

2013

## A Critique of the U.S.-Russian Adoption Process and Three Recommendations for the U.S.-Russian Bilateral Adoption Agreement

Bethanie Barnes

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# **A CRITIQUE OF THE U.S.–RUSSIAN ADOPTION PROCESS AND THREE RECOMMENDATIONS FOR THE U.S.–RUSSIAN BILATERAL ADOPTION AGREEMENT**

## **ABSTRACT**

*This Comment analyzes and recommends changes to the Adoption Agreement that will regulate intercountry adoption between the United States and the Russian Federation until January 2014. This Adoption Agreement was reached out of concern for the safety of adopted children, due to the number of stories and allegations of abuse at the hands of American parents. Between 1990 and 2012, more than twenty Russian adoptees died while in the custody of their adoptive American parents. Prior to the Adoption Agreement, there were minimal procedural safeguards put in place to protect the adoptees and ensure the readiness of their adoptive parents. A bilateral agreement regulating adoption between the United States and the Russian Federation cannot conflict with either state's existing treaty obligations. Thus, it must abide by Russia's obligations under the Convention on the Rights of the Child, and the United States' obligations under the Hague Adoption Convention. Furthermore, this Adoption Agreement must take into account the flaws of the pre-Agreement adoption process and create procedural safeguards to avoid some of the same dangers.*

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## INTRODUCTION

### A. *Nina’s Story*

Nina “Viktoria”<sup>1</sup> Hilt was barely two years old when Peggy Hilt and her husband adopted her from Russia in 2004.<sup>2</sup> Soon after bringing Nina home,

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<sup>1</sup> Viktoria Bazhenova is Nina’s birth name. Andrei Loshchilin, *Death of Russian-Born Child in U.S. Raises Adoption Concerns*, RIA NOVOSTI (Aug. 3, 2005), <http://en.rian.ru/world/20050803/41083612.html>.

Peggy realized that she was unprepared for the task at hand.<sup>3</sup> According to Peggy, Nina would erupt into violent tantrums: banging her head on the wall,<sup>4</sup> pulling her hair out,<sup>5</sup> and destroying the family's furniture.<sup>6</sup> Peggy also stated that, at times, Nina even became physically aggressive with her older sister.<sup>7</sup> If Peggy's statements about Nina were true, something was clearly wrong with Nina's behavior, yet Peggy did not get help.<sup>8</sup> Instead, Peggy fell into a depression and turned to alcohol to cope with her sense of failure.<sup>9</sup> In 2005, Peggy reached her breaking point.<sup>10</sup> While packing for a family vacation, Peggy noticed Nina reach into her diaper and smear feces on the walls and furniture.<sup>11</sup> Peggy snapped and began to kick, shake, and hit Nina.<sup>12</sup> A few days later, Nina died from internal bleeding,<sup>13</sup> and Peggy was charged with second-degree murder.<sup>14</sup>

### B. *Justin's Story*

Torry Hansen adopted Justin "Artyom"<sup>15</sup> Hansen from a Russian orphanage.<sup>16</sup> Justin was seven years old when he came to the United States.<sup>17</sup> Like Peggy, Torry did not seek help regarding Justin and his supposed

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<sup>2</sup> Juju Chang et al., *From Russia with Love—Dealing with Difficult Adoptions*, ABCNEWS (Nov. 28, 2008), <http://abcnews.go.com/2020/story?id=6322100>.

<sup>3</sup> See Pat Wingert, *When Adoption Goes Wrong*, NEWSWEEK, Dec. 17, 2007, at 58.

<sup>4</sup> Chang et al., *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> Wingert, *supra* note 3.

<sup>7</sup> *Id.*

<sup>8</sup> See Chang et al., *supra* note 2; Wingert, *supra* note 3.

<sup>9</sup> Wingert, *supra* note 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Chang et al., *supra* note 2.

<sup>14</sup> Wingert, *supra* note 3.

<sup>15</sup> Some news articles spell Justin's mother's name as Torry; others report her name as Torry-Ann. *E.g.*, Nataliya Vasilyeva & Kristin M. Hall, *American Torry-Ann Hansen SENDS BACK Adopted Russian Son*, HUFFINGTON POST (Apr. 10, 2010), [http://www.huffingtonpost.com/2010/04/09/american-torryann-hansen-\\_n\\_531477.html](http://www.huffingtonpost.com/2010/04/09/american-torryann-hansen-_n_531477.html). This Comment will refer to her as Torry. Artyom (also spelled as "Artem") is Justin's birth name. Clifford J. Levy, *Adopted Boy, 7, is Sent Back, Outraging Russia*, N.Y. TIMES, Apr. 10, 2010, at A1; see also Louise Boyle, *Judge Upholds \$150,000 Child Care Bills Tennessee Woman Ordered To Pay After She Sent Adopted Boy BACK to Russia*, MAIL ONLINE (July 13, 2012), <http://www.dailymail.co.uk/news/article-2173320/Russian-boy-abandoned-Judge-orders-U-S-mother-sent-Artem-Saveliev-pay-child-support-sent-back.html>.

<sup>16</sup> Levy, *supra* note 15.

<sup>17</sup> See Damien Cave, *At a Family's Home in Tennessee, Reminders of a Boy Returned to Russia*, N.Y. TIMES, Apr. 11, 2010, at A16.

behavioral problems.<sup>18</sup> According to Torry, Justin would kick, hit, and threaten to kill his adoptive family.<sup>19</sup> At one point, Justin drew a picture of Torry's house burning down.<sup>20</sup> According to Justin, Torry would react to Justin's behavior by pulling his hair and yelling at him.<sup>21</sup> In April 2010, Torry decided to dissolve<sup>22</sup> the adoption on her own terms.<sup>23</sup> Just six months after Torry adopted Justin, she purchased a one-way airline ticket to Moscow and sent him back to Russia.<sup>24</sup> In the note that she sent with Justin on his solitary transatlantic flight, Torry wrote that the orphanage misled her to believe that Justin was mentally healthy.<sup>25</sup> Torry also wrote that she was concerned with the safety of her family because Justin "is violent and has severe psychopathic issues," which she cited as the reason that she "no longer wished to parent this child."<sup>26</sup>

### C. *The Adoption Agreement*

Nina's and Justin's stories indicate the fractured state of intercountry adoptions between the United States and the Russian Federation. These adoptions have been marred by numerous incidents of adoption abuse and fatalities.<sup>27</sup> Nina's and Justin's stories are some of the most recent of the failed U.S.–Russian adoptions. From the early-1990s until 2012, Russian officials claim that nineteen Russian-born children died as a result of the actions of their U.S. parents.<sup>28</sup> A majority of these murders occurred within the same five-year

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<sup>18</sup> See Boyle, *supra* note 15; Michelle Ruiz, *Starkly Different Portraits of Adopted Boy Emerge*, AOL NEWS (Apr. 11, 2010), <http://www.aolnews.com/2010/04/11/starkly-different-portraits-of-adopted-russian-boy-emerge>.

<sup>19</sup> See Ruiz, *supra* note 18.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Adoption dissolution is the termination of "the adoptive parents' parental rights" after it is legally finalized, which results "in the child's return to or entry into foster care or placement with new adoptive parents." *Glossary - A*, CHILD WELFARE INFO. GATEWAY, [http://www.childwelfare.gov/admin/glossary/index.cfm#adoption\\_dissolution](http://www.childwelfare.gov/admin/glossary/index.cfm#adoption_dissolution) (last visited Feb. 20, 2012).

<sup>23</sup> See Ruiz, *supra* note 18.

<sup>24</sup> *Id.*

<sup>25</sup> Vasilyeva & Hall, *supra* note 15.

<sup>26</sup> Cave, *supra* note 17.

<sup>27</sup> See, e.g., Theresa Vargas, *N.C. Woman Admits Killing Adopted Russian Daughter*, WASH. POST, Mar. 2, 2006, at B5 (Peggy Sue Hilt admitted to killing her adopted two-year-old daughter); Jaime Belnap, *Mom Gets Prison for Killing Toddler*, TOOLE TRANSCRIPT BULL. (Oct. 14, 2008), <http://transcriptbulletin.com/bookmark/310634/article-Mom-gets-prison-for-killing-toddler> (Kimberly Emelyantsev admitted to killing her adopted fourteen-month old son).

<sup>28</sup> Alexei Anishchuk, *Russia's Putin Signals He Will Sign U.S. Adoption Ban*, REUTERS, Dec. 27, 2012, available at <http://www.reuters.com/article/2012/12/27/us-russia-usa-adoptions-putin-idUSBRE8BQ06K20121227>; Olga Khazan, *Why Are Other Countries Wary of American Adoptions?*, WORLDVIEWS (Dec. 27, 2012,

span.<sup>29</sup> For years, Russians have been outraged at the maltreatment of Russian-born children in the United States.<sup>30</sup> After Justin was “returned” to Russia, Russian authorities threatened to suspend all adoptions with the United States.<sup>31</sup> Threatening to suspend adoptions may have been the most effective way for Russia to protect its children. While ending adoptions allows the Russian government to prevent adoption abuses, this tactic also prevents potential adoptees from being paired with loving U.S. families. This dilemma set the stage for the United States and Russia to develop a preventative means to tackle the problems with U.S.–Russian adoptions.

After Justin’s story attracted international attention, the two governments began negotiating the terms of a bilateral agreement that would regulate adoptions between the United States and Russia.<sup>32</sup> The goal of these negotiations was to create a system that would “strengthen procedural safeguards in adoptions between the United States and Russia.”<sup>33</sup> On July 13, 2011, Hillary Clinton, the U.S. Secretary of State, and Sergey Lavrov, the Russian Foreign Minister, signed<sup>34</sup> the Agreement Between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children (“Adoption Agreement” or “Agreement”).<sup>35</sup>

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12:08 PM), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/27/why-are-other-countries-wary-of-american-adoptions>; see also Alexandra Odynova, *Boy’s Murder Won’t Derail Adoption Treaty*, MOSCOW TIMES (June 21, 2010), <http://www.themoscowtimes.com/news/article/boys-murder-wont-derail-adoption-treaty/408672.html> (reporting in 2010 that Russian officials raised concerns about the seventeen Russian adopted children killed by their American parents over the past fifteen years).

<sup>29</sup> Lilia Khabibullina, *International Adoption in Russia: “Market,” “Children for Organs,” and “Precious” or “Bad” Genes*, in INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN 174, 175 (Diana Marre & Laura Briggs eds., 2009) (“Between 2000 and 2005, two or three murders of adopted children were discussed in the media each year, involving eight boys and four girls ranging in age from one to eight years.”).

<sup>30</sup> See *US and Russia Agree on Rules To Make Adoptions Safer*, BBC NEWS (July 13, 2011), <http://www.bbc.co.uk/news/world-us-canada-14148431>.

<sup>31</sup> See *id.*

<sup>32</sup> See *FAQs: Bilateral Adoption Agreement with Russia*, INTERCOUNTRY ADOPTION 1 (July 13, 2011), [http://adoption.state.gov/content/pdf/FAQs\\_re\\_Agreement\\_07\\_13\\_2011\\_FINAL2.pdf](http://adoption.state.gov/content/pdf/FAQs_re_Agreement_07_13_2011_FINAL2.pdf) [hereinafter *FAQs: Bilateral Adoption Agreement with Russia*].

<sup>33</sup> *Id.*

<sup>34</sup> Press Release, U.S. Dep’t of State, Agreement Between the United States and the Russian Federation Regarding Cooperation in Adoption of Children (July 13, 2011), available at <http://www.state.gov/r/pa/prs/ps/2011/07/168180.htm>.

<sup>35</sup> Agreement Between the United States and the Russian Federation Regarding Cooperation in Adoption of Children, U.S.–Russ., July 13, 2011 (entered into force Nov. 1, 2012) [hereinafter *Adoption Agreement*], available at [http://adoption.state.gov/content/pdf/us-russia\\_adoption\\_agmt-713%2011-signed\\_english.pdf](http://adoption.state.gov/content/pdf/us-russia_adoption_agmt-713%2011-signed_english.pdf).

In the year after the Adoption Agreement was drafted, the Russian Duma approved the Agreement and Russian President Vladimir Putin signed it into law.<sup>36</sup> Unfortunately, as U.S.–Russian foreign relations, waned the Adoption Agreement became a pawn in a larger political fight.<sup>37</sup> On December 28, 2012, Putin signed Federal Law No. 272-FZ<sup>38</sup> into law, which “bans the adoption of Russian children by U.S. citizens, bars adoption service providers from assisting U.S. citizens in adopting Russian children, and requires termination of the U.S.–Russia Adoption Agreement.”<sup>39</sup>

The decision to ban adoptions with the United States was a hasty retaliatory move by the Russian Duma and President Putin.<sup>40</sup> The Adoption Agreement is expected to remain in force until January 1, 2014.<sup>41</sup> During this time, no new adoptions may commence, but adoptions that have already been approved by a Russian court may be finalized under the Adoption Agreement.<sup>42</sup> This Comment will focus on the Adoption Agreement and the issues surrounding U.S.–Russian adoptions for three reasons: (1) the analysis of U.S.–Russian

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<sup>36</sup> Notice: *President Putin Signs the Agreement Between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children*, INTERCOUNTRY ADOPTION (July 31, 2012), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=russia\\_7](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=russia_7).

<sup>37</sup> See *Ban on U.S. Adoptions is 'Adequate Reaction' - Putin*, RT (Dec. 20, 2012), <http://rt.com/politics/putins-grand-urgent-issues-455>. The decision to end the Adoption Agreement was Russia's response to the U.S.' adoption of the Magntisky Act. *Id.* A discussion of the Magntisky Act is outside the scope of this Comment.

<sup>38</sup> Federal'nyi Zakon RF o Merakh Vozdeistviia na Lits, Prichastnykh k Narusheniiam Osnovopolagaiushchikh Prav i Svobod Cheloveka, Prav i Svobod Grazhdan Rossiiskoi Federatsii [Federal Law of the Russian Federation on Measures Against Persons, Involved in Violations of Fundamental Rights and Freedoms, Rights and Freedoms of Citizens of the Russian Federation] ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 29, 2012, No. 5975 [hereinafter Federal Law of the Russian Federation No. 272-FZ], available at <http://www.rg.ru/2012/12/29/zakon-dok.html>.

<sup>39</sup> Alert: *Russian Supreme Court Letter on Implementation of Federal Law No. 272-FZ*, U.S. DEP'T STATE: INTERCOUNTRY ADOPTION (Jan. 24, 2013), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=alerts&alert\\_notice\\_file=russia\\_10](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_10); accord Federal Law of the Russian Federation No. 272-FZ, art. 4. Federal Law No. 272-FZ went into effect on January 1, 2013. *Id.*; see also Alert: *Russian Supreme Court Letter on Implementation of Federal Law No. 272-FZ*, *supra*.

<sup>40</sup> Ellen Barry, *Russia To Let a Few U.S. Adoptions Go On*, N.Y. TIMES, Jan. 11, 2013, at A13.

<sup>41</sup> See Adoption Agreement, *supra* note 35, art. 17(5); Barry, *supra* note 40; Alert: *Legislation To Ban Intercountry Adoption by U.S. Families*, INTERCOUNTRY ADOPTION (Jan. 3, 2013), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=alerts&alert\\_notice\\_file=russia\\_8](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_8).

<sup>42</sup> Barry, *supra* note 40. The Supreme Court of the Russian Federation stated in a letter explaining the implementation of Federal Law No. 272-FZ that Russian court decisions of adoption cases involving U.S. citizen parents issued and having legal force before January 1, 2013, should be given effect and the children should be transferred to their adoptive parents. See Alert: *Russian Supreme Court Letter on Implementation of Federal Law No. 272-FZ*, *supra* note 38.

issues can be applied to most wealthy Western nations; (2) Russia has similar adoption agreements with other Western nations;<sup>43</sup> and (3) if the political climate between the United States and Russia stabilizes, the countries may revisit the Adoption Agreement.<sup>44</sup>

Three aspects of the U.S.–Russian adoption process changed under the Agreement: independent adoptions<sup>45</sup> became illegal;<sup>46</sup> prospective adoptive parents were required to undergo additional training and attend parent preparation classes depending on their child’s special needs;<sup>47</sup> and prospective adoptive parents were subject to a more stringent pre-approval process.<sup>48</sup> Although these three changes were necessary, the Adoption Agreement did not adequately address all of the problems plaguing U.S.–Russian adoptions. The bilateral agreement regulating adoption between the United States and the Russian Federation should not be read to conflict with either state’s existing treaty obligations.<sup>49</sup> Russia is a party to the United Nations Convention on the Rights of the Child (“CRC”),<sup>50</sup> but it has not ratified the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (“Hague Convention” or “Convention”).<sup>51</sup> Conversely, the United States is a party to the Hague Convention, but it has not ratified the CRC.<sup>52</sup> The Adoption

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<sup>43</sup> See Yelena Kovachich, Russia, *France Sign Agreement on Child Adoption*, VOICE OF RUSSIA (Nov. 18, 2011), <http://english.ruvr.ru/2011/11/18/60645603.html> (“The first such bilateral agreement on child adoption was signed between Russia and Italy in November 2008. . . . Now Russia is currently in talks on signing similar agreements with Spain, the UK, Ireland and Israel.”).

<sup>44</sup> *Medvedev Does Not Rule Out Russian-US Adoption Agreement*, VOICE OF RUSSIA (Jan. 27, 2013), [http://english.ruvr.ru/2013\\_01\\_27/Medvedev-does-not-rule-out-Russian-US-agreement-on-adopting-children](http://english.ruvr.ru/2013_01_27/Medvedev-does-not-rule-out-Russian-US-agreement-on-adopting-children).

<sup>45</sup> For a discussion on independent adoptions, see *infra* text accompanying notes 191–194.

<sup>46</sup> See *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 32, at 3.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Vienna Convention on the Law of Treaties art. 30, May 23, 1969, 1155 U.N.T.S. 331.

<sup>50</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; 1 UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 1 APRIL 2009, at 391, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009) [hereinafter MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL].

<sup>51</sup> Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167 [hereinafter Hague Convention]; *Status of Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ac2f9> (last visited Feb. 15, 2013) [hereinafter *Hague Convention States Parties*]; *Russia*, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=russia](http://adoption.state.gov/country_information/country_specific_info.php?country-select=russia) (last visited Jan. 25, 2013) [hereinafter *Country Information: Russia*].

<sup>52</sup> *Hague Convention States Parties*, *supra* note 51; see MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra* note 50, at 389–91; see also Elisabeth J. Ryan, Note, *For the Best Interests of the Children: Why the Hague Convention on Intercountry Adoption Needs To Go Farther, As Evidenced By Implementation in Romania and the United States*, 29 B.C. INT’L & COMP. L. REV. 353, 358–59 (2006) (“The

Agreement fulfilled the goals of both the CRC and the Hague Convention. The Adoption Agreement incorporated the safeguards of the Hague Convention,<sup>53</sup> yet it achieved the uniformity of adoption regulations not present in the CRC or the Hague Convention.

The legal process for U.S.–Russian adoptions before the Adoption Agreement allowed Russian adoptees to obtain the citizenship of their U.S. adoptive parents.<sup>54</sup> Consequently, if an adoptee’s citizenship were changed, Russia would not have a basis for criminal jurisdiction to prosecute the U.S. adoptive parents that murder their Russian adoptee.<sup>55</sup> Also, the United States and Russia do not have an extradition treaty,<sup>56</sup> so the United States had no obligation to send these parents to Russia. The Agreement did not account for some of the key procedural issues that would have arisen in implementing its regulations, undermining the objective of the Adoption Agreement. To illustrate the Agreement’s shortcomings, imagine putting a Band-Aid on a broken ankle: This act recognizes a problem, identifies the source of the problem, and attempts to mend it; however, the remedy fails to provide the necessary tools to heal the underlying problems. If the ban on U.S.–Russian adoptions is lifted in the future, three critical areas must be addressed: (1) the varying medical standards between the United States and Eastern Europe which may affect the accuracy of a child’s medical report; (2) a longer screening process that will assess a prospective adoptive parent’s readiness but will also increase the time a child is subjected to institutional care; and (3) the lack of accountability between the United States and Russia to ensure both are properly enforcing the Adoption Agreement.

To address these shortcomings in a future bilateral adoption agreement, this Comment proposes three solutions. First, a new bilateral adoption agreement should take into account the varying medical standards that exist between the

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Hague Convention on Intercountry Adoption proved to be a more detailed consideration of dissenters’ objections to the CRC’s failure to facilitate international adoption.”)

<sup>53</sup> One of the main objectives of the Hague Convention is “to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child . . .” Hague Convention, *supra* note 51, art. 1(a); see Cheryl L. Allen, Note, *The US–Russian Child Adoption Agreement: An End to Failed Adoptions?*, 35 *FORDHAM INT’L L.J.* 1690, 1721 (2012).

<sup>54</sup> Adoption Agreement, *supra* note 35, art. 13(2).

<sup>55</sup> Russia could make an argument that it would have jurisdiction over the American parents under the protective principle. The protective principle bases jurisdiction on the idea that the offense harmed a national interest. See RICHARD K. GARDINER, *INTERNATIONAL LAW* 312 (2003). But this argument is tenuous at best, especially if the Russian children who were murdered were U.S. citizens at the time of their death.

<sup>56</sup> Alexander Utkin, *Russia Proposes Bilateral Extradition Treaty with U.S.*, *RIA NOVOSTI* (Feb. 10, 2012), <http://en.rian.ru/russia/20120210/171243300.html>.

United States and Eastern European states. The Adoption Agreement mandated that prospective adoptive parents will receive the child's complete medical history,<sup>57</sup> but it failed to recognize that the medical history may be inconclusive. The U.S. Department of State and the Russian Ministry of Education and Science should develop uniform terminology to assist medical professionals with proper diagnoses. Parents who are aware of their child's medical needs will likely enter into the adoption with realistic expectations. With better-informed parents, adoptions will stand a better chance of being successful. Second, a new bilateral adoption agreement should create a maximum time length for prospective adoptive parents to undergo the pre-adoption process. The time length requirement is necessary to fulfill the object of a prospective bilateral agreement.<sup>58</sup> In discussing such requirements, this Comment will argue that the United States and Russia should balance the need for careful scrutiny of prospective parents with the urgency needed to remove the children from their unhealthy environments. Finally, this Comment proposes that the United States and Russia develop a system of accountability to enforce a new bilateral adoption agreement. Each state should be required to submit annual reports explaining how that state is implementing such an agreement. Accountability will ensure that both states are executing an agreement with fidelity, and ultimately ensuring that agreement's success. For example, one of the causes attributable to the failure of the U.S.–Vietnam Bilateral Adoption Agreement was the lack of accountability.<sup>59</sup> The failed bilateral agreement between the United States and Vietnam serves as an example of how a system of accountability should be a key component of any bilateral adoption agreement.

This Comment will analyze the Adoption Agreement in the context of the past problems with intercountry adoption between the United States and Russia through the eyes of an adoptive parent like Peggy Hilt or Torry Hansen. The proposed improvements to a new bilateral adoption agreement should take into account Peggy, Torry, and other adoptive parents' stories. Part I of this Comment briefly discusses the history of intercountry adoption and the earlier international treaties used to regulate this area of the law. Part II walks through the current adoption process for a prospective U.S. parent who is interested in adopting a Russian child. This process involves understanding current

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<sup>57</sup> Adoption Agreement, *supra* note 35, art. 10(1)(b)(i).

<sup>58</sup> *See* Adoption Agreement, *supra* note 35, pmbl. (stating that the parties recognize “that the child . . . should grow up in a family environment”).

<sup>59</sup> *See infra* Part V.C.2.

requirements under both U.S. and Russian law. Most importantly, this Part will highlight the fractures in the pre-Adoption Agreement system, such as independent adoptions and a less rigorous home study process. Part III addresses the goals of the Agreement to correct some of the problems addressed in Part II. Part IV analyzes the provisions of the Agreement within the context of the CRC and the Hague Convention. An understanding of the substance of these treaties provides a context for understanding the provisions in the Adoption Agreement. Part V discusses this Comment's three suggestions for a future Agreement.

## I. BACKGROUND

### A. *Intercountry Adoption and Private International Law*

Adoption is the practice by which a child “acquires new family ties” that the law recognizes as “equivalent to biological ties.”<sup>60</sup> Intercountry adoption<sup>61</sup> is the process of adopting a child from a foreign country and bringing the child to permanently live in one's home country.<sup>62</sup> Two types of states are involved in the intercountry adoption process: sending states and receiving states.<sup>63</sup> A sending state is the child's country of origin.<sup>64</sup> Sending states are typically underdeveloped or developing nations that have “high birth rates and large numbers of orphaned or abandoned children . . . .”<sup>65</sup> A receiving state is the country of the adoptive family.<sup>66</sup> A receiving state tends to be a more affluent country with “lower birth rates and small numbers of orphaned or abandoned children . . . .”<sup>67</sup> Intercountry adoption offers adoptable children permanent homes as opposed to living in institutional care and eventually on the streets.<sup>68</sup>

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<sup>60</sup> SYLVAIN VITÉ & HERVÉ BOÉCHAT, ARTICLE 21 ADOPTION 19 (André Alen et al. eds., 2008).

<sup>61</sup> For the sake of uniformity, this Comment uses the phrase “intercountry adoption” as opposed to “international adoption.” The phrase “intercountry adoption” is used in international legal documents such as the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Hague Convention, *supra* note 51.

<sup>62</sup> *What is Intercountry Adoption*, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/adoption\\_process/what.php](http://adoption.state.gov/adoption_process/what.php) (last visited Nov. 11, 2011).

<sup>63</sup> Erica Briscoe, Comment, *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: Are Its Benefits Overshadowed by Its Shortcomings?*, 22 J. AM. ACAD. MATRIM. L. 437, 440 (2009); see also Notesong Srisopark Thompson, Note, *Hague Is Enough?: A Call for More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L.J. 441, 444 (2004).

<sup>64</sup> Briscoe, *supra* note 63, at 440.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Thompson, *supra* note 63, at 452.

Intercountry adoption provides parents with the joy of bringing a child into their family.

Modern intercountry adoption started in the 1950s.<sup>69</sup> States regulated intercountry adoption according to their own international private law for several decades.<sup>70</sup> This process was unsatisfactory to many, in part because there was a lack of information, organization, and uniformity in adoptions.<sup>71</sup> Children were often seen as commodities that could be taken (kidnapped) and exchanged for a profit (trafficked).<sup>72</sup> International efforts sought to protect the safety of children by preventing exploitative and illegal practices from interfering with the rights of the child.<sup>73</sup> These concerns prompted the United Nations to initiate a regulatory framework for adoption.<sup>74</sup> In the 1980s and 1990s, the international community recognized the need to regulate intercountry adoption.<sup>75</sup>

The United Nations' first successful effort toward regulating intercountry adoption was the CRC in 1989.<sup>76</sup> The CRC is a multilateral treaty that codifies children's rights.<sup>77</sup> Article 21 creates specific standards for the intercountry adoption process.<sup>78</sup> As a party to the CRC,<sup>79</sup> Russia must adhere to Article 21's requirements in implementing any intercountry adoption agreements. Although the United States signed the CRC, the United States has not ratified the treaty,<sup>80</sup> and is therefore not bound by Article 21. The next major international effort to regulate intercountry adoption culminated in the Hague Convention in

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<sup>69</sup> TREVOR BUCK ET AL., *INTERNATIONAL CHILD LAW* 243 (Routledge 2d ed. 2011) (2005). Following World War II and the Korean War, war-torn countries experienced a spike in the number of children available for adoption. Briscoe, *supra* note 63, at 437.

<sup>70</sup> VITÉ & BOÉCHAT, *supra* note 60, at 14.

<sup>71</sup> *See id.*; Briscoe, *supra* note 63, at 438, 456–57.

<sup>72</sup> Briscoe, *supra* note 63, at 438.

<sup>73</sup> *UNICEF's Position on Inter-Country Adoption*, UNICEF (July 22, 2010), [http://www.unicef.org/media/media\\_41918.html](http://www.unicef.org/media/media_41918.html).

<sup>74</sup> Briscoe, *supra* note 63, at 438.

<sup>75</sup> *See id.* at 438.

<sup>76</sup> *Id.*

<sup>77</sup> *See CRC*, *supra* note 50, art. 3; Ryan, *supra* note 52, at 358.

<sup>78</sup> *CRC*, *supra* note 50, art. 21(b)–(e); *see also* VITÉ & BOÉCHAT, *supra* note 60, at 4.

<sup>79</sup> *MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL*, *supra* note 50, at 391.

<sup>80</sup> *Id.*

1993.<sup>81</sup> The United States has ratified the Hague Convention<sup>82</sup> and is now obligated to follow the treaty’s framework on intercountry adoption.<sup>83</sup>

### 1. Article 21 of the CRC

In 1989, the United Nations General Assembly adopted the CRC,<sup>84</sup> which entered into force on September 2, 1990.<sup>85</sup> The CRC recognize that every child has the right to be raised in a loving and caring family environment.<sup>86</sup> Article 21 of the CRC requires that the child’s best interest be “the paramount consideration” in any “system of adoption.”<sup>87</sup> The implications of this language for intercountry adoptions are that the child’s best interest may supersede the child’s birth parents’ interest, the prospective adoptive parent’s interest, and even the child’s country of origin’s interest.<sup>88</sup> Article 21 explicitly recognizes intercountry adoption as an alternative consideration for placing the child.<sup>89</sup> However, states parties to the CRC must make domestic adoptions a priority.<sup>90</sup> A domestic adoption placement may include placing the child with her extended family, a domestic adoptive family, or in foster care.<sup>91</sup>

The Union of Soviet Socialist Republics (“U.S.S.R.” or “Soviet Union”) became a party to the CRC in 1990.<sup>92</sup> When the U.S.S.R. dissolved in 1991, the Russian Federation assumed its legal obligations,<sup>93</sup> including being a party to the CRC.<sup>94</sup> Following the dissolution of the Soviet Union, the Russian

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<sup>81</sup> VITÉ & BOÉCHAT, *supra* note 60, at 4.

<sup>82</sup> *Hague Convention States Parties*, *supra* note 51.

<sup>83</sup> See Hague Convention, *supra* note 51, art. 43(2); Vienna Convention on the Law of Treaties, *supra* note 49, art. 14(1).

<sup>84</sup> CRC, *supra* note 50, at 3; Briscoe, *supra* note 63, at 438.

<sup>85</sup> CRC, *supra* note 50, at 44 n.1; Briscoe, *supra* note 63, at 438.

<sup>86</sup> CRC, *supra* note 50, at 45; see also UNICEF’s *Position on Inter-Country Adoption*, *supra* note 73.

<sup>87</sup> CRC, *supra* note 50, art. 21.

<sup>88</sup> VITÉ & BOÉCHAT, *supra* note 60, at 24.

<sup>89</sup> CRC, *supra* note 50, art. 21(b); VITÉ & BOÉCHAT, *supra* note 60, at 45.

<sup>90</sup> See VITÉ & BOÉCHAT, *supra* note 60, at 45. For example, Russia prefers to place all of its adoptable children domestically. See *infra* text accompanying notes 135–40.

<sup>91</sup> See CRC, *supra* note 50, art. 20(3); see also Comm. on the Rights of the Child, Rep. on the 40th Sess., Sept. 12–30, 2005, para. 656, U.N. Doc. CRC/C/153 (Mar. 17, 2006); VITÉ & BOÉCHAT, *supra* note 60, at 45.

<sup>92</sup> CRC, *supra* note 50, at 44 n.1; Boris Atshuler & Anatoly Severny, *League Reports: Implementation of the Convention on the Rights of the Child*, INT’L LEAGUE FOR HUM. RTS. (Sept. 10, 1999), <http://www.ilhr.org/ilhr/reports/children/index.html>.

<sup>93</sup> Andrew M. Beato, *Newly Independent and Separating States’ Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. J. INT’L L. & POL’Y 525, 527 n.12 (1994); see also Atshuler & Severny, *supra* note 92.

<sup>94</sup> See Atshuler & Severny, *supra* note 92.

economy was altered dramatically, forcing many Russians into poverty.<sup>95</sup> Russia experienced an increase in the number of children available for adoption because many impoverished families could not afford to keep their children.<sup>96</sup>

## 2. *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*

The CRC has been criticized because it did not create a uniform process to regulate intercountry adoption.<sup>97</sup> The Hague Conference on Private International Law adopted the 1993 Hague Convention, expanding on the principles of the CRC “by adding substantive safeguards and procedures.”<sup>98</sup> The Hague Convention entered into force on May 1, 1995.<sup>99</sup> This multilateral treaty established minimum standards for states to protect the best interests of the child during and after the adoption process.<sup>100</sup> The Convention was not intended “to serve as a uniform law of adoption.”<sup>101</sup> To ensure accountability, the Hague Convention requires each signatory country to designate a Central Authority.<sup>102</sup> The Central Authority is a designated internal government agency that monitors the adoption process from each state.<sup>103</sup> This agency must implement domestic legislation that effectuates the Hague Convention requirements.<sup>104</sup> The Central Authority acts as the “gatekeeper” of the adoption

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<sup>95</sup> Mary Hora, Note, *A Standard of Service That All Families Deserve: The Transformation of Intercountry Adoption Between the United States and the Russian Federation*, 40 BRANDEIS L.J. 1017, 1020 (2002).

<sup>96</sup> *Id.* Some of the children who are available for adoption are classified as orphans, while others have parents who have committed their children to orphanages because they lack the resources to care for them. *Id.*

<sup>97</sup> E.g., Susann M. Bisignaro, Comment, *Intercountry Adoption Today and the Implications of the 1993 Hague Convention on Tomorrow*, 13 DICK. J. INT'L L. 123, 134–35 (1994); Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119, 122–23 (2007).

<sup>98</sup> HAGUE CONFERENCE ON PRIVATE INT'L LAW, THE IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE 22 (2008) [hereinafter HCCH GUIDE TO GOOD PRACTICE], available at [http://www.hcch.net/upload/adoguide\\_e.pdf](http://www.hcch.net/upload/adoguide_e.pdf); accord Briscoe, *supra* note 63, at 438; Carlberg, *supra* note 97, at 123.

<sup>99</sup> Hague Convention, *supra* note 51, at 182 n.1.

<sup>100</sup> HCCH GUIDE TO GOOD PRACTICE, *supra* note 98, at 22, 44.

<sup>101</sup> *Id.* at 22.

<sup>102</sup> Hague Convention, *supra* note 51, art. 6; accord Briscoe, *supra* note 63, at 442.

<sup>103</sup> Briscoe, *supra* note 63, at 442; see Hague Convention, *supra* note 51, arts. 6–9.

<sup>104</sup> Briscoe, *supra* note 63, at 442; see Hague Convention, *supra* note 51, arts. 6–9.

process by making sure that the child’s best interests are given “due consideration.”<sup>105</sup>

A common critique of the Hague Convention is that the treaty offers very little guidance for Convention states to interpret its regulations.<sup>106</sup> States have discretion to implement the requirements of the Hague Convention according to their own terms.<sup>107</sup> Yet, problems arise when a state embarks on its own interpretation of the Hague Convention. The Hague Convention is riddled with vague terminology; states arrive at different interpretations of the nature and goals of adoption regulations.<sup>108</sup> Thus, intercountry adoption regulations vary among states.<sup>109</sup> The consequence of this variation is a lack of international uniformity in the intercountry adoption process.<sup>110</sup> Additionally, the Hague Convention allows Convention states to conduct adoptions with non-Convention states.<sup>111</sup> Some argue that the option to conduct adoptions with non-Convention states undermines the procedural safeguards for Convention states.<sup>112</sup>

Because the Hague Convention does not restrict adoptions with non-Convention states, the United States is able to participate in adoptions with the Russian Federation. The Hague Convention imposes a great financial strain on both poor sending states and wealthy receiving states.<sup>113</sup> Ratifying and implementing the Convention is also an arduous task.<sup>114</sup> For example, the United States avoided ratification for years after it signed the Convention due to the need for “extensive preparation” to comply with the Convention.<sup>115</sup> The United States eventually signed the Hague Convention in 1994.<sup>116</sup> In 2000,

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<sup>105</sup> Hague Convention, *supra* note 51, art. 16(1); Peter Hayes, *The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention*, 25 INT’L J.L. POL’Y & FAM. 288, 289 (2011).

<sup>106</sup> E.g., Jennifer A. Ratcliff, Comment, *International Adoption: Improving on the 1993 Hague Convention*, 25 MD. J. INT’L L. 336, 337 (2010); Thompson, *supra* note 63, at 459–60 (“Adoption recognition under the *Hague Convention* is vague, and subject to arbitrary, broad, and inconsistent interpretation.”).

<sup>107</sup> Thompson, *supra* note 63, at 460.

<sup>108</sup> Carlberg, *supra* note 97, at 135; Ratcliff, *supra* note 106, at 337; Thompson, *supra* note 63, at 459–61.

<sup>109</sup> Thompson, *supra* note 63, at 460. For a discussion of the United States’ law implementing the Hague Convention, see Carlberg, *supra* note 97, at 137–43.

<sup>110</sup> Carlberg, *supra* note 97, at 137; Thompson, *supra* note 63, at 460.

<sup>111</sup> HCCH GUIDE TO GOOD PRACTICE, *supra* note 98, at 134; see also Caeli Elizabeth Kimball, Student Article, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y 561, 572, 582–83 (2005).

<sup>112</sup> See, e.g., Carlberg, *supra* note 97, at 134; Kimball, *supra* note 111, at 572.

<sup>113</sup> Briscoe, *supra* note 63, at 452.

<sup>114</sup> *Id.*

<sup>115</sup> Thompson, *supra* note 63, at 458; accord Kimball, *supra* note 111, at 581.

<sup>116</sup> *Hague Convention States Parties*, *supra* note 51.

President Clinton signed the Intercountry Adoption Act into law which implements the Hague Convention.<sup>117</sup> The Convention entered into force in the United States in April 2008.<sup>118</sup> Sending states are delegated the large responsibility of investigating the adoptability of the child and whether the adoption will be in the child's best interests.<sup>119</sup> This explanation may illustrate why the Russian Federation has not ratified the Hague Convention, especially because the Russian Duma passed laws with similar regulations.<sup>120</sup>

*B. A Rocky Past: Adoptions Between the United States and the Russian Federation*

This Subpart will discuss the problems with U.S.–Russian adoptions from the perspective of Russian and U.S. adoptive parents. From its inception, intercountry adoption has been a controversial topic for Russians.<sup>121</sup> Sending states can perceive intercountry adoption as insulting because intercountry adoption suggests that these states are unable to care for their children. Prospective adoptive parents in receiving states often have unrealistic ideas about the adoption process and about rearing a child who may have a troubled past.

This Subpart will begin by explaining the history of intercountry adoption between Russia and the United States. Next, this Subpart will consider intercountry adoption from Russia's perspective. By focusing on four factors that shape Russians' perspectives, this Subpart will explain why many Russians are unhappy with intercountry adoption. This Subpart then considers intercountry adoption from U.S. adoptive parents' perspective. The adoptive parents' perspective does not represent all U.S. adoptive parents because some of these parents have successful adoptions. However, when the adoption is unsuccessful, like Nina's and Justin's, many stories share two common themes: adoptable children with unreported mental illnesses and unprepared parents.

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<sup>117</sup> 42 U.S.C. § 14901(b)(1) (2006); Carlberg, *supra* note 97, at 137.

<sup>118</sup> *Hague Convention States Parties*, *supra* note 51; *see also* Briscoe, *supra* note 63, at 439.

<sup>119</sup> Kimball, *supra* note 111, at 569–70.

<sup>120</sup> Hora, *supra* note 95, at 1024–25.

<sup>121</sup> *See infra* Part I.B.2.

### 1. *History of Intercountry Adoption Between Russia and the United States*

For Russia, 1991 marked the dawn of a new era in its domestic law as well as its foreign policy: allowing foreigners, for the first time, to adopt Russian children.<sup>122</sup> Political disarray, poverty, and an increase in the number of children available for adoption laid the foundation for Russia opening its doors to intercountry adoption.<sup>123</sup> Many prospective adoptive parents empathized with these children and believed intercountry adoption would be a solution to the problem of many homeless and institutionalized children.<sup>124</sup> Russia quickly became one of the significant sending states for the international community.<sup>125</sup> Many prospective adoptive U.S. parents may prefer Russian children because of their European features.<sup>126</sup> In 1999, the U.S. Department of State reported 4381 adoptions from Russia.<sup>127</sup> By 2004, the numbers peaked with 5862 Russian adoptions by U.S. families.<sup>128</sup> However, in the wake of adoption scandals, like Nina's and Justin's, the percentage of U.S. adoptions of Russian-born children has steadily declined.<sup>129</sup> As early as 2003, Russian officials demanded more control over the post-adoption process because of these scandals.<sup>130</sup> In 2011, the number of adoptions reached twelve year low at 962.<sup>131</sup>

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<sup>122</sup> Hora, *supra* note 95, at 1020; Shannon Thompson, Note, *The 1998 Russian Federation Family Code Provisions on Intercountry Adoption Break the Hague Convention Ratification Gridlock: What Next? An Analysis of Post-Ratification Ramifications on Securing a Uniform Process of International Adoption*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 703, 707 (1999).

<sup>123</sup> See Hora, *supra* note 95, at 1020.

<sup>124</sup> Thompson, *supra* note 122, at 706.

<sup>125</sup> Khabibullina, *supra* note 29, at 174.

<sup>126</sup> Hora, *supra* note 95, at 121; Khabibullina, *supra* note 29, at 174.

<sup>127</sup> *Country Information: Russia*, *supra* note 51; *Statistics*, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/about\\_us/statistics.php](http://adoption.state.gov/about_us/statistics.php) (select "Adoptions by Year" tab; then select the "Country" radio button under "Filter Your Results By;" then select "Russia" from the drop down menu) (last visited Feb. 15, 2013).

<sup>128</sup> *Statistics*, *supra* note 127.

<sup>129</sup> *Id.*

<sup>130</sup> For example, following the 2003 murder of Russian adoptee Alex Pavlis, Russia's former Prime Minister Yevgeny Primakov and the Prosecutor-General Vladimir Ustinov spoke out about the lack of oversight Russia has on its children who have been adopted by U.S. citizens. See Laura Ashley Martin, Comment, "[T]he Universal Language is Not Violence. It's Love[:]" *The Pavlis Murder and Why Russia Changed the Russian Family Code and Policy on Foreign Adoptions*, 26 *PENN ST. INT'L L. REV.* 709, 728 (2008).

<sup>131</sup> *Statistics*, *supra* note 127.

## 2. *Russia's Perspective on Inter-country Adoptions*

For many Russians, intercountry adoption is a sensitive subject because it suggests that Russians cannot look after their own children.<sup>132</sup> The negative feelings amplified after the abuse and murder of Russian children because Russia may lack the jurisdiction to prosecute the U.S. citizens who commit these heinous acts on Russian-born children.<sup>133</sup> With Russians unhappy with the adoption process and the lack of control they have over post-adoption matters, they do not look favorably on the subject of intercountry adoption with the United States. Four factors contribute to why Russians may prefer ending intercountry adoptions with the United States.<sup>134</sup>

First, many Russians carry a strong sense of nationalism.<sup>135</sup> The international attention Russia receives for producing a high rate of adoptable children is damaging to its pride.<sup>136</sup> Scholar Lilia Khabibullina writes that Russian children are viewed as part of a “genofund.”<sup>137</sup> Khabibullina uses the term “genofund” to refer to the Russian nationalist idea that Russian DNA is superior to others.<sup>138</sup> For nationalist Russians, the idea of “precious Russian genes . . . going abroad” diminishes Russia’s greatness.<sup>139</sup> Consequently, Russia prioritizes domestic adoption over intercountry adoption.<sup>140</sup> Further, Russia has a history of tense relations with the United States, dating back to the Cold War.<sup>141</sup> The fact that some of the Russian genofund is sent to Russia’s former adversary may create a greater incentive for Russian nationalists to limit the number of Russian children who are adopted internationally.

Second, a lack of trust exists between Russia and the United States in the adoption process. The Russian process is portrayed in the United States as unscrupulous and lacking transparency.<sup>142</sup> Stories about corrupt politicians and

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<sup>132</sup> Hora, *supra* note 95, at 1022.

<sup>133</sup> See *supra* note 55 and accompanying text.

<sup>134</sup> This list is not exhaustive. Rather, it summarizes some of the factors that affect Russia’s perspective on intercountry adoption.

<sup>135</sup> See Thompson, *supra* note 122, at 717.

<sup>136</sup> *Id.*

<sup>137</sup> Khabibullina, *supra* note 29, at 183–85.

<sup>138</sup> See *id.* at 184.

<sup>139</sup> *Id.*; see also *Ban on U.S. Adoptions is ‘Adequate Reaction’- Putin*, *supra* note 37 (“Speaking on the proposed adoption ban . . . Putin said that to his knowledge the majority of Russians disapprove of foreign adoptions.”).

<sup>140</sup> The CRC, UNICEF, and even the Adoption Agreement make domestic adoptions a priority. See *infra* text accompanying notes 297–305.

<sup>141</sup> Hora, *supra* note 95, at 1021–22.

<sup>142</sup> See *id.* at 1021.

the lack of transparency in Russian adoptions accuse Russians of taking advantage of prospective adoptive parents.<sup>143</sup> Torry's and Justin's story illustrates this point.<sup>144</sup> Torry blamed Russian adoption officials for lying to her about Justin.<sup>145</sup> She claimed that the officials did not tell her that Justin was "mentally unstable."<sup>146</sup> Conversely, the Russian media has portrayed intercountry adoption with the United States in a negative light.<sup>147</sup> This portrayal should not be a surprise because of the incidents where Russian children were adopted by unprepared U.S. parents. When stories of abused Russian children surface in the media, many Russians are alarmed and unhappy with the lenient punishment U.S. parents receive in American criminal courts.<sup>148</sup>

Third, sending states are criticized as placing a low value on human life.<sup>149</sup> This idea is fueled by stories of orphanages overrun with children in need of homes.<sup>150</sup> Children are housed in large institutions that are often poorly managed.<sup>151</sup> The staff members are underpaid and not well-trained.<sup>152</sup> Some of the babies and infants are not nurtured and suffer from malnutrition.<sup>153</sup> These images of children in orphanages may encourage prospective parents to adopt, yet they simultaneously reflect poorly on Russia. Some scholars argue that these negative portrayals imply that the management of Russian orphanages amounts to a human rights violation.<sup>154</sup>

Finally, many Russians are concerned with the safety of their children in American homes because of the number of children who have reportedly been

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<sup>143</sup> See *id.*; Kimberly A. Chadwick, Comment, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 120–21 (1999) ("When it comes to intercountry adoption, Russia has been characterized as a huge, inefficient bureaucracy where regional officials make their own rules.").

<sup>144</sup> See *supra* Introduction.

<sup>145</sup> Vasilyeva & Hall, *supra* note 15.

<sup>146</sup> See *id.*

<sup>147</sup> Khabibullina, *supra* note 29, at 185.

<sup>148</sup> See, e.g., David M. Herszenhorn, *Russia Attacks Sentence of Adoptee's Parents*, N.Y. TIMES, Nov. 20, 2011, at A8.

<sup>149</sup> See Hora, *supra* note 95, at 1022.

<sup>150</sup> Nastassia Astrasheuskaya & Alissa de Carbonnel, *Children, Many Ill, Would Be Victims of Russia Ban on U.S. Adoption*, REUTERS, Dec. 26, 2012, available at <http://www.reuters.com/article/2012/12/27/us-russia-usa-adoption-idUSBRE8BP06120121227>.

<sup>151</sup> Donovan M. Steltzner, Note, *Intercountry Adoption: Toward a Regime That Recognizes the "Best Interests" of Adoptive Parents*, 35 CASE W. RES. J. INT'L L. 113, 125 (2003).

<sup>152</sup> *Id.* at 125–26.

<sup>153</sup> See Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. ST. U. L. REV. 333, 346–47 (2007) (describing the condition of orphanages in sending states from the child's perspective).

<sup>154</sup> See, e.g., *id.* at 347 (comparing images of children in orphanages to images taken in Nazi death camps).

abused or killed by their adoptive families.<sup>155</sup> Since 1990, seventeen Russian adoptees have been murdered by their U.S. adoptive parents.<sup>156</sup> Twelve of these murders occurred between 2000 and 2005.<sup>157</sup> Some parents claimed the deaths were accidental and were consequently convicted of involuntary manslaughter.<sup>158</sup> All of these parents were prosecuted in American courts because the children were naturalized U.S. citizens.<sup>159</sup> Many Russians complained that a Pennsylvania jury was far too lenient for acquitting a U.S. couple for the murder of their Russian-born son.<sup>160</sup> By halting adoptions, Russia may have hoped to gain leverage over a situation that was not within its control: the safety of Russian-born children abroad.

### 3. *U.S. Adoptive Parents' Perspective: Post-Adoption Realizations*

Post-adoption, many U.S. parents are under a tremendous amount of stress. Child abuse is inexcusable no matter what amount of stress the parent is under, however, learning the U.S. parents' perspective is useful in understanding how some adoptions end tragically.

#### a. *Unreported Mental Illnesses*

Many adoptive parents are unaware of their children's mental illnesses before their adoptions are finalized.<sup>161</sup> Parents often receive inaccurate medical

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<sup>155</sup> Masha Lipman, *What's Behind the Russian Adoption Ban?* NEW YORKER: NEWS DESK (Dec. 21, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/12/whats-behind-the-russian-adoption-ban.html>.

<sup>156</sup> Anishchuk, *supra* note 28.

<sup>157</sup> Khabibullina, *supra* note 29, at 175. In 2005, Russia reacted to these incidents by virtually halting adoptions with bureaucratic barriers. Alexander Osipovich, *Foreign Adoptions Get Go-Ahead from Authorities*, ST. PETERSBURG TIMES, July 13, 2007, at 3.

<sup>158</sup> Khabibullina, *supra* note 29, at 175.

<sup>159</sup> *Id.* at 176.

<sup>160</sup> See Herszenhom, *supra* note 148. Michael and Nanette Craver adopted Nathaniel from Russia in 2003. *Id.* In 2009, Nathaniel died from bleeding from a head injury while in the custody of his adoptive parents. *Id.* The couple was charged with murder, and Pennsylvania authorities claimed that the boy was abused. *Id.* The jury acquitted the couple for murder, but found that the couple was negligent in the death of Nathaniel. *Id.* In sentencing, the judge gave the couple credit for time served and did not require them to serve any additional jail time. *Id.*

<sup>161</sup> See, e.g., McMullen v. European Adoption Consultants, Inc., 129 F. Supp. 2d 805, 809 (W.D. Pa. 2001) (describing how a U.S.-based adoption agency told the McMullens that their adopted son was healthy, but the son was later diagnosed with Lennox-Gastaut Syndrome); Chang et al., *supra* note 2 (describing how, after the adoption, the Mulligans discovered that their adopted son suffered from numerous mental disorders); Wingert, *supra* note 3 (describing how the Elmores believed they were adopting a healthy girl, but she was later diagnosed with bipolar disorder).

records from sending states.<sup>162</sup> In addition, “[a]pproximately [twenty percent] of Russian . . . orphanage survivors are believed to be . . . physically and psychologically damaged by their pre-adoption experiences . . . .”<sup>163</sup> Many families spend thousands of dollars to attend to their child’s special needs.<sup>164</sup> These expenses are in addition to the cost of adopting a child, which ranges from ten thousand dollars to thirty thousand dollars.<sup>165</sup> Parents will not always know prior to the adoption whether their child is suffering from a disability.<sup>166</sup>

*b. Unprepared Parents*

The lack of accurate medical information is a disservice to parents because they are unprepared for their child’s needs.<sup>167</sup> Even parents who are aware of their child’s past trauma may have unrealistic expectations about what it takes to rehabilitate a child.<sup>168</sup> Professor Shani King categorizes these unrealistic expectations into five narratives that describe the typical prospective adoptive parent.<sup>169</sup> These narratives illustrate Western parents’ romanticized ideas about the adoptable child.<sup>170</sup> As Peggy’s and Torry’s stories indicate, a prospective adoptive parents’ expectations of parenting can be abruptly shattered.<sup>171</sup> When these expectations fail, parents have different ways of handling the harsh realities. Peggy “coped” with these realities through alcoholism and violence.<sup>172</sup> Torry decided that the realities of post-adoption life were unbearable and relinquished her rights as Justin’s parent.<sup>173</sup>

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<sup>162</sup> Judith S. Rycus et al., *Confronting Barriers to Adoption Success*, 44 FAM. CT. REV. 210, 217 (2006).

<sup>163</sup> Steltzner, *supra* note 151, at 114.

<sup>164</sup> Ryan, *supra* note 52, at 354; Steltzner, *supra* note 151, at 114.

<sup>165</sup> Ryan, *supra* note 52, at 354.

<sup>166</sup> See Rycus et al., *supra* note 162, at 223.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Shani King, *Challenging MonoHumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L L. 413, 415, 429 (2009). The five narratives are “Humanitarian History Narrative,” “Rescue Narrative,” “Improved Life Chances Narrative,” “Invisible Birth Parents Narrative,” and “Natural ‘Market’ for Intercountry Adoption Narrative.” *Id.* at 429.

<sup>170</sup> See *id.* at 415, 429. For example, the view under the Rescue Narrative is that children in war-torn countries need to be adopted to escape the post-bellum aftermath. *Id.* at 432–33. Children living in squalor need to be rescued immediately “before they grow older and become ruined psychologically or physically by their environments.” *Id.* at 433.

<sup>171</sup> See *supra* Introduction.

<sup>172</sup> See Wingert, *supra* note 3.

<sup>173</sup> Ruiz, *supra* note 18.

## II. PROBLEMS WITH THE PRE-ADOPTION AGREEMENT ADOPTION PROCESS

This Part will focus on the legal requirements for U.S. prospective adoptive parents before the Adoption Agreement. The United States regulates the intercountry adoption process through the U.S. State Department and the U.S. Citizenship and Immigration Services (“USCIS”).<sup>174</sup> Russia governs the intercountry adoption process primarily through its Family Code.<sup>175</sup>

The Family Code outlines the eligibility of the prospective adoptive parents, how to determine whether the child is available for adoption, and the Russian civil procedure for legalizing the adoption.<sup>176</sup> The Family Code is silent on post-adoption requirements and the permissibility of independent adoptions.<sup>177</sup> USCIS determines whether a “Prospective Adoptive Parent” is eligible to adopt and whether a child is eligible to immigrate to the United States.<sup>178</sup> Further, USCIS requires a home study that demonstrates the suitability of a potential parent to adopt.<sup>179</sup> Because Russia is not a party to the Hague Convention, the United States does not have to apply the same home study process to Russian adoptions as it would apply to adoptions from a Hague Convention state.<sup>180</sup> The Orphan Home Study Guidelines set minimum standards that a U.S. home study preparer must consider before determining whether an applicant is eligible to continue with the Russian adoption

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<sup>174</sup> *Country Information: Russia*, *supra* note 51. It is important to note that not all adoptable children in Russia are orphans.

<sup>175</sup> SEMEINYI KODEKS ROSSIISKOI FEDERATSII [SK RF] [Family Code] art. 124 (Russ.), *translated in Family Code of the Russian Federation*, 3 Russia & the Republics Legal Materials 2d Series (Juris Publ’g) No. 37, at 47 (2012); Andrew C. Brown, *International Adoption Law: A Comparative Analysis*, 43 INT’L LAW. 1337, 1352 (2009).

<sup>176</sup> Family Code, arts. 124–25, *translated in Family Code of the Russian Federation*, *supra* note 175, at 47–48.

<sup>177</sup> *See id.*

<sup>178</sup> *Adoption*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/adoption> (last updated Dec. 16, 2011).

<sup>179</sup> *Home Study Information*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=dd1d18a1f8b73210VgnVCM100000082ca60aRCRD&vgnnextchannel=dd1d18a1f8b73210VgnVCM100000082ca60aRCRD> (last updated Apr. 8, 2011).

<sup>180</sup> *Compare Hague Home Study Guidelines*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=6ba1741b78c73210VgnVCM100000082ca60aRCRD&vgnnextchannel=6ba1741b78c73210VgnVCM100000082ca60aRCRD> (last updated Mar. 30, 2011), *with Orphan Home Study Guidelines*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=13f1741b78c73210VgnVCM100000082ca60aRCRD&vgnnextchannel=13f1741b78c73210VgnVCM100000082ca60aRCRD> (last updated Mar. 30, 2011).

process.<sup>181</sup> Under the pre-Adoption Agreement process, parents must fulfill the requirements under both Russian and U.S. law. The U.S. State Department summarizes the adoption process as involving six steps.<sup>182</sup> Prospective adoptive parents must: (1) choose an adoption service provider; (2) apply to be found eligible to adopt in the United States; (3) be matched with a child; (4) adopt the child in Russia; (5) apply for the child to be found eligible to come to the United States; and (6) bring the child to the United States.<sup>183</sup>

#### A. *Step One: Choose an Adoption Service Provider*<sup>184</sup>

The adoption process begins with prospective adoptive parents deciding how they will adopt their child.<sup>185</sup> Prior to the Adoption Agreement, Russia allowed parents two options for beginning this process: through an adoption agency<sup>186</sup> or privately with a person who is familiar with U.S. and Russian adoption law.<sup>187</sup> If a parent chooses an adoption agency, the organization must be accredited with the Russian government to legally assist with adoptions.<sup>188</sup> Torry Hansen chose this method when she adopted Justin.<sup>189</sup> The latter option is known as an independent adoption.<sup>190</sup> Independent adoptions are arranged between the birth parent and the prospective adoptive parent.<sup>191</sup> Independent adoptions are not subject to the same requirements placed on accredited

<sup>181</sup> *Orphan Home Study Guidelines*, *supra* note 180. For a discussion of these minimum requirements see, *infra* Part V.

<sup>182</sup> *Country Information: Russia*, *supra* note 51.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *See id.* An adoption agency is “[a]n organization that is licensed to prepare families to adopt children and to do all the necessary legal, administrative and social work to insure that adoptions are efficiently handled . . . .” *Adoption Legal Terms and Definitions Related to Child Welfare and the Adoption Process*, ADOPTIONOPEN.COM, <http://www.adoptionopen.com/adoptionterms.html> (last visited Jan. 26, 2013).

<sup>187</sup> *See Country Information: Russia*, *supra* note 51; *see also Working with an Agency*, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/adoption\\_process/how\\_to\\_adopt/agencies.php](http://adoption.state.gov/adoption_process/how_to_adopt/agencies.php) (last visited Jan. 26, 2013). The State Department strongly recommends that prospective parents “work with a reputable adoption service provider in a non-Convention adoption case.” *Id.*

<sup>188</sup> *Country Information: Russia*, *supra* note 51.

<sup>189</sup> Brian Mosely, *Hansen Ordered To Pay \$150K, Monthly Child Support*, SHELBYVILLE TIMES-GAZETTE (May 18, 2012), <http://www.t-g.com/story/1850664.html>.

<sup>190</sup> *Working with an Agency*, *supra* note 187; *see also* Carlberg, *supra* note 97, at 88.

<sup>191</sup> *Adoption Legal Terms and Definitions Related to Child Welfare and the Adoption Process*, *supra* note 186. An attorney can also be used to facilitate independent adoptions. Amy Grillo Kales, Note, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT’L L. REV. 477, 481 (2004).

adoption agencies.<sup>192</sup> Without these requirements, independent adoptions present prospective adoptive parents with uncertainty and substantial risks, as was the case with Nina Hilt's adoption.<sup>193</sup> The United States requires U.S. adoption agencies and independent adoption providers to be licensed in the U.S. state of their residence.<sup>194</sup>

*B. Step Two: Apply to be Found Eligible to Adopt*<sup>195</sup>

After the prospective parent chooses her adoption service provider, she must apply to be found eligible to adopt by the USCIS.<sup>196</sup> She will have to submit to a home study<sup>197</sup> and file Form I-600A,<sup>198</sup> which helps USCIS determine her qualifications to adopt.<sup>199</sup> The home study consists of at least one interview with the applicants and assessments of the applicants' health, financial resources, living accommodations, and criminal history.<sup>200</sup> For example, under the Hague Home Study Guidelines, the home study preparer must assess the physical, mental, and emotional health or behavioral issues of the prospective adoptive parents and each adult member of the household.<sup>201</sup> Based on this information, the home study preparer must assess potential problem areas and recommend restrictions on the type of child placed in the home.<sup>202</sup>

The prospective adoptive parent must also be eligible to adopt according to Russia's laws.<sup>203</sup> The Ministry of Education and Science ("MES") oversees the

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<sup>192</sup> See Carlberg, *supra* note 97, at 119.

<sup>193</sup> *Id.*

<sup>194</sup> *Hague vs Non-Hague Adoption Process*, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/hague\\_convention/hague\\_vs\\_nonhague.php](http://adoption.state.gov/hague_convention/hague_vs_nonhague.php) (last visited Jan. 26, 2013).

<sup>195</sup> *Country Information: Russia*, *supra* note 51.

<sup>196</sup> *Id.*

<sup>197</sup> Home study is a phrase that refers to the process in which a licensed third party observes and studies the prospective parent to determine the parent's readiness for adoption. *Home Study Information*, *supra* note 179. The goal of this study is to ensure the well-being of the adopted child. *Adoption Legal Terms and Definitions Related to Child Welfare and the Adoption Process*, *supra* note 186.

<sup>198</sup> *Orphan Home Study Guidelines*, *supra* note 180. If a prospective parent does not know which child she plans to adopt, and the state is not a party to the Hague Convention, she must file Form I-600A. *Instructions for Form I-600A, Application for Advance Processing of Orphan Petition*, U.S. CITIZENSHIP & IMMIGR. SERVICES 1 (2011), <http://www.uscis.gov/files/form/i-600ainstr.pdf>.

<sup>199</sup> *Country Information: Russia*, *supra* note 51.

<sup>200</sup> *Orphan Home Study Guidelines*, *supra* note 180.

<sup>201</sup> *Hague Home Study Guidelines*, *supra* note 180.

<sup>202</sup> *Id.*

<sup>203</sup> *Country Information: Russia*, *supra* note 51.

intercountry adoption process in Russia.<sup>204</sup> The Family Code is the controlling law on Russia's intercountry adoption procedure.<sup>205</sup> Russian law allows both married and single persons, of either sex, to adopt.<sup>206</sup> Without a specific provision preventing homosexuals from adopting, many homosexual couples are able to participate in the Russian adoption process.<sup>207</sup> Article 127 of the Russian Family Code lists ten exceptions to persons who may adopt, including applicants who the Russian court finds "lack dispositive civil capacity" and applicants "who by state of health may not effectuate parental rights."<sup>208</sup> Married persons do not have an age requirement for adoption.<sup>209</sup> Single persons must be at least sixteen years older than the adoptive child.<sup>210</sup> Russia does not impose a residency requirement on prospective parents.<sup>211</sup> However, applicants are required to make at least two trips to Russia: a trip to meet the child and a trip to bring the child home.<sup>212</sup>

### C. Step Three: Be Matched with a Child<sup>213</sup>

If USCIS determines that prospective adoptive parents are eligible to adopt, the third step involves matching these parents with a child.<sup>214</sup> Prospective adoptive parents, usually through the help of an adoption provider,<sup>215</sup> must submit an application form and a petition requesting dossiers of adoptable children.<sup>216</sup> The application requires personal information, legal identification documents, and "a commitment from an authorized agency" in the parents' country to supervise the care of the child once the adoption is finalized.<sup>217</sup> The prospective adoptive parents then have the opportunity to select a child.<sup>218</sup>

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<sup>204</sup> Brown, *supra* note 175, at 1352; *Information for Adoptive Parents*, ADOPTION RUSS., <http://www.adoptinrussia.ru> (last visited Jan. 26, 2013).

<sup>205</sup> See SEMEINYI KODEKS ROSSIISKOI FEDERATSII [SK RF] [Family Code] arts. 124, 125, translated in *Family Code of the Russian Federation*, *supra* note 175, at 47–48; Thompson, *supra* note 122, at 709.

<sup>206</sup> Family Code, art. 127, translated in *Family Code of the Russian Federation*, *supra* note 175, at 49–51; *Country Information: Russia*, *supra* note 51.

<sup>207</sup> Brown, *supra* note 175, at 1353.

<sup>208</sup> Family Code, art. 127, translated in *Family Code of the Russian Federation*, *supra* note 175, at 49.

<sup>209</sup> *Country Information: Russia*, *supra* note 51.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> An adoption service provider is either an adoption agency or an attorney, usually, if the adoption is independent. *Id.*

<sup>216</sup> *Information for Adoptive Parents*, *supra* note 204.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

Once the prospective adoptive parents select a child to adopt, the MES will authorize a permit for the prospective parents to visit the child.<sup>219</sup> Specific information about the child will only be provided after the prospective adoptive parents travel to Russia and meet the child.<sup>220</sup> This trip is the first of two mandatory trips to Russia.<sup>221</sup> Russian law provides that the prospective adoptive parents should have access to the child's information.<sup>222</sup> Prospective adoptive parents may obtain information about the child's eligibility for adoption, and they can request that the child undergo an independent medical examination.<sup>223</sup> The medical examination has been one of the areas of controversy for a number of adoption scandals.<sup>224</sup> For example, Torry Hansen defended her actions by blaming Russian officials for not fully disclosing Justin's medical condition during this stage in the process.<sup>225</sup> Peggy Hilt's story implies that she too was unaware of Nina's health conditions prior to the adoption.<sup>226</sup>

#### *D. Step Four: Adopt the Child in Russia*<sup>227</sup>

The next stage in the adoption process includes determining the child's eligibility for adoption, and Russian judicial review of the prospective parents' adoption application.<sup>228</sup> Children who are eligible for adoption are classified under Russian law as "children left without the care of parents . . ." <sup>229</sup> The Family Code defines "children left without the care of parents" as children whose parents are dead, have terminated their rights,<sup>230</sup> have been deemed incapable, are ill or absent, or have avoided their parental duties.<sup>231</sup> Article 123 authorizes such children to be adopted, placed in a foster family, or "in the

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Country Information: Russia*, *supra* note 51.

<sup>222</sup> *Information for Adoptive Parents*, *supra* note 204.

<sup>223</sup> *Id.*

<sup>224</sup> Compare Ruiz, *supra* note 18 (Torry Hansen's claims), with Wingert, *supra* note 3 (Peggy Hilt's claims).

<sup>225</sup> Ruiz, *supra* note 18.

<sup>226</sup> See Wingert, *supra* note 3.

<sup>227</sup> *Country Information: Russia*, *supra* note 51.

<sup>228</sup> *Information for Adoptive Parents*, *supra* note 204.

<sup>229</sup> СЕМЕЙНЫЙ КОДЕКС РОССИЙСКОЙ ФЕДЕРАЦИИ [SK RF] [Family Code] art. 124(1), translated in *Family Code of the Russian Federation*, *supra* note 175, at 47.

<sup>230</sup> *Id.* art 121(1), translated in *Family Code of the Russian Federation*, *supra* note 175, at 45. The language of the Family Code suggests that this termination includes when parents voluntarily relinquish their rights and when a court forces parents to terminate their rights. See *id.*

<sup>231</sup> *Id.*

absence of such possibility to an organization for orphan children or children left without the care of parents of all types . . . .”<sup>232</sup> Russian adoption authorities create a database of adoptable children and place their information in a national registry for domestic adoptions.<sup>233</sup> Children are eligible for intercountry adoptions when it is impossible to place these children with relatives or with citizens of the Russian Federation.<sup>234</sup> Children must wait at least eight months before they are eligible for intercountry adoption.<sup>235</sup> The child is “registered first on the local databank for one month, the regional databank for one month, and the federal databank for six months before the child can be released for intercountry adoption.”<sup>236</sup> This waiting period reflects Russia’s preference for placing children domestically.

Prospective adoptive parents are required to have two copies of each document included in their overall application.<sup>237</sup> All documents require certification and must be translated into Russian, with an authentication of the translation’s accuracy.<sup>238</sup> Prospective adoptive parents must submit a medical report of their physical and mental health.<sup>239</sup> The court will look for any disqualifying medical conditions specified under the Family Code, including: tuberculosis, substance abuse, mental disorders, and other diseases.<sup>240</sup> Additionally, the court requires prospective adoptive parents to submit proof of their residence.<sup>241</sup> The application must include documentation of the parents’ employment status, household income,<sup>242</sup> and the prospective adoptive parents’ marital status.<sup>243</sup>

Prospective parents must be present at the adoption hearing.<sup>244</sup> The adoption hearing satisfies the requirement of a second mandatory trip to Russia.<sup>245</sup> The adoption decision is made in a closed court hearing.<sup>246</sup> The

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<sup>232</sup> *Id.* art. 123(1), translated in *Family Code of the Russian Federation*, *supra* note 175, at 47.

<sup>233</sup> *Id.* art. 121, translated in *Family Code of the Russian Federation*, *supra* note 175, at 45; *see also Information for Adoptive Parents*, *supra* note 204, *Country Information: Russia*, *supra* note 51.

<sup>234</sup> Family Code, art. 124(4), translated in *Family Code of the Russian Federation*, *supra* note 175, at 47.

<sup>235</sup> *Country Information: Russia*, *supra* note 51.

<sup>236</sup> *Id.*

<sup>237</sup> *Information for Adoptive Parents*, *supra* note 204.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

court determines whether to approve the adoption based on the information the prospective parent submitted.<sup>247</sup> If the court approves the adoption,<sup>248</sup> the presiding judge issues an adoption decree and sends a copy of the decree to the Civil Registry Office to register the adoption.<sup>249</sup>

*E. Step Five: Apply for the Child to be Found Eligible for Adoption*<sup>250</sup>

The fifth step in the adoption procedure requires the child to become a U.S. citizen. After the adoption decree is finalized, the prospective parent is no longer “prospective” and becomes the child’s parent and legal guardian.<sup>251</sup> Before bringing the child home, the parent must get permission from USCIS,<sup>252</sup> a process simplified by the Child Citizenship Act of 2000.<sup>253</sup> The parent must apply for the child’s lawful permanent residence in the United States.<sup>254</sup> If USCIS approves the application, the child automatically acquires U.S. citizenship.<sup>255</sup> The child’s Russian citizenship can be terminated if the adoptive parents reliably guarantee the child will receive a different citizenship.<sup>256</sup>

*F. Step Six: Bring the Child Home*<sup>257</sup>

At this stage, parents have legal custody over the child and must finish three final administrative tasks before bringing the child home.<sup>258</sup> These tasks

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<sup>246</sup> *Id.* Also present at this hearing are a representative of a “custody and guardianship authority,” a prosecutor, the child (if he or she is between ages ten and fourteen), and the child’s birth parents (if they are available). *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> On January 1, 2012, the Russian Duma amended the Family Code so that presiding judges will announce their decision on the adoption at the end of the court hearing. *Notice: Processing Time for Adoptions Increased*, INTERCOUNTRY ADOPTION (Feb. 21, 2012), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=russia\\_3](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=russia_3). If the judge approves of the adoption, the adoption will take effect thirty days after the judge’s decision. *Id.* This may increase the parent’s time in Russia by at least one month. *See id.*

<sup>249</sup> *Information for Adoptive Parents*, *supra* note 204.

<sup>250</sup> *Country Information: Russia*, *supra* note 51.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Acquiring U.S. Citizenship for Your Child*, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/us\\_visa\\_for\\_your\\_child/citizenship.php](http://adoption.state.gov/us_visa_for_your_child/citizenship.php) (last visited January 22, 2012); *see also* 8 U.S.C. § 1431(b) (2006).

<sup>254</sup> *Acquiring U.S. Citizenship for Your Child*, *supra* note 253.

<sup>255</sup> *Id.*

<sup>256</sup> *See Information for Adoptive Parents*, *supra* note 204.

<sup>257</sup> *Country Information: Russia*, *supra* note 51.

<sup>258</sup> *Id.*

include: (1) applying for the child's new birth certificate;<sup>259</sup> (2) applying for a Russian passport;<sup>260</sup> and (3) applying for a U.S. immigrant visa from the U.S. embassy in Russia.<sup>261</sup> After parents complete these three tasks, they can finally bring their adopted child home.<sup>262</sup>

### III. HOW THE ADOPTION AGREEMENT AIMED TO FIX THE PRE-ADOPTION AGREEMENT PROCESS

This Part will discuss how the adoption process briefly changed under the Adoption Agreement. As in Part II, Part III will discuss these changes from the perspective of a U.S. prospective parent seeking to adopt a Russian child. The U.S. State Department highlights three changes under the Adoption Agreement: (1) the end of independent adoptions; (2) a more stringent pre-approval process; and (3) prospective parents will be required to take additional training and parent preparation classes.<sup>263</sup> These changes fall under the first two steps of the adoption process: the prospective adoptive parent's options for adoption service providers, and the application process. The Adoption Agreement would have had a dramatic impact on the third and fourth steps of the current adoption process: being matched with a child and finalizing the adoption.

#### A. *Changing How Prospective Adoptive Parents Choose an Adoption Service Provider*

Under the Adoption Agreement, parents no longer had the option of deciding between using adoption agencies and adopting independently.<sup>264</sup> Article 4 of the Adoption Agreement provides that “[t]he adoption of a child from the Russia Federation . . . shall occur only with the assistance of an Authorized Organization.”<sup>265</sup> Tragedies similar to Nina Hilt's story probably inspired the states to include this provision in the Adoption Agreement. By requiring that all Russian adoptions occur with the assistance of an adoption agency, the two states had more control over how adoptions are conducted. For

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<sup>259</sup> The new birth certificate will reflect the child's new parents. *Id.*

<sup>260</sup> At this point, the child is still a Russian citizen so he or she must travel with a Russian passport. *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *See id.*

<sup>263</sup> *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 32, at 3.

<sup>264</sup> Adoption Agreement, *supra* note 35, art. 4(4).

<sup>265</sup> *Id.* An Authorized Organization is defined in Article 1(5) as an entity that “is authorized to perform activities in the field of intercountry adoption” under both Russian and U.S. law. *Id.* art 1(5). There is an exception if the child is being adopted by his relatives. *Id.* art. 4(5).

example, Article 5 gives the states the authority to regulate adoption agencies and to terminate their services if the adoption agencies are non-compliant with the Adoption Agreement's requirements.<sup>266</sup> Depending on the state's domestic law, adoption agencies may have been required to inform prospective parents of their obligations in the Adoption Agreement;<sup>267</sup> monitor the post-adoption living conditions of the child;<sup>268</sup> and if the adoption dissolves, provide written notice of the dissolution.<sup>269</sup>

### *B. A More Stringent Application Process*

The Adoption Agreement delegated authority to the prospective parents' country of origin to determine the rules of the application process.<sup>270</sup> If the Adoption Agreement is restored, this delegation may mean that the U.S.–Russian application process would mirror the application process that the United States requires of parents who adopt from Hague Convention states. The U.S. State Department has stated that prospective adoptive parents might be required to receive additional training and parent preparation depending on their child's special needs.<sup>271</sup> The Hague Convention adoption process has the same requirements as the non-Hague adoption process, but the Hague adoption process also requires ten hours of parent training.<sup>272</sup> Additionally, the home study preparer must evaluate the "physical, mental and emotional health" of all adults living in the applicants' home.<sup>273</sup> With these added layers of preparation, the U.S.–Russian adoption process would prevent many of the problems associated with unprepared parents.

### *C. Being Matched with a Child and Finalizing the Adoption*

The disclosure of the adoptable child's full medical history and the dual citizenship requirement were two significant changes in this stage of the adoption process. Under the Adoption Agreement, the Russian Family Code would still have governed the third and fourth steps in the adoption process.<sup>274</sup> The prospective parents would have been matched with a child through the

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<sup>266</sup> *Id.* art. 5(4).

<sup>267</sup> *Id.* art. 5(1)(a).

<sup>268</sup> *Id.* art. 5(1)(b).

<sup>269</sup> *Id.* art. 5(1)(e).

<sup>270</sup> *Id.* art. 6(2).

<sup>271</sup> *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 32, at 3.

<sup>272</sup> *Hague vs Non-Hague Adoption Process*, *supra* note 194.

<sup>273</sup> *Hague Home Study Guidelines*, *supra* note 180.

<sup>274</sup> *See* Adoption Agreement, *supra* note 35, art. 6(2); *see also supra* Part II.C–D.

adoption agency.<sup>275</sup> The Agreement also placed strong emphasis on the amount of medical information the child's state must provide to the prospective parents.<sup>276</sup> The Agreement required that prospective adoptive parents receive detailed written conclusions on the child's medical history and the medical history of the child's family members, if that family information was available.<sup>277</sup>

The Adoption Agreement created dual citizenship for adopted children, a significant change that would have affected any post-adoption issues with the child.<sup>278</sup> This provision should have allowed Russia to have more authority over the affairs of its children. Previously, Russia may not have had a basis for jurisdiction over the death of a Russian-born adoptee, if the adoptive parent decided to terminate the child's Russian citizenship.<sup>279</sup> But, if the child retained his or her Russian citizenship, Article 13 of the Adoption Agreement allowed the child's country of origin (here, Russia) to exercise jurisdiction with respect to the child.<sup>280</sup>

#### IV. COMPARING THE ADOPTION AGREEMENT TO THE CRC AND THE HAGUE CONVENTION<sup>281</sup>

This Part compares the Adoption Agreement to the CRC and the Hague Convention. Analyzing the Adoption Agreement within the context of the CRC and the Hague Convention helps to clarify the states' reasons for including certain provisions in the Agreement. In many respects, the Adoption Agreement mirrored the safeguards of the Hague Convention. Part IV will illustrate how the Agreement's drafters mirrored the obligations in the CRC and the Hague Convention.

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<sup>275</sup> See *id.* art. 10(1)(a)(i).

<sup>276</sup> See *id.*

<sup>277</sup> *Id.* art. 10(1)(b).

<sup>278</sup> *Id.* art. 13(2). The United States does not explicitly address dual citizenship in its laws and does not usually encourage dual citizenship. *Adoption FAQs*, EMBASSY U.S. MOSCOW RUSSIA, <http://moscow.usembassy.gov/iv-adopt-faqs.html> (last visited Feb. 12, 2013) (“While recognizing the existence of dual nationality, the U.S. Government does not encourage the practice as a matter of policy because of potential problems.”).

<sup>279</sup> See *Information for Adoptive Parents*, *supra* note 204. Currently, Russia and the United States do not have an extradition treaty. See Utkin, *supra* note 56.

<sup>280</sup> Adoption Agreement, *supra* note 35, art. 13(3).

<sup>281</sup> This Part will analyze the Adoption Agreement from the perspective of Russia as the sending state and the United States as the receiving state. The Adoption Agreement, however, applies to all adoption processes between the Russian Federation and the United States. See Adoption Agreement, *supra* note 35.

A. *The Adoption Agreement and the CRC: Russia's Obligations as the Sending State*

The CRC is a legally binding instrument that recognizes that children are entitled to certain human rights, such as growing up in a loving family environment.<sup>282</sup> Article 21 of the CRC provides five guidelines for adoption.<sup>283</sup> Because Russia is a party to the CRC, it is in Russia's interest that a bilateral adoption agreement acknowledge the best interest of the child.<sup>284</sup> Therefore, Russia must make the best interests of the child as the paramount consideration in its implementation of its domestic adoptions<sup>285</sup> and for intercountry adoptions.<sup>286</sup>

1. *Article 21(a)—Permissible Adoptions*

The CRC outlines three criteria that states parties must follow to determine whether “the adoption is permissible.”<sup>287</sup> The first criterion requires the “Competent Authorities” to authorize the adoption “in accordance with applicable law and procedures.”<sup>288</sup> In the Adoption Agreement, the Russian governmental body “authorized to perform activities in the field of intercountry adoption in the territory of a foreign state”<sup>289</sup> ultimately would have issued a decision on the prospective parent's suitability and eligibility to adopt.<sup>290</sup> The second criterion is that the child must be adoptable.<sup>291</sup> The Adoption Agreement did not define which children were adoptable.<sup>292</sup> Rather, the Agreement was only intended to cover adoptions of children whom the sending state decided met its domestic laws.<sup>293</sup> Finally, the third criterion states

<sup>282</sup> CRC, *supra* note 50, pmb1.

<sup>283</sup> *Id.* art. 21. For a discussion of the five guidelines, see *supra* Part IV.A.1–5.

<sup>284</sup> *Convention on the Rights of the Child: Introduction*, UNICEF, [http://www.unicef.org/crc/index\\_30160.html](http://www.unicef.org/crc/index_30160.html) (last updated Nov. 29, 2005) (“By agreeing to undertake the obligations of the Convention . . . States parties . . . are obliged to develop and undertake all actions and policies in light of the best interest of the child.”).

<sup>285</sup> VITÉ & BOÉCHAT, *supra* note 60, at 22 (“The principle of the best interests of the child . . . [applies] to both domestic and intercountry adoption.”).

<sup>286</sup> CRC, *supra* note 50, art. 21.

<sup>287</sup> *Id.* art. 21(a).

<sup>288</sup> *Id.*

<sup>289</sup> Adoption Agreement, *supra* note 35, art. 1(5).

<sup>290</sup> *Id.* art. 10(1).

<sup>291</sup> CRC, *supra* note 50, art. 21(a).

<sup>292</sup> See Adoption Agreement, *supra* note 35.

<sup>293</sup> *Id.* art. 3(4) (“The Parties proceed from the premise that this Agreement covers adoptions where the Country of Origin decides, in accordance with its domestic laws, that it is not possible to arranged for the upbringing of the children in their birth families . . .”).

that the Competent Authorities may need to receive the informed consent of “the persons concerned.”<sup>294</sup> This provision of the CRC left the decision regarding informed consent to the states to incorporate in their domestic legislation.<sup>295</sup> Article 3 of the Adoption Agreement required the parties to ensure that the adoptions were “based on the voluntary actions of the individuals involved in accordance with the Parties’ domestic laws.”<sup>296</sup>

## 2. Article 21(b)—The Subsidiarity Principle

The CRC regards intercountry adoption as an alternative option for placing a child, if no other suitable option is available in the child’s country of origin.<sup>297</sup> The subsidiarity principle mandates that state parties to the CRC seek “domestic suitable solutions” before attempting to place a child abroad.<sup>298</sup> The subsidiarity principle is a contentious area of intercountry adoption.<sup>299</sup> Professor Elizabeth Bartholet believes this principle unjustly deprives children of a family, just because this family lives in a different country.<sup>300</sup> On the other hand, UNICEF endorses the subsidiarity principle.<sup>301</sup> Russia agrees with UNICEF’s position on the subject.<sup>302</sup> The Adoption Agreement reflected Russia, UNICEF, and the CRC’s belief that intercountry adoption is the alternative means to placing a child.<sup>303</sup> The preamble to the Adoption Agreement recognized the “necessity to take appropriate measures to keep the child with his or her birth family, but where that is not possible, to place the

<sup>294</sup> CRC, *supra* note 50, art. 21(a).

<sup>295</sup> VITÉ & BOÉCHAT, *supra* note 60, at 29–30.

<sup>296</sup> Adoption Agreement, *supra* note 35, art. 3(2).

<sup>297</sup> VITÉ & BOÉCHAT, *supra* note 60, at 44–45. Article 21(b) of the CRC states: “[States parties shall] [r]ecognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.” CRC, *supra* note 50, art. 21(b).

<sup>298</sup> VITÉ & BOÉCHAT, *supra* note 60, at 45; *accord* Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child’s Rights Perspective*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 94–95 (2011).

<sup>299</sup> *See, e.g.*, Bartholet, *supra* note 298, at 81, 95 (“These subsidiarity provisions demonstrate deference by those drafting the CRC to the perceived rights of nation-states to hold onto what are seen as ‘their’ children, without regard to the children’s best interest.”).

<sup>300</sup> Bartholet, *supra* note 298, at 95 (“These [subsidiarity] provisions are profoundly antichild. International adoption generally serves the interest of the unparented children of the world.”).

<sup>301</sup> UNICEF’s *Position on Inter-Country Adoption*, *supra* note 73 (“For individual children who cannot be cared for in a family setting in their country of origin, inter-country adoption may be the best permanent solution.”).

<sup>302</sup> *See Country Information: Russia*, *supra* note 51 (requiring children first to be available to domestic adoptions before being eligible for intercountry adoption).

<sup>303</sup> *See* Adoption Agreement, *supra* note 35, pmb1.

child with a substitute family” in Russia.<sup>304</sup> Article 3(4) stated that the Agreement applied to situations when such placements were not possible.<sup>305</sup> Unfortunately, this principle may act as a hurdle to the ultimate objective to any bilateral adoption agreement. If Russia prefers domestic adoptions, it would have little incentive to permit intercountry adoptions.

### 3. Article 21(c)—The Non-Discrimination Principle

The third criterion under Article 21 of the CRC requires that children in intercountry adoption proceedings receive the same standards and safeguards enjoyed by children in domestic adoptions.<sup>306</sup> A similar non-discrimination principle was included in Article 2(1) of the Adoption Agreement.<sup>307</sup> Article 2(1) conferred the same property rights and “personal non-property rights and responsibilities” to domestically adopted children as to children who were adopted abroad.<sup>308</sup>

### 4. Article 21(d)—Preventing Improper Financial Gain

The fourth criterion recognizes that a distinction exists between proper and improper financial gain.<sup>309</sup> Entities may charge reasonable fees associated with adoption.<sup>310</sup> Under Article 3 of the Adoption Agreement, Russia committed itself to take “appropriate measures” within its domestic laws to “suppress illegal activities involving children being adopted . . . .”<sup>311</sup> Activities associated with improper financial gain were included in these types of activities.<sup>312</sup>

### 5. Article 21(e)—Implementing Article 21 Through Bilateral and Multilateral Agreements

The final requirement opened the door for the Hague Convention in 1993.<sup>313</sup> The CRC calls on states parties to promote the objectives of Article 21

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<sup>304</sup> *Id.*

<sup>305</sup> *Id.* art. 3(4).

<sup>306</sup> CRC, *supra* note 50, art. 21(c).

<sup>307</sup> Adoption Agreement, *supra* note 35, art. 2(1).

<sup>308</sup> *Id.*

<sup>309</sup> See CRC, *supra* note 50, art. 21(d); VITÉ & BOÉCHAT, *supra* note 60, at 52–53.

<sup>310</sup> VITÉ & BOÉCHAT, *supra* note 60, at 54.

<sup>311</sup> Adoption Agreement, *supra* note 35, art. 3(3).

<sup>312</sup> *Id.*

<sup>313</sup> See Hague Convention, *supra* note 51, pmb1.; CRC, *supra* note 50, art. 21(e); VITÉ & BOÉCHAT, *supra* note 60, at 55 (“The arrangements or agreements in question would thus be international by nature.”).

by entering into bilateral and other multilateral adoption agreements.<sup>314</sup> This criterion allows state parties to address more specific issues between their countries.<sup>315</sup> The Adoption Agreement fulfilled this goal by addressing the problems specific to U.S.–Russian adoptions.<sup>316</sup>

*B. Comparing the Adoption Agreement and the Hague Convention:  
Incorporating Hague Safeguards*

Understanding adoption requirements in the Hague Convention provides a context for understanding the Adoption Agreement’s procedural safeguards. The U.S. and Russian governments incorporated elements of the Hague Convention in the Adoption Agreement to strengthen the procedural safeguards in the adoption process.<sup>317</sup> Bilateral treaties create an opportunity for non-Hague Convention states to implement Hague safeguards: “A bilateral treaty has the potential to address more appropriately the specific issues of individual nations . . . .”<sup>318</sup> The similarities between the Hague Convention and the Adoption Agreement create a promising solution to reducing the number of U.S.–Russian adoption abuses.

*1. An Overview of the Hague Convention’s Procedures and Safeguards*

*a. Central Authorities and Accredited Bodies*

In the Hague Convention, Articles 9 and 11 allow Central Authorities<sup>319</sup> to conduct adoptions through Accredited Bodies.<sup>320</sup> Articles 9 through 12 list minimum standards for implementing the Hague Convention.<sup>321</sup>

Central Authorities can accredit bodies that demonstrate they are competent to facilitate the tasks of the Hague Convention.<sup>322</sup> An Accredited Body must: pursue non-profit objectives set within the limits dictated by the state of its

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<sup>314</sup> See CRC, *supra* note 50, art. 21(e).

<sup>315</sup> See VITÉ & BOÉCHAT, *supra* note 60, at 55.

<sup>316</sup> *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 32, at 1, 2.

<sup>317</sup> *Id.*

<sup>318</sup> Carlberg, *supra* note 97, at 124.

<sup>319</sup> For the United States, the State Department is the Central Authority. *About Us*, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/about\\_us.php](http://adoption.state.gov/about_us.php) (last visited Jan. 25, 2013). The Office of Children’s Issues carries out the State Department’s responsibilities as Central Authority. *Id.*

<sup>320</sup> Hague Convention, *supra* note 51, art. 9.

<sup>321</sup> Hague Conference on Private Int’l Law, Outline: Hague Intercountry Adoption Convention 1 (Jan. 2013), <http://www.hcch.net/upload/outline33e.pdf>.

<sup>322</sup> Hague Convention, *supra* note 51, art. 10.

accreditation;<sup>323</sup> employ personnel who are qualified by ethical standards and trained “to work in the field of intercountry adoption;”<sup>324</sup> and “be subject to supervision by competent authorities of that State.”<sup>325</sup> Article 9 lists a set of responsibilities the Central Authority must take.<sup>326</sup> Responsibilities delegated to Accredited Bodies include<sup>327</sup>: collecting and disseminating information about the child to facilitate the adoption;<sup>328</sup> initiating and assisting the adoption proceedings;<sup>329</sup> promoting pre-adoption counseling and post-adoption services;<sup>330</sup> and creating transparency between governments concerning particular adoptions.<sup>331</sup> Accredited bodies that receive accreditation in one state must also satisfy the requirements of other states where they facilitate adoptions.<sup>332</sup>

*b. Procedural Requirements*

Articles 14 through 22 lay out the procedural requirements for intercountry adoption.<sup>333</sup> Prospective adoptive parents must apply through the Central Authority of their state.<sup>334</sup> The Central Authority can develop its own criteria<sup>335</sup> regarding prospective adoptive parents’ eligibility to adopt.<sup>336</sup> In addition, the Central Authority must also collect information about any prospective adoptive parents.<sup>337</sup> The information should include personal information about the applicant, family and medical history, social environment, reasons for adoption, and overall suitability to adopt.<sup>338</sup> The Central Authority of the prospective adoptive parents must transmit this information to the Central Authority of the prospective adoptee’s home state.<sup>339</sup>

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<sup>323</sup> *Id.* art. 11(a).

<sup>324</sup> *Id.* art. 11(b).

<sup>325</sup> *Id.* art. 11(c).

<sup>326</sup> *Id.* art. 9.

<sup>327</sup> *Id.* arts. 9, 11(a).

<sup>328</sup> *Id.* art. 9(a).

<sup>329</sup> *Id.* art. 9(b).

<sup>330</sup> *Id.* art. 9(c).

<sup>331</sup> *Id.* art. 9(d)–(e).

<sup>332</sup> *Id.* art. 12.

<sup>333</sup> *See* arts. 14–22.

<sup>334</sup> *Id.* art. 14.

<sup>335</sup> The Central Authority can delegate these functions to other public authorities or to Accredited Bodies. *Id.* art. 22(1).

<sup>336</sup> *Id.* art. 15(1).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* art. 15(2).

The Central Authority must develop criteria for children who are adoptable.<sup>340</sup> Under Article 16, the Central Authority must prepare a report of the prospective adoptee including information on the child’s background, family and medical history, and any special needs of the child.<sup>341</sup> It must also give “due consideration” to the child’s ethnic, religious, and cultural background,<sup>342</sup> and ensure the proper consents are obtained.<sup>343</sup> Finally, the Central Authority must determine whether the adoption is in the child’s best interests.<sup>344</sup>

Before the adoption is final, the Central Authority must determine whether five final requirements are met: (1) the prospective adoptive parents must agree to the adoption;<sup>345</sup> (2) the prospective adoptive parents’ Central Authority must approve of the adoption, if such approval is required by the domestic law of either state;<sup>346</sup> (3) the Central Authority of both states must agree that the adoption may proceed;<sup>347</sup> (4) the parents must be eligible and suitable to adopt;<sup>348</sup> and (5) the child must be able to enter and permanently reside in the receiving state.<sup>349</sup>

## 2. *The Adoption Agreement’s Procedures and Safeguards*

### a. *Executive Body and Authorized Organization*

The text in the Adoption Agreement mirrors the language in the Hague Convention, with some exceptions. One difference between the Hague Convention and the Adoption Agreement is the nomenclature of government and non-government entities involved in the adoption process.<sup>350</sup> The Adoption Agreement uses the term Executive Body where the Hague Convention refers to the same entity as the Central Authority.<sup>351</sup> The Adoption Agreement uses the term Authorized Organizations where the Hague Convention refers to such

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<sup>340</sup> *Id.* art. 16(1).

<sup>341</sup> *Id.* art. 16(1)(a).

<sup>342</sup> *Id.* art. 16(1)(b).

<sup>343</sup> *Id.* art. 16(1)(c).

<sup>344</sup> *Id.* art. 16(1)(d).

<sup>345</sup> *Id.* art. 17(1)(a).

<sup>346</sup> *Id.* art. 17(1)(b).

<sup>347</sup> *Id.* art. 17(1)(c).

<sup>348</sup> *Id.* art. 17(1)(d).

<sup>349</sup> *Id.*

<sup>350</sup> See Adoption Agreement, *supra* note 35, art. 1.

<sup>351</sup> Compare Adoption Agreement, *supra* note 35, art. 1(3), with Hague Convention, *supra* note 51, arts. 6–9, 13.

organizations as Accredited Bodies.<sup>352</sup> Unlike the Hague Convention, the Adoption Agreement specifically refers to other entities involved in the process including a Regional Authority,<sup>353</sup> a Competent Authority who inspects living conditions of prospective adoptive parents,<sup>354</sup> and a Competent Authority who determines whether the prospective adoptive parents are suitable and eligible to adopt a child.<sup>355</sup>

At least once a year, the Executive Body of each state was required to submit an updated list of organizations authorized to perform intercountry adoption activities.<sup>356</sup> To adopt a child from the Russian Federation, prospective adoptive parents were required to use an Authorized Organization.<sup>357</sup> An exception to this rule occurs in interfamily adoptions where a prospective adoptive parent can adopt a relative independently of an Authorized Organization.<sup>358</sup>

The Adoption Agreement's Article 5 echoes Article 9 of the Hague Convention by requiring Accredited Bodies to be accountable to the Central Authority.<sup>359</sup> Article 5 provides possible requirements the Executive Body of the Country of Origin (the sending state) could impose on Authorized Organizations that conduct intercountry adoption activities in its territory.<sup>360</sup> The Adoption Agreement leaves these requirements to the discretion of the Executive Body.<sup>361</sup> Authorized Organizations were required to submit documentation that shows how they are monitoring post-adoption conditions.<sup>362</sup> Additionally, the Adoption Agreement outlines the procedure that Authorized Organizations must take to inform the Executive Body of the dissolution<sup>363</sup> of an adoption.<sup>364</sup> Authorized Organizations that failed to

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<sup>352</sup> Compare Adoption Agreement, *supra* note 35, art. 1(5), with Hague Convention, *supra* note 51, arts. 11, 13.

<sup>353</sup> Adoption Agreement, *supra* note 35, art. 1(3); see Hague Convention, *supra* note 51. The Regional Authorities for Russia and the United States are the Ministry of Education and Science of the Russian Federation and the U.S. Department of State respectively. Adoption Agreement, *supra* note 35, art. 1(3).

<sup>354</sup> Adoption Agreement, *supra* note 35, art. 1(6).

<sup>355</sup> *Id.* art. 1(7).

<sup>356</sup> *Id.* art. 4(2).

<sup>357</sup> *Id.* art. 4(4).

<sup>358</sup> *Id.* art. 4(5).

<sup>359</sup> Compare *id.* art. 5, with Hague Convention, *supra* note 51, art. 9.

<sup>360</sup> Adoption Agreement, *supra* note 35, art. 5(1).

<sup>361</sup> *Id.* The Executive Body "may establish" the criteria for the Authorized Organizations to keep or maintain their accreditation. *Id.*

<sup>362</sup> *Id.* art. 5(1)(a)–(b).

<sup>363</sup> Dissolution is a term used to describe an adoption that ends after it is legally finalized. *Adoption Legal Terms and Definitions Related to Child Welfare and the Adoption Process*, *supra* note 186. Disruption

comply with the domestic laws of their state or failed to fulfill the requirements of the Adoption Agreement would have been suspended or lost their authorization to perform intercountry adoption services.<sup>365</sup>

*b. Procedural Requirements*

The procedural requirements for adoption under the Adoption Agreement were practically identical to those under the Hague Convention.<sup>366</sup> The Competent Authority of the child's country of origin would make decisions regarding the adoption of a child.<sup>367</sup> The decision would be based on the domestic laws of that state and the provisions of the Adoption Agreement.<sup>368</sup> Prospective adoptive parents applied to the Competent Authority of the receiving state that inspects the parents' living conditions.<sup>369</sup> For prospective adoptive parents in the United States, this authority is USCIS.<sup>370</sup>

Under the Adoption Agreement, before the adoption is complete, prospective parents would have to meet the child and express their consent to adopt him or her.<sup>371</sup> Article 9 enables the country of origin to develop a procedure for parent applicants to adopt a child.<sup>372</sup> For the Russian Federation, this would likely mirror its current judicial procedure.<sup>373</sup> The documents the country of origin was required to produce pursuant to Article 10 mirror the documents required to satisfy Article 16 of the Hague Convention.<sup>374</sup>

## V. PROPOSED IMPROVEMENTS FOR A FUTURE ADOPTION AGREEMENT

The Agreement addresses many of the problems that fractured the U.S.–Russian adoption process in the past, but Part V will highlight three key areas that the Agreement overlooked. First, this Part will discuss the problems

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describes an adoption process that ends after the child is placed in the adoptive home and before the adoption is legally finalized. *Id.*

<sup>364</sup> Adoption Agreement, *supra* note 35, art. 5(1)(e)(i)–(ii).

<sup>365</sup> *Id.* art. 5(4).

<sup>366</sup> Compare Adoption Agreement, *supra* note 35, arts. 7–13, with Hague Convention, *supra* note 51, arts. 14–22.

<sup>367</sup> Adoption Agreement, *supra* note 35, art. 6(3).

<sup>368</sup> *Id.* art. 6.

<sup>369</sup> *Id.* art. 8.

<sup>370</sup> *Id.* art. 1(8).

<sup>371</sup> *Id.* art. 10(1).

<sup>372</sup> *See id.* art. 9.

<sup>373</sup> For an overview of the Russian adoption procedure, see *supra* Part II.

<sup>374</sup> Compare Adoption Agreement, *supra* note 35, art. 10, with Hague Convention, *supra* note 51, art. 16.

associated with prospective adoptive parents receiving incomplete medical information. While Article 10 of the Adoption Agreement required all prospective adoptive parents to receive full disclosure of a child's medical history,<sup>375</sup> it overlooked the varying medical terminology between the United States and Eastern European physicians. This oversight would have rendered the efforts of Article 10 futile, because the medical records may have still been inaccurate. Second, this Part will discuss the adverse effects of the increased procedural safeguards. One benefit of the pre-adoption process prior to the Adoption Agreement was its length. Extending the time used to pre-screen parents should be carefully considered by balancing the interest of the child to be removed from an orphanage against the interest of the child to be in the custody of well-prepared parents.

A. *Provide Prospective Parents with Accurate Medical Information of the Child*

Since Russia opened its doors to intercountry adoption, U.S. adoptive families have complained about the inaccurate information they received about their child's medical history.<sup>376</sup> Peggy Hilt was unprepared for Nina's behavior because she was not informed of Nina's special needs.<sup>377</sup> Torry Hansen made similar claims about Justin's mental health, arguing that she was promised a healthy boy.<sup>378</sup> Instead, Torry claims, her son suffered from severe mental health issues that made him react violently.<sup>379</sup> Another U.S. family's story illustrates Torry and Peggy's dilemma. The McMullens adopted their son from Russia under the assumption that the child had no serious medical needs.<sup>380</sup> The child's medical record indicated that the boy had a cleft lip and palate, but, aside from that condition, the record indicated that he was healthy.<sup>381</sup> However, the couple noticed their son's actual medical condition was much worse.<sup>382</sup> In the United States, a pediatrician examined the boy and determined

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<sup>375</sup> Adoption Agreement, *supra* note 35, art. 10(1)(b).

<sup>376</sup> See, e.g., McMullen v. European Adoption Consultants, Inc., 129 F. Supp. 2d 805, 809 (W.D. Pa. 2001).

<sup>377</sup> See Wingert, *supra* note 3. For example, soon after Peggy adopted Nina, she developed an alcohol problem. *Id.* Peggy attributed this addiction to her lack of preparedness for Nina's mental health illness and her disturbing behavior. *Id.*

<sup>378</sup> Ruiz, *supra* note 18.

<sup>379</sup> *Id.* Russian officials dispute Torry's claim and argue that the boy is healthy. *Id.*

<sup>380</sup> McMullen, 129 F. Supp. 2d at 809.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

that the child’s medical record was incomplete.<sup>383</sup> The child was diagnosed with Lennox-Gastaut Syndrome and is unable to function without assistance from others.<sup>384</sup> These parents’ stories indicate that the availability of complete and accurate medical records is important to assure the readiness of prospective adoptive parents.<sup>385</sup>

### 1. *Early Attempts To Regulate Disclosure of Medical Records*

The United States adopted a law that requires disclosure of medical records in intercountry adoptions; this protection only extends to adoptions conducted with fellow Hague Convention states. In October 2000, the United States enacted the Intercountry Adoption Act (“IAA”) as a part of the implementation of the Hague Convention.<sup>386</sup> The IAA requires adoption agencies to be accredited by the U.S. Department of State.<sup>387</sup> As required by the Hague Convention, the IAA mandates that adoption agencies provide prospective adoptive parents with a copy of the child’s medical records.<sup>388</sup> The Adoption Agreement appeared to be based on standards in the IAA.

### 2. *The Adoption Agreement*

Similar to the IAA, the Adoption Agreement requires that prospective adoptive parents have access to the child’s medical history. Article 10 of the Adoption Agreement acknowledges the issues associated with Russian officials failing to disclose the child’s medical history. The Agreement provides the option for each state to develop domestic laws that require prospective adoptive parents to receive accurate information of the child’s “social situation and health of all the child’s family members.”<sup>389</sup> Under the Agreement, this information includes a description of the child’s special needs and an independent medical expert’s detailed medical conclusion of the child’s current state of health.<sup>390</sup> By including this language in the Adoption

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<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> Hora, *supra* note 95, at 1018 (“In most cases, the parents have accused the adoption agencies of intentionally or negligently misrepresenting the child’s medical condition by not providing full medical records. The parents contend that they would not have adopted the child if they had known of his or her condition . . . .”) (citation omitted).

<sup>386</sup> 42 U.S.C. § 14901(b)(1) (2006); *see also* Hora, *supra* note 95, at 1024.

<sup>387</sup> 42 U.S.C. § 14921(a); *see also* Hora, *supra* note 95, at 1024.

<sup>388</sup> 42 U.S.C. § 14923(b)(1)(A)(i); *see* Hague Convention, *supra* note 51, art. 16(1)(a).

<sup>389</sup> Adoption Agreement, *supra* note 35, art. 10(1)(b)(i).

<sup>390</sup> *Id.* art. 10(1)(b)(ii), (iv).

Agreement, the parties required all prospective parents to receive accurate medical information because independent adoptions are illegal.<sup>391</sup> However, even with this compulsion to disclose, families who adopt through adoption agencies still receive inaccurate or incomplete medical information. Parents may be able to recover legal damages from adoption agencies. But a new bilateral adoption agreement should include a provision that prevents the problem of misinformation regarding a child's medical records.

### 3. *The Problem with Varying Standards*

The problems associated with providing prospective adoptive parents with inaccurate and incomplete medical history may be rooted in the varying medical standards between the United States and Eastern European states. Sandra L. Iverson and Dana E. Johnson write that referral diagnoses for children in Eastern European countries, like Russia, are different from those used in Western countries, like the United States.<sup>392</sup> One study by the Journal of the American Medical Association noted a large disparity in the diagnoses of children from Eastern Europe and with these same children diagnosed in the United States.<sup>393</sup> Besides the variance in diagnoses, many of the medical records failed to note "significant" problems with the child.<sup>394</sup> Russian adoption agencies could have been in full compliance with the Family Code and the Adoption Agreement by sending the child's medical history, yet the information could be inaccurate and inconclusive by U.S. standards. Prospective parents may still be uninformed about their prospective adopted child's medical conditions or special needs.

One way to address this ambiguity is for a future agreement to specify what type of medical examinations, at a minimum, a child must undergo. Iverson and Johnson suggest that medical examiners should measure the circumference of a child's head.<sup>395</sup> The head circumference is believed to be the most accurate reflection of brain development during the first years of life.<sup>396</sup> Also, the states can create a uniform system of medical terminology for assessing children in these exams. Equipping prospective parents with accurate

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<sup>391</sup> *Id.* art. 4(4).

<sup>392</sup> Sandra L. Iverson & Dana E. Johnson, *There Should Be Pre- and Post-Pediatric Counseling in the International Adoption Process*, in *INTERNATIONAL ADOPTIONS* 198 (Margaret Haerens ed., 2011).

<sup>393</sup> *Id.* at 198–99 (citing Lisa H. Albers et al., *Health of Children Adopted from the Former Soviet Union and Eastern Europe*, 278 *JAMA* 922, 922 (1997)).

<sup>394</sup> *Id.* at 199.

<sup>395</sup> *Id.* at 200.

<sup>396</sup> *Id.*

information on children they wish to adopt ensures that the parent is ready for the child. Perhaps if Peggy Hilt received accurate information on Nina's medical history, she would not have adopted her or would have been more prepared to deal with Nina's abnormal behavior. And perhaps if Torry Hansen knew about Justin's medical needs before the adoption, Torry would have allowed another, more prepared, family to adopt Justin.

*B. Establishing a Better Timeline: A Longer Adoption Process Places Children Further at Risk for Psychological and Developmental Damage*

The longer a child stays in institutional care, the greater the risk of psychological and developmental damage.<sup>397</sup> The first three years of a child's life are critical to her development and health.<sup>398</sup> Even well-run orphanages cannot provide children with the individualized attention they need in these formative years.<sup>399</sup> These institutions are often understaffed to meet the needs of the children in their care.<sup>400</sup> A neglected or abused child's experiences may impair the child's ability to assimilate into her adoptive family.<sup>401</sup> In one scholarly article, Henry Cellini described the long-term effects for a child who has experienced abuse: "Their brains can be locked into perceiving the world as a cold, dangerous, scary place, and they may have difficulty responding to the care and concern of others."<sup>402</sup> A significant number of failed intercountry adoptions in the United States occur with children from Eastern European nations, like Russia, who have "spent their [formative] years either in institutionalized state-run care or with family members ill-equipped to care for them."<sup>403</sup> Unfortunately, many parents lack the financial resources to raise a child who has been traumatized by their pre-adoption experiences.

The length of the adoption process under the Agreement may have increased because of the added procedural safeguards. These procedural safeguards are necessary, but the parties should consider the consequences of

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<sup>397</sup> Elizabeth Barthelet, *International Adoptions Should Be Encouraged*, in INTERNATIONAL ADOPTIONS, *supra* note 392, at 22.

<sup>398</sup> See Henry R. Cellini, *Child Abuse, Neglect, and Delinquency: The Neurological Link*, JUV. & FAM. CT. J., Fall 2004, at 1, 3, 6 (2004) ("[T]he environment has a significant impact on how predisposed character and personality traits are expressed. And when that environment is negative, the brain's development can be negatively impacted in varying ways ranging from increased suspiciousness to violence.") (citation omitted).

<sup>399</sup> See Barthelet, *supra* note 397, at 29–30.

<sup>400</sup> Astrasheuskaya & de Carbonnel, *supra* note 150.

<sup>401</sup> See Cellini, *supra* note 398, at 1, 3.

<sup>402</sup> *Id.*

<sup>403</sup> Chang et al., *supra* note 2.

extending the adoption process. The safeguards in the Adoption Agreement mirror the safeguards in the Hague Convention.<sup>404</sup> The Hague Convention is criticized for its added procedural restraints, which impose “some severe set backs on children who are able to find homes.”<sup>405</sup> The Hague Convention purports to promote the best interest of the children, yet without setting a designated time frame for the pre-adoption process, its good intentions may actually run counter to its purpose.<sup>406</sup> Similarly, the Adoption Agreement does not impose a time limit on adoption officials during the pre-adoption process.<sup>407</sup> Under the pre-Adoption Agreement legal scheme, the U.S. Department of State estimated that the intercountry adoption process is about eight months.<sup>408</sup> Under the Adoption Agreement, the adoption process was expected to lengthen due to the new and expanded requirements.<sup>409</sup>

The state parties may have intentionally left out provisions in the Adoption Agreement that establish a definite time period for the adoption to occur. One reason for excluding this provision is that the adoption process varies with the prospective parents’ adoption service provider. Each adoption agency may develop its own criteria for how to prepare prospective adoptive parents.<sup>410</sup> Controlling the length of time may cut into each adoption agency’s autonomy to determine whether candidates are fit to parent. Another reason for excluding this provision can be traced back to the subsidiarity principle of the CRC’s Article 21.<sup>411</sup> The Russian ideology that regards its children as the national heritage of its state prioritizes domestic adoptions of children over intercountry adoptions.<sup>412</sup> Therefore, Russia may have been reluctant to sign an agreement that required its Central Authority to send its children to the United States as quickly as possible. But viewing children as property of the state interferes

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<sup>404</sup> See discussion in Part V.B.1–2.

<sup>405</sup> Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT’L L. REV. 283, 323 (1995).

<sup>406</sup> Hague Convention, *supra* note 51, art. 16(1)(c); Katz, *supra* note 405, at 324.

<sup>407</sup> See Adoption Agreement, *supra* note 35, art. 5.

<sup>408</sup> *Country Information: Russia*, *supra* note 51.

<sup>409</sup> See *FAQs: Bilateral Adoption Agreement with Russia*, *supra* note 32, at 3–4. The State Department stated that three aspects of intercountry adoption will change with the Adoption Agreement: no independent adoptions, prospective parent training and preparation, and a pre-approval process. *Id.* These three aspects all are used to ensure that the pre-adoption process properly pre-screens prospective adoptive families. *Id.*

<sup>410</sup> CHILD WELFARE INFO. GATEWAY, THE ADOPTION HOME STUDY PROCESS 2, 3 (2010), available at [https://www.childwelfare.gov/pubs/f\\_homstu.pdf](https://www.childwelfare.gov/pubs/f_homstu.pdf).

<sup>411</sup> See *supra* Part IV.A.2.

<sup>412</sup> See *supra* Part I.B.1.

with their fundamental right to a loving family.<sup>413</sup> The pre-adoption process must reflect a balance between the urgency of relieving children of their dire circumstances and the Central Authority's interest in finding prepared adoptive families. Most importantly, the longer a child stays in an institution, the harder it will be for that child to adapt to a normal family environment.

*C. Working Toward a System of Accountability: Learning from the Failed U.S.–Vietnamese Adoption Agreement*

An important indicator of a successful agreement is the accountability of the contracting parties. Accountability can be viewed as a means to achieve enforcement of international obligations among sovereign states. The Adoption Agreement does not articulate a system of accountability for the United States and Russia. Without a system of accountability, a compliant state has little authority to force a non-compliant state to assume its obligations. This dilemma can corrupt the objectives of an agreement. Consequently, state parties may distrust each other and eventually decide to terminate their agreement. The U.S.–Vietnamese Adoption Agreement (“UVAA”)<sup>414</sup> serves as an example of the consequences of an agreement that lacks accountability. The United States and the Russian Federation should understand the pitfalls of the UVAA to ensure the success of the Adoption Agreement. This Subpart begins by comparing the UVAA to the Adoption Agreement. Next, this Subpart discusses how a lack of accountability doomed the fate of the UVAA. Finally, the lessons from the UVAA will be applied to the Adoption Agreement. This Subpart argues that the Adoption Agreement required the United States and Russia to release annual compliance reports as a means of vertically enforcing their obligations under the agreement.

*1. Comparing the UVAA and the Adoption Agreement*

The crisis that faced Vietnamese adoptions stands in stark contrast to the crisis with Russian adoptions; yet the mistakes from the UVAA can also occur with any new bilateral adoption agreement. The U.S.–Vietnamese adoption scandals occurred because the Vietnamese government was unable to prevent

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<sup>413</sup> See Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 319 (2005) (comparing an adult's fundamental right to marriage with a child's fundamental right to form a family).

<sup>414</sup> Agreement Between the United States of America and the Socialist Republic of Vietnam Regarding Cooperation on the Adoption of Children, U.S.-Viet., June 21, 2005, Hein's No. KAV 7494 [hereinafter UVAA].

Vietnamese adoption officials from corrupting the pre-adoption process.<sup>415</sup> The United States blamed the Vietnamese government for not regulating its intercountry adoptions.<sup>416</sup> For U.S.–Russian adoptions, in contrast, the United States is the state being blamed for not regulating the post-adoption process and preventing the deaths of adopted children.<sup>417</sup>

## 2. *Lessons from Vietnam: Why the UVAA Failed*

The UVAA failed because Vietnam failed to enforce the procedural safeguards of the agreement.<sup>418</sup> Allegations of pre-adoption abuses<sup>419</sup> led the U.S. State Department to prohibit adoptions from the Republic of Vietnam until Vietnam reformed its child welfare system.<sup>420</sup> In 2003, the United States suspended adoptions from Vietnam.<sup>421</sup> The U.S. State Department was concerned that U.S. parents were adopting children who were the victims of trafficking.<sup>422</sup> The United States agreed to resume adoptions with Vietnam once the states reached an agreement that incorporated safeguards similar to the Hague Convention.<sup>423</sup> During these negotiations, Vietnam was not a party to the Hague Convention.<sup>424</sup> Like Russia, Vietnam struggled to regulate a system of intercountry adoption without the procedural safeguards of the

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<sup>415</sup> E.J. Graff, *Anatomy of an Adoption Crisis*, FOREIGN POL'Y (Sept. 12, 2010), [http://www.foreignpolicy.com/articles/2010/09/07/anatomy\\_of\\_an\\_adoption\\_crisis](http://www.foreignpolicy.com/articles/2010/09/07/anatomy_of_an_adoption_crisis).

<sup>416</sup> See Graff, *supra* note 415; Vietnam, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=vietnam](http://adoption.state.gov/country_information/country_specific_info.php?country-select=vietnam) (last updated Mar. 2012) [hereinafter *Country Information: Vietnam*].

<sup>417</sup> *US and Russia Agree on Rules To Make Adoptions Safer*, BBC NEWS (July 13, 2011) <http://www.bbc.co.uk/news/world-us-canada-14148431>.

<sup>418</sup> Graff, *supra* note 415 (“[T]he State Department . . . discovered systematic nationwide corruption in Vietnam—a network [of individuals involved in adoption] were profiting by, paying for, defrauding, or even simply stealing Vietnamese children from their families to sell them to unsuspecting Americans.”); *Country Information: Vietnam*, *supra* note 416.

<sup>419</sup> Vietnam was under scrutiny for not controlling the fraudulent baby-buying practice within its state. Carlberg, *supra* note 97, at 121 (“[T]he price tag placed on these children can be anywhere from \$5,000 to \$25,000. As a result, there has arguably been a shift away from the best interest of the child and the suitability of the adoptive parents and a shift toward awarding the child to the highest bidding prospective parents.”).

<sup>420</sup> *Country Information: Vietnam*, *supra* note 418.

<sup>421</sup> Karen Russo, *Corruption Halts Vietnam Adoptions by Americans*, ABC NEWS (May 15, 2008), <http://abcnews.go.com/International/story?id=4845523>.

<sup>422</sup> *Id.*

<sup>423</sup> See Carlberg, *supra* note 97, at 145–46; *Country Information: Vietnam*, *supra* note 418.

<sup>424</sup> Vietnam ratified the Hague Convention on November 1, 2011. *Hague Convention States Parties*, *supra* note 51. The Convention entered into force for Vietnam on February 1, 2012. *Id.*

Hague Convention.<sup>425</sup> Instead of Vietnam ratifying the Hague Convention, the parties negotiated the terms of a bilateral adoption agreement.<sup>426</sup>

The United States and Vietnam signed the UVAA on June 21, 2005.<sup>427</sup> The parties intended for this agreement to assist in facilitating safer U.S.–Vietnamese adoptions.<sup>428</sup> Under the UVAA, these adoptions would receive similar protections to the adoptions conducted under the Hague Convention.<sup>429</sup> However, the pre-adoption problems that prompted the creation of the UVAA persisted despite the implementation of the agreement.<sup>430</sup> Vietnam violated its obligations and failed to prevent the trafficking and kidnapping of a large number of Vietnamese infants.<sup>431</sup> To the dismay of many prospective U.S. parents, some of the children they were adopting were still being stolen and “sold.”<sup>432</sup> Ultimately, the United States decided not to renew the UVAA in 2008, which ended Vietnamese adoptions for U.S. applicants.<sup>433</sup>

### 3. *Accountability Through Compliance Reports*

The UVAA demonstrates the need for transparency and enforcement in bilateral adoption agreements. The United States lacked the legal authority to oversee adoptions in Vietnam and believed ending adoptions was its only recourse.<sup>434</sup> Any new bilateral adoption agreement between the United States and Russia could suffer the same fate as the UVAA if the states do not have a means of achieving accountability. The Adoption Agreement ensured accountability of the adoption agencies<sup>435</sup> and parents,<sup>436</sup> but did not provide for the accountability of the contracting states.

Compliance reports are a model of enforcement mechanisms typically used in human rights treaties.<sup>437</sup> Children’s rights are human rights,<sup>438</sup> and the right

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<sup>425</sup> Graff, *supra* note 415.

<sup>426</sup> Carlberg, *supra* note 97, at 146.

<sup>427</sup> UVAA, *supra* note 414, at 13; Carlberg, *supra* note 97, at 146.

<sup>428</sup> Carlberg, *supra* note 97, at 146, 153 (arguing that implementing bilateral adoption treaties discredits “the importance of implementing the Hague Convention”).

<sup>429</sup> *Id.* at 146, 150; *see also* UVAA, *supra* note 414, art. 4.

<sup>430</sup> Graff, *supra* note 415.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *See* Adoption Agreement, *supra* note 35, art. 5.

<sup>436</sup> *See id.* art. 14.

<sup>437</sup> *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 109 (3d ed. 2010).

to a family is considered to be the child's most basic human right.<sup>439</sup> Therefore, the Adoption Agreement can be viewed within the context of a human rights treaty. Compliance reports originated in Article 40 of the International Civil and Political Rights Covenant ("ICCPR").<sup>440</sup> The ICCPR reporting system requires state parties to submit annual reports.<sup>441</sup> These reports document the measures the reporting state has taken to comply with the treaty.<sup>442</sup> The effectiveness of compliance reports is debatable. Some criticize how states have responded to compliance reports, stating that these reports are "long on rhetoric and short on specifics . . . ."<sup>443</sup>

If any bilateral adoption agreement were to require annual compliance reports, it must explain what information a state is required to disclose. At a minimum, such an agreement should require each state to report domestic legislation that the state is using to implement the agreement; the effectiveness of that legislation; information on the progress of the uniform medical standards;<sup>444</sup> and information on post-adoption support that each state provides. To be most effective, these compliance reports must be available for the public to view. These reports would build trust between the two states and provide transparency on a state's progress. Additionally, these compliance reports would provide beneficial information for prospective adoptive parents.

One lesson from the UVAA is that state parties need to decide how both will be held accountable to the terms of a bilateral adoption agreement. While compliance reports are not the only means to achieving accountability, the states must consider some system that will accomplish this goal. The alternative to not developing a system may be the demise of any new bilateral adoption agreement.

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<sup>438</sup> See CRC, *supra* note 50, pmb. (recognizing the "fundamental human rights" of all humans, including children).

<sup>439</sup> Barthelet, *supra* note 397, at 24 ("[C]ore human rights principles support the proposition that children have a right to be raised by parents who can provide true family care.").

<sup>440</sup> International Covenant on Civil and Political Rights art. 40, Dec. 16, 1966, S. TREATY DOC. 95-20, 999 U.N.T.S. 171 [hereafter ICCPR]; BEDERMAN, *supra* note 437, at 109.

<sup>441</sup> ICCPR, *supra* note 444, art. 40(1).

<sup>442</sup> *Id.*

<sup>443</sup> BEDERMAN, *supra* note 437, at 109.

<sup>444</sup> See *supra* Part V.A.

## CONCLUSION

A new bilateral adoption agreement may provide the best remedy for the U.S.–Russian adoption crisis. A new bilateral adoption agreement can help the states prevent future adoption abuses, rather than just reacting to these tragedies. But as the recently terminated Adoption Agreement was drafted, it neglected three areas that could affect its preventative efforts. This Comment urges the United States and Russia incorporate the three proposals discussed above into a new bilateral adoption agreement.

The problems associated with U.S.–Russian adoptions are deeply rooted. Nationalism and distrust pervade U.S.–Russian adoption relations. In fact, Russia's preference for domestic adoptions potentially endangers the future of intercountry adoption. These adoption relations worsen when stories like Nina and Justin's make international headlines. Prospective adoptive parents from the United States need to be fully informed of their adopted children's medical histories so that they may enter into these adoptions with realistic expectations and the necessary support.

The Adoption Agreement significantly changed the adoption process. Prospective adoptive parents were required to adopt through accredited adoption agencies. Those adoption agencies replaced the practice of independent adoptions. Parents were also required to undergo a more rigorous home study process, and take parent preparation classes. These requirements benefited parents in the long-term, because they were better prepared to receive their new child. Adopted children were able to retain the citizenship of their country of origin. This requirement gave more control to the country of origin if a crime against the child were to occur.

In many respects the Adoption Agreement's changes improved the safety of U.S.–Russian adoptions, but the Adoption Agreement failed to consider three critical areas. First, the Agreement should have mandated what medical examinations are conducted to assess the child's health. By only requiring medical reports without any regard for the varying medical standards, the Agreement failed to address the core of the problem. Second, the Agreement should have contemplated the consequences of an extended adoption process. The longer a child is deprived of a loving family environment, the more that child is harmed. Yet, ensuring that prospective parents are prepared should remain a priority. Third, the Agreement should have a way for determining the accountability of the United States and Russia. Without such accountability, the Adoption Agreement would most likely have faced the same fate as the

UVAA. The Adoption Agreement should have required annual compliance reports, and explained what specific information each state was required to disclose.

The aim of the Adoption Agreement was to prevent adopted children from ever living through Nina's or Justin's experiences. Prevention is key. Would Nina still be alive today if the Adoption Agreement were signed in 2004? Would Justin have avoided the trauma of being returned to Russia if his mother were more prepared under the Adoption Agreement's new standards? Perhaps, but these assertions are impossible to prove. The United States and Russia can no longer afford to only react to tragic adoption stories with bans on adoptions or with criminal punishment for the parents. These states must show greater care for the well-being of its adoptable children.

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\* Executive Symposium Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2013); B.A., Howard University (2008). I sincerely thank my faculty advisor, Professor Barbara Bennett Woodhouse, for introducing me to the subject of intercountry adoption and being so patient and helpful during this writing process. Special thanks to my loving family, my friends, and the members of the *Emory International Law Review* for all of your support during the writing and editing process.