

## Reproductive Injustice: An Analysis of Nicaragua's Complete Abortion Ban

Jocelyn E. Getgen

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# Reproductive Injustice: An Analysis of Nicaragua's Complete Abortion Ban

Jocelyn E. Getgen†

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

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† J.D., Cornell Law School, Dec. 2007; M.P.H., Johns Hopkins Bloomberg School of Public Health, May 2007; B.A., Cornell University, 2000. The author would like to thank Haydeé Castillo Flores and Padre Francisco Robles for their essential contributions to her understanding of the reality of the therapeutic abortion issues in Nicaragua. In addition, the author would like to recognize Lainie Rutkow, Benjamin Mason Meier, Lilian Sepúlveda, Marcia Greenberg, Muna Ndulo, and the staff of the *Cornell International Law Journal* for their meaningful contributions during the revision process. Also, the author thanks her family and friends for their undying support. Finally, the author would like to dedicate this Note to the women of the world who have suffered and died as a result of restrictive access to abortion services and to those advocates who dedicate their life’s work to making safe abortion services legal and available to women who choose to access them.

1. Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Platform for Action*, ¶ 106(k), U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) [hereinafter *Beijing Platform for Action*] (quoting the International Conference on Population and Development, 41 CORNELL INT’L L.J. 143 (2008))

## Introduction

Increasingly, governments throughout the world are recognizing the need to address the causes and consequences of unsafe abortion as a pressing, yet preventable, public health concern.<sup>2</sup> International norms and trends have shifted toward a rights-based approach to women's reproductive health<sup>3</sup> and to safe abortion access even though the right to reproductive choice does not necessarily include a specific right to abortion.<sup>4</sup> Furthermore, international human rights advocates and scholars have progressively challenged restrictive abortion laws through existing human rights norms, such as the rights to life and health, despite the lack of consensus on an explicit right to safe and legal abortion services.<sup>5</sup> Even amidst opposition from anti-choice forces and reactionary governments, many states have utilized various international fora to commit themselves to considering decriminalizing abortion practices, to understanding the costs and causes of unsafe abortion, and to improving abortion safety and access where already legally permitted.<sup>6</sup>

Although this international trend moving unsafe abortion from religious, moral, and political frameworks to public health and human rights arenas is a giant step towards improving the health and lives of women, there are countries sidestepping this trend. A few of these states have enacted retrogressive measures to curb safe and legal abortion practices, even for therapeutic purposes.<sup>7</sup> The abortion laws in Chile, El Salvador,

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Cairo, Egypt, Sept. 5-13, 1994, *Report of the International Conference on Population and Development*, ¶ 8.25, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994).

2. See Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 763-64 (2004); David A. Grimes et al., *Unsafe Abortion: The Preventable Pandemic*, 368 LANCET 1908, 1908 (2006).

3. See, e.g., Rebecca J. Cook, *Developments in Abortion Laws: Comparative and International Perspectives*, 913 ANNALS N.Y. ACAD. SCI. 74, 79-81 (2000) (analyzing the significant recent developments in abortion laws throughout the world and arguing that the legal trend is moving toward enacting laws to protect women's health and human rights); Lynn P. Freedman & Stephen L. Isaacs, *Human Rights and Reproductive Choice*, 24 STUD. FAM. PLAN. 18 (1993) (noting the challenges to reproductive autonomy and calling on policymakers to set international human rights standards to protect free and responsible decision-making); Jodi L. Jacobson, *Transforming Family Planning Programmes: Towards a Framework for Advancing the Reproductive Rights Agenda*, REPROD. HEALTH MATTERS, May 2000, at 21, 26 (discussing the increasing application of a human rights framework to reproductive health programs and the obstacles hampering reform); see also Ernst et al., *supra* note 2, at 764.

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

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

6. See Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action, G.A. Res. S-23/3, ¶ 72(o), U.N. GAOR, 23d Special Sess., Annex, U.N. Doc. A/Res/S-23/3 (Nov. 16, 2000) [hereinafter Beijing Further Actions]; Ad Hoc Comm. of Whole, *Key Actions for the Further Implementation of the Programme of Action of the International Conference on Population and Development*, ¶ 63(i)-(iii), U.N. Doc. A/S-21/5/Add.1 (July 1, 1999) (reported by Gabriella Vukovich) [hereinafter Cairo Key Actions]; Ernst et al., *supra* note 2, at 764.

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

and Nicaragua are among the most restrictive in the world. They effectively eliminate all legal grounds for abortion and criminalize the woman who obtains abortion services as well as the physician who provides them.<sup>8</sup> In maintaining such stringent abortion laws, these states not only contravene international legal norms and trends<sup>9</sup> but also arguably violate international treaties.<sup>10</sup> Even more vitally, these complete abortion bans violate Chilean, Salvadorian, and Nicaraguan women's fundamental human rights to life and health, which international treaties promise them.<sup>11</sup>

This Note examines these recent legislative changes in Latin America that criminalize all abortions, including therapeutic abortions performed to save the lives and health of women as well as to terminate a pregnancy in cases of rape or incest. It argues that complete abortion bans run counter to prevailing international legal trends and norms that commit states to consider decriminalizing abortion and improving the safety and access to abortion services where legal. Part I explores the reality of unsafe abortion practices worldwide and provides context surrounding the causes and con-

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8. See Cód. Pen., Delitos contra la orden familiar y moralidad pública, arts. 342-345 (1989) (Chile); Cód. Pen., ch. II, Delitos contra las vidas de seres humanos en los primeros etapas de desarrollo, arts. 133-137 (1998) (El Sal.); Cód. Pen., libro II, tit. I, Delitos contra las personas y su integridad física, psíquica, moral y social, ch. V, Del aborto, art. 165 (repealed 2006) (Nicar.).

9. International norms and trends can be seen as fundamental elements of customary international law, a primary source of international human rights law. See, e.g., MICHAEL BYERS, *CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 130 (1999) ("Most international lawyers agree that customary international law results from the co-existence of two elements: first, the presence of a consistent and general practice among States; and, secondly, a consideration on the part of those States that their practice is in accordance with law."); KAROL WOLFFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 53 (2d ed. 1993) ("An international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law."); see also THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989). In other words, general practice and general acceptance as law, also called *opinio juris*, come together to form customary international law. See BYERS, *supra*, at 130. Although scholars disagree as to when a certain practice becomes general practice among states or generally accepted among states, practice and acceptance do not have to be universal for a law to become international custom. See, e.g., JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 5 (2d ed. 2003) ("It is . . . significant that the behavioral element of custom (i.e., general practice) is . . . free from the need for total conformity, and it rests not merely upon the practice of States as such but ultimately upon the practice of all participants in the international legal process."); WOLFFKE, *supra*, at 59 (explaining that the number of states involved in the process of forming custom is immaterial and that the conduct of one state, if merely tacitly accepted by another, can lead to the formation of a custom between the states involved).

10. See, e.g., Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 513 [hereinafter CEDAW]; 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 [hereinafter American Convention]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on the Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

11. See CEDAW, *supra* note 10, arts. 12, 14(2)(b), 16(1)(e); American Convention, *supra* note 10, arts. 4-5; ICCPR, *supra* note 10, art. 6; ICESCR, *supra* note 10, arts. 10, 12.

sequences of this issue in Latin America. Part II considers the case of Nicaragua, the most recent Latin American country to pass a complete abortion ban, and the historical, political, and cultural contexts that led to the ban. Parts III and IV analyze the public health complications and human rights violations, respectively, of the complete abortion bans passed in Latin America, focusing on Nicaragua. Part V demonstrates that these complete abortion bans are exceptions to current prevailing international legal trends. Part VI offers suggestions for remedying women's human rights violations under international law. Part VII concludes by offering reasons as to why Nicaragua and other countries similarly situated should care about conforming to these international human rights norms and trends.

## I. Unsafe Abortion

### A. The Global Context

Each year, an estimated 80 million of the 210 million pregnancies that occur across the globe are unplanned.<sup>12</sup> Although some of these women decide to carry the fetus to term, 42 million women undergo induced abortions.<sup>13</sup> Of the 22% of pregnancies worldwide that end in abortion, an overwhelming majority are due to health, economic, or relationship problems.<sup>14</sup> An estimated 20 million women who voluntarily terminate their pregnancies live in countries that restrict or prohibit the procedure.<sup>15</sup> Despite the differences in the legal status of abortion between developed and developing countries, abortion rates are similar across these countries.<sup>16</sup>

The "silent pandemic"<sup>17</sup> of unsafe abortion is one of the hidden and often ignored public health concerns plaguing many less developed countries around the world.<sup>18</sup> The World Health Organization (WHO) defines

12. See WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2003 1 (5th ed. 2007), available at [http://www.who.int/reproductive-health/publications/unsafeabortion\\_2003/ua\\_estimates03.pdf](http://www.who.int/reproductive-health/publications/unsafeabortion_2003/ua_estimates03.pdf) [hereinafter WHO 2003].

13. See *id.*; see also ALAN GUTTMACHER INST., SHARING RESPONSIBILITY: WOMEN, SOCIETY AND ABORTION WORLDWIDE 25 (1999), available at <http://www.guttmacher.org/pubs/sharing.pdf>.

14. See ALAN GUTTMACHER INST., *supra* note 13, at 10, 42.

15. See *id.* at 25; cf. WHO 2003, *supra* note 12, at 1 ("Estimates indicate that 42 million pregnancies are voluntarily terminated each year—22 million within the national legal system and 20 million outside it."). Interestingly, the previous WHO report on unsafe abortion incidence found that 27 million legal abortions and 19 million abortions outside the legal system occurred in 2000. See WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2000 1 (4th ed. 2004), available at [http://www.who.int/reproductive-health/publications/unsafeabortion\\_2000/estimates.pdf](http://www.who.int/reproductive-health/publications/unsafeabortion_2000/estimates.pdf) [hereinafter WHO 2000]. These statistics demonstrate that, although the overall unsafe abortion incidence is declining, it is increasing in countries where abortion is restricted or prohibited by law. See *id.*

16. See ALAN GUTTMACHER INST., *supra* note 13, at 25.

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

18. See WHO 2003, *supra* note 12, at 1.

unsafe abortion as “the termination of an unintended pregnancy either by persons lacking the necessary skills or in an environment lacking the minimum medical standards, or both.”<sup>19</sup> The WHO estimates that women worldwide obtained 19 to 20 million unsafe abortions every year from 1993 to 2003.<sup>20</sup> In other words, approximately 10% of all pregnancies worldwide end in unsafe abortion each year.<sup>21</sup> Regardless of the legal status of abortion, many women faced with unintended pregnancies still seek out abortion services, and some even risk their health and lives in unsafe, illegal conditions to terminate their pregnancies.<sup>22</sup> For example, 5.3 million women suffer from temporary or permanent disability as a result of an unsafe abortion,<sup>23</sup> and 78,000 of the 600,000 women who die each year from pregnancy-related causes die from abortion complications.<sup>24</sup> 95% of these abortion-related deaths occur in less developed countries.<sup>25</sup> In fact, every eight minutes a woman dies from complications from an unsafe abortion in developing countries.<sup>26</sup> Many of these deaths result from clandestine abortion procedures.<sup>27</sup> Furthermore, maternal deaths are substantially higher for rural, poor women who generally have little or no access to safe abortion or post-abortion care services.<sup>28</sup> At the same time, for women with sufficient resources, access to safe abortion procedures is the norm even where abortion is prohibited by law.<sup>29</sup>

In contrast, countries that permit abortion usually have skilled practitioners who perform abortions early in pregnancies and use accepted abortion methods in hygienic environments.<sup>30</sup> Such procedures are generally safe and have low risks of post-abortion complications.<sup>31</sup> Even in some countries where abortion is legal, states may fail to respect, protect, and fulfill their obligations to women as a result of moral condemnation, inade-

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19. GUTTMACHER INST., PREVENTING UNSAFE ABORTION AND ITS CONSEQUENCES: PRIORITIES FOR RESEARCH AND ACTION vii (Ina K. Warriner & Iqbal H. Shah eds., 2006), available at <http://www.guttmacher.org/pubs/2006/07/10/PreventingUnsafeAbortion.pdf>.

20. See Grimes et al., *supra* note 2, at 1908; WHO 2003, *supra* note 12, at 14.

21. Elisabeth Ahman & Iqbal Shah, *Unsafe Abortion: Worldwide Estimates for 2000*, REPROD. HEALTH MATTERS, May 2002, at 13, 13.

22. See Cynthia Dailard, *Abortion in Context: United States and Worldwide*, ISSUES IN BRIEF (Alan Guttmacher Inst., New York, N.Y.), May 1999, at 1, available at [http://www.guttmacher.org/pubs/ib\\_0599.pdf](http://www.guttmacher.org/pubs/ib_0599.pdf).

23. Rama Lakshminarayanan et al., *Population Issues in the 21st Century: The Role of the World Bank*, HEALTH, NUTRITION & POPULATION DISCUSSION PAPER (World Bank, Wash., D.C.), Apr. 2007, at 53.

24. See Dailard, *supra* note 22, at 4.

25. See ALAN GUTTMACHER INST., *supra* note 13, at 32; L. Briozzo et al., *Unsafe Abortion in Uruguay*, 85 INT'L J. GYNECOLOGY & OBSTETRICS 70, 70 (2004).

26. See Halfdan Mahler, *Preface to WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2003* 1 (5th ed. 2007), available at [http://www.who.int/reproductive-health/publications/unsafeabortion\\_2003/ua\\_estimates03.pdf](http://www.who.int/reproductive-health/publications/unsafeabortion_2003/ua_estimates03.pdf).

27. See WHO 2000, *supra* note 15, at 1.

28. See, e.g., Briozzo et al., *supra* note 25, at 70 (finding evidence that maternal mortality rates are higher in Uruguay for low-income women).

29. See Dailard, *supra* note 22, at 4.

30. See *id.*

31. See *id.*

quate regulation, or a lack of political will to enforce the law, resulting in severely limited access to safe abortion procedures.<sup>32</sup>

Ultimately, although there is little correlation between abortion legality and abortion incidence, there is a strong correlation among abortion illegality, inadequate regulation, and *unsafe* abortion incidence.<sup>33</sup> In other words, restrictive legislation or poor regulation is positively correlated with unsafe abortion incidence.<sup>34</sup> Two visible consequences of this association are the higher rates of maternal mortality and higher proportions of abortion-related maternal deaths in countries that restrict or prohibit abortion services.<sup>35</sup>

Unsafe abortions occur in all corners of the world, yet clandestine practices are rare or non-existent in North America, Eastern Asia, and most of Europe.<sup>36</sup> In these regions, abortion is generally legal, safe, well-regulated, and accessible to women.<sup>37</sup> In developing regions, the maternal mortality rate due to unsafe abortions is 350 deaths per 100,000 abortions, a rate hundreds of times higher than that of most developed countries.<sup>38</sup> In Africa, approximately 4 million unsafe abortions occur annually, and although there are differences across sub-regions, the chance of a woman resorting to clandestine abortion is among the highest in the world.<sup>39</sup> For instance, Eastern Africa has an unsafe abortion rate of thirty-one abortions per one thousand women of reproductive age. This rate is second only to that of South America.<sup>40</sup> In parts of Latin America, estimates of the unsafe abortion rate are extremely high.<sup>41</sup> Even though there are also about 4 million unsafe abortions in Latin America each year,<sup>42</sup> the lower fertility, desire for smaller families, unmet need for contraception, and high rate of unplanned pregnancies in Latin America make the relative risk of death from post-abortion complications much higher among countries in this region.<sup>43</sup>

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32. See HUMAN RIGHTS WATCH, INTERNATIONAL HUMAN RIGHTS LAW AND ABORTION IN LATIN AMERICA 1 (2005), available at <http://www.hrw.org/backgrounder/wrd/wrd0106/wrd0106.pdf>.

33. See WHO 2003, *supra* note 12, at 3; Dailard, *supra* note 22, at 1.

34. See WHO 2000, *supra* note 15, at 3.

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

36. See *id.* at 14.

37. See *id.*

38. WHO 2003, *supra* note 12, at 18. This rate excludes China. ALAN GUTTMACHER INST., *supra* note 13, at 35 (noting a rate of 330 per 100,000 unsafe abortions in China). Abortion-related deaths are highest in Africa and estimated at 650 deaths per 100,000 unsafe abortions. See *Facts on Induced Abortion Worldwide*, FACT SHEETS (Guttmacher Inst., New York, N.Y.), Oct. 2007, at 2, available at [http://www.guttmacher.org/pubs/fb\\_IAW.pdf](http://www.guttmacher.org/pubs/fb_IAW.pdf). In contrast, abortion-related deaths are estimated at 10 per 100,000 in developed regions. *Id.*

39. See WHO 2000, *supra* note 15, at 14.

40. See *id.*

41. See *id.*

42. See *id.* at 13.

43. See, e.g., ELENA PRADA ET AL., GUTTMACHER INST., ABORTION AND POSTABORTION CARE IN GUATEMALA 5, 14 (2005), available at <http://www.guttmacher.org/pubs/2005/>

Why do these differences in unsafe abortion incidence and its negative consequences exist globally? The answer, which involves addressing the underlying determinants of unwanted pregnancies, unsafe abortions, and the resulting increases in maternal morbidity and mortality, is complex and structural in nature. Various larger global institutions and policies associated with aggravated poverty and the erosion of existing social services<sup>44</sup> may also negatively impact women's empowerment and rights to reproductive choice and freedom.<sup>45</sup> These institutions and policies, including those promoting privatization, macroeconomic adjustment (such as structural adjustment programs), foreign debt, trade inequities, international financial institutions, and transnational corporations, have continued to privatize, deregulate, and commodify reproductive health services.<sup>46</sup> Affirmations to promote these traditional capitalist priorities at international conferences such as the United Nations 1994 International Conference on Population and Development in Cairo (the Cairo Conference) serve to erect barriers to reproductive health care access and increase morbidity and mortality among women of lower socio-economic status.<sup>47</sup> Additionally, broader social issues, such as racism and high levels of inequality, can leave out the most vulnerable, resource-poor groups.<sup>48</sup> In order to advance human rights holistically, advocates and academics must address the multiple overlapping and reinforcing causes of harms against women and reproductive rights in today's world.

## B. The Latin American Context

More than 4 million Latin American women undergo induced abortions each year.<sup>49</sup> Although the restrictions or prohibitions on abortions throughout Latin America render statistical information less reliable,<sup>50</sup> even conservative estimates show that Latin America has one of the highest

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12/30/or18.pdf (discussing the desire for smaller family sizes, the unmet need for contraception, and the high rate of unplanned pregnancies); see also WHO 2000, *supra* note 15, at 14 (discussing lower fertility and high risk of death).

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

45. See Rosalind Pollack Petchesky, *From Population Control to Reproductive Rights: Feminist Fault Lines*, *REPROD. HEALTH MATTERS*, Nov. 1996, at 152, 156.

46. See *id.* ("[T]he practical implementation of this reproductive health and rights agenda will be impossible without the reallocation of resources globally and nationally to assure the full funding of social programmes, especially health—in other words, without radically new development alternatives.")

47. See *id.* at 156-57.

48. See *id.* at 158.

49. See Deirdre Wulf, *An Overview of Clandestine Abortion in Latin America*, *ISSUES IN BRIEF* (Guttmacher Inst., New York, N.Y.), Dec. 1996, at 1.

50. See CTR. FOR REPROD. RIGHTS, *PERSECUTED: POLITICAL PROCESS AND LEGISLATION ON ABORTION IN EL SALVADOR* 25 (2001).



incidences of induced abortion in the world.<sup>51</sup> Peru and Chile lead the region with the highest number of induced abortions.<sup>52</sup> Many Latin American women who seek abortions are in their late twenties or older, are married, and have at least one child.<sup>53</sup> Because most Latin American countries criminalize the procedure, most of the abortions are illegal, unsafe procedures that lead to increased mortality and morbidity rates across the region.<sup>54</sup>

Despite the region's modest declines in abortion rates since 1995,<sup>55</sup> Latin America is estimated to have one of the highest annual incidences of unsafe abortions in the world.<sup>56</sup> Data show that at least 800,000 Latin American women who have induced abortions each year require treatment for complications related to their procedures.<sup>57</sup> The methods commonly employed to induce clandestine abortions include the use of modern pharmaceuticals or herbal abortifacients, and the insertion of catheters, metal sounds, or even sticks directly into the uterus.<sup>58</sup> These clandestine and frequently self-applied methods often cause heavy bleeding, uterine rupture, and sepsis and may result in the need for post-abortion medical care from professionals.<sup>59</sup> Many women in need of medical attention due to complications from clandestine procedures are poor, rural women who may be unable to access care from skilled medical professionals.<sup>60</sup>

Complications from unsafe, clandestine abortions are a leading cause of maternal mortality in several Latin American countries.<sup>61</sup> For example, in Chile, nearly one-third of maternal deaths in the country can be attributed to abortion.<sup>62</sup> In other Latin American countries, although overall maternal mortality is relatively low, abortion deaths are disproportionately high, making unsafe abortion a leading cause of maternal deaths.<sup>63</sup> Abor-

51. See John M. Paxman et al., *The Clandestine Epidemic: The Practice of Unsafe Abortion in Latin America*, 24 *STUD. FAM. PLAN.* 205, 207 (1993).

52. Amy Deschner & Susan A. Cohen, *Contraceptive Use is Key to Reducing Abortion Worldwide*, *GUTTMACHER REP. ON PUB. POL'Y* (Guttmacher Inst., New York, N.Y.), Oct. 2003, at 7, 7 (citing Stanley K. Henshaw et al., *The Incidence of Abortion Worldwide*, 25 *INT'L FAM. PLAN. PERSP.* 530, 530-38 (1999)); Wulf, *supra* note 49, at 1).

53. See L.C. Remez, *Confronting the Reality of Abortion in Latin America*, 21 *INT'L FAM. PLAN. PERSP.* 32 (1995); Wulf, *supra* note 49, at 2.

54. See HUMAN RIGHTS WATCH, *supra* note 32, at 2; Paxman et al., *supra* note 51, at 205; Wulf, *supra* note 49, at 1.

55. See *Facts on Induced Abortion Worldwide*, *supra* note 38, at 1.

56. See WHO 2003, *supra* note 12, at 10.

57. See Wulf, *supra* note 49, at 5.

58. See Paxman et al., *supra* note 51, at 208-09.

59. See *id.* at 209.

60. See Wulf, *supra* note 49, at 2.

61. See HUMAN RIGHTS WATCH, *supra* note 32, at 2.

62. See *CTR. FOR REPROD. LAW & POLICY & OPEN FORUM ON REPROD. HEALTH & RIGHTS, WOMEN BEHIND BARS: CHILE'S ABORTION LAWS: A HUMAN RIGHTS ANALYSIS* 38 (1998); ORGANIZACIÓN PANAMERICANA DE LA SALUD NICARAGUA, *DEROGACIÓN DEL ABORTO TERAPEUTICO EN NICARAGUA: IMPACTO EN SALUD* 9 (2007), available at <http://www.abortoterapeutico.org/wp-content/uploads/2007/03/derogacion-del-aborto-terapeutico-en-nicaragua-impacto-en-salud.pdf> (citing Khan et al., *WHO Analysis of Causes of Maternal Death: A Systematic Review*, 367 *LANCET* 1066, 1066-74 (2006)).

63. See WHO 2000, *supra* note 15, at 9.

tion-related mortality in the region is between ten and one hundred times higher than in most European countries.<sup>64</sup> Stringent prohibitions on induced abortion throughout Latin America keep the practice underground and hide its victims behind a veil of secrecy.<sup>65</sup>

Cuba remains one of the only exceptions to the rule in Latin America regarding the incidence of unsafe abortions.<sup>66</sup> Unlike other countries in the region, Cuba has less restrictive, legalized abortion services.<sup>67</sup> Because of the country's use of safer abortion procedures in clinical settings, Cuba's abortion-related mortality rate is comparable to those of developed countries, with only one death per 100,000 procedures.<sup>68</sup> The liberalization of abortion laws in Cuba demonstrates the ability of countries to decrease unsafe abortion and its negative consequences by decriminalizing the practice.<sup>69</sup>

## II. Nicaragua: A Case Study

On October 26, 2006, Nicaragua's legislature voted to approve Law 603 and rescind Article 165 of the *Código Penal* (Penal Code), eliminating the only exemptions to the country's general ban on abortion and criminalizing even therapeutic use of the procedure for victims of rape or incest, or to save the health and life of the mother.<sup>70</sup> On September 13, 2007, the legislature reaffirmed this prohibition by rejecting a proposal to legalize therapeutic abortion<sup>71</sup> and voting in favor of a new penal code that maintains a total abortion ban.<sup>72</sup> As a result, Nicaragua's abortion laws now rank among the most restrictive in the world. Nicaragua joined Chile and El Salvador as the third country in the Western Hemisphere to make abor-

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64. See Paxman et al., *supra* note 51, at 210.

65. See Wulf, *supra* note 49, at 1-2.

66. See Stanley K. Henshaw et al., *The Incidence of Abortion Worldwide*, 25 INT'L FAM. PLAN. PERSP. S30, S33-34 (1999). In Latin America, legal abortions are available only in Cuba, Puerto Rico, and a few other Caribbean countries. See, e.g., HUMAN RIGHTS WATCH, *supra* note 32, at 1 (analyzing abortion restrictions in Latin America); Henshaw et al., *supra*, at S33-34.

67. See WHO 2000, *supra* note 15, at 14; Paxman et al., *supra* note 51, at 207.

68. See Paxman et al., *supra* note 51, at 210.

69. See *id.* at 221.

70. See *Nicaragua Outlaws Abortion Even to Save a Woman's Life*, IPAS, Oct. 26, 2006, [http://ipas.org/library/news/news\\_items/Nicaragua\\_outlaws\\_abortion\\_even\\_to\\_save\\_a\\_woman's\\_life.asp](http://ipas.org/library/news/news_items/Nicaragua_outlaws_abortion_even_to_save_a_woman's_life.asp) [hereinafter *Nicaragua Outlaws Abortion*]. Before the repeal of article 165, the Nicaraguan Criminal Code provided for the performance of therapeutic abortions and for legal purposes, called for three physicians and the consent of the spouse or nearest relative of the woman to intervene. See Heathe Luz McNaughton Reyes et al., *Invoking Health and Human Rights to Ensure Access to Legal Abortion: The Case of a Nine-Year-Old Girl from Nicaragua*, 9 HEALTH & HUM. RTS. 62, 66 (2006).

71. See *Nicaraguan Legislature Votes "No" to Saving Women's Lives*, IPAS, Sept. 20, 2007, [http://www.ipas.org/library/news/news\\_items/Nicaraguan\\_legislature\\_votes\\_no\\_to\\_saving\\_womens\\_lives.aspx](http://www.ipas.org/library/news/news_items/Nicaraguan_legislature_votes_no_to_saving_womens_lives.aspx) [hereinafter *Nicaraguan Legislature Votes*].

72. HUMAN RIGHTS WATCH, *OVER THEIR DEAD BODIES: DENIAL OF ACCESS TO EMERGENCY OBSTETRIC CARE AND THERAPEUTIC ABORTION IN NICARAGUA 3* (2007) available at <http://hrw.org/reports/2007/nicaragua1007/nicaragua1007web.pdf>.

tion laws more restrictive since 1994 by completely outlawing abortion.<sup>73</sup> The country's overall maternal mortality rate is high at 230 maternal deaths per 100,000 live births, a ratio more than twice that of neighboring Honduras and nearly ten times that of Costa Rica.<sup>74</sup> These policy changes to article 165 of the Nicaraguan Penal Code only add to the systemic practices of structural violence against women, deny women the right to health, and will likely lead to more maternal deaths in the country.<sup>75</sup>

#### A. Political Context Leading to Complete Abortion Ban

##### 1. Rosita's Case

*When asked how he felt about a nine-year-old girl who was raped and impregnated receiving a therapeutic abortion, one priest stated that, although the act of rape was abominable and unforgivable, the child was innocent and had a right to life. When asked to which child he was referring, the priest looked puzzled and said "the child inside her, of course."<sup>76</sup>*

Activists and politicians on both sides of the abortion controversy in Nicaragua first visited the issues surrounding therapeutic abortion years before the present ban went into effect. The highly political, public debate leading to the ban began in 2003 when the "Rosita" case gained national and international attention.<sup>77</sup> Earlier that year, an adult attacker raped and impregnated a nine-year-old Nicaraguan girl named Rosita on a coffee plantation in Costa Rica.<sup>78</sup> Rosita's parents, fearing for their only daughter's life and mental health, sought a therapeutic abortion and—despite the legality of their actions and the duties of the two states—faced resistance from the Costa Rican government and later from the Nicaraguan

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73. See Press Release, Ctr. for Reprod. Rights, Center for Reproductive Rights Condemns Passage of Nicaragua's Abortion Ban (Oct. 26, 2006), available at [http://www.reproductiverights.org/pr\\_06\\_1026Nicaragua.html](http://www.reproductiverights.org/pr_06_1026Nicaragua.html); Press Release, MADRA, Nicaraguan Assembly Passes Therapeutic Abortion Ban (Nov. 9, 2006), available at <http://www.madre.org/press/pr/nicaragua102606.html>. Other states that restrict abortion under any and all circumstances are El Salvador, Chile, Honduras, Nicaragua, and the quasi-state of the Vatican. See ORGANIZACIÓN PANAMERICANA DE LA SALUD NICARAGUA, *supra* note 62, at 7.

74. See WIM VAN LERBERGHE ET AL., WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2005: MAKE EVERY MOTHER AND CHILD COUNT 213-17 (2005), available at [http://www.who.int/whr/2005/whr2005\\_en.pdf](http://www.who.int/whr/2005/whr2005_en.pdf). The maternal mortality rate of Honduras is 110 deaths per 100,000 live births and that of Costa Rica is twenty-five deaths per 100,000 live births. *Id.*

75. See CENTRO NICARAGÜENSE DE DERECHOS HUMANOS, DERECHOS HUMANOS EN NICARAGUA: INFORME ANUAL 2006 13 (2007), available at [http://www.cenidh.org/files/cenidh\\_final.pdf](http://www.cenidh.org/files/cenidh_final.pdf). Interestingly, the Nicaraguan Assembly voted unanimously to pass the ban days before the presidential elections. See *id.* Pro-choice critics argue that this move was a political gesture to gain the support of Catholic leaders and other conservative factions. See *id.* at 12.

76. Interview with Francisco Robles, Priest for Ocotal Parrish, in Ocotal, Nicar. (Jan. 13, 2007) (on file with author).

77. See Felipe Jaime, *Therapeutic Abortion Faces Pressure from the Right*, INTER PRESS SERVICE, July 26, 2004, at 1, <http://ipsnews.net/interna.asp?idnews=24792>; Nick Miles, *Abortion Ruling Splits Nicaragua*, BBC NEWS, March 4, 2003, <http://news.bbc.co.uk/2/hi/americas/2817051.stm>.

78. See McNaughton Reyes et al., *supra* note 70, at 63; Jaime, *supra* note 77, at 1.

government.<sup>79</sup>

At that time, the general prohibition of abortion services in Costa Rica and Nicaragua permitted an exception in order to save the health and life of the pregnant woman or, in this case, the pregnant girl-child.<sup>80</sup> Additionally, both Costa Rica and Nicaragua had ratified international treaties that bound each state to protect rights that the states would infringe if they denied access to a therapeutic abortion.<sup>81</sup> At the same time, government entities, including the Ministers of Health and Family, and religious authorities opposed allowing Rosita to have an abortion, invoking national laws protecting life from the moment of conception and publicly denouncing all abortions as crimes.<sup>82</sup> Moreover, the Ministers attempted to suspend the custodial rights of Rosita's *campesino* parents and to appoint a known anti-abortion advocate to the special commission evaluating her request for a therapeutic abortion.<sup>83</sup> Thus, although both states had an obligation to provide Rosita access to safe abortion services, her family and advocates faced challenges in accessing these services amidst competing human rights claims over the rights of the fetus and the pregnant child-victim.<sup>84</sup>

Advocates calling for therapeutic abortion in Rosita's case, including the Nicaraguan Children's Ombudsman, women's rights advocates, and children's rights advocates, argued that human rights obligations and national laws protected Rosita's right to health over and above any possible fetal rights.<sup>85</sup> Those against permitting therapeutic abortions, however, pointed to the Nicaraguan *Código de la Niñez y la Adolescencia* (Code of Childhood and Adolescence), which protects the right to life of all children from the moment of conception through age twelve.<sup>86</sup> Eventually, this case caused a heated debate in the Nicaraguan Parliament, and in 2004, the Nicaraguan Congress considered removing the therapeutic exceptions to the abortion ban.<sup>87</sup> The Nicaraguan Congress suspended the debate in light of the controversy and uproar it created.<sup>88</sup> In the meantime, legisla-

79. See Jaime, *supra* note 77, at 1.

80. Cód. Pen., art. 121 (Costa Rica) (stating that abortion is not punishable when practiced by a licensed practitioner with the woman's consent and when the procedure is performed in order to avert risk to the life or health of the pregnant woman and this risk cannot be averted by any other means); Cód. Pen., libro II, tit. I, Delitos contra las personas y su integridad física, psíquica, moral y social, ch. V, Del aborto, art. 165 (repealed 2006) (Nicar.) (stating that legal therapeutic abortion must be approved in a scientific manner by at least three doctors and performed with the consent of the spouse or closest relative of the woman).

81. See, e.g., CEDAW, *supra* note 10, arts. 12, 16, (ratified by Costa Rica on Apr. 4, 1986 and by Nicaragua on Oct. 27, 1981); ICCPR, *supra* note 10, arts. 6, 9 (ratified by Costa Rica on Nov. 29, 1968 and acceded to by Nicaragua on Mar. 12, 1980); ICESCR, *supra* note 10, art. 12 (ratified by Costa Rica on Nov. 29, 1968 and acceded to by Nicaragua on Mar. 12, 1980).

82. See McNaughton Reyes et al., *supra* note 70, at 63; Miles, *supra* note 77.

83. See McNaughton Reyes et al., *supra* note 70, at 66.

84. See *id.* at 65, 71-73.

85. See *id.* at 78.

86. See Cód. NIN. ADOL., art. 12 (1998) (Nicar.).

87. See HUMAN RIGHTS WATCH, *supra* note 32, at 3.

88. See *id.*

tors who disagreed with the Children's Ombudsman continued to politicize the issue by ousting him from office in retaliation for urging respect for the national laws and applicable human rights standards that called on the state to prioritize Rosita and her family's interests over the interests of the state in protecting a potential life.<sup>89</sup>

## 2. *Revisiting Therapeutic Abortion at Elections*

When these issues resurfaced two years later during the presidential elections, politics led to the passage of the complete abortion ban in effect today.<sup>90</sup> In August 2006, abortion opponents took advantage of the extremely polarized November elections to push for a rescission of article 165 of the Nicaraguan Penal Code, which allowed exceptions to the more than 100-year-old general prohibition on abortion.<sup>91</sup> Despite pleas to separate the therapeutic abortion debate from presidential politics, Nicaraguan legislators rekindled discussions when one Sandinista candidate wanted to keep therapeutic abortion on the books while Catholic and evangelical church representatives wanted to repeal the provision.<sup>92</sup> In support of their anti-abortion movement, church representatives gathered some 200,000 signatures and presented them to the Nicaraguan congress to urge the rescission of the therapeutic abortion exception.<sup>93</sup> After this religious appeal, twenty-five left-wing legislators withdrew their past support for the permissibility of therapeutic abortion and supported the rescission measure, and thirteen other party members abstained in order to pass the bill that ensured their party's leader, Daniel Ortega, the presidency.<sup>94</sup> Many felt that those who supported therapeutic abortion silenced themselves in a political move to appease socially conservative voters.<sup>95</sup>

Although outgoing President Enrique Bolaños requested harsher, thirty-year sentences for violations of the complete abortion ban, he none-

89. See McNaughton Reyes et al., *supra* note 70, at 78.

90. *See id.*

91. *See Nicaragua Outlaws Abortion, supra* note 70.

92. *See id.*; Tania Sirias, *Aborto terapéutico no debe ser tema en tiempo electoral*, EL NUEVO DIARIO, Oct. 25, 2006, <http://www.elnuevodiario.com.ni/imprimir/2006-10-25/32212>.

93. *See Nicaragua Outlaws Abortion, supra* note 70.

94. *See id.* The bill was passed by a vote of 59-0. *Id.* Additionally, during Daniel Ortega's third attempt to recapture the presidency, the Sandinista leader aligned himself with former enemies, such as his vice-presidential running mate and former archbishop of Managua, Miguel Obando y Bravo. *See* Bernd Debusmann, *Nicaraguans See First Lady as Power Behind Throne*, REUTERS, Jan. 28, 2007, <http://www.reuters.com/article/worldNews/idUSN2632184220070129?pageNumber=1>. In 2005, Bravo conducted the marriage ceremony between Ortega and his partner of twenty-five years, Rosario Murillo, who cited the marriage as an expression of their deep commitment to Catholicism. *Id.*

95. *See Nicaragua on the Verge of Banning Abortion*, IPAS, Oct. 16, 2006, [http://www.ipas.org/Library/News/News\\_Items/Nicaragua\\_on\\_the\\_verge\\_of\\_banning\\_abortion.aspx](http://www.ipas.org/Library/News/News_Items/Nicaragua_on_the_verge_of_banning_abortion.aspx) (stating that Church and evangelical leaders had pushed the vote on the abortion law change to precede the national elections, making legislator's re-elections "hostage to their vote on the bill"); *Nicaragua Outlaws Abortion, supra* note 70 (stating that twenty-nine members were absent from the vote and two abstained).

theless signed the bill, which established six-year sentences, into law on November 17, 2006, amidst protests from women's rights organizations and the medical community.<sup>96</sup> Then, on September 13, 2007, the legislature reaffirmed the ban when it rejected a vote to legalize therapeutic abortion<sup>97</sup> and voted in favor of a new penal code maintaining the blanket prohibition on abortion.<sup>98</sup> The new law as amended punishes women with up to three years and doctors with up to two years in prison.<sup>99</sup> Since the ban took effect, Nicaraguan women in need of therapeutic abortions have died while doctors are unable to provide necessary emergency obstetric care or other treatment.<sup>100</sup> The woman believed to be the first victim of the new law criminalizing therapeutic abortions, Jazmina del Carmen Bojorge, died from shock in a public hospital in Managua after complaining of limb pains and weakness five months into her pregnancy.<sup>101</sup>

## B. Responses to Nicaragua's Complete Abortion Ban

Immediately following the Nicaraguan legislature's action, numerous national and international organizations denounced the complete abortion

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96. See Andrea Lynch, *Too Dangerous for Democracy: Abortion in Latin America*, RH REALITY CHECK, Oct. 27, 2006, <http://www.rhrealitycheck.org/blog/2006/11/28/too-dangerous-for-democracy-abortion-in-latin-america>. Interestingly, the Nicaraguan legislature met with church representatives in closed-door meetings. *Id.* However, when the Nicaraguan women's movement requested meetings with representatives from the National Assembly, they were repeatedly denied access. *Id.* Additionally, these actions happened despite a research study asking 198 obstetrician-gynecologists, 76% of all registered obstetrician-gynaecologists in the country, about the medical and ethical implications of providing abortion services. See Heathe Luz McNaughton et al., *Should Therapeutic Abortion Be Legal in Nicaragua: The Response of Nicaraguan Obstetrician-Gynaecologists*, REPROD. HEALTH MATTERS, May 2002, at 111, 111. All but nine of these physicians believed that therapeutic abortion should not be criminalized. *See id.*

97. *See Nicaraguan Legislature Votes*, *supra* note 71.

98. HUMAN RIGHTS WATCH, *supra* note 72, at 3.

99. Cód. PEN., libro II, tit I, Delitos contra las personas y su integridad física, psíquica, moral y social, ch. V, Del aborto, art. 143 (2007) (Nicar.); *see* HUMAN RIGHTS WATCH, *supra* note 72, at 3.

100. *See* HUMAN RIGHTS WATCH, *supra* note 72, at 3 (providing detailed accounts of individual cases of women who have died as a result of insufficient emergency obstetric care or other services since the ban took effect in 2006); Indira A.R. Lakshmanan, *Nicaraguan Abortion Ban Called a Threat to Lives*, BOSTON GLOBE, November 26, 2006, at A1. To the best of the author's knowledge, the total number of women who have died and the excess maternal mortality has not been officially reported. As of November 27, 2007, however, some reports claimed that eighty-seven women had died since the complete abortion ban. *Investigan denuncia a red de mujeres*, MSN, Nov. 27, 2007, <http://latino.msn.com/noticias/articles/articlepage.aspx?cp-documentid=5429875>. Of these eighty-seven women, seventeen would have been saved had the abortion ban not existed. *Id.* Twelve others committed suicide. *Id.*

101. *See* Lakshmanan, *supra* note 100, at A1. Bojorge suffered from placental abruption, a condition in which the placenta separates from the inner wall of the uterus prior to delivery. *See generally* Cande V. Ananth et al., *Placental Abruption and Adverse Perinatal Outcomes*, 282 J. AM. MED. ASS'N 1646, 1646 (1999) (explaining the symptoms of placental abruption); Lakshmanan, *supra* note 100, at A1. According to the family and advocates of Bojorge, the chilling effect of the ban caused doctors to delay treatment. *See* Lakshmanan, *supra* note 100, at A1. Moreover, Bojorge was pregnant with her second child and, thus, orphaned a son. *Id.* This issue further complicates the public health ramifications surrounding the complete abortion ban. *See id.*

ban, while church leaders praised their symbolic victory.<sup>102</sup> The *Centro Nicaragüense de Derechos Humanos* (Nicaraguan Center for Human Rights) announced that it would challenge the ban in the Nicaraguan Supreme Court and would solicit the Inter-American Commission for Human Rights, citing at least fifteen constitutional violations, including a violation of a woman's right to life.<sup>103</sup> Additionally, women's groups are documenting cases in which women in need of therapeutic abortions have been unable to access them.<sup>104</sup> These groups, led by the *Movimiento Autónomo de Mujeres* (Autonomous Women's Movement) are also collecting 200,000 signatures and marching in protest to show the large number of citizens opposed to the ban.<sup>105</sup> According to one leader of this movement to advance women's rights, women are not represented by any political movement or party and must strategically unite to oppose these political maneuvers in which women suffer as a consequence.<sup>106</sup>

The Inter-American Commission on Human Rights responded to Nicaragua's complete abortion ban by issuing an unprecedented statement declaring that the Nicaraguan government's repeal of article 165 of the Penal Code "endanger[s] the protection of women's human rights."<sup>107</sup> The statement emphasized the need for therapeutic abortion to ensure women's rights to "li[fe] as well as their physical and psychological integrity."<sup>108</sup> The Special Rapporteur on the Rights of Women for the Inter-American Commission signed the letter urging the Nicaraguan government to consider these principles of human rights before ratifying the repeal of the State's therapeutic abortion exemption.<sup>109</sup> In addition to this statement, the U.N. Committee on the Elimination of Discrimination against Women (CEDAW Committee) expressed its concerns regarding the ban and recommended that Nicaragua remove the criminal penalties imposed on women who obtain abortions and on the doctors who provide them.<sup>110</sup>

In contrast, supporters of the complete abortion ban—mainly leaders of the Catholic and evangelical churches and anti-abortion activists—responded by stating that Nicaragua is a sovereign state that has the right

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102. See Duncan Kennedy, *Nicaragua's Abortion Dilemma*, BBC NEWS, Nov. 19, 2006, <http://news.bbc.co.uk/2/low/americas/6162670.stm>.

103. See Lynch, *supra* note 96.

104. See *id.* A recent Human Rights Watch Report has documented several such cases. See HUMAN RIGHTS WATCH, *supra* note 72, at 6-13.

105. See *id.*

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

107. See Letter from Santiago A. Canton, Executive Sec'y, Org. of Am. States, to H.E. Norman Calderas Cardenal, Minister of Foreign Affairs, Nicaragua (Nov. 10, 2006), available at [http://www.reproductiverights.org/pdf/index\\_nicaragua\\_english.pdf](http://www.reproductiverights.org/pdf/index_nicaragua_english.pdf).

108. See *id.*

109. See *id.*

110. See Comm. on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Nicaragua*, ¶ 17, U.N. Doc. CEDAW/C/NIC/CO/6 (Feb. 2, 2007) [hereinafter *Concluding Comments: Nicaragua 2007*].

to make its own laws.<sup>111</sup> Moreover, those in favor of eliminating therapeutic abortion find that any intervention to save a pregnant woman's life is a choice to kill the unborn.<sup>112</sup> Pope Benedict XVI affirmed the supporters' positions by issuing a statement "reaffirming the Catholic Church's stance against abortion and calling on Catholic lawmakers around the world 'to introduce and support laws inspired by the values grounded in human nature.'"<sup>113</sup>

At the time of this Note, the Nicaraguan Supreme Court is reviewing a constitutional challenge to the legislature's recent ban on all abortions.<sup>114</sup> The Nicaraguan Center for Human Rights, representing a coalition of organizations devoted to human rights, women's rights, and physician's rights, initiated the constitutional challenge on January 8, 2007 and expects the Nicaraguan Supreme Court to render its decision in the coming months.<sup>115</sup> If the Nicaraguan Supreme Court upholds the constitutionality of the new law,<sup>116</sup> opponents will likely take their case to the United Nations Human Rights Commission or the Inter-American Commission on Human Rights.<sup>117</sup> Given the treaty-monitoring bodies' explicit statements condemning Nicaragua's complete abortion ban and the groundbreaking case of *K.L. v. Peru*<sup>118</sup> in which the Human Rights Committee held that denying access to therapeutic abortion services amounted to inhuman and degrading treatment, these activists will likely prevail at the international level.

### III. Complete Abortion Ban: A Public Health Problem

Restrictive legislation criminalizing women who seek abortion services and the doctors who provide them "is the main determinant of unsafe abortion."<sup>119</sup> These more restrictive abortion policies are associated with

111. See, e.g., Toyin Adeyemi & Allison Stevens, *Nicaraguan Activists Press Abortion Legal Case*, WOMEN'S ENEWS, Mar. 16, 2007, <http://www.womensenews.org/article.cfm/dyn/aid/3099>. What these activists fail to mention is that Nicaragua is contradicting the treaty obligations it has already made as a sovereign state at international law.

112. See Kennedy, *supra* note 102.

113. Adeyemi & Stevens, *supra* note 111 (quoting POPE BENEDICT XVI, POST-SYNODAL APOSTOLIC EXHORTATION: SACRAMENTUM CARITATIS OF THE HOLY FATHER BENEDICT XVI TO THE BISHOPS, CLERGY, CONSECRATED PERSONS AND THE LAY FAITHFUL ON THE EUCHARIST AS THE SOURCE AND SUMMIT OF THE CHURCH'S LIFE AND MISSION § 83 (2007)).

114. See *id.*.

115. See *id.*.

116. For an article that speaks to the views of Rafael Solis, the Vice President of the Supreme Court of Justice in Nicaragua, see Eloisa Ibarra, *Piden mantener derogación del aborto terapéutico*, EL NUEVO DIARIO, Mar. 22, 2007, at 1, <http://www.elnuevodiario.com.ni/2007/03/22/nacionales/44444> (stating that the complete abortion ban is constitutional).

117. See Adeyemi & Stevens, *supra* note 111.

118. See Human Rights Committee, *Communication No. 1153/2003*, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 17, 2005).

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



higher incidences of unsafe abortion,<sup>120</sup> and levels of maternal mortality and morbidity fall when countries liberalize their abortion laws.<sup>121</sup> Therefore, countries that pass complete abortion bans will likely experience increases in unsafe abortion, maternal mortality, and maternal morbidity levels. A complete abortion ban and the political and social environment in which it is passed thus pose severe threats to the health and lives of women.<sup>122</sup> Moreover, policymakers must address the serious public health ramifications and human rights violations inherent in such restrictions.

As noted above, maternal mortality as a result of clandestine abortion procedures contributes to an estimated 13% of total maternal mortality worldwide.<sup>123</sup> In El Salvador, unsafe abortion is the second most common direct cause of maternal mortality,<sup>124</sup> and in Chile, it is the first.<sup>125</sup> In Nicaragua, unsafe abortion is the main cause of maternal death for women of all ages.<sup>126</sup> Clandestine abortion practices cause 16% of maternal mortality, and national medical associations estimate that the consequences of a complete abortion ban will increase this number by 60%.<sup>127</sup> Experts estimate that illegal abortions in Nicaragua will number more than 30,000 per year under a complete abortion ban.<sup>128</sup> Due to the illegality of abortion, women avoid hospitals,<sup>129</sup> and families may fear reporting causes of death to authorities. Hence, these alarmingly high numbers likely underestimate the true maternal mortality rates resulting from unsafe abortion in countries with complete abortion bans.

In addition, maternal morbidity associated with unsafe abortion is extremely high. For instance, it is estimated that 10% to 50% of women who obtain unsafe abortions require some form of post-abortion medical care as a result of complications, including treatment for incomplete abortions, infections, uterine perforation, pelvic inflammatory disease, and

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120. WHO 2003, *supra* note 12, at 39.

121. ALAN GUTTMACHER INST., *supra* note 13, at 32. The need to improve maternal health and reduce maternal mortality, including maternal deaths due to unsafe abortion, is Millennium Development Goal (MDG) number five, one of the key MDGs expressed at the United Nations Millennium Summit in 2000. For further discussion of some of the issues surrounding unsafe abortion as it pertains to the MDGs, see Ruth Dixon-Mueller & Adrienne Germain, *Fertility Regulation and Reproductive Health in the Millennium Development Goals: The Search for a Perfect Indicator*, 97 AM. J. PUB. HEALTH 45 (2007).

122. See generally Lawrence O. Gostin, *Public Health, Ethics, and Human Rights: A Tribute to the Late Jonathan Mann*, 29 J. LAW, MED. & ETHICS 121 (2001).

123. See WHO 2003, *supra* note 12, at 5.

124. See CTR. FOR REPROD. RIGHTS, *Abortion as a Public Health Issue*, in THOUGHTS ON ABORTION 1 (1999).

125. See CTR. FOR REPROD. LAW & POLICY & OPEN FORUM ON REPROD. HEALTH & RIGHTS, *supra* note 62, at 38.

126. Letter from the CEDAW Committee to Members of the Nicar. Nat'l Assembly (October 16, 2006).

127. See Irene Schneeweis, *ALERT: Nicaraguan Assembly Bans Abortion*, MADRE, <http://www.madre.org/print/articles/lac/nicaraguaabortionalert.11.9.06.html> (last visited Jan. 2, 2008).

128. PEW FORUM ON RELIGION & PUB. LIFE, *ABORTION LAWS AROUND THE WORLD 2* (2006).

129. See CTR. FOR REPROD. RIGHTS, *supra* note 50, at 25.

hemorrhaging.<sup>130</sup> In Nicaragua, for example, nearly 6,700 women are hospitalized each year with complications from abortions, which may result in death, permanent injury, or infertility.<sup>131</sup> Additionally, victims of rape, incest, and women in need of therapeutic abortions due to emergency pregnancy complications are at risk of death from unsafe abortion since this procedure is no longer available to physicians under any circumstances.<sup>132</sup>

Recent implementation of complete abortion bans come at a time when research demonstrates the negative impact and grave threat that complete abortion bans have on women's health. For example, the steering group for the Lancet Maternal Survival Series recommends implementing complementary strategies, including safe abortion procedures, to reduce women's risk of death related to childbirth.<sup>133</sup> The steering group suggests that emergency obstetric care services cover care for post-abortion complications, irrespective of abortion's legality.<sup>134</sup> Legislatures that ignore these recommendations place doctors in a precarious position with competing loyalties to the patient and the state. Of course, ignoring these recommendations also threatens the health and lives of women. As a result, women may not receive necessary or adequate care and both women and doctors may fear prosecution.<sup>135</sup>

Another public health issue concerning unsafe abortion is the excessive economic burden that unsafe abortion places on a government's resources, particularly the public health system.<sup>136</sup> Although some states fear that liberalizing abortion laws would cause an increase in demand on their already overtaxed health care systems, these fears are not based on any evidence or findings.<sup>137</sup> In fact, the follow-up care and hospital costs associated with complications arising from unsafe abortions drain emergency room and other hospital budgets in many developing countries.<sup>138</sup>

Despite the improvements in access to contraception and increases in

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130. See World Health Day 1998: Address Unsafe Abortion, [http://www.who.int/docstore/world-health-day/en/pages1998/whd98\\_10.html](http://www.who.int/docstore/world-health-day/en/pages1998/whd98_10.html) (last visited Jan. 2, 2008).

131. See Marta María Blandón, *New Nicaraguan Law Violates Human Rights*, CTR. FOR AM. PROGRESS, Dec. 11, 2006, <http://www.americanprogress.org/issues/2006/12/nicaragua.html>.

132. See Nicaragua: Penal Reform Constitutes and Assault on Human Rights (Oct. 26, 2006), <http://www.hrw.org/english/docs/2006/10/26/nicar14466.htm>.

133. See Oona M.R. Campbell & Wendy J. Graham, *Strategies for Reducing Maternal Mortality: Getting on with What Works*, 368 LANCET 1295, 1295 (2006).

134. See *id.* at 1295. Of course, these services could not later lead to prosecutions since the threat of legal sanctions against a woman would be considered an undue burden and an insurmountable barrier to seeking care, even when the life and health of the woman are at stake. See *id.*

135. See Blandón, *supra* note 131.

136. See WHO 2000, *supra* note 15, at 46.

137. See *id.*

138. See, e.g., Deborah L. Billings & Janie Benson, *Post Abortion Care in Latin America: Policy and Service Recommendations from a Decade of Operations Research*, 20 HEALTH POL'Y & PLAN. 158, 163-64 (2005). Researchers have found that treating women for incomplete abortions or post-abortion complications can deplete more than 50% of obstetric and gynecologic budgets. *Id.*; see also B.R. Johnson et al., *Costs of Alternative Treatments for Incomplete Abortion* (World Bank, Working Paper No. 1072, 1993).

contraceptive use,<sup>139</sup> governments have not been able to adequately meet population demands due to the increasing desire for smaller families. Because nearly two in five pregnancies globally are unplanned,<sup>140</sup> many women will continue to resort to induced abortion in unsafe conditions, especially where safe and legal abortions are not available. Even when carrying a pregnancy to term risks women's health and lives, they cannot obtain safe abortions for therapeutic purposes.<sup>141</sup> As a result, public health professionals are pushing to improve family planning services while combating the causes and consequences of clandestine abortion.<sup>142</sup>

#### IV. Complete Abortion Ban: A Violation of Human Rights

Complete abortion bans are a violation of the essential human rights of women, recognized in national and international laws, to which states are bound. The most firmly grounded human rights norms that these states are bound to respect, protect, and fulfill<sup>143</sup> are the human rights to life and health.<sup>144</sup> In the case of Nicaragua,<sup>145</sup> the Nicaraguan Constitution and various international covenants the state has ratified, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention on Human Rights (American Convention), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), establish the human rights to life and health.<sup>146</sup> Thus, failing to respect, protect, or fulfill these rights amounts to a human rights violation.

First, the American Convention, the Nicaraguan Constitution, and the ICCPR protect the right to life.<sup>147</sup> Article 4 of the American Convention

139. See WHO 2000, *supra* note 15, at 17. For a discussion regarding the role of contraception in reducing the incidence of unsafe abortion, see Cicely Marston & John Cleland, *Relationships Between Contraception and Abortion: A Review of the Evidence*, 29 INT'L FAM. PLAN. PERSP. 6 (2003); John Bongaarts & Charles F. Westoff, *The Potential Role of Contraception in Reducing Abortion*, 31 STUD. FAM. PLAN. 193 (2000).

140. See ALAN GUTTMACHER INST., *supra* note 13, at 1; WHO 2003, *supra* note 12, at 2.

141. See ALAN GUTTMACHER INST., *supra* note 13, at 1.

142. See Freedman & Isaacs, *supra* note 3.

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

144. In addition, there is viable support for the argument that complete abortion bans or the enforcement of such bans violate (1) the right to be free from discrimination based on socio-economic status, (2) the right to be free from discrimination on the basis of gender, and (3) the right to privacy. For further analysis in the context of Latin America, see HUMAN RIGHTS WATCH, *supra* note 32.

145. As noted, in-depth analysis of other complete abortion bans, such as those of Chile and El Salvador, is beyond the scope of this Note. For two excellent human rights analyses of these cases, see CTR. FOR REPROD. LAW & POLICY & OPEN FORUM ON REPROD. HEALTH & RIGHTS, *supra* note 62; CTR. FOR REPROD. RIGHTS, *supra* note 50.

146. See CEDAW, *supra* note 10; American Convention, *supra* note 10; ICCPR, *supra* note 10; ICESCR, *supra* note 10.

147. See Constitución Política de la República de Nicaragua [Cn.] [Constitution] tit. IV, ch. I, art. 23 La Gaceta [L.G.], 9 Jan. 1987, as amended by Ley No. 330, Reforma Parcial a la Constitución Política de la República de Nicaragua, Jan. 18, 2000, L.G. Jan.

states that “[e]very person has the right to have [her] life respected.”<sup>148</sup> Article 23 of the Nicaraguan Constitution proclaims that “[t]he right to life is inviolable and inherent to the human person.”<sup>149</sup> In addition, Article 6(1) of the ICCPR states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of [her] life.”<sup>150</sup> Furthermore, the right to life is nonderogable under Article 4(2) of the ICCPR and under international customary law no matter the circumstances.<sup>151</sup> Because Nicaraguan women are dying in hospitals and clinics from emergency obstetric complications and clandestine abortion procedures due to fears of prosecution for performing or receiving therapeutic abortion services, this complete abortion ban is a clear violation of women’s right to life.

Next, the right to health is found in the Nicaraguan Constitution and in international human rights covenants to which Nicaragua is also a state party.<sup>152</sup> For instance, in Article 59, the Nicaraguan Constitution protects social rights by providing that “Nicaraguans have the right, equally, to health” and that the state has the duty to establish the basic conditions for the promotion, protection, recuperation, and rehabilitation of health.<sup>153</sup> Also, the ICESCR declares in Article 12(1) that states have a duty to recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>154</sup> Moreover, Article 12 of CEDAW provides for states to “take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning.”<sup>155</sup>

The most comprehensive explanation of the right to health as applied to the right to safe abortion access is found in General Comment 14 of the ICESCR.<sup>156</sup> Although not a legally binding human rights instrument at international law, this and other such U.N. documents are important declarations of political commitment to establishing the direction of emerging human rights standards and norms.<sup>157</sup> According to General Comment 14, the right to health holds both freedoms—protecting bodily integrity and control as well as sexual and reproductive freedom—and entitlements to a system that guarantees equality of opportunity to enjoy the highest

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19, 2000 (Nicar.) [hereinafter *Nicar. Const.*]; American Convention, *supra* note 10, art. 4; ICCPR, *supra* note 10, art. 6(1).

148. See American Convention, *supra* note 10, art. 4.

149. See *Nicar. Const.*, *supra* note 147.

150. See ICCPR, *supra* note 10, art. 6(1).

151. See *id.* art. 4(2).

152. See *Nicar. Const.*, *supra* note 147, art. 59; HUMAN RIGHTS WATCH, *supra* note 32, at 5.

153. See *Nicar. Const.*, *supra* note 147, art. 59.

154. See ICESCR, *supra* note 10, art. 12(1).

155. See CEDAW, *supra* note 10, art. 12.

156. See Comm. on the Elimination of Discrimination Against Women, *General Comment No. 14*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter *ICESCR General Comment 14*].

157. See Ernst et al., *supra* note 2, at 763 (discussing the Cairo Consensus).

attainable standard of health.<sup>158</sup> State parties are also urged to remove all barriers to women's access to health services, including sexual and reproductive health services.<sup>159</sup> Moreover, General Comment 14 specifically discusses the need to remove restrictive barriers to safe abortions and the need to improve the conditions under which abortions are performed, citing the risks that unsafe abortion poses to the health and life of women.<sup>160</sup> Furthermore, General Comment 14 recommends that state parties legalize abortion to the extent that the laws protect the health and lives of women and allow for abortion when pregnancy is the result of rape or incest.<sup>161</sup>

Further affirmations of the right to health are found in General Recommendation 24 of the CEDAW Committee.<sup>162</sup> Under General Recommendation 24, state parties have an obligation to respect women's right to access reproductive health services and an obligation to refrain from constructing barriers for women in pursuit of their health goals.<sup>163</sup> In addition, the CEDAW Committee recommends that state parties amend legislation criminalizing abortion "to remove punitive provisions imposed on women who undergo abortion."<sup>164</sup> In 2001, the CEDAW Committee expressed concerns regarding both Nicaragua's high maternal mortality and Nicaraguan women's limited access to reproductive health services and information.<sup>165</sup> Specifically, the CEDAW Committee recommended that the Nicaraguan government take steps to ensure the availability of pregnancy-related medical care for all women, including those in rural areas.<sup>166</sup> Furthermore, the CEDAW Committee released its concluding comments in response to Nicaragua's periodic report to the Committee on February 2, 2007, which stated:

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158. See ICESCR General Comment 14, *supra* note 156, ¶ 8.

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

160. See, e.g., Comm. on Econ., Soc. & Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Chile*, ¶ 25, U.N. Doc. E/C.12/1/Add.105 (Nov. 26, 2004).

161. See *id.*

162. See Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on Elimination of Discrimination Against Women*, General Recommendation 24, U.N. Doc. A/54/38/Rev. 1 (Aug. 20, 1999) [hereinafter CEDAW General Recommendation 24].

163. See *id.* ¶ 14.

164. See *id.* ¶ 31(c).

165. See Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, pt. 2, Nicaragua, ¶ 300-03, U.N. Doc. A/56/38 (Aug. 29, 2001).

166. See *id.*

The Committee recommends that the State party consider reviewing the laws relating to abortion with a view to removing punitive provisions imposed on women who have abortions and provide them with access to quality services for the management of complications arising from unsafe abortions, and to reduce women's maternal mortality rates . . . .<sup>167</sup>

Thus, Nicaragua's complete abortion ban conflicts with state obligations under these conventions, particularly the duty to protect women's right to health.

Although these various conventions read together with their comments obligate Nicaragua and other states to protect the human rights of women, some of these conventions and other conventions to which Nicaragua is party also call for the protection of the unborn. For example, the American Convention's right to life guarantees that "[t]his right shall be protected by law and, in general, from the moment of conception."<sup>168</sup> The Convention on the Rights of the Child provides another example, declaring that children require "special safeguards and care, including appropriate legal protection, before as well as after birth."<sup>169</sup> Additionally, the protection of the right to life in Nicaragua has been interpreted to define life as beginning at conception.<sup>170</sup> These protections, however, never previously had been viewed as a bar to therapeutic abortion. For instance, although Nicaragua confirmed the right to life beginning at conception at the 1994 Cairo Conference, the delegation explicitly excepted therapeutic abortion on the grounds of medical necessity under its own Constitution.<sup>171</sup> As a result, the complete ban on abortion would not be considered an appropriate legal protection for the unborn at the expense of women's rights to life and health, even according to Nicaragua's own previous international public affirmations of these rights.

## V. International Reproductive Rights Trends

### A. Liberalization: The Prevailing International Trend

Abortion practices predate any formal legal mechanisms established to regulate the procedure.<sup>172</sup> The majority of sovereign nations have moved from criminalizing abortion as a result of its moral condemnation in religious canons toward liberalizing abortion legislation.<sup>173</sup> Traditionally, abortion lawmakers, influenced by religious beliefs, considered abor-

167. See *Concluding Comments: Nicaragua 2007*, *supra* note 110, ¶ 118.

168. American Convention, *supra* note 10, art. 4.

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

170. See Catherine Bremer, *Abortion Clampdown Splits Nicaragua Before Election*, REUTERS, Oct. 26, 2006, <http://today.reuters.com/News/CrisesArticle.aspx?storyId=N26468228>.

171. See International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Report of the International Conference on Population and Development*, ch. V, ¶ 14, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) [hereinafter *Cairo Report*].

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

173. See *id.* at 756 n.8 (citing U.N. DEP'T OF ECON. & SOC. DEV., *ABORTION POLICIES: A GLOBAL REVIEW*, VOL. I: AFGHANISTAN TO FRANCE at 5, U.N. Doc. ST/ESA/SER.A/129, U.N. Sales. No. E.92.XIII.8 (1992)).

tion a sin, and, therefore, women seeking abortion were perpetrators of that sin.<sup>174</sup> Then, in the 1920s, Marxist principles of gender equality guided the Soviet Union to legalize abortion at a woman's request.<sup>175</sup> China followed this trend in the 1950s when national policies to curb population growth motivated the country to make abortion available to women in the first six months of pregnancy.<sup>176</sup> Throughout the latter half of the twentieth century, legislative action across Europe and in almost all industrialized nations around the world continued to legalize abortion on request, and the liberalization trend gained momentum.<sup>177</sup> This development continued when the United States Supreme Court guaranteed abortion as a constitutionally protected right in the 1973 landmark case, *Roe v. Wade*.<sup>178</sup>

Since *Roe*, more than forty countries have adopted permissive abortion laws, and the trend of abortion reform continues through successes in women's health and human rights movements.<sup>179</sup> Between 1985 and 1997, nineteen countries in developed and developing countries significantly liberalized their abortion laws.<sup>180</sup> Meanwhile, only one country, Poland, adopted considerably more restrictive legislation.<sup>181</sup> Although a few states further banned abortion services by eliminating therapeutic abortion exemptions,<sup>182</sup> other states engaged in efforts to eliminate restrictive abortion laws.<sup>183</sup> Moreover, in the past year, fifteen U.S. states have eased restrictions on abortion laws, while only two have enacted retrogressive measures.<sup>184</sup> This evidence shows that more countries are reducing

174. See GUTTMACHER INST., *supra* note 19, at 31.

175. See Ernst et al., *supra* note 2, at 757 n.14 (citing U.N. DEP'T OF ECON. & SOC. DEV., ABORTION POLICIES: A GLOBAL REVIEW, VOL. III: OMAN TO ZIMBABWE at 55, U.N. DOC. ST/ESA/SER.A/129/Add.2, U.N. Sales No. E.95.XIII.24 (1995)).

176. See Ernst et al., *supra* note 2, at 757 n.17 (citing Tao-tai Hsia & Constance A. Johnson, *China*, in LAW LIBRARY OF CONGRESS, REPORT FOR CONGRESS: ABORTION LAWS AND POLICIES IN 19 JURISDICTIONS 43, 43-45 (1996)).

177. See Anika Rahman et al., *A Global Review of Laws on Induced Abortion, 1985-1997*, 24 INT'L FAM. PLAN. PERSP. 56, 60 (1998).

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

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

180. See Rahman et al., *supra* note 177, at 60 tbl.2. The countries to liberalize abortion laws during this timeframe were Canada, Algeria, Cambodia, Malaysia, Mongolia, Pakistan, Albania, Belgium, Bulgaria, Czechoslovakia, Germany, Greece, Hungary, Romania, Spain, Botswana, Burkina Faso, Ghana, and South Africa. *Id.* Twelve of these states made first-trimester abortion permissible on demand. *Id.*

181. See *id.*

182. Countries that passed complete bans are Chile and El Salvador, which are discussed previously in this Note. See *id.* Those nations considering further restricting abortion laws include Belarus and the Russian Federation. See *id.* at 61 (citing Letter from E. Gapova, Ctr. for Gender Studies, European Humanities Univ., Minsk, Belarus, to Anika Rahman (Feb. 22, 1998); Letter from E. Kotchkina, Dir., Gender Expertise Project, Moscow Ctr. for Gender Studies, to Anika Rahman (Feb. 18, 1998); Letter from S. Thapa, Technical Advisor, Family Health Div., Ministry of Health, Kathmandu, Nepal, to Anika Rahman (Feb. 19, 1998)).

183. These countries include Great Britain, Nepal, Northern Ireland, Portugal, Sri Lanka and Switzerland. See *id.* at 61.

184. See Interview by Renee Montagne with Nancy Northup, President of Ctr. for Reprod. Rights (Apr. 25, 2007), available at <http://www.npr.org/templates/story/>

restrictions on abortion, suggesting that the international legal trend of liberalizing abortion laws has persisted through the end of the twentieth century.<sup>185</sup>

Additional international developments during this period demonstrate a continued shift toward the global liberalization of abortion laws. First, the 1994 Cairo Conference affirmed the world's commitment to preventing unsafe abortions and providing access to safe abortion services where legally permissible.<sup>186</sup> The Cairo Consensus specifically urged states to improve safety for women who obtain abortions.<sup>187</sup> In addition, the Platform for Action of the Fourth World Conference on Women in Beijing (the Beijing Conference), in order to squarely confront the negative risk factors and consequences of unsafe abortion practices, asked governments to review and reform laws that criminalize women for obtaining abortions.<sup>188</sup> The international community reaffirmed each of these conferences' platforms on abortion at review meetings five and ten years later.<sup>189</sup> States participating in these review meetings also resolved to make abortion safe and accessible where legally permitted.<sup>190</sup>

This movement towards increased recognition of women's reproductive rights and the liberalization of abortion legislation to stop unsafe abortion continues, despite a small minority of states advancing a conservative anti-abortion countertrend.<sup>191</sup> Since the Beijing Platform and its worldwide mandate, at least seventeen states have taken legislative action to remove barriers to safe abortion services.<sup>192</sup> For instance, in 2002, Nepal moved from a complete abortion ban to legalizing abortion without restriction until twelve weeks of gestation.<sup>193</sup> Additionally, in 2006, Colombia's highest court struck down its total abortion ban to permit therapeutic

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story.php?storyId=9814484 (noting that fifteen states were moving toward more abortion rights and that two states were moving toward less abortion rights). For a detailed analysis of the pro-choice and anti-choice measures considered and adopted by U.S. states in 2006, see NARAL PRO-CHOICE AM. & NARAL PRO-CHOICE AM. FOUND., WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 5-7 (2007), available at [http://www.prochoiceamerica.org/choice-action-center/in\\_your\\_state/who-decides/introduction/who\\_decides\\_2007\\_full.pdf](http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/introduction/who_decides_2007_full.pdf)

185. See Rahman et al., *supra* note 177, at 60-61.

186. See *Cairo Report*, *supra* note 171, ¶¶ 7.5-7.6.

187. See *id.* ¶ 8.25.

188. See *Beijing Platform for Action*, *supra* note 1, ¶¶ 106(k), 109(i).

189. See *Beijing Further Actions*, *supra* note 6, ¶ 72(o); *Cairo Key Actions*, *supra* note 6, ¶ 63(i)-(iii); CTR. FOR REPROD. RIGHTS, BEIJING AND INTERNATIONAL LAW: U.N. TREATY MONITORING BODIES UPHOLD REPRODUCTIVE RIGHTS 1 (2005); Ernst et al., *supra* note 2, at 764.

190. See *Beijing Further Actions*, *supra* note 6, ¶ 72(o); *Cairo Key Actions*, *supra* note 6, ¶ 63(i)-(iii); Ernst et al., *supra* note 2, at 764.

191. See CTR. FOR REPROD. RIGHTS, ABORTION AND THE LAW: TWELVE YEARS OF REFORM 1 (2005).

192. See *id.*; *Togo Legalizes Abortion in Rape, Incest Cases*, REUTERS, Dec. 28, 2006, <http://www.reuters.com/article/worldNews/idUSL2837062220061228> (reporting that Togo legalized abortion in cases of rape and incest).

193. See CTR. FOR REPROD. RIGHTS, *supra* note 191, at 3.



abortion.<sup>194</sup> On March 8, 2007, Portugal's legislature voted to legalize abortion on demand until the tenth week of pregnancy.<sup>195</sup> More recently, on April 24, 2007, Mexico City legalized abortion during the first three months of pregnancy.<sup>196</sup> Furthermore, Uruguay, Argentina, Colombia, and Brazil have encouraged formal discussions about liberalizing abortion legislation within a public health framework rather than framing the issue solely within religious, moral, or political dogma.<sup>197</sup>

In addition to legislative changes, three recent landmark decisions in Colombia, Peru, and Mexico illustrate the loosening of restrictions on abortion in Latin America. In May 2006, the Colombian Constitutional Court struck down the state's complete ban on abortion, ruling that "abortion must be permitted when a pregnancy threatens a woman's life or health, in cases of rape, incest and in cases where the fetus has malformations incompatible with life outside the womb."<sup>198</sup> The constitutional challenge to the abortion ban used international human rights law to successfully persuade Colombia's highest court that a complete ban was a violation of the state's treaty obligations to protect women's rights to life and health.<sup>199</sup>

This decision followed two other important cases in Latin America where the Human Rights Committee (HRC) and the Inter-American Commission on Human Rights found Peru and Mexico in violation of national laws and international human rights. In *K.L. v. Peru*, the HRC secured reparations for a woman who was denied a legal abortion in a case involv-

194. See Corte Constitucional [Constitutional Court], Dec. C-355/2006, Referencia: expedientes D-6122, 6123 y 6124, Demandas de inconstitucionalidad contra los Arts. 122, 123 (parcial), 124, modificados por el Art. 14 de la Ley 890 de 2004, y 32, numeral 7, de la ley 599 de 2000 Código Penal, May 10, 2006 (Colom.); WOMEN'S LINK WORLDWIDE, C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA (2007); Juan Forero, *Colombian Court Legalizes Some Abortions*, N.Y. TIMES, May 12, 2006, at A14; Jeremy McDermott, *First Legal Abortion in Colombia*, BBC NEWS, Aug. 25, 2006, <http://news.bbc.co.uk/2/hi/americas/5284604.stm>.

195. See *Portuguese Parliament Votes to Lift Ban on Abortion*, REUTERS, Mar. 9, 2007, <http://www.reuters.com/article/worldNews/idUSL0945853620070309>.

196. See *Breaking a Taboo: A Landmark Abortion Law Marks the Start of American-Style Culture Wars*, ECONOMIST, Apr. 28, 2007, at 42; James C. McKinley Jr., *Mexico City Legalizes Abortion Early in Term*, N.Y. TIMES, Apr. 25, 2007, at A8; Press Release, Ctr. for Reprod. Rights, The Center for Reproductive Rights Commends Mexico City for New Law Legalizing Abortion in First Trimester (Apr. 24, 2007), available at [http://www.reproductiverights.org/pr\\_07\\_0424MexAbortion.html](http://www.reproductiverights.org/pr_07_0424MexAbortion.html); *Abortion Legalized in Mexico City*, BBC NEWS, Apr. 25, 2007, <http://news.bbc.co.uk/2/hi/americas/6586959.stm>.

197. See Juan Forero, *Push to Loosen Abortion Laws in Latin America*, N.Y. TIMES, Dec. 3, 2005, at A1; *Mexico City to Vote on Abortion*, BBC NEWS, Apr. 24, 2007, <http://news.bbc.co.uk/2/hi/americas/6586959.stm>; Mexico: Decriminalize Abortion to Help Women (Mar. 28, 2007), <http://hrw.org/english/docs/2007/03/28/mexico15605.htm>.

198. Corte Constitucional, Dec. C-355/2006, Referencia: expedientes D-6122, 6123 y 6124, May 10, 2006 (Colom.); see also Press Release, Ctr. for Reprod. Rights, Landmark Decision by Colombia's Highest Court Liberalizes One of the World's Most Restrictive Abortion Laws (May 11, 2006), available at [http://www.reproductiverights.org/pr\\_06\\_0511colombia.html](http://www.reproductiverights.org/pr_06_0511colombia.html).

199. See CTR. FOR REPROD. RIGHTS, *supra* note 191, at 2.

ing severe fetal impairment.<sup>200</sup> Furthermore, the Mexican government agreed to settle the case of *Paulina*, a thirteen-year-old girl who was raped and denied access to a legal abortion.<sup>201</sup> Both of these states had failed to fulfill their duties at the national and international levels to protect the rights of pregnant women. These decisions further demonstrate the growing international trend toward liberalizing abortion laws, even in the traditionally socially conservative Latin American context.

Today, more than 60% of the world's population lives under broad, permissive abortion laws, and the movement is continuing to gain momentum.<sup>202</sup> Only 3% of the 193 United Nations member states prohibit abortion without exception.<sup>203</sup> Although not all states have applied specifically reproductive rights norms to abortion, an overwhelming majority of governments have recognized the need to combat the negative public health consequences of unsafe abortions.<sup>204</sup> More and more governments are supporting the decriminalization of abortion practices because states can no longer ignore the evidence-based research showing that restrictive practices only lead to an increase in clandestine abortions and preventable maternal deaths.<sup>205</sup>

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

Despite the general trend toward reproductive rights and abortion law liberalization, there is an undeniable conservative countertrend pushing for further restrictions in abortion legislation.<sup>206</sup> The countermovement is led largely by influential members of the Roman Catholic Church who encourage governments to pass laws recognizing conception as the moment from which life is to be protected.<sup>207</sup> The Catholic Church is influential in asserting its views regarding reproductive issues, including abortion, through the political and legal processes at both the national and

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200. Press Release, Ctr. for Reprod. Rights, U.N. Human Rights Committee Makes Landmark Decision Establishing Women's Right to Access to Legal Abortion (Nov. 17, 2005), available at [http://www.reproductiverights.org/pr\\_05\\_1117KarenPeru.html](http://www.reproductiverights.org/pr_05_1117KarenPeru.html).

201. See Grimes et al., *supra* note 2, at 1917. For a detailed analysis on the prevalence, problems, and consequences of rape and the denial of safe, legal abortions in Mexico, see HUMAN RIGHTS WATCH, *THE SECOND ASSAULT: OBSTRUCTING ACCESS TO LEGAL ABORTION AFTER RAPE IN MEXICO* (2006).

202. See CTR. FOR REPROD. RIGHTS, *supra* note 191, at 1.

203. See U.N. POPULATION DIV., DEP'T. OF ECON. AND SOC. AFFAIRS, *WORLD ABORTION POLICIES* (2001) (stating that 3% of U.N. member states prohibit abortion without exception); Debusmann, *supra* note 94.

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

205. See also Forero, *supra* note 194, at A14 (discussing movements to legalize abortion in Colombia, Brazil, Uruguay, and Argentina); see generally Grimes et al., *supra* note 2 (discussing the health implications of unsafe abortions practiced in countries where abortion is illegal).

206. See Ernst et al., *supra* note 2, at 762.

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

international levels.<sup>208</sup> Moreover, the United Nations treats the Holy See as a state in many ways, allowing the Church to participate in the international community with certain rights and privileges in international fora.<sup>209</sup> The Church will continue to exert its influence in these arenas even as human rights activists maintain their momentum toward liberalizing abortion laws.<sup>210</sup>

Recently, the Catholic Church has, to some degree successfully, slowed the strides of the reproductive rights movement using the Vatican's United Nations observer status. At the Cairo Conference, for example, the Vatican and its allies refused "all references to abortion and other language that might imply that it is acceptable as a method of family planning"<sup>211</sup> and effectively blocked consensus on the issue of abortion.<sup>212</sup> Even though more than 170 of the 180 Cairo Conference attendees might have settled on a more progressive set of recommendations with regard to abortion, the Vatican and a few supporting states weakened the abortion provisions, leaving behind a mere shell of the original section.<sup>213</sup> The Catholic Church continued its quest—though less aggressively and with an ability to compromise—at the Beijing Conference the following year.<sup>214</sup> In Beijing, the Vatican representative focused intently on "parts of the draft that it charge[d] promote[d] 'negative' feminism over women's roles that focus on the family"<sup>215</sup> as well as on abortion and contraception language.<sup>216</sup> In doing so, the Catholic Church reestablished its status as a force in international law, speaking out against advancements in reproductive rights and abortion liberalization. Furthermore, as the Nicaraguan case example demonstrates, the influence and power of the Catholic Church appears even more effective at curtailing liberalization of abortion legislation at the domestic level.<sup>217</sup>

In contrast to the significant number of states loosening abortion restrictions, since 1995, only two states, El Salvador and Nicaragua, have expressly defied the trend's direction and passed complete abortion bans.<sup>218</sup> A few other states, although preserving some access to safe abor-

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

209. See *id.* at 283 (citing CTR. FOR REPROD. LAW & POLICY, CHURCH OR STATE? THE HOLY SEE AT THE UNITED NATIONS (1995), available at <http://www.population-security.org/crlp-94-07.htm>).

210. See Fleishman, *supra* note 208, at 284–85.

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

212. See Fleishman, *supra* note 208, at 285. The Vatican aggressively resisted paragraph 8.25 of the document, articulating the meaning of abortion. *Id.*

213. See *id.*

214. See *id.* at 286 (citing Ian Johnson, *Vatican Adopts a Softer Line in Opposing U.N. Women's Conference Declaration*, BALT. SUN, Sept. 16, 1995, at 4A).

215. See Sheila Tefft, *War Over Words Divides UN Women's Conference*, CHRISTIAN SCI. MONITOR, Sept. 11, 1995, at 6.

216. See Fleishman, *supra* note 208, at 286.

217. See *id.* at 288–89.

218. See CTR. FOR REPROD. RIGHTS, *supra* note 191, at 5.

tion services, have taken limited measures to demonstrate their anti-abortion positions or to appease anti-abortion constituents.<sup>219</sup> Actions to tighten restrictions include mandating counseling requirements, denying funding, removing acceptable grounds for abortion, or banning particular types of abortion procedures.<sup>220</sup> Changes at the state level can depend largely on local events, such as visits from the Pope or media attention surrounding abortion-related deaths or arrests, which can quickly influence public opinion.<sup>221</sup> Although these states represent a minority in the international community, their actions signal meaningful victories for the anti-choice, anti-abortion countertrend.

Finally, a small, yet increasing, number of states have begun to revise their national constitutions to recognize the right to life as beginning from the moment of conception.<sup>222</sup> The constitutions of El Salvador and Nicaragua explicitly grant the fetus a right-to-life protection.<sup>223</sup> Although the prevailing consensus of international law is that the right to life is not intended to apply from the moment of conception and that the pregnant woman's rights are clearly established, the Convention on the Rights of the Child specifically grants fetal rights.<sup>224</sup> The American Convention on Human Rights also contemplates protecting fetal rights; however, the Inter-American Commission on Human Rights has concluded that these rights are compatible with a woman's right to access safe and legal abortion services,<sup>225</sup> especially when necessary to save the life of the woman. Of course, these constitutional provisions do not directly prohibit abortion, but the movement and support of fetal rights demonstrates a political and moral climate in which legislation liberalizing abortion could prove difficult, if not impossible, to achieve.<sup>226</sup> Moreover, state protections of fetal rights could lead to the perception that the rights of the pregnant woman have somehow diminished or disappeared.

## VI. Reparations for Victims in Nicaragua

In Nicaragua, this disregard for the rights of pregnant women—even when continuing a pregnancy seriously threatens their health and lives—is becoming a tragic reality.<sup>227</sup> In light of these serious public health

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219. These states include Poland, Hungary, the Russian Federation, and the United States. See *CTR. FOR REPROD. RIGHTS*, *supra* note 191, at 4. Most recently, on April 18, 2007, the U.S. Supreme Court upheld the federal "Partial-Birth Abortion Ban Act of 2003," which bans a particular late-term abortion procedure. See *Gonzales v. Carhart*, 550 U.S. 1 (2007).

220. See, e.g., *Gonzales*, 550 U.S. 1.

221. See *ALAN GUTTMACHER INST.*, *supra* note 13, at 7, 24.

222. See *CTR. FOR REPROD. RIGHTS*, *supra* note 191, at 4.

223. See *Nicar. Const.*, *supra* note 147; Decreto No. 541, Ratifica el artículo 1 del Acuerdo de Reforma Constitucional del 30 de abril 1997, Feb. 3, 1999 (El Sal.).

224. See Q&A: Human Rights Law and Access to Abortion (June 2005), <http://www.hrw.org/background/america/argentina0605/#apply> (last visited Jan. 2, 2008).

225. See *id.*

226. See *CTR. FOR REPROD. RIGHTS*, *supra* note 191, at 4.

227. See *id.*

problems and human rights violations occurring under Nicaragua's complete abortion ban, what rights, if any, do these victim-survivors have to a legal remedy? Because the ban largely affects poor, marginalized women, many such individuals may be unable to pursue an action against the state in Nicaraguan courts. In addition, the political power of the Catholic Church<sup>228</sup> and other pro-life lobbies in Nicaragua may silence public outcries and demands for justice.<sup>229</sup> Although challenging this ban in national courts is possible, particularly for human rights groups, Nicaraguan women also may seek reparations for state violations of their human rights.<sup>230</sup>

#### A. Reparations Under International Law

Reparations theory claims that one group or state bears an obligation to remedy historical injustices inflicted upon another group.<sup>231</sup> The term itself covers various types of remedies, such as restitution, compensation, rehabilitation, and symbolic gestures of acknowledgement or apology.<sup>232</sup> Groups seeking reparations often claim that they faced impossible barriers that prevented them from seeking a remedy at the time that they suffered the injury.<sup>233</sup> Additionally, groups often pursue reparations long after the possibility of remedies in tort or criminal law.<sup>234</sup> In general, reparations include plans that: (1) provide some form of compensation to a group of claimants, (2) are based on violations substantively permissible under the law at that time, (3) show that current laws provide no compulsory remedy for the violation, and (4) justify compensation on corrective justice grounds rather than on deterrence grounds.<sup>235</sup> As a result of the various international instruments with broad, general terms on the right to reparations, each state is left to interpret remedies when and how it chooses, often leaving victims with inconsistent or nonexistent reparations

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228. See Fleishman, *supra* note 208, at 277.

229. See, e.g., Rory Carroll, *Killer Law*, *GUARDIAN* (U.K.), Oct. 8, 2007, at 4.

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

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

232. See PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 170-71 (2002).

233. See Keith N. Hylton, *A Framework for Reparations Claims*, 24 *B.C. THIRD WORLD L.J.* 31, 36 (2004).

234. See *id.*

235. See Posner & Vermeule, *supra* note 231.

measures.<sup>236</sup>

In 2006, the U.N. General Assembly responded to these inadequacies in reparations law by adopting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Reparations Resolution).<sup>237</sup> In contrast to various international treaties and accepted customary norms, the Reparations Resolution explicitly requires states to fairly and adequately give reparations to victims and to cease, redress, and prevent human rights violations.<sup>238</sup> The Reparations Resolution takes a broadly-defined, “victim-based” perspective, reflecting the experiences of vulnerable groups—including women—while accounting for the physical, economic, legal, emotional, and mental harms that they have suffered.<sup>239</sup> Moreover, the Reparations Resolution delineates particular and comprehensive types of reparations, including material as well as non-material remedies for victim-survivors.<sup>240</sup> Thus, where the state has committed itself to respect, protect, and fulfill particular human rights obligations at international law, it must provide effective, adequate compensation to particular groups who have suffered from human rights abuses.<sup>241</sup>

For the victim-survivors of Nicaragua’s complete abortion ban, using the Reparations Resolution’s framework and initiating reparations proceedings in the Inter-American Commission on Human Rights or the Inter-American Court for Human Rights may prove integral to success in receiving reparations for past and continuing wrongs.<sup>242</sup> Article 63 of the American Convention authorizes the Inter-American Court to order a state to provide reparations for victims of human rights violations.<sup>243</sup> Victims of Argentina’s Dirty War, for instance, sought reparations against the state in the Inter-American system for the forced disappearances of family members.<sup>244</sup> The judgment recognizing Argentine victims’ rights to reparations served as a vehicle for national legislation compensating the “disappeared” for the particular human rights violations that occurred at the hands of, or

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

237. See Reparations Resolution, *supra* note 230.

238. See *id.*; Say, *supra* note 236, at 940.

239. See Reparations Resolution, *supra* note 230, paras. 9-13; Say, *supra* note 236, at 942-45.

240. See Reparations Resolution, *supra* note 230, paras. 19-23; Say, *supra* note 236, at 946.

241. See Say, *supra* note 236, at 949-50.

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

243. See American Convention, *supra* note 10, art. 63. The reparations article reads as follows: “[i]t shall rule . . . if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.” *Id.*

244. See Say, *supra* note 236, at 958.

at least at the acquiescence of, the state.<sup>245</sup> Additionally, human rights advocates are presently utilizing the Reparations Resolution to seek reparations against Japan for violating the human rights of the Japanese Army's "comfort women" in World War II.<sup>246</sup> These cases and legal mechanisms signal a larger international shift towards recognizing victims' rights to reparations for gross human rights violations as well as states' moral, ethical, and legal obligations to respect, protect, and fulfill the rights of their citizens.<sup>247</sup> Thus, the victim-survivors of Nicaragua's complete abortion ban may find remedies for wrongs that the state has committed against them and receive recognition of the state's responsibility for violating women's rights to life and health.

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

Although many international treaties obligate states both to prevent human rights abuses from occurring and to provide remedies and reparations when they fail to do so, multiple possible barriers to victims' reparations claims exist. The first possible concern may be that these human rights violations against Nicaraguan and other women are recent and ongoing.<sup>248</sup> Historically, victims seeking reparations have initiated claims long after the violations occurred, often waiting years, decades, or even generations.<sup>249</sup> Nevertheless, the Reparations Resolution, which reflects principles of legally binding international treaties and customary international law, does not preclude victims from concurrently pursuing positive legal remedies and reparations for violations.<sup>250</sup> In fact, bringing a claim before the passage of decades or generations may be preferable as there are identifiable victims and possibly current state actors to hold accountable for human rights violations.<sup>251</sup> Because local remedies may not be effective or viable options for many individual victims, international reparations claims become possible alternatives, and the recent timeframe does not preclude women in Nicaragua and elsewhere from pursuing reparations for violations as a result of the complete abortion ban.<sup>252</sup>

Another possible barrier to seeking reparations for victims of complete abortion bans may be the unwillingness of international human rights bodies to accept the claim that violations of women's right to health merit repa-

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245. *See id.*

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

247. *See Pasqualucci, supra* note 242, at 24, 32-33.

248. *See U.N. POPULATION DIV., supra* note 203.

249. *See Hylton, supra* note 233, at 36.

250. Reparations Resolution, *supra* note 230, para. (2)(c) ("Making available adequate, effective, prompt and appropriate remedies, including reparation"), para. 3(d) ("Provide effective remedies to victims, including reparation").

251. *See Hylton, supra* note 233, at 37.

252. *See Reparations Resolution, supra* note 230, para. 6.

rations. As described above, there is no doubt that national and international legal instruments obligate Nicaragua and other states similarly situated to respect, protect, and fulfill the right to health or that the criminalization of therapeutic abortion is a violation of the right to health.<sup>253</sup> In addition, there is a clear obligation mandating states to provide reparations for human rights violations.<sup>254</sup> The problem lies in the possible fears of courts or other international actors that such a precedent will open the door to countless cases based on a state's failure to prevent violations of the right to health. One counterargument is the fact that the Nicaragua case represents a retrogressive state action, thereby violating the progressive realization of the right to health.<sup>255</sup> These right-to-health violations are also paired with nonderogable right-to-life obligations<sup>256</sup> toward the women themselves, which arguably make reparations claims more compelling. As a result, the number of actual cases seeking reparations from clear, retrogressive state action may not merit fears that particular judgments would open the floodgates to thousands of new human rights reparations cases. On the contrary, a favorable judgment could serve as a mechanism for positive changes in states' policies or at least for the defeat of attempts to curtail such rights that states have the duty to protect.

A third possible barrier to receiving reparations for Nicaraguan women may be the lack of international mechanisms for enforcement of judgments and the state's limited resources to pay reparations claims.<sup>257</sup> Though this barrier is one inherent to the current international legal system and should not impede victims from pursuing reparations, the outcome may not provide tangible—or even symbolic—measures toward redress and reconciliation. Even if victim-survivors of the complete abortion ban received a favorable judgment against the government for failing to prevent these violations, international law relies on the promise of sovereign states to comply with international judgments and compensate those wronged in the event of state violations.<sup>258</sup> Furthermore, a state may acknowledge responsibility and the right to reparations and offer little to no compensation to individual victims, especially in low-income countries

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253. See, e.g., ICESCR, *supra* note 10, art. 12(1).

254. See Reparations Resolution, *supra* note 230, para. 2(c); HAYNER, *supra* note 232; Pasqualucci, *supra* note 242, at 3.

255. See ICESCR, *supra* note 10, art. 12.

256. See HUMAN RIGHTS WATCH, ON THE ABORTION-RELATED PROVISIONS OF LAW 603 OF 2006 (PENAL CODE) (2006).

257. For more information on the lack of enforcement at international law, see Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 89 (2003) (arguing that the "ICC depends on U.S. . . . military . . . and economic support for its success"); Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DAEDALUS, Winter 2003, at 47, 56-57 (arguing that the ICC cannot fulfill its goals without U.S. military support and that the ICC may in fact increase impunity for human rights violations by decreasing the likelihood of such military support to punish noncompliance); cf. Ryan Goodman & Derek Jinks, *How to Influence States Socialization and International Human Rights Law*, 54 DUKE L.J. 687-700 (2004).

258. See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 2, 93, 133 (1999).



with inadequate resources to fulfill other human rights obligations.<sup>259</sup> In the end, states with little ability to provide economic compensation to victims may establish a fund or offer more symbolic, non-material forms of compensation to reconcile the need to provide reparations to victims with legitimate claims.<sup>260</sup> For many victim-survivors, the actual process of seeking reparations and receiving recognition for wrongs committed against them may end up being the most important aspect of the legal action for reparations.<sup>261</sup>

Reparations claims are an important avenue for victim-survivors to receive remedies for states' failures to respect, protect, and fulfill human rights. Although previously used in other contexts of gross human rights violations, Nicaraguan women have a clear, legal cause of action in international law.<sup>262</sup> Advocates and scholars in public health and law must continue to discuss the positive and negative aspects of pursuing reparations for human rights violations at the hands of the state and to find solutions to those possible barriers to securing victim-survivors' human rights. Ultimately, all victim-survivors have the right to life, the right to health, and the right to a restoration of their dignity.

## Conclusion

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

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259. See *id.* at 331 ("In balancing needs and ability to pay, compromise is probably necessary in many cases because there are insufficient funds to provide full compensation to all victims.").

260. See *id.* at 331-32, 353-357.

261. See *id.* at 2, 93, 133.

262. For a clear, well-reasoned argument as to the particular rights of Nicaraguan women, see HUMAN RIGHTS WATCH, *supra* note 256.

for treating post-abortion complications to combat other priority health concerns, such as infectious diseases or malnutrition. Additionally, treaty monitoring bodies and international human rights institutions can sanction the state for these egregious violations of the rights to life and health. Finally, and most importantly, Nicaragua and other states criminalizing abortion should care about the countless women who will needlessly suffer and die under complete abortion bans. The horror of back-alley abortions performed with sticks and coat hangers is the frightening reality of many of the world's mothers, sisters, and daughters who feel they have no other choice.

