet been solemnized in court, Article 14 is violated only if the incipient familial relationships between the Russian orphans and U.S. prospective adoptive parents are entitled to protection under Article 8.

The Thomases’ situation, where the U.S. parents had already adopted one brother and the adoption of the younger sibling was prevented by the adoption ban, presents a stronger case for a violation of Article 14 argument. In that case, the familial relations of the two biological

¹¹⁸ Kari Huus, *Boy’s Christmas Wish: Adoption of Little Brother Caught in US-Russia Spat*, NBC NEWS (Dec. 24, 2012, 4:47 AM EST), http://worldnews.nbcnews.com/_news/2012/12/24/16077076-boys-christmas-wish-adoption-of-little-brother-caught-in-us-russia-spat?lite.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Ponomareva, *supra* note 112.

¹²³ European Convention on Human Rights, *supra* note 114, at art. 14.

brothers would have been secured but for the adoption ban, which prevented the brothers' reunification based on the national origin of the older brother's adoptive parents. Therefore, the adoption ban likely violates Article 14 as applied to the Thomas family's attempted adoption of the younger brother.

Third, prospective U.S. adoptive families argue that Article 3, prohibition of torture, is violated by the adoption ban.¹²⁴ This Article provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹²⁵ While the adoption ban itself has caused great emotional pain to many Russian orphans and prospective U.S. adoptive parents, the adoption ban may not be considered actual torture. However, the further institutionalization and accompanying mental and emotional issues for the Russian children as well as potential mental and emotional issues stemming from the forced abandonment of the children by adults they had come to trust could arguably be considered a form of torture.¹²⁶

¹²⁴ Ponomareva, *supra* note 112.

¹²⁵ European Convention on Human Rights, *supra* note 114, at art. 3.

¹²⁶ See generally Aden, *supra* note 74 (indicating that Russian orphans with special needs "will be in an orphanage until the age of 18, and then they are transferred to a home for the elderly or a neuropathic hospital—in short, to a madhouse . . . [where] people don't live for long" and pointing out that although orphanage conditions have improved since the 1990s when people in the West were shocked by "pictures of starving children in overcrowded Russian orphanages . . . lack of attention and insufficient long-term medical treatment are still huge problems"); see also Chizhova, Voltskaya, & Bigg, *supra* note 42 ("Sinkevich says children like Vitaly [who has Down syndrome and a life-threatening heart condition] stand 'almost no chance' in Russia, where most orphanages are woefully ill-equipped and staff often untrained to care for children with special needs."); Corey Flintoff, *For Russian Kids, a Disability Often Means Life in an Orphanage*, NPR (Nov. 4, 2014, 2:40 PM ET), <http://www.npr.org/blogs/parallels/2014/11/04/358315057/for-russian-kids-a-disability-often-means-life-in-an-orphanage> ("We visited 10 institutions across Russia, and in the vast majority, we either heard about, or we witnessed firsthand, severe forms of violence and neglect," [Andrea Mazzarino, a researcher at Human Rights Watch,] says, including children being tied up and sedated, or beaten, or dosed with cold water. She says children with severe disabilities are confined to so-called 'lying down' rooms, where they spend their days in cribs, kept in diapers and fed through tubes. Photos from her report show teenagers with the physical development of preschoolers after years of confinement."); Jedd Medefind, *Heartrending Photos of Russian Orphans*, CHRISTIAN ALLIANCE FOR ORPHANS (Feb. 21, 2014), <http://www.christianalliancefororphans.org/blog/2014/02/21/heart-rending-photos-of-russian-orphans/> (referring to a series of twelve photos by photojournalist Kate Brooks, available at <http://www.katebrooks.com/#/photographs/russia/russian-orphans/orphans10>, and citing a description on Brooks' website: "In Russia orphans with mental and physical disabilities or learning disorders are classified into one of three categories: debil, imbecile or idiot. Those labeled as imbeciles and idiots are permanently institutionalized while still toddlers"); *4 of the Worst Orphanages in Recent History*, BORGEM MAGAZINE (Sept. 26, 2013), <http://www.borgenmagazine.com/4-worst-orphanages-recent-history/> ("The Mazanovsky Orphanage [in Russia] gained notoriety [in May 2013], after footage emerged showing orphans being brutally beaten. In the clip, two adolescent 'carers' are seen whipping and kicking seven young boys. . . . This is not the first time that Russian orphanages have been accused of systematic abuses. . . . A month before the Mazanovsky video, two nurses were arrested at an orphanage in the Khabarovsk region, for beating three young children so severely that all three—ranging in age from seven months to three years—were hospitalized."); Adam Pertman, *Before It's Too Late: Understanding the Impact of Institutionalization on Children*, HUFFINGTON POST (Jan. 23, 2013, 5:36 PM EST), http://www.huffingtonpost.com/adam-pertman/russian-adoption-ban_b_2526769.html ("[T]he consequences [of institutionalization on children] can include emotional and social disorders; loss of IQ points and intellectual capacity; stunted growth and other physical ailments; and a host of additional psychological, physiological and behavioral challenges. Some of these impairments cause developmental delays that can be remediated and others can severely undermine the child for his or her lifetime."); Caitlin Dewey, *Russian Adoption Ban Will Hit Disabled Children*,

Finally, parents claim that Article 13, the right to an effective remedy, is also violated by the adoption ban. This Article requires that an effective remedy be available even if the violation is “committed by persons acting in an official capacity.”¹²⁷ The adoption ban was clearly enacted by persons acting in an official capacity. Therefore, if the ban does violate the Convention, there should, according to Article 13, be an effective remedy before a national authority. No truly effective remedy is available in this situation since any decision made in the United States or by an international adjudicative body will be ineffective unless Russia chooses to recognize and implement it.¹²⁸ Russia is a sovereign state and no remedy can be enforced against it. Consequently, Article 13 is potentially violated if no remedy is available to the U.S. families who successfully argue a violation of another article.

Thus, the Russian adoption ban may violate the European Convention on Human Rights. Specifically, the adoption ban may violate Articles 8 and 14 in general and very likely violates these Articles as applied to the Thomas family’s attempted adoption of their son’s sibling. Depending on the interpretation of “torture,” Article 3 might arguably be violated as well. If any of the other Articles are indeed violated, then Article 13 is also possibly violated because the prospective adoptive parents likely have no recourse to an effective remedy and the Russian children themselves have no recourse to any remedy whatsoever—effective or ineffective.

D. The Convention on the Rights of the Child

The Russian adoption ban may violate the Convention on the Rights of the Child, which Russia signed on January 26, 1990, and ratified on

Evangelical Christian Families, WASH. POST, Jan. 2, 2013, 8:00 AM, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/01/02/russian-adoption-ban-will-hit-disabled-children-evangelical-families/> (“Amy Livingston . . . posted pictures of her daughter Polina, who was adopted from Russia earlier this year. In the first photo, Polina stares off-camera, slack-jawed and empty-eyed. In the second, she smiles until her cheeks dimple, a big purple bow in her hair. ‘When my husband and I met Polina, she didn’t smile or want to be touched,’ said Livingston, who suspects her Down syndrome daughter was hit and otherwise abused in her orphanage. . . . In Russia, six-year-old Polina would have been transferred to a mental institution soon, Livingston said; according to The Promise, that means no education, minimal therapy and little human interaction. Now she’ll start normal kindergarten in January, and her mother hopes she’ll one day go to college and maybe live on her own.”); Stephanie Pappas, *Early Neglect Alters Kids’ Brains*, LIVE SCIENCE (Jul. 23, 2012, 4:03 PM ET), <http://www.livescience.com/21778-early-neglect-alters-kids-brains.html> (“[Researchers] found that early institutionalization changed both the structure and the function of the brain.”). *But see* Alessandra McAllister, *Touching Portraits of Disabled Russian Orphans Taken by Ten Photographers*, FEATURE SHOOT (Oct. 22, 2013), <http://www.featureshoot.com/2013/10/touching-portraits-of-disabled-russian-orphans-taken-by-ten-photographers/> (acknowledging that “Russia’s orphanages have been placed under a critical eye with past reports appertaining to descriptions of neglect, abuse and lifelong institutionalization” but indicating that photographer Ed Kashi “praise[d] the dedication of the caretakers he encountered”).

¹²⁷ European Convention on Human Rights, *supra* note 114, at art. 13.

¹²⁸ Rachael E. Schwartz, *Article: Chaos, Oppression, and Rebellion: The Use of Self-Help to Secure Individual Rights under International Law*, 12 B.U. INT’L L.J. 255, 264–65 (1994) (“[T]he international community has no supranational sovereign to enforce international law. . . . If a state . . . violates the human rights which it has promised to respect, individuals usually have no cause of action under the treaty.”).

August 16, 1990.¹²⁹ Before President Putin signed the adoption ban, Russia's deputy prime minister on social issues, Olga Golodets, sent him a letter indicating that the adoption ban violates the Convention on the Rights of the Child as well as other treaties.¹³⁰ The Human Rights Watch, an organization committed to exposing human rights violations worldwide, has likewise expressed concern about whether the Russian adoption ban complies with the Convention on the Rights of the Child.¹³¹

The Convention on the Rights of the Child provides that a child "temporarily or permanently deprived of his or her family environment" is entitled to alternative care, which may include adoption or, "if necessary[,] placement in suitable institutions for the care of children."¹³² Intercountry adoption with "safeguards and standards equivalent to those in the case of national adoption" is specified as an option for children that "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."¹³³

Whether the Russian adoption ban violates this Convention is unclear. The Convention lists intercountry adoption as an option but does not actually require countries to utilize this option. Precluding this option for those Russian orphans who do not have the opportunity to be adopted by Russian families or families in other countries that are still permitted to adopt children from Russia, however, may violate the Convention. This violation is due to the fact that placement in an institution is neither "necessary" nor "suitable" for those children who could have been adopted by American families. Russia could argue that it is "necessary" and "suitable" based on the deaths of nineteen orphans adopted by Americans. As tragic as these deaths are, however, the death rate of orphans adopted by Russians is significantly higher, and Russia continues to allow Russians to adopt Russian orphans.¹³⁴ Furthermore, while approximately 18,000 Russian families are waiting to adopt children, the number of Russian children in need of adoption far exceeds this number.¹³⁵ Categorically prohibiting American families from adopting Russian children will diminish the children's chances for adoption, thereby depriving them of their right to alternative care.¹³⁶

¹²⁹ Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Nov. 6, 2013).

¹³⁰ *Russia: Reject Adoption Ban Bill*, HUMAN RIGHTS WATCH (Dec. 21, 2012; Dec. 28, 2012 update), <http://www.hrw.org/news/2012/12/21/russia-reject-adoption-ban-bill>.

¹³¹ *Id.*

¹³² Convention on the Rights of the Child art. 20, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

¹³³ *Id.* at art. 21.

¹³⁴ See *supra* Part V.B.

¹³⁵ Kirit Radia, *Blind Teen Stands Up to Putin on Adoption Ban*, ABC NEWS, Jan. 14, 2013, 5:34 PM, <http://abcnews.go.com/blogs/headlines/2013/01/blind-teen-stands-up-to-putin-on-adoption-ban/>; Lynn Berry, *Thousands March to Protest Russia's Adoption Ban*, USA TODAY, Jan. 13, 2013, 3:49 PM, <http://www.usatoday.com/story/news/world/2013/01/13/protest-russias-adoption-ban/1830099/>; Yasmine Ergas, *Are Children Today's Iron Ore? Russia's Adoption Ban and International Diplomacy*, HUFFINGTON POST, Jan. 8, 2013, 3:02 PM, http://www.huffingtonpost.com/yasmine-ergas/russian-adoption-ban_b_2433606.html.

¹³⁶ See *id.*

Also, nearly half of the more than 750,000 children in Russian orphanages and institutions have diagnosed special needs and are unlikely to be adopted by Russian parents.¹³⁷ Eventually, these children will be transferred to mental institutions.¹³⁸ If they are confined to mental institutions while they are still minors, that situation may well be a clear violation of the children's rights if such institutions are not "suitable." Even if they are not confined to such institutions until reaching the age of majority, depriving the children of the opportunity to be adopted into a family and instead confining them to an institution and condemning them to enter mental institutions once they turn eighteen may also violate the Convention.

VII. RECOMMENDATIONS

Assuming that the adoption ban violates at least one international treaty, enforcement of the treaty is a difficult issue. The U.S.-Russia Bilateral Adoption Agreement provides that any disputes about the interpretation or application of the agreement should be resolved through negotiations and that if no agreement is reached through negotiations, the dispute should instead be resolved through other "diplomatic channels."¹³⁹ In June 2013, Astakhov came to Washington to meet with U.S. State Department officials for negotiations about adoptions, but currently negotiations over the adoption ban have stalled.¹⁴⁰ Unless negotiations resume and an agreement is reached, the dispute will, according to the bilateral adoption agreement, need to be resolved through diplomatic channels.

One possibility is for the United States to rescind the Magnitsky Act, since the adoption ban was most likely intended as retaliation for the Magnitsky Act in the first place. However, this course of action may be neither desirable nor effective. Rescinding the Magnitsky Act would, for the United States, be going back on an official statement on human rights and justice.¹⁴¹ It would also have the undesirable effect of allowing Russia to wield a potential adoption ban as a threat whenever the United States may want to do something Russia considers against its interests.¹⁴²

¹³⁷ Roberts, *supra* note 45.

¹³⁸ *Id.* ("Children with special needs are transferred to adult mental institutions at the age of 4, where they regress and suffer profoundly."); Dewey, *supra* note 126 ("In Russia, six-year-old Polina [who was recently adopted from Russia] would have been transferred to a mental institution soon, Livingston said; . . . that means no education, minimal therapy and little human interaction."); *Cf.* Aden, *supra* note 74 (indicating that special needs children are moved to mental institutions at the age of 18).

¹³⁹ U.S.-Russia Bilateral Adoption Agreement, *supra* note 69 at art. 17, subsec. 7.

¹⁴⁰ *U.S. Senator: Russia Stalling on Adoption, Children's Rights Ombudsman an "Ass,"* RADIO FREE EUROPE RADIO LIBERTY (Jan. 2, 2014), <http://www.rferl.org/content/us-russia-adoptions-land-rieu/25112556.html>.

¹⁴¹ Russia has already wielded an adoption ban as a threat against Ireland. *Under Child Adoption Threat, Ireland Scraps Magnitsky List*, MOSCOW TIMES, May 3, 2013, <http://www.themoscowtimes.com/article/479531.html> ("Ireland has dropped plans to impose U.S.-style Magnitsky sanctions on Russia after Moscow warned that it might respond by banning Irish parents from adopting Russian children.").

¹⁴² *Id.*

Another possibility is to enter into a new bilateral adoption convention with Russia that contains sufficient safeguards so that Russia will be willing to allow the adoptions.¹⁴³ This would show willingness to cooperate with Russia in ensuring the safety of Russian children adopted by families in the United States. Other acts to show such cooperation, including the U.S. government having provided Russia with a list of Russian children adopted by American parents, may also help foster goodwill in this area.¹⁴⁴ Finally, the United States could seek a partial victory by trying to come to an agreement with Russia to reopen certain types of adoption, such as allowing American parents to adopt children with special needs or children who are older and thus unlikely to find families in Russia.

There are also various enforcement mechanisms available under general international law. These include the use of force, appeals to international courts, sanctions, or pressuring Russia to remove the ban by naming and shaming. The use of force is clearly inappropriate in this situation. According to international law, the use of force is legal only when exercised in self-defense under Article 51 of the United Nations Charter or when authorized by the Security Council.¹⁴⁵ Neither applies in this situation, and even if they did, the use of force would hardly be a desirable method for reestablishing international adoption procedures, which are heavily dependent on the goodwill of the parties.

Appeals to international courts might prove helpful. Some of the American parents who were in the process of adopting children from Russia when the adoption ban came into effect have sued Russia in the European Court of Human Rights. Even if they prevail, however, “the European court is not allowed to overturn Russian court decisions—which would comply with the ban—so the victory will be a Pyrrhic one unless the Kremlin faces so much international censure it reverses the decision.”¹⁴⁶ U.S. adoptive parents hoping to adopt from Russia could also lobby for the United States to sue Russia in the International Court of Justice for breach of the U.S.-Russia Bilateral Adoption Convention.

As to sanctions, some adoption advocates suggest “reopening the Magnitsky human-rights bill to target for sanctions the Russian lawmakers who voted for the adoption ban.”¹⁴⁷ However, such a course of action would likely be counterproductive and further strain relations with Russia, making it even more difficult to reach an agreement.¹⁴⁸ As mentioned, the adoption ban itself was most likely a response to the original sanctions imposed by the Magnitsky Act.

¹⁴³ Bethanie Barnes, Comment, *A Critique of the U.S.-Russian Adoption Process and Three Recommendations for the U.S.-Russian Bilateral Adoption Agreement*, 27 EMORY INT’L L. REV. 397, 445 (2013).

¹⁴⁴ *US Hands Over List*, *supra* note 19.

¹⁴⁵ U.N. Charter art. 2, para. 4, arts. 42, 51, available at <http://www.un.org/en/documents/charter/index.shtml>.

¹⁴⁶ Loiko & Murphy, *supra* note 17.

¹⁴⁷ Belogolova, *supra* note 17.

¹⁴⁸ *Id.*

Naming and shaming is also a possible enforcement mechanism and perhaps the best option in this situation. Publicizing the plight of orphans twice abandoned, and of the many orphans with little chance to ever be adopted because of the ban, would help bring attention to the negative consequences of the adoption ban. A good example is the recent *Moscow Times* article following up on the fate of thirty-three children in St. Petersburg who had already met their prospective adoptive parents. The article brings attention to the fact that Russia is unable to find alternative families for many children who would have found a home with American parents if not for the adoption ban.¹⁴⁹

Another possibility, in a similar vein to naming and shaming, is to gather information about previous successful adoptions of Russian children to U.S. families and publicize the positive outcomes that so many children enjoy. Filmmaker Sarah McCarthy has done this through her documentary *The Dark Matter of Love*, which follows three Russian orphans adopted by a Wisconsin family and shows how they settled into family life.¹⁵⁰ Alexander D'Jamoos, a Russian adoptee, shared his own story about being abandoned by his parents due to his disabilities, living in a Russian orphanage in Nizhniy Lomov, and finally being adopted at the age of fifteen.¹⁵¹ According to him, “[i]f there’s an opportunity for a family, I think it’s immoral to take it away from a child.”¹⁵² He initiated an online petition, which was delivered to the Russian embassy in Washington, D.C.¹⁵³ An increase in sharing such Russian adoption success stories is likely to be the most effective advocacy tool because it raises awareness of the good outcomes many adopted children enjoy and which are now denied many Russian orphans due to the adoption ban.

Hopefully Russia and the United States will be able to resolve their disagreements regarding intercountry adoption through diplomatic channels and negotiate a new bilateral adoption agreement. Showing a willingness to cooperate with Russia in order to promote the safety and welfare of adopted children and publicizing the positive outcomes enjoyed by many Russian children who have been adopted by American parents will help demonstrate the importance and value of intercountry adoption.

VIII. CONCLUSION

The Russian adoption ban most likely does not violate the Hague Convention. However, the adoption ban clearly violates the Agreement between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children and may potentially

¹⁴⁹ Only “One of 33 Orphans,” *supra* note 21.

¹⁵⁰ Tina Traster, *Film Becomes Tool for Advocacy over Russian Adoption Ban*, HUFFINGTON POST (May 31, 2013, 6:11 PM), http://www.huffingtonpost.com/tina-traster/film-becomes-tool-for-a-dv_b_3366926.html.

¹⁵¹ Solash, *supra* note 21.

¹⁵² *Id.*

¹⁵³ *Id.*

violate the European Convention on Human Rights and the Convention on the Rights of the Child as well. Thus, the Russian adoption ban constitutes a violation of international law based on at least one treaty.

While enforcing international law in this situation is tricky, there are several methods that may help lead to the eventual reauthorization of Russian adoptions to the United States. These methods include diplomatic negotiations to establish a new bilateral adoption agreement that ensures the safety of adopted children, appeals to international courts, media efforts demonstrating the negative effects of the adoption ban, and media efforts showcasing the positive outcomes enjoyed by many Russian adoptees.