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### Is the United States Safely Repatriating Unaccompanied Children? Law, Policy, and Return to Guatemala

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# Is the United States Safely Repatriating Unaccompanied Children? Law, Policy, and Return to Guatemala

KAREN S. BAKER\*

*The United States regularly removes unaccompanied immigrant children and returns them to their countries of origin, with numbers rising rapidly in recent years. The United States has moral and legal obligations to this group of children. Rooted in deep moral underpinnings, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 requires the government to establish policies and procedures to effectuate the safe repatriation of unaccompanied children. However, now more than a decade later, the U.S. government has failed to delineate its practices promoting safe return and, in addition to a general lack of transparency, the scant information available suggests that the United States is not compliant with its duties. This Article evaluates U.S. law and policy governing the repatriation of unaccompanied children, examines whether known policies and procedures comport with applicable law, explores the stark realities and uncertain fates facing*

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*children returned to Guatemala, and offers recommendations to bring current practice into conformity with domestic law and social mores.*

INTRODUCTION .....	783
I. U.S. LAW AND POLICY ON REPATRIATION OF UNACCOMPANIED CHILDREN .....	786
A. <i>Unaccompanied Children in U.S. Immigration Law</i> .....	786
B. <i>U.S. Law Governing Repatriation of Unaccompanied Children: The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008</i> .....	793
C. <i>Examining Key Concepts</i> .....	796
1. REPATRIATION .....	796
2. SAFETY .....	798
3. SUSTAINABILITY .....	803
D. <i>The U.S. Government Has Failed to Effectively Implement the Law</i> .....	806
II. CASE STUDY: UNACCOMPANIED CHILDREN REPATRIATED TO GUATEMALA .....	812
A. <i>Scope, Demographics, and Trends</i> .....	813
B. <i>Current Repatriation Scheme</i> .....	817
1. PRE-DEPARTURE FROM THE UNITED STATES (POST-ISSUANCE OF REMOVAL ORDER) .....	817
2. DEPARTURE FROM THE UNITED STATES .....	819
3. ARRIVAL IN GUATEMALA .....	820
4. REINTEGRATION RESOURCES POST-RELEASE .....	824
5. UNCERTAIN FATES OF REPATRIATED CHILDREN .....	828
C. <i>Serious Potential Dangers to the Safety of Children Repatriated to Guatemala</i> .....	831
D. <i>Analysis of Current Practice</i> .....	837
III. OUTLOOK AND RECOMMENDATIONS .....	840
A. <i>Outlook: Many Reasons to Be Concerned</i> .....	840
B. <i>Recommendations</i> .....	844
1. CONDUCT A CONGRESSIONAL OVERSIGHT HEARING... ..	845
2. SYSTEMATICALLY GATHER DATA ON OUTCOMES FOR REPATRIATED CHILDREN .....	847
3. DEVELOP GUIDANCE FOR REPATRIATION DETERMINATIONS .....	850
CONCLUSION .....	861

## INTRODUCTION

The U.S. government regularly removes immigrant children who arrived in the United States unaccompanied and returns them to their countries of origin.<sup>1</sup> Though issues related to immigration enforcement frequently appear in the headlines, relatively little discussion has centered on the fates of children sent back to their countries of origin,<sup>2</sup> leading some advocates to call repatriation a “black hole where unaccompanied children easily fall through the cracks.”<sup>3</sup> Seldom do the limited accounts of the deported suggest a positive outcome upon return. Rather, the rare glimpses offered into their lives indicate that they may face a plethora of dangers and hardships.<sup>4</sup> News reports and academic research reveal that some children experience harm and, in the most extreme cases, death following removal.<sup>5</sup> For example, in a widely publicized case from 2004,

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<sup>1</sup> See *infra* note 27.

<sup>2</sup> See Sarah Stillman, *No Refuge*, NEW YORKER, Jan. 15, 2018, at 32, 34–36 (“No U.S. government body monitors the fate of deportees, and immigrant-aid groups typically lack the resources to document what happens to those who have been sent back. Fear of retribution keeps most grieving families from speaking publicly.”).

<sup>3</sup> Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 234 (2006); see also OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS* 27–29 (2012), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers/legacy\\_downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-flow-of-unaccompanied-children-through-the-immigration-system-a-resource-for-practitioners-policy-makers-and-researchers/legacy_downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf) (detailing issues that unaccompanied children face in the repatriation process).

<sup>4</sup> See, e.g., Stillman, *supra* note 2, at 34–36 (describing efforts to document what happens to individuals deported from the United States and noting cases where deportees suffered serious harm or death upon return to their countries of origin).

<sup>5</sup> See, e.g., AMNESTY INT’L, *HOME SWEET HOME? HONDURAS, GUATEMALA AND EL SALVADOR’S ROLE IN A DEEPENING REFUGEE CRISIS* 37 (2016), <https://www.amnesty.org/download/Documents/AMR0148652016ENGLISH.PDF> [hereinafter HOME SWEET HOME] (“No official statistics exist to document the number of deported migrants who are subsequently murdered, but anecdotal information and news coverage suggests it is not uncommon. An upcoming study . . . said that a review of local news reports since 2014 showed that 83 Central Americans were murdered after being deported from the United States.”);

sixteen-year-old Edgar Chocoy sought asylum in the United States based on his fear of harm by a gang in Guatemala, but an immigration judge denied his application.<sup>6</sup> A little over two weeks after his subsequent deportation, members of the gang from which Edgar initially fled murdered him.<sup>7</sup> It is likely that many more such stories exist than have been documented.<sup>8</sup>

The United States has moral and legal obligations to the unaccompanied children it repatriates, though it has not met its moral duty nor complied with existing law.<sup>9</sup> After years of unsuccessful attempts to pass a law protecting this group, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”)<sup>10</sup> became the first piece of federal legislation enacted

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Telephone Interview with Elizabeth G. Kennedy, Social Scientist, San Diego St. Univ. (June 3, 2018) (discussing the murders of at least six Guatemalans shortly after their removal from the United States); Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, *GUARDIAN* (Oct. 12, 2015, 8:57 PM), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> (highlighting cases of individuals deported from the United States who have been murdered upon return to their respective countries of origin, including at least “45 such cases in El Salvador, three in Guatemala and 35 in Honduras”); Cindy Carcamo, *In Honduras, U.S. Deportees Seek to Journey North Again*, *L.A. TIMES* (Aug. 16, 2014, 5:00 AM), <https://www.latimes.com/world/mexico-americas/la-fg-honduras-deported-youths-20140816-story.html> (estimating that between five and ten children killed in San Pedro Sula, Honduras between February and August 2014 were recently deported from the United States, according to the director of the city’s morgue).

<sup>6</sup> See Sergio De Leon, *Guatemalan Youth Slain 17 Days After Being Deported from U.S.*, *L.A. TIMES* (May 9, 2004), <http://articles.latimes.com/2004/may/09/news/adfg-deport9>.

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

<sup>8</sup> The existence of a greater number of cases than have been documented seems even more possible in light of candid confessions by the governments of the Northern Triangle countries—El Salvador, Guatemala, and Honduras—that “their resources are strained trying to keep up with the demand for services resulting from overall increases in deportations, . . .” PETER J. MEYER ET AL., *CONG. RESEARCH SERV., R43702, UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: FOREIGN POLICY CONSIDERATIONS 20* (2016), <https://fas.org/sgp/crs/home/sec/R43702.pdf>.

<sup>9</sup> See 154 CONG. REC. S10,886 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein).

<sup>10</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 8 and 22 U.S.C.). For clarity purposes, this Article provides citations

that addresses the United States's obligation to safely repatriate unaccompanied children to their countries of origin and directs the U.S. government to establish policies and procedures to effectuate such process.<sup>11</sup> Rooted in deep moral underpinnings, the provisions in the TVPRA are the deliberate product of years of growing concern for this vulnerable population and advocacy on their behalf.<sup>12</sup>

However, now a decade later, there is little evidence to assess whether or how the United States has made progress towards achieving this legal mandate and its moral responsibility. The U.S. government has failed to clearly articulate its methods for dealing with this continuing problem and to delineate how its practices promote safe return.<sup>13</sup> In addition to the general lack of transparency around this critical issue, the scant information available suggests that the United States is not compliant with its obligations.<sup>14</sup> Understanding that, in many cases, unaccompanied children have fled dangerous circumstances—such as abuse in their homes, violence in their communities, and devastating poverty<sup>15</sup>—the U.S. government must do more to proactively ensure that it safely repatriates children who are denied humanitarian relief.

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to both the TVPRA sections and their corresponding U.S. Code sections, but short-form citations are only to the TVPRA sections.

<sup>11</sup> See THOMAS LANTOS, COMM. ON FOREIGN AFFAIRS, WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2007, H.R. REP. NO. 110-430, at 22–23 (2007); Linda Kelly Hill, *The Right of Safe Repatriation for Unaccompanied Alien Children: Advancing the Intent of the Trafficking Victims Protection Reauthorization Act*, 12 LOY. J. PUB. INT. L. 85, 86–87 (2010) [hereinafter Hill, *The Right of Safe Repatriation*]; Wendy Ramirez et al., Kids in Need of Def., *Repatriation and Reintegration of Migrant Children*, in CHILDHOOD AND MIGRATION IN CENTRAL AND NORTH AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES 455, 455 (Karen Musalo, Lisa Frydman & Pablo Ceriani Cernadas eds., 2015); *infra* note 42.

<sup>12</sup> See Dara Lind, *How America's Rejection of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today*, VOX (Jan. 27, 2017, 8:12 AM), <https://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust>.

<sup>13</sup> Ramirez et al., *supra* note 11, at 455, 457–58, 473–77.

<sup>14</sup> *Id.* at 463, 473.

<sup>15</sup> HOME SWEET HOME, *supra* note 5, at 9, 11–12, 14–15, 17–18, 21–22, 25–27.

In recent years, the United States has returned upwards of several thousand unaccompanied children to their countries of origin annually, with numbers increasing more than 140% between October 2013 and August 2018.<sup>16</sup> Given the significant number of unaccompanied children apprehended in the United States each year who are placed in removal proceedings,<sup>17</sup> in combination with the increasingly adverse and hostile U.S. immigration policy governing the treatment of this group under the Trump administration,<sup>18</sup> one can reasonably expect to see an imminent corresponding rise in the number of repatriated unaccompanied children.

Accordingly, this Article evaluates U.S. law and policy governing repatriation of unaccompanied children, examines whether known policies and procedures comport with the legal obligations of the United States, explores the stark realities and uncertain fates of children returned to Guatemala, and offers recommendations to bring current practice into conformity with social mores and domestic law. In particular, this Article underscores the pressing need to ascertain the policies and procedures the U.S. government currently follows when it repatriates unaccompanied children and the outcomes of those removals. The safety needs of repatriated unaccompanied children demand much greater and more prompt attention to satisfy the United States's moral and legal obligation to ensure a safe return.

## I. U.S. LAW AND POLICY ON REPATRIATION OF UNACCOMPANIED CHILDREN

### A. *Unaccompanied Children in U.S. Immigration Law*

United States law contains a precise definition of who qualifies as an “unaccompanied child” and outlines the complex procedures to be followed by, as well as the relatively narrow remedies available to, those entering the country. Under the Homeland Security Act of 2002, an “unaccompanied alien child” is defined as

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<sup>16</sup> See *infra* Table 1.

<sup>17</sup> See *infra* note 27.

<sup>18</sup> See Callum Borchers, *Trump's Simultaneously Unifying and Dividing State of the Union Address, Annotated*, WASH. POST (Jan. 30, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/01/30/trumps-first-state-of-the-union-address-annotated/?noredirect=on&utm\\_term=.96dbf2d9e76f](https://www.washingtonpost.com/news/the-fix/wp/2018/01/30/trumps-first-state-of-the-union-address-annotated/?noredirect=on&utm_term=.96dbf2d9e76f).

a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) . . . (i) [has] no parent or legal guardian in the United States; or (ii) [has] no parent or legal guardian in the United States . . . available to provide care and physical custody.<sup>19</sup>

Typically, officers from agencies within the Department of Homeland Security (“DHS”), specifically Customs and Border Protection (“CBP”) and Immigration and Customs Enforcement (“ICE”), formally make this designation upon encountering and apprehending a child who meets the legal definition.<sup>20</sup> The designation

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<sup>19</sup> Homeland Security Act of 2002 § 462(g)(2), 6 U.S.C. § 279(g)(2) (2012). U.S. laws and regulations “utilize[] multiple terms in different legal contexts to refer to unmarried individuals who have not attained a certain age,” including “child,” “juvenile,” “minor,” and “unaccompanied alien child.” Memorandum from MaryBeth Keller, Chief Immigration Judge, U.S. Dep’t of Justice, on Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children to All Immigration Judges, All Court Administrators, All Attorney Advisors and Judicial Law Clerks, & All Immigration Court Staff, at 2 (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download>.

The Immigration and Nationality Act (INA or Act) defines a “child” as an unmarried person under 21 years of age. INA §§ 101(b)(1) and (c)(1). The regulations define a “juvenile” as an alien under the age of 18, 8 C.F.R. § 1236.3, and refer to a “minor” when describing aliens under 14 years of age. 8 C.F.R. §§ 103.8(c)(2)(ii); 1236.2. The Homeland Security Act of 2002 introduced the concept of an ‘unaccompanied alien child . . . .’

*Id.* This Article will use the terms “unaccompanied child” and “child” interchangeably to refer to an “unaccompanied alien child” as defined under the Homeland Security Act of 2002. This Article omits the use of the word “alien” because of that term’s derogatory connotation.

<sup>20</sup> See WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 5, 7 (2017), <https://fas.org/sgp/crs/homsec/R43599.pdf> (noting that “[CBP] apprehends the majority of [unaccompanied children] at or near the border” and that “ICE also may apprehend [unaccompanied children] in the U.S. interior during immigration enforcement actions”). The Trump administration temporarily made it official policy to separate children arriving in the United States with a parent. See Memorandum from Kevin K. McAleenan et al., U.S. Dep’t of Homeland Sec., on Increasing Prosecutions of Immigration Violations to the Sec’y of Homeland Sec. 3 (Apr. 23, 2018), <https://www.documentcloud.org/documents/4936568-FOIA-9-23-Family-Separation-Memo.html> (“DHS could also permissibly direct the separation of parents



of a child as unaccompanied triggers a series of actions, including transfer of the child to the care of the Office of Refugee Resettlement (“ORR”), which is part of the Department of Health and Human Services (“HHS”), and the initiation of removal proceedings, during which the child may present a case for relief that would allow him or her to lawfully remain in the United States.<sup>21</sup>

Unaccompanied children benefit from several protective provisions in the law intended to address some of their unique vulnerabilities and prescribe more favorable processes than those available to other children and adults.<sup>22</sup> However, while many unaccompanied children qualify for and are granted various forms of humanitarian relief, others with viable claims may ultimately be repatriated to their countries of origin due to serious protection deficits in the U.S. immigration system.<sup>23</sup> The general perception of immigrant

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or legal guardians and minors held in immigration detention so that the parent or legal guardian can be prosecuted pursuant to these authorities.”); Philip Bump, *What the Legal Process Looks Like for an Immigrant Child Taken Away from His Parents*, WASH. POST (May 27, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/05/27/what-the-legal-process-looks-like-for-an-immigrant-child-taken-away-from-his-parents/?utm\\_term=.62045928f682](https://www.washingtonpost.com/news/politics/wp/2018/05/27/what-the-legal-process-looks-like-for-an-immigrant-child-taken-away-from-his-parents/?utm_term=.62045928f682). As a result, several thousand children were mistakenly classified as “unaccompanied” and may keep the designation as the government struggles to reunify them with their parents. See OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., HHS OIG ISSUE BRIEF: SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE, at 1–2 (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> (“Pursuant to a June 2018 Federal District Court order, HHS has thus far identified 2,737 children in its care . . . who were separated from their parents. However, thousands of children may have been separated during an influx that began in 2017, . . . and HHS has faced challenges in identifying separated children.”).

<sup>21</sup> KANDEL, *supra* note 20, at 4–5, 8.

<sup>22</sup> *Id.* at 3–4. The law and policy around treatment of unaccompanied children in the United States principally flow from and are most affected by two laws—the Homeland Security Act of 2002 and the TVPRA of 2008—and the *Flores Settlement Agreement* of 1997. *Id.* Additionally, unaccompanied children from contiguous countries are subject to different policies and procedures than those from non-contiguous countries. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(2), 8 U.S.C. § 1232(a)(2) (2012) (providing special rules for children from contiguous countries); KANDEL, *supra* note 20, at 3 (explaining the distinct processing of children from Mexico and Canada).

<sup>23</sup> See Susan M. Akram, *Are They Human Children or Just Border Rats?*, 15 B.U. PUB. INT. L.J. 187, 188 (2006) (“In dealing with these children, authorities

children “almost exclusively as a *law enforcement problem*”<sup>24</sup> and the lack of access to counsel in removal proceedings promote repatriation.<sup>25</sup> Unaccompanied children frequently seek asylum, special immigrant juvenile status, and other forms of protection, such as visas for victims of crime or trafficking.<sup>26</sup> If the adjudicator deter-

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operate in what Professor Bhabha terms a ‘protection deficit,’ as though the fundamental guarantees of other areas of law affecting children, . . . simply do not exist. This legal lacuna traps thousands of children in the United States each year in a ‘system that violates their human rights and ignores their best interests.’”); Annie Chen & Jennifer Gill, *Unaccompanied Children and the U.S. Immigration System: Challenges and Reforms*, J. INT’L AFFAIRS, Spring/Summer 2015, at 115, 126 (“Despite the significant numbers of children eligible for relief from removal, many children are repatriated, through voluntary departure or deportation each year.”); see also AM. CIVIL LIBERTIES UNION, HUMAN RIGHTS SITUATION OF MIGRANT AND REFUGEE CHILDREN AND FAMILIES IN THE UNITED STATES: HEARING BEFORE THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2 (2014), [https://www.aclu.org/files/assets/iachr\\_-\\_human\\_rights\\_situation\\_of\\_migrant\\_and\\_refugee\\_children\\_and\\_families\\_in\\_the\\_united\\_states-v2.pdf#page=1](https://www.aclu.org/files/assets/iachr_-_human_rights_situation_of_migrant_and_refugee_children_and_families_in_the_united_states-v2.pdf#page=1) (“[T]he United States continues to violate its international legal obligations to unaccompanied and separated children seeking refuge within its borders, . . . . The United States’ response to these refugees seeking assistance has been to obstruct their access to justice, . . . by: . . . (5) conducting hearings without necessary legal safeguards such as legal representation . . . .”).

<sup>24</sup> Akram, *supra* note 23, at 187.

<sup>25</sup> See Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. REV. 247, 250–51, 270–71 (2017). The due process concerns around lack of access to counsel for children in removal proceedings has been extensively considered in existing literature. See, e.g., *id.* at 250–51 (“In reality, although a large number of children migrants are potentially eligible to stay and live in the United States as Special Immigrant Juveniles, asylees, or under other protection, many will be ordered deported . . . because they do not have a lawyer to help them. In fact, nine out of ten unrepresented children in immigration court are ordered deported, while about half of represented children are allowed to stay.”); Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Right to Counsel for Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 48 (2011) (describing the critical need for and constitutional right to counsel of unaccompanied children in removal proceedings).

<sup>26</sup> AM. IMMIGRATION COUNCIL, A GUIDE TO CHILDREN ARRIVING AT THE BORDER: LAWS, POLICIES AND RESPONSES 4 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/a\\_guide\\_to\\_children\\_arriving\\_at\\_the\\_border\\_and\\_the\\_laws\\_and\\_policies\\_governing\\_our\\_response.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf)

mines that the child is not eligible, or if the child misses a court appearance, he or she will receive an order of removal, meaning that the child can be deported.<sup>27</sup> Some children may not be entitled to relief but nonetheless face risks to their lives and safety in their countries of origin; nevertheless, such danger, on its own, does not permit them to stay in the United States under current law.<sup>28</sup> In other cases, an immigration judge may grant a child voluntary departure, in which the child agrees to return to his or her home country.<sup>29</sup> Removal, or voluntary departure, largely comports with the responses of both the Obama and Trump administrations to the immense number of children seeking protection in the United States; that is, try to swiftly send them back to their respective countries of origin.<sup>30</sup>

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(identifying common types of immigration relief for which children might be eligible); see Hlass, *supra* note 25, at 250–51.

<sup>27</sup> See Ramirez et al., *supra* note 11, at 456; KANDEL, *supra* note 20, at 11–12. Between 2005 and January 2019, over 161,800 juveniles were issued removal orders. *Juveniles – Immigration Court Deportation Proceedings*, TRAC IMMIGRATION, <http://trac.syr.edu/phptools/immigration/juvenile/> (last updated Jan. 31, 2019) [hereinafter TRAC Juvenile Statistics]. Between October 2017 and September 2018 alone, there were over 61,300 removal orders. *Id.* As context, there were over 613,400 juvenile removal cases between 2005 and January 2019, with more than 331,200 still pending. *Id.* In that same period, Judges granted relief in 9,491 cases and terminated proceedings in 44,960 cases. *Id.*

<sup>28</sup> Jennifer Nagda & Maria Woltjen, Young Ctr. for Immigrant Children’s Rights, *Best Interests of the Child Standard: Bringing Common Sense to Immigration Decisions*, in PIONEERING CHANGE: INNOVATIVE IDEAS FOR CHILDREN AND FAMILIES 105, 109 (First Focus ed., 2015), <https://firstfocus.org/wp-content/uploads/2015/04/Best-Interests-of-the-Child-Standard.pdf> (“Although safety is a relevant factor for some forms of immigration relief, a child’s lack of safety in home country is not, standing alone, a basis for remaining permanently in the United States. Our country routinely deports children to unsafe situations.”).

<sup>29</sup> Ramirez et al., *supra* note 11, at 456–57. Voluntary departure is considered a form of immigration relief because it may carry fewer consequences for future immigration prospects than an order of removal. *Id.* at 457 (noting “[v]oluntary departure is a form of immigration relief”); BYRNE & MILLER, *supra* note 3, at 26 (“Most unaccompanied children who return to their country of origin do so by requesting voluntary departure. This form of relief allows individuals who are otherwise removable to leave the United States without facing the consequences associated with an order of removal.”). Between 2005 and January 2019, over 30,800 juveniles received voluntary departure, with the number of grants appearing to spike in fiscal year 2018. See TRAC Juvenile Statistics, *supra* note 27. A full analysis of that form of relief is beyond the scope of this Article.

<sup>30</sup> See David Nakamura, *Trump Administration Releases Hard-Line Immigration Principles, Threatening Deal on ‘Dreamers,’* WASH. POST (Oct. 8, 2017),

Many of the laws governing treatment of and offering humanitarian relief to immigrant children have distinct and profound moral underpinnings.<sup>31</sup> The United States has a moral obligation to protect children arriving in this country who have fled threats to their safety, lives, and well being,<sup>32</sup> but the United States is not meeting this clear

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[https://www.washingtonpost.com/news/post-politics/wp/2017/10/08/trump-administration-releases-hard-line-immigration-principles-threatening-deal-on-dreamers/?noredirect=on&utm\\_term=.edda44fa12f6](https://www.washingtonpost.com/news/post-politics/wp/2017/10/08/trump-administration-releases-hard-line-immigration-principles-threatening-deal-on-dreamers/?noredirect=on&utm_term=.edda44fa12f6) (“Under current law, minors who arrive from noncontiguous nations are afforded greater protections than those from Mexico and Canada, but the Trump administration is proposing to treat them all the same in a bid to be able to deport the minors more quickly.”); Letter from Barack Obama, President of the U.S., to the Speaker of the H.R. et al. (June 30, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle> (indicating the Obama administration’s desire to pursue “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers”); MEYER ET AL., *supra* note 8, at 19 (“[Obama] [a]dministration officials maintain that unaccompanied minors who are not granted asylum will be returned to their home countries, raising the question of how well-equipped El Salvador, Guatemala, and Honduras are to meet the needs of deported youth. Many humanitarian experts warn that ‘rapid deportation could threaten the wellbeing of returnee children’ unless recipient countries are capable of providing adequate support.”); Sarah Rogerson, *The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border*, 61 VILL. L. REV. 843, 848–55 (2016) (describing the fears that commonly shape law and policy around unaccompanied children as including: “(1) the Fear of Economic Dependency, (2) the Fear of Floodgates, (3) the Fear of Ideological Invasion, and (4) the Fear of ‘the Immigrant Other’”); Inter-Am. Comm’n H.R., *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, at 9, OAS/Ser.L/V/II.155, Doc. 16 (2015) (“[T]he IACHR [has] documented with concern the United States’ response to increasing mixed migratory movements. Since the mid-1990s, this response has consisted of stepped up efforts to detect, detain, and deport migrants in an irregular situation.”).

<sup>31</sup> A more comprehensive discussion of the United States’s moral duties is beyond the scope of this Article.

<sup>32</sup> Noquel A. Matos, Note, *Rectifying a Wrongful Reaction: Policy Alternatives to Family Detention and Expedited Migration Proceedings Without Representation for Unaccompanied Minors and Other Migrants Seeking Asylum*, 23 CARDOZO J.L. & GENDER 215, 218 (2016) (“As refugees and children, the United States has a legal and moral responsibility to provide them with shelter and treat them humanely instead of detaining and deporting them abruptly, without carefully determining their eligibility for asylum, to satisfy political goals of reducing ‘illegal migration.’”); Lind, *supra* note 12; see MEGAN BRADLEY, *REFUGEE REPATRIATION: JUSTICE, RESPONSIBILITY AND REDRESS* 29 (2013) (explaining that,

responsibility, which has crystallized over nearly the last century.<sup>33</sup> The lineage of the provisions on asylum and special protections for children under U.S. immigration law, and arguably the immigration-related provisions that appear in anti-trafficking law, stretch back to World War II, when the United States turned away thousands of Jews seeking protection during the Holocaust.<sup>34</sup> The United States “could have saved thousands of Jews from the Nazis. They didn’t.”<sup>35</sup> Instead, the country “rejected a proposal to allow 20,000

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at least in the context of refugee repatriation, “[m]oral responsibility may be incurred for acting wrongly or, for not acting as duty requires”). In addition to exploring moral responsibility, Bradley defines and advances the concepts of causal and remedial responsibility, and she describes the relationship among the different theoretical notions of responsibility. *See id.* at 28–29.

<sup>33</sup> *See* Matos, *supra* note 32, at 237 (“[W]hile the United States has been successful at . . . decreas[ing] the number of unaccompanied minors migrating to the U.S.—it has decreased them by almost 30,000 since the 2014 surge—it has done so at the expense of doing its legal and moral duty to these children in need of refuge.”); Ramirez et al., *supra* note 11, 473–77 (summarizing “[h]ow the U.S. falls short in ensuring safe repatriation and reintegration”). The United States has signed international conventions, passed laws, and endorsed policies and other measures that recognize and respond to the unique vulnerabilities of children. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 76 (Dec. 10, 1948) (“Motherhood and childhood are entitled to special care and assistance.”); Organization of American States, American Convention on Human Rights, art. 19, Nov. 22, 1969, O.A.S.T.S. No. 17955, 1144 U.N.T.S. 123 (“Every minor child has the right to the measures of protection required by his conditions as a minor on the part of his family, society, and the state.”). By creating and operating within these specialized frameworks designed to meet children’s special needs, the United States has demonstrated its acknowledgment of, concern for, and commitment to protecting children.

<sup>34</sup> *See* Francine Kiefer, *Child Migrants: Does US Have a Moral Obligation to Them?*, CHRISTIAN SCI. MONITOR (July 19, 2014), <https://www.csmonitor.com/USA/Politics/2014/0719/Child-migrants-Does-US-have-a-moral-obligation-to-them> (“[M]any people are looking at the child migrant crisis on America’s southern border through a moral lens – with some comparing the plight of these children with Jews trying to escape Hitler’s Germany.”); Lind, *supra* note 12. The legislative history of U.S. anti-trafficking law underscores this moral obligation to protect children. In a proceeding on the TVPRA in December 2008, Senator Dianne Feinstein commented, “This bill seeks to protect children . . . who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution, and other life-threatening circumstances. These children have seen their family members threatened, tortured and even murdered. Many have been targets of attacks themselves.” 154 CONG. REC. S10,886 (daily ed. Dec. 10, 2008).

<sup>35</sup> Lind, *supra* note 12.

Jewish children to come to the [United States] for safety.”<sup>36</sup> Though “the [United States] didn’t know how terrible the Holocaust would become[,]” it was aware of the discrimination and violence directed at Jews.<sup>37</sup> Nevertheless, the United States failed to protect those seeking safety here.<sup>38</sup> “That is a moral stain on the nation’s conscience,” and “[m]odern refugee policy . . . is largely a response to the failures of the Holocaust era.”<sup>39</sup> The United States made a firm moral commitment not to let that happen again, especially not to children.<sup>40</sup> However, the country is not doing enough to fulfill this obligation, particularly by failing to do what is demanded by law, as outlined in the following sections.

B. *U.S. Law Governing Repatriation of Unaccompanied Children: The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*

The provisions governing repatriation and reintegration of unaccompanied children that appear in the TVPRA are the deliberate product of years of growing concern for the wellbeing of this population and advocacy on their behalf.<sup>41</sup> In the years leading up to the passage of the TVPRA, Congress considered various pieces of pro-

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See THOMAS LANTOS, COMM. ON FOREIGN AFFAIRS, WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2007, H.R. REP. NO. 110-430, at 22, 33–35 (2007).

<sup>41</sup> See *id.* (“It is the sense of the Congress that, to the extent consistent with the treaties and other international agreements to which the United States is a party, and to the extent practicable, the United States Government should undertake efforts to protect children from severe forms of trafficking and ensure that it does not repatriate children in Federal custody into settings that would threaten their life or safety.”); KANDEL, *supra* note 20, at 4; see also Maria Bucci, Note, *Young, Alone, and Fleeing Terror: The Human Rights Emergency of Unaccompanied Immigrant Children Seeking Asylum in the United States*, 30 NEW ENG. J. CRIM. & CIV. CONFINEMENT 275, 299 (2004) (describing the need to address protection of unaccompanied children, as they “are especially at risk for sexual abuse and exploitation because of their age, vulnerability, and the strong correlation between abuse and situations of forced population movement”).

posed legislation that advanced protections for unaccompanied children facing potential threats to their lives and safety due to trafficking or abuse.<sup>42</sup> In a report accompanying reauthorization legislation introduced in 2007, the House Committee on Foreign Affairs identified “an intense interest in combating th[e] developing horror” of human trafficking and cited to the Committee’s repeated acts to counter it.<sup>43</sup> The report highlighted how the proposed legislation intended to “prevent[] the trafficking of unaccompanied . . . children found in the United States by ensuring that they are not repatriated into the hands of traffickers or abusive families, and are well cared for.”<sup>44</sup> Therefore, the protections for unaccompanied children set forth under current law have an extensive and compelling history reflective of the deep concern around the plight of this group.

The TVPRA mandates the safe repatriation of unaccompanied children to their countries of origin if they are not eligible for asylum or other humanitarian relief.<sup>45</sup> Under the law,

[i]n order to enhance the efforts of the United States  
to prevent trafficking in persons, the Secretary of

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<sup>42</sup> See Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. § 204(a) (2001) (prohibiting the repatriation of an unaccompanied child to his or her country of origin without assessments of the relevant “country conditions and . . . the suitability of the placement of the child”); Unaccompanied Alien Child Protection Act of 2004, S. 1129, 108th Cong. § 104(a)(1) (2004) (directing the government, “to the extent consistent with the treaties and other international agreements to which the United States is party,” to “undertake efforts to ensure that it does not repatriate children in its custody into settings that would threaten the life and safety of such children”); Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. § 104(a)(1) (2005) (requiring the same); Unaccompanied Alien Child Protection Act of 2007, S. 844, 110th Cong. § 104(a)(1) (2007) (requiring the same); Place to Call Home Act, H.R. 3409, 110th Cong. § 814(a) (2007) (mirroring the Unaccompanied Alien Child Protection Act of 2007 and additionally requiring that the Department of State Human Rights Report “contain an assessment of the extent of parental abandonment and homelessness among children of the country”); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. § 236(b)(5)(A) (2007) (proposing a repatriation pilot program nearly identical to that appearing in the TVPRA of 2008).

<sup>43</sup> H.R. REP. NO. 110-430, at 34.

<sup>44</sup> *Id.* at 35.

<sup>45</sup> See generally Hill, *The Right of Safe Repatriation*, *supra* note 11, at 86–88, 98–101 (explaining the right to safe repatriation under the TVPRA of 2008).

Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied . . . children in the United States are *safely repatriated* to their country of nationality or last habitual residence.<sup>46</sup>

To effectuate the aims of this provision, the TVPRA outlines several directives.<sup>47</sup> First, it instructs the Secretary of State to establish a pilot program “to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied . . . children.”<sup>48</sup> In addition, the Secretary of Homeland Security must “consult the Department of State’s Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied . . . child to a particular country.”<sup>49</sup> Finally, the Department of State (“DOS”), HHS, and DHS are required to submit annual reports detailing “efforts to improve repatriation programs for unaccompanied . . . children.”<sup>50</sup>

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<sup>46</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(1), 8 U.S.C. § 1232(a)(1) (2012) (emphasis added).

<sup>47</sup> In addition to the three measures listed here, the TVPRA directs the government to place unaccompanied children from non-contiguous countries in removal proceedings to provide them with an opportunity to present their claims for relief. *See id.* § 235(a)(5)(D).

<sup>48</sup> *Id.* § 235(a)(5)(A).

<sup>49</sup> *Id.* § 235(a)(5)(B).

<sup>50</sup> *Id.* § 235(a)(5)(C). This report must include “the number[s] of unaccompanied . . . children ordered removed and . . . actually removed from the United States;” demographic information, including the “nationalities, ages, and gender of such children;” policies and procedures followed as well as “the steps taken to ensure that such children were safely and humanely repatriated;” the “immigration relief sought and denied to such children;” information gathered on country conditions; and certain “statistical information and other data . . . as provided for in section 462(b)(1)(J) of the Homeland Security Act of 2002.” *Id.* The Homeland Security Act of 2002 outlines statistical information and other data that the Department of Health and Human Services must maintain on unaccompanied children in its care and custody. *See* Homeland Security Act of 2002 § 462(b)(1)(J), 6 U.S.C. § 279(b)(1)(J) (2012).



### C. Examining Key Concepts

#### 1. REPATRIATION

Repatriation is the process around the return of a person to his or her country of origin by a governmental authority,<sup>51</sup> and it is generally coupled with reintegration to support long-term re-entry into a particular society.<sup>52</sup> Repatriation often begins when a government authority identifies an inadmissible child it may remove from its territory.<sup>53</sup> When children fail to obtain relief and receive an order of removal or take a grant of voluntary departure, that government returns them to their countries of origin.<sup>54</sup> However, the process of

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<sup>51</sup> Ramirez et al., *supra* note 11, at 456, 463. U.S. federal law does not define repatriation. *Id.* at 456. Repatriation often occurs when a governing authority forces an individual back to his or her home country through a removal order; however, it can also “result from a child’s request to return to her country, through . . . voluntary departure.” *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-506T, UNACCOMPANIED CHILDREN: DHS AND HHS HAVE TAKEN STEPS TO IMPROVE TRANSFERS AND MONITORING OF CARE, BUT ACTIONS STILL NEEDED 2 n.7 (2018), <https://www.gao.gov/assets/700/691526.pdf> [hereinafter GAO, UNACCOMPANIED CHILDREN] (“Repatriation is defined as returning unaccompanied children to their country of nationality or last habitual residence.”).

<sup>52</sup> See TVPRA § 235(a)(5)(A) (discussing a pilot program to advance “safe and sustainable repatriation and reintegration”); Gregor Noll, *Protecting the Dignity and Human Rights of Different Categories of Returnees*, in RETURN MIGRATION: JOURNEY OF HOPE OR DESPAIR? 101, 103–04 (Bimal Ghosh ed., 2000) (discussing the different “perspective[s] on return” as either long-term or short-term and concluding that “return [is] not merely . . . a question of logistics, but also as a sustainable process”); Ramirez et al., *supra* note 11, at 456–57 (examining the difference between the two concepts and how they are interrelated); KATY LONG, THE POINT OF NO RETURN: REFUGEES, RIGHTS, AND REPATRIATION 138 (2013) (“Repatriation is frequently accepted to be a difficult process that must link to other programmes for reconciliation, reintegration, and development.”).

<sup>53</sup> See Ramirez et al., *supra* note 11, at 456–57; see also Russell King, *Generalizations from the History of Return Migration*, in RETURN MIGRATION: JOURNEY OF HOPE OR DESPAIR? 7, 45 (Bimal Ghosh ed., 2000) (“[S]tudies of return [cannot] be isolated around the return decision or event, but [must] be built around a more holistic and theoretically informed appreciation of the nature of migration and mobility in this globalization era.”). Advocates and scholars have identified many problems that exist in the immigration system and proceedings prior to issuance of a removal order, such as the profound consequences of lack of access to counsel. See *supra* text accompanying notes 23–25.

<sup>54</sup> Ramirez et al., *supra* note 11, at 456, 463–64.

repatriation does not end upon the child's arrival in his or her country of origin; rather, it continues as children attempt to reintegrate and reestablish themselves.<sup>55</sup> Thus, repatriation encompasses much more than the narrow processes of "removal, return, or deportation"<sup>56</sup> and instead spans from identification or apprehension in the receiving country through reintegration in the country of origin.<sup>57</sup> Though the literature recognizes this wide scope of repatriation, research on these later stages of the practice remains relatively underdeveloped.<sup>58</sup>

Given this comprehensive understanding of repatriation, how should the law governing safe repatriation apply after an unaccompanied child arrives back in his or her country of origin? In other words, how should the anticipated risks or threats a child may face in his or her country of origin inform the repatriation determinations

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<sup>55</sup> Laura Hammond, *Examining the Discourse of Repatriation: Towards a More Proactive Theory of Return Migration*, in *THE END OF THE REFUGEE CYCLE?: REFUGEE REPATRIATION AND RECONSTRUCTION* 227, 227 (Richard Black & Khalid Koser eds., 1999) (discussing the later stages of repatriation); see also LONG, *supra* note 52, at 138 (considering the attractiveness of defining repatriation in terms of the "neat" process of mere physical return).

<sup>56</sup> Ramirez et al., *supra* note 11, at 456 ("Although it departs from international standards and best practices, repatriation in the United States generally proceeds in relation to the immigration removal proceeding. For this reason, repatriation is sometimes also referred to as removal, return, or deportation.") The ideas expressed here should also apply to children who leave the United States under voluntary departure, which may not always or even often truly be "voluntary." *Id.* at 470 n.61.

<sup>57</sup> See UNICEF, *UPROOTED IN CENTRAL AMERICA AND MEXICO: MIGRANT AND REFUGEE CHILDREN FACE A VICIOUS CYCLE OF HARDSHIP AND DANGER* 17 (2018), [https://www.unicef.org/publications/files/UNICEF\\_Child\\_Alert\\_2018\\_Central\\_America\\_and\\_Mexico.pdf](https://www.unicef.org/publications/files/UNICEF_Child_Alert_2018_Central_America_and_Mexico.pdf) ("[I]t is clear that reintegrating migrants safely into their communities is more complicated than simply sending them home."); Hammond, *supra* note 55, at 227; Noll, *supra* note 52, at 103 ("[W]e would propose to conceive return as a comprehensive concept spanning over a period from the manifestation of illegal stay in the returning country to a lasting reintegration in the country of origin.").

<sup>58</sup> Hammond, *supra* note 55, at 227 ("[T]here has been a virtual neglect of the later stages of repatriation, in which returnees attempt to establish themselves socially, economically and politically in their areas of return. Failing critically to consider these later stages can lead to the erroneous conclusion that with physical repatriation comes the end of the migration or displacement cycle.").

referenced in the TVPRA?<sup>59</sup> As explained above, our immigration system and laws do not provide relief to all children facing dangers to their lives and safety in their countries of origin.<sup>60</sup> Though the United States does not have legal authority to protect children abroad, it does have an obligation to not return them to conditions that would endanger them.<sup>61</sup> While the United States may not be able to do so unfailingly, it must do so in good faith and to the best of its ability. Certainly, transport and formal transfer of custody of unaccompanied children are important pieces of repatriation, but they are not the exclusive features of this process.<sup>62</sup> The aftermath of return and reintegration matter greatly, too.

## 2. SAFETY

Safety is a central concept in the repatriation of unaccompanied children from the United States back to their countries of origin; however, the meaning of this term remains ambiguous a decade after the passage of the TVPRA.<sup>63</sup> The TVPRA was “the first statutory

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<sup>59</sup> See *id.* at 228 (“Consideration of these difficulties leads us to consider what sort of future is possible and viable for returnees.”). The timing of these determinations—before, during, or after removal proceedings—is unclear. The provision regarding use of country conditions to make repatriation determinations is in its own subsection, unrelated to placement of unaccompanied children in removal proceedings. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(5)(B), (D), 8 U.S.C. § 1232(a)(5)(B), (D) (2012). In addition, in the initial draft of the 2007 reauthorization legislation, the provision on country conditions included extra language that instructed DHS to assess whether there exists any “reasonable risk” of harm to the child, which is not a standard that corresponds to any existing type of immigration relief. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. § 236(b)(5)(B) (2007).

<sup>60</sup> See *supra* Section I.A.

<sup>61</sup> See JENNIFER NAGDA & MARIA WOLTJEN, YOUNG CTR. FOR IMMIGRANT CHILDREN’S RIGHTS, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 11 (2016), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf> (“The TVPRA creates a clear expectation that vulnerable children not be returned to unsafe or inhumane situations in their countries of origin.”).

<sup>62</sup> Hammond, *supra* note 55, at 227–28.

<sup>63</sup> See Jessica Jones, *June 29, 2014 Statement-LIRS Statement for Congressional Progressive Caucus Ad-hoc Hearing “Kids First: Examining the Southern Border Humanitarian Crisis,”* LUTHERAN IMMIGR. & REFUGEE SERV. (Sept. 2, 2014), <https://www.lirs.org/06292014statement/> (“Unfortunately [safe repatriation] is another area that has gone largely disregarded in practice.”).

effort to ensure the safe repatriation of unaccompanied children”<sup>64</sup> and to “mandate that the United States government report on measures taken to ensure safe removal of children.”<sup>65</sup> Though the law represents a step forward in child protection, the implicated agencies have not clearly identified the measures they utilize to help define what “safe” signifies based on their respective areas of expertise. The government has produced sparse reports detailing its repatriation methods only three times over the past ten years.<sup>66</sup> Further, the government has yet to create meaningful and thorough

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<sup>64</sup> Hill, *The Right of Safe Repatriation*, *supra* note 11, at 86–87; *see also* NAGDA & WOLTJEN, *supra* note 61, at 11 (“The TVPRA calls upon federal agencies to ‘Ensurr[e] the Safe Repatriation of Children’ as part of the statute’s stated goal of combating child trafficking.”). In a Senate hearing following the introduction of the Unaccompanied Alien Child Protection Act of 2001, one of the first bills to address repatriation of unaccompanied children, advocates and experts expressed concern about circumstances under which children have been removed from the United States. *See The Unaccompanied Alien Child Protection Act: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 32, 58, 66 (2002) [hereinafter *S. Hearing on Unaccompanied Alien Child Protection Act*] (discussing problems with repatriation and possible solutions to make the practice safer for children). During the hearing, Wendy Young testified, “[I]n some cases, the [Immigration and Naturalization Service] has returned children under questionable circumstances. A juvenile coordinator admitted to us that she was aware of Chinese children who were arrested and jailed upon their return. A 13-year-old Honduran was deported even though his asylum claim was still pending.” *Id.* at 32. The act did not pass, but it was reintroduced in similar form in subsequent congressional sessions. *See, e.g.*, Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005). Much, but not all, of it and its various iterations introduced during subsequent years was eventually incorporated into the TVPRA. *Compare* Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. § 204(a) (2001), Unaccompanied Alien Child Protection Act of 2004, S. 1129, 108th Cong. § 104(a)(1) (2004), S. 119, § 104(a)(1), and Unaccompanied Alien Child Protection Act of 2007, S. 844, 110th Cong. § 104(a)(1) (2007), with TVPRA § 235.

<sup>65</sup> Ramirez et al., *supra* note 11, at 455; *see also* NAGDA & WOLTJEN, *supra* note 61, at 11 (“Congress also required the same federal agencies to report on how, when and why children are repatriated, with particular attention to ‘the steps taken to ensure that such children were safely and humanely repatriated,’ and a description of the immigration relief sought and denied to such children.”).

<sup>66</sup> *See, e.g.*, U.S. DEP’T OF STATE, REPORT TO CONGRESS ON THE PROVISION OF P.L. 110-457 REGARDING REPATRIATION OF UNACCOMPANIED ALIEN CHILDREN AND GOVERNMENT EFFORTS TO PROTECT THEM FROM HUMAN TRAFFICKING (2010) [hereinafter 2010 REPORT TO CONGRESS] (on file with author); U.S.

guidance ensuring policies and procedures are satisfactory.<sup>67</sup> Accordingly, it is nearly impossible to discern the substance or consequence of this condition essential to repatriation.<sup>68</sup> In light of this existing ambiguity, what should “safe” repatriation mean?

Safe repatriation that is consistent with the TVPRA should signify a return and reintegration during which a child is free from physical and emotional abuse, neglect, violence, sexual exploitation, and other harms, which are the major concerns behind the law’s critical protections.<sup>69</sup> The safety of a child in this context should apply

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DEP’T OF STATE & DEP’T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON THE PROVISION OF P.L. 110-457 REGARDING REPATRIATION OF UNACCOMPANIED ALIEN CHILDREN AND U.S. GOVERNMENT EFFORTS TO PROTECT THEM FROM HUMAN TRAFFICKING (2011) [hereinafter 2011 REPORT TO CONGRESS] (on file with author); U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON THE PROVISION OF PUBLIC LAW 110-457 REGARDING REPATRIATION OF UNACCOMPANIED ALIEN CHILDREN AND U.S. GOVERNMENT EFFORTS TO IMPROVE REPATRIATION PROGRAMS (2013) [hereinafter 2013 REPORT TO CONGRESS] (on file with author).

<sup>67</sup> See Ramirez et al., *supra* note 11, at 455.

<sup>68</sup> Linda Kelly Hill poses,

What standards and practices are followed by the United States to ensure the safety of these children [removed from the United States every year]? Until recently, no uniform law or public guidelines existed to guide the relevant immigration agencies in either effecting the removal of children from the United States or in ensuring their safe repatriation upon return to their home countries. Such oversight was matched by the absence of any comprehensive study, public or private, of how children are treated upon return. Yet as the number of unaccompanied children held in federal custody and removed from the United States has steadily increased, so has the need to address these concerns.

Hill, *The Right of Safe Repatriation*, *supra* note 11, at 85–86.

<sup>69</sup> The Committee on the Rights of the Child has defined safety as encompassing “the right of the child to protection against all forms of physical or mental violence, injury or abuse, sexual harassment, peer pressure, bullying, degrading treatment . . . as well as protection against sexual, economic and other exploitation.” Comm. on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1), ¶ 73, U.N. Doc. CRC/C/GC/14 (May 29, 2013), [https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf) [hereinafter CRC General Comment No. 14] (providing guidance on Article 3, Paragraph 1 in the Convention on the Rights of the Child); see also Comm. on the Rights of the Child, General Comment No. 13 (2011): The Right of the Child to

“to both the process and outcome of return,” reinforcing the notion that repatriation is more than physical transport from one country to another.<sup>70</sup> As Congress has recognized, special concern exists for the safety of unaccompanied children at all points throughout the migratory process due to a number of unique vulnerabilities.<sup>71</sup> The

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Freedom from All Forms of Violence, ¶¶ 20–24, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011), [https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13\\_en.pdf](https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf) [hereinafter CRC General Comment No. 13] (analyzing the meaning of “neglect or negligent treatment,” “mental violence,” “physical violence,” and “corporal punishment” in regard to Article 19, Paragraph 1 in the Convention on the Rights of the Child); U.N. HIGH COMM’R FOR REFUGEES, UNHCR GUIDELINES ON DETERMINING THE BEST INTERESTS OF THE CHILD 69 (2008), <https://www.unhcr.org/4566b16b2.pdf> [hereinafter UNHCR, GUIDELINES ON BEST INTERESTS] (highlighting that “protecting the safety of children” includes “protection from physical and mental violence, abuse, neglect, sexual exploitation, harmful traditional practices, trafficking and abduction, child labour and protection from threats posed by armed conflict to children’s lives, such as underage recruitment”); U.N. HIGH COMM’R FOR REFUGEES, UNHCR GUIDELINES ON FORMAL DETERMINATION OF THE BEST INTERESTS OF THE CHILD 33 (2006), <https://www.unicef.org/violencestudy/pdf/BID%20Guidelines%20-%20provisional%20release%20May%2006.pdf> (stating the same but without mention of “abuse,” “neglect,” and “underage recruitment”); Nagda & Woltjen, *supra* note 28, at 109 (acknowledging that, while “safety is a relevant factor,” the United States “routinely deports children to unsafe situations”). See generally SADAOKO OGATA, U.N. HIGH COMM’R FOR REFUGEES, REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE 79–94 (photo. reprint 2001) (1994) (summarizing various threats to the physical and psychological wellbeing of refugee children).

<sup>70</sup> OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS, ORG. FOR SEC. & CO-OPERATION IN EUR., GUIDING PRINCIPLES ON HUMAN RIGHTS IN THE RETURN OF TRAFFICKED PERSONS 19 (2014), <https://www.osce.org/odihr/124268?download=true>. The Committee on the Rights of the Child has indicated, “Applying a best-interests approach to decision-making means assessing the safety and integrity of the child at the current time; however, the precautionary principle also requires assessing the possibility of future risk and harm and other consequences of the decision for the child’s safety.” CRC General Comment No. 14, *supra* note 69, ¶ 74; see also Comm. on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, ¶ 84, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005), <https://undocs.org/CRC/GC/2005/6> [hereinafter CRC General Comment No. 6] (noting the importance of assessing prospects for the child’s safety upon return, in addition to other circumstances).

<sup>71</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPPRA) § 235(a)(1), (a)(5)(A), 8 U.S.C. § 1232(a)(1), (a)(5)(A) (2012).

Committee on the Rights of the Child highlights, “[U]naccompanied and separated children face greater risks of, inter alia, sexual exploitation and abuse [and] . . . child labour . . . . Unaccompanied and separated girls are at particular risk of gender-based violence, including domestic violence.”<sup>72</sup> Accordingly, a conceptualization of safe repatriation should encompass protection from this diverse set of possible threats to the lives and safety of unaccompanied children.

Some might argue against an expansive definition of this concept due to doubts about the feasibility of operationalization, the overwhelming number of children who enter the United States<sup>73</sup> and might be repatriated to their countries of origin, and the extensive resources that such definition would require.<sup>74</sup> However, the United

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<sup>72</sup> CRC General Comment No. 6, *supra* note 70, ¶ 3; *see also* U.N. HIGH COMM’R FOR REFUGEES & INT’L RESCUE COMM., FIELD HANDBOOK FOR THE IMPLEMENTATION OF UNHCR BID GUIDELINES 22–23 (2011), <https://www.ref-world.org/pdfid/4e4a57d02.pdf> (highlighting some of the most significant risks unaccompanied and separated children face).

The obligation of the State party under article 6 includes protection from violence and exploitation, to the maximum extent possible, which would jeopardize a child’s right to life, survival and development. Separated and unaccompanied children are vulnerable to various risks that affect their life, survival and development such as trafficking for purposes of sexual or other exploitation or involvement in criminal activities which could result in harm to the child, or in extreme cases, in death.

CRC General Comment No. 6, *supra* note 70, ¶ 23. Violence can have a “devastating impact” on a child’s survival and development, with short- and long-term consequences including “fatal injury; non-fatal injury (possibly leading to disability); physical health problems;” and psychological, mental health, and emotional problems, among others. CRC General Comment No. 13, *supra* note 69, ¶ 15(a). In some cases, returning a child to the country where past violence or other harmful events occurred could exacerbate their adverse psychological impact, jeopardizing the child’s mental safety. *See* UNHCR, GUIDELINES ON BEST INTERESTS, *supra* note 69, at 70 (“For a child who is seriously distressed as a result of past events, such as through serious violations of his or her fundamental rights, no decision that could cause even more distress to the child can be considered to be in his or her best interests.”).

<sup>73</sup> *See* MEYER ET AL., *supra* note 8, at 2.

<sup>74</sup> *See, e.g.,* LONG, *supra* note 52, at 138 (“Repatriation is frequently accepted to be a difficult process that must link to other programmes for reconciliation, reintegration, and development. Yet on the other hand, return still offers a seductively neat solution to the demographic and financial pressures refugee exiles pre-

States passed a law to prevent certain abuses, and it must meet its legal mandates and underlying moral duties. It is true that the government must be concerned with the safety of large numbers of children, but it could share its important burden by partnering with non-governmental organizations and countries receiving repatriated children to monitor threats to safety and to develop systems to protect these children.<sup>75</sup> While it would certainly be easier to disregard this responsibility, doing so would carry serious human, political, economic, and other consequences for the United States and the region and ultimately perpetuate a crisis involving child migrants seeking safety and protection.<sup>76</sup>

### 3. SUSTAINABILITY

Though not mentioned in section 235(a)(1) of the TVPRA, “sustainability” appears as a critical concept in the pilot program mandated under section 235(a)(5), which is an initiative that is part of the framework around ensuring safe repatriation.<sup>77</sup> Stated most simply, “sustainability” requires a guarantee of safety and the protection of human rights.<sup>78</sup> Sustainability, “very obviously, depends

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sent for host and donor states, and a means of confirming the ‘rightness’ of national-state order by putting refugees back in ‘their’ place and *through this return* establishing peace.”).

<sup>75</sup> See *infra* Sections III.B.3, IV.B.2 (describing current partnerships between the U.S. government and non-governmental organizations serving repatriated children and providing recommendations as to how the U.S. government might monitor what happens to repatriated children).

<sup>76</sup> See UNHCR, GUIDELINES ON BEST INTERESTS, *supra* note 69, at 70.

<sup>77</sup> Compare TVPRA § 235(a)(1), with § 235(a)(5).

<sup>78</sup> Fundamental international instruments and guidance have analyzed sustainability in the context of one of the most critical rights of the child—the right to life, survival, and development—to which many other rights are related. See, e.g., Comm. on the Prot. of the Rights of All Migrant Workers & Members of Their Families & Comm. on the Rights of the Child, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, ¶ 32(k), U.N. Doc. CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017), <https://undocs.org/en/CMW/C/GC/3> [hereinafter CMW & CRC Joint Comment] (“[R]eturn and reintegration measures should be sustainable from the perspective of the child’s right to life, survival and development.”).



upon ensuring the safety of repatriation. . . . An unsafe repatriation cannot be considered sustainable.”<sup>79</sup> Sustainability implies that conditions in a child’s country of origin will be such that the child will not be compelled to re-migrate after return.<sup>80</sup> This means that forced return “is sustainable only when the conditions or circumstances – whether political, economic or environmental – which led to the flight in the first instance are changed, and new opportunities [are] opened up for returnees to have a fresh start in life.”<sup>81</sup> If threats to the safety or rights of a child persist, the child, parent, or other caregiver may see no option other than to seek protection elsewhere, precipitating a new cycle of displacement and perpetuating the child’s diverse vulnerabilities.<sup>82</sup> Thus, safety and sustainability are mutually reinforcing concepts.

Ultimately, sustainability implicates the protection of human rights. One of the most fundamental rights is the child’s right to life, survival, and development, from which many other rights flow and

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<sup>79</sup> LONG, *supra* note 52, at 175.

<sup>80</sup> See Noll, *supra* note 52, at 117 (explaining that, in the individual sense, sustainable return “means alleviating the pressures leading to renewed attempts of undocumented migration”). There are both advantages and disadvantages to relying on an evaluation of individual outcomes when assessing sustainability. Richard Black & Saskia Gent, *Sustainable Return in Post-conflict Contexts*, INT’L MIGRATION, Aug. 2006, at 15, 26. Looking at sustainability at an individual level is seemingly simple to conceptualize and measure: “[M]ost obviously, if a returnee subsequently re-emigrates, is displaced a second time, or remains at home only because they are forced to do so against their will, that return could quite easily be viewed as unsustainable.” *Id.* On the other hand, such a narrow view of the sustainability of an individual’s return eclipses an understanding of “factors relevant to long-term economic and social well-being, such as income, employment, shelter or access to healthcare, education or other services.” *Id.* However, the cost of gathering that type of data is much greater. *Id.*

<sup>81</sup> Bimal Ghosh, *Introduction*, in RETURN MIGRATION: JOURNEY OF HOPE OR DESPAIR? 1, 3 (Bimal Ghosh ed., 2000) [hereinafter Ghosh, *Introduction*]. Ghosh adds, “Return is not sustainable if there is gross violation of human rights in the country of origin.” Bimal Ghosh, *The Way Ahead: Some Principles and Guidelines for Future Action*, in RETURN MIGRATION: JOURNEY OF HOPE OR DESPAIR? 227, 232 (Bimal Ghosh ed., 2000) [hereinafter Ghosh, *The Way Ahead*]; see also CMW & CRC Joint Comment, *supra* note 78, ¶ 8 (“[T]he drivers of migration, in particular unsafe and/or irregular migration, are often directly related to violations of human rights, including the rights of the child as recognized in several human rights treaties, in particular the Convention on the Rights of the Child.”).

<sup>82</sup> Cf. Ghosh, *Introduction*, *supra* note 81, at 3.

to which they are related.<sup>83</sup> Though sometimes violations “do not reach the necessary intensity required for extraterritorial protection . . . these violations diminish both the willingness of the individual to return and the prospects for sustainable return.”<sup>84</sup> Oftentimes, significant limitations in the country of origin’s infrastructure obstruct the production of conditions necessary for sustainable return.<sup>85</sup> This challenge frequently “emerge[s] due to the tendency of refugee populations to return to the most conflict-prone, impoverished, and marginalized areas of states of origin, making the realization of socio-economic or political rights extremely difficult due to infrastructural limitations.”<sup>86</sup> Relying on these principles to construct a framework around repatriation and reintegration requires devising and implementing “immediate protection measures and long-term solutions, in particular effective access to education, health, psychosocial support, family life, social inclusion, access to justice and protection from all forms of violence.”<sup>87</sup>

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<sup>83</sup> See Convention on the Rights of the Child art. 6, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (identifying children’s rights to life, survival, and development); CMW & CRC Joint Comment, *supra* note 78, ¶ 32(k) (“[R]eturn and reintegration measures should be sustainable from the perspective of the child’s right to life, survival, and development.”).

<sup>84</sup> See Noll, *supra* note 52, at 136–37 (exploring the consequences of human rights violations on sustainable return and reintegration).

<sup>85</sup> See LONG, *supra* note 52, at 145; NOLL, *supra* note 52, at 136; *see also* MEYER ET AL., *supra* note 8, at 19–26.

<sup>86</sup> LONG, *supra* note 52, at 145.

<sup>87</sup> CMW & CRC Joint Comment, *supra* note 78, at ¶ 32(k); *see also* Black & Gent, *supra* note 80, at 29–31 (explaining factors that contribute to sustainability, including voluntary return, housing, employment, training, education, public utilities, and psychosocial support); Ghosh, *The Way Ahead*, *supra* note 81, at 230 (describing the need to ensure access to basic human needs, such as shelter, nutrition, and essential social services); DANISH REFUGEE COUNCIL, RECOMMENDATIONS FOR THE RETURN AND REINTEGRATION OF REJECTED ASYLUM SEEKERS: LESSONS LEARNED FROM RETURNS TO KOSOVO 13 (Bettina Chu et al. eds., 2008), <https://www.refworld.org/pdfid/484022172.pdf> (“Sustainable return therefore implies the successful reintegration of returnees, and prerequisites the availability of the receiving community to receive and accept the returnee as well as social and physical stability in the area of return.”). Conditions need not match those that exist in affluent countries, but there must be respect for basic human rights in the country of return. BRADLEY, *supra* note 32, at 50.

D. *The U.S. Government Has Failed to Effectively Implement the Law*

Despite legal mandates, the U.S. government has not been transparent about its repatriation practices,<sup>88</sup> and this lack of transparency implicates and perpetuates two serious problems. First, without transparency, it is nearly impossible to evaluate whether the government has fulfilled its obligations. Second, the sparse information available suggests that the U.S. government has not complied with the law nor lived up to its spirit in this area. In particular, it remains unclear what the United States learned from its brief pilot program on repatriating unaccompanied children, what aspects of that program it has carried forward to advance safe repatriation, what factors the government considers before executing repatriation, how it weighs those considerations, and the impact of repatriation on unaccompanied children. In effect, the lack of transparency makes it difficult to discern what is happening during the course of repatriation.<sup>89</sup>

Transparency is necessary and critical to fulfilling governmental obligations. Some might contend that transparency is not required because the United States has already decided this group of children does not merit relief that would allow them to stay and such transparency would require the mobilization and expenditure of limited financial, human, and other resources.<sup>90</sup> However, this reasoning is untenable in light of the history and purpose behind the legal measures in question.<sup>91</sup> Without this information and thoughtful analysis of it, the protective provisions of the TVPRA governing the repatriation of unaccompanied children are empty. The United States risks endangering this group by flouting its legal and moral responsibilities, and the government perpetuates a severe regional crisis involving child migrants desperate to find safety and protection.

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<sup>88</sup> Ramirez et al., *supra* note 11, at 455, 458, 473, 477.

<sup>89</sup> *Id.* at 473.

<sup>90</sup> See KANDEL, *supra* note 20, at 4–11, 15–17 (discussing the numerous agencies involved in the repatriation process and their budgets).

<sup>91</sup> See Lind, *supra* note 12 (describing the moral underpinnings of U.S. immigration and refugee law and policy); *supra* notes 41–42 and accompanying text (discussing legislative history of the TVPRA).

In addition, others might assert that it would be dangerous for the U.S. government to disclose policies and procedures designed to protect children because bad actors may use that information to target and harm such children.<sup>92</sup> However, if that is the rationale behind the government's lack of transparency, the government should clearly state so and explain the basis for this rationale. The U.S. government's lack of transparency, what little is known about repatriation, and the implications of those realities are explored in greater detail below through an examination of the directives that appear in the TVPRA.

First, it remains unclear whether and how the law has translated into policies and procedures that actually advance safe repatriation.<sup>93</sup> Following the passage of the TVPRA, the U.S. government, in conjunction with international and Salvadoran agencies and organizations, developed and implemented a repatriation and reintegration pilot program between March 2010 and September 2011 in El Salvador, which offered some promise in terms of promoting the safe repatriation of a small number of children.<sup>94</sup> The initiative aimed to reunite children with their families, facilitate education and training opportunities, and offer financial assistance for education-related expenses.<sup>95</sup> The project advanced a relatively expansive vision of repatriation, coupled with reintegration efforts, and a multi-

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<sup>92</sup> See FED'N FOR AM. IMMIGRATION REFORM, FACT SHEET: HUMAN TRAFFICKING 2 (2016), [http://fairus.org/sites/default/files/2017-08/FAIRFactSheet\\_HumanTrafficking\\_Aug2016.pdf](http://fairus.org/sites/default/files/2017-08/FAIRFactSheet_HumanTrafficking_Aug2016.pdf) (noting that “[h]uman traffickers exploit [the TVPRA] by posing as sponsors and receiving [unaccompanied children] from noncontiguous countries”).

<sup>93</sup> Ramirez et al., *supra* note 11, at 455, 458, 473, 477.

<sup>94</sup> 2010 REPORT TO CONGRESS, *supra* note 66, at 4; 2013 REPORT TO CONGRESS, *supra* note 66, at 3. The pilot program “provided direct reintegration assistance to 64 minors (52 percent male and 48 percent female) . . . . Forty-one percent of beneficiaries were aged 17, 53 percent were between the ages of 11 and 16, and 6 percent were aged five to ten.” 2013 REPORT TO CONGRESS, *supra* note 66, at 4.

<sup>95</sup> 2010 REPORT TO CONGRESS, *supra* note 66, at 4 (noting that the International Organization for Migration (“IOM”) provided financial assistance for education-related expenses). In addition, the pilot program actively discouraged migration by hosting “community workshops on the dangers of irregular migration

dimensional understanding of safety and sustainability.<sup>96</sup> Given its nature as a pilot program, it necessarily had a finite existence; however, the U.S. government should have been able to identify and distill effective practices, as well as carry forward and expand upon the key aspects of the program, by examining the outcomes for the repatriated Salvadoran children and other minors.<sup>97</sup> It is not clear that it has done so.<sup>98</sup>

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in which project beneficiaries (UACs) share[d] with teachers, parents, and adolescents the risks they encountered during their travel to the United States.” 2011 REPORT TO CONGRESS, *supra* note 66, at 3.

<sup>96</sup> 2011 REPORT TO CONGRESS, *supra* note 66, at 2–3; 2013 REPORT TO CONGRESS, *supra* note 66, at 3–4.

<sup>97</sup> In its 2013 report, the U.S. government highlighted that, “As a result of the pilot project, the Salvadoran Government developed its own reintegration program for returned minors in which assistance is provided through local reintegration assistance networks.” 2013 REPORT TO CONGRESS, *supra* note 66, at 4. The report notes that the “IOM also developed a *Manual for Reintegration of Returned Migrant Children and Adolescents*, outlining government agencies’ roles and responsibilities with regard to reintegration of returned minors.” *Id.* Further, the report cites to an IOM report that identified the best practices on how to “facilitat[e] replication of [such] project in other Central American countries.” *Id.* The three best practices highlighted include “[i]dentifying vested stakeholders and securing the buy-in of relevant government agencies; [s]pecifically defining the role of each government agency with regard to reintegration; [and] [d]iscouraging the migration of minors through education, employment programs, access to social services, and informing parents of the dangers of migration.” *Id.* The mandated report does not clearly identify best practices the U.S. government plans to adopt, particularly with respect to what it should do prior to executing physical removal of a child. For example, evaluations related to family tracing and prospects for reunification should arguably take place before returning a child in case it appears that the child may not have an available, suitable caretaker in his or her country of origin. Nevertheless, without actually stating any details or specifics, the 2013 report concludes that “[l]essons learned from the project have contributed to the United States’ ability to safely and successfully reintegrate UAC into their home communities in Guatemala, El Salvador, Honduras, and Nicaragua.” *Id.*; *cf. infra* Section II.B.5 (discussing uncertain fates of those removed). Without additional detail or description, and by simply referring to the publications and work of other organizations, the U.S. government seems to punt the question regarding its efforts and how it is meeting its obligations.

<sup>98</sup> The author filed Freedom of Information Act (“FOIA”) requests with DOS, DHS, and HHS in 2018 to obtain information about repatriated children, as well as policies and procedures governing the repatriation process. *See* Freedom of Information Act Request from Karen Baker, Clinical Teaching Fellow & Supervising Att’y, Ctr. for Applied Legal Studies, Georgetown Univ. Law Ctr., to U.S. Dep’t of State (June 6, 2018) (on file with author); Freedom of Information Act

Next, while the government has provided some insight regarding how it utilizes the pivotal DOS publications in repatriation determinations, which the Secretary of DHS is required to consult under the TVPRA,<sup>99</sup> the government does not appear to have developed instructive guidance or standards around this decisive analysis.<sup>100</sup> In addition to reviewing the publications mentioned in the TVPRA, “ICE relies on travel warnings posted on the DOS website,” which address “short-term conditions, including natural disasters, coups, terrorist attacks, and high profile international events” as well as “long-term issues, including political instability.”<sup>101</sup> Under ICE policy, the agency must review the DOS publications and travel warnings before executing removal of an unaccompanied child.<sup>102</sup> “In cases in which DHS, in consultation with the Department of State, determines that travel is not advised, the repatriation may be delayed until conditions improve.”<sup>103</sup>

However, accessible policy does not reveal how the agencies reconcile serious warnings against travel to a particular country and continued repatriation of children to that country.<sup>104</sup> Additionally, it

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Request from Karen Baker, Clinical Teaching Fellow & Supervising Att’y, Ctr. for Applied Legal Studies, Georgetown Univ. Law Ctr., to Immigration & Customs Enf’t, U.S. Dep’t of Homeland Sec. (June 6, 2018) (on file with author); Freedom of Information Act Request from Karen Baker, Clinical Teaching Fellow & Supervising Att’y, Ctr. for Applied Legal Studies, Georgetown Univ. Law Ctr., to Admin. for Children & Families, U.S. Dep’t of Health & Human Servs. (July 23, 2018) (on file with author). As of April 2019, only DHS (specifically, ICE) has replied, offering five pages of demographic information about repatriated children. *See* Freedom of Information Act Response from Catrina M. Pavlik-Keenan, FOIA Officer, Immigration & Customs Enf’t, U.S. Dep’t of Homeland Sec., to Karen Baker, Georgetown Univ. Law Ctr. (Sept. 20, 2018) (on file with author) [hereinafter DHS FOIA Response].

<sup>99</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(5)(B), 8 U.S.C. § 1232(a)(5)(B) (2012).

<sup>100</sup> *See* 2013 REPORT TO CONGRESS, *supra* note 49, at 6 (stating merely that ICE relies on and reviews DOS reports, without any particular details about how ICE uses the information in those publications).

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

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> For example, on July 27, 2018, the DOS travel advisory for Guatemala stood at level two out of four, urging people to “[e]xercise increased caution.” Press Release, U.S. Embassy in Guat., Travel Advisory for Guatemala (July 27,

does not indicate whether DHS considers information in the DOS publications that relate to a child's individual characteristics, such as gender or ethnicity, when repatriating an unaccompanied child.<sup>105</sup> In effect, there does not appear to be a structured framework for processing these considerations. Coupled with the lack of transparency, this deficiency creates space for dangerously incomplete and subjective determinations that do not advance safe repatriation.

Finally, despite some initial movement, the government has not produced all of the mandated annual reports detailing critical information about the affected group of children and repatriation practices. Since the passage of the TVPRA nearly a decade ago, the government has released three reports, which provide information on the period between the passage of the TVPRA on December 23, 2008 and January 16, 2013, when the latest report was submitted.<sup>106</sup> The most recent report suggests that the U.S. government has made

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2018), <https://gt.usembassy.gov/travel-advisory-for-guatemala/>. Although recently updated on February 28, 2019, the travel advisory for Guatemala still lists the country at level two. Bureau of Consular Affairs, U.S. Dep't of State, *Guatemala Travel Advisory*, TRAVEL.STATE.GOV (Feb. 28, 2019), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/guatemala-travel-advisory.html> [hereinafter *Guatemala Travel Advisory*]. For El Salvador and Honduras, the travel advisories are level three, meaning that the DOS suggests that people “[r]econsider travel.” Bureau of Consular Affairs, U.S. Dep't of State, *El Salvador Travel Advisory*, TRAVEL.STATE.GOV (Jan. 29, 2019), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/el-salvador-travel-advisory.html>; Bureau of Consular Affairs, U.S. Dep't of State, *Honduras Travel Advisory*, TRAVEL.STATE.GOV (Sept. 20, 2018), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/honduras-travel-advisory.html>. The U.S. government has not addressed whether other factors, perhaps part of a best interests analysis, rebut findings that travel to a particular country is not advised.

<sup>105</sup> See 2013 REPORT TO CONGRESS, *supra* note 66, at 6 (stating that ICE policy requires review of DOS travel warnings and the DOS Country Reports on Human Rights Practices and the Trafficking in Persons Report, but nothing more).

<sup>106</sup> See 2010 REPORT TO CONGRESS, *supra* note 66 (noting that the report covers December 23, 2008 to June 4, 2010); 2011 REPORT TO CONGRESS, *supra* note 66 (covering “data from the 2010 fiscal year” and “a description of U.S. Government (USG) efforts to ensure safe repatriation of UACs through the date of submission of this report”); 2013 REPORT TO CONGRESS, *supra* note 66 (noting that “[t]his [was] the third annual report . . . and includes data from the 2011 fiscal year and a description of U.S. Government (USG) efforts to ensure safe repatriation of UAC through the date of submission of this report,” which was January 16, 2013).

some progress on safe repatriation measures.<sup>107</sup> For instance, both DHS and ORR initiated working groups on repatriation practices.<sup>108</sup> The interagency ORR-led group,<sup>109</sup> comprised of representatives from HHS, DHS, DOS, the Department of Justice, and the Department of Labor, met quarterly to work on the annual mandated report, explore non-governmental organizations and federal partnerships assisting with reintegration of unaccompanied children,<sup>110</sup> and identify ways to improve safe repatriation.<sup>111</sup> This interagency dialogue

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<sup>107</sup> See 2013 REPORT TO CONGRESS, *supra* note 66, at 2–5.

<sup>108</sup> *Id.* at 3–4 (describing the “DHS UAC Working Group” and ORR’s “Interagency Working Group on UAC repatriation”). “DHS launched a cross-component DHS UAC Working Group . . . in July 2011.” *Id.* at 3. Through its three subgroups, the Group works to improve safe repatriation “by training DHS personnel on proper UAC screening techniques and exploring opportunities to partner with international organizations and governments to inform children of the dangers of illegal immigration and establish best practices to ensure safe repatriation.” *Id.* The Working Group also “focused on increasing the safety of [unaccompanied children] within the U.S. by examining short-term care and custody of children as well as external interagency coordination on the transfer and placement of unaccompanied . . . children.” *Id.* It would be helpful to know what the Working Group identified as “best practices” and how it has addressed interagency coordination, but the report does not elaborate on those points. *See id.*

<sup>109</sup> More specifically, the Division of Children’s Services, a component of ORR, launched and led this group. *Id.* at 4.

<sup>110</sup> The report describes a collaboration between ORR and Kids in Need of Defense to facilitate reintegration assistance for repatriated children. *See id.* at 5; *infra* Section II.B.4 (describing reintegration services available to repatriated unaccompanied children).

<sup>111</sup> 2013 REPORT TO CONGRESS, *supra* note 66, at 4. It is not clear whether this group still exists and continues to meet at the intervals described in the 2013 report. According to a U.S. Government Accountability Office report, “[i]nteragency coordination on reception and reintegration efforts takes place at U.S. embassies among the U.S. Agency for International Development (USAID), Department of State (State), Department of Homeland Security (DHS), and others, in El Salvador, Guatemala, and Honduras.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-62, CENTRAL AMERICA: USAID ASSISTS MIGRANTS RETURNING TO THEIR HOME COUNTRIES, BUT EFFECTIVENESS OF REINTEGRATION EFFORTS REMAINS TO BE DETERMINED app. II at 43 (2018), <https://www.gao.gov/assets/700/695298.pdf> [hereinafter GAO, CENTRAL AMERICA: USAID]. While “[t]hese efforts occur on a formal basis . . . in El Salvador and Honduras,” these efforts happen “on an ad hoc basis in Guatemala, where no formal migration working group exists.” *Id.*



and coordination is a critical initial step to evaluating and advancing safety in repatriation.

Nevertheless, all three reports are lean, lack substantial detail, and leave significant questions unanswered, particularly in the absence of subsequent reports. The first two reports fall short because, although they “describe[] basic policies and procedures related to DHS’s apprehension of unaccompanied children, [they do] not specifically describe the process of repatriating those ordered to return to their country of origin.”<sup>112</sup> In addition, the third report makes broad statements about the government’s efforts without offering a precise description of how it will make repatriation safer.<sup>113</sup> As a result, though the government has made some strides, it is difficult to evaluate how the United States is ensuring safe repatriation of unaccompanied children and protecting them from potential serious harm, at least in the form of trafficking or other abuse, as intended by Congress.

## II. CASE STUDY: UNACCOMPANIED CHILDREN REPATRIATED TO GUATEMALA

The U.S. law and policy governing repatriation of unaccompanied children outlined above applies equally to children from any

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<sup>112</sup> BYRNE & MILLER, *supra* note 3, at 28; *see also* 2010 REPORT TO CONGRESS, *supra* note 66, at 2–4; 2011 REPORT TO CONGRESS, *supra* note 66, at 2–3. The government’s reports describe thirty local repatriation agreements between the United States and Mexico, which cover issues related to “time of return, points of repatriation, and handling of persons with special needs including UAC.” 2013 REPORT TO CONGRESS, *supra* note 66, at 3; *see also* 2010 REPORT TO CONGRESS, *supra* note 66, at 2; 2011 REPORT TO CONGRESS, *supra* note 66, at 2. These reports do not provide further details about those agreements. *See* 2010 REPORT TO CONGRESS, *supra* note 66, at 2; 2011 REPORT TO CONGRESS, *supra* note 66, at 2; 2013 REPORT TO CONGRESS, *supra* note 66, at 3. Further, while the 2011 Report notes that “DHS [was] collaborating with the Government of El Salvador to complete similar local arrangements[,]” the 2013 Report does not make any mention of the outcomes of those collaborations nor does it mention anything at all about similar agreements with any Central American country, including El Salvador. *Compare* 2011 REPORT TO CONGRESS, *supra* note 66, at 2, *with* 2013 REPORT TO CONGRESS, *supra* note 66, at 3.

<sup>113</sup> *See* 2013 REPORT TO CONGRESS, *supra* note 66, at 2–5 (noting that the DHS Working Group aims to “establish best practices to ensure safe repatriation” and the ORR Interagency Working Group identifies “ways to improve the safety of repatriation”).

non-contiguous country,<sup>114</sup> though most children are returned to Mexico and the Northern Triangle countries.<sup>115</sup> This Part will specifically examine the repatriation of unaccompanied children to Guatemala and evaluate how practice fails to align with U.S. moral and legal obligations. This focused analysis provides context to explore how the United States chooses to realize its moral and legal duties and offers a deeper understanding of the implications of those choices. Despite the fact that Guatemala may be the Northern Triangle country that is best situated to receive and assist repatriated children,<sup>116</sup> this case study reveals significant deficiencies in practice that are also common to the repatriation of Salvadoran, Honduran, and other children. Thus, many of the key issues are relevant to and inform a broader discussion around policies and procedures on the repatriation of unaccompanied children.

#### A. *Scope, Demographics, and Trends*

For a number of years, the United States repatriated as many as several hundred unaccompanied children annually to Guatemala, as shown in Table 1, though exact numbers have been difficult to discern because the government has failed to consistently produce the

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<sup>114</sup> As previously noted, the repatriation policies and procedures apply differently to unaccompanied children from contiguous countries, primarily Mexico. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(2), 8 U.S.C. § 1232(a)(2) (2012) (providing special rules for children from contiguous countries).

<sup>115</sup> See 2010 REPORT TO CONGRESS, *supra* note 66, at 1, app. B at 11 (providing demographic information about repatriated children); 2011 REPORT TO CONGRESS, *supra* note 66, at 1–2 (providing the same); 2013 REPORT TO CONGRESS, *supra* note 66, at 1–2 (providing the same). The 2013 mandated report, which provides data from the 2011 fiscal year, states that, while a handful of children were removed to Ecuador (16), Brazil (16), Nicaragua (4), and other countries (32), the majority were removed to Mexico (522), Guatemala (458), Honduras (228), and El Salvador (168). *Id.* at 2.

<sup>116</sup> See, e.g., MEYER ET AL., *supra* note 8, at 20 (“The U.S. government has previously indicated that El Salvador and Honduras are not capable of handling large influxes of deportees, stating in its extensions of Temporary Protected Status (TPS) that each of those countries ‘remains unable, temporarily, to handle adequately the return of its nationals.’”).

reports mandated under the TVPRA or to otherwise disclose this information.<sup>117</sup> More recently, data obtained via a Freedom of Information Act (“FOIA”) request reveals that there has been a dramatic, yet unsurprising, rise in the number of unaccompanied children repatriated to Guatemala.<sup>118</sup> These numbers may continue to grow as the wave of cases resulting from the increase of unaccompanied children arriving in the United States, which peaked in fiscal year 2014,<sup>119</sup> moves through the immigration system.<sup>120</sup>

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<sup>117</sup> See Aubree Abril, *Guatemalan Data Show Number of Children Returned from U.S. Is Falling*, ARIZ. CAPITOL TIMES (June 27, 2014), <https://azcapitoltimes.com/news/2014/06/27/guatemalan-data-show-number-of-children-returned-from-u-s-is-falling/> (reporting that “ICE has not released numbers of deported children”); *supra* Section I.D.

<sup>118</sup> See DHS FOIA Response, *supra* note 98, at 2–3.

<sup>119</sup> MARC R. ROSENBLUM, MIGRATION POLICY INST., UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES: THE TENSION BETWEEN PROTECTION AND PREVENTION 1–3 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/TCM-Protection-UAC.pdf> (noting the peak in 2014).

<sup>120</sup> The number of Guatemalan unaccompanied children encountered or apprehended in the United States has soared from under 2,000 in the years preceding fiscal year 2012 to over 22,000 in fiscal year 2018. See *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> (last modified Oct. 18, 2016) (showing the number of Guatemalan unaccompanied children encountered in the United States as 1,115 in 2009; 1,517 in 2010; 1,565 in 2011; and 3,835 in 2012); *U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> (last modified Oct. 23, 2018) [hereinafter *U.S. Border Patrol Apprehensions FY2018*] (showing the number of Guatemalan unaccompanied children apprehended in the United States by fiscal year as 8,068 in 2013; 17,057 in 2014; 13,589 in 2015; 18,913 in 2016; 14,827 in 2017; and 22,327 in 2018). It is estimated that around forty percent (40%) of unaccompanied children in general might be eligible for relief, meaning that many children are likely to receive orders for removal. See Muzaffar Chishti & Faye Hipsman, *Dramatic Surge in the Arrival of Unaccompanied Children Has Deep Roots and No Simple Solutions*, ONLINE J. MIGRATION POL’Y INST. (June 13, 2014), <https://www.migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions> (citing to data from the Vera Institute of Justice). It can take a long time for a child’s case to move through the immigration system, and numbers may be skewed by children who turn eighteen during proceedings, in which case they will be counted as an adult at the time of removal. See Abril, *supra* note 117.

Table 1: Unaccompanied Children Repatriated from the United States<sup>121</sup>

Period	Number of Children Repatriated to Guatemala	Total Number of Children Repatriated
FY2009 <sup>122</sup>	534	1,361
FY2010	520	1,690
FY2011	515	1,695
FY2012	626	1,809
FY2013	661	1,868
FY2014	686	1,901
FY2015	544	2,065
FY2016	891	2,545
FY2017	1,447	3,598
FY2018	2,158	4,515

The limited data produced by the government regarding unaccompanied children removed from the United States to Guatemala does not include specific statistics on the age, gender, and ethnicity

<sup>121</sup> DHS FOIA Response, *supra* note 98, at 1–2. For the purposes of this Table, each fiscal year begins in October. *Id.* The information for FY2018 is through August 4, 2018. *Id.*

<sup>122</sup> *Cf.* 2010 REPORT TO CONGRESS, *supra* note 66, at app. B at 11 (providing that the United States repatriated 657 children to Guatemala between December 23, 2008 and September 30, 2009). In the period between December 23, 2008 and June 4, 2010, twenty-three percent (23%) of all unaccompanied children removed by the United States were Guatemalan. *Id.* A total of 3,062 unaccompanied children were removed between December 23, 2008 and September 30, 2009. *Id.*

of repatriated Guatemalan children.<sup>123</sup> Generally, however, it appears that teenage males constitute a majority of this group.<sup>124</sup> Of note, many unaccompanied children returned to Guatemala are indigenous and “come from some of the poorest and most remote parts of the country,”<sup>125</sup> such as communities in the Western Highlands.<sup>126</sup> Unaccompanied children report having fled Guatemala for

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<sup>123</sup> *Cf. id.* at 1, app. A at 10; 2011 REPORT TO CONGRESS, *supra* note 66, at 1–2; 2013 REPORT TO CONGRESS, *supra* note 66, at 1–2. For instance, the 2010 mandated report details that the Executive Office for Immigration Review (“EOIR”) issued 3,083 removal orders against children from 27 different countries of origin and ranging from 1.3 to 17.9 years old during the period between December 23, 2008 and June 4, 2010. 2010 REPORT TO CONGRESS, *supra* note 66, at app. A at 10. It does not provide specific statistics on Guatemalan unaccompanied children. *See id.* Unlike the U.S. government, “Guatemala does provide annual numbers of citizens repatriated, broken down by gender and whether the deportee is an adult or a minor.” Abril, *supra* note 117. The Guatemalan government reports that the majority of returned unaccompanied children are male, between the ages of fourteen and seventeen, and from departments in the Western Highlands (including Huehuetenango, San Marcos, Quiché, Quetzaltenango, and Sololá) with predominantly indigenous communities. COMISIÓN PARA LA ATENCIÓN INTEGRAL DE NIÑEZ Y ADOLESCENCIA MIGRANTE, GOBIERNO DE LA REPÚBLICA DE GUATEMALA, PROTOCOLO NACIONAL PARA LA RECEPCIÓN Y ATENCIÓN DE NIÑEZ Y ADOLESCENCIA MIGRANTE 18–19 (2017), <http://www.sbs.gob.gt/wp-content/uploads/2016/09/PROTOCOLO-6-03-17.pdf> [hereinafter GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS].

<sup>124</sup> *See* GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 18 (stating that the highest percentage of Guatemalan repatriated children are males between the ages of fourteen and seventeen). This statistic seems to also be true of repatriated children generally. DHS FOIA Response, *supra* note 98, at 5 (showing that males have been repatriated in much higher numbers than females between fiscal years 2009 and 2018); 2010 REPORT TO CONGRESS, *supra* note 66, at app. A at 10 (stating that between December 23, 2008 and June 4, 2010 75.84% of repatriated children generally were males).

<sup>125</sup> HOME SWEET HOME, *supra* note 5, at 37.

<sup>126</sup> GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 18; THE GUAT. HUMAN RIGHTS COMM’N, CONDITIONS FACING GUATEMALANS DEPORTED FROM THE US: CONCERNS AND RECOMMENDATIONS FOR A RIGHTS-BASED APPROACH 2 (2014), <https://www.ghrc-usa.org/wp-content/uploads/2014/10/Migration-Report-Final.pdf> (providing that “the majority of unaccompanied children from Guatemala are from the Western Highlands, which has high rates of poverty and very few government services”); ALEJANDRA ARGUETA ET AL., LATIN AM. PROGRAM, WOODROW WILSON INT’L CTR. FOR SCHOLARS, THE REALITIES OF RETURNING HOME: YOUTH REPATRIATION IN GUATEMALA 16–17 (2015), <https://www.wilsoncenter.org/sites/default/files/Guatemala%20Repat->

a variety of complex and interrelated reasons, with dominant themes such as deprivation of basic necessities for survival, violations of social and cultural rights, abuse in the home, and violence in society, including violence perpetrated by gangs and other criminal groups.<sup>127</sup>

## B. Current Repatriation Scheme

### 1. PRE-DEPARTURE FROM THE UNITED STATES (POST-ISSUANCE OF REMOVAL ORDER)

After an unaccompanied child receives a removal order, ICE Enforcement and Removal Operations (“ERO”) prepares to execute

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riation\_June%202015-%20FINAL\_0.pdf (highlighting that approximately seventy-seven percent (77%) of migrant children returned to Guatemala from Mexico are indigenous).

<sup>127</sup> See LESLIE VÉLEZ ET AL., U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 24 (Pamela Goldberg ed., 2014), <https://www.unhcr.org/56fc266f4.html>; BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP’T OF STATE, GUATEMALA 2016 HUMAN RIGHTS REPORT 23 (2017), <https://www.state.gov/documents/organization/265802.pdf> [hereinafter GUATEMALA 2016 HUMAN RIGHTS REPORT]. Based on the steady rise of unaccompanied children arriving in the United States, the U.N. High Commissioner for Refugees (“UNHCR”) conducted interviews with 404 Central American and Mexican children who recently arrived at the U.S. border to better understand their reasons for fleeing. VÉLEZ ET AL., *supra*, at 5. Of those children, 100 were Guatemalan. *Id.* at 6. Among the Guatemalan children, twenty-nine percent (29%) described deprivation, twenty-three percent (23%) discussed abuse in the home, and twenty percent (20%) mentioned violence in society as the reasons they fled. *Id.* at 9. Nearly half of the Guatemalan children interviewed were indigenous, and “they represented 55% of the Guatemalan children who discussed issues of deprivation, 30% of those who discussed abuse in the home and 25% of those who discussed violence in society.” *Id.* at 8–9. Overall, UNHCR concluded that “[t]hirty-eight percent of the 100 children from Guatemala raised international protection concerns.” *Id.* at 9.

it.<sup>128</sup> ICE must notify Guatemala of the imminent removal and obtain any necessary travel documents for the child.<sup>129</sup> The Guatemalan consulate conducts an interview with the child, during which time consular officials are supposed to confirm the child's identity and nationality, facilitate provision of the letter of safe passage (*salvoconducto*), and detect situations of vulnerability.<sup>130</sup> Consular officials must also attempt to collect data and contact information on the child's family, if available.<sup>131</sup> It is not clear whether, when, or by whom a child's family or other caretaker might be contacted before departure.<sup>132</sup> In addition, the ICE Field Office Juvenile Coordinator

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<sup>128</sup> JUVENILE & FAMILY RESIDENTIAL MGMT. UNIT, ENF'T & REMOVAL OPERATIONS, U.S. IMMIGRATION & CUSTOMS ENF'T, FIELD OFFICE JUVENILE COORDINATOR HANDBOOK 13 (2017) [hereinafter FIELD OFFICE JUVENILE COORDINATOR HANDBOOK]. Notably, "ICE will incur all travel expenses for UAC, regardless of the type of order issued by an [immigration judge]." *Id.* at 46.

<sup>129</sup> See KANDEL, *supra* note 20, at 7 (describing the steps that ICE follows as it prepares to execute the physical removal of an individual from the United States).

<sup>130</sup> GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 34. Depending on the child's country of origin and the location of the shelter at which the child is housed in the United States prior to removal, consular officials may conduct in-person or telephonic interviews with the child. KANDEL, *supra* note 20, at 7 & n.37. At least one report suggests that ICE sometimes faces challenges in acquiring travel documents for a child when the country of origin objects to the return. *Id.* at 7. In addition, ICE has occasionally had problems obtaining travel documents because of changes in documentary requirements by various countries. *Id.*

<sup>131</sup> FIELD OFFICE JUVENILE COORDINATOR HANDBOOK, *supra* note 128, at 47; 2013 REPORT TO CONGRESS, *supra* note 66, at 3 ("Consular officers of the country of nationality also interview UAC prior to or upon their return to facilitate the safe and dignified return of the child to his or her country of origin."); GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 34. Facilitating this connection appears to contemplate the protection of diverse aspects of a child's safety post-arrival in the country of origin. However, what is the effect of these efforts if the child's family cannot be reached? In addition, who, if anyone, verifies that a child has not been or risks being exposed to abuse in the home to which he or she will return? The answers to these questions are not clear.

<sup>132</sup> See Angelina Chapin, *ICE Is Sending Separated Children Home with No One to Pick Them Up*, HUFFPOST (Oct. 12, 2018, 1:46 pm), [https://www.huffpost.com/entry/ice-separated-children-central-america\\_us\\_5bc0b8bae4b0bd9ed559a75c](https://www.huffpost.com/entry/ice-separated-children-central-america_us_5bc0b8bae4b0bd9ed559a75c) ("Legal and immigration experts say ICE is sending children back to Central America without properly notifying parents of their travel plans."). In October 2018, ICE removed a four-year-old separated child to Guatemala without first informing her family. *Id.*

Handbook briefly discusses the submission of a pre-departure threat assessment to the Headquarters Travel Unit, to be done ten business days prior to transport.<sup>133</sup> The submission includes a risk assessment, flight itinerary, and threat assessment.<sup>134</sup> Once it has processed these documents, the “[Headquarters] Removal Unit will provide the country clearance notification.”<sup>135</sup>

## 2. DEPARTURE FROM THE UNITED STATES

Once Guatemalan authorities have issued necessary travel documents and any other requisite approvals, ICE executes physical removal by flying unaccompanied children, escorted by ICE officers, back to Guatemala.<sup>136</sup> The consulate that interviewed the child is to inform the Guatemalan General Directorate of Consular and Migration Matters (*Dirección General de Asuntos Consulares y Migratorios*, or “DIGRACOM”) of the day and time of the child’s flight at least twelve hours prior to the child’s arrival and before the office closes for the day.<sup>137</sup> DIGRACOM must transfer the information to the Attorney General’s office (*Procuraduría General de la Nación*, or “PGN”) and the Secretariat for Social Welfare (*Secretaría de Bienestar Social de la Presidencia de la República*, or “SBS”).<sup>138</sup> In an alleged effort “[t]o safeguard the welfare of all [unaccompanied children], ICE has established policies for repatriating [unaccompanied children], including returning [unaccompanied children] only during daylight hours; recording transfers by ensuring that the receiving government officials or designees sign for custody; [and] returning [unaccompanied children] through a port designated for repatriation,” among others.<sup>139</sup> ERO also has a policy of “returning

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<sup>133</sup> FIELD OFFICE JUVENILE COORDINATOR HANDBOOK, *supra* note 128, at 47.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> KANDEL, *supra* note 20, at 7. According to the agency, “ICE provides two escort officers for each UAC,” and “[a]n additional officer is added for each group that exceeds five UAC. The gender of the officers corresponds to the gender of the children repatriated.” *Id.* at 7 & n.40.

<sup>137</sup> GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 34–35.

<sup>138</sup> *Id.*

<sup>139</sup> KANDEL, *supra* note 20, at 7; *see also* FIELD OFFICE JUVENILE COORDINATOR HANDBOOK, *supra* note 128, at 46; James W. McCament, Deputy Under



each [unaccompanied child] in the appropriate outerwear for the current climate conditions.”<sup>140</sup>

### 3. ARRIVAL IN GUATEMALA

Upon landing at the La Aurora Air Force Base in Guatemala City, officials from the Guatemalan General Directorate of Migration (*Dirección General de Migración*, or “DGM”) greet children and ICE releases the children to the Guatemalan PGN.<sup>141</sup> Guatemalan authorities retain custody of children until they can identify a

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Sec’y, Office of Strategy, Policy, & Plans, U.S. Dep’t of Homeland Sec., Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse, Testimony Before Permanent Subcommittee on Investigations, U.S. Senate Committee on Homeland Security and Governmental Affairs 6 (Apr. 25, 2018), <https://www.hsgac.senate.gov/imo/media/doc/McCament%20Testimony.pdf> [hereinafter Testimony of James W. McCament]. The mandated reports produced emphasize physical safety during transport. *See* 2010 REPORT TO CONGRESS, *supra* note 66, at 2 & n.5 (discussing policies around repatriating Mexican children, including “what days of the week are acceptable for children to be returned safely” and “the defined locations that are acceptable for the children’s return”); 2011 REPORT TO CONGRESS, *supra* note 66, at 2 (noting that “DHS is now collaborating with the Government of El Salvador to complete similar local arrangements” to those established in Mexico); 2013 REPORT TO CONGRESS, *supra* note 66, at 3 (providing that relevant considerations with repatriating Mexican children include the “time of return, points of repatriation, and handling of persons with special needs including UAC”). The foreign government official receiving the unaccompanied child signs Form I-216, Record of Persons and Property Transferred. FIELD OFFICE JUVENILE COORDINATOR HANDBOOK, *supra* note 128, at 34, 46–47. Once signed,

the I-216 will serve to document the safe repatriation and transfer to a government authority for all UAC listed. . . . Should the foreign government official or designee refuse to sign Form I-216, the officer/agent will document the official’s name (if known), date, time, and port, and will note the refusal.

*Id.* 46–47. The Field Office Juvenile Coordinator’s Handbook does not indicate how often refusal to sign occurs, why, and whether any additional protectionary measures are implemented for children in such cases. *See id.* at 45–48.

<sup>140</sup> FIELD OFFICE JUVENILE COORDINATOR HANDBOOK, *supra* note 128, at 46.

<sup>141</sup> ARGUETA ET AL., *supra* note 126, at 13; GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 36; MEYER ET AL., *supra* note 8, at 20–21. Occasionally, flights land at the La Aurora International Airport in Guatemala City. ARGUETA ET AL., *supra* note 126, at 13. While various Guatemalan government agencies are involved in the repatriation process, the SBS is principally responsible for returned migrant children. GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 23; GUATEMALAN NATIONAL PROTOCOL FOR

family member or guardian to whom they can release the child.<sup>142</sup> During processing at a reception center, representatives of the SBS briefly interview children to assess their needs and gather information, such as telephone numbers for family members if not previously obtained.<sup>143</sup> After processing, unaccompanied children may

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CHILD MIGRANTS, *supra* note 87, at 34–40 (describing the role of various Guatemalan agencies, including SBS, in the repatriation process of unaccompanied children). The U.S. government reports that “[w]ith U.S. assistance, IOM improved the capacity of the Northern Triangle governments to provide reception services to returning migrants.” GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 32. Specifically, IOM renovated seven reception centers in the region and assisted the host governments in collecting data about returned migrants, which may inform the design of reintegration policies and programs. *Id.* at 13, 32–36. Nevertheless, “coordination between the government and civil society on the provision of reception services is often lacking.” ARIEL G. RUIZ SOTO ET AL., MIGRATION POLICY INST., SUSTAINABLE REINTEGRATION: STRATEGIES TO SUPPORT MIGRANTS RETURNING TO MEXICO AND CENTRAL AMERICA 2 (2019), <https://www.migrationpolicy.org/sites/default/files/publications/MPI-ReceptionReintegration-FinalWeb.pdf>.

<sup>142</sup> MEYER ET AL., *supra* note 8, at 21.

<sup>143</sup> GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 37; *see* ARGUETA ET AL., *supra* note 126, at 20; *see also* GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 17–19 (describing the three reception centers in Guatemala). There are two reception centers that serve unaccompanied children in Guatemala City; where children go depends on whether they arrive on a commercial or chartered flight. GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 17–18. The Reception Center for Unaccompanied Migrant Children and Family Units opened in May 2017 and assists “[unaccompanied children] and families returning by commercial flights from Mexico or the United States.” *Id.* at 17. The Reception Center for Returnees at Guatemalan Air Force Base “serves adults, [unaccompanied children], and families returning by chartered flights from the United States.” *Id.* at 18. The SBS has taken a growing role in the reception of unaccompanied children since 2012 as policies and procedures have evolved. ARGUETA ET AL., *supra* note 126, at 19. “Prior to June 2012, PGN would immediately release minors to families present upon the flights['] arrival.” *Id.* After increasing numbers of child migrants fled the country, former Guatemalan First Lady Rosa Leal de Perez took a strong interest in the group and changed the reception and post-return treatment they receive. Ian Gordon, *What’s Next for the Children We Deport?*, MOTHER JONES (June 3, 2014, 10:00 AM), <https://www.motherjones.com/politics/2014/06/unaccompanied-kids-immigrants-deported-guatemala/>. Guatemala, in addition to El Salvador and Honduras, has developed specific programmes in partnership with UNHCR and the International Organization of Migration (IOM), and in the case of children, UNICEF, to better train migration officials

stay for up to seventy-two hours at a shelter, *Casa Nuestra Raíces* (Our Roots Shelter), operated by SBS in Guatemala City.<sup>144</sup> The facility can accommodate twenty children.<sup>145</sup> The shelter aims to “provide support and protection to deported minors in accordance with a Protocol on Psychosocial Care,” however services are “severely limited” and deficient beyond capacity.<sup>146</sup> Children undergo interviews with a psychologist or social worker to screen for protection needs, but the screenings may fail to detect these needs since interviews proceed in Spanish, without interpreters, despite the high proportion of indigenous children returned to Guatemala.<sup>147</sup> Accordingly, a child might not have the opportunity or ability “to express any fears they may have [about] returning to their families or communities.”<sup>148</sup> Further, children may be reluctant to disclose the reasons they fled to government employees.<sup>149</sup>

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to identify cases in need of protection and projects are underway to develop programmes to attend to those who do. Most of the reception centres followed a process in which a short initial interview could give way to a second more in-depth one, often with a trained psychologist, social worker or human rights officer, if the need was established. But in none of the cases documented by Amnesty International did deportees express that the authorities had fully or adequately inquired about or followed up on their protection needs.

HOME SWEET HOME, *supra* note 5, at 36.

<sup>144</sup> MEYER ET AL., *supra* note 8, at 21; GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 19–20. The shelter in Guatemala City receives all unaccompanied children deported by air from the United States and northern Mexico. Gordon, *supra* note 143. In August 2015, IOM renovated this shelter. GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 19. There is a second shelter with the same name in Quetzaltenango, which typically receives unaccompanied children returned by land from Mexico. MEYER ET AL., *supra* note 8, at 21; Gordon, *supra* note 143. The shelter in Quetzaltenango can accommodate approximately eighty children. ARGUETA ET AL., *supra* note 126, at 21.

<sup>145</sup> ARGUETA ET AL., *supra* note 126, at 21.

<sup>146</sup> MEYER ET AL., *supra* note 8, at 21; *see also* ARGUETA ET AL., *supra* note 126, at 21.

<sup>147</sup> ARGUETA ET AL., *supra* note 126, at 20. For instance, if an interview reveals that a child faces a threat of abuse or trafficking, the professional refers the case to the PGN, which then follows up with the appropriate agency. *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Jennifer Podkul & Cory Shindel, *Data on Access to Counsel and Reintegration Services for Children and Their Impact on Improving Policies and Protection for Central American Unaccompanied Children*, MIGRATION POL’Y

After a maximum of approximately three days, but often only several hours at the shelter,<sup>150</sup> children are either released to a family member or sent to another government shelter.<sup>151</sup> In the case of a child returning to family, the Guatemalan government has reportedly failed, at least on occasion, to conduct an individualized risk assessment before release.<sup>152</sup> One organization has “received information that the government may have, in some cases, mistakenly handed children over to people who are not family members, including individuals linked to human trafficking networks.”<sup>153</sup>

The PGN manages the formal transfer of custody, at which time it issues legal documents that parents or guardians must sign.<sup>154</sup> Through signing these documents, parents and guardians “acknowledge their responsibility for safeguarding the minor and commit to preventing the minor from migrating again. PGN staff also discusses with parents or legal guardians the risks that child

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PRAC., May 2018–Aug. 2018, at 25, 29 (“[I]nterviewing children during the reception process undermines the integrity of the data on the root causes of their migration. Children who have fled violence or harm in their countries, have endured a harrowing journey to Mexico or the United States, and have experienced immigration apprehension and detention and the disappointment of returning to their countries of origin may be hesitant to disclose to government employees the true reasons for their migration.”).

<sup>150</sup> Interview with Ana Luisa Sales, Asociación Pop No’j, in Guatemala City, Guat. (May 15, 2018). At least one organization that works with returned unaccompanied children has indicated that children often only stay at the shelter for a matter of hours before release. If that is the case, it is difficult to understand how, in that short amount of time, representatives of SBS can orient children, facilitate contact with family, provide basic necessities, interview children to identify vulnerabilities, offer emotional services, and give a psychosocial orientation to children’s family members who arrive to pick them up. See GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 38 (describing actions that SBS takes during children’s time at the *Casa Nuestras Raíces* shelter).

<sup>151</sup> ARGUETA ET AL., *supra* note 126, at 21; THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 2.

<sup>152</sup> THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 2.

<sup>153</sup> *Id.*

<sup>154</sup> ARGUETA ET AL., *supra* note 126, at 21. Prior to children’s departure from the shelter, Guatemalan government officials attempt to contact children’s families to inform them of the children’s return and coordinate reunification such that “a family member or guardian will be present at the time of the minor’s arrival so that the minor can leave with a relative shortly after legal protocols and verifications are completed.” *Id.*

migration entails and warns . . . that the minor could become ‘institutionalized’ if he or she migrates again.”<sup>155</sup> In cases where reunification with family or another guardian does not occur, children remain in state custody, have their cases referred to a judge, and are transferred to longer-term shelters managed by SBS, which often have problems with overcrowding and safety.<sup>156</sup>

#### 4. REINTEGRATION RESOURCES POST-RELEASE

A growing number of resources exist to aid the reintegration of unaccompanied children into Guatemalan society; however, the demand for these limited resources far outweighs their relatively meager capacity.<sup>157</sup> The Guatemalan government has launched some “small-scale efforts” to assist repatriated citizens, including children.<sup>158</sup> The Guatemalan National Council for Attention to the Guatemalan Migrant (*Consejo Nacional de Atención al Migrante de Guatemala*, or “CONAMIGUA”) “provides some long-term support, including reintegration services for repatriates” and “runs a pilot program with the Technical Institute for Training to train youths in jobs such as professional hair cutting.”<sup>159</sup> While meeting critical

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*; THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 1–2; GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 39; *see infra* Section II.C (describing documented harms to children at SBS shelters, including reports cited in Department of State publications); *see also* UNICEF, *supra* note 57, at 19 (explaining that there are few “alternative care options for children . . . who cannot return to their communities due to the threat of violence”).

<sup>157</sup> *See* GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 7–12, 25–29.

<sup>158</sup> MEYER ET AL., *supra* note 8, at 19–23 (describing some “small-scale efforts” by the Guatemalan government). During a visit by Amnesty International to the deportation center in Tecún Umán, in western Guatemala, a Guatemalan immigration official commented that “our responsibility ends at that door.” HOME SWEET HOME, *supra* note 5, at 29, 27 n.75.

<sup>159</sup> MEYER ET AL., *supra* note 8, at 22; *see also* HOME SWEET HOME, *supra* note 5, at 34. Various Guatemalan agencies are involved in the repatriation and reintegration of deportees, including returned unaccompanied children. *See* GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 34–40. In 2007, Guatemala passed a law establishing CONAMIGUA to organize and lead such efforts. Decreto No. 46-2007, Ley del Consejo Nacional de Atención al Migrante de Guatemala [Law of the National Council of Care of the Guatemalan Migrant], 283 Diario de Centro América (Guat.); *see also* HOME SWEET HOME, *supra* note 5, at 34 (discussing the 2007 law, which was reformed in 2008). Later, after the surge of unaccompanied children arriving in the United States in 2014

needs of repatriated children, the capacity of these programs remains limited in terms of both quantity and geography.<sup>160</sup> Since 2014, the U.S. government has provided funding for long-term assistance to

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signaled a developing humanitarian crisis, Guatemala founded the Commission for Comprehensive Attention to Child and Adolescent Migrants (*Comisión para la Atención Integral de la Niñez y Adolescencia Migrante*) to connect “various ministries working on youth and migration issues.” HOME SWEET HOME, *supra* note 5, at 34–35. CONAMIGUA’s effectiveness remains unclear, with representatives from other agencies, including the DGM and SBS, questioning its performance. *Id.* at 35. An official from CONAMIGUA responded to the criticism, explaining that there appears to exist “institutional rivalry” and misperceptions about the size of the Council’s budget. *Id.* CONAMIGUA lacked leadership for a year prior to April 2018 and “continues to face bureaucratic difficulties,” though it may have an important role in reintegration efforts moving forward. RUIZ SOTO ET AL., *supra* note 141, at 19.

<sup>160</sup> See GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 7 (“Host governments face challenges in their efforts to reintegrate migrants, including limited resources and a lack of employment opportunities.”); RUIZ SOTO ET AL., *supra* note 141, at 2 (“Lack of awareness of existing services among both migrants and government officials, coupled with the uneven geographic distribution of services, limits returning migrants’ use of these services. Access to services is especially limited for those returning to rural and underdeveloped areas where government services more broadly are often absent.”). This is particularly so in light of the numerous unaccompanied children returned from Mexico to Guatemala each year. See MEYER ET AL., *supra* note 8, at 20 (“[A]ll three [Northern Triangle] countries have reported that their resources are strained trying to keep up with the demand for services resulting from overall increases in deportations, especially from Mexico. According to the Migration Policy Institute, ‘The United States deported just three unaccompanied children for every 100 it apprehended in 2014, while Mexico deported 77 of every 100 unaccompanied children it apprehended.’” (citation omitted)); GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 18 (noting the greater number of unaccompanied children returned from Mexico in comparison to the number returned from the United States). A Kids in Need of Defense (“KIND”) program can currently support approximately 100 children. KIDS IN NEED OF DEF., 2017 ANNUAL REPORT 12 (2018), [https://supportkind.org/wp-content/uploads/2018/10/2017-Annual-Report\\_WEB-version.pdf](https://supportkind.org/wp-content/uploads/2018/10/2017-Annual-Report_WEB-version.pdf) [hereinafter KIND ANNUAL REPORT 2017]. However, “[a]part from KIND’s reintegration programme, very few services exist for repatriated children.” Podkul & Shindel, *supra* note 149, at 29. Another significant challenge faced by Guatemala is that it “has not yet determined which institution [SBS or DGM] is responsible for reintegration activities and a national plan has not yet been developed.” GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 29.

support the reintegration of migrants returning to El Salvador, Guatemala, and Honduras; nevertheless, the effectiveness of these initiatives, which are implemented by the International Organization for Migration (“IOM”), is unclear and remains to be determined.<sup>161</sup>

Several civil society organizations have taken the lead to help address the needs of this population.<sup>162</sup> Kids in Need of Defense (“KIND”), a U.S.-based non-profit organization, manages the Child Migrant Return and Reintegration Project (“CMRRP”), which it operates through several community-based partners in Guatemala and Honduras.<sup>163</sup> Its programs offer services such as “temporary shelter, family reunification assistance, psychological services, education, job training, employment assistance, workshops to support social reintegration, and ongoing individual follow-up services.”<sup>164</sup> These

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<sup>161</sup> GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 7–10, 30. The U.S. government report explains, “Reintegration seeks to restore migrants into society and to reestablish economic, psychological, and social ties.” *Id.* at 7–8. In Guatemala, the current reintegration program, known as *Centro de Formación Quédate* (Stay Vocational Training Center) and implemented by the SBS, offers vocational courses and alternative education opportunities for youth in a community in the Western Highlands. *Id.* at 25; RUIZ SOTO ET AL., *supra* note 141, at 18 (describing services offered by Stay Training Center in the Western Highlands). In response to high demand, “the [Guatemalan] government [seeks] to build two additional centers in nearby departments. RUIZ SOTO ET AL., *supra* note 141, at 18. It is not clear whether and how reintegration programs will be affected by the Trump administration’s recent announcement that it plans to cut funding to the Northern Triangle countries. See Megan Specia, *Trump Wants to Cut Aid to Central America. Here Are Some of the Dozens of U.S.-Funded Programs.*, N.Y. TIMES (Apr. 2, 2019), <https://www.nytimes.com/2019/04/02/world/americas/trump-funding-central-america.html> (discussing the potential impact of the Trump administration’s plan to discontinue funding to Central America).

<sup>162</sup> MEYER ET AL., *supra* note 8, at 23; RUIZ SOTO ET AL., *supra* note 141, at 19. Some of those have received funding from the Inter-American Foundation (“IAF”). See GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 11. For instance, the IAF granted \$33,500 to the *Asociación de Retornados Guatemaltecos*, an organization that aids returned migrants, such as by helping them find employment. *Id.*

<sup>163</sup> KIND ANNUAL REPORT 2017, *supra* note 160, at 12. Note that the CMRRP was previously the Guatemalan Child Return and Reintegration Project (“GCRRP”). See, e.g., MEYER ET AL., *supra* note 8, at 23; Ramirez et al., *supra* note 11, at 470–73.

<sup>164</sup> MEYER ET AL., *supra* note 8, at 23; see also 2013 REPORT TO CONGRESS, *supra* note 66, at 5 (explaining further services KIND provided unaccompanied children). Through its work, KIND has

services have a profound impact on a child's wellbeing upon return: in a review of its work with returned children, KIND found that the rate of remigration among Central American children dropped from twenty-three percent (23%) to five percent (5%) when offered local reintegration services.<sup>165</sup>

Importantly, while generating awareness of reintegration services among returned migrants can often be challenging,<sup>166</sup> the U.S. government collaborates with KIND to facilitate connections between the organization and children it plans to repatriate.<sup>167</sup> For instance, in fiscal year 2011, KIND staff met with ORR-funded care provider programs to explain its services, and the care providers referred over fifty Guatemalan children interested in KIND's assistance.<sup>168</sup> Ultimately, KIND served forty-four unaccompanied children in calendar year 2011, offering a diverse set of reintegration

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determined that support for the repatriated child's family, and not just the child, is critical to successful reintegration. It therefore provides youths and their families with emergency food assistance and psychosocial and other health support. KIND opens some of its educational and job training programs to siblings and parents as well as to repatriated children.

MEYER ET AL., *supra* note 8, at 23; *see also* Podkul & Shindel, *supra* note 149, at 28 (explaining the critical importance of comprehensive social services for repatriated unaccompanied children); Khalid Koser, *Return, Readmission and Reintegration: Changing Agendas, Policy Frameworks and Operational Programmes*, in RETURN MIGRATION: JOURNEY OF HOPE OR DESPAIR? 57, 94 (Bimal Ghosh ed., 2000) (explaining that "[a]nalysis of selected operational programmes has emphasized the importance of comprehensive return assistance" as well as "the importance of targeting assistance not just on individual migrants, but also on their families").

<sup>165</sup> Podkul & Shindel, *supra* note 149, at 29.

<sup>166</sup> RUIZ SOTO ET AL., *supra* note 141, at 22 (describing the limited awareness of existing reintegration services among migrants and government officials and noting that "the involuntary nature of their return and their exhausting and often traumatic experiences during detention and deportation inhibit most migrants' willingness to interact with service providers, as many prefer to leave the reception center as quickly as possible").

<sup>167</sup> 2013 REPORT TO CONGRESS, *supra* note 49, at 5.

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



services to them.<sup>169</sup> As of January 2013, the U.S. government reported that “those 44 youth have successfully reunified with their families in Guatemala, are enrolled in school, and are developing new support systems.”<sup>170</sup> In 2017, KIND had the capacity to “serve[] over 100 new children returning to Guatemala and Honduras.”<sup>171</sup> The positive outcomes of this partnership reinforce the importance of this collaborative effort and the need to cultivate sufficient services to accommodate all repatriated children.

##### 5. UNCERTAIN FATES OF REPATRIATED CHILDREN

Apart from the small handful of children who receive support from local organizations, there is no systematic monitoring of children after their release from government custody and a dearth of knowledge exists about what happens to them.<sup>172</sup> A recent report highlights that the efforts of the Northern Triangle countries “to protect their returned citizens appeared to end the moment they walked out the doors of the reception centres and that no effective protection mechanisms were in place.”<sup>173</sup> In Guatemala,

no substantial follow-up is provided to the children or adolescents after they are released. There is no systematic initiative in place to determine if the children or adolescents were able to reintegrate (socially,

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<sup>169</sup> *Id.* (“These 44 unaccompanied children were provided arrival assistance at the airport, assistance with family reunification, assistance with school enrollment, case management assistance, and referrals to vital resources such as health services, mental health services, job training, and youth group programs.”).

<sup>170</sup> *Id.*

<sup>171</sup> KIND ANNUAL REPORT 2017, *supra* note 160, at 12.

<sup>172</sup> *See* BYRNE & MILLER, *supra* note 3, at 27 (“Little is known about what happens to children after they are returned to their home countries.”); THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 1 (“Unaccompanied children are not monitored after being released to a family member.”); *International Programs, KIDS IN NEED DEF.*, <https://supportkind.org/our-work/regional-work/> (last visited Jan. 14, 2019) (“[N]o formal system exists for these children to ensure that they return safely and to address the conditions that caused them to make the dangerous journey to the United States alone.”).

<sup>173</sup> HOME SWEET HOME, *supra* note 5, at 35. Similarly, a report by the Wilson Center on the repatriation of minors to Guatemala concludes, “[T]he repatriation system in Guatemala is not prepared to adequately receive a large number of children.” ARGUETA ET AL., *supra* note 126, at 11.

economically, and culturally) back into their communities or whether they attempted to migrate once again. There are no indicators of the psycho-social or emotional abilities of the children to reconnect with their families, make sense of the whole experience or readapt to life in their home communities.<sup>174</sup>

The Guatemalan government purportedly wants or planned to follow up with children post-release from shelter after return, but the funding to do so does not exist.<sup>175</sup> At the same time, the United Nations Children’s Fund recently underscored that children sent back to their countries of origin “are likely to experience an intensification of the factors . . . that drove them to migrate in the first place,” further stressing the dire circumstances a child may face upon return.<sup>176</sup>

In February 2015, the United Nations High Commissioner for Refugees (“UNHCR”) commented that “neither national nor local authorities have, at this point, the capacity to reintegrate children in a safe manner in any [Northern Triangle] country.”<sup>177</sup> In particular,

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<sup>174</sup> ARGUETA ET AL., *supra* note 126, at 21–22.

<sup>175</sup> Gordon, *supra* note 143. The Guatemalan government outlines measures it does or will take with respect to children who require special attention—including psychological, social, or educational—post-release from *Casa Nuestra Raíces*. See GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 13 (describing the work of multidisciplinary teams at the *Casa Nuestras Raíces* shelters). Nevertheless, a recent report by UNICEF highlights that, despite the possible violence and displacement that returned children face, “there is very limited case management or psychosocial support for returned migrant children and their families in northern Central America. Nor are there many alternative care options for children and families who cannot return to their communities due to the threat of violence.” UNICEF, *supra* note 57, at 19.

<sup>176</sup> UNICEF, *supra* note 57, at 1; see also RUIZ SOTO ET AL., *supra* note 141, at 3 (identifying one of the primary challenges in reintegration as the persistence of key push and pull factors that drive emigration, including “high levels of insecurity and violence, and distrust in government institutions”). Participants at a recent meeting among returned individuals revealed that “[m]igrants report feeling unsafe upon return, and some move from their home communities to areas perceived to be safer.” RUIZ SOTO ET AL., *supra* note 141, at 25 & n.75.

<sup>177</sup> MEYER ET AL., *supra* note 8, at 22 (quoting the UNHCR); see also UNICEF, *supra* note 57, at 17 (“Many [child returnees to Central America] face

the UNHCR underscored that “providing effective protection for deported unaccompanied minors (and other deported people) remains a primary challenge for all three countries.”<sup>178</sup> With respect to Guatemala specifically, the UNHCR recognized, or at least anticipated, insufficient social services and resources for repatriated unaccompanied children following the heavy increase in the number of children that fled in 2014.<sup>179</sup> The possible “massive repatriation” of that group of children from both the United States and Mexico “brought to light the limited local capacity to receive and reintegrate migrants, in particular unaccompanied children.”<sup>180</sup> Since that time, while some improvements have been made, there has been little evidence of meaningful changes in Guatemala that indicate the situation for returning children has dramatically improved.<sup>181</sup>

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significant barriers to successful reintegration, and governments in northern Central America have neither the resources nor the capacity to provide the support that returned children and families need.”); RUIZ SOTO ET AL., *supra* note 141, at 30 (describing challenges in reintegration and noting that “[t]he most promising practices . . . are those that operate under an integrated framework that tailors services to migrants’ needs, coordinates services across institutions, and leverages existing services at the local level”). According to a recent U.S. government report, “Despite the limited number of unaccompanied children deported to [the Northern Triangle] thus far, all three countries have reported that their resources are strained trying to keep up with the demand for services resulting from overall increases in deportations.” MEYER ET AL., *supra* note 8, at 20.

<sup>178</sup> MEYER ET AL., *supra* note 8, at 22; *see also* Carla Hananía de Varela (Rapporteur of the Drafting Group on Unaccompanied Migrant Children and Adolescents and Human Rights), *Global Issue of Unaccompanied Migrant Children and Adolescents and Human Rights: Progress Report of the Human Rights Council Advisory Committee*, ¶ 45, U.N. Doc. A/HRC/33/53 (Aug. 16, 2016), <https://undocs.org/A/HRC/33/53> [hereinafter *Progress Report of Human Rights Council*] (“The massive number of child returnees and the lack of preparation to reintegrate them is a severe issue in Central America.”).

<sup>179</sup> U.N. High Comm’r for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Activities of His Office in Guatemala*, ¶ 16, U.N. Doc. A/HRC/28/3/Add.1, annex (Jan. 12, 2015), <https://undocs.org/A/HRC/28/3/Add.1>.

<sup>180</sup> *Id.*

<sup>181</sup> *See* MEYER ET AL., *supra* note 8, at 22. The quantity, character, and geographic availability of resources remain immensely insufficient. *See, e.g.*, RUIZ SOTO ET AL., *supra* note 141, at 29–30.

C. *Serious Potential Dangers to the Safety of Children  
Repatriated to Guatemala*

Guatemala is a dangerous country for children, with high levels of violence, crime, and impunity.<sup>182</sup> The TVPRA established the primacy of both the DOS Human Rights Practices and Trafficking in Persons reports in making decisions about whether to repatriate a child to a particular country,<sup>183</sup> and both of those publications have for years provided compelling evidence of the plethora of threats to the lives and safety of children in Guatemala. While the individual circumstances of each child's case must be considered,<sup>184</sup> country conditions offer critical context regarding safety risks a child may face upon return.<sup>185</sup> Guatemala boasts a relatively high murder rate, with male youth comprising a large portion of victims.<sup>186</sup> Research

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<sup>182</sup> See GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 1 (highlighting serious human rights abuses in Guatemala, such as societal violence; child abuse; trafficking, including of unaccompanied children; corruption; and impunity, among others); *Guatemala Travel Advisory*, *supra* note 104 (advising that “[v]iolent crime, such as armed robbery and murder, is common”); OVERSEAS SEC. ADVISORY COUNCIL, U.S. DEP’T OF STATE, GUATEMALA 2018 CRIME & SAFETY REPORT 1 (2018) [hereinafter 2018 CRIME & SAFETY REPORT] (“Guatemala suffers from a severe impunity problem exacerbating the wide range of crime.”). See generally U.N. High Comm’r for Refugees, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala*, at 6–14, U.N. Doc. HCR/EG/GTM/18/01 (Jan. 2018), <https://www.refworld.org/pdfid/5a5e03e96.pdf> [hereinafter UNHCR, *Eligibility Guidelines*].

<sup>183</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(5)(B), 8 U.S.C. § 1232(a)(5)(B) (2012).

<sup>184</sup> See *supra* Section I.A.

<sup>185</sup> See, e.g., RUIZ SOTO ET AL., *supra* note 141, at 3; UNICEF, *supra* note 57, at 19.

<sup>186</sup> See UNHCR, *Eligibility Guidelines*, *supra* note 182, at 10–11, 11 n.52 (reporting an average annual rate of thirty-nine intentional homicides per 100,000 inhabitants in Guatemala between 2006 and 2015 and that between 2009 and 2013, the “vast majority of homicide victims [88%] are male”); BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP’T OF STATE, GUATEMALA 2017 HUMAN RIGHTS REPORT 19 (2018), <https://www.state.gov/documents/organization/277579.pdf> [hereinafter GUATEMALA 2017 HUMAN RIGHTS REPORT] (highlighting that 683 minors suffered violent deaths in Guatemala between January and August 2017); U.N. OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 2013: TRENDS, CONTEXTS, DATA 126 (2013), [https://www.unodc.org/documents/gsh/pdfs/2014\\_GLOBAL\\_HOMICIDE\\_BOOK\\_web.pdf](https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf) (providing the annual intentional homicide rate per 100,000 population for Guatemala for each

suggests that deportees to Central America “face, on average, about a tenfold increased risk of being killed” compared to the general population.<sup>187</sup>

Guatemalan children are frequently subject to additional forms of violence, including abuse and trafficking.<sup>188</sup> Recent reports underscore the pervasiveness of child abuse in Guatemala and identify domestic violence as “a significant push factor for unaccompanied child migrants.”<sup>189</sup> Human trafficking is a widespread threat to and

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year between 2000 and 2010). The homicide rate in Guatemala is significantly higher than the approximate rate of 4.7 homicides per 100,000 population in the United States in 2012, which is the most recent available year. *See* U.N. OFFICE ON DRUGS & CRIME, *supra*. Some of the violence is related to the proliferation of street gangs and other criminal organizations in the country. *See, e.g.*, UNHCR, *Eligibility Guidelines*, *supra* note 182, at 14–15 (“Guatemala is seriously impacted by violent gang activity, . . . in 2017 it was reported that according to Guatemalan law enforcement sources, there were approximately 15,500 Barrio 18 gang members and 13,950 Mara Salvatrucha gang members.”); GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra*, at 19 (“Criminals and gangs often recruited street children, many of them victims of domestic abuse . . .”).

<sup>187</sup> TASK FORCE 2017, UNIV. OF WASH., *THE CYCLE OF VIOLENCE: MIGRATION FROM THE NORTHERN TRIANGLE* 37 (2017), [https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/38696/Cycle%20of%20Violence\\_Task%20Force%20Report%202017%20FINAL.pdf?sequence=4&isAllowed=y](https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/38696/Cycle%20of%20Violence_Task%20Force%20Report%202017%20FINAL.pdf?sequence=4&isAllowed=y) (offering such conclusion based on the compilation of “numerous local news reports of [Northern Triangle] deportees who have been murdered since January 2014”). Research has shown that deportees to Central America “face increased vulnerability to the threats that prompted them to flee in the first place,” such as those from gangs. *Id.* In addition, the above “statistic should be understood in the context of homicide rates in the [Northern Triangle of Central America], which are among the highest in the world.” *Id.* In addition, UNICEF reports,

In many cases, it is unsafe for migrant children and families to return to their home communities because of gang violence. . . . Some returnees interviewed by UNICEF in Guatemala and Honduras said that if local gang members knew someone had been deported from the United States, they would likely target that person based on the assumption that he or she had money.

UNICEF, *supra* note 57, at 19.

<sup>188</sup> *See, e.g.*, GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 21–23; GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 18–19.

<sup>189</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP’T OF STATE, GUATEMALA 2015 HUMAN RIGHTS REPORT 15 (2016), <https://www.state.gov/documents/organization/253229.pdf> [hereinafter GUATEMALA 2015 HUMAN RIGHTS REPORT]; *see also* GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 21 (calling child abuse a continuing “serious problem”); GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 18 (stating the same). Between

violation of children's human rights, particularly those of unaccompanied children.<sup>190</sup> The DOS recently found that “[t]he [Guatemalan] government significantly decreased efforts to identify and protect victims [of trafficking].”<sup>191</sup> Significant risks persist for repatriated victims, as “authorities typically did not screen for indicators of trafficking among the large numbers of Guatemalans returned

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January and August 2017, the Public Ministry reported 2,571 cases of child “abuse of all types” and a mere sixteen convictions. GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 18.

<sup>190</sup> See, e.g., GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 1 (underscoring that trafficking in persons, including of unaccompanied children, is a significant human rights abuse in Guatemala); COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA & UNICEF, HUMAN TRAFFICKING FOR SEXUAL EXPLOITATION PURPOSES IN GUATEMALA 127 (2016), [https://www.cicig.org/uploads/documents/2016/Trata\\_Ing\\_978\\_9929\\_40\\_829\\_6.pdf](https://www.cicig.org/uploads/documents/2016/Trata_Ing_978_9929_40_829_6.pdf) [hereinafter CICIG & UNICEF, HUMAN TRAFFICKING] (“The socio-economic conditions of the country foster the trafficking of very high numbers of girls, boys and adolescents between 12 and 17 years of age. These are persons who are vulnerable to sexual exploitation.”). The Guatemalan government and other groups “identified 484 trafficking victims in 2016” and, of those, “at least 395 were women and girls.” OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 187 (2017), <https://www.state.gov/documents/organization/271339.pdf> [hereinafter 2017 TRAFFICKING IN PERSONS REPORT]. Thousands of Guatemalan women, girls, and boys have disappeared as a result of sex trafficking operations. See UNHCR, *Eligibility Guidelines*, *supra* note 182, at 13 & n.72 (explaining that the Guatemalan National Civil Police reported 25,000 persons have disappeared between 2003 and 2014, 13,000 of who were women). Further, the Guatemalan government removed at least 135 children from forced labor in 2015, but it did not report numbers in 2016. See 2017 TRAFFICKING IN PERSONS REPORT, *supra*, at 187.

<sup>191</sup> TRAFFICKING IN PERSONS REPORT 2017, *supra* note 149, at 187; see also CICIG & UNICEF, HUMAN TRAFFICKING, *supra* note 190, at 128 (“Serious problems that violate the rights of victims and many times lead to their renewed victimisation still persist. . . . [T]he State needs to drastically improve comprehensive and special care for victims, particularly for boys, girls and adolescents.”).

from abroad, including unaccompanied migrant children.”<sup>192</sup> Moreover, some Guatemalan authorities are under investigation for furthering or otherwise promoting child sex trafficking.<sup>193</sup>

Gender-based violence exists at substantial levels in Guatemala and manifests in various forms.<sup>194</sup> Femicide, the killing of a woman or girl “because of [her] gender,”<sup>195</sup> is the most extreme form of violence against women and remains a major problem, with rates continuing to rise.<sup>196</sup> Family members and gangs commonly perpetrate this brutal crime.<sup>197</sup> Female children are vulnerable to high rates of rape and forced marriage.<sup>198</sup> For instance, between January and July

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<sup>192</sup> 2017 TRAFFICKING IN PERSONS REPORT, *supra* note 190, at 187; OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 185 (2016), <https://www.state.gov/documents/organization/258876.pdf>.

<sup>193</sup> 2017 TRAFFICKING IN PERSONS REPORT, *supra* note 190, at 188 (“Police, military, and elected officials have been placed under investigation for paying children for sex acts, facilitating child sex trafficking, or protecting venues where trafficking occurs.”).

<sup>194</sup> *See, e.g.*, GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 1 (noting that “lethal violence against women” is a significant human rights abuse in Guatemala); UNHCR, *Eligibility Guidelines*, *supra* note 182, at 12–13 (listing multiple types of violence against women); Podkul & Shindel, *supra* note 149, at 28 (discussing a study by “KIND, in partnership with Fray Matias de Córdova Human Rights Center, [that] has documented the prevalence of sexual and gender-based violence in Central America and its role in driving child migration from the region”).

<sup>195</sup> UNHCR, *Eligibility Guidelines*, *supra* note 182, at 12–13.

<sup>196</sup> *See id.* (noting that the rate of femicide in Guatemala is the second highest in Central America and third highest in the world and that “the percentage of women who suffer violent deaths as well as incidents of sexual violence has reportedly increased in recent years”); GUATEMALA 2015 HUMAN RIGHTS REPORT, *supra* note 189, at 15 (highlighting femicide as a major problem); GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 19 (noting “[f]emicide remained a significant problem”); GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 17 (stating the same); KIDS IN NEED OF DEF., LATIN AM. WORKING GRP. & WOMEN’S REFUGEE COMM’N, SEXUAL AND GENDER BASED VIOLENCE (SGBV) & MIGRATION FACT SHEET 2 (2018), <https://supportkind.org/wp-content/uploads/2018/05/SGBV-Fact-sheet.-April-2018.pdf> (“On average, two women are murdered each day in Guatemala, and the number of women murdered each year has more than tripled since 2000.”).

<sup>197</sup> *See* UNHCR, *Eligibility Guidelines*, *supra* note 182, at 12–13.

<sup>198</sup> *See, e.g.*, GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 22–23 (noting that “UNICEF reported that 30 percent of women 20 to 24 years of age were first married or in union by age 18 (7 percent of them by age 15) between

2016, over 1,500 pregnancies among minors fourteen years of age or younger were reported, with an estimated eighty percent (80%) of those pregnancies a consequence of intrafamilial sexual abuse.<sup>199</sup> In addition, between 2015 and 2016, “an estimated 15,000 irregular marriages of minors . . . occurred . . . 70 percent of which took place in the western part of the country.”<sup>200</sup> Other gendered violence, such as sexual assault, sexual harassment, and discrimination against women and girls, is also a major problem.<sup>201</sup>

Children cannot rely on protection by government actors who are supposed to shield them from violence and harm.<sup>202</sup> Children who, because of abuse, trafficking, or other vulnerable situations, end up in state custody often live in shelters that are frequently “overcrowded [] with extremely poor living conditions, under-trained staff, and a lack of security.”<sup>203</sup> For example, the SBS—the same governmental entity that has the duty to care for repatriated migrant children—reported at least two cases of sexual abuse of

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2008 and 2014” and that “[t]he Public Ministry reported several complaints of sexual assault or rape against minors”).

<sup>199</sup> *Id.* at 22. The affected children were primarily from the departments of Huehuetenango, Alta Verapaz, Guatemala, San Marcos, and the Petén. *Id.* “The Observatory on Sexual and Reproductive Health registered 69,445 births by girls and young women aged from 10 to 19 between January and September [2017].” AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2017/18: THE STATE OF THE WORLD’S HUMAN RIGHTS 181 (2018), <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> (noting that in Guatemala “[h]igh levels of child pregnancy remained a particular concern”).

<sup>200</sup> GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 22.

<sup>201</sup> *Id.* at 1; *see* OVERSEAS SEC. ADVISORY COUNCIL, U.S. DEP’T OF STATE, GUATEMALA 2017 CRIME & SAFETY REPORT 2–3 (2017) [hereinafter 2017 CRIME & SAFETY REPORT] (indicating that the U.S. government believes the number of sexual assaults in Guatemala to be significantly underreported due to “cultural stigmas and sporadic police presence in rural areas”); UNHCR, *Eligibility Guidelines*, *supra* note 182, at 12–13.

<sup>202</sup> *See, e.g.*, THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 2 (“The Guatemalan government is often unable to offer its citizens protection from violence—especially those most vulnerable, such as children.”).

<sup>203</sup> *Id.* at 1; *see also* GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 18 (providing that “[a]s of September [2017], 520 children and adolescents lived in shelters run by the Secretariat for Social Welfare (SBS)” and that “[o]vercrowding was common in shelters”).



children under its care in 2016 and seven in 2017.<sup>204</sup> In addition, the Guatemalan Office of the Human Rights Ombudsman (*Procurador de los Derechos Humanos*, or “PDH”) reported that “44 minors disappeared from secured SBS shelters from September to mid-November [2016].”<sup>205</sup> Further, a number of female children who escaped from government-run shelters in 2016 alleged abuse and mistreatment.<sup>206</sup> Despite the serious allegations, “some were apprehended and returned to [the shelter],” where “[t]hey were locked in a room and guarded by police.”<sup>207</sup> In protest, “one of the girls started a fire inside the room . . . resulting in the deaths of 41 girls and severe burns to 14 others.”<sup>208</sup>

Finally, Guatemala has long suffered from insufficient law enforcement resources, deeply entrenched institutional corruption, and high levels of impunity.<sup>209</sup> The National Civil Police frequently lack the human, financial, and material resources it needs to effectively protect citizens and respond to crimes.<sup>210</sup> In addition, authorities

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<sup>204</sup> GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 23; GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 19.

<sup>205</sup> GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 23.

<sup>206</sup> GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 18 (highlighting the escape of adolescent girls from the Hogar Seguro shelter on various occasions in 2016, including the escape of approximately sixty girls in March of that year).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* Several SBS and shelter officials were subsequently “charged with murder, abuse of authority, breach of duty, abuse against minors, and serious injury.” *Id.*

<sup>209</sup> *See, e.g.*, GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 1 (noting “widespread institutional corruption, particularly in the police and judicial sectors,” as a principal human rights abuse in Guatemala); 2017 CRIME & SAFETY REPORT, *supra* note 201, at 1 (“Guatemala suffers from a severe impunity problem, which exacerbates a wide range of crimes.”); 2018 CRIME & SAFETY REPORT, *supra* note 182, at 8–10 (“[R]esource constraints and lack of coordinated government action impede efficient enforcement efforts.”).

<sup>210</sup> 2017 CRIME & SAFETY REPORT, *supra* note 201, at 9–10 (“The Policia Nacional Civil (PNC) lacks personnel and training to accomplish their mission. The PNC also suffers from a lack of supplies (vehicles, fuel, ammunition) with little improvement from year-to-year. More often than not, a police investigation fails to result in an arrest, much less a conviction. Apart from impunity, a principal reason that the government is unable to respond to the needs of crime victims or to prevent them from becoming victims in the first place, is that the PNC is sig-

have allegedly perpetrated significant abuses themselves.<sup>211</sup> For instance, in combating gang violence and other criminal activity, police purportedly detained and abused youth, subjecting some to physical assaults.<sup>212</sup> Similarly, the U.S. government has reported “security force involvement in serious crimes,” such as human trafficking.<sup>213</sup> These abuses, which “exacerbat[e] impunity and deny[] victims the right to security and justice,” typically go uninvestigated and unprosecuted.<sup>214</sup> Further, there exists evidence suggesting that authorities have, on occasion, colluded with criminal organizations.<sup>215</sup>

#### D. ANALYSIS OF CURRENT PRACTICE

Safe repatriation involves protecting children from physical and psychological harm during removal and through reintegration.<sup>216</sup> In light of what is known about current practices, the United States has made narrow progress around this practice since the passage of the TVPRA. For example, ICE has refined procedures related to physical transport abroad<sup>217</sup> and ORR has coordinated with organizations that provide comprehensive reintegration services.<sup>218</sup> In addition, the U.S. government has funded efforts to improve reception, migrant-related data collection, and reintegration in Central America, though this may change in light of the Trump administration’s recent

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nificantly under-trained and under-funded. . . . The PNC’s annual budget is inadequate to support its personnel, vehicles, training, and other infrastructure needs. . . . Police in remote areas are often understaffed [and] ill-equipped . . .”).

<sup>211</sup> See THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 2.

<sup>212</sup> GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 19.

<sup>213</sup> GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 1; *see also* GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 1; THE GUATEMALA HUMAN RIGHTS COMM’N, *supra* note 89, at 2 (describing “police and military involvement in serious crimes”).

<sup>214</sup> THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 2.

<sup>215</sup> *Id.*; GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 1.

<sup>216</sup> See *supra* Section I.C.2.

<sup>217</sup> See KANDEL, *supra* note 20, at 7–8 (outlining ICE’s duties throughout the process).

<sup>218</sup> See 2013 REPORT TO CONGRESS, *supra* at 66, at 4–5 (summarizing ORR’s efforts to provide reintegration services to unaccompanied children).

announcement that it plans to cut funding to the Northern Triangle.<sup>219</sup>

However, the law compels an analysis of what might happen to children after formal transfer of custody from the U.S. government to the governments of their countries of origin.<sup>220</sup> This is where the pre-removal inquiry and follow-up appears to be lacking, or at least it has not been made clear in U.S. government reports or other resources.<sup>221</sup> For instance, before physically removing a child, does the U.S. government consider the availability of a suitable caretaker and home environment or other accommodations? What if the child is not expected to have access to reintegration services?<sup>222</sup> How do country conditions impact the decision to execute repatriation?

Considering the particular conditions in Guatemala, the U.S. government is, and has for years been, aware that some children in the custody of the Guatemalan government have repeatedly faced serious threats to their lives and wellbeing, including in the form of

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<sup>219</sup> See GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 8–10 (describing the three prongs of the U.S. government’s approach to addressing return and reintegration of migrants in El Salvador, Guatemala and Honduras); Specia, *supra* note 161. The U.S. Agency for International Development (“USAID”) provided approximately \$27 million for the three initiatives. *Id.* at 10. “As of April 2018, IOM has expended all the funds for the first two agreements, \$7.6 million and \$2.5 million respectively, and \$7.1 million of \$16.8 million . . . for the third.” *Id.* “For all three agreements, from fiscal year 2014 through April 2018, IOM expended about \$9.1 million in El Salvador, about \$5.4 million in Honduras, and about \$2.7 million in Guatemala . . .” *Id.* With respect to data and reintegration, “in all three countries the use of migration information varies and reintegration efforts are just beginning.” *Id.* at 13.

<sup>220</sup> By instructing the Secretary of State to create a pilot program advancing “safe and sustainable repatriation and reintegration” and directing Secretary of Homeland Security to evaluate country conditions before repatriating a child to a particular country, the TVPRA establishes that safe repatriation involves more than transport and delivery of a child to another country. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(5)(A)–(B), 8 U.S.C. § 1232(a)(5)(A)–(B) (2012); see also *supra* Section I.C.1.

<sup>221</sup> See, e.g., Ramirez et al., *supra* note 11, at 463, 473.

<sup>222</sup> In 2017, KIND served approximately 100 unaccompanied children repatriated to Guatemala and Honduras through its CMRRP. KIND ANNUAL REPORT 2017, *supra* note 160, at 12. However, the United States repatriated over 1,400 to Guatemala alone in fiscal year 2017. DHS FOIA Response, *supra* note 98, at 1.

sexual abuse and death.<sup>223</sup> The fact that the United States knows about the abuses that occur at government-run shelters in Guatemala, as detailed in DOS Human Rights Practices reports<sup>224</sup> that must be examined in making repatriation determinations,<sup>225</sup> but still continues to return children to Guatemala where they may be sent to these shelters is reflective of the United States's general approach of removing children to countries where their lives and safety are at risk. By delivering unaccompanied children to the governments of countries it knows cannot or will not protect them due to the immense pressure those countries face as well as abuses perpetrated by authorities,<sup>226</sup> the United States has not fulfilled its obligation under the TVPRA to “ensure the safe and sustainable repatriation and re-integration of unaccompanied . . . children.”<sup>227</sup>

Further, what does the U.S. government make of the conditions that children in Guatemala face after their release from government custody? The current DOS Travel Advisory for Guatemala, which ICE considers in combination with the DOS Human Rights Practices and Trafficking in Persons reports when it renders repatriation determinations,<sup>228</sup> warns that “[v]iolent crime, such as . . . murder, is common” and that “[l]ocal police may lack the resources to respond effectively to serious criminal incidents.”<sup>229</sup> Nevertheless, the

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<sup>223</sup> See, e.g., GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 1; GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 18. It is not entirely clear what risks children might face in temporary shelters, such as *Casa Nuestra Raíces*, or how they compared to those that exist at other state-run facilities. The cases of sexual abuse and death at Guatemalan shelters did not necessarily involve repatriated children, however they did occur at secure state-run facilities where repatriated children may be sent. See GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 18. Additionally, there is little information available about the portion of repatriated children who are released to family members or other guardians and the portion who are transferred to more permanent shelters and remain in state custody.

<sup>224</sup> See, e.g., GUATEMALA 2016 HUMAN RIGHTS REPORT, *supra* note 127, at 1, 21–23; GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 18–19.

<sup>225</sup> See TVPRA § 235(a)(5)(B).

<sup>226</sup> See *supra* Sections I.D, II.C.

<sup>227</sup> TVPRA § 235(a)(5)(A).

<sup>228</sup> See 2013 REPORT TO CONGRESS, *supra* note 66, at 6.

<sup>229</sup> *Guatemala Travel Advisory*, *supra* note 104.

United States repatriated over 2,150 children to Guatemala during the first ten months of fiscal year 2018.<sup>230</sup>

Perhaps other factors, such as the availability of a suitable caretaker in a community where the child feels secure and has access to reintegration services, “rebut” what would otherwise be a determination not to repatriate based solely on country conditions.<sup>231</sup> The law does not explicitly suggest that a repatriation determination should proceed such way, as it focuses exclusively on the consultation of two specific U.S. government publications: the DOS Human Rights Practice and the Trafficking in Persons reports.<sup>232</sup> The former analysis might be preferred, as discussed in the below recommendations, but if so, it should be clearly articulated.

### III. OUTLOOK AND RECOMMENDATIONS

#### A. *Outlook: Many Reasons to Be Concerned*

The future of promoting safe repatriation of unaccompanied children appears increasingly bleak under the Trump administration, which has worked relentlessly to construct a hostile, and largely false, dialogue around this vulnerable population. Even under the Obama administration, unaccompanied children faced great antagonism.<sup>233</sup> Much of the recent conversation around unaccompanied children has centered on their exploitation of our laws and whether they might have criminal ties.<sup>234</sup> In his State of the Union Address in January 2018, President Trump painted a picture of delinquent and dangerous unaccompanied children affiliated with the *Mara Salvatrucha* (commonly referred to as “MS-13”) gang arriving in the United States.<sup>235</sup>

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<sup>230</sup> DHS FOIA Response, *supra* note 98, at 1.

<sup>231</sup> See, e.g., NAGDA & WOLTJEN, *supra* note 61, at 38–44.

<sup>232</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(5)(B), 8 U.S.C. § 1232(a)(5)(B) (2012).

<sup>233</sup> See, e.g., Brodzinsky & Pilkington, *supra* note 5.

<sup>234</sup> See Borchers, *supra* note 18; Miriam Valverde, *Immigration, MS-13 and Crime: The Facts Behind Donald Trump’s Exaggerations*, POLITIFACT (Feb. 7, 2018, 10:39 AM), <http://www.politifact.com/truth-o-meter/statements/2018/feb/07/donald-trump/immigration-ms-13-and-crime-facts-behind-donald-tr/>.

<sup>235</sup> See Borchers, *supra* note 18 (quoting Trump as saying, “Tonight, I am calling on the Congress to finally close the deadly loopholes that have allowed MS-13, and other criminal gangs, to break into our country.”). The data does not sup-

Officials have used these positions to advocate for harsher measures to deter migration and expeditiously remove children, jeopardizing their safety and wellbeing.<sup>236</sup> Former Attorney General Jeff Sessions and former Secretary of Homeland Security Kirstjen Nielsen “have called on Congress to tighten asylum laws and ease restrictions on how the federal government treats children who are in the country illegally.”<sup>237</sup> With this sort of attitude, there does not appear to exist a realistic possibility that the current DHS will consider, advance, or appropriately implement policies (or current law) that protect this group of children who find themselves in the midst of a humanitarian crisis, especially those the government removes from the country.

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port the sensational claims by the Trump administration about this group of children. See Raz Robinson, *The Trafficking Victims Protection Act Is Why Trump’s Fight Against MS-13 Could Hurt Children*, FATHERLY (Feb. 7, 2018, 3:18 PM), <https://www.fatherly.com/news/trafficking-victims-protection-act-donald-trump-ms-13/> (“Despite the president’s multiple attempts to link the law to the entrance of MS-13 gang members, neither he or his administration have managed to present any data to support the claim that the act weakens border protections.”). Written testimony given in June 2017 from U.S. Border Patrol Acting Chief Carla Provost actually severely undercuts Trump’s assertions. In Provost’s testimony, she indicated that “since fiscal year 2012 U.S. Border Patrol apprehended 159 unaccompanied [] children with confirmed or suspected gang affiliations. Of the 159 children, 56 were suspected or confirmed to be affiliated with MS-13 . . . .” Valverde, *supra* note 234. The testimony did not distinguish between confirmed and suspected gang members. *Id.* (noting that ICE “alleged gang membership or affiliation against a number of Central American immigrants without substantiating these allegations at all”). For context, since 2012, authorities have apprehended upwards of 40,000 unaccompanied children per year, with the number of unaccompanied children apprehended nearly reaching 70,000 in 2014. KANDEL, *supra* note 20, at 2; *U.S. Border Patrol Apprehensions FY2018*, *supra* note 120.

<sup>236</sup> See Borchers, *supra* note 18; Robinson, *supra* note 235.

<sup>237</sup> Jason Buch, *DHS Officials in San Antonio Call for Tighter Asylum Laws*, SAN ANTONIO EXPRESS-NEWS (Feb. 1, 2018, 7:17 PM), <http://www.express-news.com/news/local/article/DHS-officials-in-San-Antonio-call-for-tighter-12544720.php>; see also Press Release, U.S. Dep’t of Homeland Sec., DHS Acting Press Secretary Statement on January Border Apprehension Numbers (Feb. 7, 2018), <https://www.dhs.gov/news/2018/02/07/dhs-acting-press-secretary-statement-january-border-apprehension-numbers> (describing an “unacceptable number of UACs and family units flood[ing] our border because of these catch and release loopholes,” which “have created incentives for illegal immigrants and are being exploited by dangerous transnational criminal organizations like MS-13”).

The Trump administration has developed a number of troubling policies targeting unaccompanied children that aim to more actively remove their designation as “unaccompanied,”<sup>238</sup> construct procedural challenges;<sup>239</sup> create more arduous legal standards for certain

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<sup>238</sup> In the past, it was relatively rare for authorities to affirmatively move to strip children of their designation as “unaccompanied,” which carries with it valuable legal benefits, such as being able to initially apply for asylum with U.S. Citizenship and Immigration Services (“USCIS”). See Memorandum from Jean King, General Counsel, U.S. Dep’t of Justice, to James R. McHenry, III, Acting Director, Executive Office for Immigration Review 1, 6–9 (Sept. 19, 2017), <https://cliniclegal.org/sites/default/files/resources/King-9-19-17-UAC-TVPPRA.pdf> (noting scenarios when a child can lose the designation as “unaccompanied”); KANDEL, *supra* note 20, at 10–11 (summarizing duties of the USCIS in relation to unaccompanied children). Divesting children of this designation will put them in more procedurally precarious positions, making them less likely to obtain relief. See Letter from Donald J. Trump, President of the U.S., to House and Senate Leaders (Oct. 8, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/> [hereinafter *Trump’s Immigration Principles and Policies*]; Testimony of James W. McCament, *supra* note 139, at 6 (“Permitting individuals to maintain a UAC designation when they are not, or no longer, statutorily qualified enables them and/or their parents and sponsors to exploit U.S. immigration laws and processes.”).

<sup>239</sup> The Trump administration desires to “repeal the requirement that an asylum officer have initial jurisdiction over UAC asylum applications to expedite processing,” which could hurt children’s prospects at relief even if they maintain the “unaccompanied” designation. See *Trump’s Immigration Principles and Policies*, *supra* note 239. There has been news of forthcoming draft regulations to undo such special protections. See Maria Sacchetti, *DHS Proposal Would Change Rules for Minors in Immigration Detention*, WASH. POST (May 9, 2018), [https://www.washingtonpost.com/local/immigration/dhs-proposal-would-change-rules-for-minors-in-immigration-detention/2018/05/09/267af486-4f00-11e8-b725-92c89fe3ca4c\\_story.html?noredirect=on&utm\\_term=.dca38ffdaa22](https://www.washingtonpost.com/local/immigration/dhs-proposal-would-change-rules-for-minors-in-immigration-detention/2018/05/09/267af486-4f00-11e8-b725-92c89fe3ca4c_story.html?noredirect=on&utm_term=.dca38ffdaa22). In addition, the Trump administration has demanded faster processing of cases in immigration court and established quotas for immigration judges (700 cases per year), initiatives which will further hinder children in court, many of who appear unrepresented, from receiving due process. See Victoria Neilson, *DOJ Requires Immigration Judges to Meet Quotas*, CATH. LEGAL IMMIGR. NETWORK, INC., <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas> (last visited Feb. 24, 2019). A fair hearing requires time and attention. *Id.* Consequently, the United States will likely end up removing more children who have legitimate claims for asylum and other forms of relief. See *id.* Further, the U.S. government has signaled its intent to target individuals who would agree to sponsor unaccompanied children upon their release from ORR custody, as well as others living in the sponsor’s home. See Privacy Act of 1974; System of Records, 83

forms of humanitarian relief, in particular asylum and special immigrant juvenile status,<sup>240</sup> and swiftly return them to their countries of origin.<sup>241</sup> Particularly concerning, the Trump administration has taken aim at what it wrongly characterizes as “loopholes” established under the TVPRA.<sup>242</sup> According to the former Acting Director of ICE Tom Homan, “the TVPRA ‘had great intentions to protect children from trafficking. However . . . the criminal organizations have exploited that law.’”<sup>243</sup> Homan has urged that “children from Central America should be treated like children from Mexico,”

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Fed. Reg. 20,844, 20,844 (May 8, 2018). The government will collect information that allows ICE “to identify and arrest those who may be subject to removal.” *Id.* at 20,846. This policy may deter many from stepping forward to care for unaccompanied children, which could make it easier for the U.S. government to deport them. See Tim Henderson, *U.S. Immigration Officials Can Now Deport Hosts of Migrant Children*, PEW CHARITABLE TR. (June 8, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/06/08/us-immigration-officials-can-now-deport-hosts-of-migrant-children> (describing possible effects of the policy).

<sup>240</sup> See *Trump’s Immigration Principles and Policies*, *supra* note 239 (outlining plans to make it more challenging to obtain asylum and special immigrant juvenile status). The former Attorney General’s decision in *In re A-B-* issued in June 2018, though it does not alter the asylum framework or create any new legal test, attempts to raise the bar for what an applicant must show to establish eligibility for asylum. See *In re A-B-*, 27 I. & N. Dec. 316, 317 (A.G. 2018) (outlining what an applicant must demonstrate to qualify for asylum based on violence of a private actor); HUMAN RIGHTS FIRST, FACT SHEET: CENTRAL AMERICANS WERE INCREASINGLY WINNING ASYLUM BEFORE PRESIDENT TRUMP TOOK OFFICE (2019); [https://www.humanrightsfirst.org/sites/default/files/Asylum\\_Grant\\_Rate\\_s.pdf](https://www.humanrightsfirst.org/sites/default/files/Asylum_Grant_Rate_s.pdf) (exploring the negative effect of the case on the adjudication of Central American asylum claims).

<sup>241</sup> See *Trump’s Immigration Principles and Policies*, *supra* note 239 (“[T]he Administration proposes amending current law to ensure the expeditious return of UACs and family units.”).

<sup>242</sup> See *id.* (“Loopholes in current law prevent [UACs] that arrive in the country illegally from being removed.”); *supra* Part I (providing context and legislative history of immigration laws protecting those in need of humanitarian relief, particularly children); Valverde, *supra* note 234 (“[W]hat Trump refers to as ‘loopholes’ are actually specific protections for undocumented minors called for by law.”).

<sup>243</sup> Leandra Bernstein, *Trump Says Immigration Reform Must End Loopholes Exploited by MS-13*, WJLA (Feb. 7, 2018), <http://wjla.com/news/nation-world/trump-says-immigration-reform-must-end-loopholes-exploited-by-ms-13>.



which would entail a cursory screening of protection needs and hasty return.<sup>244</sup>

Given these tendencies and trends that focus on removing protections and increasing enforcement, it is reasonable to expect to see a rise in the number of repatriated unaccompanied children. According to Laura Licher, former president of the American Immigration Lawyers Association, the Trump administration's proposed changes to law and policy "ha[ve] nothing to do with loopholes or weaknesses in the system."<sup>245</sup> Instead, she says, "This is just about keeping people out, even when it means that keeping somebody out might end up with them dead."<sup>246</sup>

### B. Recommendations

In light of the dearth of information available about the population of children removed from the United States, policies and procedures guiding repatriation of unaccompanied children, and outcomes of this practice,<sup>247</sup> it is imperative that the U.S. government disclose the measures it follows and develop them sufficiently to ensure that it safely repatriates unaccompanied children and satisfies

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<sup>244</sup> Buch, *supra* note 237; see also JAMIL DAKWAR & SARAH MEHTA, AM. CIVIL LIBERTIES UNION, WRITTEN STATEMENT SUBMITTED TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REGARDING ACCESS TO JUSTICE FOR CHILDREN AND FAMILIES SEEKING ASYLUM 7–8 (2014), [https://www.aclu.org/files/assets/iachr\\_-\\_human\\_rights\\_situation\\_of\\_migrant\\_and\\_refugee\\_children\\_and\\_families\\_in\\_the\\_united\\_states-v2.pdf#page=53](https://www.aclu.org/files/assets/iachr_-_human_rights_situation_of_migrant_and_refugee_children_and_families_in_the_united_states-v2.pdf#page=53) (explaining that "[t]he high rate of return for Mexican unaccompanied minors is not indicative of the merit of their claims" but rather "U.S. immigration officers are not adequately conducting the required TVPRA screening to identify unaccompanied Mexican children with asylum or trafficking claims or who cannot independently consent to being returned"). According to the American Civil Liberties Union ("ACLU"), the U.S. government's approach to repatriation of Mexican children has largely been "the exact opposite of what the TVPRA was designed to do—namely, to put the burden on U.S. immigration officials to show that a child would *not* be in danger if removed from the United States." DAKWAR & MEHTA, *supra*, at 8.

<sup>245</sup> Buch, *supra* note 237.

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., BYRNE & MILLER, *supra* note 3, at 27–28 (noting how "[l]ittle is known about what happens to children after they are returned to their home countries"); *supra* Sections I.D, II.D.

its legal obligations and moral duties.<sup>248</sup> Accordingly, the government should produce the information required by law each year,<sup>249</sup> in addition to supplying data for the years during which it did not submit the mandated reports.<sup>250</sup>

Additionally, lawmakers should pressure the appropriate government actors to understand repatriation practices involving unaccompanied children and advocate for revisions and improvements, systematically monitor and analyze what happens to children upon return to their countries of origin to evaluate whether existing policies and procedures support safe repatriation, and develop a framework to aid in making determinations about and implementing safe repatriation. While these recommendations might appear unlikely to be adopted, particularly under the Trump administration, there exists some precedent that suggests they could be viable. Several of these proposals are elaborated on below.

#### 1. CONDUCT A CONGRESSIONAL OVERSIGHT HEARING

Congress should convene an oversight hearing at which its members request answers from the various departments and agencies involved in the repatriation of unaccompanied children regarding whether and how they safely and sustainably effectuate repatriation and reintegration.<sup>251</sup> The Senate and House Judiciary Commit-

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<sup>248</sup> See Ramirez et al., *supra* note 11, at 477; see also William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 232(a)(5), 8 U.S.C. § 1232(a)(5) (2012); THOMAS LANTOS, COMM. ON FOREIGN AFFAIRS, WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2007, H.R. REP. NO. 110-430, at 22 (2007). These recommendations apply not only to the treatment of unaccompanied children repatriated to Guatemala but also those repatriated to other countries, namely El Salvador and Honduras.

<sup>249</sup> See TVPRA § 235(a)(5)(C).

<sup>250</sup> See *supra* note 74 and accompanying text.

<sup>251</sup> See ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL 1–4, 14, 17–22 (2014) (explaining the purpose, authority, participants, and processes, among other matters, involved in congressional oversight). Congressional oversight entails “the review, monitoring, and supervision of the implementation of public policy” and allows Congress “[t]o make certain that [federal administrators] faithfully execute laws according to [its] intent.” *Id.* at 1. There are various ways to structure and conduct oversight, but

tees, to which the government must submit the annual TVPRA-mandated report,<sup>252</sup> can conduct such hearing.<sup>253</sup> Since the passage of the TVPRA, the U.S. government has produced the required annual reports detailing repatriation policies and procedures just three times.<sup>254</sup> The available reports offer only a cursory summary of the information that the law compels.<sup>255</sup> Congress should challenge underdeveloped or overly narrow interpretations of the law, as well as relevant concepts, to advance U.S. compliance with domestic and international legal obligations requiring the government to protect unaccompanied children.<sup>256</sup>

Alternatively, or additionally, the Permanent Subcommittee on Investigations of the Senate Committee on Homeland Security and Governmental Affairs could call for a hearing.<sup>257</sup> The Subcommittee recently conducted a hearing entitled “Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse.”<sup>258</sup> However, that hearing focused primarily on issues related to the release of unaccompanied children from ORR custody to sponsors in the United States during the pendency of children’s removal proceedings,<sup>259</sup> as well as challenges that

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one of “[t]he most common and effective method[s] . . . is through the committee structure. Throughout their histories, the House and Senate have used their standing committees as well as select or special committees to investigate federal activities and agencies . . . .” *Id.* at 14.

<sup>252</sup> See TVPRA § 235(a)(5)(C).

<sup>253</sup> See DOLAN ET AL., *supra* note 251, at 16.

<sup>254</sup> See 2010 REPORT TO CONGRESS, *supra* note 66, at 1; 2011 REPORT TO CONGRESS, *supra* note 66, at 1; 2013 REPORT TO CONGRESS, *supra* note 66, at 1 (“This is the third annual report on such efforts . . .”).

<sup>255</sup> See BYRNE & MILLER, *supra* note 3, at 28; *supra* notes 112–13 and accompanying text.

<sup>256</sup> See generally Ramirez et al., *supra* note 11, at 461–63.

<sup>257</sup> See DOLAN ET AL., *supra* note 251, at 14.

<sup>258</sup> See *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse*, U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFF. (Apr. 26, 2018), <https://www.hsgac.senate.gov/hearings/oversight-of-hhs-and-dhs-efforts-to-protect-unaccompanied-alien-children-from-human-trafficking-and-abuse>.

<sup>259</sup> Sen. Tom R. Carper, Ranking Member, U.S. Senate Comm. on Homeland Sec. & Governmental Affairs, *Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse*, Statement Before Permanent Subcommittee on Investigations, U.S. Senate Committee on Homeland Security and Governmental Affairs 2–3 (2018), <https://www.hsgac.sen>

those children face in obtaining post-release services and other support.<sup>260</sup> As such, the Subcommittee should arrange another hearing to scrutinize the policies and procedures that DOS, DHS, and HHS have developed in an effort to ensure the safe repatriation of unaccompanied children to their respective countries of origin and to inquire about how they have complied with the mandates under the TVPRA.

## 2. SYSTEMATICALLY GATHER DATA ON OUTCOMES FOR REPATRIATED CHILDREN

The United States must better understand the experiences of returned unaccompanied children to ensure that the relevant policies and procedures effectively advance their safe repatriation.<sup>261</sup> More

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ate.gov/imo/media/doc/Opening%20Statement%20of%20Ranking%20Member%20Tom%20Carper.pdf; Steven Wagner, Acting Assistant Sec’y, Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., Oversight of HHS and DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse, Statement Before Permanent Subcommittee on Investigations, U.S. Senate Committee on Homeland Security and Governmental Affairs 5–6 (2018), <https://www.hsgac.senate.gov/imo/media/doc/Wagner%20Testimony.pdf> [hereinafter Statement of Steven Wagner]; STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 114TH CONG., REP. ON PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES: THE ROLE OF THE OFFICE OF REFUGEE RESETTLEMENT 26–40 (2016), <https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf> [hereinafter PERMANENT SUBCOMM. ON INVESTIGATIONS REP.] (describing problems with the placement of unaccompanied children by HHS with sponsors in the United States).

<sup>260</sup> See Statement of Steven Wagner, *supra* note 259, at 7–9; PERMANENT SUBCOMM. ON INVESTIGATIONS REP., *supra* note 259, at 40–44 (describing problems with the placement of unaccompanied children by HHS with sponsors in the United States).

<sup>261</sup> The Regional Conference on Migration suggests that “[a]ccording to national legislation, the institutions coordinating the repatriation should keep statistical records of unaccompanied children who are repatriated, in order to, among other things, provide reliable information for national policy-making aimed at improving the protection of their human rights and strengthening international cooperation on this matter.” REG’L CONFERENCE ON MIGRATION, REGIONAL GUIDELINES FOR THE ASSISTANCE TO UNACCOMPANIED CHILDREN IN CASES OF REPATRIATION 9 (2009), <https://www.unhcr.org/4bfd29859.html>. At least one expert has

specifically, the United States must systematically monitor what happens to repatriated unaccompanied children in Guatemala after transfer to the Guatemalan government, including while in State custody and, if applicable, after release to a family member or other guardian.<sup>262</sup> The need to monitor is especially compelling given what is known regarding recent issues at government shelters receiving the returning population or providing more permanent care<sup>263</sup> and the prevalence of violence and abuse directed against

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noted that, “While statistics on asylum applications are readily published and widely dispersed by asylum countries, statistics on return are hard to obtain for most countries. The amount of secrecy engulfing return is considerable . . . .” Noll, *supra* note 52, at 106. Further, the U.N. Human Rights Council has commented, “Unaccompanied migrant children separated from their families are the most vulnerable group among all migrants; the lack of information about their situation is one of the most important barriers faced by institutions and States seeking to effectively protect their rights.” *Progress Report of Human Rights Council*, *supra* note 161, ¶ 34; *see also* U.N. High Comm’r for Refugees Exec. Comm. of the High Comm’r’s Programme, Rep. of the Fifty-Eighth Session, at 9, U.N. Doc. A/AC.96/1048 (Oct. 10, 2007), <https://www.unhcr.org/471615cb2.html> [hereinafter UNHCR, *Rep. of the Fifty-Eighth Session*] (“Recogniz[ing] that the systematic collection and analysis of age- and sex-disaggregated data, and of data on children with specific needs, such as unaccompanied and separated children, can be useful for States, UNHCR and other relevant agencies and partners in identifying children at heightened risk.”); Podkul & Shindel, *supra* note 149, at 28 (“[D]ata can help to inform the creation and delivery of services to help children returning to Central America to safely reintegrate into their communities.”).

<sup>262</sup> *See* Ramirez et al., *supra* note 11, at 466; THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 89, at 2. Such analysis may implicate a challenging question regarding the period of time beginning with and extending beyond physical return that requires consideration in a repatriation determination: How far into the future must the government attempt to look? The statute envisions looking at safe and sustainable repatriation and reintegration, and it is difficult to identify a precise window of time because of the expansiveness of those concepts. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(5)(A), 8 U.S.C. § 1232(a)(5)(A) (2012) (mandating that the government must “create a pilot program . . . to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied [] children”). Perhaps six months or one year post-return could serve as a starting point.

<sup>263</sup> *See* THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 1–2 (describing overcrowding and inadequate supplies at Guatemalan shelters).

children in the country.<sup>264</sup> For instance, there have been reports of repatriated unaccompanied children at risk of, or having suffered, trafficking and abuse,<sup>265</sup> precisely the harms the TVPRA endeavors to prevent.<sup>266</sup> At this time, the United States does not have the requisite information to assess whether the policies and procedures that exist, which are difficult to discern in the first place in the absence of the TVPRA-mandated reports or other materials,<sup>267</sup> work well or continue to leave children at risk of harm. Thus, the United States should attempt to fill this critical gap in knowledge.<sup>268</sup>

Certainly, the United States cannot, and should not, undertake this initiative on its own. Instead, the United States must identify,

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<sup>264</sup> See THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 2 (explaining that “[t]wenty-three percent of the unaccompanied children the UNHCR interviewed mentioned violence they suffered in the home”); CMW & CRC Joint Comment, *supra* note 78, ¶ 14 (“[A]uthorities responsible for migration and other related policies that affect children’s rights should . . . systematically assess and address the impacts on and needs of children in the context of international migration at every stage of policymaking and implementation.”).

<sup>265</sup> See, e.g., THE GUAT. HUMAN RIGHTS COMM’N, *supra* note 126, at 2; *supra* Section II.C.

<sup>266</sup> See, e.g., THOMAS LANTOS, COMM. ON FOREIGN AFFAIRS, WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2007, H.R. REP. NO. 110-430, at 22, 33–35 (2007).

<sup>267</sup> See *supra* note 106 and accompanying text.

<sup>268</sup> See Ramirez et al., *supra* note 11, at 457, 459. USAID indicated that it planned to sign a three-year agreement with a public international organization for a new reintegration program to “be underpinned by a monitoring and evaluation plan, [which] is expected to result in . . . a strengthened focus on monitoring and evaluation systems to track reintegration at the community level.” GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 37–38. Regarding information to collect, data captured should be both qualitative and quantitative in nature and might include variables such as ethnicity, disability, living accommodations (e.g., home versus shelter), caretaker, education status, employment status, health status (i.e., physical and psychological), and whether the child has suffered any threats of violence or harm. See CMW & CRC Joint Comment, *supra* note 78, ¶ 16 (“States parties should develop a systematic rights-based policy on the collection and public dissemination of qualitative and quantitative data on all children . . . Such data should be disaggregated by nationality, migration status, gender, age, ethnicity, disability and all other relevant statuses to monitor intersectional discrimination.”); RUIZ SOTO ET AL., *supra* note 141, at 11–12 (listing and describing characteristics that might influence the reception and reintegration needs of returning migrants).

develop partnerships with, and provide appropriate support to government, international, and local organizations that are best positioned to help conduct this monitoring and evaluation.<sup>269</sup> For example, there are a few local organizations in Guatemala that offer social services and other assistance to a portion of repatriated unaccompanied children.<sup>270</sup> Working closely with children and their families, these organizations might be able to share their expertise and experiences as well as collaborate in gathering key data.<sup>271</sup>

Additionally, the United States could partner with non-governmental organizations that have expertise in conducting fact-finding missions as well as groups at academic institutions, such as law school clinics, to explore and develop this critical information.<sup>272</sup> These are established vehicles that can collect evidence and reveal realities in the country in question.<sup>273</sup> Without such data, the United States limits its ability to tailor policies and procedures necessary to effectuating safe repatriation and to addressing children's other protection needs.<sup>274</sup>

### 3. DEVELOP GUIDANCE FOR REPATRIATION DETERMINATIONS

The United States should develop guidance to give consequence to the idea of "safe repatriation" and apply it accordingly before it removes unaccompanied children. How can the government translate its objective of protecting children from trafficking and other abuses into practice? For instance, what factors should decision makers assess to gauge the possibility of safety, or harm, to children

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<sup>269</sup> See Ramirez et al., *supra* note 11, at 473, 479; RUIZ SOTO ET AL., *supra* note 141, at 3.

<sup>270</sup> See, e.g., MEYER ET AL., *supra* note 8, at 22–23; Ramirez et al., *supra* note 11, at 470–71.

<sup>271</sup> See Ramirez et al., *supra* note 11, at 471.

<sup>272</sup> See, e.g., MEYER ET AL., *supra* note 8, at 22–23 (discussing organizations that work with repatriated unaccompanied children in Central America).

<sup>273</sup> See *id.*

<sup>274</sup> See Hammond, *supra* note 55, at 230 ("Working with a conceptual framework that does not recognise real experiences of returnees, we run the risk of providing assistance that is inappropriate and of allowing legitimate needs for integration to go unrecognised and unmet.").

upon return to their countries of origin?<sup>275</sup> In what ways should officials utilize DOS reports that document significant, widespread trafficking, abuse, and violence in a country?

A flexible but organized framework can guide an analysis of whether the circumstances of a child's case indicate that repatriation may or may not be safely effectuated.<sup>276</sup> Enumerating more precise guidance, though it is surely impossible and not advisable to develop an exhaustive list of factors or considerations, will advance the protection of children from trafficking, abuse, and other threats to their safety during the repatriation process.<sup>277</sup> Without such parameters, "safe" repatriation might be an empty endeavor.<sup>278</sup>

There are five primary factors, or categories of concern, that regularly appear in discussions related to children's safety in the repatriation and other relevant contexts, as shown in Table 2. These include (1) a child's wishes, trauma history, and unique vulnerabilities; (2) availability of a suitable caretaker and home environment or alternative accommodations; (3) services, resources, or initiatives to facilitate a child's reintegration post-return; (4) country conditions; and (5) removal (actual transport and transfer of custody).<sup>279</sup> An analysis under this framework uses an ecological model to guide

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<sup>275</sup> See, e.g., UNHCR, *Rep. of the Fifty-Eighth Session*, *supra* note 261, at 8–9 (identifying individual and environmental risk factors that contribute to children being at heightened risk of suffering harm). Who should make these assessments? The Inter-American Commission on Human Rights has recommended that the ORR have exclusive jurisdiction over the repatriation process, underscoring that the United States should "continue to improve its repatriation protocols . . . to ensure that unaccompanied minors are repatriated safely and into a safe home environment." Inter-Am. Comm'n H.R., *Report on Immigration in the United States: Detention and Due Process*, ¶ 453, OEA/Serv.L/V/II., Doc. 78/10 (2010). Generally, the U.S. government should have the burden to establish that safe repatriation is possible before removal is executed. See NAGDA & WOLTJEN, *supra* note 61, at 11, 14; *cf.* Testimony of James W. McCament, *supra* note 139, at 5–6.

<sup>276</sup> *Cf.* Ramirez et al., *supra* note 11, at 477. This Article does not advocate for the construction of a rigid definition to apply indiscriminately in each case.

<sup>277</sup> See generally, e.g., *id.*; NAGDA & WOLTJEN, *supra* note 61, at 4, 26–45 (providing proposed checklists for each step of the repatriation process).

<sup>278</sup> See Ramirez et al., *supra* note 11, at 473

<sup>279</sup> See, e.g., NAGDA & WOLTJEN, *supra* note 61, at 13–23.



the decision maker through an evaluation of individual to interpersonal to social risk factors.<sup>280</sup> Once the decision maker examines the first four factors that describe prospects post-physical return and finds that safe repatriation is possible, he or she can consider whether transport and transfer of custody can be safely executed.<sup>281</sup> The content of several of these factors has been developed in law, policy, and advocacy efforts.<sup>282</sup>

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<sup>280</sup> Cf. COMM. ON THE COMMERCIAL SEXUAL EXPLOITATION & SEX TRAFFICKING OF MINORS IN THE U.S. ET AL., INST. OF MED. & NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 77–79 (Ellen Wright Clayton et al. eds., 2013) (explaining the use of the ecological model to understand possible risk factors for commercial sexual exploitation and sex trafficking of minors). The proposed factors and considerations are not necessarily listed in order of importance or due weight. Literature from other fields on risk and protective factors that influence children's susceptibility to violence and abuse offers direction. In the public health literature, for instance, risk factors have been grouped into four domains: individual, interpersonal, community, and society. *See, e.g., id.* at 77–79. In addition, regional guidelines on child trafficking victims have followed similar organization by proposing consideration of the child's "family and community situation" and "protective measures that could be required for his or her social reintegration" as part of decisions around whether to repatriate. REG'L CONFERENCE ON MIGRATION, REGIONAL GUIDELINES FOR SPECIAL PROTECTION IN CASES OF THE REPATRIATION OF CHILD VICTIMS OF TRAFFICKING 7 (2007), <https://www.unhcr.org/4bfb9179.html>. The United States is a member of the Regional Conference on Migration. *Member Countries*, REGIONAL CONF. ON MIGRATION, <http://www.crmsv.org/en/about-us/member-countries> (last visited Mar. 23, 2019).

<sup>281</sup> *See* NAGDA & WOLTJEN, *supra* note 61, at 14 (suggesting that DHS should take steps to determine whether transport to country of origin can be done safely).

<sup>282</sup> *See, e.g.,* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(c)(1)–(3), 8 U.S.C. § 1232(c)(1)–(3) (requiring that the U.S. government provide "safe and secure placements" for unaccompanied children in the United States and mandating that the authorities conduct home studies before placement for especially vulnerable children, such as those who have disabilities or suffered trafficking or abuse); NAGDA & WOLTJEN, *supra* note 61, at 26–32, 40, 43 (making recommendations to DHS, ORR, and EOIR regarding transport, accommodations, caretaker, and services).

Table 2: Proposed Framework for Safe Repatriation Analysis

	<b>Factor</b>	<b>Considerations</b>
<b>1</b>	Child's wishes, trauma history, and unique vulnerabilities	<ul style="list-style-type: none"> <li>- Child's wishes regarding return to his or her country of origin</li> <li>- Any history of physical, sexual, mental, and emotional abuse, neglect, or exploitation</li> <li>- Witness to or victim of a crime</li> <li>- Fear of others who seek to harm or exploit a child, such as smugglers, traffickers, or other criminal groups</li> <li>- Age, gender, poverty, unemployment, indigenous heritage, discrimination, marginalization, and other relevant characteristics</li> </ul>
<b>2</b>	Availability of a suitable caretaker and home environment or other accommodations	<ul style="list-style-type: none"> <li>- Identification of potential caretaker</li> <li>- Verification of caretaker's identity and relationship to the child</li> <li>- Capacity of the caretaker to provide for the child's physical and mental wellbeing</li> <li>- Criminal history of caretaker and others with access to the home</li> </ul>
<b>3</b>	Services, resources, or initiatives to facilitate a child's reintegration post-return	<ul style="list-style-type: none"> <li>- Verify existence of programs in applicable region of home country</li> <li>- Diversity of resources, including in-country transportation, health, nutrition, psychosocial support, education, and recreation</li> <li>- Ensure programs have capacity to assist child to be repatriated</li> <li>- Ability to facilitate a connection between the child and service provider prior to execution of removal</li> </ul>
<b>4</b>	Country conditions	<ul style="list-style-type: none"> <li>- Administrative, economic, or judicial infrastructure of country</li> <li>- Security and socioeconomic conditions</li> <li>- Any ongoing civil strife</li> <li>- Context for children with particular profiles, such as gender, race, ethnicity, or religion</li> </ul>
<b>5</b>	Transport and transfer of custody	<p>Pre-departure (post-removal order)</p> <ul style="list-style-type: none"> <li>- Perform analysis of preceding four factors and find that safe repatriation is possible</li> <li>- Obtain necessary travel documents*</li> <li>- Availability of reception and care arrangements upon arrival</li> </ul> <p>Transport</p> <ul style="list-style-type: none"> <li>- Appropriate quantity and gender of accompanying officials*</li> <li>- Arrival at appropriate hour, time, and port designated for repatriation*</li> <li>- Child returned in/with garments appropriate for weather*</li> </ul> <p>Arrival</p> <ul style="list-style-type: none"> <li>- Receiving government signs for custody*</li> </ul>

\* Already written into U.S. policy.

First, beginning with the individual characteristics of the particular child, one of the most important considerations should be the child's wishes.<sup>283</sup> Does the child desire to return to his or her country

<sup>283</sup> See, e.g., NAGDA & WOLTJEN, *supra* note 61, at 16, 19, 22–23 (underscoring the need to consider the child's wishes and proposing when and how to do so); UNHCR, GUIDELINES ON BEST INTERESTS, *supra* note 69, at 97–98 (provid-

of origin? Other relevant considerations include any history of physical, sexual, mental, and emotional abuse, neglect, or exploitation.<sup>284</sup> In addition, when evaluating possible placement of unaccompanied children with sponsors in the United States during the pendency of removal proceedings, the government considers whether “a child or youth [is] fearful of others, such as specific individuals who would seek to harm or exploit the child (e.g., smugglers, traffickers, drug cartels, or other organized crime groups), and [whether] a child or youth . . . is a material witness or victim of crime.”<sup>285</sup> Further, characteristics including age, gender, parental risk of violence, poverty, unemployment, discrimination, marginalization, indigenous heritage, status as a migrant, and with whom a child lives (i.e., biological parents versus alternative forms of care) can be predictive of whether a child is likely to be exposed to some form of violence.<sup>286</sup>

Second, an assessment of whether there is a suitable caretaker and home environment or other accommodations requires an examination of considerations, including but not limited to the following:

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ing a checklist of factors to consider when determining of the child’s best interests, including the child’s wishes and feelings as well as the frequency, patterns, and trends of any past harm).

<sup>284</sup> See, e.g., UNHCR, GUIDELINES ON BEST INTERESTS, *supra* note 69, at 69 (stating that the guidelines “relate specifically to protecting the safety of children, including protection from physical and mental violence, abuse, neglect, sexual exploitation, harmful traditional practices, trafficking and abduction, child labour and protection from threats posed by armed conflict to children’s lives, such as underage recruitment”).

<sup>285</sup> *Children Entering the United States Unaccompanied: Section 1*, OFF. REFUGEE RESETTLEMENT (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.3> (quoting Section 1.2.3 Safety Issues).

<sup>286</sup> See CRC General Comment No. 13, *supra* note 69, ¶ 72(e)–(g); Comm. on the Prot. of the Rights of All Migrant Workers & Members of Their Families & Comm. on the Rights of the Child, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, ¶ 54, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017), <https://undocs.org/en/CMW/C/GC/4> (explaining that “a child’s physical and mental health can be affected by a variety of factors, including structural determinants such as poverty, unemployment, migration and population displacements, violence, discrimination and marginalization”).

the identification of a potential caretaker, such as a parent or relative;<sup>287</sup> verification of the proposed caretaker's identity and relationship to the child;<sup>288</sup> the capacity of the proposed caretaker to provide for the child's physical and mental wellbeing;<sup>289</sup> whether the caretaker or anyone else with access to the home has engaged in any activity that jeopardizes the safety of the child, such as domestic violence or other criminal acts;<sup>290</sup> and whether the child feels secure with a particular caretaker and in the home where he or she will live.<sup>291</sup> To evaluate these considerations, the government could coordinate with consular officials who may have gathered pieces of

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<sup>287</sup> See Office of the High Comm'r for Human Rights, Recommended Principles and Guidelines on Human Rights at International Borders: Conference Room Paper, at 21, U.N. Doc. A/69CRP.1 (July 23, 2014) [hereinafter OHCHR, Recommended Principles and Guidelines] (indicating that pre-removal preparation should involve "[e]nsuring that . . . the family or guardian [of the child] has been identified"). According to international guidance, "[i]n the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin." CRC General Comment No. 6, *supra* note 70, ¶ 85.

<sup>288</sup> See, e.g., OHCHR, Recommended Principles and Guidelines, *supra* note 287, at 16–17, 22.

<sup>289</sup> See, e.g., *id.* at 21.

<sup>290</sup> See, e.g., Ramirez et al., *supra* note 11, at 470 (discussing an assessment tool that helps "detect any past history of abuse or other circumstances that would render return as contrary to the best interest of the child").

<sup>291</sup> See, e.g., CHILDREN'S BUREAU, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2016), [https://www.childwelfare.gov/pubpdfs/best\\_interest.pdf](https://www.childwelfare.gov/pubpdfs/best_interest.pdf) (discussing factors included in various state laws related to decisions around a child's appropriate custody and care, including availability of an adequate caretaker); UNHCR, GUIDELINES ON BEST INTERESTS, *supra* note 69, at 70 ("[R]eturn would not be in the child's best interests if adequate care arrangements are not available upon return.").

relevant information through interviews with children to be repatriated.<sup>292</sup> Additionally, the government could contract with organizations that perform prospective home assessments in children's countries of origin to aid in its evaluation.<sup>293</sup>

On this point, the TVPRA provides instructive guidance. The law addresses the safety of unaccompanied children to be released

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<sup>292</sup> ICE is to coordinate contact between children to be repatriated and consular officials. KANDEL, *supra* note 20, at 7; 2013 REPORT TO CONGRESS, *supra* note 66, at 3 (“Consular officers of the country of nationality . . . interview UAC prior to or upon their return to facilitate the safe and dignified return of the child to his or her country of origin.”).

<sup>293</sup> One of the precautionary approaches advanced by advocates involves prospective home assessments in children's countries of origin. *See S. Hearing on the Unaccompanied Alien Child Protection Act*, *supra* note 64, at 58 (testimony of Julianne Duncan, Dir., Office of Children's Servs., Migration & Refugee Servs./U.S. Conference of Catholic Bishops). At a hearing before the U.S. Senate in 2002, Julianne Duncan of the United States Conference of Catholic Bishops, an organization involved in caring for unaccompanied children, argued for the need to determine, prior to a child's removal, the availability of “family members or relatives . . . willing or able to care for [the] child, and whether there is a safe and appropriate home” in the child's country of origin. *Id.* at 59, 66. Addressing the logistics of such a venture, Ms. Duncan explained,

Overseas home assessments are . . . not insurmountable problems. Each of our agencies has considerable experience in conducting both domestic and foreign home assessments. Other international agencies do this work as well. The International Committee for the Red Cross and the International Organization for Migration both do this work in certain circumstances. We are prepared to assist in the design of an appropriate program.

*Id.* at 58. Years later, the House Committee on Appropriations identified the safe repatriation of unaccompanied children as an area of concern. *See* CHAD C. HADDAL, CONG. RESEARCH SERV., RL33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 27–28 (2009) (describing conferees' concerns on repatriation).

The Committee direct[ed] ICE, in close consultation with the Department of State and ORR, to develop and implement policies and procedures to ensure the safe and secure repatriation of unaccompanied . . . children to their home countries, including through the arrangement of family reunification services and placement with non-profit organizations that provide for orphan services.

DAVID PRICE, COMM. ON APPROPRIATIONS, DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS BILL, 2008, H.R. REP. NO. 110-181, at 43 (2007).

from the custody of ORR to a sponsor in the United States.<sup>294</sup> Before placement, ORR must determine that

the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.<sup>295</sup>

Relevant factors to evaluating whether there exists "a documented risk to the safety of the child" include parental drug or alcohol addiction and criminal history.<sup>296</sup> Following its investigation, ORR determines if release to the sponsor is permissible and "assess[es] the severity of the initial, identified safety risk, the length of time that has passed since any events related to the risk, any evidence of rehabilitation, and the parent/child relationship."<sup>297</sup>

Third, to advance safe and sustainable repatriation, it is important to consider the services, resources, or other initiatives available to the child to support reintegration in his or her country of origin.<sup>298</sup> The U.S. government effectively acknowledged this need by writing into the TVPRA a directive to develop a pilot program to promote safe and sustainable repatriation and reintegration,<sup>299</sup> as well as by applauding its progress and endorsing its achievements in the few mandated reports it has produced.<sup>300</sup> The government's pilot program, country of origin initiatives, and support offered via

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<sup>294</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(c)(1)–(3), 8 U.S.C. § 1232(c)(1)–(3) (2012) (requiring that the U.S. government provide "safe and secure placements" for unaccompanied children in the United States and mandating that the authorities conduct home studies before placement for especially vulnerable children, such as those who have disabilities or who have suffered trafficking or abuse).

<sup>295</sup> *Id.* § 235(c)(3)(A).

<sup>296</sup> Statement of Steven Wagner, *supra* note 259, at 5.

<sup>297</sup> *Id.*

<sup>298</sup> See, e.g., MEYER ET AL., *supra* note 8, at 22–23; Podkul & Shindel, *supra* note 149, at 29.

<sup>299</sup> TVPRA § 235(a)(5)(A).

<sup>300</sup> *Cf.* 2013 REPORT TO CONGRESS, *supra* note 66, at 2–5.

civil society organizations, such as KIND, demonstrate the importance of the child and the child's family having access to resources related to transportation from the airport, health, nutrition, psychosocial support, education or vocational scholarships, and recreation.<sup>301</sup> Though the U.S. government may not run these programs or services itself, it should verify their existence, ensure they have the capacity to assist the child it seeks to repatriate, and facilitate a connection between the child and the service provider, all before making a final decision on repatriation.<sup>302</sup>

Fourth, the U.S. government must consider that domestic law and international guidance recognize the significance of country conditions, such as security and socioeconomic conditions, in making decisions about repatriation.<sup>303</sup> The TVPRA explicitly instructs DHS to consider the DOS Human Rights Practices and Trafficking in Persons reports when it makes repatriation determinations.<sup>304</sup> Those reports provide general information on country conditions and critical context for individualized repatriation analyses.<sup>305</sup> Refugee and asylum law offers direction as to how country conditions

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<sup>301</sup> MEYER ET AL., *supra* note 8, at 22–23 (“KIND . . . determined that support for the repatriated child’s family, and not just the child, is critical to successful reintegration.”); 2013 REPORT TO CONGRESS, *supra* note 66, at 4.

<sup>302</sup> For instance, following the conclusion of its pilot program in El Salvador, the U.S. government acknowledged that reintegration assistance for Salvadoran unaccompanied children was not available in every region of the country, though that did not appear to stop the United States from repatriating children there. 2013 REPORT TO CONGRESS, *supra* note 66, at 4. However, the U.S. government has financed some development and reintegration projects in Central America. *See Return and Reintegration in the Northern Triangle Program*, U.S. AGENCY FOR INT’L DEV. (May 2, 2017, 10:30 AM), <https://www.usaid.gov/documents/1862/return-and-reintegration-northern-triangle-program-0>; *see also* GAO, CENTRAL AMERICA: USAID, *supra* note 111, at 10; Press Release, Int’l Org. for Migration, IOM, USAID Promote Good Practice on Reintegration of Returned Migrants in Central America’s Northern Triangle (May 11, 2018), <https://www.iom.int/news/iom-usaid-promote-good-practice-reintegration-returned-migrants-central-americas-northern>.

<sup>303</sup> *See* TVPRA § 235(a)(5)(B) (mandating consideration of country conditions “in assessing whether to repatriate an unaccompanied alien child to a particular country”); CRC General Comment No. 6, *supra* note 70, ¶ 84 (calling for consideration of “safety, security and other conditions, including socio-economic conditions, awaiting a child upon return”).

<sup>304</sup> TVPRA § 235 (a)(5)(B).

<sup>305</sup> *See, e.g.*, GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 1; 2017 TRAFFICKING IN PERSONS REPORT, *supra* note 190, at 186–88.

can be utilized.<sup>306</sup> Under such law, for example, when adjudicators in the United States evaluate whether an asylum applicant can internally relocate in his or her country of origin, they consider criteria including whether there is “any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; . . . and social and cultural constraints, such as age, gender, health, and social and familial ties.”<sup>307</sup> Further, country conditions materials provide context as to whether children with particular profiles, based on their age, gender, race, ethnicity, or religion, face special risk.<sup>308</sup>

Fifth, and last, actual transport and transfer of custody must be evaluated. This includes logistics and procedures, such as the procurement of any necessary travel documents; timely notification to the receiving country of the child’s upcoming return and anticipated arrival date and time;<sup>309</sup> appropriate quantity and gender of officials accompanying unaccompanied children during transit;<sup>310</sup> whether the child is returned with garments appropriate for the anticipated weather conditions in his or her country of origin; arrival at established hours and locations;<sup>311</sup> documented transfer of custody to receiving government officials (or other individuals, if applicable); and the existence of immediate reception and care arrangements.<sup>312</sup>

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<sup>306</sup> See, e.g., 8 C.F.R. § 208.13(b)(3) (2018) (directing adjudicators to consider a non-exhaustive list of factors in determining the “[r]easonableness of internal relocation”).

<sup>307</sup> *Id.*

<sup>308</sup> See, e.g., GUATEMALA 2017 HUMAN RIGHTS REPORT, *supra* note 186, at 1 (noting “cases of killing of women because of their gender” as a significant human rights issue in Guatemala); 2017 TRAFFICKING IN PERSONS REPORT, *supra* note 190, at 188 (articulating that “Guatemalan women, girls, and boys are exploited in sex trafficking”). A majority of unaccompanied children repatriated to Guatemala are indigenous. See GUATEMALAN NATIONAL PROTOCOL FOR CHILD MIGRANTS, *supra* note 123, at 18. Thus, country reports might indicate, for example, whether indigenous children are at heightened risk of harm.

<sup>309</sup> See REG’L CONFERENCE ON MIGRATION, *supra* note 261, at 8.

<sup>310</sup> *Id.*; see OHCHR, Recommended Principles and Guidelines, *supra* note 287, at 21 (articulating the need to “[e]nsur[e] that a guardian will accompany children throughout the return process”).

<sup>311</sup> See REG’L CONFERENCE ON MIGRATION, *supra* note 261, at 7.

<sup>312</sup> See OHCHR, Recommended Principles and Guidelines, *supra* note 287, at 21 (describing the need for “clarity about reception and care arrangements of children in countries to which they are being returned”).



It should be noted that the U.S. government already recognizes the importance of most of these points regarding conditions around the physical return and has incorporated them into procedures around repatriation of unaccompanied children.<sup>313</sup>

This analysis, pursuant to the obligation of the United States to safely repatriate,<sup>314</sup> implicates numerous challenging and complex questions related to policy and practice that require further exploration and careful consideration. How should the government evaluate or weigh factors affecting safety to inform repatriation determinations? Which agencies should be charged with performing this analysis and affirmatively establishing that safe repatriation is possible? What should become of children who do not legally qualify for immigration relief but who the government determines cannot be safely repatriated? The United States must have clear policy on how to handle caretakers, accommodations, and the immigration record of those children.<sup>315</sup> What will happen to unaccompanied children who cannot be safely repatriated after they turn eighteen years old?<sup>316</sup> Protectionary measures arguably should not be immediately withdrawn, which necessitates development of transition measures and continued support.<sup>317</sup> More broadly, can and should the United

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<sup>313</sup> See KANDEL, *supra* note 20, at 7; FIELD OFFICE JUVENILE COORDINATOR HANDBOOK, *supra* note 128, at 30, 34.

<sup>314</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) § 235(a)(1), 8 U.S.C. § 1232(a)(1) (2012).

<sup>315</sup> The U.S. government should consider how it might handle children who cannot be safely repatriated and are not sent back to their countries of origin. The approaches and experiences of other countries might be instructive. See Sarah Maloney, *TransAtlantic Workshop on 'Unaccompanied/Separated Children: Comparative Policies and Practices in North America and Europe', held at Georgetown University, 18–19 June, 2001*, 15 J. REFUGEE STUD. 102, 107 (2002) (discussing how the Netherlands grants a special humanitarian status to “failed . . . child asylum seeker[s] who cannot be returned safely” to their countries of origin, which allows them “to stay until a safe return becomes possible or until the children reaches 18 years of age,” as well as how the UK “grant[s] exceptional leave to remain” to such group of children).

<sup>316</sup> See, e.g., U.N. Secretary-General, *Promotion and Protection of Human Rights, Including Ways and Means to Promote the Human Rights of Migrants*, ¶¶ 16–19, U.N. Doc. A/69/277 (Aug. 7, 2014) (discussing the transition to adulthood and explaining why protectionary measures should sometimes remain in place after a child turns 18).

<sup>317</sup> *Id.* ¶ 19.

States accept this group of children? Does it have the required resources and political will?<sup>318</sup> These issues, in addition to others likely not captured here, need further examination.

#### CONCLUSION

Rooted in a moral duty to protect unaccompanied children, federal law directs that the government safely repatriate them from the United States to their respective countries of origin to protect them from harms, such as trafficking and abuse.<sup>319</sup> In the specific context of Guatemalan unaccompanied children, many documented deficiencies in the repatriation process that jeopardize or at least fail to promote safety have been identified.<sup>320</sup> Similar and distinct shortcomings likely exist in the repatriation of unaccompanied children to other countries, namely El Salvador and Honduras.<sup>321</sup> Nevertheless, based on what is known, the United States, in the intervening decade since the passage of the TVPRA, has failed to live up to its obligation to identify best practices and develop necessary guidance.<sup>322</sup> In particular, the government has not sufficiently translated key concepts, such as safety, into practice.<sup>323</sup> Repatriation involves a multi-dimensional approach to protecting the safety of children during both physical removal and as they begin the process of reintegration into their communities.<sup>324</sup> Therefore, before the United

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<sup>318</sup> With respect to possible policy concerns, some may argue that a lack of repatriation would incentivize more children to migrate to the United States. *See* Brian Rinker, *Congress Grills Administration Officials on Unaccompanied Minors*, CHRON. SOC. CHANGE (July 10, 2014), <https://chronicleofsocialchange.org/news-2/congress-grills-administration-officials-on-unaccompanied-minors>; *cf.* WILLIAM W. CHIP, CTR. FOR IMMIGRATION STUDIES, MASS DEPORTATION VS. MASS LEGALIZATION: A FALSE CHOICE 5–6 (2015), [https://cis.org/sites/cis.org/files/chip-false-choice\\_2.pdf](https://cis.org/sites/cis.org/files/chip-false-choice_2.pdf) (stating that “a legalization program [for beneficiaries of President Obama’s Deferred Action for Childhood Arrivals (DACA) program] will reduce the numbers of both ‘voluntary’ and ‘reluctant’ returnees”). However, this reasoning cannot justify returning children to countries where their safety and wellbeing is at risk.

<sup>319</sup> *See supra* Sections I.A–I.B.

<sup>320</sup> *See supra* Part II.

<sup>321</sup> *See, e.g.*, MEYER ET AL., *supra* note 8, at 19–23.

<sup>322</sup> *See* Ramirez et al., *supra* note 11, at 473–77.

<sup>323</sup> *See supra* Section I.D.

<sup>324</sup> *See supra* Section I.C.1.

States continues to execute deportations of unaccompanied children, it must make more progress towards effectively realizing its critical objectives and fulfilling its essential obligation to protect their safety.