

**COUNTERING PREVAILING TRENDS IN VIOLATION OF WOMEN’S RIGHTS TO LIFE & HEALTH:
AN ANALYSIS OF NICARAGUA’S COMPLETE ABORTION BAN**

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“ . . . All governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women’s health, to deal with the health impact of unsafe abortion as a major public health concern . . . , consider reviewing laws containing punitive measures against women who have undergone illegal abortions.”¹

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¹ Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, para. 106(k), U.N. Doc. A/CONF.177/20 (1995) [hereinafter Beijing Platform for Action].

ABSTRACT

Unsafe abortion is both a preventable public health problem and a serious violation of women's fundamental human rights to life and health. In recognition of the causes and consequences of unsafe abortion, an overwhelming majority of states have moved toward a liberalization of abortion laws and a decriminalization of abortion practices. Despite these trends, a few states, including Chile, El Salvador, and Nicaragua, have retrogressively enacted further restrictions on abortion and criminalized abortion practices even for therapeutic purposes to protect the health and lives of pregnant women. This Article critically analyzes Nicaragua's complete abortion ban in the context of pressing public health and human rights concerns surrounding unsafe abortion. It argues that Nicaragua is countering prevailing international trends toward a liberalization of abortion laws. Additionally, it finds that victims-survivors have viable reparations claims for harms suffered at international law and discusses possible barriers to success in receiving reparations for violations resulting from Nicaragua's complete abortion ban.

INTRODUCTION

Increasingly throughout the world, governments are recognizing the need to address the causes and consequences of unsafe abortion as an entirely preventable, pressing public health concern.² Additionally, international norms and trends are moving toward an increasingly rights-based approach to women's reproductive health³ and to safe abortion access even though the right to reproductive choice does not include a specific right to abortion.⁴ Furthermore, international human rights advocates and scholars have progressively challenged restrictive abortion laws through existing human rights norms—such as the rights to life and health—

² See Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 763–4 (2003-2004); David A. Grimes et al., *Unsafe Abortion: The Preventable Pandemic*, 368(9550) LANCET 1908, 1908 (2006).

³ See, e.g., Rebecca J. Cook, *Developments in Abortion Laws: Comparative and International Perspectives*, 913(1) ANNALS N.Y. ACAD. SCIENCES 74 (2000) (analyzing the recent, significant developments in abortion laws throughout the world and arguing that the trend is moving toward protecting women's health and human rights); Jodi L. Jacobson, *Transforming Family Planning Programs: Towards a Framework for Advancing the Reproductive Rights Agenda*, 8(15) REPRO. HEALTH MATTERS 21 (2000) (discussing the application of a human rights framework to reproductive health programs and the barriers to doing so); Lynn P. Freedman & Stephen L. Isaacs, *Human Rights and Reproductive Choice*, 24(1) STUD. IN FAM. PLANNING 18 (1993) (demonstrating the challenges to reproductive choice and calling on policymakers to formulate international human rights standards for reproductive choice in international conferences). See Ernst et al., *supra* note 2, at 764.

⁴ Jill M. Bracken, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 IND. INT'L & COMP. L. REV. 197 (1995-1996).

despite a lack of consensus toward any explicit right to safe and legal abortion services.⁵ Even in the midst of opposition from anti-choice forces and reactionary governments, overwhelmingly states have committed themselves through various international fora to consider decriminalizing abortion practices, to understand the determinants and costs of unsafe abortion, and to improve abortion safety and access where permitted by law.⁶

While this international trend toward moving unsafe abortion from the religious, moral, and political frameworks to the public health and human rights arenas has gained momentum and is a giant step forward to improve the health and lives of women, there are countries sidestepping this trend. A few states have run counter to recent movements in reproductive rights and have enacted retrogressive measures to curb safe and legal abortion practices—even for therapeutic purposes—within their borders. The abortion laws in Chile, El Salvador and Nicaragua are presently among the most restrictive in the world; they effectively eliminate all legal grounds for abortion and criminalize the woman who obtains abortion services as well as the physician who provides them.⁷ In doing so, these states are not only out of step with international legal norms and trends,⁸ but each country also violates international treaties to which it is bound.⁹

⁵ See Ernst et al., *supra* note 2, at 764.

⁶ See *Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action*, U.N. GAOR, 23d Special Sess., Annex, Agenda item 10, para. 72(o), U.N. Doc. A/Res/S-23/3 (2000); *Key Actions for the Further Implementation of the Programme of Action of the International Conference on Population and Development*, U.N. GAOR, 21st Special Sess. para. 63(i)-(iii), U.N. Doc. A/S-21/5/Add.1 (1999); Ernst et al., *supra* note 2, at 764.

⁷ See Chile, Código Penal, Delitos Contra La Orden Familiar y Moralidad Pública, Artículos 342–5 (1989); El Salvador, Código Penal, Capítulo II, Delitos Contra las Vidas de Seres Humanos en los Primeros Etapas de Desarrollo, Artículos 133–7 (1998); República de Nicaragua, Código Penal, Libro II, Título I, Delitos Contra las Personas y Su Integridad Física, Psíquica, Moral y Social, Capítulo V, Del Aborto, Artículo 165 (repealed 2006).

⁸ International norms and trends can be seen as fundamental elements of customary international law, a primary source of international human rights law. See, e.g., MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS & CUSTOMARY INTERNATIONAL LAW 130 (1999) (“... [C]ustomary international law results from the coexistence of two elements: first, the presence of a consistent and general practice among States; and, secondly, a consideration on the part of those States that their practice is in accordance with law.”); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989); KAROL WOLFKE, CUSTOM PRESENT IN INTERNATIONAL LAW 53 (2d rev. ed. 1993) (“[I]nternational custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law.”). In other words, general practice and general acceptance as law, also called *opinio juris*,

Additionally, and even more vitally, these complete abortion bans are a violation of Chilean, El Salvadoran, and Nicaraguan women's fundamental rights to life and health.

This Article critically examines these recent legislative changes that have passed in Latin America to criminalize all abortions, including therapeutic abortions performed to save the lives and health of women as well as to terminate a pregnancy in cases of rape or incest. It argues that complete abortion bans run counter to prevailing international legal trends and norms that commit states to consider decriminalizing abortion and improving the safety and access to abortion services where legal. Part I addresses the reality of unsafe abortion practices worldwide and also gives context to the causes and consequences of this issue in Latin America. Part II considers the case of Nicaragua, the most recent Latin American state to pass a complete abortion ban, and the recent historical, political and cultural contexts that led to the ban. Parts III and IV analyze the public health complications and human rights violations, respectively, of the complete abortion bans passed in Latin America with a continued focus on the case of Nicaragua. Part V demonstrates that these complete bans are exceptions to the current, prevailing international legal trends. Part VI offers suggestions for remedying women's human rights violations at international law. Part VII concludes by offering reasons as to why Nicaragua and other countries similarly situated should care about conforming to these international human rights norms and trends.

come together to form customary international law. Although scholars disagree as to when a certain practice becomes general practice among states or generally accepted among states, practice and acceptance do not have to be universal for a law to become international custom. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW OF THE UNITED STATES 3 (1996) ("It is . . . significant that the behavioral element of custom (*i.e.*, general practice) is . . . free from the need of total conformity, and it rests not merely upon the practice of states as such but ultimately upon the practice of all participants in the international legal process."). *C.f.* KAROL WOLFKE, *supra*, at 59 (stating that the number of states involved in the process of forming custom is immaterial and that the conduct of one state can lead to customary international law).

⁹ *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on the Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 513 [hereinafter CEDAW]; American Convention on Human Rights, O.A.S. Treaty Series No. 36, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention].

I. Unsafe Abortion

A. The Global Context

Each year, an estimated 80 million of the 210 million pregnancies that occur across the globe are unplanned.¹⁰ While some of these women choose to carry the fetus to term, another 46 million women choose to have induced abortions.¹¹ Of the 22 percent of pregnancies worldwide that end in abortion, an overwhelming majority is due to health, economic, or relationship problems.¹² Additionally, 20 million women who voluntarily terminate their pregnancies live in countries that restrict or prohibit the procedure.¹³ Despite the differences in the legal status of abortion between developed and developing countries, rates of abortion are similar across these countries.¹⁴

The “silent pandemic”¹⁵ of unsafe abortion is one of the hidden and often ignored public health concerns plaguing many less developed countries around the world.¹⁶ The World Health Organization (WHO) defines unsafe abortion as “the termination of an unintended pregnancy either by persons lacking the necessary skills or in an environment lacking the minimum medical standards, or both.”¹⁷ The WHO estimates that, globally, women obtained 19 million unsafe abortions in the year 2000.¹⁸ In other words, approximately 10 percent of all pregnancies worldwide ended in unsafe abortion in 2000. Regardless of the legal status of abortion, many women faced with unintended pregnancies still seek out abortion services, and some even risk

¹⁰ See WORLD HEALTH ORG. (WHO), UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2000 1 (2004).

¹¹ See *id.*; ALAN GUTTMACHER INST., SHARING RESPONSIBILITY: WOMEN, SOCIETY AND ABORTION WORLDWIDE 25 (1999).

¹² See ALAN GUTTMACHER INST., *supra* note 11, at 10.

¹³ See *id.* at 25; WHO, *supra* note 10, at 1.

¹⁴ See ALAN GUTTMACHER INST., *supra* note 11, at 25.

¹⁵ Grimes et al., *supra* note 2, at 1908; see Friday Okonofua, *Abortion and Maternal Mortality in the Developing World*, 28(11) J. OBSTETRICS & GYNAECOLOGY CAN. 974 (2006).

¹⁶ See WHO, *supra* note 10, at 1.

¹⁷ ALAN GUTTMACHER INST. (Ina K. Warriner & Iqbal H. Shah, eds.), PREVENTING UNSAFE ABORTION AND ITS CONSEQUENCES: PRIORITIES FOR RESEARCH AND ACTION vii (2006) (preface).

¹⁸ See Grimes et al., *supra* note 2, at 1908; WHO, *supra* note 10, at 9.

their health and lives in unsafe, illegal conditions to terminate their pregnancies.¹⁹ For example, 5.3 million women suffer from temporary or permanent disability, and 68,000 of the 600,000 women who die each year from pregnancy-related causes die from abortion complications.²⁰ In addition, 95 percent of these abortion-related deaths occur in less-developed countries.²¹ Many of these deaths result from clandestine abortion procedures.²² Furthermore, maternal deaths are substantially higher for rural, poor women who generally have little or no access to safe abortion or post-abortion care services.²³ For women with sufficient resources, access to safe abortion procedures is the norm even where abortion is prohibited by law.

In contrast, countries that permit abortion usually have skilled practitioners who perform abortions early in pregnancies and use accepted methods in hygienic environments.²⁴ Such procedures are generally safe and have low risks of post-abortion complications.²⁵ Even in some countries where abortion is legal, however, states fail to respect, protect and fulfill their obligations to its citizens: women may still have severely limited access to safe procedures due to moral condemnation, inadequate regulation, or a lack of political will to enforce the law.²⁶ In the end, while little correlation exists between abortion legality and abortion incidence, a strong correlation exists among abortion illegality, inadequate regulation and *unsafe* abortion incidence.²⁷ That is to say, restrictive legislation or poor regulation is positively correlated with unsafe abortion incidence, and the most visible consequence of this association are the higher

¹⁹ See Alan Guttmacher Inst., *Abortion in Context: United States and Worldwide*, Issues in Brief 1: 1 (1999).

²⁰ See WHO, *supra* note 10, at 9.

²¹ See ALAN GUTTMACHER INSTITUTE, *supra* note 11, at 32; L. Briozzo et al., *Unsafe Abortion in Uruguay*, 85 INT'L J. GYNECOLOGY & OBSTET. 70, 70 (2004).

²² See WHO, *supra* note 10, at 1.

²³ See, e.g., Briozzo et al., *supra* note 21, at 70 (finding evidence that maternal deaths are higher in Uruguay where there is little to no post-abortion care services).

²⁴ See Alan Guttmacher Inst., *supra* note 19, at 4.

²⁵ See *id.*

²⁶ See HUMAN RIGHTS WATCH, INTERNATIONAL HUMAN RIGHTS LAW AND ABORTION IN LATIN AMERICA 1 (2005).

²⁷ See WHO, *supra* note 10, at 3; Alan Guttmacher Institute, *supra* note 19, at 1.

rates of maternal mortality or higher proportions of abortion-related maternal deaths in countries that restrict or prohibit abortion services.²⁸

Unsafe abortions occur in all corners of the world. Clandestine practices, however, are rare or non-existent in North America, throughout most of Europe and in Eastern Asia.²⁹ In these regions, abortion is generally legal, safe, well-regulated, and accessible to most women.³⁰ In developing regions, the maternal mortality due to unsafe abortions is 330 deaths per 100,000 abortions, a rate hundreds of times higher than that of developed countries.³¹ In Africa, approximately 4 million unsafe abortions occur annually, and although there are differences across sub-regions, the chance of a woman resorting to clandestine abortion is among the highest in the world.³² Eastern Africa, for instance, has an unsafe abortion rate of 31 abortions per 1,000 women of reproductive age, and this rate is second only to that of South America.³³ In parts of Latin America, the unsafe abortion rate estimates are highest. Even though there are also about 4 million unsafe abortions that occur in Latin America, the lower fertility in the region, the desire for smaller family sizes, the unmet need for contraception, and the high rate of unplanned pregnancies³⁴ make the relative risk of death from post-abortion complications much higher among countries in this region.³⁵

The question arises as to why these differences in unsafe abortion incidence and its negative consequences exist globally. The answer, which involves addressing the underlying

²⁸ See WHO, *supra* note 9, at 3. The unsafe abortion mortality ratio generally offers a good comparison between regions, although it is complex to interpret and the differences in fertility across settings may under- or overemphasize its importance. See *id.* at 9.

²⁹ See *id.* at 14.

³⁰ See *id.*

³¹ ALAN GUTTMACHER INSTITUTE, *supra* note 10, at 32. This rate excludes China. *Id.*

³² See WHO, *supra* note 9, at 14.

³³ See *id.*

³⁴ See, e.g., ELENA PRADA ET AL., ABORTION AND POSTABORTION CARE IN GUATEMALA: A REPORT FROM HEALTH CARE PROFESSIONALS AND HEALTH FACILITIES (OCCASIONAL REPORT 18, GUTTMACHER INST.) 5 (2005).

³⁵ See WHO, *supra* note 9, at 14.

determinants of unwanted pregnancies, unsafe abortions and the resulting increases in maternal morbidity and mortality, is complex and structural in nature. Various larger global institutions and policies that have been associated with aggravated poverty and the erosion of existing social services³⁶ may also negatively impact women's empowerment and rights to reproductive choice and freedom. These institutions and policies, including those promoting privatization, macroeconomic adjustment—such as structural adjustment programs (SAPs)—foreign debt, trade inequities, international financial institutions (IFIs), and transnational corporations,³⁷ have continued to privatize, deregulate and commodify reproductive health services. Affirmations to promote these traditional capitalist priorities at international conferences such as the United Nations 1994 International Conference on Population and Development (ICPD) in Cairo serve to erect barriers to reproductive health care access and increase morbidity and mortality among women of lower socio-economic status.³⁸ Additionally, RACISM & CLASSISM (LEAVING OUT THE MOST IMPOVERISHED VULNERABLE GROUPS) In order to advance human rights holistically, advocates and academics must address the multiple, overlapping and reinforcing causes of harms against women and reproductive rights in today's world.

B. The Latin American Context

More than 4 million Latin American women undergo induced abortions each year.³⁹

Although the restrictions or prohibitions on abortions throughout Latin America render statistical

³⁶ Cf. Gabriel Kolko, *Ravaging the Poor: The International Monetary Fund Indicted by its Own Data*, in THE POLITICAL ECONOMY OF SOCIAL INEQUALITIES: CONSEQUENCES FOR HEALTH AND QUALITY OF LIFE 173, 177 (Vicente Navarro ed., 2002) (arguing that data show that states following the International Monetary Fund's (IMF) structural adjustment programs have experienced correlated economic crises, low or negative economic growth, increasing foreign debts among other negative consequences).

³⁷ See Rosalind Pollack Petchesky, *From Population Control to Reproductive Rights: Feminist Fault Lines*, 3 REPRO. HEALTH MATTERS 152, 156 (1995) (“... [T]he practical implementation of this reproductive health and rights agenda will be impossible without the reallocation of resources globally and nationally to assure the full funding of social programmes, especially health—in other words, without radically new development alternatives.”).

³⁸ See *id.* at 157.

³⁹ See Deirdre Wulf, *An Overview of Clandestine Abortion in Latin America*, THE ALAN GUTTMACHER INSTITUTE: ISSUES IN BRIEF 1 (1996).

information less reliable,⁴⁰ estimates, which likely understate the problem, show that Latin America has one of the highest incidences of induced abortions in the world.⁴¹ Studies rank Peru and Chile as the countries in the region with the highest estimated induced abortion rates.⁴² Many Latin American women who seek abortions are in their late 20s or older, are married, and have at least one child.⁴³ Because most Latin American countries criminalize the procedure, most of the abortions are illegal, unsafe procedures that lead to increased mortality and morbidity for thousands of women across the region.⁴⁴

Latin America is also estimated to have one of the highest annual incidences of unsafe abortions in the world.⁴⁵ Data show that at least 800,000 Latin American women who have induced abortions each year require treatment for complications related to their procedures.⁴⁶ The methods commonly employed to induce clandestine abortions include the use of modern pharmaceuticals or herbal abortifacients, and the insertion of catheters, metal sounds or even sticks directly into the uterus.⁴⁷ These clandestine and frequently self-applied methods often cause heavy bleeding, uterine rupture and sepsis, and may result in the need for post-abortion medical care from skilled professionals.⁴⁸ Many women in need of medical attention due to

⁴⁰ See CTR. FOR REPRODUCTIVE RIGHTS, PERSECUTED: POLITICAL PROCESS AND ABORTION LEGISLATION IN EL SALVADOR 9 (2001).

⁴¹ See John M. Paxman et al., *The Clandestine Epidemic: The Practice of Unsafe Abortion in Latin America*, 24(4) STUDIES IN FAM. PLANNING 205, 207 (1993).

⁴² Amy Deschner & Susan A. Cohen, *Contraceptive Use is Key to Reducing Abortion Worldwide*, GUTTMACHER REPORT ON PUB. POLICY 7, 7 (Oct. 2003) (citing Stanley K. Henshaw, Susheela Singh & Taylor Haas, *Recent Trends in Abortion Rates Worldwide*, 25(Supp.) INT'L FAM. PLANNING PERSPECTIVES S30–38 (1999)); Wulf, *supra* note 35, at 1.

⁴³ See L.C. Remez, *Confronting the Reality of Abortion in Latin America*, 21 INT'L FAM. PLANNING PERSPECTIVES 32 (1995); Wulf, *supra* note 35, at 2.

⁴⁴ See HUMAN RIGHTS WATCH, *supra* note 25, at 2; John M. Paxman et al., *supra* note 37, at 205; Wulf, *supra* note 35, at 1.

⁴⁵ See WHO, *supra* note 9, at 10.

⁴⁶ See Wulf, *supra* note 35, at 5.

⁴⁷ See Paxman et al., *supra* note 37, at 208–9.

⁴⁸ See *id.* at 209.

complications from clandestine procedures, however, are poor, rural women⁴⁹ who may not have access to or seek care from skilled medical professionals.

Complications as a result of unsafe, clandestine abortions are a leading cause of maternal mortality in several countries throughout Latin America.⁵⁰ For example, in Chile, nearly one-third of maternal deaths in the country can be attributed to abortion.⁵¹ Although overall maternal mortality in Latin America is relatively low, proportionately, abortion deaths are high, making them the number one cause of maternal deaths in the region.⁵² Abortion-related mortality in the region is between 10 and 100 times higher than in most countries in Europe.⁵³ As a direct result of the stringent prohibitions on induced abortion throughout the region, the practice is kept underground, and its victims are hidden behind a veil of secrecy.

Cuba remains one of the only exceptions to the rule in Latin America regarding unsafe abortion incidence.⁵⁴ Unlike other countries in the region, Cuba has less restrictive, legalized abortion services provided free to women by the state.⁵⁵ Because of the country's use of safer abortion procedures in clinical settings, Cuba's abortion-related mortality rate is comparable to those of developed countries with only one death per 100,000 procedures.⁵⁶ The liberalization of abortion laws in Cuba clearly demonstrates and exemplifies a country's ability to decrease

⁴⁹ See Wulf, *supra* note 35, at 2.

⁵⁰ See HUMAN RIGHTS WATCH, *supra* note 25, at 2.

⁵¹ See CTR. FOR REPRODUCTIVE LAW & POLICY & THE OPEN FORUM ON REPRODUCTIVE HEALTH AND RIGHTS, WOMEN BEHIND BARS: CHILE'S ABORTION LAWS: A HUMAN RIGHTS ANALYSIS 38 (1998); ORG. PANAMERICANA DE SALUD (PAHO) NICARAGUA, DEROGACIÓN DEL ABORTO TERAPEUTICO EN NICARAGUA: IMPACTO EN SALUD 9 (2007) (citing Khan et al., *WHO Analysis of Causes of Maternal Death: A Systematic Review*, 367(9516) LANCET 1066-74 (2006)).

⁵² See WHO, *supra* note 9, at 9.

⁵³ See Paxman et al., *supra* note 37, at 210.

⁵⁴ See Stanley K. Henshaw et al., *The Incidence of Abortion Worldwide*, 25 INT'L FAM. PLANNING PERSPECTIVES S30, S34 (1999). In Latin America, legal abortions are available only in Cuba, Puerto Rico and a few small Caribbean countries. *Id.* See, e.g., HUMAN RIGHTS WATCH, *supra* note 25, at 1 (analyzing abortion restrictions in Latin America).

⁵⁵ See WHO, *supra* note 9, at 14; Paxman et al., *supra* note 37, at 207.

⁵⁶ See Paxman et al., *supra* note 37, at 210.

unsafe abortion and its negative consequences as a result of decriminalizing the practice.⁵⁷

II. Nicaragua: a Case Study

On October 26, 2006, Nicaragua's congressional vote to approve law 603 and rescind article 165 of the Penal Code eliminated the only exemptions to the country's general ban on abortion, criminalizing the procedure even for therapeutic purposes—when performed to save the health and life of the mother and for victims of rape or incest.⁵⁸ As a result, Nicaragua's abortion laws now rank among the most restrictive in the world. Nicaragua joined Chile and El Salvador as the third country in the Western Hemisphere to make abortion laws more restrictive since 1994 and to completely outlaw abortion.⁵⁹ The country's overall maternal mortality ratio is high at 230 maternal deaths per 100,000 live births, a ratio twice that of neighboring Honduras and ten times that of Costa Rica.⁶⁰ These policy changes to article 165 of the Nicaraguan Penal Code only add to the systemic practices of structural violence against women, deny the right to health, and will likely lead to more maternal deaths in the country.⁶¹

⁵⁷ See *id.* at 221.

⁵⁸ See HUMAN RIGHTS WATCH, *supra* note 25, at 1; Press Release, Human Rights Watch, Nicaragua: Penal Reform Constitutes an Assault on Human Rights (Oct. 26, 2006). Before the repeal of article 165, the Nicaraguan Criminal Code provided for the performance of therapeutic abortions, and for legal purposes, its Code called for three physicians and the consent of the spouse or nearest relative of the woman to intervene. Press Release, Human Rights Watch, *supra*.

⁵⁹ See Irene Schneeweis, *Nicaraguan Assembly Passes Therapeutic Abortion Ban*, MADRE, Oct. 26, 2006, available at <http://www.madre.org/press/pr/nicaragua102606.html> (last visited Apr. 18, 2007); Press Release, Ctr. for Reproductive Rights, Center for Reproductive Rights Condemns Passage of Nicaragua's Abortion Ban, Oct. 26, 2006, available at http://www.crlp.org/pr_06_1026Nicaragua.html (last visited Apr. 18, 2007). The countries of the world that restrict abortion under any and all circumstances are El Salvador, Chile, the Vatican, Honduras, and Nicaragua. See ORG. PANAMERICANA DE SALUD (PAHO) NICARAGUA, *supra* note 47, at 7.

⁶⁰ See W. Van Lerberghe et al., *The World Health Report 2005: Make Every Mother and Child Count*, WORLD HEALTH ORG. (2005), available at http://www.who.int/whr/2005/whr2005_en.pdf. Honduras' maternal mortality ratio is 110 and that of Costa Rica is 25. *Id.*

⁶¹ Interestingly, the assembly voted unanimously to pass the ban days before the presidential elections. Pro-choice critics argue that this move was a political gesture to gain support of Catholic leaders and other conservative factions. See CENTRO NICARAGÜENSE DE DERECHOS HUMANOS, DERECHOS HUMANOS EN NICARAGUA: INFORME ANNUAL 2006 12 (2006).

A. Political Context Leading to Complete Abortion Ban

1. Rosita's Case

When asked how he felt about a nine year-old girl who was raped and impregnated receiving a therapeutic abortion, the priest stated that, although the act of rape was abominable and unforgivable, the child was innocent and had a right to life. When asked to which child he was referring, the priest looked puzzled and said "the child inside her, of course."⁶²

Activists and politicians on either side of the abortion controversy in Nicaragua first visited the issues surrounding therapeutic abortion years before the present ban went into effect. The highly political, public debate leading to the ban began in 2003 when the "Rosita" case gained national and international attention. Earlier that year, an adult attacker raped and impregnated a nine-year-old Nicaraguan girl named "Rosita" on a coffee plantation in Costa Rica.⁶³ Rosita's illiterate, *campesino* parents, fearing for their only daughter's life and mental health, sought a therapeutic abortion and—despite the legality of their actions and the duties of the two states—faced resistance from the Costa Rican government and later from the Nicaraguan government.⁶⁴

At that time, the laws in Costa Rica and Nicaragua allowed for exceptions to the general prohibition of abortion services to save the health and life of the pregnant woman or, in this case, the pregnant child.⁶⁵ Additionally, both Costa Rica and Nicaragua ratified international treaties

⁶² Interview with Padre Francisco Roble, Sacerdote en Ocotal, Nueva Segovia, in Ocotal, Nicaragua (Jan. 13, 2007) (on file with author).

⁶³ See Heathe Luz McNaughton Reyes et al., *Invoking Health and Human Rights to Ensure Access to Legal Abortion: The Case of a Nine-Year-Old Girl from Nicaragua*, 9 HEALTH & H. R. 62, 63 (2006); Felipe Jaime, *Therapeutic Abortion Faces Pressure from the Right*, INTER PRESS SERVICE NEWS AGENCY, July 26, 2004, at 1, available at <http://ipsnews.net/interna.asp?idnews=24792> (last visited Apr. 24, 2007).

⁶⁴ See Jaime, *supra* note 59, at 1.

⁶⁵ República de Costa Rica, Código Penal Sección II, Aborto, Artículo 121, available at <http://cyber.law.harvard.edu/population/abortion/CostaRica.abo.htm> (stating that abortion is not punishable when practiced by a licensed practitioner with the woman's consent and when the procedure is performed in order to avert risk to the life or health of the pregnant woman and this risk cannot be averted by any other means); República de Nicaragua, Código Penal, Libro II, Título I, Delitos Contra las Personas y Su Integridad Física, Psíquica, Moral y Social, Capítulo V, Del Aborto, Artículo 165, available at <http://cyber.law.harvard.edu/population/abortion/Nicaragua.abo.htm> (stating that legal therapeutic abortion must be

that bound each state to protect rights violated by a denial of therapeutic abortion.⁶⁶ At the same time, government entities, including the Ministers of Health and Family, and Church authorities invoked national laws protecting life from the moment of conception and publicly denounced all abortions as crimes.⁶⁷ Moreover, the Ministers attempted to suspend Rosita's mother and father's parental rights and to appoint a known anti-abortion advocate to the special commission that was to evaluate the therapeutic abortion request.⁶⁸ Thus, even though each state had an obligation to provide Rosita access to safe abortion services, her family and advocates faced challenges in dealing with competing human rights arguments claiming rights of the fetus and the pregnant child-victim.⁶⁹

Advocates calling for therapeutic abortion in Rosita's case, including the Nicaraguan Children's Ombudsman, women's rights advocates and children's rights advocates, argued that human rights obligations and national laws protected Rosita's right to health over and above any possible fetal rights.⁷⁰ Those against permitting therapeutic abortions, however, pointed to the Nicaraguan Code of Childhood and Adolescence, which protects the right to life of all children from the moment of conception through age twelve.⁷¹ Eventually, this case caused a heated debate to erupt in the Nicaraguan parliament, and, in 2004, the Congress considered removing the exceptions to the criminalization of abortion for therapeutic purposes.⁷² Congress suspended

determined in a scientific manner by at least three doctors and performed with the consent of the spouse or closest relative of the woman).

⁶⁶ See, e.g., CEDAW, *supra* note 8, *ratified* by Costa Rica, Apr. 4, 1986 & Nicaragua, Oct. 27, 1981; ICCPR, *supra* note 8, *ratified* by Costa Rica, Nov. 29 1968 & Nicaragua, Mar. 12, 1980; ICESCR, *supra* note 8, *ratified* by Costa Rica, Nov. 29 1968 & Nicaragua, Mar. 12, 1980.

⁶⁷ See McNaughton Reyes et al., *supra* note 59, at 63; N. Miles, *Abortion Ruling Splits Nicaragua*, BBC NEWS, March 4, 2003, available at <http://news.bbc.co.uk/1/hi/world/americas/2817051.stm> (last visited Apr. 18, 2007).

⁶⁸ See McNaughton Reyes et al., *supra* note 59, at 66; *Raped Nicaraguan girl aborts baby*, BBC NEWS, Feb. 21, 2003, available at <http://news.bbc.co.uk/1/hi/world/americas/2789279.stm> (last visited Apr. 18, 2007).

⁶⁹ See McNaughton Reyes et al., *supra* note 59, at 65.

⁷⁰ See *id.* at 78.

⁷¹ See República de Nicaragua, Ley No. 287, Código de la Niñez y la Adolescencia. Libro Primero. Derechos, Libertades, Garantías y Deberes. Capítulo I. Derechos Civiles y Políticos. Arto. 12. (May 12, 1998).

⁷² See HUMAN RIGHTS WATCH, *supra* note 25, at 3.

the debate in light of the controversy and uproar it created about whether Nicaragua should continue to legally permit therapeutic abortions at all.⁷³ In the meantime, however, legislators who disagreed with the Nicaraguan Children's Ombudsman continued to politicize the issue by ousting him from office for nothing more than respecting the laws and applicable conventions that called for prioritizing Rosita and her family's interests over the interests of the state in protecting potential life.⁷⁴

2. Revisiting Therapeutic Abortion at Elections

When these issues resurfaced two years later during the presidential elections, politics clearly led to the passage of the complete abortion ban in effect today. In August 2006, abortion opponents took advantage of the extremely polarized November elections to push for a rescission of article 165 of the Nicaraguan Penal Code that allowed exceptions to the more than 100-year-old general prohibition on abortion.⁷⁵ Despite pleas to separate the therapeutic abortion debate from politics, Nicaraguan legislators rekindled discussions when a Sandinista candidate wanted to keep therapeutic abortion on the books while Catholic and evangelical church representatives wanted a revocation of the provision.⁷⁶ In support of their anti-abortion movement, church representatives gathered some 200,000 signatures and presented them to Congress in order to rescind the therapeutic abortion exception of the Nicaraguan Penal Code.⁷⁷ Afterward, twenty-five left-wing legislators broke from past affirmations to permit therapeutic abortion, aligned with the Church and supported the rescission measure, while thirteen other party members

⁷³ See *id.*

⁷⁴ See McNaughton Reyes et al., *supra* note 59, at 78.

⁷⁵ See Ipas, *Global Abortion News Update: Latin America and the Caribbean: Nicaragua*, October 2006, available at http://www.ipas.org/english/press_room/2006/global_abortion_news_updates/102006.asp (last visited Apr. 4, 2007).

⁷⁶ See *id.*; Tania Sirias, *Aborto terapéutico no debe ser tema en tiempo electoral*, EL NUEVO DIARIO, Oct. 25, 2006, available at <http://www.elnuevodiario.com.ni/imprimir/2006-10-25/32212> (last visited Apr. 22, 2007).

⁷⁷ See Ipas, *supra* note 71.

abstained to pass the bill that ensured their party's leader, Daniel Ortega, the presidency.⁷⁸ It was clear that those who supported the need for therapeutic abortion silenced themselves in a political move to appease socially conservative voters.

Although outgoing President Enrique Bolaños requested harsher, thirty-year sentences for violations of the complete abortion ban, he signed the bill into law on November 17, 2006 amidst protests from women's rights organizations and the medical community.⁷⁹ The new law punishes women and doctors with up to six years in prison.⁸⁰ As a consequence of the ban, Nicaraguan women in need of therapeutic abortions have died since the ban took effect.⁸¹ The woman believed to be the first victim of the new law criminalizing therapeutic abortions, Jazmina del Carmen Bojorje, died from shock in a public hospital in Managua after complaining

⁷⁸ See *id.* The bill was passed by a vote of 52-0. *Id.* Additionally, during Daniel Ortega's third attempt to recapture the presidency, the Sandinista leader aligned himself with former enemies, such as his vice-presidential running mate and former archbishop of Managua, Miguel Obando y Bravo. In 2005, Bravo married Ortega and his long-time partner of twenty-five years, Rosario Murillo, who cited the marriage as expressing their deep commitment to Catholicism. See Bernd Debusmann, *Nicaraguans see First Lady as power behind throne*, REUTERS, Jan. 28, 2007, available at <http://www.reuters.com/article/worldNews/idUSN2632184220070129?pageNumber=2> (last visited April 24, 2007).

⁷⁹ See Andrea Lynch, *Too Dangerous for Democracy: Abortion in Latin America*, RH REALITY CHECK (Oct. 27, 2006), available at <http://www.rhrealitycheck.org/blog/2006/11/28/too-dangerous-for-democracy-abortion-in-latin-america> (last visited Apr. 26, 2007). Interestingly, the Nicaraguan legislature met with church representatives in closed-door meetings. However, when the Nicaraguan women's movement requested meetings with representatives from the National Assembly, they were repeatedly denied access. *Id.* Additionally, these actions happened despite a research study asking 198 obstetrician-gynaecologists on the medical and ethical implications of providing abortion services. All but 9 of these physicians (who represent 76% of all registered obstetrician-gynaecologists in the country) believed that therapeutic abortion should not be criminalized. See H.L. McNaughton et al., *Should Therapeutic Abortion be Legal in Nicaragua: the Response of Nicaraguan Obstetrician-Gynaecologists*, 10(19) REPRO. HEALTH MATTERS 111 (2002) (countering claims of the Nicaraguan Medical Association and the Church that these procedures were outdated).

⁸⁰ See *id.*

⁸¹ See Indira A.R. Lakshmanan, *Nicaraguan abortion ban called a threat to lives*, BOSTON GLOBE, November 26, 2006, available at http://www.boston.com/news/world/latinamerica/articles/2006/11/26/nicaragua_abortion_ban_called_a_threat_to_lives/ (last visited, Apr. 23, 2007). To the best of the author's knowledge, the total number of women who have died and the excess maternal mortality have not been officially reported. As of March 9, 2007, however, the reports claimed that 23 women had died due to the complete abortion ban. See Tania Sirias, *Ya Eliminó a 63 Mujeres la Penalización del Terapéutico*, EL NUEVO DIARIO, Mar. 9, 2007, available at <http://www.elnuevodiario.com.ni/imprimir/2007-03-09/43298> (last visited Apr. 24, 2007) (claiming that annually, 63 women die from gender violence in Nicaragua).

of limb pains and weakness five months into her pregnancy.⁸²

B. Responses to Nicaragua's Complete Abortion Ban

Immediately following the Nicaraguan legislative action, numerous national and international organizations denounced the complete abortion ban while church leaders praised their symbolic victory.⁸³ On the protest side, the Nicaraguan Center for Human Rights announced it would challenge the ban in the Nicaraguan Supreme Court and solicit the Inter-American Commission for Human Rights, citing at least fifteen Constitutional violations, including a violation of women's right to life with the growing number of cases like that of Jazmina del Carmen Bojorje.⁸⁴ Additionally, women's groups are documenting cases in which women in need of therapeutic abortions cannot access them.⁸⁵ These groups, led by the Autonomous Women's Movement (*Movimiento Autónomo de Mujeres—MAM*) are also collecting 200,000 signatures and marching in protest to show the large number of citizens opposed to the ban.⁸⁶ According to one leader of this movement to advance women's rights, women are not represented by any political movement or party and must strategically unite to oppose these political maneuvers in which women suffer as a consequence.⁸⁷

Also, in resistance to Nicaragua's complete abortion ban, the Inter-American Commission on Human Rights issued an unprecedented statement declaring that the government's repeal of article 165 of the Penal Code "endanger[s] the protection of women's

⁸² See *id.* Bojorje suffered from placental abruption, a condition in which the placenta separated from the inner wall of the uterus prior to delivery. Placental abruption requires immediate medical attention and inducing delivery, and the fetus at this point during the pregnancy will not be viable due to inadequate lung development. Bojorje was pregnant with her second child; thus, she also orphaned a son. *Id.* This issue further complicates the public health ramifications surrounding the complete abortion ban.

⁸³ See Duncan Kennedy, *Nicaragua's Abortion Dilemma*, BBC NEWS, Nov. 19, 2006, available at <http://news.bbc.co.uk/2/low/americas/6162670.stm> (last visited Apr. 24, 2007).

⁸⁴ See Jaime, *supra* note 59.

⁸⁵ See Lynch, *supra* note 75.

⁸⁶ See *id.*

⁸⁷ See Interview with leader of the *Movimiento Autónomo de Mujeres de Nicaragua* (Women's Autonomous Movement), Haydeé Castillo Flores, in Ocotol, Nicaragua (Jan. 8, 2007) (on file with author).

human rights.”⁸⁸ The statement emphasized the need for therapeutic abortion to ensure women’s rights to “li[fe] as well as their physical and psychological integrity.”⁸⁹ The Special Rapporteur on the Rights of Women for the Inter-American Commission signed the letter urging the Nicaraguan government to consider these principles of human rights before ratifying the repeal of the State’s therapeutic abortion exemption.⁹⁰ In addition to this statement, the U.N. Committee on the Elimination of Discrimination Against Women (CEDAW Committee) expressed its concerns regarding the ban in its Concluding Comments in February and recommended removing criminal penalties imposed on women who obtain abortions and on doctors who provide them in Nicaragua.⁹¹

In contrast, supporters of the complete abortion ban—mainly leaders of the Catholic and evangelical churches and anti-abortion activists—responded by stating that Nicaragua is a sovereign state that has the right to make its own laws.⁹² Moreover, those in favor of eliminating therapeutic abortion find that any intervention to save a woman’s life—even in the 400 cases of ectopic pregnancy each year in Nicaragua⁹³—is a choice to kill the unborn.⁹⁴ Finally, Pope Benedict XVI affirmed the supporters’ positions by issuing a statement “reaffirming the Catholic Church’s stance against abortion and calling on Catholic lawmakers around the world ‘to

⁸⁸ See Letter from the Organization of American States to HE Norman Calderas Cardenal, Minister of Foreign Affairs, Nicaragua on Nov. 10, 2006, at 1.

⁸⁹ See *id.*

⁹⁰ See *id.* at 1–2.

⁹¹ See Concluding comments of the Committee on the Elimination of Discrimination against Women: Nicaragua, U.N. Doc. No. C/NIC/CO/6 (2007), para. 18.

⁹² See Toyin Adeyemi & Allison Stevens, *Nicaraguan Activists Press Abortion Legal Case*, WOMEN’S ENEWS 1, available at <http://www.womensenews.org/article.cfm/dyn/aid/3099> (last visited Apr. 24, 2007). What these activists fail to mention is that Nicaragua is contradicting the treaty obligations it has already made as a sovereign state at international law.

⁹³ See, e.g., *Nicaragua Votes to Ban Abortions*, BBC NEWS, Oct. 26, 2006, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/6089718.stm> (last visited Apr. 24, 2007).

⁹⁴ See Duncan Kennedy, *Nicaragua’s Abortion Dilemma*, BBC NEWS (Nov. 19, 2006), available at <http://news.bbc.co.uk/2/low/americas/6162670.stm> (last visited Feb. 28, 2007).

introduce and support laws inspired by the values grounded in human nature.’’⁹⁵

Presently, the Nicaraguan Supreme Court is reviewing a test case to decide the constitutionality of the legislature’s recent ban on all abortions.⁹⁶ The Nicaraguan Center for Human Rights, representing a coalition of human rights, women’s rights, and physician’s rights organizations, initiated the constitutional challenge to the ban on January 8, 2007 and expects the Court to render its decision any day.⁹⁷ If the Supreme Court upholds the constitutionality of the new law,⁹⁸ opponents will take their case to international human rights bodies, including the United Nations Human Rights Commission and the Inter-American Commission on Human Rights.⁹⁹ Given the various statements in condemnation of Nicaragua’s complete abortion ban made by international treaty bodies, these activists will likely prevail at the international level.

III. Complete Abortion Ban: a Public Health Problem

Restrictive legislation criminalizing women who seek abortion services and the doctors who provide them is the main determinant of unsafe abortion.¹⁰⁰ Given that these more restrictive abortion prohibitions are associated with higher incidences of unsafe abortion¹⁰¹ and that levels of maternal mortality and morbidity fall when countries liberalize their abortion

⁹⁵ Adeyemi & Stevens, *supra* note 87 (quoting the Post-Synodal Apostolic Exhortation, *Sacramentum Caritatis of the Holy Father Benedict XVI to the Bishops, Clergy, Consecrated Persons and the Lay Faithful on the Eucharist as the Source and Summit of the Church’s Life and Mission*, § 83 (2007), available at http://www.vatican.va/holy_father/benedict_xvi/apost_exhortations/documents/hf_ben-xvi_exh_20070222_sacramentum-caritatis_en.html (last visited Apr. 24, 2007)).

⁹⁶ See Adeyemi & Stevens, *supra* note 87.

⁹⁷ See *id.*

⁹⁸ For an article that speaks to the views of Rafael Solís, the Vice President of the Supreme Court of Justice in Nicaragua, see Eloisa Ibarra, *Piden Mantener Derogación del Aborto Terapéutico*. EL NUEVO DIARIO, Mar. 22, 2007, available at <http://www.elnuevodiario.com.ni/2007/03/22/nacionales/44444> (last visited May 1, 2007) (stating that the complete abortion ban is constitutional).

⁹⁹ Toyin Adeyemi & Allison Stevens, *Nicaraguan Activists Press Abortion Legal Case*, WOMEN’S ENEWS 1, available at <http://www.womensenews.org/article.cfm/dyn/aid/3099> (last visited Apr. 1, 2007).

¹⁰⁰ Axel I. Mundigo, *Determinants of Unsafe Induced Abortion in Developing Countries*, in THE GUTTMACHER INSTITUTE (Ina K. Warriner & Iqbal H. Shah, eds.), PREVENTING UNSAFE ABORTION AND ITS CONSEQUENCES: PRIORITIES FOR RESEARCH AND ACTION 52 (2006).

¹⁰¹ WHO, *supra* note 9, at 9.

laws,¹⁰² countries that pass complete abortion bans will likely experience increases in unsafe abortion, maternal mortality and maternal morbidity levels. A complete abortion ban, and the political and social environment in which it is passed, thus poses severe threats to the health and lives of women.¹⁰³ Moreover, the serious public health ramifications and human rights violations prove that such restrictions need to be addressed.

As noted above, maternal mortality as a result of clandestine abortion procedures contributes to an estimated 13 percent of total maternal mortality worldwide.¹⁰⁴ In El Salvador, unsafe abortion is the second direct cause of maternal mortality,¹⁰⁵ and in Chile, it is the first.¹⁰⁶ In Nicaragua, unsafe abortion is the main cause of maternal deaths for women of all ages.¹⁰⁷ Clandestine abortion practices cause 16 percent of maternal mortality, and national medical associations estimate that the consequences of a complete abortion ban will increase this number by 60 percent.¹⁰⁸ Experts estimate that illegal abortions in Nicaragua will number more than 30,000 per year under a complete abortion ban.¹⁰⁹ Due to the illegality of abortion in these contexts, women avoid hospitals¹¹⁰ and families may fear reporting causes of death to authorities. Hence, these alarmingly high numbers are also likely underestimations of the true

¹⁰² ALAN GUTTMACHER INSTITUTE, *supra* note 10, at 32. The need to improve maternal health and reduce maternal mortality, including maternal deaths due to unsafe abortion, is Millennium Development Goal (MDG) number 5, one of the key MDGs expressed at the United Nations Millennium Summit in 2000. For further discussion of some of the issues surrounding unsafe abortion as it pertains to the MDGs, see Ruth Dixon-Mueller & Adrienne Germain, *Fertility Regulation and Reproductive Health in the Millennium Development Goals: The Search for a Perfect Indicator*, 97 AM. J. PUB. HEALTH 45 (2007). See generally, UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2003, MILLENNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY (2003); WORLD HEALTH ORG., REPRODUCTIVE HEALTH STRATEGY TO ACCELERATE PROGRESS TOWARDS THE ATTAINMENT OF INTERNATIONAL DEVELOPMENT GOALS AND TARGETS (2004).

¹⁰³ See Lawrence O. Gostin, *Human Rights: A Tribute to the Late Jonathan Mann*, 29 J. LAW, MED. & ETHICS 121 (2001).

¹⁰⁴ See *id.*

¹⁰⁵ See CRLP, *supra* note 36, at 25; CRLP, *Abortion as a Public Health Issue*, in THOUGHTS ON ABORTION 1 (1999).

¹⁰⁶ See CRLP & THE OPEN FORUM ON REPRODUCTIVE HEALTH AND RIGHTS, *supra* note 47, at 38.

¹⁰⁷ Letter from the Committee on the Elimination of Discrimination Against Women addressed to Members of the Nicaraguan National Assembly (October 16, 2006).

¹⁰⁸ See Irene Schneeweis, *ALERT: Nicaraguan Assembly Bans Abortion*, MADRE, Oct. 26, 2006, available at <http://www.madre.org/print-/articles/lac/nicaraguaabortionalert.11.9.06.html> (last visited Apr. 24, 2007).

¹⁰⁹ THE PEW FORUM ON RELIGION & PUBLIC LIFE, ABORTION LAWS AROUND THE WORLD 2 (2006).

¹¹⁰ See CRLP, *supra* note 36, at 25.

maternal mortality ratios caused by unsafe abortion in countries with complete abortion bans.

In addition, maternal morbidity associated with unsafe abortion is extremely high. For instance, it is estimated that 10 to 50 percent of women who obtain unsafe abortions require some form of post-abortion medical care as a result of complications, including incomplete abortions, infections, uterine perforation, pelvic inflammatory disease, and hemorrhage.¹¹¹ In Nicaragua, for example, nearly 6,700 women are hospitalized each year with complications from abortions, which may result in death, permanent injury or infertility.¹¹² Additionally, victims of rape and incest as well as women in need of therapeutic abortions due to emergency pregnancy complications are at risk of death from unsafe abortion since this procedure is no longer available to physicians under any circumstances.

Recent legislative actions invoking complete abortion bans come at a time when research findings demonstrate the negative impacts and grave threats these types of abortion restrictions have on women's health. For example, the Lancet Maternal Survival Series steering group recommends complementary strategies, including safe abortion procedures, to reduce women's risk of death related to childbirth.¹¹³ The steering group suggests that care for post-abortion complications be covered by emergency obstetric care services, irrespective of abortion's legality.¹¹⁴ Ignoring these recommendations places doctors in a precarious position with competing dual loyalties to the patient and state. Of course, it also threatens the health and lives of women. As a result, women may not receive necessary or adequate care, and both women and

¹¹¹ See Press Release, Human Rights Watch, *supra* note 54.

¹¹² See Marta María Blandón, *New Nicaraguan Law Violates Human Rights*, CENTER OF AMERICAN PROGRESS, Dec. 11, 2006, available at http://www.ipas.org/english/press_room/2006/releases/12182006.asp (last visited Mar. 1, 2007).

¹¹³ See Oona M.R. Campbell & Wendy J. Graham, on behalf of The Lancet Maternal Survival Series steering group, *Strategies for reducing maternal mortality: getting on with what works*, 368 THE LANCET 1295, 1295 (2006).

¹¹⁴ See *id.* Of course, these services could not later lead to prosecutions since the threat of legal sanctions against a woman would be considered an undue burden and insurmountable barrier to seeking care, even when the life and health of the woman are at stake. See *id.*

doctors may fear prosecution.¹¹⁵

Another public health issue concerning unsafe abortion is the excessive economic burden it places on a government's resources, especially on the public health system.¹¹⁶ Although some states fear that liberalizing abortion laws would cause an increase in demand on their already overtaxed health care systems, these fears are not based on any evidence or findings.¹¹⁷ In fact, the follow-up care and hospital costs associated with post-abortion complications drain emergency room and other hospital budgets in many developing countries.¹¹⁸

Despite the improvements in access to contraception and increases in contraceptive use,¹¹⁹ governments have not been able to adequately meet population demands due to the increasing desire for smaller families. Since nearly two in five pregnancies globally are unplanned,¹²⁰ many women will continue to resort to induced abortion in unsafe conditions, especially where safe and legal abortions are not available. Even when carrying a pregnancy to term risks women's health and lives, they cannot obtain safe abortions for therapeutic purposes. As a result, public health professionals are pushing for improving family planning services while combating the causes and consequences of clandestine abortion.

IV. Complete Abortion Ban: a Violation of Human Rights

Complete abortion bans are a violation of the essential human rights of women, recognized in national and international laws, to which states are bound. The most firmly

¹¹⁵ See Blandón, *supra* note 106.

¹¹⁶ See WHO, *supra* note 9, at 46.

¹¹⁷ See *id.*

¹¹⁸ See, e.g., Deborah L. Billings & Janie Benson, *Post Abortion Care in Latin America: Policy and Service Recommendations from a Decade of Operations Research*, 20(3) HEALTH POL. PLANNING 158, 163–4 (2005). Researchers have found that treating women for incomplete abortions or post-abortion complications can deplete more than 50 percent of obstetric and gynecologic budgets. *Id.*; see also B.R. Johnson et al., *Costs of Alternative Treatments for Incomplete Abortion* (World Bank, Working Paper, 1993).

¹¹⁹ See WHO, *supra* note 9, at 17. For a discussion regarding the role of contraception in reducing the incidence of unsafe abortion, see Cicely Marston & John Cleland, *Relationships Between Contraception and Abortion: A Review of the Evidence*, 29(1) INT'L FAM. PLANNING PERSPECTIVES 6 (2003); John Bongaarts & Charles F. Westoff, *The Potential Role of Contraception in Reducing Abortion*, 31(3) STUD. IN FAM. PLANNING 193 (2000).

¹²⁰ See ALAN GUTTMACHER INSTITUTE, *supra* note 10, at 1.

grounded human rights norms that these states are bound to respect, protect and fulfill,¹²¹ and which they are violating, are the human rights to life and health.¹²² In the case of Nicaragua,¹²³ the Nicaraguan Constitution and various international covenants the state has ratified—including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention on Human Rights (American Convention), and the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW)—establish the human rights to life and health.¹²⁴ Thus, failing to respect, protect and fulfill these rights amounts to human rights violations against Nicaraguan women and women in other countries similarly situated.

First, the American Convention, the Nicaraguan Constitution and the ICCPR protect the right to life.¹²⁵ Article 4 of the American Convention states that “[e]very person has the right to have [her] life respected.”¹²⁶ Article 23 of the state Constitution proclaims that “[t]he right to life is inviolable and inherent to the human person.”¹²⁷ In addition, article 6(1) of the ICCPR states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of [her] life.”¹²⁸ Furthermore, the right to life is nonderogable under article 4(2) of the ICCPR and at customary law under any and all

¹²¹ See Brigit Toebes, *Towards an Improved Understanding of the International Human Right to Health*, in PUBLIC HEALTH LAW AND ETHICS: A READER 124 (Lawrence O. Gostin ed., 2002).

¹²² In addition, viable arguments could be made that complete abortion bans or the enforcement of such bans include violations of 1) the right to be free from discrimination based on socio-economic status, 2) the right to be free from discrimination on the basis of gender, and 3) the right to privacy. For further analysis in the context of Latin America, see HUMAN RIGHTS WATCH, *supra* note 25.

¹²³ As noted, in-depth analysis of other complete abortion bans, such as those of Chile and El Salvador, is beyond the scope of this Article. For two excellent human rights analyses of these cases, see CRLP, *supra* note 36; CRLP & THE OPEN FORUM ON REPRODUCTIVE HEALTH AND RIGHTS, *supra* note 47.

¹²⁴ See ICCPR, *supra* note 8; ICESCR, *supra* note 8; American Convention, *supra* note 8; CEDAW, *supra* note 8.

¹²⁵ See ICCPR, *supra* note 8, at art. 6(1); American Convention, *supra* note 8; Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. IV, ch. I, Derechos Individuales, art. 23 [L.G.] 9 January 1987, as amended by Ley No. 330, Reforma Parcial a la Constitución Política de la República de Nicaragua, Jan. 18, 2000, L.G. Jan. 19, 2000 [hereinafter Nicaraguan Constitution].

¹²⁶ See American Convention, *supra* note 8, at art. 4.

¹²⁷ See Nicaraguan Constitution, *supra* note 119.

¹²⁸ See ICCPR, *supra* note 8, at art. 6(1).

circumstances.¹²⁹ Because Nicaraguan women are dying in hospitals and clinics from emergency obstetric complications and clandestine abortion procedures due to fears of prosecution for performing or receiving therapeutic abortion services, this complete abortion ban is a clear violation of women's rights to life.

Next, the right to health is found in the state Constitution and in international human rights covenants to which Nicaragua is a party as well.¹³⁰ For instance, in article 59, the Constitution protects social rights by providing that "Nicaraguans have the right, equally, to health" and that the state has the duty to establish the basic conditions for the promotion, protection, recuperation and rehabilitation of health.¹³¹ Also, the ICESCR declares in article 12(1) that states have a duty to recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."¹³² Moreover, article 12 of the CEDAW provides for states to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning."¹³³

The most comprehensive explanation of the right to health as applied to the right to safe abortion access is found in General Comment 14 of the ICESCR. Although not a legally binding human rights instrument at international law, this and other such U.N. documents are important declarations of political commitment to establish the direction of emerging human rights standards and norms.¹³⁴ According to General Comment 14, the right to health holds both freedoms—such as those protecting bodily integrity and control as well as sexual and

¹²⁹ See *id.*, at art. 4(2).

¹³⁰ See Human Rights Watch, *supra* note 105.

¹³¹ See Nicaraguan Constitution, *supra* note 119, at art. 59.

¹³² See ICESCR, *supra* note 8, at art. 12(1).

¹³³ See CEDAW, *supra* note 8, at art. 12.

¹³⁴ See Ernst et al., *supra* note 2, at 763 (discussing the Cairo Programme of Action).

reproductive freedoms—and entitlements to a system that guarantees equality of opportunity for everyone to enjoy the highest attainable standard of health.¹³⁵ States Parties are also urged to remove all barriers to women’s access to health services, including sexual and reproductive health services.¹³⁶ Moreover, General Comment 14 specifically discusses the need to remove restrictive barriers to safe abortion and the need to improve the conditions under which abortions are performed, citing the risks that unsafe abortion poses to the health and life of the mother.¹³⁷ Furthermore, it recommends that States Parties legalize abortion to the extent that the laws protect the health and life of the mother and allow for abortion when pregnancy is the result of rape or incest.¹³⁸

Further affirmations of the right to health are found in General Recommendation 24 of the CEDAW Committee. Here, according to the Committee, States Parties’ obligations are to respect a woman’s right to access reproductive health services and to refrain from constructing barriers for women in pursuit of their health goals.¹³⁹ In addition, the Committee recommends that States Parties amend legislation criminalizing abortion “to remove punitive provisions imposed on women who undergo abortion.”¹⁴⁰ In 2001, the CEDAW Committee expressed concerns regarding the country’s high maternal mortality and Nicaraguan women’s limited

¹³⁵ See ICESCR, General Comment 14, The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter General Comment 14], para. 8.

¹³⁶ See *id.* at para. 21. The full text of this paragraph of General Comment 14 reads: “To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women’s right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women’s health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women’s right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.” *Id.*

¹³⁷ See, e.g., ICESCR, concluding observations on Chile, U.N. Doc. E/C.12/1/Add.105 (2004), para. 25.

¹³⁸ See *id.*

¹³⁹ See CEDAW Committee, General Recommendation 24, Women and Health (Article 12), U.N. Doc. No. A/54/38/Rev.1 (1999), para. 14.

¹⁴⁰ See *id.* at para. 31(c).

access to reproductive health services and information. Specifically, the Committee recommended that the Nicaraguan government take steps to ensure the availability of pregnancy-related medical care for all women, including those in rural areas.¹⁴¹ Furthermore, the CEDAW Committee released its concluding comments in response to Nicaragua's periodic report to the Committee on February 2, 2007, which stated the following:

The Committee recommends that the State party consider reviewing the laws relating to abortion with a view to removing punitive provisions imposed on women who have abortions and provide them with access to quality services for the management of complications arising from unsafe abortions, and to reduce women's maternal mortality rates¹⁴²

Thus, Nicaragua is not completing its obligations pursuant to these recommendations and conventions and is violating women's right to health by enacting this complete abortion ban.

Although these various conventions and comments taken together obligate Nicaragua and other states to protect the human rights of women, some of these same and other conventions call for the protection of the unborn as well. For example, the American Convention's right to life guarantees that "[t]his right shall be protected by law and, in general, from the moment of conception."¹⁴³ Another example is found in the Convention on the Rights of the Child, which declares that children require "special safeguards and care, including appropriate legal protection, before as well as after birth."¹⁴⁴ Additionally, the protection of the right to life in Nicaragua has been interpreted to define life as beginning at conception.¹⁴⁵ These protections, however, had never previously been viewed to include therapeutic abortion. For instance, while Nicaragua confirmed the right to life beginning at conception at the 1994 World Population

¹⁴¹ See CEDAW Committee's concluding observations on Nicaragua, U.N. Doc. No. A/56/38, Part II (2001), paras. 300–301 & 303.

¹⁴² Concluding comments of the Committee on the Elimination of Discrimination against Women: Nicaragua, U.N. Doc. No. C/NIC/CO/6 (2007), para. 18.

¹⁴³ American Convention, *supra* note 8, at art. 4.

¹⁴⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, preamble.

¹⁴⁵ See Catherine Bremer, *Abortion Clampdown Splits Nicaragua before Election*, REUTERS, Oct. 26, 2006, available at <http://today.reuters.com/News/CrisesArticle.aspx?storyId=N26468228> (last visited Apr. 24, 2007).

Conference in Cairo, the delegation explicitly excepted therapeutic abortion on the grounds of medical necessity under its own Constitution.¹⁴⁶ As a result, the complete ban on abortion would not be considered an appropriate legal protection for the unborn at the expense of the woman's rights to life and health even according to the Nicaragua's own previous international public affirmations of these rights.

V. International Reproductive Rights Trends

A. Liberalization: the Prevailing International Trend

Abortion practice predates any formal legal mechanisms established to regulate the procedure.¹⁴⁷ The majority of sovereign nations have moved from initially criminalizing abortion—following its moral condemnation in religious canons—toward liberalizing abortion legislation.¹⁴⁸ Traditionally, abortion laws influenced by religious beliefs considered abortion a sin, and, thus, women seeking abortion were perpetrators of that sin.¹⁴⁹ Then, in the 1920s for instance, Marxist principles of gender equality guided the Soviet Union to legalize abortion at a woman's request.¹⁵⁰ China followed this trend in the 1950s when national policies to curb population growth motivated the country to make abortion available to women in the first six months of pregnancy.¹⁵¹ Throughout the latter half of the twentieth century, legislative action across Europe and in almost all industrialized nations around the world continued to legalize

¹⁴⁶ See *Report of the International Conference on Population and Development*, International Conference on Population and Development, Cairo, Egypt, 5–13, Sept. 1994, U.N. Doc.A/CONF.171/13/Rev.1, U.N. Sales No. 95XIII.18 (1995) [hereinafter Cairo Programme of Action].

¹⁴⁷ See Ernst et al., *supra* note 2, at 756.

¹⁴⁸ See U.N. DEP'T OF ECONOMIC & SOCIAL DEVELOPMENT, *ABORTION POLICIES: A GLOBAL REVIEW, VOL. I: AFGHANISTAN TO FRANCE* 5, U.N. Doc. ST/ESA/SER.A/129, U.N. Sales No.E.92.XIII.8 (1992).

¹⁴⁹ See ALAN GUTTMACHER INSTITUTE, *supra* note 16, at 31.

¹⁵⁰ See U.N. DEP'T OF ECONOMIC & SOCIAL DEVELOPMENT, *ABORTION POLICIES: A GLOBAL REVIEW, VOL. III: OMAN TO ZIMBABWE* 55, U.N. Doc. ST/ESA/SER.A/129/Add.2, U.N. Sales No.E.95.XIII.24 (1995), *cited in* Ernst et al., *supra* note 2, at 757.

¹⁵¹ See Tao-tai Hsia & Constance A. Johnson, *China*, in LAW LIBRARY OF CONGRESS, *REPORT FOR CONGRESS: ABORTION LAWS AND POLICIES IN 19 JURISDICTIONS* 43, 43–5 (1996), *in* Ernst et al., at 757.

abortion on request, and the liberalization trend gained momentum.¹⁵² This development continued when the United States Supreme Court guaranteed abortion as a constitutionally protected right for women in the 1973 landmark case, *Roe v. Wade*.¹⁵³

Since *Roe*, more than forty countries have adopted permissible abortion laws, and this trend of abortion reform continues today through successes in the women's health and human rights movements.¹⁵⁴ Between 1985 and 1997, for instance, nineteen countries in developed and developing countries significantly liberalized their abortion laws, while only one country—Poland—adopted considerably more restrictive legislation.¹⁵⁵ Although a few additional states further banned abortion services by eliminating exemptions for therapeutic abortion or considered doing so during this period,¹⁵⁶ others engaged in efforts to eliminate restrictive abortion laws.¹⁵⁷ Moreover, in the past year, 15 states within the United States have eased restrictions on abortion laws, while only 2 have enacted retrogressive measures against the practice.¹⁵⁸ This evidence shows that, overwhelmingly, more countries—and states within countries—are reducing restrictions on abortion, suggesting that the liberalizing international legal trend persisted through the end of the twentieth century.¹⁵⁹

¹⁵² See Anika Rahman, et al., *A Global Review of Laws on Induced Abortion, 1985-1997*, 24(2) INT'L FAM. PLANNING PERSPECTIVES 56, 60 (June 1998).

¹⁵³ See 410 U.S. 113 (1973). For the current legal standard on abortion in the United States, see *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁵⁴ See Ernst et al., *supra* note 2, at 760.

¹⁵⁵ See Anika Rahman et al., *supra* note 146. The countries to liberalize abortion laws during this timeframe were Canada, Algeria, Cambodia, Malaysia, Mongolia, Pakistan, Albania, Belgium, Bulgaria, Czechoslovakia, Germany, Greece, Hungary, Romania, Spain, Botswana, Burkina Faso, Ghana, and South Africa. Twelve of these states made first-trimester abortion permissible on demand. *Id.*

¹⁵⁶ Countries that passed complete bans are Chile and El Salvador and are discussed previously in this Article. Those nations considering further restricting abortion laws include Belarus and the Russian Federation. See *id.* at 61.

¹⁵⁷ These countries include Great Britain, Nepal, Northern Ireland, Portugal, Sri Lanka and Switzerland. See *id.*

¹⁵⁸ See NPR INTERVIEW, Apr. 25, 2007: 15 states were moving toward more abortion rights and 2 against; For a detailed analysis of the pro-choice and anti-choice measures considered and adopted by states in the United States in 2006, see NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 5 & 7 (2007).

¹⁵⁹ See *id.* at 60.

Additional international developments during this period demonstrate the continued shift toward the world liberalization of abortion laws through the protections of the right to reproductive health. First, the United Nations 1994 International Conference on Population and Development (ICPD) in Cairo affirmed the world's commitment to preventing unsafe abortion and providing access to safe abortion services where legally permissible.¹⁶⁰ Cairo's Programme of Action specifically urged states to improve safety and concern for women who obtain abortions.¹⁶¹ In addition, the Fourth World Conference on Women in Beijing's Platform for Action further advanced state commitments by asking governments to review and reform laws criminalizing women for obtaining abortions in order to squarely confront the negative risk factors and consequences of unsafe abortion practices.¹⁶² The international community even reaffirmed each of these conferences' platforms on abortion at review meetings five and ten years later.¹⁶³ Furthermore, states participating in these review meetings resolved to make abortion safe and accessible where legally permitted.¹⁶⁴

This movement toward increasingly recognizing women's reproductive rights and liberalizing abortion legislation to stop unsafe abortion has continued to the present, despite a small minority of states advancing a conservative anti-abortion countertrend.¹⁶⁵ Since the Beijing Platform and its worldwide mandate, at least thirteen states have taken action to remove

¹⁶⁰ See Cairo Programme of Action, *supra* note 140.

¹⁶¹ See *id.* at para. 8.25.

¹⁶² See Beijing Platform for Action, *supra* note 1, at paras. 106(k) & 109(i).

¹⁶³ See *Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action*, U.N. GAOR, 23d Special Sess., Annex, Agenda item 10, para. 72(o), U.N. Doc. A/Res/S-23/3 (2000) [hereinafter Beijing Declaration Further Actions]; *Key Actions for the Further Implementation of the Programme of Action of the International Conference on Population and Development*, U.N. GAOR, 21st Special Sess. para. 63(i)-(iii), U.N. Doc. A/S-21/5/Add.1 (1999) [hereinafter Cairo Key Actions]; Ernst et al., *supra* note 2, at 764; CTR. FOR REPRODUCTIVE RIGHTS, BEIJING AND INTERNATIONAL LAW: U.N. TREATY MONITORING BODIES UPHOLD REPRODUCTIVE RIGHTS, BRIEFING PAPER 1 (2005).

¹⁶⁴ See Beijing Declaration Further Actions, *supra* note 156; Cairo Key Actions, *supra* note 156; Ernst et al., *supra* note 2, at 764.

¹⁶⁵ See Ctr. for Reproductive Rights, *Abortion and the Law: Ten Years of Reform*, BRIEFING PAPER 1 (2005).

legal barriers for women to access safe abortion services.¹⁶⁶ For instance, Nepal moved from a complete abortion ban to legalizing abortion without restriction until twelve weeks of gestation in 2002.¹⁶⁷ Additionally, Colombia's highest court struck down its total abortion ban to allow for therapeutic abortion in 2006.¹⁶⁸ On March 8, 2007, Portugal's legislature voted to legalize abortion on demand until the tenth week of pregnancy.¹⁶⁹ Moreover, Uruguay, Argentina, Colombia, Brazil and states within Mexico have encouraged formal discussions to liberalize abortion legislation within a public health framework rather than framing it solely within religious, moral or political dogma.¹⁷⁰ Most recently, on April 24, 2007, Mexico City's legislature voted to legalize abortion on request in the first trimester.¹⁷¹

Three landmark decisions illustrating the decisive movement toward loosening restrictions on abortion in Latin America involved Colombia, Peru, and Mexico. In May of 2006, the Colombian Constitutional Court struck down the state's complete ban on abortion, ruling that "abortion must be permitted when a pregnancy threatens a woman's life or health, in cases of rape, incest and in cases where the fetus has malformations incompatible with life

¹⁶⁶ See *id.*; *Togo legalizes abortion in rape, incest cases*, REUTERS, Dec. 28, 2006, available at <http://www.topix.net/content/reuters/0819025085079181373405663883373258834266> (last visited Apr. 24, 2007) (reporting that Togo legalized abortion in cases of rape and incest).

¹⁶⁷ See Ctr. for Reproductive Rights, *supra* note 158, at 3.

¹⁶⁸ See Colombia Constitutional Court Dec. C-355/06 (May 10, 2006); WOMEN'S LINK WORLDWIDE, C-355 2006. EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA (2007); Juan Forero, *Colombian Court Legalizes Some Abortions*, N.Y. TIMES, May 12, 2006 at A14; Jeremy McDermott, *First legal abortion in Colombia*, BBC NEWS, Aug. 25, 2006, available at <http://news.bbc.co.uk/2/hi/americas/5284604.stm> (last visited Apr. 24, 2007).

¹⁶⁹ See *Portuguese parliament votes to lift ban on abortion*, REUTERS, Mar. 9, 2007, available at <http://www.alertnet.org/thenews/newsdesk/L09458536.htm> (last visited Apr. 24, 2007).

¹⁷⁰ See Juan Forero, *Push to Loosen Abortion Laws in Latin America*, N.Y. TIMES, Dec. 3, 2005, available at <http://www.iwhc.org/resources/nyt120305.cfm?bSuppressLayout=1&> (last visited Apr. 24, 2007); Mexico City to Vote on Abortion, BBC NEWS, Apr. 24, 2007, available at <http://news.bbc.co.uk/2/hi/americas/6586959.stm> (last visited Apr. 24, 2007); Mexico: Decriminalize Abortion to Help Women, HUMAN RIGHTS WATCH NEWS, Mar. 28, 2007, available at <http://hrw.org/english/docs/2007/03/28/mexico15605.htm> (last visited Apr. 24, 2007).

¹⁷¹ See *Abortion Legalized in Mexico City*, BBC NEWS, Apr. 25, 2007, available at <http://news.bbc.co.uk/2/hi/americas/6586959.stm> (last visited Apr. 26, 2007); Press Release, Ctr. for Reproductive Rights, The Center for Reproductive Rights Commends Mexico City for New Law Legalizing Abortion in First Trimester (Apr. 24, 2007), available at http://www.reproductiverights.org/pr_07_0424MexAbortion.html (last visited Apr. 26, 2007); *Breaking a Taboo: A Landmark Abortion Law Marks the Start of American-style Culture Wars*, ECONOMIST, Apr. 28, 2007, at 42.

outside the womb.”¹⁷² The constitutional challenge to the abortion ban utilized international human rights law to successfully persuade Colombia’s highest court that a complete ban was a violation of the state’s treaty obligations to protect women’s rights to life and health.¹⁷³

This decision followed two other important landmark cases in Latin America where the U.N. Human Rights Committee (HRC) and the Inter-American Commission on Human Rights found Peru and Mexico, respectively, in violation of national laws and international human rights. In *K.L. v. Peru*, the HRC secured reparations for a woman who was denied a legal abortion in a case of severe fetal impairment.¹⁷⁴ Similarly, the Mexican government agreed to settle the case of *Paulina*, a 13-year-old girl who was raped and denied access to a legal abortion.¹⁷⁵ Each of these states had blatantly failed to fulfill its duties at the national and international levels to protect the rights of the pregnant woman. As a result, these decisions further demonstrate the conclusive international trend toward liberalizing abortion laws, even in the traditionally more socially conservative Latin American context.

Today, more than 60 percent of the world’s population lives under broad, permissible abortion laws, and the movement is continuing to gain momentum.¹⁷⁶ Only 3 percent of the 193 United Nations member states prohibit abortion without exception.¹⁷⁷ Although states have not

¹⁷² Colombia Constitutional Court Dec. C-355/06 (May 10, 2006); See Press Release, Ctr. for Reproductive Rights, Landmark Decision by Colombia’s Highest Court Liberalizes one of the World’s Most Restrictive Abortion Laws (May 11, 2006), available at http://www.reproductiverights.org/pr_06_0511colombia.html (last visited Apr. 24, 2007).

¹⁷³ See Ctr. for Reproductive Rights, *supra* note 164.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*; Press Release, Ctr. For Reproductive Rights, U.N. Human Rights Committee Makes Landmark Decision Establishing Women’s Right to Access to Legal Abortion (Nov. 17, 2005), available at http://www.reproductiverights.org/pr_05_1117KarenPeru.html (last visited Apr. 24, 2007). For a detailed analysis on the prevalence, problems and consequences of rape and the denial of safe, legal abortions in Mexico, see HUMAN RIGHTS WATCH, THE SECOND ASSAULT: OBSTRUCTING ACCESS TO LEGAL ABORTION AFTER RAPE IN MEXICO (2006).

¹⁷⁶ See Ctr. for Reproductive Rights, *supra* note 158.

¹⁷⁷ See UNITED NATIONS POPULATION DIVISION, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, WORLD ABORTION POLICIES (2001) (stating that 2 percent of the United Nations member states prohibit abortion without exception); Bernd Debusmann, *Nicaraguans see First Lady as power behind throne*, REUTERS, Jan. 28, 2007,

specifically applied reproductive rights norms to abortion, an overwhelming majority of governments has recognized the need to combat the negative public health consequences of unsafe abortions.¹⁷⁸ More and more governments are supporting decriminalizing abortion practices because states can no longer ignore the evidence-based research that restrictive practices only lead to increases in clandestine abortion and preventable maternal deaths.

B. Countering Prevailing Trends in International Reproductive Rights and Abortion Legislation

Even as the general trends toward reproductive rights and abortion law liberalization overwhelmingly prevail, there is an undeniable conservative countertrend that coincides with the present movement pushing for further restrictions in abortion legislation.¹⁷⁹ The countermovement is largely led by influential members of the Roman Catholic Church who encourage governments to pass laws recognizing conception as the moment from which life is protected.¹⁸⁰ The Catholic Church is extremely influential in asserting its views regarding reproductive issues, including abortion, through the political and legal processes at both the international and national levels.¹⁸¹ What's more, the United Nations treats the Holy See as a state in many ways; thus, the Church participates in the international community with certain rights and privileges in international fora.¹⁸² The Church will continue to exert its influence in these arenas as the world becomes increasingly more secular and human rights activists maintain

available at <http://www.reuters.com/article/worldNews/idUSN2632184220070129?pageNumber=2> (last visited April 24, 2007).

¹⁷⁸ See Ernst et al., *supra* note 2, at 763.

¹⁷⁹ See *id.* at 762.

¹⁸⁰ See REBECCA J. COOK ET AL., *REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS AND LAW* 102 (2003).

¹⁸¹ See Rishona Fleishman, *The Battle against Reproductive Rights: the Impact of the Catholic Church on Abortion Law in Both International and Domestic Arenas*, 14 EMORY INT'L L. R. 277, 277 & 279 (2000).

¹⁸² See *id.* (citing Center for Reproductive Rights, *Church or State? The Holy See at the United Nations*, (Mar. 8, 1995)).

the momentum toward liberalizing abortion laws.¹⁸³

Recently, the Catholic Church has, to some degree, successfully slowed the strides of the reproductive rights movement using the Vatican's United Nations observer status. At the 1994 ICPD Cairo Conference, for example, the Vatican and its allies refused "all references to abortion and other language that might imply that it is acceptable as a method of family planning . . ."¹⁸⁴ and effectively blocked consensus on the issue of abortion.¹⁸⁵ Even though more than 170 of the 180 Cairo conference attendees might have settled on a more progressive set of recommendations with regard to abortion, the Vatican and a few supporting states weakened the abortion provisions until a mere shell of the original section remained.¹⁸⁶ The Catholic Church continued its quest—though less aggressively and with an ability to compromise—at the Beijing Conference the next year.¹⁸⁷ In 1995, the Vatican representative focused intently on "language it claimed denigrated two-parent families [and] belittled motherhood"¹⁸⁸ as well as on abortion and contraception language.¹⁸⁹ In doing so, the Catholic Church reestablished its status as a force in international law, speaking out against advancements in reproductive rights and abortion liberalization. Furthermore, as we have seen in the Nicaraguan case example, the influence and power of the Catholic Church seems even more effective at curtailing liberalization of abortion legislation at the domestic level.¹⁹⁰

In contrast to the significant number of states loosening abortion restrictions, only two states—El Salvador and Nicaragua—have expressly defied the trend's direction and passed

¹⁸³ See *id.* at 284–5.

¹⁸⁴ Barbara Crosette, *Vatican Holds Up Abortion Debate at Talks in Cairo*, N.Y. TIMES at A1 (Sept. 8, 1994).

¹⁸⁵ See Fleishman, *supra* note 173, at 285. The Vatican aggressively resisted paragraph 8.25 of the document, articulating the meaning of abortion. *Id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.* at 287 (citing Ian Johnson, *Vatican Adopts a Softer Line in Opposing U.N. Women's Conference Declaration*, THE BALTIMORE SUN, at 4A (Sept. 16, 1995)).

¹⁸⁸ *Vatican Criticizes Women's Platform*, U.P.I. (Sept. 15, 1995), available at LEXIS, Nexis Library, UPI File.

¹⁸⁹ See Fleishman, *supra* note 173, at 286.

¹⁹⁰ See *id.* at 288–9.

complete abortion bans since 1995.¹⁹¹ A few other governments, while still preserving some access to safe abortion services, have taken limited measures to demonstrate their anti-abortion positions or to appease anti-abortion constituents.¹⁹² Actions to tighten restrictions include mandating unreasonable counseling requirements, denying funding, taking away acceptable grounds for abortion, or banning particular types of abortion procedures.¹⁹³ Changes at the state level can depend largely on local events, such as visits from the Pope or media attention to abortion-related deaths or arrests, and can quickly influence public opinion.¹⁹⁴ Although these states definitely represent a minority in the international community, their actions are not insignificant victories for the anti-choice, anti-abortion countertrend.

Finally, a small yet increasing number of states have begun to revise national constitutions to recognize the right to life beginning from the moment of conception.¹⁹⁵ As noted previously, Nicaragua's constitution explicitly grants the fetus a right-to-life protection, as does that of El Salvador.¹⁹⁶ While the consensus at international law is that the right to life is not intended to apply from the moment of conception and that the pregnant woman's rights are clearly established, the Convention on the Rights of the Child specifically grants fetal rights.¹⁹⁷ The American Convention on Human Rights also contemplates protecting fetal rights; however, the Commission clearly concluded that these rights are compatible with a woman's right to

¹⁹¹ See Ctr. for Reproductive Rights, *supra* note 158, at 4; Press Release, Human Rights Watch, *supra* note 54.

¹⁹² These states include Poland, Hungary, the Russian Federation and the United States. See Ctr. for Reproductive Rights, *supra* note 158, at 4. Most recently, on April 18, 2007, the United States Supreme Court upheld the federal "Partial-Birth Abortion Ban Act of 2003," which bans a particular abortion procedure. See *Gonzales v. Carhart*, 550 U.S. 1 (2007).

¹⁹³ See *id.*

¹⁹⁴ See ALAN GUTTMACHER INSTITUTE, *supra* note 10, at 7 & 24.

¹⁹⁵ See Ctr. for Reproductive Rights, *supra* note 158, at 4.

¹⁹⁶ See Nicaraguan Constitution, *supra* note 119; El Salvador, Legislative Decree No. 541 of Feb. 3, 1999 ratifying Constitutional Reform Agreement of Apr. 30, 1997.

¹⁹⁷ See Human Rights Watch, *Q&A: Human Rights Law and Access to Abortion*, BACKGROUNDERS, available at <http://www.hrw.org/backgrounder/americas/argentina0605/#apply> (last visited Apr. 24, 2007).

access safe and legal abortion services,¹⁹⁸ especially when accessed to save the life of the woman. Of course, these constitutional provisions do not directly prohibit abortion. The movement and support of fetal rights, however, does demonstrate the political and moral climate in which liberalization of abortion legislation could prove difficult, if not impossible, to achieve.¹⁹⁹ Moreover, state protections of fetal rights can lead to the perception that the rights of the pregnant woman have somehow become more limited or non-existent.

VI. Reparations for Victims in Nicaragua

In Nicaragua, this perception that the rights of pregnant women do not apply—even when continuing a pregnancy seriously threatens their health and lives—is becoming a tragic reality. In light of these serious public health problems and human rights violations presently occurring against women under Nicaragua’s complete abortion ban, what rights, if any, do these victim-survivors have to a legal remedy? Because the ban largely affects poor, marginalized women, it may be extremely difficult if not impossible for each individual to pursue an action against the state in Nicaraguan courts. In addition, the political power of the Catholic Church²⁰⁰ and other pro-life lobbies in Nicaragua may silence these victims from public outcry and demands for justice.²⁰¹ Although challenging this ban in national courts is possible—and human rights groups can and will pursue these legal actions—Nicaraguan women are not precluded from additionally seeking reparations for state violations of their human rights.²⁰²

¹⁹⁸ *See id.*

¹⁹⁹ *See* Ctr. for Reproductive Rights, *supra* note 158, at 4.

²⁰⁰ *See* Fleishman, *supra* note 173, at 277.

²⁰¹ *See* Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 36 (2004). For an excellent, in-depth and thorough discussion of reparations at international human rights law, *see* DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (1999).

²⁰² The U.N. Resolution adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law states that, “[i]n addition to individual access to justice, States should endeavor to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.” G.A. Res. 60/147, para. 13, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter *Reparations Resolution*].

A. Reparations at International Law

Reparations theory claims that one group—or state—bears an obligation to remedy historical injustices inflicted upon another group.²⁰³ The term, *reparations*, covers various types of remedies, such as restitution, compensation, rehabilitation, and symbolic gestures of acknowledgement or apology, for the violations committed.²⁰⁴ Groups seeking reparations often claim that they faced impossible barriers which prevented them from seeking a remedy at the time they suffered the injury.²⁰⁵ Additionally, groups often pursue reparations long after the possibility of remedies in tort or criminal law.²⁰⁶ In general, reparations include plans that 1) provide some form of compensation to a group of claimants, 2) are based on violations substantively permissible under the law at that time, 3) under current laws, a compulsory remedy for the violation is barred, and that 4) justify compensation on corrective-justice grounds rather than on deterrence grounds.²⁰⁷ As a result of the various international instruments with broad, general terms on the right to reparations, each state is left to interpret remedies when and how it chooses, often leaving victims with inconsistent or nonexistent reparations measures.²⁰⁸

In 2006, the U.N. General Assembly responded to these inadequacies in reparations law by adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Reparations Resolution).²⁰⁹ In contrast to the various international treaties and accepted custom, this Reparations Resolution explicitly requires states

²⁰³ See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 689 (2003).

²⁰⁴ See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 170–1 (2002).

²⁰⁵ See Hylton, *supra* note 193.

²⁰⁶ See *id.*

²⁰⁷ See Posner & Vermeule, *supra* note 195.

²⁰⁸ Brooke Say, *Ripe for Justice: A New UN Tool to Strengthen the Position of the “Comfort Women” and to Corner Japan into its Reparation Responsibility*, 23 PENN ST. INT’L L. REV. 931, 938 (2004–2005).

²⁰⁹ See Reparations Resolution, *supra* note 194.

to fairly and adequately give reparations to victims and to remove, redress and prevent human rights violations.²¹⁰ The Resolution takes a broadly-defined, “victim-based” perspective, reflecting vulnerable groups’—including women’s—experiences while accounting for the physical, economic, legal, emotional and mental harms they have suffered.²¹¹ Moreover, this Resolution delineates particular and comprehensive types of reparations, including material as well as non-material remedies for victims-survivors.²¹² Thus, the State must provide effective, adequate compensation to particular groups who have suffered from human rights abuses where it has committed itself to respect, protect, and fulfill particular human rights obligations at international law.

For the victims-survivors of Nicaragua’s complete abortion ban, utilizing the Reparations Resolution’s framework and initiating reparations proceedings in the Inter-American Commission on Human Rights or the Inter-American Court for Human Rights may prove integral for success in receiving reparations for the wrongs that have and continue to occur against them.²¹³ Article 63 of the American Convention gives the Inter-American Court the authority to order the state to provide reparations for victims of human rights violations.²¹⁴ Victims of Argentina’s Dirty War, for instance, sought reparations in the Inter-American system against the State for the forced disappearances of family members.²¹⁵ The judgment recognizing Argentine victims’ rights to reparations served as a vehicle for national legislation compensating the “disappeared” for the particular human rights violations that occurred at the hands of—or at

²¹⁰ See *id.*; Say, *supra* note 200.

²¹¹ See Reparations Resolution, *supra* note 194; Say, *supra* note 200, at 942–5.

²¹² See Reparations Resolution, *supra* note 194; Say, *supra* note 200, at 946.

²¹³ See Jo M. Pasqualucci, Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure, 18 MICH. J. INT’L L. 1, 3 (1996).

²¹⁴ See American Convention, *supra* note 8, at art. 63. The reparations article reads as follows: “[i]t shall rule . . . if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.” *Id.*

²¹⁵ See Say, *supra* note 200, at 958 (citing Vandeginste, Stef, *Reparation*, 146, available at www.unog.ch/uncc (last visited Dec. 11, 2003)).

least acquiescence of—the State.²¹⁶ Additionally, human rights advocates are presently utilizing the Reparations Resolution as a guideline and international mandate to seek reparations against Japan for human rights violations of the Japanese Army’s “comfort women”²¹⁷ in World War II. These cases and legal mechanisms signal a larger international shift toward increasingly recognizing victims’ rights to reparations for gross human rights violations as well as States’ moral, ethical and legal obligations to respect, protect and fulfill the rights of its citizens. Thus, the victims-survivors of Nicaragua’s complete abortion ban may find remedies for these wrongs committed against them and the recognition of state responsibility for violations of women’s rights to life and health.

B. Possible Barriers to Reparations Claims for State Violations of Women’s Rights

Although many international treaties obligate states to both prevent human rights abuses from happening and to provide remedies and reparations when they fail to do so, there exist multiple possible barriers to victims’ reparations claims. The first possible concern may be that these abuses are recent and ongoing human rights violations against Nicaraguan and other women. Historically, victims seeking reparations have done so long after the violations occurred, allowing a significant passage of time—usually years, decades, or even generations—before initiating claims.²¹⁸ However, the Reparations Resolution, which reflects principles of legally-binding international treaties and customary international law, does not preclude victims

²¹⁶ *See id.*

²¹⁷ *See id.* “Comfort women” is the term used to describe the estimated 200,000 Korean, Chinese, Indonesian, Filipino, Taiwanese, Dutch, and Japanese women who were victims of forced or coerced prostitution for the Japanese Army during World War II. *See id.* at 932.

²¹⁸ *See Hylton, supra* note 193.

from concurrently pursuing positive legal remedies and reparations for violations.²¹⁹ In fact, bringing a claim before the passage of decades or generations may be preferable since there are identifiable victims and possibly current state actors to hold accountable for human rights violations.²²⁰ Because local remedies may not be effective or viable options for many individual victims, international reparations claims become possible alternatives, and the passage of time—although a characteristic of past reparations claims—does not preclude Nicaraguan and other women from pursuing reparations for violations as a result of the complete abortion ban.

Another possible barrier to seeking reparations for victims of complete abortion bans may be the willingness of international human rights bodies to accept the claim that violations of women's right to health merit reparations. As described above, there is no doubt that national and international legal instruments obligate Nicaragua and other states similarly situated to respect, protect, and fulfill the right to health, or that the criminalization of therapeutic abortion is a violation of the right to health.²²¹ In addition, there is a clear obligation mandating states to provide reparations for human rights violations.²²² Here, the problem lies in the possible fears of courts or other international actors that this precedent will open the door to countless cases of states' failures to honor obligations to prevent violations of the right to health. One could argue, however, that the Nicaragua case represents a retrogressive state action, thereby violating the progressive realization of the right to health.²²³ These right-to-health violations are also paired with nonderogable right-to-life obligations, which arguably make reparations claims more compelling. As a result, the number of actual cases seeking reparations from clear, retrogressive

²¹⁹ Reparations Resolution, *supra* note 194, at § 1, para. (2)(c) (stating: "Making available adequate, effective, prompt and appropriate remedies, including reparation . . .") & § II, para. 3(d) (stating: "Provide effective remedies to victims, including reparation . . .").

²²⁰ See Hylton, *supra* note 193, at 37.

²²¹ See *e.g.*, ICESCR, *supra* note 8, at art. 12(1).

²²² See Reparations Resolution, *supra* note 194; HAYNER, *supra* note 196; Pasqualucci, *supra* note 205, at 3.

²²³ See ICESCR, *supra* note 8.

state action may not merit fears that particular judgments would open the floodgates to thousands of new human rights reparations cases. On the contrary, a favorable judgment could serve as a mechanism for positive changes in states' policies, or at least for the defeat of attempts to curtail such rights that states have the duty to protect.

A third possible barrier to receiving reparations for Nicaraguan women may be the lack of international enforcement of judgments and the reality of the state's limited resources to pay reparations claims. Though this barrier is one inherent to the current international legal system and should not impede victims from pursuing reparations, the outcome may not provide tangible—or even symbolic—measures toward redress and reconciliation. Even if victims-survivors of the complete abortion ban received a favorable judgment against the government for failing to prevent these violations, international law relies on the promise of sovereign States to comply with international judgments and compensate those wronged in the event of state violations. Furthermore, a State may acknowledge responsibility and the right to reparations and offer little to no compensation to individual victims, especially in low-income countries with inadequate resources to fulfill other human rights obligations. In the end, these States with little ability to provide economic compensation to victims may offer more symbolic, non-material forms of compensation to reconcile the need to provide reparations to victims with legitimate claims. For many victims-survivors, the actual process of seeking reparations and receiving recognition for wrongs committed against them may end up being the most important aspect of the legal action for reparations against State violations.

Reparations claims are an important avenue for victims-survivors of violations to receive remedies for States' failures to respect, protect and fulfill human rights. Although previously used in other contexts of gross human rights violations, Nicaraguan women have a clear, legal

cause of action at international law. Advocates and scholars in public health and law must continue to discuss the positive and negative aspects of pursuing reparations in cases of human rights violations at the hands of the state to find solutions to these and additional possible barriers for securing victims-survivors' human rights. Ultimately, all victims-survivors have the right to life, the right to health, and a right to a restoration of their dignity.

CONCLUSION

Why should countries with absolute restrictions on abortion like Nicaragua care about international trends toward a liberalization of abortion laws, reconsider their anti-abortion stances, and repair human rights violations? There are several reasons. First, movements for reform within countries are often influenced by the attitudes toward similar issues in other countries, especially in an age of ever-increasing globalization. Liberalization efforts and successes will continue to arm women's rights advocates in Nicaragua and around the world who will provide irrefutable evidence of the unacceptable, preventable public health costs and human rights violations occurring under such restrictive abortion laws. This impending opposition backed by sound, evidence-based research and public health knowledge will be a challenging force to oppose in the future. Second, international human rights norms and laws have gained unprecedented recognition and acceptance in recent years, and this trend shows no signs of slowing down. Private investors monitor and evaluate state compliance with human rights norms and international treaties to ensure socially responsible investments with governments who comply with treaties and other international customary norms. Third, unsafe abortion drains the already-taxed health care systems of the developing world—where most restrictive laws are in effect. Countries like Nicaragua could benefit enormously from diverting funding currently used for treating post-abortion complications to combat other priority health concerns, such as

infectious diseases or malnutrition. Additionally, treaty monitoring bodies and international human rights institutions can sanction the state for these egregious violations of the rights to life and health. Finally, and most importantly, Nicaragua and other states criminalizing abortion should care about the countless women who will needlessly suffer and die under complete abortion bans. The “myths” of the back alley abortions performed with sticks and coat hangers are the frightening realities of many of the world’s mothers, sisters, and daughters who feel they have no other choice.