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# International Adoption Law: A Comparative Analysis

ANDREW C. BROWN\*

## I. Introduction

Over the past decade, the number of international adoptions to the United States has increased, reaching a peak of 22,884 adoptions in 2004.<sup>1</sup> International adoption has also become increasingly visible over the years due to the trend amongst high-profile celebrities of adopting children from Third World countries.<sup>2</sup> Although the coverage of these celebrity adoptions makes the process of international adoption seem relatively quick and easy, this is certainly not the case for either the celebrity or the majority of “regular” families seeking to adopt from other countries. Families who wish to adopt a child from another country face a number of unique legal challenges that are often in a state of flux due to frequent (and often unpredictable) changes in internal governance and relationships between nations.

Foremost among the challenges faced by prospective adoptive families is navigating the various laws with which they must comply. In order for an American family to adopt a child from another country, that family must comply with three sets of laws: (1) U.S. Federal law, (2) the laws of the child’s home country, and (3) the laws of the state in which the family resides.<sup>3</sup> Given the wide range of state adoption laws, this paper will focus solely on U.S. federal law and international law, but it should be kept in mind that the legal status of any international adoption is also dependent upon state law.<sup>4</sup> U.S. laws

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1. U.S. Dep’t of State, Total Adoptions to the United States, [http://adoption.state.gov/news/total\\_chart.html](http://adoption.state.gov/news/total_chart.html) (last visited Jan. 3, 2009).

2. Vicki Peterson, *International Adoptions: Celebrities vs. Real People*, WASH. POST, Oct. 26, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/discussion/2006/10/26/DI2006102600640.html>.

3. U.S. Dep’t of State, How to Adopt, <http://adoption.state.gov/about/how.html> (last visited Dec. 28, 2009).

4. Any individual interested in adopting internationally should first determine whether or not they are eligible to adopt under the laws of the state in which they reside. For example, certain states, like California,

regarding international adoption are now subject to "The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention), which entered into force in the United States in April 2008.<sup>5</sup> I will begin by examining the provisions of this landmark international agreement and its effects on the laws of international adoptions. Then, by way of illustration, I will compare and contrast the adoption laws of China, a country that is party to The Hague Adoption Convention, and Russia, a country that is not party to the Convention.<sup>6</sup> Both China and Russia were in the top five for countries U.S. families adopted from during Fiscal Year 2008.<sup>7</sup> This comparison will show that, although the Hague Adoption Convention is a necessary tool by which the international community can provide for the well-being of adopted children and prevent many abuses that have plagued international adoptions, it still has some significant weaknesses that must be worked out if it is to truly be effective.

## II. The Hague Adoption Convention

### A. HISTORY OF THE CONVENTION

The Hague Adoption Convention was concluded on May 29, 1993. The work on the agreement, however, had been ongoing since it was first proposed by the Sixteenth Session of the Hague Conference on Private International Law (HCCH) in 1988.<sup>8</sup> It was at the conclusion of this session of the conference, which meets every four years, when the members recommended that the agenda for the seventeenth session should include "the preparation of a convention on the adoption of children coming from abroad."<sup>9</sup> The Permanent Bureau of the HCCH noted that the "dramatic increase in international adoptions which [sic] had occurred in many countries since the late 1960s" had resulted in a "worldwide phenomenon" of the extensive migration of children over long distances and between vastly different societies and cultures.<sup>10</sup> This increased migration of children brought to the forefront many different and challenging legal issues that most countries were ill-equipped to handle at the time. Thus, it was recommended that the HCCH make the issue of international adoptions a priority for the seventeenth session in order to ensure the protection of the children being adopted.

In order to address the various issues raised by international adoptions, the HCCH focused on four main requirements. First, the HCCH recognized the "need for the estab-

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permit adoptions by same-sex couples while others, like Utah, remain resistant to adoptions by same-sex couples. Thus, the legal status of an international adoption by a same-sex couple that resides in a state that forbids such adoptions may be challenged. See, Lambda Legal, *In Your State*, <http://www.lambdalegal.org/our-work/states> (last visited Dec. 28, 2009).

5. U.S. Dep't of State, *Hague Convention Overview*, <http://adoption.state.gov/hague/overview.html> (last visited Nov. 16, 2008).

6. U.S. Dep't of State, *Convention Countries*, <http://adoption.state.gov/hague/overview/countries.html> (last visited Jan. 12, 2009).

7. Total Adoptions to the United States, *supra* note 1.

8. Hans Van Loon, *Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption*, *THE INTL. J. OF CHILDREN'S RIGHTS* 3: 463-468 (1995).

9. Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ¶ 57, 1994, *available at* <http://hcch.e-vision.nl/upload/exp133e.pdf> [hereinafter Explanatory Report].

10. *Id.*

lishment of legally binding standards which [sic] should be observed in connection with intercountry adoption."<sup>11</sup> Such a common set of standards would aid countries in answering vital questions such as how to identify situations in which an international adoption is appropriate, and what law should govern the arrangement.<sup>12</sup> The second requirement identified by the HCCH was the need to establish a system of supervision to ensure that the standards of the Convention were followed and that would be able to prevent adoptions that may not be in the best interest of the child or that were secured through fraud or bribery.<sup>13</sup> This requirement recognizes the ongoing abuse of "child trafficking" in connection with international adoptions. According to the United Nations Children's Fund (UNICEF), nearly 1.2 million children are trafficked each year for various purposes.<sup>14</sup> In addition to being trafficked for labor or sexual exploitation, many of these children are being "sold" outside of official adoption channels.<sup>15</sup> The third and fourth requirements recognize the need for the establishment of effective channels of communication and the encouragement of cooperation between countries of origin and destination in international adoptions.<sup>16</sup>

Under the Hague Adoption Convention, each "Contracting State" (that is, the countries party to an adoption) is required to appoint a "Central Authority" to oversee the process and determine that the provisions of the Convention are followed.<sup>17</sup> In the United States, the Department of State is the Central Authority.<sup>18</sup> As such, the State Department is charged with a number of tasks, which include working with U.S. embassies and host governments on issues relating to adoptions, providing timely information to prospective adoptive families, and overseeing the international adoption process.<sup>19</sup> Although the need for such a supervisory authority is apparent, the effectiveness of the supervision is less clear given that the majority of the illicit sales of children occur behind the "façade of legitimate adoptions."<sup>20</sup> Thus, while the Hague Adoption Convention may cut down on the number of illegal baby sales that occur in Convention countries, such

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11. *Id.*

12. *Id.*

13. *Id.*

14. UNICEF, *Child Protection from Violence, Exploitation, and Abuse: Child Trafficking*, [http://www.unicef.org/protection/index\\_exploitation.html](http://www.unicef.org/protection/index_exploitation.html) (last visited Jan. 25, 2008).

15. Greece, which is not a signatory to the Hague Adoption Convention, is becoming increasingly popular as a source of private adoptions for people who are unable to adopt children through official channels. Kitsantonis and Brunwasser explain that the lack of regulations in Greece concerning private adoptions has allowed an illicit adoption network to develop in that country where prospective adoptive parents can simply purchase children from their birth parents. According to Greek authorities, the most desirable babies are fetching prices upwards of \$30,000. The sales often occur through brokers who arrange the deals and take a significant cut of the price paid by the adoptive parents. Since these transactions are, by their nature, illegal, the brokers often cheat the birth parents out of their portion of the selling price. Perhaps more disturbing are the reports of mothers who are forced to sell their children in order to satisfy previously owed debts. See Niki Kitsantonis & Matthew Brunwasser, *Baby Trafficking is Thriving in Greece*, INT'L HERALD TRIBUNE, Dec. 18, 2006, available at <http://www.iht.com/articles/2006/12/18/news/babies.php>.

16. See Explanatory Report, *supra* note 9.

17. See Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 6, May 29, 1993, S. Treaty Doc. No. 105-51 (1998), available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69).

18. U.S. Dep't of State, Our Role, <http://adoption.state.gov/meet/role.html> (last visited Jan. 15, 2009).

19. *Id.*

20. See Kitsantonis, *supra* note 15.

sales continue to thrive in countries where the Convention holds no legal authority. The third requirement recognized the need for the “establishment of channels of communications between authorities in countries of origin of children and those where they live after adoption.”<sup>21</sup> Such channels of communications, conceivably administered by the Central Authorities appointed by each country per Article 6 of the Convention, would enable countries of origin to ensure the protection of their adopted children and prevent many of the abuses outlined by the second requirement. Finally, the HCCH recognized the need for “co-operation between the countries of origin and of destination” in order to better facilitate the adoption process and provide for the welfare of the adopted children.<sup>22</sup>

## B. THE HAGUE ADOPTION CONVENTION AND THE UNITED STATES

Following the completion of the Hague Adoption Convention in May 1993, it was sent to member countries for ratification. The United States signed the Convention on March 31, 1994 and began the process of bringing its adoption laws into line with the requirements of the Convention.<sup>23</sup> In 2000, both Houses of the U.S. Congress passed the “Inter-country Adoption Act of 2000” (IAA), which provided for the “implementation by the United States of the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption.”<sup>24</sup> President Clinton signed the IAA that same year, which led to the Convention entering into force in the United States in April 2008.<sup>25</sup>

In implementing the requirements of the Hague Adoption Convention, the IAA took several important steps: (1) it designated the U.S. Department of State as the Central Authority for the administration and oversight of international adoptions to which citizens of the United States are a party; (2) required that any person or group that wished to provide international adoption services become accredited, and outlined the process by which such a person or group becomes accredited; (3) amended the definition of a “child” in the Immigration and Nationality Act (8 U.S.C. 1101(b)(1)) to bring it into line with the requirements of the Hague Adoption Convention; (4) provided for the enforcement of the Convention requirements; and (5) provided that the IAA and the Hague Adoption Convention would preempt any inconsistent state law.<sup>26</sup>

The provision requiring accreditation of any person or group wishing to provide international adoption services is especially critical in light of the overarching concern of the international community to curb the problem of child trafficking. In order for a group or individual to receive accreditation to perform international adoption services, the group or individual must comply with standards outlined in Section 96 of Title 22 of the U.S. Code, which governs foreign relations.<sup>27</sup> The standards outlined in Subpart F of 22 C.F.R. § 96 (Subpart F) include provisions regarding the structure of agencies seeking accreditation, as well as specific ethical guidelines that must be followed in order to re-

21. See Explanatory Report, *supra* note 9.

22. *Id.*

23. Carrie Craft, *What is the Hague Convention on Inter-country Adoption?*, ABOUT.COM, <http://adoption.about.com/od/international/f/whathague.htm> (last visited Jan. 13, 2009).

24. Inter-country Adoption Act of 2000, 42 U.S.C. §§ 14901-14944 (2000).

25. See U.S. Dep’t of State, Hague Convention Overview, *supra* note 5.

26. *Id.*

27. U.S. Dep’t of State, Accreditation: Becoming Accredited, <http://adoption.state.gov/hague/accreditation/process.html> (last visited Jan. 20, 2009).

ceive accreditation.<sup>28</sup> These ethical guidelines center on the overall goal of The Hague Adoption Convention and the IAA, which is to ensure that any international adoption is in the best interests of the child.<sup>29</sup> In addition to the ethical guidelines, Subpart F also contains an exhaustive list of corporate structure and internal auditing requirements with which any agency seeking accreditation must comply.<sup>30</sup> With respect to the problem of child trafficking, Section 96.36 of the code explicitly prohibits the giving of “money or other consideration, directly or indirectly, to a child’s parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child.”<sup>31</sup> Additionally, Section 96.34 creates more safeguards against the illicit sale of children by outlining compensation requirements for employees of an agency seeking accreditation under the IAA.<sup>32</sup> The provisions of this section specifically outlaw the use of incentive fees for each child successfully adopted, and require that any salaries paid to employees of agencies seeking accreditation not be “unreasonably high” in relation to the kind of work performed.<sup>33</sup> Under the IAA, any violation of the accreditation requirement is subject to stiff fines and the possibility of up to five years imprisonment depending on the severity of the violation.<sup>34</sup>

### 1. *Criticisms*

Although the strict provisions of the IAA aimed at curtailing the incidents of child trafficking are certainly effective, a major loophole remains. Under the current law, only agencies that engage in adoptions between the United States and countries that are also signatories to The Hague Adoption Convention are required to be accredited.<sup>35</sup> Thus, any agency or individual that facilitates adoptions between the United States and non-convention countries—which include several major sources of American adoptions like Kazakhstan and Russia—are not required to abide by the requirements for accreditation as outlined in 22 C.F.R. § 96. In theory, then, this loophole could be used by less reputable individuals or agencies to engage in the purchasing of children for adoption. This is not to say that all adoption agencies that are not accredited or that work with non-convention countries are disreputable or engage in illegal practices. But prospective adoptive parents should be aware that in order to attain accreditation under the terms of the Hague Adoption Convention, a given agency must meet and abide by the highest standards of ethics and practice.

Besides the loophole in the IAA, concerns have also been raised about the way in which its requirements have been implemented. The Evan B. Donaldson Adoption Institute (Donaldson Institute), a non-profit adoption research and advocacy organization that has been a frequent advisor to Congress regarding adoption policies, has expressed concerns

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28. Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000, 22 C.F.R. § 96 (2007).

29. *Id.*

30. 22 C.F.R. § 96.33.

31. 22 C.F.R. § 96.36(a).

32. 22 C.F.R. § 96.34(a)–(f).

33. *Id.*

34. See 44 U.S.C. § 14944 (2000).

35. U.S. Dep’t of State, Accreditation, <http://adoption.state.gov/hague/accreditation.html> (last visited Jan 20, 2009).

that the United States has not taken strong enough action in its implementation of the Hague Adoption Conventions through the IAA to address some of the most egregious abuses that occur in international adoptions.<sup>36</sup> Between the time that the IAA was passed in 2000 and the time that it took effect in 2008, the Donaldson Institute, among others, issued recommendations to Congress and the State Department concerning the implementation of the requirements of the Hague Adoption Convention. Specifically, the Donaldson Institute criticized IAA regulations for placing too much emphasis on the initial accreditation process and not enough emphasis on continued monitoring and enforcement.<sup>37</sup> The Donaldson Institute argued that “the regulatory scheme largely focuses on accreditation techniques that . . . are primarily used to measure an organization’s quality and capacity against its own past performance, not adherence to industry [and] regulatory standards.”<sup>38</sup> In order to overcome these perceived deficiencies in the regulations, the Donaldson Institute proposed several recommendations. First, it recommended that the State Department require agencies to regularly compile and disclose important information regarding its practices and performance in a standardized format.<sup>39</sup> Additionally, the Donaldson Institute recommended that the State Department conduct regular monitoring and oversight of accredited adoption organizations, as opposed to the internal monitoring requirements provided in the IAA.<sup>40</sup> Such oversight, according to the Donaldson Institute, would require that the State Department evaluate each accredited agency by its “compliance with system-wide practice standards,” and then compare this to the “median performance within the industry” based on the information required in the standardized reporting mentioned above.<sup>41</sup>

Another common criticism of the implementation of the Hague Adoption Convention is the increased difficulty in navigating the international adoption process as signatory nations struggle to bring their laws into alignment with the requirements of the Convention.<sup>42</sup> This situation has led to a slowdown in the number of international adoptions to the United States in recent years, and has left many families in a legal limbo as to when, and even if, their adoption will occur.<sup>43</sup> Much of this uncertainty seems to stem from a lack of transparency with respect to the promulgation of adoption policies that leaves even the State Department unclear as to what steps are being taken within individual countries.<sup>44</sup> Thus, adoption agencies and attorneys are often left in the dark as to internal legal

36. Cindy Freidmutter, *Recommendations for Implementing the Hague Convention & the Intercountry Adoption Act of 2000*, EVAN B. DONALDSON ADOPTION INST., June 18, 2001, available at [http://www.adoptioninstitute.org/policy/iaa\\_regs\\_critique\\_final.pdf](http://www.adoptioninstitute.org/policy/iaa_regs_critique_final.pdf).

37. *Id.* at 1.

38. *Id.* at 2.

39. The Donaldson Institute recommended that this standardize reporting include information on such factors as fees, services, disruption rates, and the time taken to finalize adoptions from given countries. *Id.* at 4.

40. *Id.*

41. *Id.*

42. Interview by Judy Woodruff with Susan Soon-Keum Cox, Holt International, and Kathleen Strotzman, Executive Director of the Congressional Coalition on Adoption Institute, *NewsHour* (PBS television broadcast July 1, 2008), transcript available at [http://www.pbs.org/newshour/bb/social\\_issues/july-dec08/adoption-abroad\\_07-01.html](http://www.pbs.org/newshour/bb/social_issues/july-dec08/adoption-abroad_07-01.html) [hereinafter Judy Woodruff Interview].

43. *Id.*

44. See U.S. Dep’t of State, Adoption Notice: Moldova, Jan. 30, 2009, <http://adoption.state.gov/news/moldova.html> (last visited Feb. 18, 2009) (discussing conflicting reports about possible bans on international

developments of foreign countries until the final versions of laws are made public. Besides the inconvenience and uncertainty to adoptive families, the most significant side effect of the slowdown is the number of children in desperate need of a loving home who are left waiting.<sup>45</sup> A prime example of this problem can be found in Guatemala, which was the number one source of international adoptions to the United States during Fiscal Year 2008. In September 2008, the State Department announced an immediate halt to all adoptions coming from Guatemala until further notice.<sup>46</sup> Guatemala signed on to The Hague Adoption Convention in March 2003 and subsequently passed necessary legislation to start bringing its adoption practices into compliance.<sup>47</sup> But the nation does not yet possess the "regulations and infrastructure necessary to meet its obligations under the [Hague Adoption] Convention."<sup>48</sup> As a result of its obligations as a country in which The Hague Adoption Convention has entered into effect, the United States is unable to process and issue the paperwork required for Convention adoptions until Guatemala has met its Convention obligations.<sup>49</sup> At the time of this writing, it is unclear when Guatemala will achieve compliance, allowing the ban on adoptions from that country to be lifted. This situation is further complicated by the inability of U.S. authorities to verify what changes need to be made to Guatemalan laws and institutions, or the progress of Guatemalan authorities in making these changes.<sup>50</sup> Although the ongoing situation with Guatemala is illustrative of one of the problems raised by the implementation of the Hague Adoption Convention, the vast majority of adoption professionals note that the short-term inconvenience and uncertainty, while frustrating to families seeking adoptions, is outweighed by the long-term benefits that ethical guidelines for international adoptions will yield.<sup>51</sup>

## 2. *Response and Reform*

By the time that the Hague Adoption Convention (through the IAA) entered into force in the United States in April 2008, many of the Donaldson Institute's recommendations had been implemented. Congress addressed one of the primary criticisms of the IAA—its lack of continued oversight of accredited adoption agencies—by establishing two Accrediting Entities (AEs) that are charged with handling the accreditation process.<sup>52</sup> The two AEs designated by the State Department are the Council on Accreditation and the Colo-

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adoptions from Moldova, and recommending that American adopters not pursue adoptions from this country until further information is available.); *see also*, U.S. Dep't of State, U.S. Not Processing Guatemalan Adoptions, Sept. 12, 2008, <http://adoption.state.gov/news/guatemala.html> (last visited Jan. 26, 2009) (stating that adoptions between the U.S. and Guatemala have been suspended because the U.S. State Department is unable to verify if Guatemalan laws have been sufficiently amended to come into compliance with the Hague Adoption Convention.).

45. *See* Judy Woodruff Interview, *supra* note 42.

46. *See* U.S. Not Processing Guatemalan Adoptions, *supra* note 44.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* Judy Woodruff Interview, *supra* note 42.

52. Derek Repp, *New Intercountry Adoption Standards Implemented in United States*, AMERICA.GOV, May 1, 2008, available at <http://www.america.gov/st/diversity-english/2008/May/20080430094700zjsredna0.1149866.html?CP.rss=true>.



rado Department of Human Services.<sup>53</sup> These two AEs are charged with monitoring the agencies and individuals that they have accredited “at least annually” to ensure that they remain in compliance with the accreditation standards outlined by Subpart F.<sup>54</sup> Accredited agencies and individuals comply with this requirement of annual oversight by attesting “that they have remained in substantial compliance” with the accreditation requirements of Subpart F and providing “supporting documentation to indicate ongoing compliance.”<sup>55</sup>

Additionally, the AEs must investigate any complaints lodged against accredited agencies or individuals.<sup>56</sup> In order to assist the AEs in the execution of their oversight duties, the State Department established a web-based complaint registry in which prospective adoptive parents who have problems with their accredited agency can file a complaint against the provider.<sup>57</sup> The complaint will then be referred to the AE that handled the particular agency’s accreditation for resolution.<sup>58</sup> In order for an individual to file a complaint through the State Department’s registry, the complaint must involve: (1) the Hague Adoption Convention, meaning that the child’s country of origin is also a party to (and has ratified) the Convention; (2) the IAA; (3) the implementing regulations for the IAA as set out in 22 C.F.R. §§ 96–98; or (4) a Hague Convention adoption case.<sup>59</sup> The individual with a complaint, however, must first attempt to resolve it with their adoption service provider before the State Department will get involved.<sup>60</sup> While the annual compliance provisions for accredited agencies and the Complaint Registry program address many of the complaints that the Donaldson Institute and others had regarding the lack of continued monitoring of agencies and individuals in the original drafts of the IAA, significant problems remain. An examination of the Complaint Registry site once again reveals what seems to be the Achilles’ heel of the Hague Adoption Convention as implemented through the IAA. If an individual has a complaint that does not involve a Hague Convention country or that is not governed by one of the regulations listed above, then the complaint cannot be filed through the State Department’s Complaint Registry.<sup>61</sup> Instead, the State Department instructs such individuals to contact their State adoption agency licensing authority for assistance on resolving the problem.<sup>62</sup> Thus, we see again that individuals who choose to adopt from a country that is not a party to The Hague Adoption Convention are left with little recourse in resolving any problems that may arise during the adoption process.

As countries that are party to The Hague Adoption Convention come into compliance with its requirements, the common standards should serve to make the process more efficient and transparent. Outside of the standards imposed by the Convention, however, an

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53. *Id.*

54. See 22 C.F.R. § 96.66(a).

55. See 22 C.F.R. § 96.66(c).

56. See 22 C.F.R. § 96.66(b).

57. See Derek Repp, *supra* note 52; U.S. Dep’t of State, Hague Complaint Registry, <http://adoption.state.gov/hague/overview/complaints.html> (last visited Jan. 20, 2009).

58. Hague Complaint Registry, *supra* note 57.

59. U.S. Dep’t of State, Hague Convention on Intercountry Adoptions Complaint Registry, <http://adoption.usca.state.gov/HCRWeb/WelcomeForm.aspx> (last visited Jan. 24, 2009).

60. *Id.*

61. *Id.*

62. *Id.*

individual nation is free to establish and enforce its own laws regarding adoptions in keeping with its unique public policy interests.<sup>63</sup> Thus, families seeking international adoptions must stay abreast of the laws of the country from which they wish to adopt, regardless of whether or not that country is a party to the Convention. The following sections will examine the adoption laws of two of the most popular countries of origin for American adoptive families: China and Russia.

### III. China

#### A. BACKGROUND

For many years, China has been among the most popular countries for adoptions by U.S. citizens.<sup>64</sup> During Fiscal Year 2008, there were 3,909 adoptions to the United States from China, making it second only to Guatemala.<sup>65</sup> This popularity has been due, in large part, to the overall stability and reliability of the Chinese adoption system.<sup>66</sup> In addition, the ongoing family-planning policy imposed by the Chinese government that limits families to one child has resulted in a large number of children available for adoption.<sup>67</sup> In March 2008, the Chinese government, citing continued population growth, announced that its "one-child" policy would continue for at least another decade as the Chinese population continues to grow.<sup>68</sup> The "one-child" policy has drawn considerable international criticism because, according to critics, it has led to abuses such as forced abortions, sterilization, and abandonment.<sup>69</sup> To its credit, the Chinese government has taken some steps to cut down on these abuses, yet critics insist that the practices continue, especially in the impoverished rural parts of the country.<sup>70</sup> Because Chinese culture is marked by a preference for sons who will be able to carry on the family name and inherit ancestral lands, many of the children that are either aborted or abandoned are female.<sup>71</sup> Those that are found (a high number because the abandoned children are often left in public places) are brought to orphanages where they are placed up for adoption.<sup>72</sup> This policy combined with China's enormous population naturally results in a significant supply (for lack of a better term) of children in need of adoption.

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63. See, e.g., Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 24, *supra* note 17.

64. See Total Adoptions to the United States, *supra* note 1.

65. *Id.*

66. Adoption.com, China Adoption, <http://china.adoption.com> (last visited Jan. 25, 2009).

67. *Id.*

68. China is currently the most populous country on earth with approximately 1.3 billion people. According to U.S. State Department estimates, the population of China continues to grow at about 0.6% per year. *China to Keep One-Child Policy*, CNN, March 10, 2008, <http://www.cnn.com/2008/WORLD/asiapcf/03/10/china.onechild/index.html>.

69. Jim Yardley, *China Says 1-Child Limit Stays*, BOSTON GLOBE, March 11, 2008, available at [http://www.boston.com/news/world/articles/2008/03/11/china\\_says\\_1\\_child\\_limit\\_stays](http://www.boston.com/news/world/articles/2008/03/11/china_says_1_child_limit_stays).

70. *Id.*

71. See China Adoption, *supra* note 66.

72. *Id.*

China, as a signatory to the Hague Adoption Convention, must meet the requirements of the Convention in all adoptions of Chinese children by citizens of other countries.<sup>73</sup> Just as the United States has designated the State Department as its Central Authority for the processing of all international adoptions to which the United States is a party, the Chinese Center for Adoption Affairs (CCAA) is the Central Authority for all international adoptions to which China is a party.<sup>74</sup> The CCAA, in addition to being the Central Authority for China, promulgates a wide variety of very specific regulations covering adoptions of Chinese children by foreign citizens.<sup>75</sup>

## B. CHINESE ADOPTION REGULATIONS

Due in some measure to the controversy surrounding its family planning policies as well as its long history of being closed off to the outside world, Chinese authorities are extremely sensitive about international adoptions and the inevitable intrusion of foreign entities that such adoptions necessitate.<sup>76</sup> As a result, the CCAA has promulgated a wide-range of specific rules concerning adoptions by foreign citizens.<sup>77</sup>

### 1. *Who May Adopt*

The CCAA has enacted detailed rules that set forth guidelines severely limiting the kinds of individuals who are permitted to adopt a Chinese child.<sup>78</sup> As established by the Adoption Law of the People's Republic of China, prospective adoptive parents must meet strict requirements on a range of factors, from age and income to sexual orientation and medical history.<sup>79</sup>

An example of these stringent requirements is found in the Chinese government's rules relating to the marital status of foreign individuals who wish to adopt.<sup>80</sup> On May 1, 2007, China enacted a new adoption policy that prohibited the adoption of Chinese children by unmarried individuals from foreign countries.<sup>81</sup> The reason for this amendment to Chinese adoption policy may be due, in part, to China's ban on adoptions by homosexuals.<sup>82</sup> Although laws prohibiting adoption by homosexual couples are quite common (as mentioned earlier, many U.S. jurisdictions have similar bans), same-sex couples have been able to circumvent these bans by adopting from countries that allow single-parent adoptions.<sup>83</sup>

73. U.S. Dep't of State, Country Specific Information for China, <http://adoption.state.gov/country/china.html> (last visited Jan. 25, 2009).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See China Adoption, *supra* note 66.

79. China Center for Adoption Affairs, What Requirements Should the Adopters Meet? (Oct. 10, 2005), [http://www.china-ccaa.org/site%5Cinfocontent%5CSWSY\\_20051009022651140\\_en.htm](http://www.china-ccaa.org/site%5Cinfocontent%5CSWSY_20051009022651140_en.htm).

80. See China Adoption, *supra* note 66.

81. Elisa Poncz, *China's Proposed International Adoption Law: The Likely Impact on Single U.S. Citizens Seeking to Adopt from China and the Available Alternatives*, 48 HARV. INT'L L.J. ONLINE 74 (2007), available at <http://www.harvardilj.org/online/112?sn=0&PHPSESSID=84ca75456694e51eb3e6df46b287469c>.

82. China Center for Adoption Affairs, Can Homosexuals Adopt Children from China? (Oct. 12, 2005), [http://www.china-ccaa.org/site%5Cinfocontent%5CSWSY\\_2005101202091715\\_en.htm](http://www.china-ccaa.org/site%5Cinfocontent%5CSWSY_2005101202091715_en.htm).

83. A.J. Mistretta, *Foreign Adoptions Sometimes a Good Option for Gay Parents*, DALLAS VOICE, July 13, 2006, available at [http://www.dallasvoice.com/artman/publish/article\\_2735.php](http://www.dallasvoice.com/artman/publish/article_2735.php).

In these kinds of adoptions, one partner will travel to the country of origin and adopt the child, which will establish that partner as the child's legal parent.<sup>84</sup> Upon return to the United States, the other partner will petition state authorities for dual-parent status, which may or may not be granted depending on the laws of the state in which the couple resides.<sup>85</sup> The change in Chinese adoption law, then, is significant because it essentially blocks an avenue that had previously allowed foreign same-sex couples to adopt Chinese children. According to the CCAA, homosexual adoptions are not recognized or permitted because Chinese law "recognizes only families formed by marriage [between people] of [the] opposite sex."<sup>86</sup> The CCAA justifies this position by citing medical and cultural reasons. According to the CCAA website, "the China Mental Disorder Classification and Diagnosis Standard classifies homosexuality as [a] . . . psychiatric disease."<sup>87</sup> Additionally, homosexuality is not recognized or protected by Chinese society because its traditional culture views homosexuality as "an act violating public morality."<sup>88</sup> As a result of this policy, foreign citizens who wish to adopt from China are now required to sign an affidavit stating that they are heterosexual.<sup>89</sup>

Just being married and heterosexual, however, does not guarantee that a couple will clear the high hurdle set by China's marital requirements. Before being allowed to adopt, a couple must be married for at least two years, but only if neither spouse has been divorced.<sup>90</sup> If either spouse has been divorced, then the couple must be married for at least five years prior to applying for adoption.<sup>91</sup> Finally, if either spouse has more than two divorces, then the couple will not be able to adopt.<sup>92</sup>

In addition to its stringent marriage requirements, China recently passed requirements relating to physical and mental attributes of the adoptive parents.<sup>93</sup> Chinese health standards for adoptive parents include common-sense prohibitions on certain conditions that would either put the child's health in danger or severely impair the ability of the adoptive parent to care for the child.<sup>94</sup> For example, individuals with terminal conditions such as cancer or AIDS are prohibited from adopting from China, as are individuals with severe mental disabilities or non-functioning limbs.<sup>95</sup> But the new Chinese regulations also prohibit adoptions by individuals with certain conditions that some could argue should not disqualify them from adopting. For example, individuals with a Body Mass Index (BMI) of forty or more are prohibited from adopting as well as individuals with depression or

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84. *Id.*

85. *Id.*; see also Lambda Legal, *supra* note 4 (Showing the differences between individual states with respect to the issue of so-called "second parent adoptions." As in note 4, we see that California, which allows adoptions by same-sex couples, also allows second parent adoptions, while Utah, which does not allow adoptions by same-sex couples, also forbids second parent adoptions. Same-sex couples who are thinking about adopting internationally, then, should be aware that they are essentially subverting current law in most countries and it may not work out as planned).

86. See Can Homosexuals Adopt Children from China?, *supra* note 82.

87. *Id.*

88. *Id.*

89. See China Adoption, *supra* note 66.

90. See Country Specific Information for China, *supra* note 73.

91. *Id.*

92. *Id.*

93. See Elisa Poncz, *supra* note 81, at 76.

94. See, e.g., Country Specific Information for China, *supra* note 73.

95. *Id.*

"severe facial deformation."<sup>96</sup> While the severity of conditions such as depression and the extent to which the facial deformation would affect the individual's ability to care for the child are absolutely factors that should be considered, an outright ban on individuals that have these conditions seems somewhat discriminatory. According to Elisa Poncz, the Chinese government has justified these new, more stringent regulations on an increased demand for domestic adoptions and an easing of the country's one-child policy.<sup>97</sup> However, given the large number of Chinese children that are without homes and statements from high-ranking government officials that indicate that the one-child policy will remain in place for at least another ten years, this justification seems dubious at best. On the other hand, while a sweeping ban on conditions that vary in severity is draconian and discriminatory, many of these conditions, if severe, increase the risk that the adopted child will end up in a situation in which the adoptive parents are unable to provide the necessary care. Thus, the ban on certain conditions, although unfair in some cases, does serve a legitimate purpose in decreasing the time and cost that would result if the Chinese authorities had to evaluate each individual with one of these conditions and render a decision on a case-by-case basis.

## 2. *Who May Be Adopted*

Whether a particular child qualifies for adoption is one of the most significant and complex questions that each country must answer due to the numerous regulations that must be followed. Under the Hague Adoption Convention, any "adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin—(a) have established that the child is adoptable[ . . . ]."<sup>98</sup> As well as requiring that any prospective adoptee be qualified as adoptable under the laws of the state of origin, the Hague Adoption Convention mandates that the child is also authorized under the laws of the receiving state to "enter and reside permanently in that State."<sup>99</sup> Thus, in order for a child to be certified as "adoptable" under the Hague Adoption Convention, that child must meet the requirements of adoptability under the laws of her home country as well as the immigration and naturalization laws of her adoptive parents' home country.<sup>100</sup> If the child does not meet the qualifications as established by either country, then she will not be able to be adopted. For individuals seeking to adopt internationally, the task of researching two different sets of laws and then determining whether or not a particular child meets the requirements of both is often a daunting task.

Under the Adoption Law of the People's Republic of China, any child under the age of fourteen is eligible for adoption provided that the child meets one of three requirements.<sup>101</sup> First, that the child be an "orphan bereaved of parents," which the Chinese government defines as a child whose parents are either dead or who have been "an-

96. *Id.*

97. See, Elisa Poncz, *supra* note 81, at 76.

98. See Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 17, art. 4.

99. See *id.*, art. 5.

100. U.S. Dep't of State, Who Can Be Adopted?, <http://adoption.state.gov/about/how/childeligibility.html> (last visited Jan. 26, 2009).

101. Adoption Law of the People's Republic of China, art. 4 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1991, effective April 1, 1992).

nounced dead by the people's court."<sup>102</sup> The second type of child deemed eligible for adoption under Chinese law is a child that has been abandoned or "whose parents cannot be [easily] ascertained or found."<sup>103</sup> The final category of children that the Chinese government classifies as adoptable are "children whose parents are unable to rear them due to unusual difficulties."<sup>104</sup> The term, "unusual difficulties," is defined rather broadly, but includes such factors as disability, illness, and other elements that make the child's biological parents' life "extremely difficult."<sup>105</sup>

Just because a child is found to be suitable for adoption under Chinese law does not necessarily mean that the child will automatically be able to enter the United States. In addition to being suitable for adoption under Chinese law, the child must also meet several requirements before being allowed to immigrate into the United States as a Convention adoptee.<sup>106</sup> The immigration of children adopted from another country is governed by the U.S. Citizenship and Immigration Services (USCIS).<sup>107</sup> Before the adopted child may enter the United States, the adoptive parents must file a "Petition to Classify Convention Adoptee as an Immediate Relative" (Petition) with the USCIS to ensure that the child meets five main requirements that the United States has identified in keeping with the requirements of The Hague Adoption Convention.<sup>108</sup> While many of these elements are similar to those outlined by the Chinese government in order to certify the child as adoptable, there is some divergence. This divergence in requirements is a key consideration of which individuals pursuing international adoption must be aware. First, the USCIS requires that the child be under the age of sixteen by the time that the Petition is filed on her behalf.<sup>109</sup> When compared to Chinese adoption law, this requirement presents little conflict because the Adoption Law of the People's Republic of China does not allow the adoption of children over the age of fourteen.<sup>110</sup> Second, the adoptive parent or parents must be U.S. citizens and already have been certified as eligible to adopt by the USCIS.<sup>111</sup> U.S. law permits both married and unmarried (as long as they are at least twenty-five years old) to adopt.<sup>112</sup> Recall, however, that under new Chinese law, unmarried individuals are no longer permitted to adopt. So, even though an unmarried U.S. citizen may meet the requirements to adopt internationally and bring the child back into the United States, she will not be allowed to do so in China. The third and fourth elements are aimed at preventing the abuses of child trafficking by requiring information regarding the child's birth parents.<sup>113</sup> If one of the child's birth parents is alive, then proof

102. China Center for Adoption Affairs, Who Can Be Placed Out as Adoptees for Adoption? (Oct. 10, 2005), [http://www.china-ccaa.org/site%5Cinfocontent%5CSWSY\\_20051010014708359\\_en.htm](http://www.china-ccaa.org/site%5Cinfocontent%5CSWSY_20051010014708359_en.htm).

103. See Adoption Law of the People's Republic of China, *supra* note 101.

104. *Id.*

105. See Who Can Be Placed Out as Adoptees for Adoption, *supra* note 102.

106. See Who Can Be Adopted?, *supra* note 100 (It should be noted that while these are based on the requirements of the Hague Adoption Convention, the specifics of the rules will vary between individual nations and the U.S. requirements are offered in this case by way of illustration).

107. *Id.*

108. *Id.*

109. U.S. Citizenship and Immigration Services, Instructions for Form I-800: Petition to Classify Convention Adoptee as an Immediate Relative (Rev. Sept. 10, 2008).

110. See Adoption Law of the People's Republic of China, *supra* note 101.

111. See Who Can Be Adopted?, *supra* note 100.

112. *Id.*

113. *Id.*

of the parent(s) consent to the adoption and "the termination of their legal relationship with the child" or proof that the parent(s) are unfit to care for the child is required.<sup>114</sup> If neither parent is alive, or is unable to be located, then either proof of death of the parents or the consent of the legal custodian of the child (i.e. the relative or state entity that is caring for the child prior to the adoption) is required.<sup>115</sup> These provisions are directly related to one of the Hague Adoption Convention's primary goals of ending the practice of child trafficking and preventing the sale of children who have either been stolen from their parents or whose parents have been coerced into giving them up. Because China is a signatory to the Hague Adoption Convention, this should not pose a problem for U.S. citizens who adopt Chinese children. This could present a significant obstacle for U.S. citizens adopting from non-convention countries, however, especially if the child's country of origin does not have a sophisticated record-keeping system in place. The final provision is a kind of catch-all provision that requires that the child "has been adopted or will be adopted in the United States or in the Convention country in accordance with the rules and procedures elaborated in the Hague Adoption Convention and the . . . IAA," that proper procedures have been followed, and that there is no indication of fraud or other prohibited activity associated with the adoption.<sup>116</sup> Again, this is a provision that is aimed at protecting the child and ensuring that all international adoptions are legal and free from corruption. China, as a signatory to the Hague Adoption Convention, is obligated to follow these procedures in any adoption that it authorizes.

Because a prospective adoptee must meet the requirements of two sets of laws (in this case, Chinese and American), the possibility exists that a child eligible for adoption in its country of origin may be ineligible to enter the receiving country. The likelihood of this happening in an adoption between China and the United States is minimal given that both parties have incorporated the requirements of the Convention into their adoption laws. Parents seeking to adopt internationally, however, should remain aware that the possibility does exist and plan accordingly.

### C. CRITICISM OF CHINESE ADOPTION LAW AND COMMENTARY

Ironically, the greatest criticism relating to China's adoption laws, its one-child policy, is probably one of the main reasons that China's international adoption program has been so successful. Since 1979, the Chinese government has enforced a policy that limits each family to only one child.<sup>117</sup> This policy has been widely criticized by human rights groups, governments, and the United Nations for resulting in such tragedies as child abandonment and infanticide.<sup>118</sup> Although the Chinese government energetically refutes these assertions, stories continually surface of forced abortions being carried out on Chi-

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114. *Id.*

115. *Id.*

116. *Id.*

117. Elina Hemminki, Zhuochun Wu, Guiying Cao, & Kirsi Viisainen, *Illegal Births and Legal Abortions—the Case of China*, 2 REPROD. HEALTH 5 (2005), available at <http://www.reproductive-health-journal.com/content/2/1/5>.

118. Amnesty Int'l, People's Republic of China: Briefing for the Committee Against Torture in Advance of their Consideration of China's Fourth Periodic Report (ASA17/094/2008), 11, Sept. 30, 2008, available at <http://www.amnesty.org/en/library/asset/ASA17/094/2008/en/bb7a7607-8f0b-11dd-8d03-3f760a3cc4a3/asa170942008en.pdf>.

nese women who have “violated” the law by becoming pregnant with a second child.<sup>119</sup> These stories follow roughly the same plot line: a Chinese woman is discovered to be pregnant with a second child; soon thereafter family planning officials show up at her home and take her (often forcibly) to a local hospital where she is told to sign a consent agreement. After signing the agreement, the woman is given several shots, which result in her child being stillborn within several hours.<sup>120</sup> Unfortunately, due to China’s reputation for secrecy, these stories remain largely unsubstantiated as Chinese officials vigorously deny that such events take place.<sup>121</sup> While these forced abortions in all likelihood do take place, they are certainly not as common as the practice of Chinese mothers abandoning infants that are either the second child or, in many cases, happen to be female.<sup>122</sup> These abandoned infants make up the vast majority of children in Chinese orphanages that are adopted by foreign parents. Thus, a striking paradox exists—while the West views the Chinese one-child policy and its culture’s preference for male children with a mixture of disgust and bewilderment, thousands of adoptive parents each year benefit from the policy. So, although the West may claim some kind of moral superiority, its record-setting adoption rates from China fuel the very system that it finds so repugnant. This is not meant to disparage the thousands of loving families who take these orphans into their homes every year. Indeed, these individuals should be commended for providing a home to children who would otherwise not have one. But there is a strange balance between the humanitarian act of rescuing thousands of unwanted children whose only crime was being born under a legal framework that would rather they not exist and deriving a benefit from that policy. Many mothers who have adopted Chinese children have expressed this feeling of remorse in knowing that they “were getting a daughter because someone had been forced to give her up.”<sup>123</sup>

Despite its draconian family planning policies, China remains one of the most popular and accessible countries from which U.S. citizens are able to adopt.<sup>124</sup> With its ratification of The Hague Adoption Convention and other recent steps towards reform in its governance, China has indicated that it is ready to become more cooperative and involved with the global community. Although its human rights record remains sketchy at best, and it still has a long way to go, China’s ascension to The Hague Adoption Convention is a step in the right direction toward showing an increased respect for human rights.

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119. *Id.*

120. *Id.*

121. *Id.*

122. Diane Clehane, *The Chinese Adoption Effect*, VANITY FAIR, Aug. 18, 2008, available at <http://www.vanityfair.com/culture/features/2008/08/adoption200808?currentPage=1>.

123. *Id.*

124. The number of adoptions to the United States from China, however, has declined significantly since their peak in 2005. Some reports indicate that this may be due to China’s recent tightening of its adoptions regulations as well as that government’s sensitivity to outside intervention. See, e.g., Country Specific Information for China, *supra* note 73.



## IV. Russia

### A. BACKGROUND

As opposed to China and the United States, the Russian Federation is not a party to The Hague Adoption Convention and is, thus, not bound by its requirements.<sup>125</sup> Despite this fact, U.S. citizens are still permitted to adopt from Russia, and do by the thousands each year.<sup>126</sup> In Fiscal Year 2008, there were 1,861 adoptions from Russia to the United States, making it the third most popular country for U.S. citizens to adopt from that year.<sup>127</sup> Like China, Russia owes much of its popularity as a source of adoptions to the relative stability of its program.<sup>128</sup> Also like China, Russia is no stranger to controversy in connection with its adoption laws. While the criticism of China is focused mainly on its controversial one-child policy and its effects on that country's adoption policies, the criticism of Russia stems from the reputation of Russian bureaucrats for quietly demanding bribes to help the lengthy process to move along as well as poor orphan care.<sup>129</sup> While it is difficult to confirm whether or not bribes take place in connection with international adoptions from Russia and, if so, how widespread the practice is, the speculation is no doubt fueled by the fact that Russia has yet to become a party to the Hague Adoption Convention, which contains an outright ban on practices, like bribery, that are connected with child trafficking.<sup>130</sup> More notably, Russia has been widely criticized for the way in which it runs the orphanages that care for many of the children that may eventually be adopted.<sup>131</sup> These criticisms will be examined in more detail below.

### B. RUSSIAN ADOPTION REGULATIONS

The Ministry of Education and Science (MES) is the central authority that handles all adoptions from the Russian Federation by individuals who do not reside in Russia.<sup>132</sup> In this capacity, the MES enforces adoption procedures primarily established by the Family Code of the Russian Federation.<sup>133</sup> Under the provisions of the Russian Family Code, adoptions "by foreign citizens or by stateless persons" are permitted only when it has proven impossible for the children to be placed with families who are citizens of Russia or

125. U.S. Dep't of State, Country Specific Information for Russia, Mar. 19, 2009, <http://adoption.state.gov/country/russia.html> (last visited Feb. 2, 2009).

126. *Id.*

127. See Total Adoptions to the United States, *supra* note 1.

128. Although Russia temporarily stopped accepting and processing applications for international adoptions during 2007 while it sought to revamp its adoption laws. This suspension of adoptions is likely one of the main reasons for the drop in the number of Russian adoptions to the United States between 2006 and 2008. See Lynette Clemetson, *Working on Overhaul, Russia Halts Adoption Applications*, N.Y. TIMES, Apr. 12, 2007, available at [http://www.nytimes.com/2007/04/12/us/12adopt.html?\\_r=1](http://www.nytimes.com/2007/04/12/us/12adopt.html?_r=1); see also Total Adoptions to the United States, *supra* note 1.

129. See Irina Sandul, *Adapting to Adoption*, RUSSIA J., Feb. 27, 2002, available at <http://www.russiajournal.com/node/11704>.

130. See Explanatory Report, *supra* note 9.

131. See, e.g., HUMAN RIGHTS WATCH, ABANDONED TO THE STATE: CRUELTY AND NEGLECT IN RUSSIAN ORPHANAGES (1998), available at [http://www.hrw.org/legacy/reports/reports98/russia2/#P86\\_4793](http://www.hrw.org/legacy/reports/reports98/russia2/#P86_4793).

132. The Ministry of Education and Science of the Russian Federation, Adoption In Russia, <http://www.adopt-in-russia.ru> (last visited Feb. 12, 2009).

133. *Id.*

who permanently reside in Russia.<sup>134</sup> This regulation, however, is a relatively minor barrier to international adoptions from Russia due to the large numbers of orphaned and abandoned children in that country. Although precise numbers are often difficult to come by due to the inconsistency between official reports, international organizations such as UNICEF and Human Rights Watch estimate that there are upwards of 600,000 children in Russia who are classified as “without parental care.”<sup>135</sup>

### 1. *Who May Adopt*

As opposed to the stringent requirements that the Chinese government places on foreign individuals seeking to adopt, Russia’s requirements are much less exacting. But because Russia is increasingly concerned about the safety of Russian children following adoption and emigration, the Russian government has promulgated considerable regulations that prospective adoptive parents must meet.<sup>136</sup>

A primary example of the difference in the requirements between Russian and Chinese adoption regulations is with respect to marriage. While China has promulgated extensive regulations requiring that foreign adopters be married (as defined as between one man and one woman), Russia allows adoptions by both married and single individuals.<sup>137</sup> If a single individual wishes to adopt from Russia, the Russian government requires that the adoptive parent be at least sixteen years older than the child that they are adopting.<sup>138</sup> No such age restrictions are imposed on married adopters.

Like China, Russian law prohibits adoptions by homosexual couples.<sup>139</sup> But Russia’s more flexible marital regulations provide a loophole for homosexual couples that does not exist under Chinese adoption law. Homosexuals may, and often do, circumscribe the ban by taking advantage of the fact that Russia allows adoptions by unmarried individuals.<sup>140</sup> Under this scenario, one partner registers as a single individual with the MES and proceeds through the process as would a single heterosexual. As mentioned earlier, in the United States, the partner who adopts the child is recognized as the child’s legal parent and the parent’s partner may petition the state of residence for dual-parent recognition provided that the state allows adoptions by homosexuals.<sup>141</sup> Regardless of one’s position on the justice of laws banning adoptions by homosexuals, it should be noted that the ban is still the law in Russia, and any homosexual couple seeking to take advantage of the single-parent loophole in order to adopt would, technically, be breaking the law. Russian adoption officials also frequently question prospective adopters about their sexuality, so homosexual adopters may also face a situation in which they must lie to adoption officials in

134. Semeinyi Kodeks RF [SK] [Family Code] art. 124 (Russ.).

135. See Human Rights Watch, *Abandoned to the State*, *supra* note 131, Ch. II.

136. See, e.g., Country Specific Information for Russia, *supra* note 125; Freeman Klopott, *U.S. Urges Russia to Sign Adoption Treaty*, D.C. EXAMINER, Jan. 11, 2009, available at [http://www.dcxaminer.com/local/011209-US\\_urges\\_Russia\\_to\\_sign\\_adoption\\_treaty.html](http://www.dcxaminer.com/local/011209-US_urges_Russia_to_sign_adoption_treaty.html).

137. See Country Specific Information for Russia, *supra* note 125.

138. *Id.*

139. See, Franco Ordonez, *For Gays, Adoption Irony*, BOSTON GLOBE, May 8, 2004, available at [http://www.boston.com/news/local/articles/2004/05/08/for\\_gays\\_adoption\\_irony](http://www.boston.com/news/local/articles/2004/05/08/for_gays_adoption_irony).

140. *Id.*

141. See Mistretta, *supra* note 83.

order to secure an adoption.<sup>142</sup> If caught, this would likely invalidate the adoption due to the ban as well as a strong cultural prejudice in Russia against homosexuality, which the nation decriminalized as recently as 1993.<sup>143</sup>

In addition to its marriage requirements for prospective adoptive parents, Russia has also issued a series of strict regulations regarding the health of foreign individuals seeking adoption.<sup>144</sup> According to Article 127 of the Family Code of the Russian Federation, individuals are prohibited from adopting “who cannot perform the parental duties because of the state of their health,” and further provides that the list of disqualifying diseases and conditions is to be defined by the relevant government authorities.<sup>145</sup> The MES has promulgated an extensive list of medical and psychological conditions that would prohibit an individual from adopting a Russian child. Some disqualifying conditions include:

Tuberculosis (TB)-active and chronic; illness of internal organs and nervous system-diabetes, epilepsy, etc.; dysfunction of the limbs-multiple sclerosis, quadriplegia, etc.; infectious disease-AIDS, Hepatitis C, etc.; alcohol or drug addiction; psychiatric disorder-bipolar, depression, etc.; [and] any disability that prevents a person from working.<sup>146</sup>

As with the Chinese regulations, many of the above disqualifying conditions, such as AIDS and quadriplegia, seem entirely reasonable to best ensure that the child will have the best quality of life possible. On the other hand, some of the more broad or easily treatable conditions, such as diabetes and depression (depending, of course, on the severity), seem to be more arbitrary. Although this may prove inconvenient and unjust to individuals who have what could be considered a relatively minor condition, these regulations seem reasonable given the time and expense that would result if the Russian government would have to screen each individual seeking an adoption to determine if their condition is too severe to allow adoption. This broad list of disqualifying conditions, then, makes the adoption process more efficient for both the government and the prospective adoptive parents.

The Family Code of the Russian Federation contains several other limitations on the right of individuals to adopt in addition to the major ones outlined above.<sup>147</sup> These regulations, however, are more reasonable on their face and, therefore, present a lower risk of confusion and controversy. Such regulations include a prohibition on adoptions by individuals who have previously had their duties as a parent or guardian restricted by a court, or whose adoptions have been “cancelled by the court through their guilt [. . .].”<sup>148</sup> The Russian government also restricts international adoptions based on income level that would ensure the adopted child a “minimum of subsistence [. . .].”<sup>149</sup> Although the Family Code of the Russian Federation does not define the income level that would meet this

142. *See id.*

143. *Moscow Gay Rights Protest: Russian Nationals Attack Gays, Right Said Fred, and a German Politician*, DER SPIEGEL, May 28, 2007, <http://www.spiegel.de/international/world/0,1518,485262,00.html>.

144. *See* Country Specific Information for Russia, *supra* note 125.

145. *See* [Family Code] art. 127 (Russ.).

146. Crystal Killion, *International Adoption from Russia: Information for Adoptive Parents*, SUITE 101, July 21, 2008, available at [http://international-adoption.suite101.com/article.cfm/international\\_adoption\\_russia](http://international-adoption.suite101.com/article.cfm/international_adoption_russia).

147. *See generally* [Family Code] art. 127 (Russ.).

148. *See* [Family Code] art. 127(1) (Russ.).

149. *Id.*

"minimum of subsistence" standard, most would acknowledge that it is entirely proper for the Russian government to regulate this factor in order to better ensure the well-being of children adopted from its orphanages.

## 2. *Who May Be Adopted*

According to Article 124 of the Family Code of the Russian Federation, adoption is the preferred means by which the government provides for the well-being of "children who have remained without parental care."<sup>150</sup> The Family Code of the Russian Federation defines "children who have remained without parental care" to include children whose parents have died, had their parental rights restricted or revoked, been deemed incapable, suffer from severe illness, been absent for an extended period of time, or who have avoided exercising their parental duties through any number of actions including refusal to retrieve their children from educational establishments, medical centers, or institutions of social protection.<sup>151</sup> The Family Code of the Russian Federation imposes the duty of caring for these children on "the guardianship and trusteeship bodies" (Guardianship Bodies), which are branches of local governments.<sup>152</sup> These Guardianship Bodies are entrusted with the identification, registration, care (including education), and placement of "children who have remained without parental care."<sup>153</sup> Most often, the Guardianship Bodies place the children in orphanages, which have become the subject of considerable criticism for allegations of mistreatment of the children entrusted to their care.<sup>154</sup>

Once the Guardianship Bodies have identified a child that meets the definition of one who has "remained without parental care," the officials of the body must register the child in a databank that keeps track of the number of children under the care of Guardianship Bodies.<sup>155</sup> The ages of children listed in this databank range from infants to around seventeen or eighteen years, at which point Russian law requires that the child leave the orphanage.<sup>156</sup> Before being considered eligible for international adoption, Russian law requires that a child have been registered in the local databank for at least one month, the regional databank for at least one month, and the federal databank for at least six months.<sup>157</sup> Thus, the average time that a Russian child must be in an orphanage before being eligible for adoption is between eight months and one year.<sup>158</sup> Simply being classified as eligible for adoption and registered in the databank for the requisite amount of time is not enough for a child to be released for adoption by foreign individuals. Given that "children who have remained without parental care" is a fairly broad classification, the Russian government imposes different regulations for the adoption of children depending on their individual circumstances.<sup>159</sup> For example, if the child's natural parents

150. See [Family Code] art. 124(1) (Russ.).

151. See [Family Code] art. 121 (Russ.).

152. *Id.*

153. *Id.*

154. See, e.g., Abandoned to the State, *supra* note 131, Ch. I; The Plight of the Russian Orphan, Friends of Russian Orphans, [http://www.russian-orphans.org/orphans\\_russia.htm](http://www.russian-orphans.org/orphans_russia.htm) (last visited Feb. 4, 2009).

155. See Country Specific Information for Russia, *supra* note 125.

156. See, The Plight of the Russian Orphan, *supra* note 154.

157. Country Specific Information for Russia, *supra* note 125.

158. See, The Plight of the Russian Orphan, *supra* note 154.

159. *Id.*

are known and alive, then the law requires that their consent be given prior to the adoption of the child.<sup>160</sup> This regulation would apply in cases where the child's parents have refused to retrieve them from various state institutions, or where the child's natural parents have voluntarily given up the care of the child for any number of personal reasons. Parental consent, however, is not required where the child's parents are deceased or missing (obviously), have been recognized as legally incapable of raising the child, or have had their parental rights stripped by the courts.<sup>161</sup> If the child's natural parents are under the age of sixteen, then the law requires their consent, as well as the consent of their parents (the child's natural grandparents) provided that they do not fall into one of the categories for which parental consent is not required.<sup>162</sup> Further complicating the issue, the Family Code of the Russian Federation also provides that the child's natural parents (or grandparents in the case of parents who are under the age of sixteen) may withdraw their consent at any time and for any reason before the court issues its final approval of the adoption.<sup>163</sup> Thus, it would be entirely possible for an international family to go through the entire adoption process only to have the adoption cancelled at the last minute because the adoptive child's natural parents chose to withdraw their consent. These situations are difficult because, on the one hand, you have the interests of the adoptive parents who, arguably, are better equipped to provide the child a loving home and better quality of life than they would otherwise have, but, on the other, you have the interests and rights of the child's natural parents (provided, of course, that these rights have not been revoked). Adding to the difficulty of the consent situation is the consideration of what is in the best interests of the child. Should the Russian courts be empowered to determine whether or not adoption would be in the best interest of the child at issue? Based on the text of the Family Code of the Russian Federation, it would seem that the Russian government has answered this question in the negative by providing the requirement of parental consent and the right of revocation, while remaining silent on the issue of whether the court may overrule the withdrawal of consent. Although it is undeniable that the rights of the child's natural parents should be protected, especially in cases in which the child was placed in state care due to circumstances beyond the parents' control that would not result in the revocation of their legal rights of parentage, it is easy to imagine cases in which it would seem that the interests of the child would be better served if the adoption were allowed to proceed over the withdrawal of consent. But this practice could also open the door to potential abuses of discretion and increased governmental intrusion into the family sphere. Once the child reaches the age of ten, however, the parental consent requirement is superseded by a provision requiring the consent of the child to her adoption.<sup>164</sup> This provision seems to be based on the idea that once the child reaches a certain age, then they become the best qualified to determine what is in their own best interests. By comparison, child consent requirements also exist in the United States, but the majority of states place the age of consent at fourteen as opposed to ten.<sup>165</sup>

160. See [Family Code] art. 129 (Russ.).

161. [Family Code] art. 130 (Russ.).

162. [Family Code] art. 129(1) (Russ.).

163. [Family Code] art. 129(2) (Russ.).

164. [Family Code] art. 132 (Russ.).

165. Adoption.com, Consent to Adoption, <http://laws.adoption.com/statutes/consent-to-adoption.html> (last visited Feb. 7, 2009).

Just as a child adopted from China by an American couple must meet certain requirements in order to immigrate into the United States, so must a Russian child adopted by an American couple. Because Russia is not yet a party to the Hague Adoption Convention, however, a different set of rules apply. The adopted child, rather than qualifying as a "Convention Adoptee," "must meet the definition of an "orphan" under the Immigration and Nationalities Act in order to be allowed entrance into the United States.<sup>166</sup> Before adopting a child from Russia, American parents should ensure that the child meets the definition of an orphan as outlined in the instructions to the U.S. Citizenship and Immigration Services' Form I-600.<sup>167</sup> Under U.S. immigration law, a child is classified as an orphan if she "has no parents because of the death or disappearance of abandonment, or desertion by, or separation or loss from both parents."<sup>168</sup> Additionally, a child is an orphan if she has only one living parent that has been deemed incapable of taking care of the child or "who . . . has, in writing, irrevocably released the [alien] for emigration and adoption."<sup>169</sup> It would appear that these requirements match up fairly well with the Russian requirements for a child to be eligible for adoption, and American families should have little trouble meeting both sets of laws. As with any adoption though, prospective parents should ensure that the child that they wish to adopt meets the requirements before going forward.

### C. CRITICISM OF RUSSIAN ADOPTION LAW AND COMMENTARY

#### 1. *The State of Russian Orphan Care*

Unlike China, the greatest criticism of Russia's adoption process comes not from its specific adoption policies, but the way in which those policies have been implemented. Specifically, governments and international watchdog groups have focused the majority of their ire on the way in which orphans are treated in the Russian orphanage system.

As mentioned above, it is estimated that there are over 600,000 orphans in Russia; one-third of which live in state-run institutions.<sup>170</sup> Despite the fact that the Family Code of the Russian Federation requires the Guardianship Bodies to provide for the placement, care, and education of children that have become wards of the state, these children are often subject to neglect and abuse in state institutions.<sup>171</sup> Much of the neglect and abuse results directly from the fact that the various institutions for orphans are often underfunded and forced to wade through a bureaucratic maze in order to obtain the resources that they need to carry out their duties.<sup>172</sup> Thus, orphanage staff often lack critical training, are overworked, and underpaid.<sup>173</sup>

166. See *Who Can Be Adopted?*, *supra* note 100.

167. U.S. Citizenship and Immigration Services, Instructions for Form I-600: Petition to Classify Orphan as an Immediate Relative, Expires Sept. 30, 2009.

168. *Id.*

169. *Id.*

170. See *Abandoned to the State*, *supra* note 131, Ch. I.

171. *Id.*

172. *The Plight of the Russian Orphan*, *supra* note 154.

173. *Id.*

Human rights advocates are also critical of the Russian system of orphan classification that determines, by the age of four, what kind of care a given child will receive.<sup>174</sup> As a result of the high numbers of orphans in state institutions, the Russian government has developed a system by which orphans are classified as “educable” or not. During infancy until the age of four, orphans are observed by orphanage staff as well as medical and psychological professionals for any signs of medical or developmental disorders.<sup>175</sup> Once the child reaches the age of four, she undergoes a final interview before a panel of doctors—a process that many human rights advocates argue is confusing, unfair, and have compared to a sort of inquisition—where her fate is determined.<sup>176</sup> Those that are deemed “educable” are sent to the “dyetskii dom” (children’s home) where they live with other orphans and attend regular public schools in the city where the home is located.<sup>177</sup> Those that are deemed uneducable or retarded are sent to the “internat” where they live with other orphans who have been similarly classified and have little to no contact with the outside world.<sup>178</sup> These children are essentially forgotten and rarely receive the kind of special care that is necessary to help children with developmental disorders.<sup>179</sup>

Those orphans that are lucky enough to make it into the “dyetskii dom” system will receive education in public schools until the ninth grade, at which point they can elect to go on to receive a high school diploma or enroll in a trade school.<sup>180</sup> While there are still allegations of abuse in the “dyetskii dom” system, life is considerably better for these orphans. Once an orphan reaches the age of seventeen or eighteen, however, Russian law mandates that they leave the orphanage and make a life on their own.<sup>181</sup> The orphan is “emancipated,” an ironic choice of terms given the hardships that many of them face on the outside, and given a small stipend to find a place to live.<sup>182</sup> Emancipated orphans often have a difficult life outside of the orphanage because they often lack essential skills that would make them competitive in the job market. Although the orphans receive education while in the “dyetskii dom,” and many pursue a trade after ninth grade, the lack of adequate funding for the orphan system often results in a situation where the orphan is not able to adequately develop marketable skills. In addition to a lack of skills, there is a cultural bias among many Russians that believe orphans are somehow defective. This bias often prevents emancipated orphans from getting the opportunities afforded children that Russian society perceives as normal.<sup>183</sup> The statistics regarding the quality of life of emancipated orphans are staggering. Only two percent of emancipated Russian orphans enter the university (compared with forty-five percent of children raised in families).<sup>184</sup> Among the rest of emancipated orphans, forty percent end up in crime, another forty

174. See, e.g., *Abandoned to the State*, *supra* note 131, Ch. II; *The Plight of the Russian Orphan*, *supra* note 154.

175. *Id.*

176. See *Abandoned to the State*, *supra* note 131, Ch. II.

177. *Id.*

178. See, e.g., *Abandoned to the State*, *supra* note 131, Ch. II; *The Plight of the Russian Orphan*, *supra* note 154.

179. See *The Plight of the Russian Orphan*, *supra* note 154.

180. *Id.*

181. *Id.*

182. *Id.*

183. See *Abandoned to the State*, *supra* note 131, Ch. II.

184. Richard Sargent, *New Hope for Russian Orphans*, BBC NEWS, Oct. 20, 2003, <http://news.bbc.co.uk/1/hi/world/europe/3159582.stm>.

percent become addicted to alcohol and/or drugs, and ten percent commit suicide or simply disappear.<sup>185</sup>

Although it is clear that Russia has a huge problem with its orphan care structure, there is some sign of hope. Russian entrepreneurs recently founded a village called Kitezh that they hope will serve as a model for reforming the Russian orphan care system. The village is a sort of orphan collective that "combines features of an orphanage with those of foster care."<sup>186</sup> In Kitezh, orphans live with foster parents in homes, as opposed to orphanage dormitories, help run the village, and receive education and training. The foster parents are trained teachers, medical professionals, or psychologists, whose goals are not simply the physical care of the orphans, but also their intellectual and psychological development.<sup>187</sup> Thus far, Kitezh has produced incredible results. Approximately forty children have graduated from the village—sixty percent of those have gone on to enroll in institutions of higher education, and nearly every graduate has found a job outside of the village.<sup>188</sup> Whether this model will be able to be effectively applied to the care of the 600,000 plus orphans that currently reside in Russia remains to be seen.<sup>189</sup> But the success of Kitezh shows that current Russian policies towards orphan care are ineffective and must undergo a massive overhaul. An overhaul of the system will require not only a change in policies, but also in cultural attitudes towards orphans that would allow the widespread introduction of a foster-care system. In addition, because of the staggering numbers of orphaned children in the Russian Federation, the government should take proactive steps that would further encourage adoption by qualified foreign individuals.

## 2. Recent Reluctance by Russian Courts to Permit Adoptions Due to Reports of Abuse

Rather than taking steps to promote and more efficiently facilitate international adoptions, however, the MES has recently proposed more stringent regulations for adoptive parents.<sup>190</sup> In response to recent reports of abuse against children adopted from Russia, including one case in which an adopted Russian infant died in Virginia after being left in a hot car all day, Russian courts have become increasingly reluctant to approve international adoptions.<sup>191</sup> This heightened level of suspicion of foreigners seeking adoptions in Russia led the MES to propose new legislation that would require adoptive parents to provide more information about themselves to Russian authorities, submit to a series of psychological evaluations, and undergo an extensive training program before being allowed to adopt.<sup>192</sup> As of the time of this writing, the new legislation has not passed, but, if approved, would dramatically increase the time that it would take for foreign couples to finalize an adoption from Russia. These new regulations would likely prove to be a

185. *Id.*

186. Michael Schwirtz, *In a Fairy-Tale Village, Russian Orphans Thrive*, INT'L HERALD TRIBUNE, Oct. 2, 2008, available at <http://www.ihf.com/bin/printfriendly.php?id=16632414>.

187. *Id.*

188. *Id.*

189. See Abandoned to the State, *supra* note 131, Ch. II.

190. See, Press Release, Ministry of Education and Science of the Russ. Federation, The Ministry of Education and Science Considers Necessary to Make Changes [sic] in Federal Laws to Protect the Rights of Children Adopted by Foreigners (Mar. 21, 2008), available at <http://eng.mon.gov.ru/press/release/4145>.

191. See Klopott, *supra* note 136.

192. See Ministry of Education and Science of the Russian Federation, *supra* note 190.



double-edged sword. On the one hand, they are completely in keeping with the primary goal of The Hague Adoption Convention to provide for the protection of children adopted internationally. On the other hand, increased regulations on adoption from Russia could result in a dramatic decrease in the number of foreign individuals who choose to adopt Russian children, further exacerbating the Russian orphan problem. While the priority with respect to the promulgation of any adoption law must always be the well-being of the child, Russia is in a unique situation in which it must balance these policies with policies that encourage the placement of orphaned children in loving homes. Additionally, there is a sense that the Russian government should remove the plank from its own eye, so to speak, by dealing with the rampant abuses within its own orphan care system before complaining about foreign instances of abuse. Signing the Hague Adoption Convention and coming into compliance with its requirements would be a step in the right direction towards dealing with these problems.

## V. Hope and Heartache—A Personal Story of International Adoption

In July 2007, my cousin and her husband (Couple J)<sup>193</sup> began the international adoption process. After researching the various options that were available, they settled on adopting a child from the former Soviet republic of Kazakhstan due largely to that nation's reputation for exceptional orphan care. In order to facilitate this process, Couple J, like the majority of couples seeking to adopt internationally, sought out an accredited adoption agency with an excellent reputation (Agency). The Agency guided Couple J through the initial screening process, which is lengthy and involves copious amounts of paperwork, as well as several interviews and a "home study" performed by a social worker, and monitored the progress of their paperwork as it went through various stages of review.<sup>194</sup> Kazakhstan is currently not a party to the Hague Adoption Convention; although its government has been undergoing an in-depth review of its international adoption procedures that could indicate that the country is making preparations to sign on to the Convention.<sup>195</sup> Because of these reviews, which began while they were going through the screening process, Couple J reported experiencing frequent delays. Finally, Couple J received their letter of invitation from the Kazakh government in October 2008 and traveled to Kazakhstan the following week.<sup>196</sup>

Under Kazakhstan adoption laws, after receiving approval, prospective adopters typically must spend between five to seven weeks in-country going through the various legal requirements for adoption as well as a mandatory two-week "bonding period" with the child selected for adoption.<sup>197</sup> Unlike other countries, adopters are not "matched" with or "assigned" a child, but spend much of their time in country visiting orphanages and meeting children that are eligible for adoption.<sup>198</sup> Although adopters are not "matched" with a

193. I have withheld the names of the couple as well as the adoption agency and any other individuals associated with the case out of a respect for privacy.

194. Telephone Interview with Mrs. J. (Mar. 3, 2009).

195. See, U.S. Dep't of State, Country Specific Information for Kazakhstan (Mar. 21, 2008), *available at* <http://adoption.state.gov/country/kazakhstan.html>.

196. Email from Mrs. J., to Andrew Brown et. al. (Oct. 19, 2009, 12:14 CST) (on file with author).

197. Adoption.com, Kazakhstan Adoption, <http://kazakhstan.adoption.com> (last visited Mar. 3, 2009).

198. See Country Specific Information for Kazakhstan, *supra* note 195.

child, one of the initial steps in the screening process was filling out paperwork that asked the couple to specify various preferences related to traits of children that they would be able to adopt (e.g., age, gender, medical conditions, etc.).<sup>199</sup> The Agency informed Couple J that once their application for adoption was approved by the Kazakh government, they would be contacted when a child became available that met these preferences.<sup>200</sup> Although Couple J conceded that no guarantees are made that the children prospective adopters are shown will meet their exact preferences, the understanding was that the adopters will not be contacted to travel to Kazakhstan until children became available that met those qualifications as best as possible.<sup>201</sup> So, after receiving the call and traveling to Kazakhstan, Couple J expected that the next several weeks would be spent bonding with what would become their child.<sup>202</sup> Unfortunately, this would not be the case.

After arriving in Kazakhstan and settling in, Couple J was taken by their in-country coordinators to the local baby house where they would supposedly be shown various children who met the preferences indicated on their paperwork. Given that their socio-economic status would not allow them to care for a child that had severe health problems, which would require expensive medical care, Couple J indicated their preference for children who were as healthy as possible with only minor health issues.<sup>203</sup> Mrs. J. stated that they understood, however, that it was unlikely that they would be able to adopt a completely healthy child and that they "knew that our child would likely have some orphanage [developmental] delays (approximately one month delay for every three months of life in an orphanage)."<sup>204</sup> Upon arrival at the baby house, however, Couple J was informed by the directors that there were no healthy children available at that time and were shown two children with severe health problems.<sup>205</sup> After seeing the two infants, the doctors told Couple J that these were the only infants at the baby house and began describing older children that were available, each with health problems of their own. Couple J elected not to see these children and returned to their apartment to try to decide what to do. During the drive back, Couple J asked why they were called to come to Kazakhstan at that time,

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199. Telephone Interview with Mrs. J., *supra* note 194.

200. This paperwork is also vital for U.S. immigration purposes because, as mentioned above, the adopted child must also be cleared by USCIS in order to enter the country. Mrs. J. indicated that it is possible to adopt outside of these preferences if an adopter bonds with a child that does not fit within the parameters, but would require a reprocessing of preferences by USCIS. See Telephone Interview with Mrs. J., *supra* note 194.

201. *Id.*

202. Email from Mrs. J., *supra* note 196.

203. Telephone Interview with Mrs. J., *supra* note 194.

204. Email from Mrs. J., *supra* note 196.

205. Mrs. J. described the children's health conditions in an email soon after visiting the Baby House:

"[The first child] had convergent strabismus [a condition causing the eyes to cross, which could likely be corrected with glasses, patching, or surgery] and when she was brought to the Baby House they [the Baby House medical staff] had done an ultrasound and found a "spot"/cyst in her head. They said that in June a computer scan had shown it to be gone. They described another physical problem that we won't go into here, but it sounded very disturbing. It seemed that every time the page was turned in her file, more health concerns arose [. . .]. The second girl had Hydrocephaly [an excessive buildup of cerebrospinal fluid that causes an enlargement of the head and could result in some cognitive impairments], atrophy of the optic nerves, and possible pituitary gland issues. When she was younger, water had been found in her head and they had put in a tube which was still there." *Id.*

but were not shown children that they would be able to adopt. Their local coordinator informed them that "more citizens of Kazakhstan were becoming able to adopt and that because we have more resources in the U.S. and other foreign countries, and greater means to help these children, that now healthy children were not being given to foreigners."<sup>206</sup> Although they cannot be sure, Couple J indicated that they felt that there were healthy children available that the adoption officials were not showing them.<sup>207</sup> Although confused and disappointed, Couple J believes that this was not done maliciously, but with the best interests of the children in mind.<sup>208</sup> During the time that they were at the baby house, the doctors kept talking about the great health care system in the United States and seemed to indicate that they believed that Couple J could really help these children have a better life.<sup>209</sup> Mrs. J continues to have "much respect for the people who actually care for the children," and regrets that they were not in a position to adopt and provide the necessary care for the children that they were shown.<sup>210</sup>

In the immediate aftermath, the Agency offered to help them find a child in another region of Kazakhstan. Due to the heartache and disappointment that they had just been through, Couple J decided to return home.<sup>211</sup> "We just lost confidence in the process," Mrs. J told me in an interview.<sup>212</sup> "We did everything we were supposed to do for so long, and after what happened we felt deceived and like we couldn't trust anyone."<sup>213</sup> Couple J cautions individuals seeking international adoption to prepare themselves for a process that is more time consuming and emotionally draining than expected.<sup>214</sup>

When I asked her what changes that she would like to see made to the international adoption process, Mrs. J's main concern was the transparency of the process.<sup>215</sup> Even though they had a reputable and professional adoption agency, the entire process was still marked by confusion and secrecy. Once the paperwork was in the hands of the Kazakh government, not even the Agency knew what was taking place.<sup>216</sup> One clause of Couple J's contract with the Agency states that the Agency has no way of verifying what children are available or what type of children the adopters will be shown upon arrival in-country.<sup>217</sup> Because a lack of transparency was a major source of the failure of Couple J's adoption, Mrs. J suggested that one possible solution to the transparency problem would include some sort of "objective third party" that could monitor the children that are available in orphanages.<sup>218</sup> I will explore this suggestion more fully in the following section.

In the end, Couple J estimates that they spent a total of \$20,000 on the failed adoption process, including agency fees and costs associated with travel.<sup>219</sup> They have chosen not

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206. *Id.*

207. Telephone Interview with Mrs. J., *supra* note 194.

208. *Id.*

209. *Id.*

210. *Id.*

211. Email from Mrs. J., *supra* note 196.

212. Telephone Interview with Mrs. J., *supra* note 194.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Email from Mrs. J., to Andrew Brown (Mar. 3, 2009, 20:10 EST) (on file with author).

218. Telephone Interview with Mrs. J., *supra* note 194.

219. Mar. 3 Email from Mrs. J., *supra* note 217.

to pursue legal action, due largely to a desire to put the incident behind and then and move forward.<sup>220</sup> The couple has not foreclosed the idea of adopting and is currently considering all their options.<sup>221</sup>

## VI. Conclusion

As has been shown, the Hague Adoption Convention is an effective tool for the international community to use to ensure that adoptions occur in the safest and most efficient way possible. But as we have learned from the comparison of the adoption regimes of China, a Convention country, and Russia, a non-convention country, there are areas in which The Hague Adoption Convention must be improved in order to be truly effective. The case studies of China and Russia have shown two major areas in which the provisions and implementation of the Hague Adoption Convention have proven to be weak. First, the broadly defined requirements of the Convention allow individual nations considerable leeway in the rules and regulations that govern international adoptions from within their borders. Although the Hague Adoption Convention has made the international adoption process more efficient, the leeway that it grants to countries to create and change their adoption laws often results in temporary suspensions of adoptions with little or no warning.<sup>222</sup> While requiring even more commonality between the adoption policies of countries that are signatories to the Hague Adoption Convention would help solve the problems created by these discrepancies, such requirements would likely meet intense resistance for intruding into the sovereignty of individual nations. Perhaps the best solution to this problem would be for current signatories to the Hague Adoption Convention to convene with the goal of reaching an agreement on further regulations that would create better consistency between the adoption laws of member nations and make the international adoption more efficient.

The second major area of weakness in the implementation of the Hague Adoption Convention is that it does not require that parties to the Convention only authorize adoptions from countries that are also parties to the Convention. Despite this, member countries often discontinue adoptions from countries that are party to the Convention, but who have not sufficiently implemented its requirements.<sup>223</sup> The recent struggles that Guatemala has had since becoming a signatory to the Hague Adoption Convention, as discussed above, provide a relevant illustration. In September 2008, the United States discontinued all adoptions from Guatemala until that country could bring its adoption policies into sufficient compliance with the requirements of the Hague Adoption Convention.<sup>224</sup> Several critics have noted the inequality in the way in which the United States has treated Guatemala's failure to comply with Hague Adoption Convention requirements and the

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220. Telephone Interview with Mrs. J., *supra* note 194.

221. *Id.*

222. See, e.g., U.S. Dep't of State, China Adoption Notice (Jan. 23, 2009), available at <http://adoption.state.gov/news/china.html> (cautioning U.S. families seeking to adopt from China about potential delays that could result as China changes its process for handling adoption cases with other Hague Convention countries).

223. See, e.g., Annette Schmit, The Hague Convention: The Problems with Accession and Implementation, 15 IND. J. GLOBAL LEGAL STUD. 375, 387 (2008).

224. See U.S. Not Processing Guatemalan Adoptions, *supra* note 44.

way it has responded to similar failures by non-Convention countries.<sup>225</sup> While the United States has discontinued adoptions from Guatemala as that nation attempts to bring its adoption laws into compliance, it has continued adoptions with countries like Vietnam, which is not a party to the Hague Adoption Convention and has had problems with "fraudulent adoption practices."<sup>226</sup> Despite these problems, the United States and Vietnam have entered into a so-called "Memorandum of Agreement" as required under Vietnamese law that permits adoptions between the United States and Vietnam.<sup>227</sup> Although the most recent "Memorandum of Agreement" has expired, the United States is currently working with the government of Vietnam to negotiate a new agreement.<sup>228</sup> Critics, like Annette Schmit, cite this discrepancy in the treatment of Convention and non-convention countries as providing a disincentive for non-convention countries to become signatories to the Hague Adoption Convention.<sup>229</sup> Schmit points out that while Convention countries that have not fully implemented the requirements of the Hague Adoption Convention are punished by having their international adoptions suspended by other member countries, non-convention countries are rewarded by being permitted "to ignore Convention requirements."<sup>230</sup> Thus, a situation is created in which many of the key provisions of the Hague Adoption Convention are seriously, and potentially harmfully, undermined.

In addition to the aforementioned weaknesses, an issue that remains at the forefront of the international adoption process, regardless of whether the countries involved are parties to The Hague Adoption Convention or not, is the troubling lack of transparency in the process. In order to solve this critical problem, countries that are party to the Hague Adoption Convention should meet to agree on a more thorough oversight process that would vastly improve the transparency of the process. While the priority should always be the interests of the adopted children, the international community must also be mindful of the intense emotional effects that the process has on prospective adopters. There continue to be far too many stories of deserving families who put in months, and even years, of effort to prepare to welcome a child into their homes only to have the rug pulled out from under them at the last minute. While political corruption is sometimes to blame, failures in international adoptions seem to stem most often from confusion caused by a lack of transparency. To this end, a central oversight body under the auspices of the Hague Adoption Convention charged with monitoring the adoption processes of member countries, care of orphans, and solving disputes that arise should be considered. Such an oversight body would also serve to meet the requirements of improving channels of communication and cooperation between Convention countries as expressed by the HCCH explanatory report.<sup>231</sup>

Despite its weaknesses, the Hague Adoption Convention is a vital tool for providing for the protection of children adopted internationally and making the process more equitable

225. See Annette Schmit, *supra* note 223, at 218.

226. Memorandum from U.S. Dep't of State, Vietnam Adoption Alert: Expiration of 2005 Memorandum of Agreement (Oct. 1, 2008), *available at* <http://adoption.state.gov/news/vietnam.html>.

227. *Id.*

228. *Id.*

229. See Annette Schmit, *supra* note 223, at 388.

230. *Id.*

231. See Explanatory Report, *supra* note 98.

and efficient. As more countries become signatories to the Convention and bring their laws into further compliance with its provisions, it should become increasingly effective at meeting its goals. In order to become more effective, however, member nations should commit to continually monitoring the ever-changing nature of international adoption and making necessary changes to the provisions of The Hague Adoption Convention in order to account for these developments. Above all, officials should prioritize the best-interests of the adopted children in making all decisions about international adoption processes, as well as maintaining a respect for how time-consuming and emotional the process is for families seeking adoptions.

