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The Nicaraguan Abortion Ban: Killing in Defense of Life

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INTRODUCTION

While many Americans may be unfamiliar with the state of reproductive policies in Nicaragua and more broadly around the world, the abortion debate is nonetheless domestically familiar both politically and socially. As it is in the United States, abortion is a highly provocative and emotionally charged topic in Nicaragua.¹ It has also been a highly polarizing debate in both countries.² But while

1. "Abortion is a . . . problematic issue, still extremely divisive" in Nicaragua. *Becoming Visible Women in Nicaragua*, REVISTA ENVÍO, Dec. 1987, available at <http://www.envio.org.ni/articulo/3183>.

2. This polarization is evidenced by the stereotyping that occurs. See, e.g., *The 700 Club* (CBN television broadcast Aug. 16, 2005), available at <http://mediamatters.org/items/200508170006> (quoting Pat Robertson as saying, "Who are [sic] leading the charge for abortions? So often, you'll find people who are lesbians leading the fight for the destruction of human life."). A popular stereotype of pro-life activists is that they are all religious fanatics. Cf. Dean Barnett, Op-Ed., *I'm Pro-Life, but Not Religious*, BOSTON

the social climate has been similarly divisive in both the United States and Nicaragua, the policy outcomes have been decidedly dissimilar.

As a result of the American antagonistic and divisive social background, U.S. abortion policy has emerged as a delicately worded, cost-benefit assessment of motherhood based on medical precepts.³ On the other hand, Nicaragua has retained a much stronger conservative stance on abortion.⁴ For more than one hundred years, Nicaraguan law⁵ only allowed for termination of pregnancy when the mother's health was at risk.⁶ Then, in 2006, the Nicaraguan legislature repealed the exception for the mother's health, known as the "therapeutic abortion exception," thereby instituting a blanket ban on abortion (hereinafter "the blanket ban").⁷

Since the blanket ban's inception, maternal mortality rates have risen over one hundred percent in Nicaragua.⁸ In 2007, the

GLOBE, May 21, 2007, at A9 (characterizing the notion that pro-life advocates base their abortion opinion on religious beliefs as an "often erroneous stereotype"). In Nicaragua, during the debates over the abortion ban, "Constitutional Liberal Party (PLC) Deputies Wilfredo Navarro and Freddy Torres described the protesters [against the ban] as lesbians and murderers." NicaNet, Nicaragua Network and Nicaragua Solidarity Campaign Send Letter to Nicaraguan Officials on Abortion Ban, <http://www.nicanet.org/?p=444> (last visited Dec. 26, 2008).

3. See *Roe v. Wade*, 410 U.S. 113, 160–66 (1973) (using viability as a medically determined definition of when life begins); *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (defining when an abortion is necessary for doctors by stating it "is a professional judgment that . . . may be exercised in the light of all 'factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient.' All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.").

4. See *infra* notes 135–41 and accompanying text. See generally Frances Raday, *Culture, Religion and Gender*, 1 INT'L J. CONST. L. 663 (2003) (analyzing the intersection between religion, law, and conceptions of women's rights).

5. See Angela Heimbürger & Lance Lattig, *For Nicaraguans, International Women's Day Marks a Step Back*, HUMAN RIGHTS WATCH, Mar. 8, 2008, <http://hrw.org/english/docs/2008/03/12/nicara18276.htm> (explaining that the exception to the ban had been in place for over 130 years).

6. Código Penal, libro II, tit. I, Delitos Contra las Personas y su Integridad Física, Psíquica, Moral y Social, Capítulo V, Del Aborto, art. 165 [Penal Code, Book II, Title I, Crimes Against Peoples and Their Physical, Psychic, Moral and Social Integrity, Chapter 5, On Abortion, Article 165] (repealed 2006) (Nicar.) (translation by author), available at http://www.unifr.ch/ddp1/derechopenal/legislacion/l_20080616_65.pdf; see Ley No. 603, 26 Oct. 2006, Ley de Derogación al Artículo 165 del Código Penal Vigente [Law Revoking Article 165 of the Penal Code in Force], La Gaceta [L.G.], 17 Nov. 2006 (Nicar.) (translation by author), available at [http://legislacion.asamblea.gob.ni/Normaweb.nsf/\(\\$All\)/CB461294F9939E56062572340070AAE9?OpenDocument](http://legislacion.asamblea.gob.ni/Normaweb.nsf/($All)/CB461294F9939E56062572340070AAE9?OpenDocument) [hereinafter The Ban].

7. See *infra* notes 61–66 (explaining the circumstances behind the blanket ban's enactment).

8. See Angela Heimbürger & Lance Lattig, *Abortion Ban Killing Women*, MIAMI HERALD, Oct. 20, 2007, at 25A ("Even according to the government's own figures, maternal mortality has shot up by 100 percent in the past year.").

Nicaraguan blanket ban contributed to the deaths of more than eighty Nicaraguan women.⁹ Dr. Leonel Arguello, president of the Nicaraguan Society of General Medicine, attested that, between January 1 and September 15, 2007, eighty-two women died from treatable pregnancy conditions.¹⁰ He believes that six of those eighty-two cases necessitated the use of therapeutic abortion.¹¹ Also contributing to these eighty-two deaths is the refusal of doctors to treat pregnancy complications out of fear of incurring liability, losing their ability to practice medicine, or receiving up to six years of jail time for contributing to the death of a fetus.¹² Further, countless other women have refused to seek treatment from hospitals out of fear.¹³

Yet, although the Nicaraguan blanket ban may draw criticism for its many shortcomings, there is no consensus on the correct policy choice for reproductive health.¹⁴ Furthermore, the many interests involved complicate finding an acceptable solution. On a systemic level, reproductive freedom and family planning programs are designed to quell population stress.¹⁵ On an individual level, these programs and the degree of liberality in government policy can have extensive implications on women's rights and individual decision-

9. Filadelfo Aleman, *Nicaragua's Abortion Ban Putting Women's Lives at Risk*, *US Rights Group Says*, INT'L HERALD TRIB., Oct. 2, 2007, available at <http://www.iht.com/articles/ap/2007/10/03/america/LA-GEN-Nicaragua-Abortions.php> (“[S]ix of those cases required a therapeutic abortion—including one involving an ectopic pregnancy, in which a fetus forms outside the uterus.”).

10. *Id.*

11. *Id.*

12. Ley No. 641, 16 Nov. 2007, Código Penal: Libro Segundo de los Delitos y sus Penas [Nuevo Código Penal] [New Penal Code, Second Book on Crimes and Punishments] tit. I, ch. II, art. 144, La Gaceta [L.G.], 3 Dec. 2007 (Nicar.) (translation by author) (Article 144, Abortion without Consent: Whoever intentionally provokes an abortion without the consent of the woman will be punished with three to six years in prison. If performed by a health professional, the principal punishment will simultaneously contain the punishment of a prohibition from practicing medicine for four to seven years.). The new penal code was published in La Gaceta, May 9, 2008, and is available at http://www.cejamerica.org/doc/legislacion/Ley641_CPenal_Nicarg.pdf.

13. *Nicaragua: Blanket Ban on Abortion Harms Women*, HUMAN RIGHTS WATCH, Aug. 31, 2007, <http://hrw.org/english/docs/2007/08/30/nicara16776.htm> (“Human Rights Watch documented delays in the provision of obstetric emergency care in the public health sector that resulted in avoidable fatalities.” Women with pregnancy complications or other health problems “showed a pronounced fear of seeking treatment.”) [hereinafter HUMAN RIGHTS WATCH].

14. See *infra* notes 235–39 and accompanying text (discussing present conceptions of reproductive rights).

15. For example, China has a “one child” policy, which is aimed at lowering fertility levels. See *infra* note 20.

making abilities.¹⁶ At the same time, while government involvement is at the foreground of reproductive policy, reproductive health is not merely a political issue, health issue, or rights issue; rather, the use of contraception, especially abortion, is a highly charged moral issue.¹⁷ Due to these societal and political concerns, the difficulty in delineating a workable reproductive health policy exists worldwide. Policy-makers must struggle to balance the relative interests of the mother and the child in determining national legislation.¹⁸

It is perhaps because of this difficulty in balancing that, although there is a trend toward recognizing the right for reproductive health in international agreements,¹⁹ there is less indication of global

16. See *infra* Part IV (discussing conceptions of reproductive rights) and Part V (discussing treaty law and characterizations of reproductive rights as autonomy and self-determination rights).

17. See generally Richard G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIA L. REV. 123 (2006) (discussing reproductive rights from a moral stance). Though abortion is frowned upon by many of the world's religions, including Protestantism and Islam, the Catholic Church has historically been abortion's most vocal opponent. See generally *id.* "More recently, the Cairo Conference saw a coalition of Christian (led by the Vatican) and Muslim fundamentalists attempting, and succeeding in part, in restraining the affirmation and elaboration of women's reproductive rights." Sajeda Amin & Sara Hossain, *Women's Reproductive Rights and the Politics of Fundamentalism: A View from Bangladesh*, 44 AM. U. L. REV. 1319, 1337 (1995); see also World Conference on Human Rights, Aug. 5, 1990, *The Cairo Declaration on Human Rights in Islam*, U.N. Doc. A/CONF.157/PC/62/Add.18, available at <http://www1.umn.edu/humanrts/instr/cairodeclaration.html> (outlining the right to life in Article 2 and the right of "the fetus" to be "safeguarded" in Article 7(a)). The Church opposes controls on reproduction in any form. See *infra* notes 96–97 and accompanying text. While religion has certainly had a firm place historically in guiding social policy, moralizing any issue often fuels the animosity between the two sides of the debate. See R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION* 119 (2000) (discussing how the "facile invocation of religious symbols and stories can exacerbate ethnic tensions and foster a social climate conducive to riots, mob violence, or the random beatings and killings known as hate crimes").

18. Some issues policy makers may balance include:

- Whether the mother's self-determination should be protected at the expense of the child's life
- Whether the mother should be forced to take the baby to term if a reasonable degree of medical certainty exists that the pregnancy will kill the mother but the baby would be spared
- Whether the country should enact a policy that would force the mother to take the pregnancy to term in situations in which both the mother and baby could die as a result

19. See *infra* Part V (discussing international treaties protecting reproductive health). Though commemorating the importance of these health rights is an important step toward protection, active enforcement—that is, addressing violations of these rights—is essential to legitimizing the interest at stake. Interview with Arthur M. Weisburd, Martha M.

convergence in policies.²⁰ At the same time, while there is no widespread agreement on when and if an abortion should be allowed, the majority of the world's countries permit abortion to preserve the woman's health. Blanket bans are, by their own definition, policies that do not allow exceptions for the mother's health. They are unnecessarily restrictive and have the effect of harming women's living standards and even endangering their lives. We are already

Brandis Professor of Law, University of North Carolina School of Law, Chapel Hill, N.C. (Mar. 17, 2008). Even the legitimacy of rights that are universally agreed upon, such as the right to be free from slavery or from international acts of aggression, is sometimes undermined by a lack of enforcement efforts. *Id.*; see also Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 43 (1988) (arguing "the only real test of whether rules produced by a given process create obligations in international law is whether, in their practice, states treat such rules as legally binding . . . mean[ing] that states generally obey" them).

20. See *infra* note 28 and accompanying text (discussing customary international law). The terms "liberal" and "conservative" relate to the weighting of reproductive choice as an autonomy right. See *infra* Part IV.B (discussing "framing the issue" and the span of reproductive policies). Some social democracies not only leave the decision to use contraception to the woman, but also pay for abortions. See *Europe's Abortion Rules*, BBC NEWS, Feb. 12, 2007, <http://news.bbc.co.uk/2/hi/europe/6235557.stm>. For instance, in Finland and the Netherlands, abortion is covered by national health insurance. *Id.* Other countries impose waiting periods and restrictions on abortions. *Id.* Countries such as Austria and Belgium require counseling, while Denmark mandates approval by a committee and Italy imposes a one-week reflection period. *Id.* Still other countries have extremely restrictive policies, such as bans that except only for the mother's health. See *id.* For instance, Portugal only allows abortion to save a woman's life or to alleviate a threat to her mental or physical health, and Spain only allows abortion in the case of rape or serious risk to the woman. *Id.* There are also policies meant to limit reproduction such as the Chinese "one child" policy, which imposes population control through forced sterilizations and economic disincentives to have more children after the first child is born to a couple. See Rachel Farkas, Recent Development, *The Bush Administration's Decision to Defund the United Nations Population Fund and Its Implications for Women in Developing Nations*, 18 BERKELEY WOMEN'S L.J. 237, 238-40 (2003). Also among the most restrictive countries, and constituting the main issue of this piece, a small number of nations, including Malta, Chile, El Salvador, and now Nicaragua, impose full bans which deny access to an abortion under any circumstance. See *id.*

While some policies evoke more criticism than others, none of these policies is free from negative consequences, and therefore all are subject to criticism. The Chinese policy, for one, has increased the occurrence of female infanticide as families seek a son as their allotted child; the social democracy policy, on the other hand, is said to value the concept of autonomy over life itself. See *Religion and Ethics: Female Infanticide*, BBC NEWS, July 7, 2006, http://www.bbc.co.uk/religion/ethics/abortion/medical/infanticide_1.shtml; see also L.M. Cirando, Note, *Informed Choice and Population Policy: Do the Population Policies of China and the United States Respect and Ensure Women's Right to Informed Choice?*, 19 FORDHAM INT'L L. J. 611, 615 (1995) (arguing that the population policies of both China and the United States "violate women's rights by denying women the opportunity to make voluntary choices regarding child-bearing and fertility regulation").

seeing these effects in Nicaragua.²¹ With all these concerns in mind, the goal of this piece is very narrow. Rather than pleading for unfettered access to abortions in Nicaragua or arguing that there is an internationally recognized right to an abortion, this Comment argues that the ban violates even the most basic and internationally accepted right, *the right to life*.²² This right is recognized in Nicaragua as it is in all nations around the world. Further, it is protected under binding multilateral and regional international human rights treaties to which Nicaragua is a party.²³

Part I of this Comment provides background on Nicaragua. It examines the socio-cultural and political background in Nicaragua before discussing the circumstances in which the blanket ban was enacted. Next, Part II discusses the blanket abortion ban itself, as instituted by Bill 603 of the Nicaraguan Penal Code, which repealed the provision allowing for therapeutic abortion.²⁴ The current ban was later codified under Bill 641, which reformed Nicaragua's penal code.²⁵ Part III details the unlikelihood of domestic judicial response to the newly enacted abortion legislation. Specifically, this part concentrates on political pressure to uphold the blanket ban as well as the narrow role of the court in civil law nations as factors limiting the possibility of the blanket ban being judicially overturned. Next, Part IV evaluates the possibility of international intervention. Also in question are the means of addressing these violations. Traditional means of handling human rights violations such as sanctions or the leveraging of international aid would be an inappropriate response to this issue because of the absence of international agreement on

21. See *supra* notes 8–13 and accompanying text; see also *infra* notes 145–51 and accompanying text.

22. The lack of international consensus on abortion makes finding a workable solution in Nicaragua more difficult, especially with regard to the prospect of enforcement efforts to protect reproductive rights. Therefore, presenting the issue as the mother's right to life has the added benefit of regional legitimacy.

23. Specifically, treaties that Nicaragua has ratified include the International Convention on Civil and Political Rights ("ICCPR") and regional agreements. See *infra* Part V on treaty law.

24. Ley No. 603, 26 Oct. 2006, *Ley de Derogación al Artículo 165 del Código Penal Vigente* [Law Revoking Article 165 of the Penal Code in Force], La Gaceta [L.G.], 17 Nov. 2006 (Nicar.) (translation by author), available at [http://legislacion.asamblea.gob.ni/Normaweb.nsf/\(\\$All\)/CB461294F9939E56062572340070AAE9?OpenDocument](http://legislacion.asamblea.gob.ni/Normaweb.nsf/($All)/CB461294F9939E56062572340070AAE9?OpenDocument). For more on the bill's enactment, see *infra* notes 65–66 and accompanying text.

25. Ley No. 641, 16 Nov. 2007, *Código Penal: Libro Segundo de los Delitos y sus Penas* [Nuevo Código Penal] [New Penal Code, Second Book on Crimes and Punishment] tit. I, ch. II, art. 144, La Gaceta [L.G.], 3 Dec. 2007 (Nicar.) (translation by author). Articles 143–45 deal specifically with the punishments for abortion. *Id.* For more on Bill 641, see *supra* note 12 and accompanying text.

reproductive rights.²⁶ Such broad-based international interventions are controversial, as they are rarely free from politics or power play.²⁷ Instead, as Part V addresses, international accountability can be reinforced through the United Nations treaty law regime and particularly through the use of regional agreements.²⁸ Finally, Part VI concentrates on the role of the Inter-American Court in enforcing the right to life through treaty law. This part also details potential procedural roadblocks to the Inter-American Court²⁹ hearing the issue and discusses the law that the court will apply and the implications of a holding on the issue by the court.

I. BACKGROUND ON NICARAGUA: CATHOLICISM, MARIANISMO, AND POLITICAL POSTURING

To better understand the factors leading to the blanket ban's enactment, it is first important to set the social, cultural, and economic backdrop in Nicaragua. Nicaragua is a predominantly Catholic,³⁰ developing nation in Central America, which has only

26. See *infra* Part IV.A on international interventions.

27. See generally COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* (2007) (chronicling the use of force and political coercion in international intervention efforts). At the same time, Latin American politics are equally influential on the issue. The rise of neo-nationalist leaders who emphasize sovereignty in domestic affairs for developing nations, such as Ortega in Nicaragua, would likely view the withdrawal of aid by countries with more liberal reproductive rights policies as antagonistic and neo-imperialistic based on the extensive history of U.S. intervention in the region. See *infra* notes 276–77 and accompanying text (discussing the political climate in Latin America and recent diplomatic developments since the ban was enacted).

28. I base my argument in treaty law for two main reasons. First, as I indicate later, I believe the use of force is generally an unsound policy and wholly inappropriate in this context. Second, I base my argument in treaty law rather than notions of customary international law or *jus cogens* in order to avoid the positivism versus natural law debate. See generally Helen Silving, *The Twilight Zone of Positive and Natural Law*, 43 CAL. L. REV. 477 (1955) (discussing the contention between positivism and natural law theories). Human Rights proponents are often attacked for their reliance on customary international law and norms due to a lack of consensus on what that body of law entails. For more information on this debate, see generally Kathleen M. Kedian, Note, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of the Paquete Habana*, 40 WM. & MARY L. REV. 1395, 1401–06 (1999) (describing attempts to define customary international law). Cf. Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 11–20 (1988) (critiquing the inability of customary international law to set clear standards of conduct as one of many reasons that it is difficult to apply).

29. Claudio Grossman, *The Inter-American System: Opportunities for Women's Rights*, 44 AM. U. L. R. 1305, 1305–09 (1995) (evaluating the Inter-American Court's utility as a forum for women's rights, and providing an overview of court procedure).

30. Catholicism is the dominant religion in Nicaragua and comprises fifty-seven percent of the nation's population; more than ninety percent of Nicaraguans are of

recently emerged as a secular democracy³¹ after years of civil strife.³² Particularly important undercurrents for the blanket ban were the political atmosphere, the Catholic Church's profound influence on society and government, and the role and stances of women's groups in civil society.

A. *The Political Backdrop*

An understanding of Nicaraguan politics, specifically background on the political reorganization of Nicaragua following the Nicaraguan Revolution (also known as the Contra War),³³ is essential to assessing the motivation behind the blanket ban as well as the constitutionality of the law. This history includes two distinct political eras: first, the period of restructuring after the worst of the Contra War, including the 1980s constitutional debates that led to Nicaragua's current constitution; and second, the return of Ortega and the issues and political alliances formed during the recent 2006 presidential election.

For the better part of its existence as a nation, Nicaragua was ruled by dictatorship until 1979, when the Frente Sandinista de Liberación Nacional ("FSLN"), a socialist group known as the Sandinistas, overthrew the Somoza regime.³⁴ Headed in part by

Christian faith. See U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2006, <http://www.state.gov/g/drl/rls/irf/2006/71468.htm> (2006).

31. See Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. II, ch. I, art. 14, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf>; see also CENTRO NICARAGÜENSE DE DERECHOS HUMANOS ("CENIDH"), INFORME SOBRE LOS PRIMEROS CIEN DIAS DE GOBIERNO DEL PRESIDENTE DANIEL ORTEGA SAAVEDRA [THE NICARAGUAN CENTER FOR HUMAN RIGHTS, REPORT ON THE FIRST ONE-HUNDRED DAYS OF THE GOVERNMENT OF PRESIDENT DANIEL ORTEGA SAAVEDRA] (2007), <http://www.cenidh.org/files/CIEN%20DIAS%20DE%20GOBIERNO.pdf> [hereinafter CIEN DIAS] (suggesting that the political process behind the ban constitutes a violation of Article 14 of the constitution, which established Nicaragua as an "estado laico" or as a law-based, secular country) (translation by author).

32. This civil strife was aggravated by heavy U.S. intervention. This legacy of intervention will likely negatively impact any unilateral efforts by the United States to influence the current situation in Nicaragua. See generally Peter S. Michaels, *Lawless Intervention: United States Foreign Policy in El Salvador and Nicaragua*, 7 B.C. THIRD WORLD L.J. 223 (1987) (providing in-depth analysis of the United State's role in the Nicaraguan conflict). See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 3-8, 10-11 (June 27) (stating the holding of a contentious case before the International Court of Justice ("ICJ") in which the United States was found accountable under several theories of international liability for its substantial role in the conflict). ICJ decisions are available at <http://www.icj-cij.org>.

33. See JOHN CHARLES CHASTEEN, *BORN IN BLOOD AND FIRE: A CONCISE HISTORY OF LATIN AMERICA* 294-97 (2001).

34. *Id.* at 295. The Somoza family ruled Nicaragua from the 1930s through the time of the Nicaraguan revolutionary movement. *Id.* at 294. The regime was corrupt and

Daniel Ortega, the FSLN established itself as a political party.³⁵ At the time they took power, the FSLN were faced with an estimated 50,000 casualties from the war³⁶ and inherited a devastated economic infrastructure with a foreign debt of 1.6 billion dollars.³⁷

In 1983, as part of the FSLN reorganization of Nicaragua, the leading political parties engaged in constitutional debates to reform the Nicaraguan constitution.³⁸ These debates necessitated extensive compromises between the Sandinistas, other left-leaning groups, and traditionally conservative parties.³⁹ During the debates, women's groups stressed a need for social reform, focusing in part on equal rights;⁴⁰ reproductive rights were an especially contested subject.⁴¹ Yet despite the attention paid to social equity issues throughout the debates, abortion was never conceived to be a basic right.⁴² In fact, deadlock prevented the framers from clearly delineating any constitutionally protected rights in the area of reproductive health.⁴³ Much less, the constitution stopped short of explicitly enumerating even a broader right giving some degree of reproductive freedom.⁴⁴

Rather, the constitution outlines only the general right of political equality between men and women.⁴⁵ At the close of the

enriched itself at the expense of the Nicaraguan people by accumulating one-fifth of Nicaragua's arable land for itself). See THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 375 (6th ed. 2005).

35. See SKIDMORE & SMITH, *supra* note 34, at 373–80 (providing background on Somoza and Nicaraguan political history as well as U.S. intervention).

36. Jeffrey L. Gould, *Is the Fifth Time a Charm? The Election of Daniel Ortega and the Frente Sandinista*, HIST. NEWS NETWORK, Dec. 4, 2006, <http://hnn.us/articles/32376.html>.

37. *Various Aspects of the Nicaraguan Economy, 1982*, REVISTA ENVÍO, May 30, 1982, available at <http://www.envio.org.ni/articulo/3290>.

38. See generally Constitución Política de la República de Nicaragua [Cn.] tit. IV, ch. I, art. 23, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf> (forming Nicaraguan democratic institutions in 1987).

39. See Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1, 20 n.69 and accompanying text (noting that seven political parties were involved in the constitutional drafting process: the FSLN, three parties "politically to the right of the FSLN," and three that "traditionally were to its left").

40. *Id.* at 11 (pointing out that the "women's movement in Nicaragua was closely identified" with the FSLN). "[V]oices of women were heard during the constitutional process." *Id.* at 5.

41. *Id.* at 93.

42. *Id.*

43. *Id.*

44. *Id.*

45. See Constitución Política de la República de Nicaragua [Cn.] tit. VII, ch. III, art. 14, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/>

debates, the espoused right of equality was overly broad;⁴⁶ meanwhile, even though “the problem of illegal abortion was no secret in Nicaragua . . . it was rarely mentioned publicly” in the debates or by politicians because of “awareness of the religious opposition to abortion and fear of reaction from the . . . leadership of the Catholic Church.”⁴⁷ Some “suggested that in the future the supreme court might be called upon to review the constitutional debates concerning the meaning[.]”⁴⁸ of women’s issues such as *maltrato* (abuse), and the same is the case with reproductive rights. In the wake of broadly defined constitutional protections, the extent of women’s reproductive rights has essentially been left up to the supreme court to delineate.⁴⁹

After the new constitution was in place, the FSLN set about unifying the country by establishing an economic plan centered on social equality and instituting general elections in 1984.⁵⁰ However, continuing skirmishes with the U.S.-supported Contras forced the FSLN government to spend half of its national budget on defense.⁵¹ The lack of government funds, combined with a U.S.-imposed trade embargo had the effect of crippling an already weak economy.⁵² The economic crisis⁵³ culminated in 1988 when inflation reached an unprecedented 33,000%.⁵⁴ Finally, in 1990, tired of the faltering economy, Nicaraguans voted the FSLN and Ortega out of power. The country instead elected a female presidential candidate, Violeta Barrios de Chamorro.⁵⁵ However, under Chamorro, the country’s financial instability persisted through the 1990s, and its economy was

constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf; see *id.* art. 27 and 48 (addressing political equality section).

46. See Morgan, *supra* note 39, at 48; see also *id.* at 48 n.191 (citing IV SESIÓN CONSTITUYENTE V, 75 (1986)).

47. Morgan, *supra* note 39, at 53.

48. *Id.* at 48 & n.191 (citing IV SESIÓN CONSTITUYENTE V, 75 (1986)).

49. *Id.* at 54.

50. WorldPolicy.org, Background to Nicaraguan Elections of 2001 (Oct. 25, 2001), <http://www.worldpolicy.org/projects/globalrights/nicaragua/2001-Nicaragua-election-background.html>.

51. SKIDMORE & SMITH, *supra* note 34, at 378.

52. *Id.*

53. *Id.*

54. *Id.*

55. Violeta Chamorro represented a coalition of fourteen different political parties called the United National Opposition (“UNO”). FLORENCE E. BABB, AFTER REVOLUTION: MAPPING GENDER AND CULTURAL POLITICS IN NEOLIBERAL NICARAGUA 8–9 (2001). She was elected on a platform of peace and carried with her the “likely end of the U.S. economic embargo[.]” *Id.* at 13.

kept afloat largely by the \$860 million it received in foreign loans.⁵⁶ While the political climate has finally stabilized after the 1994 peace agreement,⁵⁷ all of the growing pains and poverty characteristic of a newly formed democracy⁵⁸ still plague Nicaragua today.⁵⁹ Largely as a result of both political and economic instability, the new democratic government has had a small window of time in which to address social issues and develop cohesive policy stances.⁶⁰

Despite all the social, political, and economic turmoil, one policy stance—the law on abortion—remained unchanged and in place in Nicaragua for over 130 years. That is, until 2003, when this law was called into question after national attention was drawn to a nine-year-old girl. The girl, referred to as Rosita, became pregnant as a result of rape⁶¹ and sought an abortion. After asking authorities for permission and enduring much public debate, the family procured the procedure at a private clinic.⁶² They were met with outrage from the Catholic Church. Cardinal Obando, the now retired Archbishop of Nicaragua, declared everyone involved in the process to be excommunicated.⁶³ This uproar led to a larger debate over the

56. SKIDMORE & SMITH, *supra* note 34, at 379. Chamorro proved to be an instrument of conservatism. Once in office, she set about undoing many of the Sandinista social reforms. *Id.*

57. *Id.*

58. *But see* Otto J. Reich, *Ortega, Again: The Left's Dear Comandante Comes Back in Nicaragua*, NAT'L REV., July 18, 2005, http://findarticles.com/p/articles/mi_m1282/is_13_57/ai_n15674138 (arguing that democratic values are waning in Nicaragua, through the work of “[t]wo of democracy’s cleverest enemies in Central America—Ortega and Alemán—who have refined a technique of hollowing out democratic institutions from the inside in order illegitimately to rule a country from their position as political party bosses”).

59. *See* Rural Poverty Portal, *Rural Poverty in Nicaragua*, <http://www.ruralpovertyportal.org/web/guest/country/home/tags/nicaragua> (last visited Dec. 26, 2008) (describing Nicaraguan development indicators including the poverty lines).

60. Roughly twenty years have passed since Nicaragua’s democratization under the 1987 constitution, which “established a democratic system of government with a mixed economy based on a separation of powers that could guarantee civil liberties.” NICARAGUA: A COUNTRY STUDY (Tim Merrill ed., 1993), *available at* <http://countrystudies.us/nicaragua/30.htm> [hereinafter COUNTRY STUDY]. A significant amount of the time was devoted to reconciliation and rebuilding in the wake of the Somoza dictatorship and Contra conflict. For instance, from 1972–82, the political group Luisa Amanda Espinoza Association of Nicaraguan Women (“AMNLAE,” or the Asociación de Mujeres Nicaragüenes Luisa Amanda Espinoza) focused its platform specifically on “national reconstruction, rebuilding the country after the devastation wreaked by Somoza in the last year before his downfall.” *Becoming Visible Women in Nicaragua*, *supra* note 1.

61. *Nine-Year-Old Nicaraguan Girl Has an Abortion Amid Controversy*, REPROD. HEALTH MATTERS, May 2003, at 195, *available at* <http://www.jstor.org/stable/3776690>.

62. *Id.*

63. *Id.*; *see also* Michael Glenwick, *To Risk Not Saving a Life: Abortion Ban in Nicaragua and Its Societal Implications*, COUNCIL ON HEMISPHERIC AFFAIRS, Dec. 11,

soundness of the therapeutic abortion exception. The exception, which Rosita relied on, allows for an abortion to be performed only for compelling medical reasons, such as when the mother's health is at stake.⁶⁴ The issue was then taken up by the legislature, and on October 27, 2006, the Nicaraguan legislature passed Bill Number 603, which repealed Article 165.⁶⁵ The rescission of Article 165 was approved by a vote of fifty-two to zero, thus fully banning the practice of abortion. President Enrique Bolaños signed the bill into law on November 17, 2006.⁶⁶

Given the party's history, FSLN representatives would be expected to oppose such a law. Yet, the bill passed without a single dissenting vote.⁶⁷ Most believe that the FSLN's assent was gained as a result of political motivations. The FSLN aligned with the Liberal Constitutionalist Party (Partido Liberal Constitucionalista, or "PLC") and the Liberal Alliance-Conservative Party (Alianza Liberal Nicaragüense Partido Conservador, or "ALN-PC") on abortion in order to return the FSLN's candidate, Daniel Ortega, to power.⁶⁸ Further evidencing this policy opportunism, when the issue reached its pinnacle during the 2006 elections, all but one of the candidates, including Ortega, the most left-leaning candidate,⁶⁹ voiced their support for the law to remove the therapeutic abortion exception.⁷⁰ Simultaneously, Ortega flip-flopped to align most of his policy stances with Cardinal Obando's during the election. He did so even though, throughout Ortega's political career, Ortega and Obando had diametrically opposed one another.⁷¹ In aligning with Obando,

2007, <http://www.coha.org/2007/12/to-risk-not-saving-a-life-abortion-ban-in-nicaragua-and-its-societal-implications> (describing Ortega's support for the ban).

64. Glenwick, *supra* note 63 (describing the debate with the Catholic Church and officials on one side, and women's and children's groups in support of the child being allowed to seek an abortion on the other side).

65. The Ban, *supra* note 6.

66. *Id.*

67. See KAISER DAILY WOMEN'S HEALTH POLICY REPORT, SOME DOCTORS, WOMEN'S RIGHTS ADVOCATES SAY NICARAGUAN ABORTION BAN CAUSED DEATH OF PREGNANT WOMAN, (2006), http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=41286 (noting that the exact breakdown was "52-0 with nine abstentions and 29 not present").

68. Joe DeRaymond, *The Strange Return of Daniel Ortega*, NICARAGUA REDUX, Nov. 13, 2006, <http://www.counterpunch.org/deraymond11132006.html> ("The Sandinista Party allied itself with the conservative Catholic Church to outlaw all abortion, in the weeks before the election.").

69. See Glenwick, *supra* note 63.

70. CIEN DIAS, *supra* note 31, at 10.

71. See Glenwick, *supra* note 63 (calling Ortega a "foe of Cardinal Obando"). "Daniel and the Sandinistas also made concessions to the right. On a personal level,

Ortega isolated many of his former Sandinista allies, leaving them in disbelief at his willingness to compromise his platform in order to get elected.⁷² Although Ortega won just thirty-eight percent of the vote in the 2006 elections,⁷³ he was able to gain that margin chiefly because of the Church's support. Further, although the repeal of the exception met immediate international outcry, it was overwhelmingly reaffirmed in September 2007, when the legislature voted sixty-six to three to defeat an "amendment to the Penal Code which would have decriminalized therapeutic abortion" provided that "three medical specialists agreed it was necessary to save the life of the mother."⁷⁴ With this proposal defeated, the blanket ban prohibition was incorporated into the reformed penal code under Bill 641.⁷⁵

Though this political union between the Catholic Church and a self-described atheist⁷⁶ seems an unlikely pairing, Ortega may have had other reasons besides deeply held religious beliefs for his support for the law. Ortega has always been anti-abortion, but politics and economics rather than morality seem to lie at the heart of his support for the measure. Evidenced by his 1983 denunciation of abortion as an instrument of population politics instituted by the United States and the United States Agency for International Development ("USAID"), Ortega believes that family planning programs are put in place by the United States and other world powers to keep the developing countries weak and under-populated.⁷⁷ In 1983, Ortega also argued that Nicaragua needed to reproduce and rebuild its

Daniel 'confessed' publicly of his sins of the 80's to the conservative cleric Obando y Bravo." DeRaymond, *supra* note 68.

72. Glenwick, *supra* note 63.

73. Angus Reid Global Monitor, Election Tracker: Nicaragua, <http://www.angus-reid.com/tracker/view/11396/nicaragua> (last visited Dec. 26, 2008) (showing Ortega polling at 37.999% at the close of the 2006 elections). "The repeal happened during a time that the Sandinista Party needed the support of the Catholic Church and the repeal was considered part of the 'give and take' of politics." Penn Garvin, *Gender Violence*, CAWN, Apr. 2008, <http://www.cawn.org/news/genderviolence.htm>.

74. Nicaragua Network and Nicaragua Solidarity Campaign Send Letter to Nicaraguan Officials on Abortion Ban, *supra* note 2.

75. Ley No. 641, 3 Dec. 2007, Código Penal: Libro Segundo de los Delitos y sus Penas [Nuevo Código Penal] [New Penal Code, Second Book on Crimes and Punishment] tit. I, ch. II, art. 144, La Gaceta [L.G.], 3 Dec. 2007 (Nicar.) (translation by author) (Articles 143-45 deal specifically with the punishments for abortion). For more on Bill 641, see *supra* notes 12, 25, and accompanying text.

76. See T. Christian Miller, *Ortega Tries to Disarm Terror as an Election Issue*, L.A. TIMES, Nov. 4, 2001, at A28, available at <http://articles.latimes.com/2001/nov/04/news/mn-115> ("Atheism? Out. Ortega's a born-again Christian.").

77. Ortega has always been anti-abortion. Morgan, *supra* note 39, at 77-78. He does not necessarily oppose abortion for the moral reasons that he currently cites but rather as a form of population politics. *Id.* at 81.

population after the Contra War.⁷⁸ Further evidencing his populist leanings, he also cited the agrarian economy and the need for laborers as incentives to have restrictive reproductive rights policies.⁷⁹

Others believe that he is less wedded to any political agenda than he is to being in power.⁸⁰ There is some evidence to support Ortega's history of policy compromises to stay in office. In 2001, Ortega sought the political support of the Catholic Church and suggested the repeal of a 1987 law permitting unilateral divorce.⁸¹ Still others have cited Ortega's recent bad publicity as his incentive for finding religion. He has faced public allegations from his step-daughter, Zoilamérica Narváez, that he sexually abused her throughout her childhood.⁸² Zoilamérica even took her case to the Inter-American Court after stating her belief that no justice could come to her in Nicaragua.⁸³ This drew both national and international attention and was the worst kind of public relations for Ortega before an election.⁸⁴ Though no one can be sure of Ortega's exact motivations in entering into the alliance, it has proved mutually beneficial, helping both to secure Ortega's place in government and to realize a long-standing policy goal of the Catholic Church.

78. *See id.*

79. *Id.*

80. *See* Onofre Guevara López, *Nicaragua: Reflections on the Daily Violation of the Secular State*, REVISTA ENVÍO, May 2008, available at <http://www.envio.org.ni/articulo/3783> ("With his Machiavellian toying with God and religion and his alliance with the religious hierarchies, President Ortega opened up two fronts against the Right, one political and one ideological. The first is to hold on to power and the second is to take away the Right's traditional pre-eminence in the religious field, making it his own private reserve.").

81. SKIDMORE & SMITH, *supra* note 34, at 379–80 (suggesting that the repeal was jointly suggested by Ortega and Alemán in an attempt to stay in power).

82. Tim Padgett, *An Ugly Family Affair*, TIME: LATIN AMERICA, Mar. 23, 1998, http://www.time.com/time/magazine/1998/int/980323/latin_america.an_ugly_fa3.html ("So when Narvaez, 30, publicly accused Ortega, 53, two weeks ago of sexual abuse, there was the sense of a *moral abscess* opening in Nicaragua, with explosive political complications.") (emphasis added).

83. *See Case 12,230: Zoilamérica Narváez vs. the Nicaraguan State*, REVISTA ENVÍO, Mar. 2002, available at <http://www.envio.org.ni/articulo/1567> ("[H]aving spent 16 months visiting the National Assembly and hoping that Daniel Ortega would be stripped of his immunity so he would go to court and enable me to demonstrate my charges, I decided to resort to an international tribunal, the Inter-American Commission on Human Rights."); *see also* Zoilamérica Narváez Murillo v. Nicaragua, Case 12.388, Inter-Am. C.H.R., Report No. 118/01, OEA/Ser.L/V/II.114, doc. 5 rev. (2001). Report No. 118/01, Case 12.230, Zoilamérica Narváez Murillo, Nicaragua, Oct. 15, 2001, available at www.cidh.oas.org/annualrep/2001eng/Nicaragua12230.htm.

84. *See Case 12,230: Zoilamérica Narváez vs. Nicaraguan State*, *supra* note 83.

B. *The Role of Catholicism in Latin America and Nicaragua*

As the previous Section on politics suggests, Catholicism exercises a great deal of influence on Nicaraguan culture and society.⁸⁵ It follows that the Church's position on social issues ultimately helps shape political agendas and resulting national policy as well.⁸⁶ The Catholic Church in Latin America, utilizing its power over public opinion, has supported conservative causes for much of its long history in the region.⁸⁷ Yet, the Church's relationship with the Sandinistas has not always been contentious. Coinciding with the Sandinista rise to power, the Catholic Church in Nicaragua was swept up in the revolutionary tide of the 1970s.⁸⁸ The Church fleetingly shifted "left" with the advent of liberation theology and supported widespread reform strikingly similar to socialist agendas, emphasizing poverty alleviation and economic equity.⁸⁹ This represented a short period of leftist social and political unification in Nicaraguan history

85. "[T]he Roman Catholic Church has retained a special status in Nicaraguan society. When Nicaraguans speak of 'the church,' they mean the Roman Catholic Church." COUNTRY STUDY, *supra* note 60.

86. Morgan, *supra* note 39, at 25.

87. See MANZAR FOROOHAR, THE CATHOLIC CHURCH AND SOCIAL CHANGE IN NICARAGUA 3-10 (1989) (describing the Church's history of supporting conservative causes in Latin America); *see also id.* at 67 (describing the Catholic Church hierarchy's conservatism in the 1960s).

88. *Id.* at 8 (discussing political support for leftists or conservatives). The Catholic Church's role in Latin America has been dynamic, changing over time from paternalistic to the champion of social justice causes, particularly poverty, under Liberation Theology. *See generally* Edward T. Brett, *The Impact of Religion in Central America: A Bibliographical Essay*, 49 THE AMERICAS 297, 297-341 (1993) (providing a bibliographical study by analyzing nineteenth and twentieth century historical, sociological, and political science studies). The Vatican then denounced liberation theology, and the Catholic Church in Nicaragua swung politically toward the right and in support of socially conservative agendas. Condemning the Marxist rhetoric intertwined with liberation theology, the Church proclaimed that "[t]heir theology is a theology of class. Arguments and teachings thus do not have to be examined in themselves since they are only reflections of class interests. Thus, the instruction of others is decreed to be, in principle, false." JOSEPH CARDINAL RATZINGER, INSTRUCTION ON CERTAIN ASPECTS OF THE "THEOLOGY OF LIBERATION" (Aug. 6, 1984). Pope John Paul II then appointed conservative bishops in Latin America, effectively ending the movement. *See* SKIDMORE & SMITH, *supra* note 34, at 447. This trend of denunciation has continued. *See, e.g.,* POPE BENEDICT XVI, NOTIFICATION ON THE WORKS OF FATHER JON SOBRINO, SJ, CONGREGATION FOR THE DOCTRINE OF THE FAITH (2006), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20061126_notification-sobrino_en.html (censuring the teachings of a prominent liberation theologian). For a brief overview of liberation theology in Latin America, particularly the ties between the revolutionary religious movement and Marxism, *see* CHASTEEN, *supra* note 33, at 270-73.

89. *See* Brett, *supra* note 88, at 297-98.

when the FSLN aligned with the Church on many social issues.⁹⁰ But soon, Pope John Paul II sought to denounce liberation theology.⁹¹ In an instruction ordered by Pope John Paul II, the Church called liberation theology a “theology of class,” referencing the Marxist undertones of liberation theology and declaring that it was a political rather than religious movement; therefore, it was not of the Church’s concern.⁹² The Church soon shifted back to a conservative platform, led in Nicaragua by Cardinal Obando, who supported more conservative legislation.⁹³

Yet throughout its history and changing social agenda, the Catholic Church has maintained a firm stance on contraception.⁹⁴ In particular, the Church fears that “freedom in contraception would increase the rates of abortion, family break-ups, wife and child abuse, and out-of-wedlock births, to name a few consequences.”⁹⁵ The Church views contraception as unnecessary and even harmful.⁹⁶ Specifically, the Church’s stance against abortion has been unwavering⁹⁷ and has resonance with many Nicaraguans.⁹⁸ Advocating a vehemently pro-life policy “[s]ince the first century,”

90. See FOROCHAR, *supra* note 87, at 111–15 (discussing the FSLN and the Catholic Church).

91. RATZINGER, *supra* note 88, at 26–27 (explaining that Pope John Paul II approved this instruction by Cardinal Ratzinger and “ordered its publication”).

92. *Id.*

93. Yet the movement has not entirely died out. Some liberation theologians remain in Nicaragua today. See George Russel, *Taming the Liberation Theologians: In Latin America, the Church Struggles Over the Plight of the Poor*, TIME, Feb. 4, 1985, at 56.

94. The Church asserts that “[f]ecundity [fertility] is a gift, an *end of marriage*,” and “[m]arried couples should regard it as their proper mission to transmit human life” CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH pt. 3, § 2, ch. 2, art. 6, no. III, ¶¶ 2366–67, at 507 (Geoffrey Chapman ed., 1999) [hereinafter CATECHISM] (emphasis added), available at http://www.vatican.va/archive/ENG0015/_INDEX.HTM.

95. Tania Jiyoung Cho, Note, *The Double Moral: Compliance of International Legal Obligations of Reproductive Rights vs. Allegiance to the Catholic Church*, 5 SW. J. L. & TRADE AM. 421, 432 (1998); see also Archbishop Charles J. Chaput, Of Human Life, A Pastoral Letter to the People of God of Northern Colorado on the Truth and Meaning of Married Love (July 22, 1998), http://www.archden.org/archbishop/doc/of_human_life.htm (commemorating the thirtieth anniversary of Pope Paul IV’s letter discussing the Church’s position on birth and contraception).

96. See Pope Paul VI, *Humanae Vitae* (July 25, 1968), http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html; see also Chaput, *supra* note 95.

97. The Church proclaims a long history of objecting to abortion in Catechism 2271. “This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law” CATECHISM, *supra* note 94, pt. 3, § 2, ch. 2, art. 5, no. I, ¶ 2271.

98. Morgan, *supra* note 39, at 4–5 (“Traditional Catholicism with its patriarchal views of home and family exerts tremendous influence on Nicaraguans’ daily lives.”). “Nicaraguan women have not rejected the role of mother.” *Id.* at 18.

the Catholic Church has consistently “affirmed the moral evil of every procured abortion.”⁹⁹ Under Catholic doctrine, human life begins at conception. The fetus is entitled to all the care, defense, and healing of any human being.¹⁰⁰ Accordingly, an abortion performed at any stage and for any reason constitutes murder.¹⁰¹

Along these lines, the Church has long opposed the “therapeutic exception” in the Penal Code.¹⁰² As Pope John Paul II articulated the Church’s slippery slope argument, society has perpetuated “a semantic evolution . . . in which homicide is called ‘induced death,’ infanticide, ‘*therapeutic abortion*,’ and adultery becomes a mere ‘extra-marital adventure.’ No longer possessing absolute certainty in moral matters, the divine law becomes an option among the latest variety of opinions in vogue.”¹⁰³ Therefore, when a political dialogue opened up in Nicaraguan society about the therapeutic abortion exception in 2003, the Church was an extremely vocal proponent of rescinding the exception.¹⁰⁴ The Church went as far as to directly involve itself in the legislative process: holding conferences for legislators on what to vote for;¹⁰⁵ expressing outright support for political candidates who vowed to change the law;¹⁰⁶ and publicly pressuring the social sphere by threatening the excommunication of doctors who performed these legal abortions under the exception.¹⁰⁷

99. CATECHISM, *supra* note 94, pt. 3, § 2, ch. 2, art. 5, no. I, ¶ 2271.

100. *Id.* para. 2274, at 490 (“Since it must be treated from conception as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being.”).

101. Alfonso Cardinal Lopez Trujillo, Family Values Versus Safe Sex (Dec. 1, 2003), http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20031201_family-values-safe-sex-trujillo_en.html (quoting Pope John Paul II’s address to the Bishops of Brazil from the East 2 Region on their “*Ad Limina*”).

102. *Id.* (characterizing therapeutic abortion, which is only performed in emergency circumstances, as infanticide); *see also* Cho, *supra* note 95, at 431 (indicating that the Church views all abortions as murder).

103. Pope John Paul II, Address to the Bishops of Brazil from the East 2 Region on Their “*Ad Limina*” Visit (Nov. 16, 2002), http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/november/documents/hf_jp-ii_spe_20021116_brazil-leste-ii_en.html.

104. *See Defending Reproductive Choice: Nicaragua and Chile*, WOMEN’S HEALTH J., Jan.–Mar. 2003, http://findarticles.com/p/articles/mi_m0MDX/is_1_2003/ai_n18616334.

105. *See* Pontifical Council for the Family, L’Osservatore Romano, Sect. III, para. 12 (July 10, 1996), *available at* <http://www.catholicculture.org/library/view.cfm?recnum=5110>.

106. *See Nicaragua Outlaws Therapeutic Abortion; Women’s Lives Jeopardized*, NOTICEN, Nov. 2, 2006, <http://www.allbusiness.com/caribbean/3911968-1.html>; *Nicaragua Passes Tough Abortion Law*, HERALD SUN (Austl.), Oct. 27, 2006, *available at*, <http://www.news.com.au/heraldsun/story/0,21985,20653520-5005961,00.html>.

107. *See supra* note 63 and accompanying text; *see also Nicaragua Shaken by Child’s Abortion*, CBS NEWS, Mar. 23, 2003, <http://www.cbsnews.com/stories/2003/03/23/world/main545560.shtml> (“Cardinal Miguel Obando y Bravo said those involved in the girl’s abortion had excommunicated themselves under church law.”).

Then, once the blanket ban was legislatively renewed in 2007, the new pope, Pope Benedict XVI, commended Nicaragua for its courage as it “‘regards the theme of life’” and for passing the ban “‘in the face of no small amount of domestic and international pressure.’”¹⁰⁸ Further, Pope Benedict expressed the Church’s commitment to keeping the legislation in place, stating that the Church is “‘ready to maintain a dialogue—a constant and sincere communication—with the government, contributing to the creation of the essential conditions that . . . establish[] a climate of peace and authentic social justice.’”¹⁰⁹ With this top-down Church-wide commitment, the Nicaraguan clergy’s support for the blanket ban is unlikely to dissipate.

Further, echoing the Pope’s support for the blanket ban, the Church in Nicaragua is reluctant to acknowledge any potentially harmful effects of the law.¹¹⁰ Endorsing the Pope’s belief that the blanket ban promotes “‘authentic social justice,’”¹¹¹ Nicaraguan clerics have actively defended the law against charges that the blanket ban jeopardizes women’s health.¹¹² As Priest Henry Romero asserts, “‘[w]hen two lives are in danger, you must try to save both the woman and the child. [Given technological advances,] [i]t’s difficult to say now that it isn’t possible to save both.’”¹¹³

Barring an unlikely decrease in its influence, the Church’s opinion will always be relevant on Nicaraguan legislation concerning reproductive rights. However, the Catholic Church’s ideological opposition to contraception is not the sole source of opposition to family planning programs. Rather, the resistance is more widespread. Traditional agrarian sectors of society have resisted contraception, citing the utility of large families as a source of labor.¹¹⁴ At the same time, some leftist populists such as Ortega believe family planning

108. *Pope Praises Nicaragua for Pro-Life Policies*, CATHOLIC NEWS AGENCY, Sept. 25, 2007, <http://www.catholicnewsagency.com/new.php?n=10485> (emphasis added) (“Pope Benedict XVI . . . sa[y]ing] it was very ‘positive that last year the national assembly approved the revocation of therapeutic abortion.’”).

109. *Id.* Such support is consistent with the Church’s willingness to “impose its influence on domestic lawmaking throughout Latin America.” Cho, *supra* note 95, at 433.

110. Pope Benedict XVI views the law as upholding the right to life. See *Pope Praises Nicaragua for Pro-Life Policies*, *supra* note 108.

111. *Id.*

112. Traci Carl, *Doctors Fight No-Abortion Policy: In Nicaragua, Doctors Say No-Exceptions Abortion Ban Causing Deaths*, ABC NEWS, Nov. 5, 2007, <http://abcnews.go.com/International/comments?type=story&id=3820888>.

113. *Id.*

114. SKIDMORE & SMITH, *supra* note 34, at 443.

programs are part of an elaborate “imperialist plot to weaken Latin America.”¹¹⁵

C. *Marianismo and Cultural Conceptions of Women’s Rights*

In this religiously infused climate, the majority of Nicaraguan women hold a conception of feminism¹¹⁶ and women’s rights that is distinct from that of the majority of women in the United States.¹¹⁷ More broadly, the Nicaraguan women’s movement is divergent “[d]espite extensive contacts with women from other countries a certain insularity exists within the Nicaraguan women’s movement.”¹¹⁸ At the same time, women’s conception of their rights and responsibilities is culturally bound and also influenced by socio-economics.¹¹⁹ Women in Nicaragua embrace the role of mother, which is termed “marianismo,” and are heavily impacted by traditional views of family structure and women’s roles.¹²⁰

Though women’s groups push for social change, “Latin American feminists are in the process of constructing their own conceptual frameworks for understanding and restructuring gender relationships within their societies.”¹²¹ In Nicaragua, the women’s movement arose as women created a tradition of revolutionary motherhood in the fight against Somoza.¹²² They did so out of an “initial desire to protect their children.”¹²³ This view was articulated by one woman as the need “to protect our children’s lives for we had given them life. After giving them this beautiful gift, we had to

115. *Id.* at 442.

116. Although it is difficult to generalize what women believe as a group, one account of Nicaraguan feminism can be found in María Teresa Blandón, *The Coalición Nacional de Mujeres: An Alliance of Left-Wing Women, Right-Wing Women, and Radical Feminists in Nicaragua*, in *RADICAL WOMEN IN LATIN AMERICA: LEFT AND RIGHT* 117 (Victoria González & Karen Kampwirth eds., 2001).

117. See Victoria González, *Somocista Women, Right-Wing Politics, and Feminism in Nicaragua, 1936–1979*, in *RADICAL WOMEN IN LATIN AMERICA: LEFT AND RIGHT*, *supra* note 116, at 41.

118. Morgan, *supra* note 39, at 17.

119. “As is true in any study of women, an analysis of class and ethnicity, as well as gender, is crucial to understanding Latin American women.” *Id.* at 9.

120. Morgan, *supra* note 39, at 4–5 (stating that patriarchal conceptions of family strongly influence life in Nicaragua); see also Rowan Ireland, *Popular Religions and the Building of Democracy in Latin America: Saving the Tocquevillian Parallel*, 41 *J. INTERAMERICAN STUD. & WORLD AFFAIRS*, 111–36 (Winter 1999) (discussing the impact of religion on fostering democracy in Latin America).

121. Morgan, *supra* note 39, at 9.

122. *Becoming Visible Women in Nicaragua*, *supra* note 1.

123. *Id.*

defend it”¹²⁴ As this background suggests, though many women were involved in the Sandinista movement and socialism’s influence has played a role in introducing notions of gender equity into Nicaraguan culture, this has not equated to liberalizing views of reproductive rights.¹²⁵ At the same time, the message of reproductive autonomy has not been popular in mainstream politics, even among female politicians.¹²⁶ While some women’s groups pushed for a broadly stated right to “leave the door open to future laws decriminalizing abortion” at the constitutional debates in the 1980s,¹²⁷ the female politician Rodríguez de Chamorro supported “equal rights for women . . . ‘within the framework of Christian morals.’”¹²⁸ Still others did not support therapeutic abortions after rape but instead advocated for stronger penalties for rapists,¹²⁹ calling abortion “the death penalty . . . against a being who cannot even defend itself.”¹³⁰

As many women continue to adhere to these traditional values, women’s groups have focused on advocating for equal political rights and an end to domestic and sexual violence rather than advocating for reproductive autonomy in the strict sense.¹³¹ In essence, the presence of feminist groups in Nicaragua is not analogous to the presence of a pro-choice movement.¹³² Prominent women’s political

124. *Id.*

125. “Nicaragua has borrowed much from traditional socialist formulations of what to do about women’s emancipation.” *Id.*; see also Morgan, *supra* note 39, at 5 (using the term “marianismo” to describe the prototypical role of women in Latin American society). “Nicaraguan women are called ‘pillars of their families.’” *Id.* at 18. A countervailing force has been the introduction of socialist thought in Latin America with its emphasis on equity and its effect on gender roles. “Unique among the radical ideologies that traversed Latin America, socialism professed the full equality of men and women, and in identifying the family as a major site of inequality, it proposed to remove the basis of the traditional gender order by giving women new rights and the means to achieve economic autonomy through employment.” Maxine Molyneux, *Twentieth-Century State Formations in Latin America*, in *HIDDEN HISTORIES OF GENDER AND THE STATE IN LATIN AMERICA* 33, 59 (Elizabeth Dore & Maxine Molyneux eds., 2000).

126. *Becoming Visible Women in Nicaragua*, *supra* note 1 (“Classical socialist theory characterizes women’s oppression or inequality as springing from the unequal and unjust economic structure and the way in which capitalism denies them significant, much less equal, access to the productive world.”)

127. Morgan, *supra* note 39, at 55.

128. *Id.* at 58 (quoting Rodríguez de Chamorro, *¿Legalación del parricidios?*, EL NUEVO DIARIO, June 10, 1988, at 20).

129. *Id.*

130. *Id.*

131. See Blandón, *supra* note 116, at 117–21; see also Morgan, *supra* note 39, at 44–49 (discussing Nicaraguan women’s attempts to address *maltrato* (domestic violence) and rape).

132. Morgan, *supra* note 39, at 14–15 (noting that feminists in the United States may lack understanding for the situation that Latin American women face).

parties, such as the Association of Nicaraguan Women Luisa Amanda Espinosa (“AMNLAE”), which played an active role in the forming of Nicaragua’s new constitution in 1983, do not support the right to abortion.¹³³ As a result, Latin American women, even those that consider themselves feminists, are far from unified on the issue of reproductive rights.¹³⁴ At the same time, while the social atmosphere will not allow for unfettered access to abortion, this does not equate to public support for a law prohibiting women from seeking healthcare in life-threatening situations.

II. BACKGROUND ON THE BLANKET BAN

A. *A Discussion of Past and Present Law: From Restriction to Dogmatism*

While Part I explains the mechanics behind why the therapeutic abortion exception was repealed, an examination of the previous law is essential to understanding what social ills the legislature sought to address.

The previous law on abortion was enacted in 1838 in Articles 162–65. While Articles 162–64 prohibited abortion and delineated the criminal consequences, Article 165 of the Penal Code contained a medical exception to the prohibition.¹³⁵ At the same time, Article 146 of the previous penal code allowed a doctor to perform the procedure without fear of punishment.¹³⁶ The Nicaraguan Ministry of Health defined such procedures as the legal interruption of the pregnancy before twenty weeks of gestation for medical purposes due to maternal conditions that are aggravated by the pregnancy and have negative repercussions on fetal growth and development and that compromise the joint health of the mother and child.¹³⁷ According to the Ministry’s regulations, a woman could obtain a therapeutic abortion in the first trimester for chronic renal insufficiency, cardiac

133. *Id.* at 12–14.

134. *Id.* at 94.

135. The Ban, *supra* note 6.

136. “This will not be punishable in any case.” See Código Penal, libro II, tit. I, Delitos Contra las Personas y su Integridad Física, Psíquica, Moral y Social, Capítulo V, Del Aborto, art. 165 [Penal Code, Book II, Title I, Crimes Against Peoples and Their Physical, Psychic, Moral and Social Integrity, Chapter 5, On Abortion, Article 165] (repealed 2006) (Nicar.), available at http://www.unifr.ch/ddp1/derechopenal/legislacion/l_20080616_65.pdf (translation by author).

137. Tania Sirias and Melvin Martínez, *Ministras Huyen de la Prensa* [Ministers Flee from the Press], EL NUEVO DIARIO, Feb. 8, 2007, available at <http://impreso.elnuevodiario.com.ni/2007/02/08/politica/40831> (translation by author).

conditions or danger, cancer, incest, rape, rubella, and other life-endangering conditions.¹³⁸ To obtain a legal abortion, the law required that three doctors assess and agree upon the scientific validity of the need for the procedure and that the spouse or next of kin also give his consent.¹³⁹ Although the law took great pains to lay out all the conditions that needed to be met, the medical circumstances required to necessitate a therapeutic abortion remained unclear. For instance, while the law articulated that three “medical personnel not necessarily doctors—ha[d] to approve [the abortion],” the law “[gave] little guidance about what conditions they should look for”¹⁴⁰ in making this determination. Despite this lack of clarity, the exception for therapeutic abortions provided the means to save women’s lives.¹⁴¹

Now, with the passing of Bill 641, the law on abortion mandates one to three years in prison for a person who performs an abortion and one to two years for a woman who obtains one.¹⁴² The harmful effects of this law¹⁴³ are aggravated by the Ministry of Health’s current failure to set clear standards as to what treatment is legally allowed in obstetric emergency situations.¹⁴⁴ Although the Ministry of Health issued “mandatory guidelines” on the care of pregnant women, both women’s groups and medical professionals consider these standards overly ambiguous.¹⁴⁵

Thus, even though the blanket ban does not explicitly prohibit other forms of medical care to pregnant women in distress, the statute’s vague language has further implications on women’s health.

138. *Id.*

139. *Id.*

140. Associated Press, *Nicaragua Shaken By Child’s Abortion: Rape Victim, Just Nine Years Old, Sparks Fierce Debate*, CBS NEWS, Mar. 23, 2003, available at <http://www.cbsnews.com/stories/2003/03/23/world/main545560.shtml> (noting that Church backing for the ban was spurred by the case featured in this article).

141. CENTRO NICARAGÜENSE DE DERECHOS HUMANOS (“CENIDH”), INFORME ANUAL: DERECHOS HUMANOS EN NICARAGUA 2006 (2007), [THE NICARAGUAN CENTER FOR HUMAN RIGHTS, ANNUAL REPORT: HUMAN RIGHTS IN NICARAGUA 2006], available at http://cenidh.org/files/cenidh_final.pdf [hereinafter INFORME ANUAL] (translation by author).

142. HUMAN RIGHTS WATCH, OVER THEIR DEAD BODIES: DENIAL OF ACCESS TO EMERGENCY OBSTETRIC CARE AND THERAPEUTIC ABORTION IN NICARAGUA (Oct. 2007), available at <http://www.hrw.org/sites/default/files/reports/nicaragua1007webwcover.pdf> [hereinafter HUMAN RIGHTS WATCH REPORT].

143. *Nicaragua’s Abortion Ban Putting Women’s Lives at Risk*, US Rights Group Says, INT’L HERALD TRIB., Oct. 2, 2007, available at <http://www.ihf.com/articles/ap/2007/10/02/america/LA-GEN-Nicaragua-Abortions.php>.

144. *Id.*

145. *Id.*

The law broadly defines an abortion as “any procedure that has the effect of terminating the baby’s life” and lacks parameters to help doctors avoid criminal liability in emergency situations, should the baby die as a result.¹⁴⁶ Because of the unclear state of the law, many doctors are unwilling to intervene to assist expectant mothers with serious health problems for fear of incurring criminal liability under the law.¹⁴⁷ Take for instance the case of Olga Reyes, a law student.

[Reyes] knew something was horribly wrong [She was] sent to Bertha Calderon maternity hospital . . . [, where she] was given a cursory exam, sent home[,] and told to return the next day. By that time, the bleeding and cramping were worse . . . [. S]he had an ultrasound that confirmed her condition, [after which] they left her bent over and in agony for hours in a waiting room. When a doctor at a shift change saw her condition [presumably that the baby had died], she was rushed into surgery. She suffered three heart attacks and [had] an exploratory surgery.

They knew she had a limited amount of time before she bled out. The whole world knows that [is what happens] with an ectopic pregnancy . . . [, but t]hey didn’t treat her, out of fear.¹⁴⁸

146. Ley No. 641, 16 Nov. 2007, Código Penal: Libro Segundo de los Delitos y sus Penas [Nuevo Código Penal] [New Penal Code, Second Book on Crimes and Punishments] tit. I, ch. II, art. 144, La Gaceta [L.G.], 3 Dec. 2007 (Nicar.) (translation by author).

147. At the same time, there are not statistics to support that the fear of legal sanctions is well-founded. *Id.*

148. *Women Die After Nicaragua’s Ban on Abortions: Law Won’t Allow the Procedure Even When Mother’s Life Is at Stake*, MSNBC, Nov. 6, 2007, <http://www.msnbc.msn.com/id/21601045/> (internal quotations omitted).

The Reyes case is only one of many accounts¹⁴⁹ of women in Nicaragua being denied care and dying as a result of treatable pregnancy complications. Dr. Jorge Orochena, Director for Quality Control at the Nicaragua Health Ministry, describes the effect of the blanket ban on “medical personnel There have been situations that should have been treated,” but were not “out of fear For example, in one hospital [there was] a patient with an ectopic pregnancy, [and] it was ruptured, . . . but [the patient] was not treated. It’s like an excuse The doctors don’t want to put themselves on the line.”¹⁵⁰ But while reports of doctor’s unwillingness to treat women and women’s subsequent deaths will continue to surface in the media, the law has had other, more pervasive effects—it has undermined women’s confidence in the healthcare system and their faith in the ability of doctors to treat them.¹⁵¹

B. Questions of Means and Ends: Inherent Problems with the Blanket Abortion Ban

There are arguments that the abortion blanket ban violates domestic law on two fronts. The first deals with the *means* in which the blanket ban was enacted—after the Catholic Church directly involved itself with the legislative process by holding conferences for legislators on what legislation to pass; by actively endorsing presidential candidates;¹⁵² and by threatening the excommunication of

149. See, e.g., N.C. Aizenman, *Nicaragua’s Total Ban on Abortion Spurs Critics*, WASH. POST, Nov. 28, 2006, at A1 (describing the death of a pregnant woman in distress) (emphasis added).

Jazmina Bojorge arrived at Managua’s Fernando Vález Paiz Hospital on a Tuesday evening, nearly five months pregnant and racked with fever and abdominal pain. By the following Thursday morning, both the pretty 18-year-old and the female fetus in her womb were dead. . . .

Bojorge showed signs of vaginal bleeding and uterine contractions on her arrival at the hospital, [but] doctors decided to give her medication to stave off the contractions *because an ultrasound indicated that her fetus was alive*. The next day, another test indicated that the fetus had died, and Bojorge was taken off the medication to allow her body to expel the dead fetus naturally. Instead, she went into shock, possibly because the placenta had detached, causing massive blood loss.

Id. (emphasis added).

150. See HUMAN RIGHTS WATCH, *supra* note 13.

151. *Id.* (reporting that countless others have refused to seek treatment for fear that the hospital will watch them die rather than treating them).

152. Pontifical Council for the Family, *supra* note 105; see also Philip Pullella, *Pope Warns Catholic Politicians Who Back Abortion*, REUTERS, May 9, 2007, available at <http://www.reuters.com/article/worldNews/idUSL0956318820070509?feedType=>

doctors who performed legally allowed abortions. At the same time, the *ends* of the legislation are unclear in terms of what the repeal of a medical exception seeks to address.¹⁵³

First, the process by which the blanket ban was enacted violated the separation of church and state. Nicaragua defines itself as a secular nation,¹⁵⁴ and allowing the Church to influence the political process in deciding this issue is impermissible in a secular state.¹⁵⁵ However, the means of the policy's enactment speaks less to the blanket ban itself than it does to Nicaraguan politics as a whole. Though the Church's soft power influence can be felt in any predominantly Catholic country¹⁵⁶ through socialization and a "ripple-effect on public discourse,"¹⁵⁷ the Church's influence as a political institution in Nicaragua has been more overt.¹⁵⁸

For instance, during Ortega's 2007 Presidential Inauguration, Cardinal Obando and another bishop were seated alongside Ortega and the president of the legislature.¹⁵⁹ These two clerical figures sat in place of the other presidents of the governmental branches,

RSS&rpc=22. Perhaps as a result of the Church's longstanding opposition to abortion, heavily Catholic countries tend to have stricter limits in place on allowable abortion procedures. There is also a tie between Islamic countries and restrictive reproductive health policies. See *supra* note 17 and accompanying text (discussing the Cairo Convention).

153. This is the equivalent of a scrutiny argument; the means are not narrowly tailored to the ends. In further analogizing to U.S. law, one could argue that this law would not pass the rational basis test due to the fact that the law does not correct a societal ill, as supported by hard facts.

154. See Constitución Política de la República de Nicaragua [Cn.] tit. II, ch. I, art. 14, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf>. Article 14 of Nicaragua's constitution states that Nicaragua has no official religion. *Id.* ("El Estado no tiene religión oficial.").

155. López, *supra* note 80.

156. See, e.g., *Portugal Ratifies Law Allowing Abortions*, THE GUARDIAN, Apr. 10, 2007, <http://www.guardian.co.uk/world/2007/apr/10/1> (describing how Portugal has relaxed its position on abortion to address injuries sustained from poorly performed illegal abortions).

157. Ted G. Jelen, John O'Donnell & Clyde Wilcox, *A Contextual Analysis of Catholicism and Abortion Attitudes in Western Europe*, SOC. OF RELIGION, Winter 1993, at 375, 376-77.

158. For a discussion of how religion can be an overt influence in a culture, see R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION* 55 (2000) ("If religion operates according to its own logic and internal dynamics, it is seldom, if ever, uncompromised by the pressures of daily life—by political considerations, ethnic or national loyalties, or social and economic pressures. Religion is apt to 'hide' in culture, be appropriated by politicians, or blend into society in ways that make it hard to identify as an independent variable.").

159. López, *supra* note 80.

effectively supplanting them.¹⁶⁰ The imagery this incident evokes is powerful—Church clergymen reigning in a new administration alongside government officials. Ortega has also “ordered all state dependencies to pray and sing to the Virgin Mary’s Conception” and introduced religious imagery into many of his speeches.¹⁶¹ At the same time, the Church has not shirked from exerting political influence when given the opportunity. For example, in 1996, demonstrating direct involvement in political agenda-setting, the Vatican’s Pontifical Council for the Family held a conference for Latin American policy makers which urged legislators to “put an end to contraceptive imperialism.”¹⁶² Therefore, the relationship between the Church and the State is mutually reinforcing in Nicaragua—each party is seeking to blur the lines that a secular state creates between the two institutions.

The next flaw in the law is the legislative intent, that is, what harm the law seeks to address. It is doubtful the ban was passed to address a past laxity in Nicaraguan abortion law as the law only allowed for medically necessary procedures.¹⁶³ Nor is the argument convincing that the blanket ban seeks to address perceived abuses of the therapeutic abortion exception. In fact, one study estimates that only twenty-four legal abortions took place in Nicaragua from 2004 through 2007, while 32,000 abortions occurred illegally each of those years.¹⁶⁴

If anything, legislation should be enacted to address the high prevalence of illegal abortions rather than a perceived over-use of the therapeutic abortion exception.¹⁶⁵ However, as a policy fix to high numbers of illegal abortions, the legislation should have considered broadening the exception as statistical evidence shows that the more restrictive the reproductive policy, the greater the incidence of unintended pregnancies. In turn, this explains the increased reliance

160. *Id.*

161. *Id.*

162. Pontifical Council for the Family, *supra* note 105; *see also* Morgan, *supra* note 39, at 31.

163. *See infra* note 164 and accompanying text (citing the low incidence of abortion under Article 165).

164. *See* KAISER DAILY WOMEN’S HEALTH POLICY REPORT, *supra* note 67 (citing the reproductive rights group IPAS, located in Chapel Hill, North Carolina).

165. Many believe the ban was passed in reaction to the 2003 granting of an abortion to a nine-year-old child after she was raped. *See supra* notes 61–66 and accompanying text. The country was split in terms of public reaction to the abortion and Catholic Church called for a tightening up of abortion laws. *See* Associated Press, *supra* note 140.

on illegal abortion.¹⁶⁶ Already constituting one of the highest percentages in Latin America, UNICEF estimates that twenty-eight percent of all children are born to teenage mothers in Nicaragua. Death as a result of adolescent pregnancy comprises one-third of all maternal deaths.¹⁶⁷ Overall, the evidence shows that, while abortion rates do not decrease under restrictive policies, maternal mortality rates do increase dramatically.¹⁶⁸

Among the law's many flaws, allowing the Church's views to shape national policy violates the tenet of separation of church and state to which Nicaragua purports to adhere. At the same time, the law lacks a rational basis for its enactment.¹⁶⁹ What's more, as addressed in depth in Part V, the change in the law does nothing to promote the country's constitutional or international obligations. Yet all of these flaws in the blanket ban are still less disturbing than its practical effects on women's health. The only true effect of the change is to deny medical care to the very few women that would qualify for a therapeutic abortion under the old law.

III. DOMESTIC REMEDIES: AN ANALYSIS OF DOMESTIC SOURCES OF SUPPORT FOR THE BAN AND SOURCES OF OPPOSITION

A. *Opposition*

While conservative parties, the Catholic Church and Evangelical groups, and President Ortega have wholeheartedly supported the blanket ban, public support has been inconsistent. In fact, popular support for the ban has been neither overwhelming nor uniform. In a public opinion poll conducted in Nicaragua soon after the blanket ban's implementation, sixty-nine percent of the poll's respondents believed that abortion should be allowed when a woman's life is in

166. *Id.*; see also UNITED NATIONS POPULATION FUND ("UNFPA"), STATE OF THE WORLD POPULATION 1997, THE RIGHT TO CHOOSE: REPRODUCTIVE RIGHTS AND REPRODUCTIVE HEALTH (1997), available at <http://www.unfpa.org/swp/1997/chapter2.htm> [hereinafter UNFPA REPORT].

167. UNICEF, EVALUATION OF GENDER POLICY IMPLEMENTATION IN UNICEF (ANNEX: COUNTRY CASE STUDIES) 88 (2008), http://www.unicef.org/evaldatabase/files/2008_Gender_Evaluation_Report_Annex.pdf.

168. UNFPA REPORT, *supra* note 166.

169. The Nicaraguan legislature conceives the blanket ban as consistent with the right to life. In fact, legislative intent driving the ban is upholding the right to life. I used the language of "means and ends" in this Section because the legislature's reasoning behind the law fails the "means fitting the ends" analysis. In trying to uphold the right to life, the legislature has violated the right to life. The legislature's narrow interpretation of the "right to life" focuses exclusively on the fetus, while disregarding the mother's right to life.

danger.¹⁷⁰ At the same time, much of domestic civil society, including women's groups and medical associations, has been vocal in denouncing the law.¹⁷¹

Nicaraguan non-governmental organizations ("NGOs") criticize the blanket ban as a clear violation of the rights to sexual and reproductive health and, more fundamentally, life.¹⁷² A number of human rights organizations collaborated in January of 2007 to present a petition to the Nicaraguan Supreme Court denouncing the law as unconstitutional.¹⁷³ There, the NGOs argued that, as a result of the political alliance between the FSLN and the Catholic Church, Nicaragua is one of four countries in the world that prohibits all procedures that terminate pregnancies.¹⁷⁴ They also contended that the Church's involvement in politics and domestic affairs "results in a lack of information and services to women in Latin American countries and a loss of self-determination for women concerning their reproductive rights."¹⁷⁵ At the same time, both international and domestic women's rights groups oppose the new legislation. They consider the blanket ban to be an egregious violation of human rights.¹⁷⁶ That said, while these arguments are generally persuasive,

170. Angus Reid Global Monitor, *Polls & Research: Nicaraguans Favour Abortion in Some Cases*, ANGUS REID POLLS, Dec. 4, 2006, http://www.angus-reid.com/polls/view/nicaraguans_favour_abortion_in_some_cases/ ("Methodology: Face-to-face interviews with 1,000 Nicaraguan adults, conducted from Aug. 28 to Sept. 2, 2006. Margin of error is 4 per cent."). Generally, research has supported that respondents with pro-life views in opinion polls are not necessarily supportive of abortion bans without exceptions for the woman's life and health when given the opportunity to respond to those questions. See generally Elizabeth A. Cook et al., *Measuring Public Attitudes on Abortion: Methodological and Substantive Considerations*, 25 FAM. PLAN. PERSP. 118 (1993) (explaining that even proponents of abortion laws would restrict abortion laws in certain situations). The study was conducted in the United States but can be analogized to sentiments in Nicaragua.

171. See generally HUMAN RIGHTS WATCH, *supra* note 13 (relating stories from Nicaraguan women and doctors and arguing that the blanket ban violates human rights standards).

172. See, e.g., INFORME ANUAL, *supra* note 141 (explaining that the current abortion ban is a flagrant abuse of women's human rights).

173. These groups included CENIDH, the Feminist Movement, medical associations such as the Nicaraguan Society of Obstetricians and Gynecologists ("SONIGOB") and the Nicaraguan Society of General Medicine ("SONIMEG"), the Faculty of Medicine Managua UNAN, Faculty of Medicine, Leon UNAN, CODENIs (a UNICEF affiliated children's NGO), the Communal Movement, and Human Rights Activists. See, e.g., CIEN DIAS, *supra* note 31, at 10 (explaining that CENIDH and other feminist and socially-oriented organizations protested the law).

174. CIEN DIAS, *supra* note 31, at 10.

175. Cho, *supra* note 95, at 422.

176. Groups such as CENIDH, Feminist Movement, SONIGOB, SONIMEG, have petitioned the Nicaraguan Supreme Court to overrule the law and have simultaneously

and although civil society can exert a great deal of influence on politics, on its own, NGO opposition to anti-abortion legislation is unlikely to set off a policy reversal in the legislature of this predominantly Catholic country.¹⁷⁷

B. Sources of Political Support: The Executive and Legislative Branches and Their Influence on the Court

In March of 2007, President Ortega reaffirmed his stance on abortion and support for the blanket ban when speaking before the Nicaraguan Supreme Court.¹⁷⁸ René Núñez, the deputy of the FSLN and the President of Nicaragua's National Assembly, further bolstered Ortega's support for the law when he expressed the FSLN's intent to continue a working relationship with the hierarchy of the Catholic Church.¹⁷⁹ These statements of support, combined with the National Assembly's legislative renewal of the blanket ban in September of 2007, suggest continued political backing of the ban.¹⁸⁰

With this overwhelming political support for the blanket ban in mind, the most viable domestic option remaining for overturning the blanket ban is for the Nicaraguan Supreme Court to find the law unconstitutional. As with all supreme courts, the Nicaraguan Supreme Court should not be swayed by social forces or political motivations. Rather, the court must interpret the law in an unbiased manner to ensure that the court's decisions are consistent with the constitution. Unfortunately, in Nicaragua, the ideal of judicial impartiality is not upheld. "[T]he Nicaraguan Supreme Court is one of the most discredited institutions in the country,"¹⁸¹ especially in light of a 1999 political pact (hereinafter "the pact") between former

engaged in lobbying campaigns at a national and international level. See, e.g., Brief for Human Rights Watch as Amicus Curiae Opposing the Law, On the Abortion-Related Provisions of Law 603 of 2006 (Penal Code), Supreme Court of Justice, at 19, available at <http://hrw.org/pub/amicusbriefs/nicaragua0807web.pdf> [hereinafter HRW Amicus Brief] (articulating the inconsistencies between the abortion law in Nicaragua and general international human rights laws and delineating the human rights implicated and violated in the abortion ban). For an analysis of the potential power of civil society to change the law, see generally BARRY E. CARTER ET AL., INTERNATIONAL LAW 145-48 (5th ed. 2007) (describing the rise of NGOs, their increasing influence, and their inherent limitations).

177. *Id.* at 148 (citing NGO limitations).

178. CIEN DIAS, *supra* note 31, at 10.

179. *Id.*

180. The ban was renewed "in a historic 66-3 vote." Matthew C. Hoffman, *Pope Congratulates Nicaraguan Government for Maintaining Prohibition of Abortion*, LIFE SITE NEWS, Sept. 25, 2007, <http://www.lifesitenews.com/ldn/2007/sep/07092502.html>.

181. Reich, *supra* note 58.

presidents Arnaldo Alemán¹⁸² and Daniel Ortega.¹⁸³ In order to “understand the character of the Nicaraguan Supreme Court, it helps to know that it may be the only supreme court in the world on which three sitting justices have had their U.S. visas revoked because of corruption.”¹⁸⁴ Aside from the ethics concerns arising from the individual judges, the pact increased the size of the Nicaraguan Supreme Court from twelve to sixteen justices and as a result of the alliance, the court’s members have been “personally selected by Ortega or Alemán, and they respond to orders from their party bosses.”¹⁸⁵

C. *The Court and the Problem of Implied Rights: A Constitutional Challenge in a Civil Law Country—Arguments and Counterarguments*

Even without the high level of corruption, the court may hold the law to be constitutional, because the Nicaraguan constitution makes no explicit mention of the right to an abortion. In civil law countries such as Nicaragua, rights granted domestically must be explicitly mentioned in the constitution.¹⁸⁶ That is, rights are never implied but are binding only if they are institutionalized through the wording of the legislation.¹⁸⁷ In the context of the abortion blanket ban, because there is no explicit inclusion of the right to an abortion in the constitution and no history of enforcement of women’s equality

182. Alemán was the Nicaraguan President from 1997 to 2001. He has faced worldwide allegations of money laundering and corruption. See, e.g., David Gonzalez, *Nicaragua President Demands Corruption Trial for Predecessor*, N.Y. TIMES, Aug. 8, 2002, at A5 (explaining that President Enrique Bolaños accused Alemán, his predecessor, of “having stolen nearly \$95 million from his impoverished country’s coffers for personal enrichment and demanded that he be stripped of immunity and face trial”); see also Joel Brinkley, *U.S. Envoy Goes to Nicaragua to Back Embattled Leader*, N.Y. TIMES, Oct. 5, 2005, at A6 (describing the pact (“el pacto”), which gives Alemán immunity and Ortega control of the court and the legislature).

183. The pact came after Ortega had been ousted from the presidency and was seeking to regain political power. See Brinkley, *supra* note 182; see also SKIDMORE & SMITH, *supra* note 34, at 379 (noting Ortega’s fall from power).

184. Reich, *supra* note 58.

185. *Id.*

186. As a civil law country, Nicaragua’s main source of law is the Civil Code (Código Civil). See New York University GlobaLex, <http://www.nyulawglobal.org/globalex/Nicaragua.htm> (last visited Dec. 26, 2008) (providing a general guide to Nicaraguan legislation and government).

187. See generally MARGHERITA RENDEL, WHOSE HUMAN RIGHTS? 11–12 (1997) (explaining that rights are secure only when they are “embedded or institutionalized in a web of institutions, rules of procedures, and beliefs: in legislation, constitutions[,] and international Conventions”).

rights,¹⁸⁸ it is unlikely that the court will decide the issue in favor of human rights groups.¹⁸⁹

The Nicaraguan National Assembly, for its part, justifies the law under Article 23 of the constitution.¹⁹⁰ Under Article 23, the right to life is inviolable and inherent to the human person.¹⁹¹ The legislature also cites Article 74, which provides for special protection to the process of human reproduction.¹⁹² The legislature reasons that, under these provisions, it is clear that under no circumstances should one person be allowed to take away another person's life, which includes the life of an unborn child.¹⁹³

Ironically, these same provisions in the constitution peripherally support the right to an abortion under certain circumstances. The blanket ban violates Article 23¹⁹⁴ by compromising the mother's right to life, and it also violates Article 74¹⁹⁵ by denying healthcare to

188. Rights given in constitutions are either negative or positive rights. Positive rights, also known as affirmative rights, are binding, and they require overt governmental action in the form of executive, judicial, or legislative enforcement. However, in Nicaragua, there is no historical evidence to show that rights violated by the ban have been affirmatively enforced. See discussion *infra* Part V.C, notes 311–14 and accompanying text (commenting on the absence of enforcement of women's rights in Nicaragua).

189. The ruling was supposed to come in early 2007. Organizations protesting the ban have been reporting since September 2007 that the "Supreme Court is expected to rule on the issue in a few weeks." NicaNet, *supra* note 2; see also, Nicaragua Solidarity Campaign, Abortion Rights in Nicaragua, http://www.nicaraguasc.org.uk/campaigns/abortion_rights.htm (last visited Dec. 26, 2008) (explaining that NGOs, such as the Nicaragua Solidarity Campaign, have been exerting pressure on the Nicaraguan Supreme Court since November 2007).

190. See Constitución Política de la República de Nicaragua [Cn.] tit. IV, ch. I, art. 23, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf>; see also *Exposición de Motivos y el Proyecto de Ley de Reforma a los Artículos 162, 163, 164 y 165 del Código Penal*, <http://www.euram.com.ni/Terapeutico/Archivos%20HTML/EI%20Proyecto%20de%20la%20Iglesia.htm> [hereinafter Penal Code Reform Project] (articulating specific constitutional support for the abortion ban).

191. Constitución Política de la República de Nicaragua [Cn.] tit. IV, ch. I, art. 23, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf>. In Nicaragua, there is no death penalty. *Id.*

192. A mother has special protection during her pregnancy. See Constitución Política de la República de Nicaragua [Cn.] tit. IV, ch. I, art. 23, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf>.

193. See Penal Code Reform Project, *supra* note 190.

194. See Constitución Política de la República de Nicaragua [Cn.] tit. IV, ch. I, art. 23, La Gaceta [L.G.] 9 January 1987, <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf>.

195. See *id.* tit. IV, ch. IV, art. 74.

pregnant women in distress. Additionally, Article 27¹⁹⁶ and Article 48,¹⁹⁷ which both outline political rights, support the right to an abortion. Article 27 states that all persons are equal before the law, have the right to equal protection under the law, and shall not be discriminated against based on gender.¹⁹⁸ Article 48 reaffirms this by asserting that there is an absolute equality between men and women,¹⁹⁹ which presumably includes an equal right to life and protection under the law.

The denial of medical care under the blanket ban constitutes a violation of equal protection for women.²⁰⁰ However, Article 27 speaks in vague language and only supports gender equity as a broad category—there is no explicit listing of the rights it provides. By declaring that all persons shall have the right to respect for their physical, psychological, and moral integrity and that no one shall be subjected to torture or to inhumane, cruel, or degrading treatment, Article 36 also lends credence to the argument that the blanket ban is unconstitutional.²⁰¹ Once again, the absolute denial of medical care during a pregnancy that will almost certainly result in death if not aborted embodies a clear violation of this provision.²⁰²

At the same time, Nicaragua's monist constitution provides domestic accountability for treaty obligations.²⁰³ "Monism sees international law and the domestic legal system as part of the same legal order. International law has a primary place in this unitary legal system, such that domestic legal systems must always conform to the requirements of international law or find themselves in violation."²⁰⁴ Nicaragua has gone as far as to constitutionalize human rights treaties

196. This Article establishes that every person is equal under the law with the rights of equal protection, and that there will not be discrimination based on birth, nationality, political party, race, or sex. *Id.* tit. IV, ch. I, art. 27.

197. This Article establishes unconditional equality for all Nicaraguans in the exercise of political rights and states that absolute equality exists between men and women. The Article also asserts that it is the obligation of the State to eliminate the obstacles that currently impede equality between Nicaraguans and their effective participation in political, social, and economic life of the country. *Id.* tit. IV, ch. II, art. 48.

198. *See id.* tit. IV, ch. I, art. 27.

199. *See id.* tit. IV, ch. II, art. 48.

200. HUMAN RIGHTS WATCH REPORT, *supra* note 142.

201. *See* Constitución Política de la República de Nicaragua [Cn.] tit. IV, ch. I, art. 36, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf>.

202. *See infra* note 452 and accompanying text (examining the ideal plaintiff for litigating this issue).

203. Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 204 (2008).

204. *Id.*

in its constitution.²⁰⁵ In doing so, Nicaragua has shown the seriousness of its commitment to the human rights; as implemented by the constitution, these rights are “unlikely to be exited lightly.”²⁰⁶ Specifically, Article 46 of the Nicaraguan constitution provides constitutional recognition of international law as a source of domestic law, stating:

Everyone enjoys State protection and recognition of the inherent rights of the human person, the unqualified respect, promotion and protection of human rights and *the full realization of the rights enshrined in the Universal Declaration of Human Rights, in the American Declaration of Rights and Duties of Man, in the International Covenant on Economic, Social and Cultural Rights in the International Covenant on Civil and Political Organization United Nations and the American Convention on Human Rights of the Organization of American States.*²⁰⁷

Article 46 puts treaty obligations on par with domestic constitutional law, and, therefore, obligates the judicial branch to address violations of treaty law.²⁰⁸ Further, the legislature is obligated to implement laws in accordance with duties created by its monist constitutional system and under international law.²⁰⁹ Article 46 of the Nicaraguan constitution, in its monist orientation, calls for parity between domestic and international law rather than one prevailing over the other.²¹⁰ It also can be seen as a means of entrenching values and policies such that they cannot be overturned by the legislature on a whim.²¹¹

As constitutional rights are implicated, in theory, the Nicaraguan Supreme Court possesses the authority to review the constitutionality of the law. However, several legal factors hinder the court’s ability to

205. *Id.* at 207.

206. *Id.* at 226.

207. See Constitución Política de la República de Nicaragua [Cn.] tit. IV, ch. I, art. 46, La Gaceta [L.G.] 9 January 1987, available at <http://www.asamblea.gob.ni/opciones/constituciones/Constitucion%20Politica%20y%20sus%20reformas.pdf> (translation by author) (emphasis added).

208. See *id.* This can be contrasted against the U.S. difficulties implementing the Vienna Convention on Consular Relations (Apr., 21 U.S.T. 77, 596 U.N.T.S. 261). For suggestions on fixing this, see Smart on Crime: Recommendations for the Next Administration and Congress, *Fixing Medellin: Compliance with International Law and Protecting Consular Access*, http://www.2009transition.org/criminaljustice/index.php?option=com_content&view=article&id=25&Itemid=22 (last visited Dec. 26, 2008).

209. Tom Ginsburg et al., *supra* note 203, at 204.

210. *Id.*

211. *Id.* at 219.

rule in favor of a woman's right to an abortion. First, as a civil law country, Nicaragua grants the courts much more limited powers than common law countries such as the United States.²¹² The judicial branch in Nicaragua may not engage in judicial activism.²¹³ Only the Nicaraguan Supreme Court has the power of judicial review, but the court does not have the power to imply rights from the constitution.²¹⁴ Therefore, the court's determination of constitutionality will likely adhere strictly to a literal reading²¹⁵ of the constitution and its enumerated rights, which makes no mention of a right to an abortion.²¹⁶

In predicting the Nicaraguan Supreme Court's ruling, it is helpful to analogize to the Chilean abortion blanket ban. Chile, a civil law nation with a blanket ban on abortion in place, provides a parallel to the situation in Nicaragua. Chilean courts have upheld Chile's ban by consistently applying interpretive formalism, "as evidenced by [the court's] narrow interpretation and application of laws and constitutional provisions to factual situations, as well as in the evaluation of evidence."²¹⁷ The decision of the Chilean Supreme Court to narrowly construe the country's constitution bolsters the

212. Morgan, *supra* note 39, at 27; *see also* JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 38 (2d ed. 1985) ("[W]ithin the civil law tradition . . . the judicial function is narrow, mechanical, and uncreative.").

213. *See* Morgan, *supra* note 39, at 27.

214. *Id.* ("Civil law countries generally do not recognize judicial power to make law as common-law systems do."); *see also* MERRYMAN, *supra* note 212, at 156–57 (supporting the notion that judicial review in Latin America is entrusted to supreme courts rather than the judicial branch as a whole).

215. The same principles of strict interpretation, as would be followed by strict-constructionist justices in the United States, apply to the civil law justices in Nicaragua, thus leaving little room for implying rights from the constitution. *See* Morgan, *supra* note 39, at 11 ("Civil law countries generally do not recognize judicial power to make law as common-law systems do."). There are no notions of "penumbras" or implied rights of any sort. *Contra* *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (finding that certain constitutional provisions have "penumbras" that may cover rights, such as privacy, not explicit in the constitution). The justices in Nicaragua are not permitted to delve into de facto violations of the constitution, as the U.S. Supreme Court has done on many occasions. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that de facto segregation of schools on the basis of race violated the constitutionally guaranteed protection of due process). For more on this method of interpretation, *see generally* ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1998).

216. *See* Constitución Política de la República de Chile [Constitution], Capítulo III, De Los Derechos y Deberes Constitucionales, Artículos 19–23 (Chile), *available at* http://www.camara.cl/legis/constitucion/constitucion_politica.pdf (assuring a right to healthcare similar to the right that exists in Nicaragua).

217. CENTER FOR REPRODUCTIVE RIGHTS, *BODIES ON TRIAL: REPRODUCTIVE RIGHTS IN LATIN AMERICAN COURTS* 38 (2003), *available at* http://www.reproductive-rights.org/pub_bo_bot.html.

argument that rights do not exist without explicit constitutional enumeration, and it is likely that, as a civil law nation, Nicaragua's judicial body will follow the Chilean court's method of interpretation and subsequent ruling.

Ultimately, advocates of the therapeutic abortion exception are unlikely to win a procedural battle, much less a substantive one. The court will likely adjudge the law to be constitutional, because it addresses abortion on its face; but the law violates the constitution through its effects, namely, the denial of medical care to pregnant women. The pro-choice proponents' case is further weakened by the fact that there is no activist court in Nicaragua, nor notions of tyranny of the majority in civil law countries,²¹⁸ which would allow for judicial intervention to protect the weak.²¹⁹ Absent these conditions, the Nicaraguan Supreme Court's sole purpose is to interpret the code strictly.²²⁰ The limitations of a civil law court combined with the undermined impartiality of the Nicaraguan court indicate that the court will likely continue to yield to those in power and uphold the law created by the executive and legislative branches.

D. Ad-Hoc Domestic Solutions: Abortion Tourism and Black Markets

Another alternative for expectant mothers would be to leave the country to have an abortion. While this seems a viable option in theory, it ignores the socio-economic reality in Nicaragua. In fact, relying on abortion tourism as the answer on this issue is the reproductive health policy equivalent to "let them eat cake." Women who cannot afford to bribe a physician for an abortion in a private clinic certainly cannot pay to travel outside the country for an

218. Morgan, *supra* note 39, at 27 ("[D]ifficulties in implementing the constitution arose as a result of the magnitude of the task facing the National Assembly and the judicial system. Like other Latin American countries, Nicaragua's legal system is a civil law system which relies on written codes or statutes as sources of law to a much greater extent than do common-law systems. Civil law countries generally do not recognize judicial power to make law as common-law systems do.").

219. The term "tyranny of the majority" originated from Alexis de Tocqueville in the 1800s. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283-300 (Arthur Goldhammer trans., 2004) (discussing the dangers of a democratic society falling into tyranny when the majority has "omnipotent" power over both the political and social decisions, at times to the destruction of minority groups).

220. The court has done this in a haphazard matter. See William Grigsby, *Nicaragua's Justice System: A Portrait in Grays*, *REVISTA ENVÍO*, Oct. 2007, available at <http://www.envio.org.ni/articulo/3669> (explaining that corruption and a lack of uniformity, rather than fidelity to the law, pervade Nicaragua's judicial decisions).

abortion. Thus, the women most hurt by the abortion blanket ban are the poorest of the poor.

Likewise, leaving these women reliant on homeopathic cures—the Rhythm Method advocated by the Nicaraguan Catholic Church,²²¹ or the Billings Ovulation method, also known as Vatican Roulette, advocated more broadly by the Catholic Church²²²—or on a black market in abortion procedures, are all equally unacceptable solutions. The United Nations Population Fund estimates that thirty to forty percent of maternal deaths are caused by illegal abortions, enough to constitute one of the main causes of death in expectant mothers in Latin America.²²³ By forcing women to rely on medicinal cures and the black market, Nicaragua increases the risk that mothers will perish from the resultant complications of these procedures. The law lacks the deterrent effect the legislature may envision; statistics have shown that abortions will continue to occur regardless of their legality.²²⁴ Hence, through the pursuit of preserving the unborn and “the right to life,” legislators have effectively “mandate[ed] death sentences for women” in certain circumstances.²²⁵

IV. THE ROLE OF INTERNATIONAL LAW

A. *Discussion of International Intervention: Form and Substance*

Deciding the question internationally raises the question—where does the international community derive the authority to intervene in

221. HELEN VARNEY ET AL., *VARNEY'S MIDWIFERY* 472 (2003), available at <http://books.google.com/> (search “Varney’s Midwifery calendar method,” then follow “Varney’s Midwifery—Page 472”). “The Nicaraguan Roman Catholic Church has publicly condemned contraception other than the rhythm method.” Dennis Gilbert, *The Society and Its Environment*, in *NICARAGUA: A COUNTRY STUDY*, 53, 83 (im Merrill ed., Library of Congress, Federal Research Division, 1994).

222. VARNEY ET AL., *supra* note 221, at 472–73. “Periodic continence, that is, the methods of birth regulation based on self-observation and the use of infertile periods, is in conformity with the objective criteria of morality.” CATECHISM 2370, *supra* note 94, at 508; *see also* The Billings Centre of Fertility Education, *What is the Billings Ovulation Method?*, <http://www.billings-centre.ab.ca/general/index.html> (last visited Dec. 26, 2008) (describing the Billings Ovulation Method as natural contraception through abstaining from sexual intercourse until fertility is at its lowest).

223. Cho, *supra* note 95, at 426 (citing UNFPA figures).

224. *See* Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 *BROOK. J. INT’L L.* 309, 323 (1991) (“[A]lthough abortion is a controversial method of fertility control, it is indisputable that throughout history women have exercised that option and will continue to do so whatever the risks.”).

225. Penn Garvin, *Information on the Case Against the Network of Women Against Violence*, *THE CENTRAL AMERICAN WOMEN’S NETWORK WEBSITE* (Apr. 2008), <http://www.cawn.org/news/genderviolence.htm>.

order to alter a domestic policy? For lesser developed countries (“LDCs”), especially in Latin America, the process of intervention elicits memories of the colonial powers and most recently, the United States’ cultural imperialist attempts to exert influence in the developing world.²²⁶ Past processes of changing internal policy have been less about law, norms, and enforceable global standards than about power, political strategy, and coercion. Yet international bodies, such as the United Nations, and treaty law’s growing regime have made it increasingly difficult to unilaterally exercise hard power in the world arena without international repercussions.²²⁷ Though this is not to say that political expediency is entirely removed from the equation.²²⁸

With these constraints in mind, several important prerequisites must be met in order for an international remedy to be deemed appropriate. First of all, as the international reaction is predicated on human rights, the right involved must be established and then the subsequent violations of the right must be supported by fact-finding.²²⁹ Next, with the need for intervention established, the appropriate means of intervention must be chosen. This involves deciding which international organizations, countries, or courts will

226. For instance, the United States’ history of intervention includes policies such as the Roosevelt Corollary. “With this statement, [Theodore] Roosevelt enunciated not merely a corollary to the Monroe Doctrine but an entirely new diplomatic tenet which epitomized his ‘big stick’ approach to foreign policy.” Serge Ricard, *The Roosevelt Corollary*, 36 PRESIDENTIAL STUD. Q. 17, 18 (2006). Roosevelt used this Corollary to justify United States intervention into countries in the Western Hemisphere. *Id.* It was “an aggressive policy . . . [used as] . . . a cover for imperial designs on Latin America.” *Id.* The Roosevelt Corollary “claim[ed] for the United States the right to act unilaterally and, if necessary, preemptively, to maintain order in the Western Hemisphere.” *Id.* While the United States pushes abroad on policy change, it is resistant to change at home. More and more, there is pressure on the United States to abolish the death penalty—the United States is increasingly isolated but refuses to conform to a developing international standard. See Rory Carroll, *Global Petition Puts Pressure on U.S. to Abolish Death Penalty*, THE GUARDIAN (Manchester), Dec. 19, 2000, available at <http://www.guardian.co.uk/world/2000/dec/19/uselections2000.usa>.

227. See, e.g., JEAN BRICMONT, HUMANITARIAN IMPERIALISM: USING HUMAN RIGHTS TO SELL WAR 9 (Diana Johnstone trans., 2006) (citing the disasters of “intervention policy” such as the current intervention in Iraq). Repercussions of such policies may come in the form of international opinion or military response.

228. See Interview with Arthur M. Weisburd, *supra* note 19 (discussing why human rights violations are addressed by governments in some instances but are ignored in others). As a practical matter, governments are less inclined to criticize their political allies, trading partners, and major world powers due to political concerns. *Id.*

229. See generally Sydney D. Bailey, *UN Fact-Finding and Human Rights Complaints*, 48 INTL. AFF. 250 (1972) (discussing the various types of fact-finding done by the United Nations regarding human rights violations and the challenges that accompany sifting through necessarily broad scope of factual information obtained).

be involved in enforcing the right. In the case of the Nicaraguan blanket abortion ban, this Comment argues that the right at issue should be framed as “the right to the mother’s life,” and a nexus of treaty obligations to which Nicaragua has assented can enforce the appropriate remedy.

B. Step One—Framing the Issue

International law is frequently critiqued for its inability to enforce broad declarations, particularly in the area of human rights.²³⁰ Though some believe that it is a reality for domestic legislative bodies that “international norms . . . may determine the ultimate legality of their official actions,”²³¹ others remain fierce advocates for sovereignty over domestic issues.²³² At the same time, it is an even more delicate proposition to characterize a domestic policy that affects only a small section of the population under very narrow conditions as a sweeping matter of international law. Indeed, the effort risks coming across as a publicity stance or as another unwanted intrusion from countries with antithetical ideological stances on reproductive issues.

It is because of the delicacy of these issues that any international effort must be seen from all perspectives as legitimate. Due to a need for legitimacy in action, this Section seeks to illustrate that, due to the current wide range of abortion and reproductive rights policies,²³³ the

230. “[T]he obligations set out in the human rights regime” are acknowledged by most states but “the actual behavior of states . . . often indicates a failure to live up to those obligations.” TONY EVANS, *THE POLITICS OF HUMAN RIGHTS* 62 (2d ed. 2005).

231. Wilkins & Reynolds, *supra* note 17, at 125.

232. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 *STAN. L. REV.* 1175, 1179 (2007) (using the notion of “dualism” to argue that “international law and domestic law control only their respective spheres”).

233. See Albin Eser & Hans-Georg Koch, *ABORTION AND THE LAW: FROM INTERNATIONAL COMPARISON TO LEGAL POLICY* 29–68 (Emily Silverman trans., 2005) (explaining the range of reproductive policies around the world as well as the motivations and concerns behind them). In comparison to the United States, although Congress contemporaneously enacted a more restrictive policy in the federal partial birth abortion ban when the Nicaraguan ban was passed, the policies were implemented for strikingly different reasons. See *Gonzales v. Carhart*, 550 U.S. 124, ___, 127 S.Ct. 1610, 1638–39 (2007) (upholding the partial birth abortion ban based on interstate commerce). The display of judicial power in the United States abortion debate contrasts with the relative impotence of the courts in civil law nations like Nicaragua. Furthermore, the right involved in the United States is characterized as a privacy right. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Planned Parenthood v. Casey*, 505 U.S. 833, 896 (1992); *Roe v. Wade*, 410 U.S. 113, 154 (1973). See generally JOYCELYN M. POLLOCK, *ETHICS IN CRIME AND JUSTICE:*

issue in Nicaragua should be framed primarily as a right to life rather than to reproductive health. Even among those who purport to hold broad universalist views of human rights, who maintain that human rights exist uniformly regardless of culture, concepts of reproductive rights differ.²³⁴ Reproductive health policies vary substantially in nations²³⁵ that have signed on to the primary Universalist human rights document, the Universal Declaration of Human Rights (“UDHR”).²³⁶ Without consensus in policy among Universalists, framing the issue primarily as a right to reproductive health presents an even more precarious position from a culturally relative rights standpoint.²³⁷ Cultural relativists believe that rights exist through

DILEMMAS & DECISIONS (2d ed. 1994) (conceptualizing abortion as a privacy right). The remaining issues are largely jurisdictional and involve federalism concerns. Specifically, whether state interests or national legislation control the issue hinges on whether interstate commerce is involved. *See Carhart*, 550 U.S. at ___, 127 S. Ct. at 1624 (framing aspects of the Federal Abortion Ban within the context of interstate commerce regulation). Furthermore, the conservative trend embodied by the United States’ recently enacted ban on partial birth abortions provides further evidence of a lack of consensus, both domestically and internationally, on the issue. *See id.* (upholding the constitutionality of the Federal Abortion Ban). Though the actual terms of the new U.S. legislation are not nearly as restrictive as the law in Nicaragua, pro-choice groups find the implications of the tightening of restrictions to be unsettling. *See generally* National Women’s Law Center, Gonzales v. Carhart: *The Supreme Court Turns Its Back on Women’s Health and on Three Decades of Constitutional Law* (2007), <http://www.nwlc.org/pdf/GonzalesvCarhart2.pdf> (critiquing the Supreme Court decision). Meanwhile, the disparity in policies worldwide is highlighted by the liberal approach to abortion favored by many European social democracies like the Netherlands. These countries provide free abortions for women during the first twenty-four weeks of pregnancy. *See, e.g.*, Netherlands Ministry of Foreign Affairs, Q&A on Abortion in the Netherlands, at 2, <http://www.hollandnagykovetseg.hu/files/4486929507.pdf> (last visited Dec. 26, 2008) (discussing the laws on abortion in the Netherlands). *Cf.* Wilkins & Reynolds, *supra* note 17, at 131–36 (asserting that the United Nations, along with the International Criminal Court, has attempted to establish a “world-wide right to abortion,” and examining the notion that international law is now more readily viewed as controlling over domestic policy in certain instances).

234. *See* Melissa Robbins, Comment, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT’L L.J. 275, 277–79 (2005).

235. Tatyana A. Margolin, *Abortion as a Human Right*, 29 WOMEN’S RTS. L. REP. 77, 88–89 (2008) (contrasting nominal declarations in treaties with the implementation of reproductive health policies in line with U.N. treaty commitments).

236. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), *available at* <http://www.unhcr.ch/udhr/>.

237. There is a longstanding debate among human rights scholars whether rights should be universal or whether they should be culturally relative. For further discussion of the differences between the two stances, *see* Robbins, *supra* note 234, at 277–79. Yet, while Robbins’ definitional sections on cultural relativism and universalism are helpful, this piece disagrees with the assertion that regional agreements lead to the breakdown of rights regimes or that “differences between regional systems create disparities in the

culture.²³⁸ Therefore, there is no singular bundle of human rights but rather rights differ from one culture to another.²³⁹ In this light, the issue is extremely delicate in an environment that is unreceptive to notions of reproductive autonomy. As articulated by Pope Paul VI,

[the Catholic Church is] obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, *even for therapeutic reasons*, are to be absolutely excluded as lawful means of regulating the number of children.²⁴⁰

interpretation and enforcement of human rights.” *Id.* at 286–87. Rather, this Comment argues that regional agreements can be used to bolster broader human rights treaty obligations.

238. Robbins, *supra* note 234, at 278.

239. See generally Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUMAN RIGHTS Q. 400, 403 (1984) (“[T]he cultural variability of human nature not only permits but requires significant allowance for crosscultural variations in human rights.”).

240. See THE CATHOLIC CHURCH, HUMANAE VITAE: ENCYCLICAL OF POPE PAUL VI ON THE REGULATION OF BIRTH 14 (1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_pvi_enc_25071968_humanae-vitae_en.html (emphasis added). In 1991, Pope John Paul II reaffirmed his commitment to fight abortion. “[I]t seems more urgent than ever that we should forcefully reaffirm our common teaching, based on sacred Scripture and tradition, with regard to the inviolability of innocent human life.” Letter of Pope John Paul II to All the World’s Bishops, On Combating Abortion and Euthanasia (May 19, 1991), <http://www.theworkofgod.org/JohnPill/Popoteach/combat.htm> (English text as released by the Vatican on June 21, 1991). The Church has forcefully echoed this sentiment throughout the twentieth and twenty-first centuries. In 2005, Pope Benedict reiterated that “it is necessary to help all people to be aware that the intrinsic evil of the crime of abortion, which attacks human life at its beginning, is also an aggression against society itself.” Cindy Wooden, *Abortion is Crime Against Society, Says Pope Benedict*, CATHOLIC NEWS SERVICE, Dec. 5, 2005, <http://www.catholicnews.com/data/stories/cns/0506904.htm>. However, even among Catholic countries, no consensus in policy exists. In fact, very few primarily Catholic countries have adopted the Pope’s words verbatim as national policy. Instead, most governments have chosen to make exceptions for rape and incest, as well as for both physical and mental health concerns. THE CENTER FOR REPRODUCTIVE RIGHTS, THE WORLD’S ABORTION LAWS (May 2007), available at http://www.reproductiverights.org/pdf/pub_fac_abortionlaws.pdf (stating that “61% of the world’s people live in countries where induced abortion is permitted either for a wide range of reasons or without restriction as to reason”). That said, no definitive trend can be found among Catholic countries of either relaxing or restricting reproductive health regulations. For instance, the Nicaraguan ban contrasts with Mexico City’s recent decision to allow abortion in certain instances. See Jo Tuckman, *Judges Uphold Abortion Rights in Mexico City*, THE GUARDIAN, Aug. 29, 2008, available at <http://www.guardian.co.uk/world/2008/aug/29/mexico.humanrights> (“Mexico’s supreme court yesterday upheld the capital’s abortion law by dismissing a challenge brought by the conservative federal government by eight votes to three. The law, in effect since April last year, requires Mexico City health services to provide free terminations to any woman up to 12 weeks into a pregnancy.”). Similarly, Portugal, a ninety percent Catholic nation, contemporaneously relaxed its law on abortion when Nicaragua implemented its total ban. *Portugal Ratifies Law Allowing Abortions*, THE GUARDIAN, Apr. 10, 2007, <http://www.guardian.co.uk/world/2007/apr/10/1>

It is because of this schism in human rights thought that the right involved must be conceptualized as one that is recognized from a culturally relative view of rights as it is the narrower of the two in the actions it will support. Framing the central issue as the right to life has the benefit of being strongly recognized in Latin America and under Catholicism.²⁴¹ This way, advocates of both schools of thought will view international action to protect this right as legitimate.

C. *Step Two—The Potentiality of a Human Rights Based Intervention*

Absent domestic protection of their rights, the injured minority must seek help from the international community for protection.²⁴² Enforcement efforts provide the “means of limiting or controlling the power and authority of the strong.”²⁴³ International enforcements

(discussing Portugal’s relaxation of abortion laws to address injuries from poorly performed illegal abortions).

241. In this environment without international consensus, there are some points on which the vast majority of people and governments tend to agree. For instance, even vehemently pro-life groups in the United States and the vast majority of other countries consider a complete ban on abortion extremist and beyond the scope of what the law should cover. Certain pro-life proponents in the United States even liken a law that allows abortion to save the woman’s life to self-defense provisions in criminal statutes. FRANCIS J. BECKWITH, *DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE* xiii (2007). The Catholic Church has even acknowledged the right to self-defense in CATECHISM 2264, which states that “[l]ove toward oneself remains a fundamental principle of morality. Therefore it is legitimate to insist on respect for one’s own right to life. Someone who defends his life is not guilty of murder even if he is forced to deal his [or her] aggressor a lethal blow.” CATECHISM 2264, *supra* note 94, at 487. While there may be separate issues with referring to an unborn baby as an aggressor, this provision of canon law suggests that the law in Nicaragua may very well violate Catholic conceptions of morality by denying the mother the means to defend her own life. On the other hand, most agree that forced sterilization programs violate human rights and natural law by denying the woman’s natural role as a mother. *See* Center for Reproductive Rights Worldwide, *Victory in Landmark Reproductive Rights Case Before CEDAW* (Nov. 9, 2006), <http://www.reproductiverights.org/worldwide.html> (arguing that sterilization without consent violates human rights). Along these same lines, it follows that an abortion ban that does not allow for the mother’s life can be perceived as a perversion of natural law in the sense that such a ban transforms a process designed to bring about new life into one that results in death. In this manner, the inherent problems with a complete ban on abortion, especially when it denies access to life-saving procedures, cannot fully be explained away with cultural relativist versions of human rights or by viewing human rights from a Catholic perspective. In fact, the violations involved seem all the more egregious in light of the Church’s espoused goal of preserving life. *See supra* notes 85–115 and accompanying text (discussing the Catholic Church’s goal in reproductive policy).

242. For more information on the domestic exhaustion of remedies, see sources cited *infra* Part VI.A and accompanying text.

243. RENDEL, *supra* note 187, at 1.

were first legitimized during the Nuremberg trials²⁴⁴ and have proven to be an effective tool for promoting human rights over the course of the twentieth century.²⁴⁵ At the same time, interventions can come in many forms: “military force; sanction systems, bilateral or multilateral; a cultural package bound in one or another form of exchange; or trade and aid.”²⁴⁶ Legitimate international interventions may occur where the democratic process has failed to produce laws that are consistent with human rights.²⁴⁷

In this instance, the situation is far removed from the rights abuses perpetrated in Sierra Leone or *los desaparecidos*²⁴⁸ and the disregard of rights seen under Pinochet.²⁴⁹ This is also not an instance of repression of the will of the majority,²⁵⁰ but quite the opposite; what must be addressed in Nicaragua is a democratically enacted law. However, international law and particularly human rights law are often at odds with principles of sovereignty. At the same time, it would be naïve to believe a democratically enacted law ensures the law’s consistency with human rights.²⁵¹

244. See The Nuremberg Trial, 6 F.R.D 69, 76 (1946) (“The Tribunal was invested with power to try and punish persons who had committed crimes against peace, war crimes and crimes against humanity as defined by the Charter.”). The “modern view of human rights emerged with the Nuremberg Tribunals and the Charter of the United Nations.” Berta E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT’L L. 309, 322 (1991). This view recognized that “the rules of public international law should and, in fact, do apply to individuals.” *Id.*

245. Since Nuremberg, the international court system has had increasing success in its prosecutorial efforts of human rights abuses perpetrated by individuals and corrupt regimes. See Hernandez, *supra* note 244, at 322. However, the prosecutorial model of redress would be inappropriate and ineffective in the Nicaraguan context. This stems from the fact that, while the Inter-American Court has had a great deal of success in enforcing reparations, it has had little success in enforcing criminal sanctions.

246. Makau Nutua, *The Complexity of Universalism in Human Rights*, in HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM 51, 57 (Andras Sajó ed., 2004).

247. TOM CAMPBELL, RIGHTS: A CRITICAL INTRODUCTION 111–16 (2006).

248. Proyecto Desaparecido, <http://www.desaparecidos.org/chile/eng.html> (last visited Dec. 26, 2008) (chronicling stories of “the disappeared” in 1970s Chile under Pinochet’s regime, which murdered thousands of its own citizens in an effort to stamp out political dissent). Similar practices occurred in Argentina at the same time under its military junta. *Id.*

249. See, e.g., Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 HUM. RTS. Q. 927 (1999) (detailing the numerous human rights violations under Pinochet’s rule and his subsequent arrest).

250. Some would argue the law was a repression of the will of the majority. See María López Vigil, *Nicaragua: Notes on a Scandal of Epic Proportions*, REVISTA ENVÍO, Oct. 2007, available at <http://www.envio.org.ni/articulo/3670> (“[T]his isn’t going to be decided by medical criteria or evidence from reality. This is a political deal.”).

251. See CAMPBELL, *supra* note 247, at 97 (“Democracy too can be a threat to human rights because of (a) the special interests of elected politicians who neglect human rights in

1. Hard and Soft Power Solutions: The Leveraging of Aid and the Potential Use of Sanctions

Most commonly, sanctions and monetary power have been used to address domestic policies that are inconsistent with human rights. The West has an extensive history of conditioning charitable aid on compliance with the donor country's policy objectives.²⁵² In theory, "[f]inancial and technical assistance should be aimed exclusively at promoting the economic and social progress of developing countries and should not in any way be used by the developed countries to the detriment of the national sovereignty of recipient countries."²⁵³ Yet, in practice, as Benjamin Nelson²⁵⁴ noted, "[a]id appears to have established as a priority the importance of influencing domestic policy in the recipient countries."²⁵⁵

As one can imagine, the need to receive aid, albeit aid conditioned on the fulfillment of the donor's foreign policy objective, is greater for Nicaragua and other developing nations than in the more developed countries.²⁵⁶ However, to date, the use of economic

order to retain or gain power (short-sightedness, pressure groups, public opinion polls, etc.), (b) the unfettered power of majorities to impose their will on the rest of society[,] and (c) the special vulnerability of disadvantaged groups under any political system.").

252. Aid from the United States has historically been offered in areas of national security or military involvement—in the Cold War, aid was offered to fight communism and promote progressive societies. Examples of this practice are the United States' diplomatic efforts in North Korea to curb the development of nuclear weapons and the United States' aid to Pakistan and Egypt to bribe the countries into friendly relations. See Evan Osbourne, *Rethinking Foreign Aid*, 22 CATO J. 297, 306–07 (Fall 2002), available at <http://www.cato.org/pubs/journal/cj22n2/cj22n2-7.pdf> (detailing statistics of aid from the United States and the role of the United States' development projects). The same strategy is now being implemented in the realm of social values. In 2005, the United States proved to be a finicky donor of international aid, pulling funds out of Brazil's family planning projects. Despite its overwhelming success, the United States did not agree with Brazil's methodology, as the government was distributing condoms to prostitutes and paying them to conduct mini-courses on safe sex with their customers. See Larry Rohter, *Prostitution Puts U.S. and Brazil at Odds on AIDS Policy*, N.Y. TIMES, July 24, 2005, at A3, available at <http://www.nytimes.com/2005/07/24/international/americas/24brazil.html>.

253. International Development Strategy for the Second United Nations Development Decade, G.A. Res. 2626, ¶ 46, U.N. Doc. A/RES/2626 (Oct. 24, 1970), available at <http://www.un-documents.net/a25r2626.htm>.

254. At the time of the statement, Nelson served as Director of International Relations and Trade Issues, National Security and International Affairs Division.

255. *International Affairs Budget: Framework for Assessing Relevance, Priority and Efficiency: Hearing Before the Subcomm. on the Budget*, 105th Cong. 15 (1997) (testimony of Benjamin F. Nelson, Director, International Relations & Trade Issues, National Security & International Affairs Division).

256. For example, if the European Union offered an economic incentive package to abolish the death penalty, the United States likely would not accept on principle, regardless of the specific numbers involved.

coercion has proved ineffective at inciting a policy change in Nicaragua. In fact, Nicaragua overwhelmingly renewed the ban on abortion in August 2007, ignoring thinly veiled threats from various donor nations.²⁵⁷ In particular, Sweden has been vocal in denouncing the law and announced that it was withdrawing aid from Nicaragua, El Salvador, and Honduras.²⁵⁸ In response, Nicaragua, which receives \$21 million a year from Sweden, has accused Sweden of “interfering in Nicaragua’s domestic affairs and acting like a proconsul by conditioning the aid on permitting abortion.”²⁵⁹ Nicaragua has also fended off criticism from the Netherlands and other liberal European powers that invest in or otherwise aid the country.²⁶⁰

Judging from the ineffective leveraging of economic aid, it is also unlikely that sanctions would work in this context.²⁶¹ While it is tempting to use the proverbial stick when the carrot does not work, the use of sanctions would likely fuel the antagonism caused by unsolicited foreign involvement in Nicaragua’s domestic affairs. In addition, it is important to note who bears the brunt of sanctions.²⁶² Effective economic sanctions have historically disproportionately hurt the poor; the policy makers tend to have the means to live comfortably despite the repercussions on the national economy.²⁶³

Also, the effectiveness of sanctions is dependent on a consensus on the issue at hand. Nations have utilized sanctions in instances in which near unanimous political and ethical agreement on a particular issue existed. For example, sanctions were successful in changing the policies of class-based societies based on the common belief that

257. Samantha Singson, *Netherlands Threatens Nicaragua over Conservative Abortion Laws*, CATHOLIC FAM. & HUM. RTS. INST., July 5, 2007, http://www.c-fam.org/publications/pub_detail.asp?id=521&css; cf. Daniel Downs, *United Nations: Liberalism’s Strong Arm for Abortion*, AM. CHRON., July 28, 2007, <http://www.americanchronicle.com/articles/33423> (discussing the Catholic view of international intervention regarding abortion).

258. See *Tracking Trends*, LATIN AM. WKLY REP., Sept. 6, 2007, at 15.

259. *Id.*

260. Singson, *supra* note 257 (“Bert Koenders, Dutch Minister of Development, has told the government of Nicaragua that his country may withdraw much needed development assistance unless Nicaragua liberalizes its abortion laws.”).

261. See Debra Liang Fenton, *What Works?*, in IMPLEMENTING U.S. HUMAN RIGHTS POLICY 435, 443–45 (Debra Liang Fenton ed., 2004).

262. See Aryeh Neier, *Economic Sanctions and Human Rights*, in REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 291 (Samantha Power & Graham Allison eds., 2000) (noting the “harmful impact on ordinary citizens”).

263. Income distribution figures for Nicaragua show that “forty-five percent of all income goes to the richest ten percent of the population.” UNICEF, *At a Glance: Nicaragua*, <http://www.unicef.org/infobycountry/nicaragua.html> (last visited Dec. 26, 2008).

racial prejudice is an unsupportable basis for national policy.²⁶⁴ Of course, in this instance, there is less of a consensus and sanctions to address a reproductive health policy are unprecedented. Due to this fact, sanctions are inappropriately broad punishment—affecting all of society. Rather, the remedy must narrowly address the injury. At the same time, imposing sanctions against the third-poorest nation in the Americas,²⁶⁵ aside from generating bad public relations within the developing world, could have long-lasting implications on the already lacking healthcare system and the overall economy. Sanctions are ultimately a poor choice in light of the goal of an international intervention in this instance, which is to promote access to healthcare and life-saving procedures.

2. Critique of Power-Based Interventions in the Latin American Context and the Role of the United States

Given Nicaragua's economic reality, it seems unexpected that the country would risk losing foreign aid. But Nicaragua's refusal to alter domestic policy in response to foreign pressure is not as surprising as it would initially seem. In his 2006 book, Jean Bricmont coins the term "humanitarian imperialism."²⁶⁶ Although Bricmont's views are more radical than the views put forth by this Comment, he does present a poignant critique of Western intervention. Centering on the United States, and to some extent on the West as a whole, Bricmont analyzes the dynamics of foreign relations between the developed world and the developing world. The United States is experiencing a Habermian legitimation crisis on an international level.²⁶⁷ That is, the United States, as a nation, is seen to be perpetually exercising a unilateral right to intervene.²⁶⁸ As a result,

264. See BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, *INTERNATIONAL LAW* 134 (5th ed., 2007) (describing the use of sanctions to address apartheid in the South African context, in which the international action was justified by South Africa's violation of Articles 55 and 56 of the U.N. Charter). *But see* Neier, *supra* note 262, at 299–301 (questioning the effectiveness of sanctions in South Africa).

265. Neier, *supra* note 262, at 291.

266. BRICMONT, *supra* note 227, at 10.

267. The term "legitimation crisis" is borrowed from Jürgen Habermas' book, *Legitimation Crisis*. JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (Thomas McCarthy trans., Beacon Press 1975). A legitimation crisis occurs when a government loses its authority to govern. See Alex Gourevitch, *National Insecurities: Moral Crisis and National Interest in American Foreign Policy*, available at http://www.allacademic.com/meta/p98667_index.html (last visited Dec. 26, 2008) (paper presented at the annual meeting of the International Studies Association, Mar. 22, 2006). The term can be applied outside of a domestic context and in an international context to the United States' twenty-first century dominance of human rights enforcements, now under heavy critique.

268. Bricmont, *supra* note 227, at 18 (noting a perceived "duty to intervene").

the United States has lost its credibility with the world as the principal defender of human rights. This loss of credibility is not just in the Middle East, or the United States' "backyard," Latin America, but has spread throughout LDCs worldwide. As articulated by Mahathir Mohamad, former prime minister of Malaysia,

there are not just double standards where human rights are concerned, there are multiple standards. [T]he people whose hands are soaked in the blood of the innocents . . . the Panamanians, *the Nicaraguans*, the Chileans, the Ecuadorians; the people who assassinated the presidents of Panama, Chile, Ecuador; the people who ignored international law and mounted military attacks, invading and killing hundreds of Panamanians in order to arrest Noriega and to try him not under Panamanian laws but under their own country's law, have these people a right to question human rights in our country[?]²⁶⁹

This recent legitimacy crisis combines with the well-engrained rhetoric of dependency theory in the region.²⁷⁰ Dependency theory is premised on the belief that developed nations, such as the United States, assert themselves and economically victimize the developing world. On many fronts, our neighbors to the south have decades of built-up resentment against the United States. At the same time, on the human rights front, Latin American leaders are increasingly tired of the United States' attempts to save Latin Americans from themselves.²⁷¹ Further evidencing the changing world sentiment

269. Mahathir Mohamad, *People with Blood-soaked Hands*, Address at Suhakam's Human Rights Conference (Sept. 9, 2005), <http://www.informationclearinghouse.info/article10305.htm> (emphasis added); *see also* BRICMONT, *supra* note 227, at 82 (citing Mohamad's speech and discussing its implications).

270. *See generally* FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, *DEPENDENCIA Y DESARROLLO EN AMÉRICA LATINA* (1969). This source was later published in English as *DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA* (Marjory Mattingly Urquidí trans., 1979). These two economists proved extremely influential on leftist political ideologies in Latin America. Ramón Grosfoguel, *Developmentalism, Modernity, and Dependency Theory*, 2 *NEPANTLA* 347, 367 (2000), available at <http://muse.jhu.edu/journals/nepantla/v001/1.2grosfoguel.pdf>. Dependency theory supported a shift to Marxism, as the "capitalist world market is conceptualized as an international (multiple national social formations) unequal structure of dominant and subordinate nations wherein the centers' capital penetrates dependent societies." *Id.* The left sought to escape a system in which it would be economic victims. *Id.*

271. *See, e.g.*, MAYRA GÓMEZ, *HUMAN RIGHTS IN CUBA, EL SALVADOR & NICARAGUA* 157 (2007) (quoting Daniel Ortega as saying, "The people of Nicaragua were suffering oppression. This made us develop an awareness which eventually led us to commit ourselves to the struggle against the damnation of the capitalists of our country in collusion with the U.S. government, i.e., imperialism. And that's why our struggle took an anti-imperialist character.").

toward sanctions, the United Nations recently adopted a resolution urging States to refrain from using coercive means of changing the domestic policies of developing countries.²⁷² In the wake of the unpopular intervention in Iraq and the ensuing rise of anti-U.S. sentiment amongst Latin American leaders, regional support for the United States' international human rights initiatives has diminished. LDCs now cynically view the United States' emphasis on human rights as a "tactical camouflage to conceal pursuit of U.S. interests,"²⁷³ and international action by the United States is seen as "intrusive . . . [involving] constant threats, repression and lies."²⁷⁴

Constructivism in international relations theory stresses that history, culture, politics, and economic motivations must be taken into account when examining the potential outcomes of diplomatic actions.²⁷⁵ On a political level, Latin American leaders such as "Fidel

272. G.A. Res. 9/4, U.N. Doc. A/HRC/9/L.13 (Sept. 24, 2008).

A U.N. Resolution "on human rights and unilateral coercive measures, adopted by a vote of 33 in favour, 11 against, and 2 abstentions" urging "all States to stop adopting or implementing unilateral coercive measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature with extraterritorial effects, which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of individuals and peoples to development. The Council strongly objects to the extraterritorial nature of those measures which threaten the sovereignty of States and calls upon all Member States neither to recognize these measures nor apply them, and to take effective administrative or legislative measures to counteract the extraterritorial application or effects of unilateral coercive measures. It condemns the continued unilateral application and enforcement by certain powers of such measures as tools of political or economic pressure against any country, particularly against developing countries.

Press Release, Human Rights Council, Human Rights Council Adopts 19 Texts on Various Issues (Sept. 24, 2008), <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/A85D341F0D7A9B5BC12574CE004BD33E?opendocument> (passing with Nicaragua, Argentina, Bolivia, Brazil, Chile, Cuba, Mexico, and Uruguay in favor, with Canada and much of Europe, including France, Germany, Italy, Netherlands, Switzerland, and the United Kingdom against); see also Louis Henkin, *Human Rights, in* REALIZING HUMAN RIGHTS 3, 22 (noting that the Third World added a "right to self-determination" in the ICCPR and ICESCR in reaction to intervention and colonialism).

273. J. Bryan Hehir, *Human Rights and U.S. Foreign Policy: A Perspective from Theological Ethics, in* THE MORAL IMPERATIVES OF HUMAN RIGHTS: A WORLD SURVEY 3 (Kenneth W. Thompson ed., 1980).

274. America Vera-Zavala, *Evo Morales Has Plans for Bolivia, in* THESE TIMES, 36, 37 (Jan. 2006) (quoting Evo Morales, the leftist indigenous candidate, prior to his election victory on December 18, 2005).

275. See generally THE CULTURE OF NATIONAL SECURITY (Peter Joachim Katzenstein ed., 1996) (providing background on Constructivism). These factors must also

and Chavez, [and] also Kirchner [in Argentina], Lula and Tabarez Vasquez [in Uruguay],” as well as Evo Morales, have gained widespread popularity with platforms of varying degrees of nationalism, protectionism,²⁷⁶ and anti-U.S. rhetoric.²⁷⁷ Unjustified involvement in Nicaragua would give Latin American nationalist leaders ample opportunity and incentive to denounce the activity as an exercise in neo-imperialism. This geopolitical reaction would undermine the effectiveness of any efforts to address the law.

It is also important to gauge Daniel Ortega’s reaction to international involvement. Although it seems unlikely that a former Sandinista rebel, a Marxist,²⁷⁸ and a self-declared atheist²⁷⁹ would be wedded to keeping such a morally infused law intact, as discussed in Part II, Ortega may have other motivations behind supporting the blanket ban.²⁸⁰ Even lacking a personal commitment to the law, Ortega needs no further incentive to defy the United States, as he has sought to do on many occasions.²⁸¹ Ultimately, there is reason to believe that Ortega would be extremely resistant to unilateral political pressure from the United States to change the policy.

While it is unpleasant to come to terms with the Americas’ shifting role in geopolitics, world opinion has direct implications on the effectiveness of international efforts. After all, any international intervention would take place in the context of this fractured political climate. The current distaste for the United States’ foreign policy makes unilateral action a dangerous option. Further, any multilateral action involving the United States would demand a heightened need for legitimacy and consensus. As Debra Liang Fenton cautions in the

be accounted for when dealing with human rights violations. See Fred Judson, *Understanding Patterns Of Human Rights Violations*, in HUMAN RIGHTS DILEMMAS IN CONTEMPORARY TIMES: ISSUES AND ANSWERS 211–13 (Ashraf Haran ed., 1998).

276. Vera-Zavala, *supra* note 274, at 37.

277. *Id.* (“[Latin] America would be better off without the United States and the IMF controlling all of its resources.”).

278. For more on the Marxist movement in Nicaragua, see CHASTEEN, *supra* note 33, at 278.

279. See Michael Glenwick, Council on Hemispheric Affairs, *To Risk Not Saving a Life: Abortion Ban in Nicaragua and its Societal Implications* (Dec. 11, 2007), <http://www.coha.org/2007/12/to-risk-not-saving-a-life-abortion-ban-in-nicaragua-and-its-societal-implications>.

280. See *supra* notes 76–84 and accompanying text.

281. See Sol Sanders, *Ortega in Tehran: Attracted Not by Love, but Hate [of U.S.]*, WORLD TRIB., June 18, 2007, http://www.worldtribune.com/worldtribune/WTARC/2007/s6_15.asp; see also Duncan Kennedy, *Ortega Race Brings up the Past*, BBC NEWS, Nov. 3, 2006, <http://news.bbc.co.uk/1/hi/world/americas/6112942.stm> (“If Ortega wins . . . [h]e will have key regional allies . . . who together could create problems aplenty for the US [sic] and its democratic Latin American allies.”) (internal quotations omitted).

book *Implementing U.S. Human Rights Policy*, it is key to “[w]ork [m]ultilaterally, [w]henever [p]ossible.”²⁸² The resulting action cannot be based on cultural imperialism²⁸³ presupposing American values should be imposed around the world. Nor can “soft power” in the form of economic or political coercion be utilized without breeding resentment in return.

V. TREATY LAW—A WORKABLE SOLUTION

A. *Regional Agreements Bolstered by Universal Rights*

Balancing respect for sovereignty with human rights concerns is increasingly important. Under the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,²⁸⁴ “[e]ach State has the duty to respect the [political] personality of other States.”²⁸⁵ At the same time, human rights law, by its nature, necessitates that international law trump the need for sovereignty and complete control over domestic affairs.²⁸⁶ If a violation of human rights is established, the defense that the blanket ban is national policy preference will fail.²⁸⁷ That said, sovereignty remains an important aspect of this issue. As legislation rather than acts of force are being addressed, in accordance with principles of proportionality,²⁸⁸ any intervention should take place via legal

282. See FENTON, *supra* note 261, at 455; see also JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 177–79 (2d ed. 2003) (discussing the limits of bilateral action).

283. Mark W. Janis, *American Versions of the International Law of Christendom: Kent, Wheaton, and the Grotian Tradition*, in RELIGION AND INTERNATIONAL LAW 228 (Mark W. Janis & Carolyn Evans eds., 1999) (discussing GEORGE F. KENNAN, AMERICAN DIPLOMACY, 1900–1950 (1951)).

284. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, at 121, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970).

285. *Id.* at 124; see also DAVID J. BEDERMAN, SPIRIT OF INTERNATIONAL LAW 117 (2002).

286. Before the implementation of human rights treaties, claims of sovereign immunity prevailed in the area of human rights and served to effectively eliminate the availability of a legal remedy. See generally Louis Henkin, *Human Rights and State “Sovereignty,”* 25 GA. J. INTL’L & COMP. L. 31, 37 (1995–96) (explaining that sovereignty necessarily implies a shield against international influence).

287. BECKWITH, *supra* note 241, at 4.

288. Proportionality is an important tenet of international law and is used in the context of self-defense and in interactions under treaty law. Proportionality in the context of diplomatic relations operates under the general concept that “every action deserves an

auspices, such as diplomacy and judicial remediation, rather than threats of physical violation of the territorial integrity of the country. The necessary proportional intervention is best accomplished through the use of international treaty law.²⁸⁹ Treaty law is a consent-based regime whereby sovereignty is conceded to partake in the international system.

B. Interpreting Nicaragua's Obligations: Respecting The Right to Life under Treaty Law

Treaty law is especially relevant in regards to Nicaragua as the country actively participates in many international treaties. To date, Nicaragua has signed the Universal Declaration of Human Rights ("UDHR")²⁹⁰ and has also ratified seven major international human rights instruments: the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),²⁹¹ the International Covenant on Civil and Political Rights ("ICCPR"),²⁹² the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"),²⁹³ the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),²⁹⁴ the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment ("CAT"),²⁹⁵ the Convention on the Rights of the Child

equal and opposite reaction." See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (Jan. 27, 1980) [hereinafter VCLT].

289. See BEDERMAN, *supra* note 285, at 190; see also *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 134 (June 27, 1986) (noting that the use of force was not "the appropriate method to monitor or ensure" respect of human rights, for "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves").

290. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

291. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

292. International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

293. International Convention on the Elimination of all forms of Racial Discrimination, G.A. Res. 2106, at 47, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965) [hereinafter ICERD].

294. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 193, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW].

295. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

("CRC");²⁹⁶ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("ICRMW").²⁹⁷

Yet the regional agreements which Nicaragua has signed and ratified are most important to this issue. These include the American Declaration of the Rights and Duties of Man²⁹⁸ and the American Convention on Human Rights.²⁹⁹ Nicaragua also signed on to the Optional Protocol to Abolish the Death Penalty³⁰⁰ and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (the Convention of Belém do Pará).³⁰¹ These regional agreements are particularly of interest as they provide the legislature's main source of support for the blanket ban's consistency with Nicaragua's treaty obligations.³⁰² Specifically,

296. Convention on the Rights of the Child, G.A. Res. 44/25, at 167, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC].

297. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, at 261, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Dec. 18, 1990) [hereinafter ICRMW].

298. American Declaration of the Rights and Duties of Man, O.A.S. official Rec., OEA/ser.L./V./II.23, doc. 21 rev. 6 (1948), *reprinted in* INTER-AMERICAN COURT OF HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 19 (2003), *available at* <http://www.corteidh.or.cr/docs/libros/Basingl01.pdf> [hereinafter BASIC DOCUMENTS].

299. American Convention on Human Rights: "Pact of San José" art. 4, Nov. 22, 1969, T.S. No. 17955, 1144 U.N.T.S. 144, *available at* <http://www.oas.org/juridico/english/Sigs/b-32.html>. [hereinafter American Convention on Human Rights].

300. Nicaragua also signed the Optional Protocol to Abolish the Death Penalty, an addendum to the American Convention on Human Rights, on August 30, 1990, and ratified the protocol on November 8, 1999. Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. 73, *reprinted in* BASIC DOCUMENTS, *supra* note 298, at 93. The goal of the optional protocol was to reaffirm Article 4 of the American Convention by declaring "[t]he States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction." *Id.* The optional protocol also heightens compliance by forbidding reservations except when the signatory country is at war. *Id.*

301. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," *opened for signature* June 4, 1994, OAS/ser.L./II.2.27, CIM/doc.33/9 (Mar. 5, 1995), *reprinted in* BASIC DOCUMENTS, *supra* note 298, at 117. Nicaragua ratified the Convention of Belém do Pará on December 12, 1995. The status of ratification is available at <http://www.oas.org/cim/English/Laws.Rat.Belem.htm>. Nicaragua has also signed the Protocol of San Salvador treaty but has not ratified it; fourteen countries have ratified it as of 2008. The status of ratification is available at <http://www.oas.org/juridico/English/sigs/a-52.html>. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," *opened for signature* Nov. 17, 1988, O.A.S.T.S. No. 69 (Nov. 16, 1999), *reprinted in* BASIC DOCUMENTS, *supra* note 298, at 79.

302. See Penal Code Reform Project, *supra* note 190 (citing a number of international treaties and pacts, such as the Universal Declaration of Human Rights and the American Convention on Human Rights of the Organization of American States, among others).

Nicaragua purports to be implementing its obligation to protect the “right to life” as pronounced in the American Convention.³⁰³

The reasoning behind the legislature’s justification is flawed, however, as Nicaragua’s current interpretation of its obligations under the American Convention may be at odds with the interpretive canon of reconciling obligations under treaty law. Under the Vienna Convention on the Law of Treaties, which governs treaty interpretation, treaty obligations are to be interpreted as consistent with one another.³⁰⁴ Given that Nicaragua is a party to a large number of treaties that also uphold the right to life, Nicaragua is obligated to respect and reconcile these treaty obligations under *pacta sunt servanda*.³⁰⁵ *Pacta sunt servanda* imposes an international obligation to carry out treaty obligations in good faith.³⁰⁶ Further, Nicaragua’s monist constitution imposes heightened accountability on Nicaragua to comply with treaty law. Nicaragua has constitutionalized its human rights obligations; this supports compliance by attaching domestic accountability to derogating from treaty law, which holds the same weight as the Nicaraguan constitution. The legislature may neither override treaty obligations with newly implemented domestic statutes under the last in time rule, nor can it erase the country’s international obligations through statutory or even constitutional amendments. Further, overriding existing obligations does not seem to be the legislative intent in the present situation. In fact, the legislature has justified the blanket ban as an attempt to comply with the American Convention.³⁰⁷

Therefore, the problem is Nicaragua’s interpretation of its international obligation to uphold the right to life. The blanket ban’s practical effects cannot be reconciled with preserving the right to life, as defined by the international accords listed in Article 46 of the Nicaraguan constitution. This is namely because Nicaragua’s obligations under the American Convention should be interpreted by any international court as consistent with CEDAW, the ICCPR, the ICESCR, and other treaty obligations, if possible. That is, the final

303. American Convention on Human Rights, *supra* note 299, art. 4.

304. VCLT, *supra* note 288, art. 26. Nicaragua is a party to the VCLT, but this treaty also constitutes CIL and is, therefore, binding on Nicaragua regardless. *See also infra* note 448.

305. *Pacta sunt servanda* is the underlying principle of treaty law, which requires signatory nations to honor their agreements.

306. VCLT, *supra* note 288, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

307. *See* Penal Code Reform Project, *supra* note 190 (claiming that the ban is aligned with the rights articulated in the American Convention).

conception of Nicaragua's obligation to respect the right to life will be filtered through the broad language of a women's rights treaty, a social rights treaty, and a treaty upholding political rights irrespective of gender.

C. *The Use of Regional Agreements: Defining Rights with Specificity and Shaping the Definition of the Right to Life*

The benefits of regional agreements are twofold. First, they have the ability to delineate the rights they involve with specificity, and second, they have the added benefit of heightened legitimacy among their signatories. Nicaragua's regional obligations support rights recognized in other broader multilateral rights treaties. However, regional treaties are able to do so with greater specificity because of the smaller numbers of signatories involved. This is due to the practical fact that when fewer countries are involved, the likelihood that they have commonalities in policy is higher. Further, "states in the same region are more likely to share common values and cooperate with each other."³⁰⁸ In larger treaties, the final product must be framed to satisfy the outlier signatory countries whose policy goals diverge from the norm. As a result, it is not surprising that the rights involved in larger multilateral rights treaties tend to be very broadly framed. At the same time, broadly framing rights in larger rights treaties produces both implementation and enforcement problems. This is due to difficulty discerning the exact rights involved and the specific obligations they confer. For the same reasons that the rights are broadly defined, the particulars of enforcement are rarely articulated. Needless to say, these are all obstacles to implementing these espoused rights domestically.³⁰⁹ Regional agreements, however, "tend to have more success in enforcement," as

308. Margolin, *supra* note 235, at 88.

309. Interview with Arthur M. Weisburd, *supra* note 19 (discussing CEDAW in particular as an example of a treaty with rights that are so broadly framed that they are almost impossible to implement domestically). For instance, Article 3 of CEDAW:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

CEDAW, *supra* note 294, art. 3. Due to the broad language, which lacks indicators for compliance and fails to suggest particular steps to take, it is hard to determine when, if ever, a state is in compliance with Article 3. Interview with Arthur M. Weisburd, *supra* note 19.

they are more manageable in terms of the scale of monitoring required.³¹⁰

In the context of Nicaragua, the right to life is protected under both regional and larger multilateral rights treaties to which Nicaragua is a party.³¹¹ While “the right to life,” as defined by the American Convention on Human Rights (the Pact of San José), was conceived as a means to address the death penalty, it is certainly applicable in any context that involves a deprivation of life. Evidencing its applicability, Nicaragua uses Article 4 of the American Convention as its primary source of support for the country’s blanket ban on abortion.³¹² Article 4 states that everyone has the right to respect for his or her life, that this right shall be protected by law from the *moment of conception*, and that no one shall be *arbitrarily* deprived of life.³¹³ While the Nicaraguan Legislature emphasizes that the Convention defines life as beginning at conception, the legislators ignore the fact that the mother (having also been conceived) is protected under the definition of life given by the Convention. Furthermore, the language of the Convention uses the phrase “arbitrarily deprived,” which suggests that ending the life of the fetus may be warranted in certain instances. Properly interpreted, the American Convention imposes the affirmative duty to protect the life of the mother as well as the fetus.³¹⁴ While the language of the Convention leans against allowing unfettered access to abortion, Nicaragua has as much of a duty to protect women’s lives as it does for the life of the fetus. However, in the case of an ectopic pregnancy, or in other circumstances in which the baby is not viable, Nicaragua may have the obligation to save the mother’s life, or at least allow her

310. Margolin, *supra* note 235, at 87–88.

311. *See infra* Part V. For more on how the Church shapes reproductive rights law in Latin American Catholic countries, see UNITED NATIONS POPULATION FUND (“UNFPA”), CULTURE MATTERS—WORKING WITH COMMUNITIES AND FAITH-BASED ORGANIZATIONS: CASE STUDIES FROM COUNTRY PROGRAMMES 9–16, 63–65 (2004) (discussing the influence of the Catholic Church on women, the interactions between religion and the government, and reproductive health rights).

312. While Nicaragua’s conception of the American Convention is flawed, the Convention and other regional agreements are still vital to this issue. *See* Penal Code Reform Project, *supra* note 190.

313. American Convention on Human Rights, *supra* note 299, art. 4. The right to life is also affirmed under the American Declaration of the Rights and Duties of Man. American Convention on Human Rights, art. 4 (1969), *reprinted in* BASIC DOCUMENTS, *supra* note 298, at 31.

314. This reading is consistent with the Inter-American Commission’s stance on the law. *See infra* note 339 and accompanying text.

the legal option to save herself, even if it means unnaturally ending the life of the fetus.

D. The Use of Broader Multilateral Rights Treaties: The Utility of Broader Treaties and Supporting Rights

Under the American Convention,³¹⁵ when a domestic law conflicts with international human rights law, the Inter-American Court will resolve the conflict by interpreting the law in a way that furthers the enjoyment of rights guaranteed under the American Convention.³¹⁶ More broadly, this means that while the court will interpret rights to have broad application, the Inter-American Court is only charged with *enforcing* the treaties of the Inter-American System in contentious cases.³¹⁷ At the same time, under the VCLT, the court should *interpret* Nicaragua's obligations under the Inter-American treaty system³¹⁸ to be consistent with Nicaragua's other international treaty obligations, if possible.³¹⁹

In the context of the blanket ban, this means Nicaragua's human rights treaty obligations under the American Convention are supported by and to be interpreted as consistent with the country's duties under the ICCPR, ICESCR, and CEDAW.³²⁰ Each of these treaties, in addition to the UDHR, constitutes the Universal Bill of

315. The American Convention on Human Rights entered into force July 18, 1989. It was the Inter-American system's first binding human rights instrument. The Convention created the Inter-American Court and Conditions as well as laid out the human rights protected under the instrument. See Charter of the Organization of American States, www.oas.org/juridico/english/charter.html (last visited Dec. 26, 2008).

316. American Convention on Human Rights, art. 29 (1969), reprinted in BASIC DOCUMENTS, *supra* note 298, at 42.

317. Statute of the Inter-American Court on Human Rights, OEA/Ser.P/IX.0.2/80, vol. 1 at 98 [hereinafter Inter-American Court Statute]; Annual Report of the Inter-American Court on Human Rights, OEA/Ser.L/V.III.3, doc. 13, corr. 1, at 16 (1980).

318. Charter of the Organization of American States, art. 34(j), T.I.A.S. 2361, 119 U.N.T.S. 3, amended by the Protocol of Buenos Aires, O.A.S.T.S. No. 1-A (1967), further amended by Protocol of Cartagena O.A.S.T.S. No. 66 (1985), further amended by Protocol of Washington, OEA/Ser. A/2 Add. 1993, available at www.oas.org/juridico/english/charter.html. The Court has blanket jurisdiction over Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. *Id.* In terms of advisory jurisdiction, the Inter-American Court's jurisdiction extends to interpreting rights under the Convention and other treaties ratified by the OAS member state in question. See American Convention on Human Rights, art. 64 (1969), reprinted in BASIC DOCUMENTS, *supra* note 298, at 53.

319. See *infra* note 448.

320. These treaties are binding on Nicaragua, as Nicaragua has ratified each of them. For the status of Nicaragua's ratification of these and other U.N human rights treaties, see Office of the High Comm'r for Human Rights, June 4, 2004, *Status of the Ratifications of the Principal International Human Rights Treaties*, <http://www.unhchr.ch/pdf/report.pdf>.

Rights under the United Nations Treaty system.³²¹ All of these treaties are in force in Nicaragua, and each contains rights that are implicated by the blanket ban. As discussed below, although the treaty provisions implicated by the blanket ban differ in their wording and scope, the seven essential rights infringed on by the blanket ban are: the Right to Life; the Right to Liberty and Security of the Person; the Right to Gender Equity; the Right to Health; the Right to be Free from Torture or Other Cruel, Degrading and Inhuman Treatment; the Right to Control Reproduction; and the Right to Privacy.

1. Protections of the Right to Life

- *Inter-American System:*
 - *American Convention, Article 4:* “Every person has the right to have [her] life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of [her] life.”³²²
 - *Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Preamble:* acknowledging “[t]hat Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty . . . everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason.”³²³
 - *Belém do Pará, Article 1:* “For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or

321. See International Human Rights Instruments, <http://www1.umn.edu/humanrts/instree/ainstls1.htm> (last visited Dec. 26, 2008) (indicating that Nicaragua has not ratified the optional protocols).

322. American Convention on Human Rights, art. 4(1) (1969), *reprinted in* BASIC DOCUMENTS, *supra* note 298, at 31.

323. Nicaragua is one of the few countries that has ratified this Protocol, which (under Article 4) entered into force in Nicaragua once it deposited its instrument of ratification with the OAS on November 9, 1999. Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990), *reprinted in* BASIC DOCUMENTS, *supra* note 298, at 93; A-53: Protocol to the American Convention on Human Rights to Abolish the Death Penalty, <http://www.oas.org/juridico/english/sigs/a-53.html> (last visited Dec. 26, 2008).

physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”³²⁴

- *Belém do Pará, Article 4*: “The right to have her life respected.”³²⁵
- *UDHR*
 - *Article 3*: “Everyone has the right to life, liberty and security of person.”³²⁶
- *ICCPR*
 - *Article 6*: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”³²⁷

According to principles of treaty interpretation under the Vienna Convention on the Law of Treaties (“VCLT”), the American Convention’s articulation of the right to life should be reconciled with the UDHR and ICCPR interpretations of these rights.³²⁸ The

324. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (“Convention of Belém do Pará”), 33 I.L.M. 1534, 1535 (1994), *adopted on June 9, 1994* [hereinafter *Belém do Pará*].

325. *Id.*

326. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3, U.N. Doc. A/810 (Dec. 10, 1948). “The U.N. Human Rights Committee and the Committee on the Elimination of Discrimination Against Women have repeatedly expressed concern about the relationship between restrictive abortion laws, clandestine abortions, and threats to women’s lives.” HRW Amicus Brief, *supra* note 176, at 19. This concern has also been raised by various NGOs and recently documented in a shadow report collectively submitted by the Centro de Derechos Constitucionales, the Movimiento Autónomo de Mujeres, and the International Women’s Human Rights Law Clinic supplementing fact-finding recounted in the Second and Third Periodic Reports of Nicaragua by the United Nations Human Rights Committee. *See* Centro de Derechos Constitucionales, et al. *Report on Violations of Women’s Human Rights to Therapeutic Abortion and Emergency Medical Care, and the Rights of Women’s Human Rights Defenders* (Oct. 2008), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MAM_CDC_IWHR.pdf.

327. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 53, U.N. Doc. A/6316 (Dec. 16, 1966). Nicaragua has also signed, but not ratified, the Second Optional Protocol of the ICCPR—abolishing the death penalty and expressing its commitment to “progress in the enjoyment of the right to life” Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, at 207, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/128 (Dec. 15, 1989).

328. VCLT, *supra* note 288, art. 30(2) (“When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”). Article 31 outlines general rules of treaty interpretation. *See id.* art. 31; *See generally* Christopher Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT’L L. REV. 573 (2005) (discussing the limitations of the VCLT in resolving treaty overlap and treaty disputes).

UDHR, which outlines universal human rights, is the broadest and most commonly cited human rights document.³²⁹ Though the UDHR is considered a declaration rather than a binding treaty, the conception of rights in the UDHR has influenced both U.N. treaties and regional agreements. While the language of the UDHR³³⁰ explicitly protects the right to life, the provision also applies broadly to respecting the physical integrity of the individual.³³¹ In this case, the UDHR defines a broad right. The UDHR-espoused right stops short of defining any affirmative obligations on the part of the State and does not address the definitional limits of when life starts and ends.³³²

At the same time, Nicaragua's duty to protect the right to life is also supported by Article 6 of the ICCPR.³³³ Nicaragua's binding commitment to respect the right to life under the ICCPR includes women as individuals and expectant mothers as a group.³³⁴ The U.N. Human Rights Committee has explained that the right to life under the ICCPR is affirmative and requires that the State take direct action to protect the right rather than just refrain from infringing on the right.³³⁵ The Committee also has found statistics on "pregnancy and

329. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); see also U.N. Department of Public Information, *The Universal Declaration of Human Rights: A Magna Carta for All Humanity*, at 1, U.N. Doc. DPI/1937/A (Feb. 1998), available at <http://www.unhcr.ch/udhr/miscinfo/carta.htm> ("Since 1948, the Universal Declaration has been translated into more than 200 languages and remains one of the best known and most often cited human rights documents in the world."). However, it is not considered a legally binding instrument. Maryam Javaherian, Comment, *Women's Human Rights in Iran: What Can the International Human Rights System Do?*, 40 SANTA CLARA L. REV. 819, 830 (2000).

330. The Inter-American Court of Human Rights was established in 1979 in San Jose, Costa Rica, as part of the American Convention of Human Rights, and is part of the Organization of American States ("OAS"). See Information History of the Inter-American Court of Human Rights, <http://www.corteidh.or.cr/historia.cfm?&CFID=446069&CFTOKEN=58735214> (last visited Dec. 26, 2008).

331. LARS ADAM REBOF, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 94 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999).

332. *Id.* at 101 (indicating the obligation of the state to "protect the lives of its citizens" and "[q]uestions of life and death" are controversial issues that have yet to be addressed).

333. See ICCPR, *supra* note 292, at 53 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life . . . [the] [s]entence of death shall not be . . . carried out on pregnant women.").

334. See Human Rights Comm., General Comment 28, art. 28, Equal. of Rights Between Men and Women (art. 3), ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter General Comment 28] (requiring reporting on state measures to prevent unwanted pregnancies and life-threatening abortions as well as measures "to protect women from practices[] that violate their right to life").

335. See *id.*

childbirth-related deaths of women” to be important in determining whether the right to life has been violated.³³⁶ Article Six also provides for the right to seek pardon from the death penalty and does not allow the death penalty for minors or pregnant women.³³⁷ Further, the ICCPR requires reporting on “any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undertake life-threatening clandestine abortions.”³³⁸ This suggests that a blanket ban such as Nicaragua’s violates women’s right to life in compromising their ability to procure abortions, not just for unwanted pregnancies but for life-threatening pregnancy.

The Inter-American Court, upon hearing the issue, would interpret the right to life espoused by the American Convention as one that is consistent with other international treaties, or, as the various committee notes suggest, one that provides for the life of the mother as well as the life of the child. Though the American Convention is the only treaty of the three to define life as starting at conception, this does not preclude the American Convention from providing for the protection of the mother’s life. Further, the use of the phrase “arbitrary deprivation” of life suggests that the Convention does not call for hard and fast prohibitions on abortion. Rather, under the language of the Convention, there is room for grey area. This view is further supported by the Inter-American Commission, which has noted that the Convention’s qualifying language leaves room for access to legal abortion in compelling circumstances.³³⁹

2. Protections of the Right to Liberty and to Security of the Person

- *American Convention*

336. *Id.*; see also Christina Zampas & Jamie M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 257 (2008) (discussing ICCPR protections of the right to life).

337. ICCPR, *supra* note 292, at 53; see also Dina Bogecho, *Putting it to Good Use: The International Covenant on Civil and Political Rights and Women’s Right to Reproductive Health*, 13 S. CAL. REV. L. & WOMEN’S STUD. 229, 241–42 (2004) (describing women’s groups’ use of the “right to life” to protect women’s reproductive rights).

338. General Comment 29, *supra* note 334, ¶ 10.

339. Inter-Am. Comm’n on Human Rights, Annual Report of the Inter-American Commission on Human Rights 1980–1981, OEA/Ser.L/V/II.54 (Mar. 6, 1981), available at <http://www.cidh.org/annualrep/80.81eng/USA2141.htm> (citing OAS General Secretariat, Conferencia Especializada Interamericana Sobre Derechos Humanos, OEA/Ser.K/XVI/1.2, at p. 159 (Sept. 26, 1969)).

- *Article 5*: “Every person has the right to have his physical, mental, and moral integrity respected.”³⁴⁰
- *Article 7*: “Every person has the right to personal liberty and security.”³⁴¹
- *Belém do Pará, Article 4*: “The right to have her physical, mental and moral integrity respected”³⁴² and the “right to personal liberty and security.”³⁴³
- *UDHR, Article 25*: “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and *medical care and necessary social services*, and *the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*”³⁴⁴
- *ICESCR, Article 1*: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”³⁴⁵
- *ICCPR, Article 9*: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”³⁴⁶
- *CEDAW, Article 12*: “States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”³⁴⁷

The U.N. Human Rights Committee has interpreted Article 9 of the ICCPR to require States to provide information on domestic laws and practices that may disproportionately affect women and deprive

340. American Convention on Human Rights, *supra* note 299, art. 5(1).

341. *Id.* art. 7(1).

342. *Id.* art. 4(b).

343. *Id.* art. 4(c).

344. UDHR, *supra* note 290, art. 25(1).

345. ICESCR, *supra* note 291, art. 1(1).

346. *See* ICCPR, *supra* note 292, art. 9(1).

347. CEDAW, *supra* note 294, art. 12(2).

them of their liberties on an unequal basis.³⁴⁸ Meanwhile, in 2007, CEDAW's Committee noted Nicaragua's high rates of maternal mortality. The Committee went on to specifically criticize the blanket ban's repeal of the therapeutic abortion exception, "which may lead more women to seek unsafe, illegal abortions, with consequent risks to their life and health."³⁴⁹ The Committee deplored the imposition of "severe sanctions on women who have undergone illegal abortions, as well as on health professionals who provide medical care for the management of complications arising from unsafe abortions."³⁵⁰ These laws serve to limit women's liberty by restricting their ability to seek healthcare.

3. Protections of the Right to Gender Equity

- *American Convention*
 - *Article 1*: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."³⁵¹ Noting that, "for the purposes of this Convention, 'person' means every human being."³⁵²
 - *Article 24*: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."
 - *Belém do Pará, Article 4*: "Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments" including the "right to equal protection before the law and of the law."³⁵³

348. Comm. on the Elimination of Discrimination Against Women, *Concluding Comments: Nicaragua*, 37th Sess., U.N. Doc. CEDAW/C/NIC/CO/6 (Feb. 2, 2007) [hereinafter CEDAW 37th Session].

349. *Id.*

350. *Id.*; see also Margolin, *supra* note 235, at 89 (noting that the "CEDAW Committee, which monitors states' compliance with the treaty has frequently criticized restrictive abortion laws and suggested that they violate the rights to life and health").

351. American Convention on Human Rights, *supra* note 299, art. 1.1.

352. *Id.* art. 1.2.

353. Belém do Pará, *supra* note 324, art. 4(f).

- *UDHR, Article 2*: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”³⁵⁴
- *ICCPR, Article 2*: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*”³⁵⁵
- *ICESCR, Article 2*: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³⁵⁶
- *CEDAW*
 - *Article 2*: “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”³⁵⁷ . . . including “repeal[ing] all national penal provisions which constitute discrimination against women.”³⁵⁸
 - *Article 3*: “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and

354. UDHR, *supra* note 290, art. 2 (emphasis added).

355. ICCPR, *supra* note 292, art. 2.1 (emphasis added).

356. ICESCR, *supra* 291, art. 2.2.

357. CEDAW, *supra* 293, art. 2.

358. *Id.* art. 2(g).

enjoyment of human rights and fundamental freedoms on a basis of equality with men.”³⁵⁹

CEDAW’s very purpose is to eliminate discrimination against women and to promote gender equity. While both Articles 1 and 3 speak to legislative and broader measures to ensure gender equity, Article 1 in particular requires removing legislative measures. In fact, Article 1 addresses measures in the penal code that could have negatively implications on women’s rights. The Nicaraguan abortion blanket ban could very well constitute such an impediment to women’s equity in the social sphere and in terms of equal access to healthcare as it restricts women’s access to potentially lifesaving procedures. At the same time, in regards to the ICCPR, the U.N. Human Rights Committee has noted the link between gender equity and access to reproductive health services.³⁶⁰

4. Protections of the Right to Health³⁶¹

- *ICESCR*
 - *Article 10*: “Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.”³⁶²

359. *Id.* art. 3.

360. General Comment 28, *supra* note 334.

361. Also protected under the American Convention’s Protocol of San Salvador (signed but not yet ratified by Nicaragua):

Article 10: “Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental, and social well-being.”

Article 15.3: “The States Parties hereby undertake to accord adequate protection to the family unit and in particular . . . [t]o provide special care and assistance to mothers during a reasonable period before and after childbirth.”

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, “Protocol of San Salvador,” Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* BASIC DOCUMENTS, *supra* note 298, at 67. This Protocol was signed by Nicaragua on November 11, 1988, but never ratified. The status of ratifications is available at <http://www.oas.org/juridico/English/signs/a-52.html>. The Protocol also states that a “right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.” *Id.* art. 4.

362. ICESCR, *supra* note 291, art. 10.2.

- *Article 12*: “States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³⁶³
- *UDHR, Article 25*: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care and necessary social services.”³⁶⁴ “Motherhood [is] entitled to special care and assistance.”³⁶⁵
- *CEDAW*
 - *Article 12*: “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”
 - *Article 14*: “States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right . . . [to] have access to adequate health care facilities, including information, counseling and services in family planning.”³⁶⁶

The ICESCR and CEDAW expressly address women’s right to health and the right has been applied in the context of abortion by both treaties’ monitoring bodies.³⁶⁷ Under the ICESCR, the right to health has been interpreted by the treaty’s Committee (the “CESCR”) to involve not only rights for individuals but obligations on the part of the State.³⁶⁸ These obligations are to respect (refrain

363. *Id.* art. 12.1.

364. UDHR, *supra* note 290, art. 25.1.

365. *Id.* art. 25.2. Under the UDHR, the right to healthcare and social services is protected. What’s more, Article 25 of the UDHR explicitly mentions the right of a pregnant woman to have special access to healthcare and assistance.

366. CEDAW, *supra* note 290, art. 25(1) (recognizing that the rural poor are the most vulnerable segment in society with regard to access to healthcare).

367. See Zampas & Gher, *supra* note 336, at 269.

368. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), available

from interfering with the right to health), protect (take measures to prevent third parties from interfering with the right to health), and fulfill (provide, facilitate, and promote the right to health).³⁶⁹ Specifically, the State should not limit “access to contraceptives and other means of maintaining sexual and reproductive health, [refrain] from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing” individuals, such as doctors, “participation in health-related matters.”³⁷⁰

Although, in determining the State’s obligations in health, the Committee takes into account the “State’s available resources,” this will not cover denials of available resources, as is taking place in Nicaragua. Further, the Commission notes

retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.³⁷¹

In this situation, the Nicaraguan legislature will be affronted by statistics that show dramatic increases in maternal mortality rates after the blanket ban’s enactment. If a violation is shown under the ICESCR, any “person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.”³⁷²

At the same time, CEDAW’s Committee echoed the CESCR by stating that CEDAW’s Article 12 “implies an obligation to respect, protect and fulfill women’s rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations.”³⁷³ There must also be

at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En) [hereinafter CESCR] (dealing with substantive issues that arise during the implementation of the ICESCR).

369. *Id.* ¶ 33.

370. *Id.* ¶ 34.

371. *Id.* ¶ 32.

372. *Id.* ¶ 59 (stating that victims have a right to reparations in the form of “restitution, compensation, satisfaction[,] or guarantees of non-repetition”).

373. Comm. on the Elimination of Discrimination Against Women, *Report of the Comm. on the Elimination of Discrimination Against Women on Its Twentieth Session, General Recommendation 24*, ¶ 13, U.N. Doc. A/54/38/ Rev.1 (Aug. 20, 1999) [hereinafter CEDAW Gen. Rec. 24].

appropriate judicial action when these rights are not respected.³⁷⁴ The Committee advised States to take affirmative steps to “enhance women’s access to health care, in particular to sexual and reproductive health services, in accordance with article 12 of the Convention.”³⁷⁵

The Committee also commented on the relationship between restrictive abortion laws and women’s right to health, noting “barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”³⁷⁶ Although the Committee has noted the exceptionally high rate of death from unsafe abortions in Nicaragua in various reports, the Committee specifically expressed its concern regarding the maternal mortality rates in Nicaragua in 2007.³⁷⁷ The Committee further criticized the “recent steps taken by the State party to criminalize therapeutic abortion.”³⁷⁸ The Committee feared that the law would lead to more dangerous illegal abortions, thereby further jeopardizing the health of the nation’s women. At the same time, the Committee deplored imposing “severe sanctions” on women and noted the strain on medical professionals who must “provide medical care for the management of complications arising from unsafe abortions.”³⁷⁹

These rights interact less with the rights of the Inter-American system than they would if Nicaragua had ratified the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), which provides more protections for healthcare rights (and therefore women’s reproductive health rights). As it stands, Nicaragua’s obligation to respect healthcare rights filters from the rights to life, liberty, security, equality, and privacy under the American Convention.

374. *Id.*

375. CEDAW 37th Session, *supra* note 348, ¶ 18.

376. CEDAW Gen. Rec. 24, *supra* note 373, ¶ 14.

377. CEDAW 37th Session, *supra* note 348, ¶ 17. This is consistent with the Committee’s stance in other countries banning abortion. See Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Human Rights Committee: Chile*, ¶ 15, U.N. Doc. CCPR/C/79/Add.104 (Mar. 30, 1999) (outlining the Committee’s concerns on Chile’s similarly restrictive reproductive health policy).

378. CEDAW 37th Session, *supra* note 248, ¶ 14.

379. *Id.*

5. The Right to be Free from Torture or Other Cruel, Inhuman, or Degrading Treatment

- *American Convention, Article 5*: “Every person has the right to have his physical, mental, and moral integrity respected.”³⁸⁰ “No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”³⁸¹
- *Belém do Pará, Article 4*: Every person has the “right not to be subjected to torture.”³⁸²
- *ICCPR, Article 7*: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”³⁸³

In practice, the unwillingness of Nicaraguan doctors to provide medical care for pregnant women in distress may well be a violation of the right to be free from torture or other cruel, inhuman, or degrading treatment. In particular, the U.N.’s Human Rights Committee (“HRC”) has noted a correlation between laws that restrict abortion and situations in which women have been subjected to cruel, inhuman, or degrading treatment.³⁸⁴ Under the ICCPR, the HRC has indicated that criminalizing abortion may violate Article 7’s protections.³⁸⁵

380. American Convention on Human Rights, *supra* note 299, art. 5(1).

381. *Id.* art. 5(2).

382. *Belém do Pará, supra* note 324, art. 4.

383. ICCPR, *supra* note 292, art. 7.

384. HRW Amicus Brief, *supra* note 176, at 19.

385. *Id.*

On repeated occasions, the Committee has also indicated that Peru’s abortion legislation—which is less restrictive than Nicaragua’s—is incompatible with Article 7 of the ICCPR. In 1996, the Committee observed: ‘The Committee notes with concern that . . . abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape and that clandestine abortions are the main cause of maternal mortality. These provisions not only mean that women are subject to inhumane treatment but are possibly incompatible with articles 3 [equality of rights between men and women], 6 [right to life] and 7 [right to be free from torture] of the Covenant.’

Id. (quoting Human Rights Committee, *Concluding Observations of the Human Rights Committee: Peru*, U.N. Doc. CCPR/CO/70/PER, ¶ 20 (Nov. 15, 2000)).

6. Protections of the Right to Control Reproduction³⁸⁶

- CEDAW
 - *Article 10*: “Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.”³⁸⁷
 - *Article 12*: “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”³⁸⁸
 - *Article 16*: “Parties shall take all appropriate measures to ensure for women the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”³⁸⁹
- ICESCR, Article 12.2(a): Everyone has “[t]he right to maternal, child, and reproductive health.”³⁹⁰
- *Belém do Pará, Article 4*: Everyone has “[t]he right to have the inherent dignity of her person respected and her family protected.”³⁹¹

These rights also imply the right to access modern contraceptives and family planning information. Criminalizing a means of controlling reproduction is a facial affront to this right. Further, the ICESCR Article 12(2) was interpreted by the CESCR to require “measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to

386. These provisions overlap with reproductive rights in the sense that they protect against forced medical procedures such as female genital mutilation (“FGM”), promote self-determination of the woman in reproductive health, and imply the right to decide the number and spacing of children. See Berta Esperanza Hernandez-Truyol, *Women’s Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT’L L. 605, 655 (1996).

387. CEDAW, *supra* note 294, art. 10(h).

388. *Id.* art. 12(1) (emphasis added).

389. *Id.* art. 16 (recognizing a woman’s right to control her own reproduction).

390. ICESCR, *supra* note 291, art. 12.2(a).

391. *Belém do Pará*, *supra* note 324, art. 4(e).

information, as well as to resources necessary to act on that information.”³⁹²

The CEDAW Committee has specifically addressed women’s right to control their own reproduction. It requested that State parties

strengthen measures aimed at the prevention of unwanted pregnancies, including by increasing knowledge and awareness about family planning and services for women and girls, and to take measures to ensure that women do not seek unsafe medical procedures, such as illegal abortion, because of the lack or inaccessibility, including due to cost, of appropriate family planning and the contraceptive services.³⁹³

More generally, the Committee has found that controlling reproduction enables women to more fully participate in society through employment and also has positive implications on equality between men and women.³⁹⁴

7. Protections of Privacy Rights

- *American Convention, Article 11*: “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”³⁹⁵
- *UDHR, Article 12*: “No one shall be subjected to arbitrary interference with his *privacy, family*, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”³⁹⁶
- *ICCPR, Article 17*: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”³⁹⁷

392. CESCR, *supra* note 368, art. 14.

393. CEDAW 37th Session, *supra* note 348, ¶ 18.

394. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 21: Equality in Marriage and Family Relations*, 1–10, U.N. Doc. A/49/38 (Apr. 14, 1994).

395. American Convention on Human Rights, *supra* note 299, art. 11(2).

396. UDHR, *supra* note 290, art. 12 (emphasis added).

397. ICCPR, *supra* note 292, art. 17(1).

Although “abortion has not been articulated as a ‘privacy’ right domestically in Nicaragua[.]”³⁹⁸ an international court might find the country in violation of an international obligation to respect women’s privacy. The wording of these privacy provisions are very similar and may be applicable to the blanket ban through their implication of privacy rights in matters of the family. When patient confidentiality is not adhered to, it has negative implications on women seeking medical assistance.³⁹⁹ In the area of reproduction, where abortions are criminalized, doctors are required to report women who seek their help to the police. This has a deterrent effect on women in the sense that they will be less likely to seek medical assistance when in need. In other words, it creates an atmosphere of mistrust and undermines women’s health.⁴⁰⁰ In defining what constitutes a violation of the right to life, the ICCPR’s Committee noted that the right to life may be compromised when “States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion,”⁴⁰¹ as is required in Nicaragua. The Committee has required reporting on “any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference.”⁴⁰²

E. Limits of Multilateral Treaties: A Case Study of CEDAW and the Nicaraguan Blanket Ban

As articulated in Part IV, reproductive rights are a poor foundation for upholding a claim in the context of the blanket ban. Part IV recounts the cultural relativism argument against arguing for reproductive rights; the second reason, discussed *infra*, is that CEDAW has one of the poorest enforcement regimes of all the human rights treaties.⁴⁰³ Why then should we spend time looking at these treaty provisions? While the rights enumerated by broad

398. Morgan, *supra* note 39, at 93.

399. CEDAW Gen. Rec. 24, *supra* note 373, ¶ 12(d).

400. General Comment 28, *supra* note 334, ¶ 20.

401. *Id.*

402. *Id.*

403. The enforcement of CEDAW has been hindered by the fact that, until 2000, there was no mechanism for an individual complaint. This is changing with the Optional Protocol entering into force; however, no case was decided under this mechanism until July 2004. There is now a small body of case law developing. See U.N. Division for the Advancement of Women, CEDAW, Decisions/Views, <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm> (last visited Dec. 26, 2008).

multilateral treaties such as CEDAW and ICESCR and to some extent the ICCPR are considered by some to be too vague for practical implementation, at the very least they serve to support rights that Nicaragua has more concretely bound itself to protect in regional agreements such as the American Convention.⁴⁰⁴ When interpreted in light of Nicaragua's obligation under the American Convention, these international obligations support the argument that Nicaragua has a duty to protect the life of the expectant mother. These supporting rights offer additional protections and bolster any claim before an international court. In total, there is a strong argument that Nicaragua has violated the provisions in the UDHR, CEDAW, the ICCPR, the ICESCR, and most importantly the American Convention.

CEDAW provides a good case study of the weaknesses of the U.N. treaty regime. As its broadly articulated rights and emphasis on reporting rather than judicial remedies suggest, CEDAW is limited in its utility because it lacks the means to enforce the provisions beyond public shaming mechanisms.⁴⁰⁵ Also contributing to CEDAW's problems in implementation is the allowance of reservations by the countries that are parties to the agreement.⁴⁰⁶ Although Nicaragua made no such reservations, it has still had many problems complying with the treaty.⁴⁰⁷ Nicaragua signed CEDAW on July 17, 1980, and then ratified the treaty on October 27, 1981.⁴⁰⁸ As recently as 2001,

404. The Inter-American Court can apply these provisions and consider them when interpreting Nicaragua's treaty obligations. *See infra* Part VI.

405. The treaty has an extensive system for reporting, recording, and publicly condemning violations of the treaty. Although Nicaragua is not a party to CEDAW's optional protocol, it should be noted that CEDAW is now gaining strength in its implementation through the Optional Protocol, which gives an individual the standing to bring a complaint against a government. *See* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/54/49 (Oct. 15, 1999). CEDAW has followed the ICCPR in implementing the protocol to increase the availability of remedies. *See* Optional Protocol to the International Covenant on Civil and Political Rights, art. 2, U.N. Doc. A/RES/2200 (Dec. 16, 1966).

406. CEDAW in particular has had numerous problems in implementation due to the allowance of reservations. *See generally* Myriam Jacobs, *A Conditional Promise*, 3 NQHR 271 (1994) (analyzing CEDAW and the use of reservations). For a discussion of the use of reservations and how they hinder the implementation of CEDAW, *see generally* Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991); *see also* VCLT, *supra* note 288, art. 19 (allowing for reservations unless: "(a) [t]he reservation is prohibited by the treaty; (b) [t]he treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) [t]he reservation is incompatible with the object and purpose of the treaty").

407. *See* CEDAW, *supra* note 294 (listing states that impose reservations).

408. *See id.*

CEDAW's reporting found that Nicaragua has both failed to incorporate the treaty's provisions into domestic law and to institute legal mechanisms to assure compliance with the Convention. For example, Nicaragua has stalled in adopting a "family code" or "equal rights and opportunities."⁴⁰⁹ Additionally, in the context of the issue at hand, CEDAW's committee has also found that Nicaragua has not complied with provisions granting reproductive health rights to women.⁴¹⁰

At the same time, CEDAW and the other U.N. treaties remain important to the issue, as the blanket ban is most clearly inconsistent with the country's obligations under CEDAW. CEDAW seeks to eliminate discrimination against women and constitutes the world's most authoritative human rights treaty on women's rights.⁴¹¹ Further, CEDAW and reproductive rights are important supporting rights to the right to life. Therefore, although CEDAW lacks the means to enforce its own provisions and its articles lack the specificity to support a court claim, the treaty is still useful to support the contention that Nicaragua has expressly violated its treaty obligations.⁴¹² The injured party may argue the breach of multiple human rights, including rights under CEDAW before an international court. Even in the context of a case before the Inter-American Court, which will only apply rights under the OAS treaty system, CEDAW and other treaties remain important in matters of interpretation. Any plaintiff bringing a claim under the right to life would also argue that the rights to liberty, security, health, privacy, and equality have been

409. Comm. on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Nicaragua*, ¶ 7, U.N. Doc. CEDAW/C/NIC/CO/6 (Jan. 15–Feb. 2, 2007), available at, <http://www.universalhumanrightsindex.org/documents/826/1056/document/en/text.html>.

410. *Id.* ¶ 17.

411. CEDAW, *supra* note 294, art. II. CEDAW was adopted in 1979 by the UNGA, entered into force in 1981, and has been ratified by 185 states. That said, CEDAW has a poor record of compliance. CEDAW rights are particularly broad and do not have practical means of enforcement. Nor is there an established means to enforce an affirmative obligation on the part of the government to realize these rights (such is the case with negative rights, which necessitate government restraint rather than overt action). See U.N. Division for the Advancement of Women, CEDAW, Overview of the Convention, <http://www.un.org/womenwatch/daw/cedaw/index.html> (last visited Dec. 26, 2008).

412. Though CEDAW's Committee has explicitly noted that the Nicaraguan ban is inconsistent with the nation's obligations under CEDAW, the "Convention . . . suffers from weak enforcement mechanisms and an unusually high number of reservations entered by State parties." Margolin, *supra* note 235, at 88.

violated under interpretations of the American Convention that are consistent with Nicaragua's other international obligations.⁴¹³

VI. CHOOSING A FORUM—APPLYING TREATY LAW

A. *The Domestic Exhaustion of Remedies and the Inter-American Court of Human Rights*

There has been a great deal of academic discussion about the fragmentation of international law⁴¹⁴ due to the availability of multiple fora to hear human rights claims.⁴¹⁵ As discussed in the previous Section, human rights treaties often have overlapping rights and therefore overlapping jurisdiction. However, in this specific case, many of these issues are moot. While the ICPPR, ICESCR, CEDAW, and other treaties provide for complaint mechanisms, the Inter-American Court of Human Rights (“IACtHR”)⁴¹⁶ is the only forum of these in which individual complaints are recognized by Nicaragua.⁴¹⁷ Though CEDAW and the ICCPR have optional protocols provisions that allow for individual complaints, these have not been ratified by Nicaragua.⁴¹⁸ Absent the country taking itself to court, an individual complaint before the IACtHR may very well be the only forum where the case can be heard.⁴¹⁹

413. See DAVID J. BEDERMAN, *SPIRIT OF INTERNATIONAL LAW* 141 (2002) (“Alternatively, an approach is using domestic law to find violation: international tribunals are free to apply and interpret national law as relevant to the international disputes that come before them.”); see also American Convention on Human Rights, *supra* note 316, art. 29 (stating that no rule of the American Convention is to be interpreted to restrict the enforcement of any right or freedom recognized by other Conventions to which the State is a party).

414. There is an ongoing debate in treaty law on whether regional treaties are helping or harming international law. See Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals*, 271 *RECUEIL DES COURS* 101, 351 (1998).

415. See L.G.P. Specker, *Remedying the Normative Impacts of Forum Shopping in International Human Rights Tribunals*, 2 *N.Z. POSTGRADUATE L. E-JOURNAL*, Issue 2 2005, [http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%202%20\(2005\)/6%20Leontine%27s%20Final.pdf](http://nzpostgraduatelawejournal.auckland.ac.nz/PDF%20Articles/Issue%202%20(2005)/6%20Leontine%27s%20Final.pdf) (discussing potential normative problems in international law due to overlapping treaty rights, fragmented petition systems, and the ability of the human rights plaintiff to forum shop).

416. The IACtHR is charged with applying the two fundamental treaties of the OAS system—the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man. See Grossman, *supra* note 29, at 1305.

417. NGOs and individuals, as well as countries themselves, are allowed to present their cases before the court. See Inter-American Court Statute, *supra* note 317.

418. See Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, at 8 (2004), <http://www.unhchr.ch/pdf/report.pdf> (noting the status of Nicaraguan ratifications).

419. See, e.g., Andrew Srulovitch, *Non-Compliance with the International Court of Justice*, in Conference of Presidents of Major American Jewish Organizations (July 8,

The IACtHR is a “seven-member autonomous body, elected by the states that are parties to the Convention.”⁴²⁰ It has advisory and contentious jurisdiction.⁴²¹ Contentious cases must begin with the filing of a complaint in the commission.⁴²² Judgments are monetary or non-monetary reparations under international remedies rules.⁴²³ Decisions are generally complied with and are binding.⁴²⁴ The court hearing this issue is further supported by the fact that regional treaties and courts have the ability to implement regionally recognized rights which are often articulated with greater specificity.⁴²⁵ As the IACtHR’s strong record of compliance evidences, regional recognition has a strong correlation to compliance.⁴²⁶ In this case, the Nicaraguan legislature has relied on the American Convention’s Right to Life in enacting the blanket ban. As the IACtHR is charged with implementing the Convention, it is the best forum to interpret Nicaragua’s obligations.

B. Procedure: Domestic Exhaustion of Remedies

According to the rule of exhaustion of local remedies, a State “must be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question at the level of regional and international organs.”⁴²⁷ However, many international courts and

2004), http://www.eyeontheun.org/assets/attachments/articles/1549_non_compliance_with_the_icj.pdf (responding to the Israeli Wall case and citing the ICJ’s history of non-compliance).

420. Richard J. Wilson, *Supporting or Thwarting the Revolution? The Inter-American Human Rights System and Criminal Procedure Reform in Latin America*, 14 SW. J. L. & TRADE AM. 287, 291 (2008).

421. *Id.*

422. *Id.*

423. *Id.* at 291–92.

424. *Id.* at 292.

425. See *supra* Part V for a discussion of the American Convention and other regional treaties; see also Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L. L. 101, 106 (2008) (arguing that regional treaty bodies “permit agreement on a fuller list of human rights, or their more detailed definition”).

426. See generally Morse Tan, *Member State Compliance with the Judgments of the Inter-American Court of Human Rights*, 33 INT’L J. LEGAL INFO. 319 (2005) (discussing why nations obey international law).

427. CANÇADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW: ITS RATIONALE IN THE INTERNATIONAL PROTECTION OF INDIVIDUAL RIGHTS 1* (1983). This rule has been applied in the case law of international courts. See, e.g., *Azucena Ferry Echaverri et al. v. Nicar.*, Case 11.878, Inter-Am. C.H.R., Report No. 1/07, OEA/Ser.L/V/II.130, doc. 22 rev. ¶ 35 (2007) (upholding the requirement that domestic remedies be exhausted before the international

human rights treaties have carved out exceptions to the rule when domestic remedies will have no hope of succeeding—such as when the domestic courts are neither independent nor impartial or when the case has undergone an excessive delay at the local level, as has been the case in Nicaragua.⁴²⁸ The Nicaraguan CSJ's self-imposed deadline for deciding the case was January of 2007, but the court has not indicated a need for an extension in deciding, nor has it promised a decision in the near future. Therefore, whether the CSJ decides to uphold the ban or continues to delay, the blanket ban may well be considered an issue justiciable by international law.⁴²⁹

Next, in contentious cases, the American Commission or the State must refer the case to the court. The Commission has held that, when the American Convention has been violated, there is a presumption of referral. However, while the Commission is charged with referring cases on specific grounds, under *iura novit curia*, the court may find different or additional violations.⁴³⁰ In this case, the Inter-American Commission's willingness to address the issue publicly further supports the viability of the IACtHR as a forum. When the blanket ban was enacted, the Inter-American Commission

council may rule on an issue, since it is “designed for the benefit of the State, because the rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had an opportunity to remedy them by internal means”); *see also* Cho, *supra* note 95, at 438.

428. Court officials declared they will decide on the constitutionality of the ban in due time. *See* HUMAN RIGHTS WATCH REPORT, *supra* note 142; *see also* Silvia D'Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection* 13–14 (European Univ. Inst. Working Paper No. 2007/02, 2007), available at <http://ssrn.com/abstract=964195> (“The American Convention on Human Rights states that the rule of the previous exhaustion of local remedies does not apply when domestic law does not guarantee a due process of law, when the individual has been denied access to local remedies, and when there occurred a prolonged and excessive delay in the decision of the case at the local level (art.46.2). The latter exception is also mentioned in the Additional Protocol to the ICCPR (art.5.2.b.)”); *supra* notes 172–73, 176, and accompanying text (discussing the potential for domestic remedy).

429. *See* D'Ascoli & Scherr, *supra* note 428; *see also* Bernard Robertson, *Exhaustion of Local Remedies in International Human Rights Litigation: The Burden of Proof Reconsidered*, 39 INT'L & COMP. L. Q. 191, 193 (Jan. 1990) (“saying that the legal burden of persuasion on the exhaustion of local remedies rests with the applicant but that the respondent State bears an evidential burden of demonstrating that remedies exist to be exhausted”). *See, for example*, Article 46(1)(a) of the American Convention, which requires that domestic legal remedies must be exhausted in order to hear the case. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 46(1)(a) [hereinafter Organization of American States]. This principle is applicable as a general principle of international law. *See id.*

430. Quintana Osuna, *Recognitions of Women's Rights Before the Inter-American Court of Human Rights*, 21 HARV. HUM. RTS. J. 301, 311 (2008).

issued a statement declaring that “Nicaragua’s recently passed abortion ban is contrary to international law and threatens women’s human rights.”⁴³¹ The statement represented the Commission’s first attempt to delineate any reproductive health obligations under the American Convention.

C. *Scope of the Court’s Jurisdiction*

The IACtHR has broad advisory jurisdiction.⁴³² While the court’s contentious jurisdiction is primarily limited to the American Convention, the IACtHR “may apply other treaties that give it power which include OAS treaties such as the Convention of Belém do Pará.”⁴³³ The Inter-American system uses the “fourth instance formula” whereby the international court system does not consider itself “a court of appeal from adverse decisions at the highest level of domestic [trial and appeal].”⁴³⁴ In evaluating whether to refer a case to the court, the Commission does not review compliance with domestic law but rather compliance with judicial guarantees.⁴³⁵

[A]lthough they are human rights bodies, both the Commission and the Court have widely extended the sources from which they draw their jurisprudence to include international humanitarian law as well as international criminal law, where relevant. They also draw from the jurisprudence of the U.N. and regional bodies, and often invoke standards and guidelines that have been acknowledged as relevant or binding at an international level.⁴³⁶

As the American Convention mandates domestic judicial protection for human rights, the court will likely hear a case alleging

431. Letter from Victor Abramovich, Rapporteur on the Rights of Women, Org. of Am. States, to Norman Calderas Cardenal, Minister of Foreign Affairs, Nicar. (Nov. 10, 2006), http://www.reproductiverights.org/pdf/index_nicaragua_english.pdf. “This statement, addressed to the Nicaraguan government, was released prior to the ban becoming law and is the first ever issued by the Commission on abortion.” Press Release, Center for Reproductive Rights, Inter-American Commission Issues Landmark Statement Declaring Nicaragua’s Abortion Ban Jeopardizes Women’s Human Rights (Dec. 1, 2006).

432. Neuman, *supra* note 425, at 102.

433. Osuna, *supra* note 430, at 310. The Inter-American Convention for the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) entered into force on March 5, 1995, and is currently the only OAS treaty to address women and the only international treaty that is aimed specifically at preventing violence against women. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63.

434. Wilson, *supra* note 420, at 300.

435. *Id.* at 301.

436. *Id.* at 292.

violations of international law as constitutionalized in Nicaragua.⁴³⁷ Concurrently, the court may rule on the lack of judicial remedy for the violation of Nicaraguan constitutional rights.⁴³⁸ Further, in a contentious case, such as a case to overturn Nicaragua's blanket ban, the court will have broad authority once a violation is found.⁴³⁹

D. *A Hypothetical Ruling*

If involved, there is a good deal of evidence that the court will find the blanket ban in violation of international human rights and find Nicaragua in breach of its duties under treaty law. In terms of women's rights, progress has been made very recently in the Inter-American system. The court addressed violence against women in the 1997 Loayza-Tamayo Case.⁴⁴⁰ In Loayza, the court noted that "gender-related abuses violated Article 5 of the American Convention . . . the right to humane treatment."⁴⁴¹ In late 2006, the Castro-Castro prison case utilized the Convention of Belém do Pará in its analysis of the Peruvian government's potential violations of human rights.⁴⁴² This was the first case by the court to directly address women's human rights. The court found that Articles 8 and 25, rights to due process and a fair trial, were violated "when [the State] failed to investigate violations of Article 5."⁴⁴³ In analyzing a violation of Article 5, the court took into account "the suffering of pregnant women" as well as the lack of pre-partum and post-partum care and found that the State "imposed an undue burden on women because of their gender."⁴⁴⁴ Further, in regards to due process and the right to a fair trial, the court found that "once the state authorities become aware of [the violation], they must start, *ex officio* and without delay, a serious, impartial and effective investigation."⁴⁴⁵ The violations involved in the *Castro-Castro Prison* case can be analogized to the situation under the Nicaraguan ban in the denial of pre-partum

437. See Organization of American States, *supra* note 429.

438. See *id.* Also, as mentioned in Part III.C, *supra*, Nicaragua's monist constitution holds international treaty rights as the equivalent of constitutional rights. Therefore, the claims of violations of international and domestic law may very well overlap.

439. The Court may order the protection of individuals. See Organization of American States, *supra* note 429, art. 63(1) & (2).

440. Osuna, *supra* note 430, at 302.

441. *Id.* at 305.

442. *Id.* at 304–10.

443. *Id.* at 306.

444. *Id.* at 308.

445. *Id.* at 308, n.57 (citing Case of Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs), Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 378 (Nov. 25, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf).

which did not except for the life of the mother was unconstitutional, basing its decision largely on the American Convention.⁴⁵¹

These factors provide a basis to predict that the Inter-American Court will rule against the law.⁴⁵² Furthermore, any judgment the court issues in a contentious case is legally binding on Nicaragua. As noted previously, the Inter-American Court has an extremely high rate of compliance with its decisions.⁴⁵³ In terms of remedies, the court can order reparations in the form of monetary “compensation, restitution, satisfaction and guarantees of non-repetition.”⁴⁵⁴ Although the court has only done so rarely, the “most significant of the powers of the Court . . . is to strike down domestic legislation that falls below the floor of human rights protected in the Americas.”⁴⁵⁵ In the instances in which the court has held the domestic law in violation of the American Convention, “States have amended the laws, domestic courts have declared them unconstitutional, or domestic court judgments have been annulled.”⁴⁵⁶

The power of the court to order the alteration of domestic law has potentially profound consequences in Nicaragua. Should the court rule that the ban violates basic human rights in the Americas, Nicaragua will likely be compelled to alter its policies if the court finds the law unsatisfactory, perhaps by reinstating the therapeutic abortion exception or, in a less drastic remedy, ordering the Ministry of Health to create clear guidelines for doctors for dealing with

of treaty signatories. Colombia is one of the twenty-five countries to have ratified the American Convention. See American Convention on Human Rights, *supra* note 299.

451. *In re* Abortion Law Challenge in Colombia, Corte Constitucional, Sentencia C-355/06 (2006).

452. The ideal plaintiff for litigating this issue before the court is a mother with an ectopic pregnancy, as the case for preserving the mother’s life is exceptionally compelling when medical certainty exists that the baby cannot be saved. This eliminates arguments for the baby’s competing interests. Cases of ectopic pregnancy, gestational diabetes, and instances where the expectant mother is simultaneously diagnosed with cancer preclude the Catholic Church’s argument that with today’s medical technology, there are no scenarios where both the baby *and* the mother cannot be saved. See *supra* notes 110–13 and accompanying text for the Church’s position that the law does not deny the mother the right to life in any instance.

453. See *supra* note 426 and accompanying text.

454. Osuna, *supra* note 430, at 309.

455. Wilson, *supra* note 420, at 310.

456. Tan, *supra* note 426, at 329; see also Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 394 (2008) (“[T]he Inter-American Court is no longer shy about requiring society-wide reparations, including legislative and institutional reform, even in cases involving a sole litigant.”).

pregnant women in distress under the abortion ban.⁴⁵⁷ Such a decision would create a ripple effect for other Latin American nations that are parties to the American Convention. Countries such as El Salvador with similarly restrictive policies may very well amend their policies in light of a court judgment protecting the life of the mother.⁴⁵⁸

In the end, a ruling striking the law down would have widespread implications, not only regionally but internationally. The court would be holding that extreme limits placed on reproductive health is inconsistent with the duties imposed by the Convention. Therefore, reproductive health policies which do not provide for the mother's life would be deemed human rights violations even by treaties created and policed by socially conservative countries and under culturally relative conceptions of human rights.

CONCLUSION

Viewing the issue from a human rights perspective, law itself "can be an instrument of oppression as well as of protection and liberation."⁴⁵⁹ As the enactment of the blanket ban has shown in Nicaragua, domestically protected "rights can be lost as well as won."⁴⁶⁰ This Comment sought to outline a practical approach to addressing the Nicaraguan blanket ban through international action, should domestic remedies fail. Some human rights proponents may argue that this paper does the cause a disservice through its recognition of cultural relativism, its narrow framing of the issue, and its small goal of reinstating the therapeutic abortion exception. While I agree that the outcome may be less awe-inspiring than a complete liberalization of the law, reinstating the exception is an attainable goal. Taking culture and politics into account, it is better to argue for small but realizable changes than make calls for wide-sweeping institutional reform.

457. See Tan, *supra* note 426, at 329. Note, however, that this will only work if the decision involves reparations rather than criminal penalties. Compare CEDAW, *supra* note 294, which has a notoriously low rate of compliance.

458. A less desirable, though unlikely, outcome would be that Nicaragua and other parties with similar laws withdraw from treaties which impose an international obligation to protect the life of the mother. For an example of a country's noncompliance and recommitment to the Court, see Morse H. Tan, *Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights*, 43 TEX. INT'L L.J. 243, 246 (2008) (citing Peru's noncompliance with the Inter-American Court and its subsequent reaffirmation of commitment).

459. RENDEL, *supra* note 187, at 1.

460. *Id.*

Accordingly, the piece is structured along practical lines. First placing the law itself in the context of Nicaragua's greater social and political scheme, the piece provided background and addressed the particulars of the law itself. Next, the piece followed the procedural concerns of an international court. As the domestic exhaustion of remedies is necessary to any international intervention and is the most preferable outcome, this possibility was addressed next. However, because the blanket ban is likely to pass a constitutional challenge, this piece then analyzed the possibility of internationally addressing the ban.

Part IV considered the forms an international response could take through the lens of international relations theory. Operating from the hypothetical premise that the United States will take steps to address the blanket ban, Part IV posited why unilateral efforts could prove unsuccessful. First, it stressed the need for legitimacy in action. That is, the steps taken should be seen as part of a multilateral effort rather than as neo-imperialism. Next, this Part addressed what form multilateral action should take. While the use of force is a wholly inappropriate remedy in this context, even economic sanctions, an often-used means of coercing governments to change their policies, is a poor course of action. Although methods of economic pressure, such as sanctions, embargos, or the withdrawal of humanitarian aid, have been successful in the past, these are increasingly criticized for their disproportionate impact on the poor.⁴⁶¹ In essence, the criticism is that these tactics punish the victims. Instead, international law, specifically treaty law, is the appropriate means to address the blanket ban.

However, because international law is a delicate regime, plagued by haphazard enforcement, framing both the right in question and the suggested remedy as narrowly as possible maximizes the potential for a favorable court ruling. In light of these concerns, this Comment focused on the right to life, one of the most broadly recognized and historically enforced rights,⁴⁶² rather than on women's rights. That is not to say that rights to reproductive health, access to healthcare, and more general equality concerns are not important to the issue. While it is unlikely that any of these rights alone would sustain a claim

461. See *supra* notes 252–63 and accompanying text.

462. The right to life is acknowledged by both cultural relativists and universalists, see *supra* notes 234–41 and accompanying text (discussing the debate between cultural relativists and universalists), and by both multilateral and regional treaties. Perhaps most importantly, the right to life is protected by Nicaragua's constitution, and, more broadly, it is recognized as a protectable interest by the government itself.

before an international court, they are important supporting rights to the right to life. Using these rights as one would in a common litigation tactic—by arguing many theories of the case as opposed to just one—strengthens the claim before a court.

The Inter-American Court has the potential to play a pivotal role in resolving this issue. However, even after presenting a workable case against the blanket ban based upon various international agreements, it is important to be aware of the limits to treaty law and international courts on controlling State behavior.⁴⁶³ International treaty law is based on the consent of States, and although a court decision is binding in theory, the State may ultimately choose to ignore the court's decision.⁴⁶⁴ Existing problems with compliance are aggravated by unclear standards.⁴⁶⁵ Human rights instruments need to more clearly delineate the obligations States are undertaking by signing on to the agreement.⁴⁶⁶ This can be accomplished through tighter restrictions on the number and form of reservations.⁴⁶⁷ Regional treaties are extremely important because of their ability to enumerate specific rights that can be enforced domestically.⁴⁶⁸ These measures will increase adherence to the terms of any given treaty.

In light of the need for heightened clarity in obligations and binding terms, regional agreements are exceptionally important in this context. The American Convention and the Inter-American Court have the most persuasive power over Nicaragua because Nicaragua's regional allies have ratified and are parties to the Convention.⁴⁶⁹ Further weighing in favor of compliance, the United

463. Tan, *supra* note 426, at 330–44 (arguing ways to increase compliance).

464. See CHRISTOPHER C. JOYNER, *INTERNATIONAL LAW IN THE 21ST CENTURY* 115–16 (2005) (discussing the validity of treaties).

465. Some academics attribute the problems with the system to unclear standards set by the Vienna Convention on the Law of Treaties. See generally, Daniel N. Hylton, Note, *Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419 (1994) (providing an in-depth critique of the Vienna Convention's framework for reservations).

466. Cho, *supra* note 95, at 435.

467. For example, CEDAW, Article 28(2) allows for reservations provided that they are not "incompatible with the object and purpose of the present Convention." See CEDAW, *supra* note 294, art. 28. Although the provision makes intuitive sense, it only prohibits the most extreme of reservations which thwart the purpose of the statute itself. The range of reservations allowed under CEDAW creates inconsistent and uneven obligations among signatory states and therefore weakens the potential of CEDAW as a coherent enforceable obligation.

468. Regional treaties can be enforced domestically because the bounds of the right are clear and the terms are enforceable.

469. López, *supra* note 80 ("Therapeutic abortion is practiced in all the Latin American countries with leftwing governments, with the exception of Chile and

States' lack of involvement with the American Convention preempts arguments that the United States has exercised undue influence over the court's decision. This eliminates protests of power-play in the court's decision-making process.

Ultimately, while treaty law is an imperfect remedy due to the tenuousness of the obligations it imposes, it is also the best hope for enforcement of legal norms in the context of human rights. While some commentators argue that regional agreements are leading to the breakdowns of rights norms,⁴⁷⁰ regional agreements play a beneficial role by more clearly delineating the same rights espoused by broader multilateral treaties.⁴⁷¹ In this instance, the possibility of the Inter-American Court addressing the law in Nicaragua holds a great deal of promise. This is largely due to the Court's record of compliance and the prospect of regional political pressure in abiding by the Inter-American Court's determination. It is impossible to predict Nicaragua's reaction to a court ruling. Nevertheless, Nicaragua would be most likely to comply with a decision from the Inter-American Court in which the country has a "greater stake in keeping up with obligations and following treaties that have been co-signed with neighbors"⁴⁷²—ones that recognize the right to life as sacred and worthy of the law's protection.

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Nicaragua. In Chile, this was imposed by the Pinochet dictatorship to reward the Catholic hierarchy for supporting its crimes against both the Chilean people and democracy.").

470. See, e.g., Siobhan Mullally, *Reclaiming Universalism: Toward a Feminist Response to Reservationists on Human Rights Treaties* (May 27, 2004) (unpublished manuscript, available at http://www.allacademic.com/meta/p117064_index.html) (claiming that feminist use of localism and shifts away from universalism have perpetuated the fragmentation of treaty regimes).

471. Because the signatory state's obligations must be interpreted as consistent whenever possible, regional treaties cannot undermine larger multilateral treaty obligations. See *supra* notes 315–19 and accompanying text (discussing regional treaties).

472. Margolin, *supra* note 235, at 87–88. Many of these neighbors are also political allies with more liberal stances on reproductive health:

The Colombian Supreme Court declared laws against abortion unconstitutional in that country. The very Catholic Brazilian president told Catholic radio stations that while he was personally opposed to abortion, Brazil's social conditions mean that some pregnant women need help. The state needs to treat [abortion] as a matter of public health. In Uruguay, the House passed a liberal abortion law four and a half years ago, and although it failed in the Senate in 2004, the issue is expected to emerge again.

Frances Kissling, *What Does a Girl Have To Do To Get Excommunicated*, SALON, May 21, 2007, available at <http://www.salon.com/opinion/feature/2007/05/21/excommunication/>.