

September 2016

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Tate A. Henvey

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### Recommended Citation

Henvey, Tate A. (2016) "From Russia, without Love: How the Icy Hand of Politics Left Russia's Orphans Out in the Cold.," *Liberty University Law Review*: Vol. 11 : Iss. 1 , Article 7.

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## NOTE

### FROM RUSSIA, WITHOUT LOVE: HOW THE ICY HAND OF POLITICS LEFT RUSSIA'S ORPHANS OUT IN THE COLD

Tate A. Henvey<sup>†</sup>

#### ABSTRACT

*In 2013, Russia enacted Law no. 272-FZ, banning all adoptions of Russian children by American citizens. The law prevented multiple American families from taking their prospective children home with them. This occurred even after the American families had already visited the children and completed every part of the adoption process short of receiving a court order authorizing the adoption. Those families now seek relief in the European Court of Human Rights.*

*The American families are claiming Russia violated three different provisions of the European Convention on Human Rights: (1) Article 3, prohibiting torture, inhuman, or degrading treatment; (2) Article 8, prohibiting interference with private or family life; and (3) Article 14, prohibiting discrimination based on national origin. It is doubtful that the court will hold Russia in violation of Article 3, as the standard of ill-treatment requires a certain level of severity that is lacking in this case. The Article 8 claim is less doubtful, but is still a difficult claim for the Americans. In order to show a violation, the Americans will have to show that their relationship with the Russian children rose to the level of constituting a family even without the adoption being completed. It seems much more likely that the court will hold that Russia has violated Article 14, prohibiting discrimination. Though Article 14 has no enforceability on its own, the subject matter of this case, the ability to adopt and create a family, falls within the ambit of "family life" covered under Article 8.*

*This Note (1) predicts how the European Court of Human Rights will rule in this case and (2) discusses how a judgment against Russia from the ECHR is the most effective way of creating change in Russian law.*

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<sup>†</sup> *Business Manager*, LIBERTY UNIVERSITY LAW REVIEW, Volume 11; J.D. Candidate, Liberty University School of Law (2017); B.A., Criminal Justice, Thomas Edison State University, 2013.

## I. INTRODUCTION

Although they are diverse in their individual afflictions, the most vulnerable members of society share in a common plight: they have no family to care for them. When Russia enacted Federal Law no. 272-FZ (the “Dima Yakovlev Act”) in late 2012, prospective American parents were barred from adopting Russian orphans at a stage in the adoption process when the parents were within weeks of taking the children home with them.<sup>1</sup> This is an injustice to both the prospective American parents and the Russian orphans. Seeking recourse for the injustice done to them, the prospective American parents sued Russia in the European Court of Human Rights (“ECHR”).<sup>2</sup>

The bond of love and care with a family is perhaps the greatest cure for the traumas that life may throw at the human race. It is this bond, love, and care that allows an individual to overcome the greatest adversities. At man’s core, he requires and desires the love and care of a good family. It seems that the human race is hardwired to need love, to need a family, and to belong to the same. Being robbed of a family and having nobody to love and care for a child is perhaps the greatest tragedy that a child can experience in this life.

In spite of this, Russia has prevented thousands of orphans from having the opportunity of receiving the love and care of a family. The Russian government previously determined, as a prerequisite to the international adoption of Russian children, that it was highly unlikely that any Russians would ever adopt the orphans.<sup>3</sup> Now, those children are left to pray that another family will adopt them. All is not lost for these children, however. The Dima Yakovlev Act only prohibits United States citizens from adopting Russian children.<sup>4</sup> Thus, there is a chance that the children may be adopted

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1. See ROSSIISKAIA GAZETA, *Federal’nyi zakon ot 28 dekabria 2012 g. N 272-FZ* [Federal law of 28 December 2012 no. 272-FZ] <http://www.rg.ru/2012/12/29/zakon-dok.html> (last visited Oct. 10, 2015) *translated in* RT, <https://www.rt.com/politics/official-word/dima-yakovlev-law-full-995/>.

2. A.H. v. Russia, App. No. 6033/13 Eur. Ct. H.R. at 1, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

3. The adoption policy in Russia prior to the Dima Yakovlev Act required such a determination from the Russian government before any citizens of foreign nations could adopt Russian citizens. See *generally* ADOPTION.COM, <http://russia.adoption.com> (last visited Oct. 10, 2015).

4. ROSSIISKAIA GAZETA, *translated in* RT, *supra* note 1 (“Zapreshchaetsia peredacha detei, iavliaiushchikhsia grazhdanami Rossiiskoi Federatsii, na usynovlenie (udocherenie) grazhdanam Soedinennykh Shtatov Ameriki, a takzhe osushchestvlenie na territorii Rossiiskoi Federatsii deiatel’nosti organov i organizatsii v tseliakh podbora i peredachi detei,

by citizens of another country such as Great Britain or Canada. However, many of the orphans in Russia have severe medical conditions that require specialized medical care.<sup>5</sup>

The Dima Yakovlev Act was, without a doubt, politically motivated.<sup>6</sup> Although relations between the United States and Russia have always been tense, there were tragedies on both sides that became the tipping point that led to the current state of affairs in Russia's adoption policy. On the Russian side, a Russian child who had been adopted by an American died of heatstroke after being left in a hot car for nine hours by his adoptive father.<sup>7</sup> This led Russia to enact Federal Law no. 272-FZ. The law is commonly called the Dima Yakovlev Act in honor of a neglected child who died in America. On the American side, an American named Sergei Magnitsky was tortured and killed by Russian authorities.<sup>8</sup> This led the United States to enact the Sergei Magnitsky Rule of Law Accountability Act.<sup>9</sup> It was this American law that the Russian government responded to in the majority of the sections of Federal Law No. 272-FZ. The Dima Yakovlev Act has a second popular title because of this, the Anti-Magnitsky Act.

The tragedies on both sides were severe, and they each sparked different reactions in the United States and Russia. What is even more unfortunate, however, is that these tragedies were subsequently used as chess pieces in the political tension between the United States and Russia. As is so often the case, laws that are designed to be used in the eternal chess match of politics utterly fail to bring about prosperity to the people or to provide for the needs of society's most vulnerable members. The players sacrifice their pawns so that the stratagem succeeds and an advantage is obtained. What can be done, though, when a foreign government enacts an arbitrary restriction against another nation as a part of the game? The interactions of

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iavliaiushchikhsia grazhdanami Rossiiskoi Federatsii, na usynovlenie (udocherenie) grazhdanam Soedinennykh Shtatov Ameriki, zhelaiushchim usynovit' (udocherit') ukazannykh detei.") ("It is forbidden to pass children, citizens of the Russian Federation over for adoption by citizens of the United States of America. Operation of organizations and bodies involved in selecting and passing children, citizens of the Russian Federation over for adoption by citizens of the United States of America willing to adopt the indicated children is prohibited on the territory of the Russian Federation.").

5. A.H. v. Russia, App. No. 6033/13 Eur. Ct. H.R. at 2, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

6. See *infra* Part II.C.

7. Ellen Barry, *Russian Furor Over U.S. Adoptions Follows American's Acquittal in Boy's Death*, N.Y. TIMES (Jan. 3, 2009), [http://www.nytimes.com/2009/01/04/world/europe/04adopt.html?\\_r=1](http://www.nytimes.com/2009/01/04/world/europe/04adopt.html?_r=1).

8. Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat 1496.

9. See *id.* at 1503.

nations are bound only by what those nations agree to be bound by, and those bindings are enforceable only to the extent to which those nations consent. Such is the nature of international law.

Russia manifested consent when it became a party to the European Convention on Human Rights (the "Convention"). Knowing this, and hoping they might find relief for their grievances, the American families who were closest to completing their adoptions have sought help from the European Court of Human Rights ("ECHR") by suing the nation of Russia in the court.<sup>10</sup> Those families now await the chance to be heard by the ECHR and to attempt to persuade the court that Russia has violated the provisions of the Convention.

This Note explains the circumstances surrounding the Americans' claims against Russia, predicts how the Court will rule on those claims, and explains the effect that ruling will have on the parties involved. The focus of this Note is on the pending case *A.H. v. Russia*, Eur. Ct. H.R. (2013), in which the prospective American parents sued Russia for violation of the European Convention on Human Rights.<sup>11</sup> Specifically, this Note will focus on case precedent from the ECHR in an attempt to predict how the ECHR will rule when this case is eventually heard.

Part II of this Note provides the context for the litigation. It details the adoption procedures in both the United States and Russia prior to the enactment of the Dima Yakovlev Act, discusses the Bilateral Agreement on Adoption between the United States and Russia, explains some of the events and political tensions that contributed to the creation of the Dima Yakovlev Act, and details the complaint filed by the American families in the ECHR. Part III analyzes that complaint and explores ECHR case precedent in an attempt to predict how the ECHR will resolve the dispute. Finally, Part IV discusses the effect of a ruling against Russia by the ECHR by analyzing the enforcement mechanisms of the Convention and the Council of Europe, by discussing Russia's potential responses to such a ruling, and by comparing the ECHR to other channels of solving international conflicts. Part IV concludes with the proposition that seeking a judgment from the ECHR is the best method available to the United States for effecting change in Russian law.

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10. The ECHR is the judicial body that enforces the provisions of the Convention and ensures that the member nations abide by their agreement to follow the Convention. The ECHR is explained in further detail below. *Infra* Part IV.A.

11. See *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 1, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

## II. BACKGROUND

This Part details the events that led to the American families suing Russia in the ECHR. First, this Part explores the general adoption procedures that guided adoptions of Russian children by U.S. Citizens. Additionally, this Part discusses the Bilateral Agreement on Adoption between the U.S. and Russia. This Part then discusses the Dima Yakovlev Act and the corresponding Sergei Magnitsky Act that inspired the majority of the Dima Yakovlev Act. Finally, this Part details the complaint filed in the ECHR by the American families.

### A. General Adoption Procedures Prior to Russia's Ban

Before Russia enacted the Dima Yakovlev Act, adoption of Russian children by United States citizens was quite common. Between 1999 and 2013, there were 46,111 Russian children adopted by U.S. citizens.<sup>12</sup> The number of adoptions from Russia peaked in 2004, after which it steadily declined until it was banned in 2013.<sup>13</sup> The adoption process itself had some costly requirements that Russia imposed.<sup>14</sup> Russia has two primary interests regarding the adoption of its citizens: (1) Russia has a strong interest in ensuring that its orphans are placed in good homes that can provide proper care for the children; and (2) Russia prefers that its orphans be placed in Russian homes as opposed to homes in foreign nations.

The requirements for adoption that were in place prior to the enactment of the Dima Yakovlev Act reflected that second interest. They stipulated that the only Russian children who may be adopted by foreign families are those who have not been adopted by a Russian family after being on the adoption registry for six months.<sup>15</sup> The requirements preceding and following adoption placements reflected Russia's interest in ensuring its orphans were placed in good homes. Russia required prospective adoptive parents to visit their prospective child in Russia twice before the adoption

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12. U.S. DEPARTMENT OF STATE, <http://travel.state.gov/content/adoptionsabroad/en/about-us/statistics.html> (last visited Oct. 10, 2015) (select the tab labeled "Adoptions by Year," select Russia from the drop down menu, and click "GO").

13. In 2004, there were 5,862 Russian children adopted by American citizens. *Id.* This number went down every year until the Dima Yakovlev Act went into force in 2013. *Id.* The U.S. Department of State reports 250 adoptions were completed in 2013, but only two took place in 2014. No adoptions took place in 2015. *Id.*

14. See e.g., ADOPTION.COM, <http://russia.adoption.com> (last visited Oct. 10, 2015) (describing travel requirements, follow up requirements, and a six-month waitlist for Russian children).

15. *Id.*

could be finalized.<sup>16</sup> After the adoption was finalized, Russia required four post-placement follow up reports for three years: the first between months five and seven, the second between months eleven and thirteen, the third between months twenty-three and twenty-five, and the fourth between months thirty-five and thirty-seven.<sup>17</sup>

*B. Agreement Between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children*

Part of what makes Russia's ban of American adoption so controversial is that it was enacted roughly 17 months after the signing of the Agreement Between the United States of America and the Russian Federation regarding Cooperation in Adoption of Children ("Bilateral Agreement on Adoption" or "Bilateral Agreement" or "Agreement"). The Bilateral Agreement on Adoption was signed on July 13, 2011,<sup>18</sup> but did not enter into force until November 1, 2012.<sup>19</sup> The Agreement was made after a strong public outcry from Russia. The outcry came as a result of a Russian child being sent back to Russia alone after being adopted by an American family.<sup>20</sup> The Agreement was made in the mutual pursuit of improving the adoption system between Russia and the United States in an attempt to prevent cases such as that and to prevent child abuse in general.

Unfortunately, there is a history of American adoptive families abusing Russian children.<sup>21</sup> One breaking point came in 2010, when Torry Hansen sent her adopted 8-year-old son, Artyom Savelyev (adoptive name, Justin Hansen), back to Russia on an unaccompanied flight with only a note saying, "This child is mentally unstable. He is violent and has severe psychopathic issues."<sup>22</sup> After this, Russian officials responded, calling for a

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16. *Id.*

17. U.S. DEPARTMENT OF STATE, <http://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/russia.html> (last visited Oct. 10, 2015) (expand tab labeled "Hague Convention Information").

18. Agreement Between the United States of America and the Russian Federation regarding Cooperation in Adoption of Children, Russ.-U.S., July 13, 2011, 5 J. EURASIAN L. 235, 252 [hereinafter *Agreement regarding Adoption*].

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

20. See *Adopted Boy Returned to Russia Alone*, WASH. TIMES, (Apr. 9, 2010), <http://www.washingtontimes.com/news/2010/apr/09/adoption-freeze-urged-after-boy-returned-russia/>.

21. See CYNTHIA R. MABRY & LISA KELLY, ADOPTION LAW THEORY, POLICY, AND PRACTICE 447 (2d. ed. 2010).

22. *Adopted Boy Returned to Russia Alone*, *supra* note 20.

freeze on all adoptions between Russia and the United States until an agreement could be made not only to prevent children from being sent back to Russia, but also to prevent children from being abused.<sup>23</sup> The case of Artyom Savelyev generated enough outcry in Russia so as to create the spark that would lead to the creation of the Bilateral Agreement on Adoption one year later.<sup>24</sup>

To achieve the goal of preventing Russian children from being abused by their adoptive American parents, the Agreement provides that prospective parents must be screened and given “psycho-social preparation.”<sup>25</sup> The Agreement also provides for the previously mentioned requirement of post-placement follow up reporting to the Russian government.<sup>26</sup> The problem that Russia’s adoption ban creates with regard to the Bilateral Agreement, however, is that it unilaterally terminates the Agreement without accommodating the families who were at advanced stages of the adoption process at the time the ban was enacted.<sup>27</sup> The Russian government allowed the completion of adoptions that were court approved prior to the law coming into force.<sup>28</sup> However, those families who had already completed one or both of the required trips to Russia and had bonded with their prospective child were stopped in their tracks and left with no recourse. They were not allowed to complete their adoptions.

### C. *The Dima Yakovlev Act*

With the enactment of the Dima Yakovlev Act, adoptions of Russian children by American citizens came to a screeching halt a mere two months

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23. *Id.*

24. *See id.*

25. *Agreement regarding Adoption, supra* note 18, at 246.

26. *Id.* at 241-42.

27. ROSSIISKAIA GAZETA, *translated in* RT, *supra* note 1 (“V sviazi s ustanovlennym chast’iu 1 nastoiashchei stat’i zapretom na peredachu detei, iavliaiushchikhsia grazhdanami Rossiiskoi Federatsii, na usynovlenie (udocherenie) grazhdanam Soedinennykh Shtatov Ameriki prekratit’ ot imeni Rossiiskoi Federatsii deistvie Soglasheniia mezhdru Rossiiskoi Federatsiei i Soedinennymi Shtatami Ameriki o sotrudnichestve v oblasti usynovleniia (udochereniia) detei, podpisannogo v gorode Vashingtone 13 iiulia 2011 goda.”) (“Due to the prohibition on passing children, citizens of the Russian Federation over for adoption by the citizens of the United States of America as imposed in Part 1 of this Article, on the part of the Russian Federation terminate the operation of the Agreement between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children that had been signed in Washington, DC on July 13, 2011.”).

28. Letter from V. I. Nechayev, Deputy Chairman of the Supreme Court, The Supreme Court of the Russian Federation, to Chairmen of the Supreme Courts of the subjects of the Federation (Jan. 22, 2013), <http://moscow.usembassy.gov/adoptions-supreme-court.html>.



after the Bilateral Agreement on Adoption went into force.<sup>29</sup> The Dima Yakovlev Act prohibits all adoptions of Russian citizens by American citizens.<sup>30</sup> Dima Yakovlev (also known as Dimtri Yakovlev) was a Russian boy adopted by Miles Harrison and his wife in 2008.<sup>31</sup> The couple renamed Dima as Chase Harrison after adopting him.<sup>32</sup> On July 8, 2008, Miles Harrison left the 21 month old Chase inside Miles' parked vehicle for nine hours.<sup>33</sup> Chase died of heatstroke that day because of Miles Harrison's negligence as a parent.<sup>34</sup> In December 2008, Miles Harrison was acquitted of involuntary manslaughter, infuriating the Russians.<sup>35</sup> These events sparked outrage in Russia, culminating in the enactment of Law no. 272-FZ, which became popularly referred to as the Dima Yakovlev Act. The Dima Yakovlev Act was approved by the State Duma on December 21, 2012, and was approved by the Federation Council on December 26, 2012.<sup>36</sup> The law went into force on January 1, 2013.<sup>37</sup>

However, motives for enacting laws are rarely so straightforward. The law is not only referred to as the Dima Yakovlev Act, but is also referred to as the Anti-Magnitsky Act. This is because the law was enacted as a direct

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29. ROSSIISKAIA GAZETA, *translated in* RT, *supra* note 1 ("Nastoiashchii Federal'nyi zakon vstupae v silu s 1 ianvaria 2013 goda.") (This Federal law comes in to force as of January 1, 2013); Media Note, U.S. Department of State, United States – Russia Bilateral Adoption Agreement (Oct. 18, 2012), <http://www.state.gov/r/pa/prs/ps/2012/10/199322.htm>.

30. ROSSIISKAIA GAZETA, *translated in* RT, *supra* note 1 ("Zapreshchaetsia peredacha detei, iavliaiushchikhsia grazhdanami Rossiiskoi Federatsii, na usynovlenie (udocherenie) grazhdanam Soedinennykh Shtatov Ameriki, a takzhe osushchestvlenie na territorii Rossiiskoi Federatsii deiatel'nosti organov i organizatsii v tseliakh podbora i peredachi detei, iavliaiushchikhsia grazhdanami Rossiiskoi Federatsii, na usynovlenie (udocherenie) grazhdanam Soedinennykh Shtatov Ameriki, zhelaiushchim usynovit' (udocherit') ukazannykh detei.") ("It is forbidden to pass children, citizens of the Russian Federation over for adoption by citizens of the United States of America. Operation of organizations and bodies involved in selecting and passing children, citizens of the Russian Federation over for adoption by citizens of the United States of America willing to adopt the indicated children is prohibited on the territory of the Russian Federation.").

31. Barry, *supra* note 7.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. ROSSIISKAIA GAZETA, *translated in* RT, *supra* note 1 ("Priniat Gosudarstvennoi Dumoi 21 dekabria 2012 goda. Odobren Sovetom Federatsii 26 dekabria 2012 goda.") (Approved by the State Duma on December 21, 2012, and approved by the Federation Council on December 26, 2012.).

37. *Id.* ("Nastoiashchii Federal'nyi zakon vstupae v silu s 1 ianvaria 2013 goda.") (This Federal law comes in to force as of January 1, 2013).

response to the Sergei Magnitsky Rule of Law Accountability Act (“Magnitsky Act”). The Magnitsky Act was enacted by the United States Congress on December 14, 2012.<sup>38</sup> It was enacted to punish the Russian officials responsible for the torture and death of Sergei Magnitsky.<sup>39</sup>

The Library of Congress Summary details the mechanics of the Act. It explains that the Secretary of State is required to keep a list of all people whom the Secretary has reason to believe are either responsible for, financially benefitted from, or in any way participated in the detention, abuse, or death of Sergei Magnitsky.<sup>40</sup> The list must also include any person responsible for extrajudicial killings, torture, or any human rights violations that are committed against United States citizens seeking to promote human rights or to expose illegal activity carried out by Russian government officials.<sup>41</sup> Any person placed on this list becomes ineligible to enter or be admitted to the United States and his or her visa will be revoked.<sup>42</sup> The Secretary of the Treasury is required to freeze and prohibit U.S. property transactions of any person who is on the Secretary of State’s list.<sup>43</sup>

The Russian government saw the Magnitsky Act as a direct political offensive against Russia, and it indeed may have been exactly that. Regardless of the United States’ motives, Russia responded by devoting the majority of the Dima Yakovlev Act to establishing a similar system of imposing sanctions against the United States.<sup>44</sup> Under the Dima Yakovlev Act, American citizens deemed by the Russian Federation to have abused the fundamental human rights and freedoms of Russian citizens have the following sanctions imposed upon them: (1) they are prohibited from disposing of property located in Russia; (2) the activity of legal entities run by them is suspended in Russia; and (3) their membership in boards of directors or other governing bodies of organizations in Russia is suspended.<sup>45</sup>

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38. Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112-208, 126 Stat 1496.

39. The Congressional findings in the act detail the events that led to its drafting, revealing the political motivations behind the Act. *See id.* at 1502-05.

40. S. 1039 (112th): *Sergei Magnitsky Rule of Law Accountability Act of 2012*, GOVTRACK.US (July 23, 2012), <https://www.govtrack.us/congress/bills/112/s1039/summary>.

41. *Id.*

42. *Id.*

43. *Id.*

44. Articles 1, 2, and 3 establish the sanctioning system. ROSSIISKAIA GAZETA, *translated in RT, supra* note 1.

45. *Id.*

In summary, the Dima Yakovlev Act was enacted for at least two purposes: (1) to retaliate against the acquittal of Miles Harrison in the death of his adopted son, Chase (Dima/Dimtri Yakovlev); and (2) to respond in kind to the enactment of America's Magnitsky Act. Public outrage in the United States, however, appears to be focused solely on the adoption ban. Although Russia allowed for the completion of adoptions approved by a Russian court prior to January 1, 2013, many families were unable to complete their adoptions due to the various complications that arose in the rush to have adoptions approved before that date. Seeking a remedy under the Convention, a significant number of those families have now sued Russia in the ECHR. They claim that Russia has violated the European Convention of Human Rights, to which Russia is a party.

*D. The Americans' Application to the European Court of Human Rights*

1. General Background

*A.H. v. Russia* consists of 23 applications to the ECHR.<sup>46</sup> These applications involve 23 different families that were prevented from completing their adoptions.<sup>47</sup> The applicants all started their proceedings for adopting a Russian child between 2010-2012.<sup>48</sup> They complied with all requirements set by the United States and obtained a favorable conclusion regarding their financial conditions and suitability to adopt a child.<sup>49</sup> Some of the applicants had to comply with the new standards set in place by the Bilateral Agreement on Adoption after it went into force.<sup>50</sup> Once the applicants completed all of the requisite steps in the United States, they began going through the Russian system.<sup>51</sup> The Russian government gave all of the applicants a favorable conclusion regarding the impossibility of transferring their prospective child or children to a Russian family and their suitability to be parents.<sup>52</sup> The applicants all visited their prospective children in Russia at least twice,<sup>53</sup> spending several days during each visit

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46. *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 1, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

47. *Id.* at 1-2, 5-16.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 2, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

53. See e.g., ADOPTION.COM, <http://russia.adoption.com> (last visited Oct. 10, 2015) (describing travel requirements).

bonding with the children.<sup>54</sup> One case even involved the adoption of the brother of a previously adopted girl.<sup>55</sup> Of the 34 children involved, 25 of them suffer from severe medical conditions that required specialized care.<sup>56</sup>

As of December 2012, all of the applicants completed all of the steps for the adoption procedure prior to submitting the application for adoption to a Russian court.<sup>57</sup> Once the Dima Yakovlev Act was enacted, all of the applicants were prevented from completing their adoptions.<sup>58</sup> This resulted in the applicants being involved in this case.<sup>59</sup> It is unknown if all of the families involved submitted an application for adoption.<sup>60</sup> The families who submitted the application for adoption before January 1, 2013, and whose hearings were scheduled between January and February 2013, had their hearings rescheduled.<sup>61</sup> However, most of the Americans were unable to make it to those hearings due to short notice.<sup>62</sup> It was because of the Americans' failure to appear in court that the Russian court discontinued the adoption proceedings.<sup>63</sup>

Though some of the families appealed, it is unknown whether those appeals were ever heard.<sup>64</sup> As for the families who submitted an application for adoption after January 1, 2013, the applications were denied under the newly enacted Dima Yakovlev Act.<sup>65</sup> If the application was submitted on an applicant's behalf by an adoption agency, the application was denied on the grounds that the agency's activity had been banned by the Dima Yakovlev Act.<sup>66</sup> If the application was submitted by a different representative, it was denied on the ground that only an adoption agency could submit the application.<sup>67</sup> During April and May of 2013, the Russian Ministry of

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54. A.H. v. Russia, App. No. 6033/13 Eur. Ct. H.R. at 2, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

55. *Id.*

56. *Id.* at 5-16.

57. *Id.* at 2.

58. *Id.*

59. *See id.*

60. A.H. v. Russia, App. No. 6033/13 Eur. Ct. H.R. at 2, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. A.H. v. Russia, App. No. 6033/13 Eur. Ct. H.R. at 2, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

67. *Id.*

Education and Sciences informed the families that they had been removed from the State prospective adoptive parent data bank.<sup>68</sup> In the spring and summer of 2013, some of the families learned that the children they had been prohibited from adopting had subsequently been adopted by other families.<sup>69</sup>

## 2. Relevant International and Domestic Law and Practice

After detailing the U.S. and Russian adoption processes, the ECHR went on to list all relevant laws and practices. These materials were drawn from Russian sources, international conventions, and included the Bilateral Agreement on Adoption between the United States and Russia.<sup>70</sup> Some provisions were more relevant than others. The Bilateral Agreement and the Dima Yakovlev Act are the most relevant to this Note. The ECHR noted this, highlighting the procedures the Agreement created for adoption between Russia and the United States.<sup>71</sup> Regarding the Dima Yakovlev Act, the ECHR highlighted Article 4, which is the part of the law banning adoption of Russian children by United States citizens.<sup>72</sup>

## 3. The Applicants' Complaints

The applicants listed three complaints under the Convention.<sup>73</sup> The complaints are based on three different articles of the Convention. The first complaint was based on Article 8 of the Convention, stating that “the introduction and application to [the applicants] of the ban on adoption of [Russian] children [by United States nationals] provided by Law no. 272-FZ constituted an unlawful and disproportionate interference with their family life.”<sup>74</sup> The second complaint was based on Article 14 in conjunction with Article 8, stating that the applicants “were subject[] to discrimination on the ground of [their] nationality . . . .”<sup>75</sup> The final complaint was based on Article 3 of the Convention, stating that “most children applicants are in need of special medical care that would only be available to them in the

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68. *Id.*

69. *Id.* It is unknown if the children were adopted by Russian or foreign parents.

70. *See generally id.* at 16-25.

71. *Id.* at 22.

72. *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 24, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

73. *Id.* at 25-26.

74. *Id.* at 25.

75. *Id.* at 26.

United States and . . . that depriving them of such medical assistance amounts to treatment prohibited by Article 3 of the Convention.”<sup>76</sup>

#### 4. The Court’s Questions

Finally, the ECHR listed nine questions it wanted the applicants to answer.<sup>77</sup> The purpose of the first two questions was to fill in some of the

76. *Id.* Torture and inhuman or degrading treatment is the “treatment prohibited by Article 3.” Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, art. 3, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

77. *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 27-28, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

1. The parties are requested to inform the Court on the latest steps taken by the applicants within the adoption proceedings and on the latest decision of the executive or judicial authorities in this respect. The parties are requested to provide copies of the relevant documents.

2. The Government are requested to inform the Court on the current situation of the prospective adoptive children in the present cases: whether they remain in an orphanage, including the address of the orphanage, and whether the transfer to a different foster family is pending and, if so, at what stage; or whether they have been transferred to a different foster family.

3. Given that the adoption procedure was not finalised, do the adult applicants have the authority to bring the applications before the Court on behalf of the children applicants? (See *S.D., D.P., and T v. the United Kingdom*, no.23715/94, Commission decision of 20 May 1996, unpublished, Commission report of 11 April 1997, DR 89-A, p. 31.)

4. Given the advanced stage of the adoption procedure, did the relations between the prospective adoptive parents and children constitute “family life” or “private life” within the meaning of Article 8 of the Convention?

In particular, as regards cases nos. 23890/13 and 42340/13, has there been “family life” or “private life” within the meaning of Article 8 of the Convention taking into account that the prospective adoptive parents and children met and formed a relationship prior to the initiation of the adoption procedure and, as regards case no. 37173/13, taking into account that the child the prospective adoptive parents are seeking to adopt is a sibling of their previously adopted daughter?

5. Having regard to the Federal Law no. 272-FZ of 28 December 2012 on Measures in respect of Persons Involved in a Breach of Fundamental Human Rights and Freedoms, Rights and Freedoms of Nationals of the Russian Federation (Law no. 272-FZ), has there been an interference with the applicants’ right to respect for their private and/or family life, within the meaning of Article 8 § 1 of the Convention?

6. If so, was that interference in accordance with the law and necessary in terms of Article 8 § 2?

7. If the relations between the prospective adoptive parents and children did not constitute “family life” or “private life” within the meaning of Article 8 of

gaps in the information that the ECHR had so that it could make a better determination of how the case should be decided. The rest of the questions are questions of law the Court will be answering as it decides the case. Though the questions were submitted to the parties on November 4, 2013, it is unknown whether the parties have submitted their answers to the ECHR. Whether the parties have submitted their answers or not, however, there have been no hearings held for this case nor are there any hearings for this case scheduled any time soon.<sup>78</sup>

### III. ANALYSIS OF THE CLAIMS

This Part analyzes the claims made by the American families by examining the existing case law of the ECHR. The applicants' claims are that Russia violated Articles 3, 8, and 14 of the European Convention on Human Rights. Article 3 prohibits torture. Article 8 prohibits interference with family life. Article 14 prohibits discrimination.

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the Convention, do they fall within the ambit of that provision for the purposes of Article 14 of the Convention? (See *E.B. v. France* [GC], no. 43546/02, §§ 41, 45 and 47, 22 January 2008).

In particular:

(i) What is the date of termination of the Bilateral Agreement on Adoption between the United States and Russia of 13 July 2011 (the Bilateral Agreement on Adoption)?

(ii) If the Bilateral Agreement on Adoption remains in force throughout 2013, has the ban on adoption of children – nationals of the Russian Federation by nationals of the United States introduced by Law no. 272-FZ – become effective as from 1 January 2013? If so, how is the application of the ban in the present cases compatible with the Bilateral Agreement on Adoption?

(iii) What are the modalities of application of the ban on adoption introduced by Law no. 272-FZ to the applicants, given that they had initiated the adoption procedure prior to its entry into force?

8. Have the applicants suffered discrimination in the enjoyment of their Convention rights on the ground of the adult applicants' nationality, contrary to Article 14 of the Convention read in conjunction with Article 8? In particular, were they subjected to differential treatment and, if so, was it justified by objective and reasonable grounds?

9. Do the prospective adoptive children in the present cases require medical treatment that would only be available to them in the United States? If such treatment is unavailable in Russia, have the children applicants been subjected to treatment in breach of Article 3 of the Convention?

*Id.*

78. *Provisional List of Scheduled Hearings*, EUROPEAN COURT OF HUMAN RIGHTS, [http://www.echr.coe.int/Pages/home.aspx?p=hearings/calendar&c=#n1353927184398\\_point](http://www.echr.coe.int/Pages/home.aspx?p=hearings/calendar&c=#n1353927184398_point) er (last visited Aug 7, 2016).

*A. The Claim of Torture*

Article 3 of the Convention provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>79</sup> In *A.H. v. Russia*, the applicants complained that, by depriving the Russian orphans of access to special medical care that is only available in the United States, Russia was subjecting the orphans to inhuman or degrading treatment prohibited under Article 3.<sup>80</sup> The ECHR has well-established case law on what constitutes inhuman or degrading treatment under Article 3. This case law is laid out in the cases of *N. v. The United Kingdom* and *Stanev v. Bulgaria*.

1. *N. v. The United Kingdom*, 2008-III Eur. Ct. H.R. 227.

In *N. v. The United Kingdom*,<sup>81</sup> N. was a Ugandan national who moved to London, where she was diagnosed as being HIV-positive.<sup>82</sup> N. applied for asylum in the U.K., but her applications were denied.<sup>83</sup> N. then sought relief from the ECHR, complaining that “given her illness and the lack of freely available antiretroviral and other necessary medical treatment, social support or nursing care in Uganda, her removal there would cause acute physical and mental suffering, followed by an early death, in breach of Article 3 of the Convention.”<sup>84</sup>

The Court then explained its general principles regarding Article 3 claims. First, the Court detailed the scope of Article 3, stating that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3.”<sup>85</sup> This level of severity is to be determined based on the particular circumstances of a case, including “the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.”<sup>86</sup> Although Article 3 usually applies to intentional mistreatment of individuals, it can also apply to suffering caused by naturally occurring illness, “where it is, or risks being, exacerbated by

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79. European Convention on Human Rights, *supra* note 76, at art. 3.

80. *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 26, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

81. *N. v. The United Kingdom*, 2008-III Eur. Ct. H.R. 227.

82. *Id.* at 233.

83. *See id.*

84. *Id.* at 238-39.

85. *Id.* at 242.

86. *Id.*



treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.”<sup>87</sup>

Second, the Court looked at the rights of Contracting States,<sup>88</sup> stating that they “have the right to control the entry, residence and removal of aliens.”<sup>89</sup> However, the Court also stated that expulsion can give rise to an Article 3 claim “where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.”<sup>90</sup> Finally, the Court stated that “Article 3 principally applies to prevent a deportation or expulsion where the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection.”<sup>91</sup>

After establishing the general principles regarding Article 3, the court examined multiple cases specifically addressing Article 3 claims regarding the expulsion of seriously ill individuals. The court concluded that a reduction in life expectancy or other circumstances resulting from expulsion alone are not breaches of Article 3.<sup>92</sup> However, if the country to which a person is being removed has inferior facilities for the treatment of that person’s illness, then an Article 3 issue may be raised, but only in very exceptional circumstances where there are compelling humanitarian grounds against the removal.<sup>93</sup> Applying these principles to the facts, the court held, by a vote of fourteen-to-three, that there would be no violation of Article 3 if N. were to be removed to Uganda.<sup>94</sup>

2. *Stanev v. Bulgaria*, 2012-I Eur. Ct. H.R. 81.

In *Stanev v. Bulgaria*,<sup>95</sup> Stanev was diagnosed with schizophrenia and placed in a social care home known as Pastra.<sup>96</sup> Stanev sought relief from the ECHR, complaining under Articles 3 and 13 that “the living conditions in the Pastra social care home were poor and that no effective remedy was

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87. *N. v. The United Kingdom*, 2008-III Eur. Ct. H.R. 227, 242.

88. *Id.* Contracting States are the nations that are parties to the Convention. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 247.

93. *N. v. The United Kingdom*, 2008-III Eur. Ct. H.R. 227, 247.

94. *Id.* at 249.

95. *Stanev v. Bulgaria*, 2012-I Eur. Ct. H.R. 81.

96. *Id.* at 93-94.

available under Bulgarian law in respect of that complaint.”<sup>97</sup> The Court proceeded by identifying the general principles of Article 3 law. Broadly, Article 3 “prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour.”<sup>98</sup> Just as the Court explained in *N. v. The United Kingdom*, the alleged ill-treatment must have a minimum level of severity, the determination of which is relative and dependent on the circumstances of the case.<sup>99</sup>

The Court then defined the terms “inhuman” and “degrading.”<sup>100</sup> Treatment is considered inhuman when it is “premeditated, [is] applied for hours at a stretch[,] and cause[s] either actual bodily injury or intense physical or mental suffering.”<sup>101</sup> Treatment is considered degrading when it [is] intended to create “feelings of fear, anguish and inferiority capable of humiliating and debasing [the victims] and possibly breaking their physical or moral resistance or driving them to act against their will or conscience.”<sup>102</sup> While intent is a factor, the absence of intent does not preclude a finding that Article 3 has been violated.<sup>103</sup> Applying these principles to the facts, the Court concluded that Stanev’s living conditions in the Pastra social care home amounted to degrading treatment in violation of Article 3.<sup>104</sup>

### 3. The Russian Government Was Not Torturing the Russian Orphans

It is highly unlikely that the ECHR will find that Russia has violated Article 3 of the Convention. The conditions in which the Russian children are living are unlikely to be classified as “ill-treatment,” and are further unlikely to meet the minimum level of severity required to fall within the scope of Article 3. Even if the conditions were so classified, the treatment does not fall within the definitions of either “inhuman” or “degrading” treatment as described by the Court. The mistreatment must be intentional.<sup>105</sup> Here, Russian officials are not inflicting premeditated actual bodily injury or intense physical or mental suffering for hours at a time.

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97. *Id.* at 136.

98. *Id.* at 138.

99. *Id.*

100. *Id.*

101. *Stanev v. Bulgaria*, 2012 Eur. Ct. H.R. 81, 138.

102. *Id.*

103. *Id.* at 138-39.

104. *Id.* at 140-41.

105. *See id.* at 138.

Neither are they trying to create feelings of fear, anguish, or inferiority such that the children will be humiliated or debased or have their physical or moral resistance broken. The troubles the children face are medical conditions for which there is no adequate treatment available in Russia. These conditions hardly amount to the requisite level of severity required for a violation of Article 3.

Compare the Russian children's circumstances to those of *N. from N. v. United Kingdom*. *N.* had lived in a country that had the means of providing the medical care she needed, but the ECHR ruled that sending her back to Uganda (where there is no such medical care) would not violate Article 3 of the Convention.<sup>106</sup> The disparity between the medical treatment available in the United Kingdom and Uganda is far greater than the disparity between the United States and Russia. In *A.H. v. Russia*, the children are not facing removal in America, but rather, they are currently in Russia and unlikely to leave. Furthermore, the children here have access to other countries with suitable medical care.

As was previously mentioned, the children could be adopted by a Canadian or British family and receive treatment in those countries.<sup>107</sup> Additionally, the children are not prevented by law from travelling to America temporarily to receive medical care. The prohibition of the Dima Yakovlev Act is against Americans adopting Russian children. Thus, it does not bar those children from receiving American (or any other nation's) medical care. The primary force preventing such treatment is the children's lack of funding to provide for such expensive medical care and travel. Though this is a tragedy, there is no intentional mistreatment being inflicted on the Russian children by Russian authorities. Thus, it is not a tragedy for which the nation of Russia can be held accountable under Article 3 of the Convention. Accordingly, the ECHR is unlikely to find a violation of Article 3 of the Convention.

#### *B. The Claim of Interference With Family Life*

Article 8 of the Convention provides,

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law

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106. See *N. v. The United Kingdom*, 2008-III Eur. Ct. H.R. 227, 232-235.

107. In the advent of adoption by Canadians, the family could even travel to the United States to receive medical care. See *supra* Part I.

and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>108</sup>

In *A.H. v. Russia*, the applicants complained that, due to the bond formed between the Russian children and the prospective American parents, the Dima Yakovlev Act “constituted an unlawful and disproportionate interference with their family life.”<sup>109</sup> Russia’s ban on the adoption of Russian children by American parents is unprecedented. However, the ECHR has established principles of Article 8 law that apply to this case.

1. *E.B. v. France*, Eur. Ct. H.R., HUDOC (2008).

In *E.B. v. France*,<sup>110</sup> E.B. was a lesbian woman cohabiting with a partner,<sup>111</sup> who sought authorization to adopt a child.<sup>112</sup> E.B.’s request was denied by the adoption board due to a lack of a male referent to serve as a father for the child.<sup>113</sup> E.B. sought relief from the ECHR, claiming that France had violated Article 14 of the Convention in conjunction with Article 8.<sup>114</sup>

In its analysis, the Court set forth principles of Article 8 law. First, the Court stated that “provisions of Article 8 do not guarantee either the right to found a family or the right to adopt.”<sup>115</sup> Such a right is not recognized by any domestic or international law.<sup>116</sup> Further,

[t]he right to respect for ‘family life’ does not safeguard the mere desire to found a family; it presupposes the existence of a family,

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108. European Convention on Human Rights, *supra* note 76, at art. 8.

109. *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 25, HUDOC (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

110. *E.B. v. France*, App. No. 43546/02 Eur. Ct. H.R., HUDOC (2008), <http://hudoc.echr.coe.int/eng?i=001-84571>.

111. *Id.* at 3. Strangely, though the Court says E.B. “has been in a stable relationship with a woman, Ms. R.,” the report of the socio-educational assistant and pediatric nurse noted that Ms. E.B. and Ms. R do not consider themselves to be a couple. *Id.* at 3.

112. *Id.*

113. *Id.* at 6.

114. *Id.* at 13. Article 14 will be discussed in further detail *infra* Part III.C.

115. *Id.*

116. *E.B. v. France*, App. No. 43546/02 Eur. Ct. H.R. at 16, HUDOC (2008), <http://hudoc.echr.coe.int/eng?i=001-84571>.

or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father, or the relationship that arises from a genuine marriage, even if family life has not yet been fully established, or the relationship that arises from a lawful and genuine adoption.<sup>117</sup>

Next, the Court defined the concept of “private life” in broad terms, stating that it “encompasses, *inter alia*, the right to establish and develop relationships with other human beings, the right to ‘personal development’ or the right to self-determination as such.”<sup>118</sup> Further, private life includes “elements such as names, gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8, and the right to respect for both the decisions to have and not to have a child.”<sup>119</sup>

Rather than relying on Article 8, E.B.’s case relied primarily on her discrimination claim. As will be discussed in Part III.C., Article 14 must be claimed in conjunction with another article of the Convention. In *E.B. v. France*, the Court noted that E.B. was claiming that she had been discriminated against based on her homosexuality and that, therefore, the Court did not need to rule whether the right to adopt should fall under Article 8 by itself.<sup>120</sup> In the remainder of its opinion, the ECHR discussed Article 14 law. After applying Article 14 law as it related to Article 8, the Court ruled ten-to-seven that France had violated Article 14 in conjunction with Article 8.<sup>121</sup>

2. *Pini v. Romania*, 2004-V Eur. Ct. H.R. 297.

In *Pini v. Romania*,<sup>122</sup> the applicants were two Italian couples who had adopted Romanian children.<sup>123</sup> For reasons not mentioned in the case report, the adoptions were contested by the Romanian Committee for Adoption.<sup>124</sup> At no point in time was either adoption invalidated by any legal entity in either Italy or Romania.<sup>125</sup> Many different objections were made, and actions were brought to invalidate the adoption orders, including

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117. *Id.* (internal citations omitted)

118. *Id.* (internal citations omitted).

119. *Id.* (internal citations omitted).

120. *Id.* at 17.

121. *Id.* at 28.

122. *Pini v. Romania*, 2004-V Eur. Ct. H.R. 297.

123. *Id.* at 305-06.

124. *Id.* at 306.

125. *Id.* at 305-07.

actions brought by the children themselves.<sup>126</sup> Ultimately, the adoption orders issued by the Romanian court were never enforced and the Romanian children never joined their adoptive parents in Italy.<sup>127</sup> This caused the adoptive parents to seek relief from the ECHR under Article 8 of the Convention.<sup>128</sup>

The applicants argued that there was a family tie between themselves and their adopted children, whereas the government argued that there was no *de facto* family formed.<sup>129</sup> The Court pointed out that Article 8 must be interpreted in light of the Hague Convention, the United Nations Convention on the Rights of the Child, and the European Convention on the Adoption of Children.<sup>130</sup> The Court went on to say that “although the right to adopt is not, as such, included among the rights guaranteed by the Convention, the relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention.”<sup>131</sup> The Court then pointed out that the adoption orders were valid and were in compliance with all international treaties to which Romania was a party.<sup>132</sup> Thus, because the adoption orders were valid, the adoptive parents had all of the rights that biological parents would normally have.<sup>133</sup> The Court ruled five-to-two “that there was a bond between the applicants and the adopted children amounting to ‘family life’ within the meaning of Article 8” and ruled six-to-one that there was no violation of Article 8.<sup>134</sup>

### 3. The Americans Had Not Yet Formed a Family Unit with the Russian Children

Although the applicants’ Article 8 claim is much stronger than their Article 3 claim, the ECHR is unlikely to find a violation of Article 8 in this case. While the treatment of the Russian orphans does not appear to fall within the scope of Article 3, the relationship between the children and the Americans seeking to adopt them does fall within the scope of Article 8. Despite the ECHR explaining in *E.B. and Others v. France* that Article 8

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126. *Id.* at 307-16.

127. *See id.* at 326.

128. *Pini v. Romania*, 2004-V Eur. Ct. H.R. 297, 326.

129. *Id.* at 332.

130. *Id.*

131. *Id.* at 332-33.

132. *Id.* at 333.

133. *Id.*

134. *Pini v. Romania*, 2004-V Eur. Ct. H.R. 297, 344.

does not guarantee any right to found a family or to adopt children, the relationship between adoptive parents and adoptive children does fall within the scope of “family life” as protected by Article 8. This is because once a child is adopted, that child irrevocably becomes part of that family unit. Thus, any interference with that family unit would fall under the provisions of Article 8.

The problem that this claim faces is the fact that, unlike the official adoptions that went unenforced in *Pini v. Romania*, none of the current applicants’ adoptions were finalized. Article 8 presupposes the existence of a family without regard for the desire to create a family.<sup>135</sup> In *Pini v. Romania*, the adoptions had been finalized.<sup>136</sup> Thus, a family unit was officially created and the non-enforcement of the adoption orders constituted an interference with the family life of those individuals. In *A.H. v. Russia*, however, there is no official family unit. The Americans’ adoptions were never finalized.<sup>137</sup> In the eyes of the law, the Russian children and their prospective American parents are not related and are not part of a family unit.

The Americans, though they had progressed substantially in the adoption process, had not yet been declared the adoptive parents of the Russian children.<sup>138</sup> Thus, because there is no official family unit, there cannot be an interference with the family life of those individuals. The Dima Yakovlev Act does not interfere with existing family life, but rather prevents Americans from creating a new family unit by adopting Russian children. Furthermore, Article 8 only applies to existing family units and prevents governments from interfering with those units.<sup>139</sup> Thus, the ECHR is unlikely to find a violation of Article 8 of the Convention.

### C. *The Claim of Discrimination*

Article 14 of the Convention provides, “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>140</sup> This Article differs from the other articles discussed in this note in that it has no enforceability

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135. *Id.* at 333.

136. *Id.* at 326.

137. *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 2 (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

138. *Id.*

139. *See generally* *Pini v. Romania*, 2004-V Eur. Ct. H.R. 297, 332-34.

140. European Convention on Human Rights, *supra* note 76, at art. 14.

on its own. When claiming a violation of Article 14, one must also claim that it was violated in conjunction with another Article of the convention.<sup>141</sup> In *A.H. v. Russia*, the applicants claimed that Russia violated Article 14 in conjunction with Article 8 because the Dima Yakovlev Act discriminates against Americans solely on the basis of their nationality.<sup>142</sup> The ECHR has well-established case law that details the principles of Article 14 law. The following case sets forth those principles and focuses on an alleged violation of Article 14 in conjunction with Article 8.

1. *X. v. Austria*, 2013-II Eur. Ct. H.R. 1.

In *X. v. Austria*,<sup>143</sup> the three applicants were two cohabiting lesbian women and the son of one of the two women.<sup>144</sup> The non-mother partner sought to adopt the son of the mother partner and was denied because Article 182 § 2 of the Civil Code of Austria prohibited such adoptions.<sup>145</sup> The applicants sought relief from the ECHR, claiming that the law discriminated against homosexual couples in violation of Article 14 in conjunction with Article 8.<sup>146</sup> Specifically, the applicants stated “that there was no reasonable and objective justification for allowing the adoption of one partner’s child by the other partner where heterosexual couples, whether married or unmarried, were concerned, while prohibiting the adoption of one partner’s child by the other partner in the case of same-sex couples.”<sup>147</sup>

The Court began its analysis by determining whether Article 14 was applicable. The Court first explained that “Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to ‘the enjoyment of the rights and freedoms’ safeguarded by those provisions.”<sup>148</sup> Further, the Court explained that although applying Article 14 does not assume a violation of another provision, Article 14 cannot be applied unless the facts of the case “fall within the ambit of” some other provision.<sup>149</sup> The Court

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141. *X. v. Austria*, 2013-II Eur. Ct. H.R. 1, 40.

142. *A.H. v. Russia*, App. No. 6033/13 Eur. Ct. H.R. at 26 (2013), <http://hudoc.echr.coe.int/eng?i=001-138911>.

143. *X. v. Austria*, 2013-II Eur. Ct. H.R. 1.

144. *Id.* at 11.

145. *Id.*

146. *Id.* at 31.

147. *Id.*

148. *Id.* at 40.

149. *X. v. Austria*, 2013-II Eur. Ct. H.R. 1, 40.



then stated that “the relationship of a cohabiting same-sex couple living in a stable *de facto* relationship falls within the notion of ‘family life’ just as the relationship of a different-sex couple in the same situation would.”<sup>150</sup> The Court held that the relationship between the three applicants amounted to family life as covered by Article 8 because the two women had cohabited for many years, the child shared their home, and the women cared for the child jointly.<sup>151</sup> Thus, the Court held that Article 14 was applicable in conjunction with Article 8.<sup>152</sup>

The Court then laid out the principles of Article 14 law in conjunction with Article 8 law. First, “in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations.”<sup>153</sup> Further, the Court explained that “[s]uch a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”<sup>154</sup> However, the Court pointed out that “[t]he Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment.”<sup>155</sup> The Court further explained how sexual orientation is covered by Article 14 and analyzed the applicants’ case to determine whether a violation had occurred.<sup>156</sup> The Court then ruled unanimously that there was no violation when the applicants were compared to married couples, and held ten-to-seven that there was a violation when compared to unmarried, different-sex couples.<sup>157</sup>

## 2. Russia is Arbitrarily Discriminating Against the United States.

The first stage in this analysis is to determine whether the Dima Yakovlev Act falls within the ambit of Article 8. Though the Dima Yakovlev Act does not appear to violate Article 8, when Article 8 is taken in conjunction with Article 14, it appears far more likely that a violation has occurred. Article 14 has no enforceability on its own.<sup>158</sup> For a claim to fall

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150. *Id.*

151. *Id.*

152. *Id.* at 41.

153. *Id.*

154. *Id.*

155. *X. v. Austria*, 2013-II Eur. Ct. H.R. 1, 41.

156. *Id.*

157. *Id.* at 58.

158. *Id.* at 41.

under Article 14, it must fall under the ambit of another provision of the Convention.<sup>159</sup> However, the discriminatory action does not have to violate another article in order for it to violate Article 14; it only has to fall within the ambit of the other article's protection.<sup>160</sup> In *A.H. v. Russia*, though there does not appear to be a violation of Article 8, the facts fall within the ambit of Article 8's protections.

Compare the facts of *A.H. v. Russia* with the facts of *X. v. Austria*. In both cases, the applicants were seeking to adopt, but were prevented from having their adoptions approved. Though they had not created an official family unit and though the laws at issue did not inherently violate Article 8, the application of the law in both cases was discriminatory in nature and violated Article 14. Thus, just as Austria's prohibition against homosexuals who sought to adopt their partner's child fell within the ambit of Article 8 in *X. v. Austria*, so too does Russia's prohibition against American families who are seeking to adopt Russian children fall within the ambit of Article 8.

The next stage in the analysis is to determine whether the Dima Yakovlev Act violates Article 14. A violation of Article 14 requires people in relevantly similar situations to be treated differently without any objective or reasonable justification.<sup>161</sup> In *A.H. v. Russia*, the Dima Yakovlev Act explicitly discriminated against Americans seeking to adopt Russian children. This is plain from the text of the law.<sup>162</sup> Americans, and only Americans, are permanently prohibited from adopting Russian children.<sup>163</sup> No other country is subjected to this prohibition in Russia's laws.

There is no objective difference between an American seeking to adopt a Russian child and an Italian, British, Chinese, Libyan, or any other citizen of any other country seeking to adopt a Russian child. In fact, there are other countries that are far more dangerous for children than the United States.<sup>164</sup> Yet, the Dima Yakovlev Act prohibits only Americans from adopting Russian children. Based on the events leading up to the enactment of the

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159. *Id.*

160. *Id.*

161. *X. v. Austria*, 2013-II Eur. Ct. H.R. 1, 41.

162. See generally ROSSIISKAIA GAZETA, translated in RT, *supra* note 1.

163. Barry, *supra* note 7.

164. Compare the under-five mortality rate in the United States to that of other countries. According to the World Health Organization, the under-five mortality rate in the United States is less than ten, whereas Russia has a rate between ten and forty-nine. *Under-Five Mortality Rate Map*, WORLD HEALTH ORGANIZATION (2015), [http://gamapserver.who.int/mapLibrary/Files/Maps/Global\\_UnderFiveMortality\\_2015.png](http://gamapserver.who.int/mapLibrary/Files/Maps/Global_UnderFiveMortality_2015.png). Children are markedly more likely to die before the age of five in almost every Asian, African, and South American country than in the United States. *Id.*

Dima Yakovlev Act, as discussed in Part II, the most favorable rationale behind the law appears to be that it was enacted to prevent Russian children from being adopted by abusive families and to encourage placing Russian orphans with Russian families. However, there is no objective or reasonable justification for prohibiting only American citizens from adopting Russian children as the means for achieving these goals.

Hypothetically, a Thai citizen could adopt a Russian child, take the child home to Thailand, decide to enroll the child in the Thai sex trafficking industry, and the Dima Yakovlev Act would not provide any further protection than what is already afforded under Russian law. The prohibition against American adoptions is entirely arbitrary as it relates to these goals. The Dima Yakovlev Act singles out the United States as being highly abusive to children while still allowing citizens of far more dangerous countries to adopt Russian children.<sup>165</sup> The underinclusiveness of the Dima Yakovlev Act runs contrary to its stated purpose. The Dima Yakovlev Act is discriminatory on its face and does little to truly protect Russian children. As such, the ECHR is likely to find that Russia has violated Article 14 of the Convention in conjunction with Article 8.

#### D. Summary

The ECHR will likely rule that there is no violation of Article 3 and Article 8 of the Convention. The effect of the Dima Yakovlev Act does not rise to the requisite level of severity required to violate Article 3. The American applicants never formed a family unit with the Russian children they sought to adopt. Thus, the Dima Yakovlev Act does not violate Article 8, though the Act does fall within the ambit of Article 8's provisions as required for Article 14 analysis. The ECHR will likely rule in favor of the American applicants because the Dima Yakovlev Act violates Article 14 in

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165. ROSSIISKAIA GAZETA, *translated in* RT, *supra* note 1 ("Zapreshchaetsia peredacha detei, iavliaiushchikhsia grazhdanami Rossiiskoi Federatsii, na usynovlenie (udocherenie) grazhdanam Soedinennykh Shtatov Ameriki, a takzhe osushchestvlenie na territorii Rossiiskoi Federatsii deiatel'nosti organov i organizatsii v tseliakh podbora i peredachi detei, iavliaiushchikhsia grazhdanami Rossiiskoi Federatsii, na usynovlenie (udocherenie) grazhdanam Soedinennykh Shtatov Ameriki, zhelaiushchim usynovit' (udocherit') ukazannykh detei.") ("It is forbidden to pass children, citizens of the Russian Federation over for adoption by citizens of the United States of America. Operation of organizations and bodies involved in selecting and passing children, citizens of the Russian Federation over for adoption by citizens of the United States of America willing to adopt the indicated children is prohibited on the territory of the Russian Federation."). The text of the law makes it clear that the United States is the only country being selected for specific prohibition. There is no similar prohibition in Russia's laws against other countries.

conjunction with Article 8 of the Convention by prohibiting Americans, and only Americans, from adopting Russian children.

#### IV. THE EFFECT OF A JUDGMENT AGAINST RUSSIA

If the prediction in Part III is correct and the ECHR finds that Russia has violated Article 14 of the Convention in conjunction with Article 8, the question remains: what effect will such a judgment have on the conflict? Will a judgment against Russia from the ECHR accomplish the goal of restoring the United States-Russian adoption process? This Part attempts to answer this question by analyzing the enforcement mechanisms of the ECHR and the Council of Europe, exploring the options Russia has available once an adverse judgment has been entered, and examining other methods of effecting change in Russian law. This Part concludes with the proposition that seeking a judgment from the ECHR is the best method available to the United States for effecting change in Russian law.

##### A. *The Enforcement Mechanisms of the European Convention on Human Rights*

In the event the ECHR rules Russia has violated Article 14 of the Convention in conjunction with Article 8, there is a concern that such a judgment will have no effect on either the applicants' specific situations or the status of Russia's adoption ban. The root of this concern lies in the nature of international relations. Nations are sovereign; therefore, they cannot be subjected to any laws to which they do not consent to be subjected. Generally, domestic law is composed of either statutory law, common law, or a combination thereof. The whole of international law, in contrast, is made up of various treaties and agreements between nations. This is because there is no global legislature to enact laws and no global executive to enforce them. Thus, the controlling force of international law is consent. It is through the cooperation of nations that agreements are enforced.

In essence, international law is entirely contractual. Nations enter into contracts called treaties, which detail the standards by which the nations are bound and the mechanisms by which breaches of these standards are enforced. These contracts are inherently self-enforcing due to the lack of an international executive to serve as the enforcer. As such, in order to determine the effect of a violation, it is necessary to look to the enforcement mechanisms that are detailed within the agreement.

Section II (Articles 19-51) of the Convention establishes the ECHR as the entity tasked with ensuring that the contracting parties abide by the

provisions of the Convention.<sup>166</sup> It also establishes the procedures of making an admissible claim against a contracting party and the execution of ECHR judgments.<sup>167</sup> The following articles detail the purpose, jurisdiction, structure, and power of the ECHR.

1. Article 19—Establishment of the Court

The ECHR is established by Article 19 of the Convention.<sup>168</sup> According to Article 19, the ECHR was established for the purpose of “ensur[ing] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.”<sup>169</sup> Article 19 gives the ECHR its name and states that “[i]t shall function on a permanent basis.”<sup>170</sup>

2. Article 26—Single-judge formation, Committees, Chambers, and Grand Chambers.

The structure of the ECHR is laid out in Article 26 of the Convention.<sup>171</sup> Section 1 allows the ECHR to sit in single-judge formation, three-judge committees, seven-judge Chambers, and seventeen-judge Grand Chambers, though it does not give any guidance as to what sittings are required for which types of cases.<sup>172</sup> Section 2 allows the Committee of Ministers to reduce the number of judges in a Chamber to five.<sup>173</sup> Section 3 prohibits a judge sitting as a single judge to examine the applications against his home country.<sup>174</sup> Section 4 requires for a judge from the High Contracting Party concerned in a case to sit as an *ex officio* member of the Chamber or Grand Chamber.<sup>175</sup> If there is no such judge, then the President of the Court must choose from a list submitted in advance by the High Contracting Party.<sup>176</sup> Section 5 lists the requirements for who must sit in a Grand Chamber and who cannot sit in a Grand Chamber.<sup>177</sup>

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166. See generally European Convention on Human Rights, *supra* note 76, at art. 19-51.

167. *Id.*

168. *Id.* at art. 19.

169. *Id.*

170. *Id.*

171. *Id.* at art. 26.

172. European Convention on Human Rights, *supra* note 76, at art. 26, § 1.

173. *Id.* § 2.

174. *Id.* § 3.

175. *Id.* § 4.

176. *Id.*

177. *Id.* § 5.

3. Articles 27-30—Competence of Single Judges; Competence of Committees; Decisions by Chambers on Admissibility and Merits; Relinquishment of Jurisdiction to Grand Chambers

Articles 27-30 of the Convention establish the so-called “pecking order” of the various sittings of the judges.<sup>178</sup> An application may be declared inadmissible by a single judge.<sup>179</sup> If no such declaration is made, then the application may be forwarded to either a Committee or a Chamber.<sup>180</sup> A Committee may declare an application inadmissible.<sup>181</sup> A Committee may also declare an application admissible, and then render judgment on the merits, assuming the underlying question is a subject of well-established case law.<sup>182</sup> If neither a single judge nor a Committee make any declaration or judgment, then a Chamber decides the admissibility and judges the merits of applications.<sup>183</sup> If, however, a case “raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court,” then the Chamber may refer the case to a Grand Chamber.<sup>184</sup>

4. Article 41—Just Satisfaction

Article 41 of the Convention allows for the awarding of just satisfaction.<sup>185</sup> Just satisfaction is only allowed if two criteria are met. First, the ECHR must find that there has been a violation of the Convention or its Protocols.<sup>186</sup> Second, the internal law of the contracting party must allow only partial reparation to be made.<sup>187</sup> Once these two criteria are met, the ECHR is required to award just satisfaction to the injured party, but only if such award is necessary.<sup>188</sup>

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178. European Convention on Human Rights, *supra* note 76, at art. 27-30.

179. *Id.* at art. 27, § 1.

180. *Id.* § 3.

181. *Id.* at art. 28, § 1, ¶ a.

182. *Id.* ¶ b.

183. *Id.* at art. 29, § 1-2.

184. European Convention on Human Rights, *supra* note 76, at art. 30.

185. *Id.* at art. 41.

186. *Id.*

187. *Id.*

188. *Id.*

### 5. Article 46—Binding Force and Execution of Judgments

Article 46 is arguably the most important provision in Section II. It details the binding force and the process executing the judgments of the ECHR.<sup>189</sup> Section 1 places the responsibility for executing a judgment primarily on the contracting party in a particular case.<sup>190</sup> However, Section 2 requires that execution of the judgment be supervised by the Committee of Ministers of the Council of Europe.<sup>191</sup> Section 3 requires the ECHR to clarify any problems of interpretation of a judgment if the Committee of Ministers determines that such problem of interpretation is hindering execution of a judgment.<sup>192</sup> In the event that the Committee of Ministers determines that a contracting party refuses to execute a judgment, Section 4 allows the Committee of Ministers to refer to the ECHR the question of whether that party has failed to execute the judgment.<sup>193</sup> If the ECHR finds a violation of section 1, the case is referred back to the Committee of Ministers so that it may determine what measures should be taken.<sup>194</sup>

#### *B. Enforcement Mechanisms of the Council of Europe*

In light of Article 46 of the Convention, the procedures and enforcement mechanisms of the Council of Europe must be analyzed in order to fully understand how a judgment from the ECHR is enforced. The Council of Europe has its own provisions that govern the actions of the member nations. These provisions are listed in the Statute of the Council of Europe (“Statute”). The Statute is what gives the judgments of the ECHR the weight to be enforced.

#### 1. Article 3

Article 3 provides the basic requirement that all of the member nations of the Council of Europe are required to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”<sup>195</sup> This

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189. *Id.* at art. 46.

190. European Convention on Human Rights, *supra* note 76, at art. 46, § 1.

191. *Id.* § 2.

192. *Id.* § 3.

193. *Id.* § 4.

194. *Id.* § 5.

195. Statute of the Council of Europe, art. 3, May 5, 1949, E.T.S. No. 1.

article requires compliance with the Convention and gives the basis for the enforcement of Article 8.

## 2. Article 8

Article 8 provides the penalty for violating the provisions of the Statute.<sup>196</sup> If a member nation does not comply with the provisions of the Statute or the Convention, then the Committee of Ministers can suspend that nation from the Council of Europe and request that the nation withdraw from the Council entirely.<sup>197</sup> If the member nation refuses to comply with a request to withdraw, then the Committee of Ministers can decide that the nation is no longer a member of the Council of Europe.<sup>198</sup>

### C. *Russia's Possible Responses to an Adverse Judgment*

Having established the procedures of the Convention and the Statute and that the ECHR and Convention have power and weight, the focus of this Note now shifts to Russia's potential responses to an adverse judgment. Predicting exactly how Russia will react to a judgment of the ECHR against it requires a detailed level of analysis of the politics involved. Such analysis is beyond the scope of this Note. Instead, this Part will simply describe Russia's possible responses to an adverse judgment and derive a conclusion to determine how effective a judgment from the ECHR is in granting relief to the applicants.

Russia, like the other Contracting States, has a choice between three possible responses to an adverse judgment from the ECHR: (1) Russia can comply with the judgment; (2) Russia can ignore the judgment and face the consequences; or (3) Russia can withdraw from the Convention and the Council of Europe. However, as mentioned above, ignoring a judgment of the ECHR results in the removal of that nation from the Council of Europe. Thus, options 2 and 3 have no substantive distinction between them. The only difference is that with option 2 Russia's departure from the Council of Europe is caused by the party, not Russia itself.

Exactly how Russia would choose to comply with an adverse judgment depends on how the ECHR crafts its judgment. If the Americans get their relief sought, then Russia would be required to repeal the portion of the Dima Yakovlev Act that bans the adoption of Russian children by American citizens. If, however, the ECHR rules in favor of Russia either in whole or in part, then such response would not be necessary. Any response to a

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196. *Id.* at art. 8.

197. *Id.*

198. *Id.*



partially-adverse judgment would depend on the precise nature of the ECHR's judgment.

Removal from the Council of Europe appears to be the only threat Russia faces if it chooses to ignore an adverse judgment.<sup>199</sup> The question Russia must ask is whether the consequences of that threat, if realized, are severe enough to cause Russia to want to repeal the adoption ban. The deciding factor for Russia will be the value of remaining a member of the Council of Europe. If Russia determines that continuing to enforce the adoption ban as a political tactic is not worth the cost of losing its membership in the Council of Europe, then it will repeal the ban. However, if Russia decides that the tragedies that have befallen its children are unforgiveable, then it will either withdraw or allow the Committee of Ministers to remove it from the Council of Europe. As will be explained in the next section, though Russia does control the board and it may choose to ignore a judgment from the ECHR, seeking a judgment against Russia is the best option available to the United States for effecting change in Russian law.

*D. Seeking Relief from the European Court of Human Rights is the United States' Best Strategy*

Though the power ultimately rests in Russia's hands, seeking a judgment from the ECHR is the best strategy available to Americans. Currently, the United States has at least two alternative options available: (1) the United States could attempt to persuade Russia to repeal its adoption ban through diplomacy and negotiation; or (2) the United States could seek relief from the United Nations. The former has a low probability of success. It has been more than three years since the enactment of the Dima Yakovlev Act and the Russians do not appear to be any closer to backing down today than they did in December 2012.<sup>200</sup>

The latter option also appears unlikely to succeed. Though Russia is a party to the United Nations Convention on the Rights of the Child, the United Nations Committee on the Rights of the Child (the "Committee") has been passive in its reaction to the Dima Yakovlev Act. In its "Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation," the Committee stated that it was

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199. *Id.*

200. Russian Senator Yelena Mizulina, said, "It was the right step to pass the Dima Yakovlev Law. This is the only way that allows us to control the children's fates and offer them protection. Probably we should have passed it earlier." *Russian Senator Warns of Dangers of International Adoption After Fresh US Scandal*, RT (Mar. 11, 2016), <https://www.rt.com/politics/335251-russian-senator-points-at-dangers/>.

“seriously concerned that: . . . The Dima Yakovlev Federal Act . . . has eliminated the prospect of adoption for a considerable number of children, in particular children with disabilities in care institutions.”<sup>201</sup> However, the Committee failed to explicitly condemn the ban in its official recommendations. Instead, the Committee recommended that Russia facilitate the adoption process in general more effectively by not allowing politics to get in the way of a child’s well-being, and set up methods of screening to ensure the well-being of children adopted by residents of foreign nations.<sup>202</sup> While the Committee hinted at its disapproval of the adoption ban, it did not appear to think that the Dima Yakovlev Act expressly violates the Convention on the Rights of the Child.

The report was of little effect. As stated previously, Russia is not backing down on the adoption ban. Russia does not have to report to the Committee again until 2019. It is possible that upon review of the situation in Russia, over a longer time period, the Committee will be less passive in its disapproval of the ban should they determine that it is directly harming the well-being of Russian children. However, at this stage, one can only speculate as to what the Committee’s next report on Russia will conclude. The United Nations does not currently appear to desire exerting pressure on Russia to change its adoption policy. The Committee’s report simply does not bear the weight that a resolution of the General Assembly bears. With Russia being a current and highly influential member of the Security Council, it is unlikely that the United Nations will pass a resolution against Russia’s adoption ban. To do so would likely cause Russia to retaliate through its position on the Security Council. Without a clearer showing of a violation of a treaty or convention, Russia is unlikely to feel any pressure to remove their adoption prohibition.

Having explored the provisions of the European Convention on Human Rights and the Statute of the Council of Europe in the preceding section, the tools of enforcement available to the ECHR in enforcing their judgments against Contracting States are now clear. There appears to be a presumption that the Contracting States will take adequate measures to ensure compliance with adverse judgments from the ECHR.<sup>203</sup> However, in the

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201. Comm. on the Rights of the Child, Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation, U.N. Doc. CRC/C/RUS/CO/4-5, at 11 (Feb. 25, 2014).

202. *Id.* at 11-12.

203. European Convention on Human Rights, *supra* note 76, at art. 46, § 1.

event that a Contracting State fails to take such measures, the Council of Europe may step in to ensure compliance.<sup>204</sup>

The sole tool that the Council of Europe has to enforce judgments from the ECHR is the threat of expulsion from the Council of Europe.<sup>205</sup> The threat of expulsion is a strong threat and the corresponding weight of a judgment from the ECHR is quite heavy. Generally, nations prefer to follow the principles of international law so that they can work together and maintain amicable relations.<sup>206</sup> If a nation violates international law, it runs the risk of incurring poor standing in the international community and possibly incurring sanctions from other nations. The threat of condemnation and ostracization from the international community is thus a strong tool of enforcement for the Council of Europe and the ECHR to employ.

Neither direct diplomacy nor the United Nations are viable options for effecting change in Russian law in the near future. Diplomacy will not put enough pressure on Russia to rethink their ban and the United Nations does not believe that the ban has yet violated the Convention on the Rights of the Child. Thus, seeking a judgment from the ECHR is the fastest, most effective means of effecting change in Russian law. Should the ECHR find Russia has violated the Convention, the remaining member nations of the Convention will be obligated to participate in providing the teeth for enforcing the judgment.

A judgment from the ECHR would effectively secure the cooperation of nearly all of the nations of Europe in pressuring Russia into repealing its adoption ban whereas those nations would ordinarily have no reason to become involved in the political chess match between the United States and Russia. A judgment from the ECHR will accomplish what direct diplomacy cannot accomplish and what the United Nations is currently unwilling to accomplish. Such a judgment will analyze the adoption ban from an objective perspective, determine whether it violates the provisions of the Convention, and then place great pressure on Russia to repeal it. It is for this reason that seeking a judgment against Russia from the ECHR was and is the United States' best strategy for effecting change in Russian law.

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204. *Id.* § 5. The Committee of Ministers mentioned in Article 46 is an organ of the Council of Europe. Statute of the Council of Europe, *supra* note 195, at art. 10 § 4-5.

205. Statute of the Council of Europe, *supra* note 195, at art. 8.

206. As Louis Henkin so eloquently put it, "[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all the time." LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

## V. CONCLUSION

The extreme political nature of the Dima Yakovlev Act has resulted in the creation of a prohibition that was hastily enacted out of spite. Although the abuses that have befallen some of the Russian children adopted by American families are indeed tragic, it is far more tragic that Russia has chosen to respond to these events by prohibiting all such adoptions. By arbitrarily limiting the number of potential adoptive families, Russia has increased the number of orphans who will never have a loving and caring family. Because many of those orphans have severe medical needs that cannot be provided for in Russia, Russia has effectively condemned its most afflicted orphans to death by cutting off their opportunity to be adopted by American families who are willing to provide the care that they need.

The power of change ultimately lies in Russia's hands. Seeking a judgment from the ECHR was the best move for the United States to make. Unfortunately, it is neither a perfect nor a certain solution. After more than three years, the ECHR has not scheduled a hearing for the case. The long delay has already resulted in some of the Russian adoptees being adopted by other families. For the Americans who bonded with those children, there can be no relief. The fight is not in restoring the American applicants to their original positions, but rather it is in working towards the revocation of an arbitrary and unjust law. A ruling against Russia from the ECHR will apply a substantial amount of political pressure that may well cause Russia's leaders to rethink the adoption ban. However, it is equally likely that Russia could ignore such a judgment due to the highly political motivations behind the ban. Russia holds the cards. The battle is in convincing Russia to fold. A judgment from the ECHR will go a long way towards accomplishing that goal.

Relations between the United States and Russia have always been rather frigid. The United States' Magnitsky Act and Russia's Dima Yakovlev Act are no exceptions to this. When children are involved in any controversy, however, hearts of ice can often melt when the realities behind the policies are seen and understood. Sadly, the passion that people have for protecting children can also blind them. Russia, in its desire to protect its children from abuse, was blinded to the consequences of a full prohibition on American adoptions. If the prediction in this Note is correct, and the ECHR rules against Russia, then perhaps its eyes will be opened and both Russia and the United States can begin implementing policies that will both allow children to receive the loving families they desperately need while also preventing tragic cases of abuse from occurring in the future. "And now the

fight continues for all orphans and children who need families who will love and care for them—until they too can all go home.”<sup>207</sup>

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207. KIM DE BLECOURT, *UNTIL WE ALL COME HOME: A HARROWING JOURNEY, A MOTHER'S COURAGE, A RACE TO FREEDOM* (2012).