

The Impact of the Complete Ban of Abortion in Nicaragua:

Briefing to the United Nations Committee against Torture by Amnesty International

I. INTRODUCTION

In this briefing, Amnesty International conveys concerns regarding the denial of access to essential medical services through legislation that imposes an absolute ban on the provision of abortion services and the criminalisation of abortion. Nicaragua's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) are examined in light of Amnesty International's research findings from recent country visits.¹

Prior to 2006, Nicaraguan law permitted exceptions to the general ban on abortion only for those women and girls whose life or health was threatened by the continuation of their pregnancy, and in some cases, for victims of rape. The revised penal code, which came into force in July 2008, repealed this exception, with the result that victims of rape and those whose life or health depend on access to abortion are now prohibited from legally obtaining it. The new legislation criminalises all forms of abortion, regardless of the circumstances in which the abortion is sought, obtained or performed.² The revised law also provides for prison sentences for medical providers who cause unintentional harm to the foetus during the administration of medically indicated treatment to pregnant women and girls.³

Amnesty International has examined both the purpose and the likely consequences of these provisions in the revised penal code in relation to Nicaragua's obligation to ensure the right of women to freedom from torture and cruel, inhuman or degrading treatment.⁴ The complete

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¹ Where women's access to safe and legal abortion services and information is restricted, their fundamental human rights may be at grave risk.

Amnesty International therefore calls on states to do the following to prevent and end grave abuses of women's human rights in accordance with state obligations under international human rights standards: (a) repeal all laws which permit the imprisonment or imposition of any other criminal sanction on women for seeking or having an abortion and all other laws which provide for imprisonment or other criminal penalties solely for those providing information about or carrying out abortions; (b) provide access to medical services for complications arising from abortion to all women in need in any circumstance, regardless of the legal status of abortion; (c) take all necessary measures to ensure that safe and legal abortion services are available, accessible, acceptable and of good quality for all women who require them in cases of unwanted pregnancy as a result of rape, sexual assault or incest and pregnancy which poses a risk to the life or grave risk to the health of the woman. Amnesty International does not take a position on any other aspects of abortion.

² See Law No. 164, Penal Code of the Republic of Nicaragua, arts. 143 and 145. (See http://www.poderjudicial.gob.ni/arc-pdf/CP_641.pdf for the full reformed penal code as of July 2008)

³ See *ibid.*, arts. 148 and 149.

⁴ Amnesty International assessed the implications of the revised penal code on women's access to medical care during obstetric complications and the provision of support and medical care for victims of rape and incest in Nicaragua. In June and October 2008, Amnesty International interviewed Nicaraguan doctors and gynaecologists working in both public and private health institutions, directors, psychiatrists, lawyers and social workers in organizations providing psycho-social and legal support for victims of gender-based violence, including victims of rape and sexual abuse who are under the age of 18. Amnesty International also interviewed 27 rape victims and their relatives. Amnesty International has also expressed public concern about the complete ban on abortion to the Committee on Economic Social and Cultural Rights in October 2008 (AMR 43/002/2008)). These documents are available from: <http://www.amnesty.org/en/library/info/AMR43/001/2008/en> and <http://www.amnesty.org/en/library/info/AMR43/002/2008/en>

criminalisation of abortion greatly increases the level of pain and suffering endured by many pregnant women and girls, including those who are seeking medical care for complications and those who are seeking a therapeutic abortion. Amnesty International finds that the impact of the ban on abortion in Nicaragua is most acutely felt by:

- ... women and girl survivors of rape and incest
- ... women and girls who need treatment for life-threatening illnesses
- ... women and girls facing complications in pregnancy and in need of essential medical treatment
- ... women and girls in need of post-abortion care, whether for a miscarriage or induced abortion

The denial of access to legal and safe abortion services can cause delays in treatment which pose a threat to the health and life of Nicaraguan women and girls. The criminalisation of abortion compounds physical pain, fear, depression and stigma. In many cases, the level of suffering may lead to death or suicide. As Amnesty International and other groups have found elsewhere, criminalisation does not mean that no abortions will take place—some women and girls will instead resort to illegal abortion, risking their health and lives as well as the possibility of severe punishment in the process. Doctors who perform abortions could also be subject to punitive measures, including professional, criminal and even religious sanctions.⁵ They must either obey the law or fulfil their ethical obligation to save life and to respect the inherent dignity of their patient.

Indeed, the denial of access to essential medical services alone has severe consequences for pregnant women and girls, regardless of whether criminal penalties are imposed. Nicaraguan women and girls who are affected by this law are often in a traumatised state, experiencing severe pain and in fear for their health and lives, even prior to the denial of medically indicated treatment. These women and girls suffer torture and other ill-treatment as a direct result of the state's legislative action.

II. THE IMPACT OF THE NEW ABORTION LAW

Prior to 2006, the Nicaraguan penal code permitted 'therapeutic abortion'. The pre-2006 law was interpreted in practice to permit abortion to be performed when the life or health of the pregnant woman or girl was at risk from continuation of pregnancy and, on particular occasions, in cases of pregnancy as a result of rape.⁶ In addition to the woman's consent, the pre-2006 law required authorisation for abortion by a minimum of three physicians and the consent of the partner or closest family member of the woman.⁷

By contrast, the revised penal code removes any exceptions to the criminal prohibition on abortion. Article 143 of the revised penal code states:

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⁵ An example of such religious sanctions can be seen in the case of doctors who provided a 9 year old girl pregnant with twins as a consequence of rape in Brazil. Both the doctors and the mother in this case were excommunicated by the Catholic Church for seeking and providing safe abortion services. For more information on this case see "Excommunicated doctor hailed for abortion on child rape victim," CNN 11 March 2009 available from:

<http://edition.cnn.com/2009/WORLD/americas/03/11/brazil.rape.abortion/> and further "Excommunication Of Brazilian Abortion Doctors In Case Of Nine-Year-Old Rape Survivor Fuels Controversy" Medical News Today, 16 March 2009 available from:

<http://www.medicalnewstoday.com/articles/142292.php> and, further "Vatican backs Abortion Row Bishop" BBC News online 7 March 2009 available at: <http://news.bbc.co.uk/1/hi/world/americas/7930380.stm> ###

⁶ The circumstances in which therapeutic abortion was permitted were not explicitly defined in Nicaraguan law. However, the Health Ministry in its laws governing the provision of therapeutic abortion, defined therapeutic abortion as: "Interruption of pregnancy before 20 weeks gestation through medically indicated treatment due to maternal pathologies...that are exacerbated by the pregnancy or for maternal pathologies that have a negative effect on the growth and development of the foetus." Ministerio de Salud, Norma de Atencion al Aborto. Managua, Nicaragua, 1989

⁷ Article 165 of the Penal Code, since the year 1893, established that "Therapeutic abortion will be scientifically determined by at least three physicians and with the consent of the partner or relative closest to the woman, for legal purposes." (El aborto terapéutico será determinado científicamente, con la intervención de tres facultivos por lo menos y el consentimiento del cónyuge o pariente más cercano a la mujer, para los fines legales.)

Whosoever causes an abortion with the consent of the woman shall be sanctioned with a penalty of one to three years in prison. If the person is a medical professional or health worker, the penalty will simultaneously include being prohibited from working in medicine or as a health worker for two to five years.⁸

The woman who intentionally causes her own abortion or agrees with someone else to provide an abortion will face a penalty of one to two years in prison.⁹

Article 145 of the revised penal code states:

Whosoever through recklessness causes a woman to abort will be punished by between six months and one year in prison; if the event occurs in the course of practising as a health professional, the additional punishment of a prohibition on holding medical office for between one and four years will also be imposed. In this case, the pregnant woman will not be punished.¹⁰

As a result, the penal code now provides prison sentences for health care providers who carry out abortion and for women and girls who seek or obtain an abortion. These sanctions apply even in cases where abortion services are in response to the risk to a woman's life or health posed by continuation of pregnancy.

The new law also added two additional provisions aimed at health care providers. Article 148 of the revised penal code states:

Whosoever, by whatever method or procedure wounds the unborn or causes an illness which has grave consequences for normal development, or causes a grave and permanent physical or psychological wound to the foetus will be punished by between two to five years in prison and a prohibition on exercising any medical profession or providing services of any type in a clinic or gynaecological practice, public or private, for between two to eight years.¹¹

Article 149 of the revised penal code states:

Whosoever through recklessness causes the wounds described in the previous article to the unborn will be punished with between one and two years in prison and a prohibition on exercising any medical profession or providing services of any type in a clinic or gynaecological practice, public or private, for between one to five years. The pregnant woman will not be punished under this article.¹²

These provisions put doctors at risk of criminal prosecution in any case, regardless of intent, in which foetal injury of any degree, or foetal death, results from medical care aimed at preserving the woman's or the foetus's life or health.

; Articles 143-149, "Ley 641: Penal Code of the Republic of Nicaragua", in Chapter 2 of the reformed penal code titled "Abortion, Genetic manipulation and harm to the unborn foetus" sited from the Editorial Juridica 1ra edicion 2008, pages 67-68/ The English text contained in this submission to the Committee

Against Torture is an unofficial translation from the Spanish of articles 143,145, 148 and 149 by Amnesty International

< Ibid. Ley 641

10 Ibid. Ley 641

11 Ibid. Ley 641

12 Supra N7, Ley 641.Penal Code of the Republic of Nicaragua

A. The New Law Results in Denial or Unacceptable Delays in the Treatment of Obstetric Complications

Foetal and/or maternal life and health can be put at risk by medical conditions experienced by the pregnant woman, whether these conditions are caused by the pregnancy (such as eclampsia or spontaneous abortion/miscarriage) or aggravated by it (such as malaria). Foetal and/or maternal life and health can also be put at risk by obstructed or premature labour. In each situation of medical risk, doctors would aim to preserve or restore both foetal and maternal life and health.

It is widely accepted medical practice to terminate a pregnancy where a woman or girl's life or health is at risk. In fact, the current protocols and procedures on best practice issued by Nicaragua's Ministry of Health recommend termination of the pregnancy in cases of severe pre-eclampsia, ectopic pregnancy or other cases where the pregnancy poses a risk to the life or health of the patient.¹³

Where there has been a stillbirth, a miscarriage or an unsafe abortion, medical care is necessary to repair damage and prevent the woman developing sepsis or some other condition which will cause her death. Decisions in these cases must often be taken very rapidly. Delay can mean death or permanent injury, such as infertility.

Some medical interventions during pregnancy or delivery aimed at preserving maternal and/or foetal life and health can result in unintentional injury or death of the foetus. These include, for instance, malaria or cancer treatment and surgery or expedited delivery.

Nicaraguan doctors and other medical staff told Amnesty International they felt that, as a result of Articles 148 and 149, they had cause to be extremely concerned about treating pregnant women or assisting difficult births. Doctors said they were concerned that fear of criminal prosecution under Articles 148 and 149 had caused otherwise preventable delays in the treatment of pregnant women with obstetric complications, even though doctors know that delays in treatment risk leading to permanent health damage to the patient, such as loss of fertility or permanent disability, or even the loss of her life.

Amnesty International heard numerous accounts of how medical practitioners, in fear of prosecution, had attempted to avoid handling cases of pregnant women and girls who required medical treatment. Such avoidance included sending women and girls to other medical centres, requiring the patients to repeat test unnecessarily, and delaying medical intervention until it was virtually certain that the patient was going to die if left untreated.

Even in the absence of prosecutions, the doctors interviewed by Amnesty International were unanimous in their anxiety at the possibility of being criminally charged under the law. As one doctor told Amnesty International, "Doctors' hands are tied. . . . We are apprehensive even over treating a miscarriage, for example."¹⁴

As a result, the revised law interferes with and thwarts medical practitioners' ability to assess, diagnose and treat women and girls suffering from ill-health or obstetric complications during pregnancy. It denies the opportunity for doctors to have a meaningful discussion with the woman or girl about treatment options, or consider her views on the same. It causes delays in urgent decision making concerning life-saving and health-preserving medical treatment.

13 See Ministry of Health, "Rules and Protocols for the Management of Obstetric Complications", December 2006 (on file with Amnesty International). The obstetric protocols were prepared by the Ministry of Health specifically to reduce maternal illness and deaths and raise the standard of obstetric care across the country. All doctors in Nicaragua are required to comply with these protocols.###

14 Amnesty International interview with gynaecologist (name withheld), Nicaragua, October 2008

B. By Compelling Women and Girls to Carry Unwanted or Non-Viable Pregnancies to Term, the New Law Causes Severe Pain and Suffering

The mental anguish and physical consequences inherent in forcing, or coercing in anyway, any pregnant woman or girl to carry an unwanted pregnancy to term is multiplied among the women and girls targeted by this law: victims of rape and women and girls whose life or health depend on the termination of their pregnancy.

In more than half of the rape cases reported in Nicaragua, the victims are girls below the age of 18, according to the records of the Women's Police Unit (Comisaría de la Mujer) and the Nicaraguan Forensic Institute (Instituto de Medicina Legal).¹⁵ The Nicaraguan Forensic Institute found that out of the 379 victims of sexual violence they examined in the month of December 2008, 295 (77%) were under the age of 17.¹⁶ An analysis by the Nicaragua section of Catholics for Choice working on sexual and reproductive rights carried out a survey of newspaper reports of cases of sexual violence in Nicaragua. The results show that between 2005 and 2007, 1,247 young girls were reported in newspapers to have been raped and or to have been the victims of incest. Of the 1,247 girls, some 198 (16%) were reported to be pregnant as a result of the rape. Of those 198 girls who were pregnant as a result of rape, 172 – that is some 87% – were between the ages of 10 and 14 years.¹⁷ These findings are only the tip of the iceberg and likely underestimate the number of girls' pregnancies that result from sexual violence.

Pregnant women under the age of 20 have a higher risk of obstetric complications than women between the ages of 20 and 35, according to Nicaraguan Society of Gynaecologists and Obstetrics (SONIGOB) and international medical opinion.¹⁸ Such complications include cephalo-pelvic disproportion, the medical term for a pelvis that is too narrow to allow passage of the foetus. This condition often occurs in younger girls who have not yet reached physical maturity; it results in obstructed and prolonged labour.¹⁹ The higher risk for girls of complications during pregnancy means that they may suffer disproportionately from the negative impact of delays or denial of medically indicated treatment as a result of the complete prohibition of abortion.

Some rape victims bring their pregnancy to term by their own choice. For many, however, the pregnancy is a daily reminder of the violence and humiliation they have suffered with long-lasting physical consequences. A psychiatrist working for an organization supporting victims of rape and abuse told Amnesty International, "Many of those who have become pregnant as a result of rape have to leave school. They do not have the capacity to concentrate, and many of them tell us that they do not even have the will to continue with their lives."²⁰

The World Health Organization's Guidelines for medico-legal care for victims of sexual violence include pregnancy testing, pregnancy prevention and access to safe abortion services among the range of services to which rape victims should be ensured access.²¹ The importance to rape victims of having this range of services and options available cannot be underestimated. As the mother of a rape victim told Amnesty International, following both her own and her daughters' experience of sexual violence, "If I could ask the officials here for anything I would ask them to hear and trust the words of rape victims and change the treatment of victims of sexual violence. I would ask them to

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¹⁵ See Corte Suprema de Justicia Instituto de Medicina Legal, *Subdirección de Vigilancia y Epidemiología Forense*, Boletín Estadístico Mensual Numero 12 Diciembre 2008

¹⁶ Corte Suprema de Justicia Instituto de Medicina Legal, *Subdirección de Vigilancia y Epidemiología Forense*, Boletín Estadístico Mensual Numero 12 Diciembre 2008. Page 5

¹⁷ Católicas por el Derecho a Decidir, Nicaragua section, *'Medios de Comunicación y abuso sexual'* 18 April, 2008

¹⁸ Amicus Curiae to the Constitutional section of the Nicaraguan Supreme Court, by the Nicaraguan Society of Gynaecologists and Obstetrics (SONIGOB),

28 May 2007, at page 16

¹⁹ Ibid. SONIGOB Amicus Curiae (28 May 2007)

²⁰ Amnesty International interview with psychiatrist, October 2008

²¹ World Health Organisation, *Guidelines for medico-legal care for victims of sexual violence*, 2003, pp. 2 and 28, http://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en/index.html

stop denying victims of rape the option to have a therapeutic abortion.”²² All the victims of rape interviewed by Amnesty International underlined the importance of victims of rape having all options available to them in order to control the consequences of rape and abuse as they personally decide what is best for them, including therapeutic abortion.

Because the new law denies them the choice of accessing safe abortion services legally, it compels rape victims to continue the pregnancy against their will, resulting in extended and intense physical and psychological suffering. Faced with these circumstances, some rape victims seek illegal and unsafe abortions, putting their health, liberty and even life at risk. Some attempt suicide. One doctor told Amnesty International that just he had seen that week a mother and her fifteen-year-old daughter. The daughter had been raped by a neighbour and found out she was pregnant as a consequence of the rape. She was distraught and had attempted to kill herself by cutting her wrists.²³

III. THE NEW LAW VIOLATES THE PROHIBITION AGAINST TORTURE UNDER ARTICLE 1 OF THE CONVENTION AGAINST TORTURE

The revised penal code’s provisions on abortion (articles 143 and 145) and foetal harm (articles 148 and 149) breach Nicaragua’s obligation under the Convention against Torture.

Article 1(1) of the Convention defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The intentional denial of an essential health service meets each of the elements of article 1 and is torture within the meaning of the convention.

A. The New Law Results in Severe Physical and Mental Pain and Suffering

1. The Severity of Suffering Is Such That Death May Result

This suffering is so severe that the lives of women and girls are threatened. The new law causes this particularly extreme form of suffering in two principal ways.

First, the new law increases the risk that women and girls will die from preventable causes. The link between unsafe abortion and maternal mortality and morbidity is now well established.²⁴ Twelve

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²² Amnesty International interview with mother of rape victim and rape victim herself [names withheld], Nicaragua, October 2008

²³ Interview with a gynaecologist in Managua, Nicaragua, November 2008. Name withheld. Also, interviews with experts working in the field of sexual abuse emphasised the concern they had at the rising number of suicides which might be linked to involuntary continuation of pregnancy. Although the State has not investigated whether or not they are victims of sexual violence, the prevalence of sexual violence against young girls and adolescents in Nicaragua and the rise in teenage deaths as a result of consumption of poison are of concern *Análisis Comparativo de Situación de Mortalidad Semanas Epidemiológicas 1 a la 53 Años: 2007 – 2008* Ministerio de Salud, 5 January 2009

²⁴ See page 14, “*Safe abortion: Technical and Policy Guidance for Health Systems*” World Health Organisation, Geneva, 2003 and further “Global and Regional estimates of the incidence of unsafe abortion and associated mortality in 2003” 5th edition, World Health Organisation 2003. Available at: http://who.int/reproductive-health/publications/unsafeabortion_2003/ua_estimates03.pdf

percent of maternal deaths in Latin America are caused by complications from unsafe abortions.²⁵ This law risks any efforts by the Nicaraguan government to reduce maternal mortality.

The new law is therefore contrary to the opinion of the Human Rights Committee that, in order to reduce the maternal death rate, states should prevent women from undergoing clandestine illegal abortions. The indivisible nature of the right to health, the right to equality and the right to life, in particular for women and girls, was noted by the Human Rights Committee in its General Comment 28 on the Equality of Rights Between Men and Women. That committee urged:

When reporting on the right to life protected by article 6, States parties should provide data on birth rates and on pregnancy- and childbirth-related deaths of women. Gender-disaggregated data should be provided on infant mortality rates. States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions. States parties should also report on measures to protect women from practices that violate their right to life, such as female infanticide, the burning of widows and dowry killings. The Committee also wishes to have information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.²⁶

Second, the new law limits the options women and girls have to such an extent that some may feel driven to commit suicide. Public health research has established a causal link between unwanted pregnancy and suicide of women. The World Health Organisation has found:

Suicide is disproportionately associated with adolescent pregnancy, and appears to be the last resort for women with an unwanted pregnancy in settings where reproductive choice is limited; for example, where single women are not legally able to obtain contraceptives, and legal pregnancy termination services are unavailable.²⁷

This Committee has repeatedly called on states to take measures to prevent suicide.²⁸

In Nicaragua, an analysis by the Ministry of Health of the maternal mortality figures for 2007 and 2008 found that the principal causes of adolescent maternal mortality were the consumption of poison and pre-eclampsia.²⁹

Preventable maternal death and suicide are extreme forms of suffering caused by the new law. In addition, Amnesty International's research in Nicaragua indicates other severe pain and suffering, both physical and mental, that women and girls may be forced to endure as a result of the law.

25 See page 9, statistic taken from a study published in 2006, "Nota informativa: Derogación del Derecho al Aborto Terapéutico en Nicaragua: Impacto en

Salud" published by the Pan-American Health Organisation (OPS-OMS) November, 2006 Available from:
<http://www.bertha.gob.ni/adolescentes/descarga/doc1/Derogacion%20del%20%20Aborto%20Terapeutico%20en%20Nicaragua.pdf>

26 Human Rights Committee, General Comment 28, Article 3, Equality of rights between men and women (Para 10) , U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

27 World Health Organisation and UNFPA, Mental health aspects of women's reproductive health - A global review of the literature, 2009, p. 9,
http://whqlibdoc.who.int/publications/2009/9789241563567_eng.pdf

28 See, for example, the Conclusions and Recommendations of the Committee Against Torture on the United Kingdom, CAT/C/CR/33/3, para. 4 (expressing concern over "reports of incidents of bullying followed by self-harm and suicide in the armed forces, and the need for full public inquiry into these incidents and adequate preventive measures"), Conclusions and Recommendations of the Committee Against Torture on the Republic of Korea, CAT/C/KOR/CO/2, para. 14 ("The Committee is concerned about the high number of suicides and other sudden deaths in detention facilities...The State party should take all necessary steps to prevent and reduce the number of deaths in detention facilities...and suicide prevention programmes should be established in such facilities."), Conclusions and Recommendations of the Committee Against Torture on Portugal, CAT/C/PRT/CO/4, para. 11 (the state party "should also step up measures aimed at preventing violence among inmates, including sexual violence, and suicide by prisoners.")

29 Análisis Comparativo de Situación de Mortalidad Semanas Epidemiológicas 1 a la 53 Años: 2007 – 2008 Ministerio de Salud, 5 January 2009

2. Other Severe Physical Pain and Suffering Result from Denial of Access to Safe Abortion Services

Other forms of severe physical pain and suffering include the following:

- ... Denial of appropriate treatment for a disease such as cancer on the grounds that such treatment could cause harm to the foetus.
- ... Continuation rather than alleviation of physical suffering for serious health conditions, including eclampsia and other hypertensive disorders.
- ... Denial of appropriate treatment for malaria, a disease where pregnancy increases the risk of morbidity and mortality.
- ... The use of painful and dangerous methods to procure an unsafe abortion, including consumption of dangerous liquids, insertion of objects into the vagina, leading to a perforated uterus and other conditions.
- ... Health consequences of unsafe abortion – haemorrhage, sepsis, poisoning, infertility or other permanent disability, and, as noted above, even death.
- ... Denial of post-abortion services in circumstances above and after a miscarriage, because of doctors' concerns that they may be liable to prosecution.
- ... Treatment delayed solely because of uncertainty as to its legal status.

3. The Denial of Access to Safe Abortion Services also leads to Severe Mental Pain and Suffering

The mental pain and suffering resulting from criminalisation of abortion and the denial of access to safe abortion services include the following:

- ... A woman or girl's fear and horror at discovering that she is pregnant, in some cases after being raped or sexually abused within the family over a long period, is compounded by the knowledge that she cannot go anywhere for help unless she continues with the pregnancy against her will.
- ... Fear of seeking care when suffering miscarriage, in case of being accused of having carried out an abortion, leading to delays in treatment and jeopardising their health and life.
- ... The anguish of seeking an unsafe and illegal alternative, then the pain of unsafe treatment with uncertain outcomes, no proper aftercare and the possibility of being imprisoned if found out.
- ... Fear of being detained and imprisoned
- ... Fear that deprivation of liberty could cause suffering and have a detrimental impact on, or even harm, other dependents.
- ... Fear of being labelled a criminal or murderer for requesting an abortion.
- ... The anxiety of not being able to have access to appropriate medical care.
- ... Fear of health damage and death if continuing with a risky pregnancy, particularly for girls who are not yet physically mature.
- ... Severe depression because of lack of comprehensive socio-medical counselling that is adequate to their needs.
- ... Terror at the consequences in family and society of the pregnancy being discovered.
- ... Terror at the consequences of an abortion being discovered.
- ... Combination of these fears and physical pain, leading to severe depression, self-destructive behaviours or, as noted above, suicide.

B. This Pain and Suffering Is Intentionally Inflicted

In its General Comment No. 2, this Committee has explained that "elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must

be objective determinations under the circumstances.”³⁰. The government of Nicaragua both intended to engage in the conduct (prohibition and criminalisation of abortion) and was aware of the consequences (severe pain and suffering or death).

When the actor in question is the legislature, intent is usually resolved without difficulty. As a general proposition, the legislature is presumed to mean what it says in enacting a law and to intend the consequences that necessarily flow from a law it creates. This presumption of legislative intent is reinforced by reference to the legislative history, including the debates among lawmakers and the information put before them.³¹

The intent of the National Assembly here could not be more straightforward: It repealed a provision that permitted therapeutic abortions and enacted new provisions that ban abortions in all circumstances.

In so acting, the National Assembly required doctors to ignore the requirements of the obstetric protocols developed by the Ministry of Health for best practice management of complications during pregnancy. The purpose of the obstetric protocols is “to institutionalise best practices, those procedures that have proven to be the safest, most effective, most efficient and least costly and that ensure the reduction of maternal and infant mortality”.³² The protocols mandate termination of pregnancy in particular medical circumstances.

A robust public debate followed the initial proposal to prohibit abortion in all circumstances. The Nicaraguan medical community, women’s rights groups and civil society organizations raised wide-ranging public health and human rights concerns in the media and with those state authorities willing to receive them, relating to the blanket prohibition of abortion.³³ These constituencies repeatedly highlighted to the government and the legislature the multiple detrimental effects the complete prohibition and criminalisation of abortion would have on pregnant women and girls.

As one example of these efforts, on 20 October 2006, 21 Nicaraguan medical associations from across the spectrum of medical disciplines, including those representing gynaecologists, obstetricians, nurses, psychiatrists, public health experts and cardiologists, issued a joint public statement against the proposed total ban on abortion, with an explicit warning that health professionals’ “ability to provide health care and practice our profession will be limited if this prohibition is passed”.³⁴ The statement, directed specifically to the legislature, explained that “There

30 UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, paragraph 9.

31 See, for example, Peter de Cruz, “A Comparative Study of Statutory Interpretation,” in *Comparative Law in a Changing World*, 2d ed., 1999, pp. 265-92. See also Claire M. Germain, “Approaches to Statutory Interpretation and Legislative History in France,” *Duke Journal of Comparative and International Law*, vol. 13 (2003), pp. 195-206.

32 Page 26, “Rules and protocols for the treatment of obstetric complications” Ministry of Health December, 2006

33 See for example the joint letter written to all the Presidential candidates and the President of the National Assembly, from the Campaña 28 de septiembre por la Despenalización del Aborto en América Latina y el Caribe, Movimiento Autónomo de Mujeres, Asociación de Hombres contra la Violencia, Comité Latinoamericano y del Caribe de Defensa de los Derechos de la Mujer, Red de Salud de las Mujeres Latinoamericanas y del Caribe available from: <http://www.minsa.gob.ni/bns/observatorio/documentos/antes/Carta%20del%20Movimiento%20Autonomo%20de%20Mujeres.pdf> and, further, the Declaration of Nicaraguan medical societies and faculties of medicine on the criminalization of therapeutic abortion issued on 20 October 2006 <http://www.euram.com.ni/Terapeutico/Archivos%20PDF/Antes%20Penalizacion/Sociedades%20Medicas,%20Enfermeria%20y%20Universidades,%20Declaracion.pdf>. See also the Nicaraguan Society of General Medical Practitioners (SONIMEG) statement at http://www.sonimeg.net/index.php?option=com_content&view=section&layout=blog&id=8&Itemid=1

34 See the Declaration of Nicaraguan medical societies and faculties of medicine on the criminalization of therapeutic abortion issued on 20 October 2006 <http://www.euram.com.ni/Terapeutico/Archivos%20PDF/Antes%20Penalizacion/Sociedades%20Medicas,%20Enfermeria%20y%20Universidades,%20Declaracion.pdf>. See also the Nicaraguan Society of General Medical Practitioners (SONIMEG) statement at http://www.sonimeg.net/index.php?option=com_content&view=section&layout=blog&id=8&Itemid=1

The full list of Nicaraguan associations of health care professionals who signed the statement warning against a complete prohibition are the following: Sociedad Nicaragüense de Ginecología y Obstetricia, Sociedad Nicaragüense de Medicina General, Facultad de Medicina UNAN León, Asociación de Gineco-Obstetras, Ecografistas de Nicaragua, Asociación Nicaragüense de Cirugía General, Asociación Nicaragüense de Psiquiatría, Centro de Investigaciones y Estudios de la Salud, Asociación Nicaragüense de Salud Pública, Asociación Centroamericana de Sistema y Economía de Salud, Facultad

are situations in which continuation of pregnancy could result in the death or permanent disability for the woman.”³⁵ The associations of doctors and nurses urged the legislature to ensure that the law provide for an exception to the criminalization of abortion, permitting abortion to take place in cases where continuation of pregnancy poses a risk to the life or health of the woman.³⁶

The women’s rights movement and the Coordinadora Civil, an umbrella organization representing the interest of many Nicaraguan civil society organizations and networks working on a wide range of issues, issued statements explicitly outlining the risks to the health and lives of women and girls in Nicaragua.³⁷

The representatives of a number of international institutions and states co-signed a letter expressing their grave concern regarding the proposed revision of the penal code’s provisions on abortion to the National Assembly on the same day.³⁸ These included the United Nations Children’s Fund (UNICEF), United Nations Development Programme (UNDP), United Nations Population Fund (UNFPA), the Pan-American Health Organisation (PAHO), the World Health Organisation and the diplomatic representatives of Norway, the Netherlands, the European Commission, Finland, Denmark, Iceland and the United Kingdom. The Inter-American Commission on Human Rights also sent a letter of concern to the Foreign Minister of Nicaragua.³⁹

In spite of these efforts to persuade the National Assembly to avoid the harms to women and girls that would result from their action, that body repealed a provision that allowed for the possibility of therapeutic abortion, replacing it with a blanket prohibition on abortion and enacting other punitive measures that deny essential medical services to pregnant women and girls. Accordingly, applying an objective determination of intent, the presumptions that attach to legislative action, and the fact that numerous national and international organizations explicitly and repeatedly called lawmakers’ attention to the consequences of the new law, this Committee should conclude that the National Assembly enacted the legislation with the full knowledge of the severe pain and suffering that necessarily follow from the denial of essential medical services to pregnant women and girls.

C. The Decision to Withhold Essential Health Services to Women and Girls Is Discriminatory

The ban and criminalisation of abortion in Nicaragua specifically targeted those narrow categories of individuals for whom abortion had been previously available, namely women and girls who had become pregnant as a result of rape or whose life or health were threatened by continuation of their pregnancy. Its impact is felt most acutely by these groups of women and girls, as well as by pregnant women and girls in need of medical care that is denied or delayed due to the threat of criminal sanctions against doctors. That only women and girls, and not men or boys, suffer under this law demonstrates the law’s discriminatory intent and impact.

1. Withholding health services for women and girls constitutes sex discrimination

de Medicina UNAN Managua, Asociación Nicaragüense de Ortopedia y Traumatología, Fundación de Mujeres Médicas, Asociación de Cirugía Oral y Maxilofacial, Asociación Nicaragüense de Cirugía Laparoscópica, Asociación Nicaragüense de Dermatología, Asociación Nicaragüense de Infectología, Asociación Gineco-Obstetras de León, Asociación Urológica de Nicaragua, Asociación Nicaragüense de Cardiología, Colegio de Enfermeras/os de Nicaragua and the Asociación Nicaragüense de Medicina Interna.

³⁵ See the Declaration of Nicaraguan medical societies and faculties of medicine on the criminalization of therapeutic abortion issued on 20 October 2006 <http://www.euram.com.ni/Terapeutico/Archivos%20PDF/Antes%20Penalizacion/Sociedades%20Medicas,%20Enfermeria%20y%20Universidades,%20Declaracion.pdf>

³⁶ Ibid.

³⁷ See the joint petition to the Supreme Court by the Nicaraguan Centre for Human Rights (CENIDH) Movimiento Feminista, la Sociedad Nicaragüense de Ginecología y Obstetricia, la Asociación de Médicos Generales, la Facultad de Medicina de la UNAN Managua y León, la Sociedad de Enfermeras/os de Nicaragua, la Coordinadora de la Niñez y la Adolescencia, el Movimiento Comunal Nicaragüense, la Coordinadora Civil available from: <http://www.cenidh.org/casodetalle.php?idinforme=17> see also article titled “Brenes suena tambores de guerra contra el aborto terapéutico” available at: <http://www.radiolaprimerisima.com/noticias/8807>

³⁸ Copy of the letter in Amnesty International records

³⁹ Copy of the letter in Amnesty International records

Only women and girls – not men and boys – experience pregnancy. Under the revised law, they are denied access to treatment which only they need as women and girls. The total ban therefore constitutes discrimination on the ground of sex.

The Committee on the Elimination of All Forms of Discrimination against Women has found that laws that criminalize medical procedures only needed by women – such as laws criminalising abortion – constitute barriers to women’s access to appropriate health care which should be amended so as to withdraw punitive measures imposed on women who undergo abortion.⁴⁰

2. Sex discrimination in access to abortion services leads to other violations of civil and political rights

In its concluding observations on Peru, the Human Rights Committee combined its analysis of the criminalisation of abortion with a gender discrimination perspective by reference to article 3 of the International Covenant of Civil and Political Rights (ICCPR) and also with an analysis of torture and other forms of cruel, inhuman or degrading treatment under article 7 of that covenant. The Human Rights Committee expressed concern “that abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape and that clandestine abortions are the main cause of maternal mortality.” It found that the restrictions of the criminal law subjected women to inhuman treatment, contrary to article 7. Moreover, the Human Rights Committee explained that this aspect of the criminal law was incompatible with article 3, on equal entitlement of men and women to enjoyment of the rights set forth in the covenant. The Human Rights Committee noted that the rights protected unequally by Peru’s law would include the right to life, guaranteed in article 6 of the covenant, because men could request medical care for a life-endangering condition without fear that they or their care-providers would face criminal prosecution, while women could not.⁴¹

Further, the penalties the state imposes on health professionals for providing abortions or for causing harm, even unintentionally, to foetuses in the course of providing treatment have the potential to create conditions akin to those this Committee has criticised in its concluding observations on Chile. In that country, the Committee found that restrictive abortion laws may create the conditions under which women seek illegal abortions and then are subjected to coercive interrogation before they can access emergency medical treatment. The Committee strongly recommended that Chile:

Eliminate the practice of extracting confessions for prosecution purposes from women seeking emergency medical care as a result of illegal abortion; investigate and review convictions where statements obtained by coercion in such cases have been admitted into evidence, and take remedial measures including nullifying convictions which are not in conformity with the Convention.⁴²

3. Sex discrimination in access to health care violates the right to life

The level of discrimination is such that abortion becomes one of the leading causes of maternal death, as has been previously noted, constituting some 12% of maternal deaths in Latin America.⁴³ High rates of maternal mortality and morbidity have been recognised as preventable death and injury, for which governments are accountable because of the punitive measures they impose and because of their failure to provide accessible health services. For this reason, the Human Rights Committee asks governments to report on maternal mortality under article 6 of the ICCPR. In 1982, the Human Rights Committee noted “quite often the information given concerning article 6 was

40 UN Committee on the Elimination of All Forms of Discrimination against Women, General recommendation No. 24: Article 12 of the Convention

(women and health), paras. 14 and 31 (c)

41 Concluding observations by the Human Rights Committee : Peru. 15/11/2000, CCPR/CO/70/PER , at para. 20. Available from:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.70.PER.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.70.PER.En?Opendocument)

42 Conclusions and recommendations of the Committee against Torture, Chile, U.N. Doc. CAT/C/CR/32/5 (2004).

43 Supra N25 Pan-American Health Organisation Statement, page 9

limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly." It further noted that "the expression 'inherent right to life' cannot be properly understood in a restrictive manner, and the protection of this right requires that States adopt positive measures, citing as examples the reduction in infant mortality and increase in life expectancy."⁴⁴

The positive effect of abortion law reform on women's health has been demonstrated repeatedly: for instance, maternal deaths in Romania dropped immediately and dramatically, almost by half, because abortion was legalized in 1989.⁴⁵ In South Africa, abortion law reform was followed by a decrease in abortion mortality of more than 90 per cent between 1996 and 2000.⁴⁶

4. Denial of abortion services constitutes violence against women

This Committee recognises that "gender is a key factor" in determining risk of torture and ill-treatment and the consequences thereof. It has identified the context of medical treatment, particularly involving reproductive decisions, as one in which women and girls are at risk. The Committee has further pointed to actual or perceived non-conformity with socially determined gender roles as a basis of violations of the Convention against Torture.⁴⁷

The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, noted, "Acts deliberately restraining women from ... having an abortion constitute violence against women by subjecting women to excessive pregnancies and childbearing against their will, resulting in increased and preventable risks of maternal mortality and morbidity."⁴⁸

As described more fully above, Amnesty International has found that severe pain and suffering, both physical and mental, result from denial of abortion services. This suffering constitutes gender based violence as defined by article 1 of the Inter-American Convention on the prevention, punishment and eradication of violence against women (Convention of Belém do Pará) as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere." The Convention of Belém do Pará establishes in article 2 a) b) and c) that violence against women can be perpetrated by any actor in any place, including health facilities for example, where it is "perpetrated or condoned by the state or its agents regardless of where it occurs."⁴⁹

5. Sex discrimination and gender based violence resulting from the denial of abortion services are disproportionately experienced by girls and women who are young, poor and otherwise at risk

Following a friendly settlement with the Inter-American Commission in the 'Paulina' case, where a 14-year-old girl, pregnant as a result of rape, was denied a legal abortion, Mexico accepted its responsibility to provide substantial compensation to Paulina and her son. The Mexican authorities further agreed to strengthen legally binding procedures for health care providers to ensure that

44 United Nations, Human Rights Committee. General Comment 6, Article 6 (Right to Life). Paras (1) and (5) 1982, UN Docs Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).
45 Hord, Charlotte E., et al. 1991. Reproductive health in Romania: Reversing the Ceausescu Legacy. Studies in Family Planning, Vol 231.
46 Jewkes, Rachel, Helen Rees, Kim Dickson, Heather Brown, and Jonathan Levin. 2005. The impact of age on the epidemiology of incomplete abortions in South Africa after legislative change. BJOG, Vol. 112.
47 UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, paragraph 22.
48 Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1997/44, Addendum: Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women, UN Doc E/CN.4/1999/68/Add.4, paragraph 57, 21 January 1999
49 See the Inter-American Convention on the prevention, punishment and eradication of violence against women (Convention Belem do Para) to which Nicaragua is a party (1995) available from: <http://www.oas.org/cim/english/convention%20violence%20against%20women.htm#2>

abortion services are accessible to rape victims, including rape committed outside the family context.⁵⁰

In April 2007, the Legislative Assembly of Mexico City passed legislation decriminalizing abortion in the first trimester of pregnancy, permitting and making available pregnancy termination during the first three months of pregnancy. It also reduced criminal penalties for women seeking later abortions. Having come into effect two days after the vote, the law was immediately challenged before the Supreme Court by the National Commission on Human Rights and Attorney General who argued that it contravened the Constitution's protection of the right to life from conception and that such a right was supported by international human rights treaties that protect the right to life. In August 2008, the Supreme Court dismissed the constitutional challenge and upheld the legality of the law, referring explicitly in its ruling to international human rights standards.

Amnesty International has found through its research that abortion laws and policies that impose unreasonable restrictions have been shown to result in inequitable access to safe abortion services for women lacking financial means or social connections, adolescents, survivors of sexual violence, victims of racial or ethnic discrimination, or others in vulnerable circumstances, and consequently to large numbers of maternal deaths and injuries.⁵¹ Reforms of such laws – such as those brought about by the Mexican authorities– are therefore likely to be of specific benefit to women who are marginalised or in vulnerable circumstances.

In the *KL v Peru* case, the Human Rights Committee noted that KL was young – 17 years old – and poor and had therefore been unable to pay for abortion services. Finding a violation of article 24 of the covenant, among other rights, the committee recognised KL's special vulnerability as a girl and held the state liable for failing to take special measures to protect KL's health and well being. The state should have provided both during and after her pregnancy, "the medical and psychological support necessary in the specific circumstances of her case."⁵²

6. Gender-based violence is recognised as a form of discrimination

As a form of discrimination,⁵³ gender-based violence impairs or nullifies the enjoyment by women of their right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, among other rights.⁵⁴ As with torture, states have the duty under international human rights law to criminalise gender-based violence and take positive measures to prevent it.⁵⁵

With regard to a gender-sensitive definition of torture, the UN Special Rapporteur on Torture, Manfred Nowak, has concluded:

the purpose element is always fulfilled when it comes to gender-specific violence against women, in that such violence is inherently discriminatory and one of the possible purposes enumerated in the Convention is discrimination.⁵⁶

At a more general level, he has stated:

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⁵⁰Report N° 21/07 Petition 161-02 Inter-American Commission on Human Rights, Friendly Settlement Paulina del Carmen Ramirez Jacinto v Mexico March 9, 2007 Available from: <http://www.cidh.oas.org/annualrep/2007eng/Mexico161.02eng.htm>

⁵¹Berer, Marge. 2004. National laws and unsafe abortion: the parameters of change. *Reproductive Health Matters* 12(24 Supplement): 3-8.

⁵²KL was compelled to involuntarily continue with an anencephalic pregnancy. An anencephalic foetus is severely malformed and normally only survives for a few hours or days after birth. KL was not only compelled to carry the pregnancy to term against her will, but also to breastfeed the baby before it died a short while later. See *K.L v Peru*, HRC Comm. No. 1153/2003, 24 October 2005 and also *K.L v Peru*, analysis by Interights Bulletin Vol. 15 No. 3, 2006 pages 102 -104.

⁵³Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (Violence against Women), paragraph 1.

⁵⁴*Id.*, paragraph 7

⁵⁵*Id.*, paragraph 24.

⁵⁶Report of the UN Special Rapporteur on torture, Manfred Nowak, to the 7th Session of the Human Rights Council, UN Doc. A/HRC/7/3 15 January 2008, paragraph 68.

In regard to women, the purpose element is always fulfilled, if the acts can be shown to be gender specific, since discrimination is one of the elements mentioned in the CAT definition. Moreover, if it can be shown that an act had a specific purpose, the intent can be implied.⁵⁷

Unsafe abortion itself has been identified as a manifestation of violence against women.⁵⁸

7. Is the foetus discriminated against through the provision of abortion services?

There is no requirement on states to refrain from or be opposed to making abortion services legal, safe and accessible in order to meet their obligation to respect, protect and fulfil the right to freedom from discrimination. States are obliged to take measures to protect foetal life.⁵⁹ But universally agreed human rights treaties and conventions do not accord the foetus a status as rights holder equivalent to that of a woman. The American Convention on Human Rights is the only human rights treaty which calls for the right to life to “be protected by law, and, in general, from the *moment of conception*” (article 4 (1), emphasis added). Cecilia Medina Quiroga, the current President of the Inter-American Court of Human Rights, has commented that when interpreting the obligations of the State parties to the American Convention this would mean:

In certain cases, such as when continuing the pregnancy would endanger the life of the woman, or when the pregnancy is as a result of rape, the criminalisation of abortion would cause a violation of the obligation of the State to protect the life of the woman.⁶⁰

The Constitutional Court of Colombia in its 2006 decision ruled that the complete criminalisation of abortion was unconstitutional. The Court found that the constitutional value of foetal life was distinguishable from the right to life of a born human being and could be protected by means that are compatible with the human rights of women, including their rights to life and health.⁶¹

D. The Purpose of Withholding Essential Medical Services and Causing Severe Pain and Suffering May Fairly Be Described as Punishment or Coercion

There is no legitimate state purpose for withholding essential medical services, including those required to prevent permanent physical or psychological damage to the mother or foetus. The new law runs counter to accepted practice for the medical treatment of abortion, and it is incompatible with international human rights law and standards. Nicaragua’s decision to withhold this care, then, can only serve an improper purpose, such as punishment or coercion.

This conclusion is reinforced by the explicitly punitive elements of the new law. As discussed above, the new law establishes penalties for seeking, receiving and carrying out abortions in all circumstances, and it also provides for the punishment of health professionals when foetuses are harmed, however unintentionally, in the course of medical procedures. In light of all of these

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⁵⁷ Report of the UN Special Rapporteur on torture, Manfred Nowak, to the 7th Session of the Human Rights Council, UN Doc. A/HRC/7/3 15 January 2008, paragraph 30.

⁵⁸ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1997/44 Addendum Policies and practices that impact women’s reproductive rights and contribute to, cause or constitute violence against women GE.9910326, UN Doc. E/CN.4/1999/68/Add.4, 21 January 1999, paragraphs 45 and 57

⁵⁹ For instance, the Convention of the Rights of the Child calls on states, in implementing the child’s right to the highest attainable standard of health, to undertake appropriate measures “[t]o ensure appropriate pre-natal and post-natal health care for mothers” (article 24 (2-d)). The International Covenant on Economic, Social and Cultural Rights requires states to take steps necessary for “the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child”, including in relation to appropriate prenatal and post-natal health care for mothers (article 12(2)(a)). The UN Convention on the Elimination of All Forms of Discrimination Against Women calls on states to “ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation” (article 12).

⁶⁰ See Cecilia Medina Quiroga, La Convención Americana: Teoría y Jurisprudencia, ed. Centro de Derechos Humanos de la Facultad de Derecho de la Universidad de Chile, Santiago, 2003, p. 78. AI translation.

⁶¹ Constitutional Court of Colombia, Decision C-355/2006, Bogotá, D.C., 10 May 2006

circumstances, this Committee may fairly conclude that the state's decision to withhold these essential medical services and thereby to cause severe pain and suffering was punitive in nature.

E. "Any Act" by a "Public Official" Includes Legislation

The revision of Articles 143, 145, 148 and 149 of the penal code resulted from legislative action and is unquestionably an act by public officials of the Nicaraguan state.

IV. THE NEW LAW VIOLATES THE PROHIBITION AGAINST OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT UNDER ARTICLE 16 OF THE CONVENTION AGAINST TORTURE

The state has at a minimum violated the prohibition against other cruel, inhuman or degrading treatment or punishment under article 16.

Article 16 (1) states that "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The Special Rapporteur on Torture has noted the close relationship between torture, as defined in article 1, and other forms of cruel, inhuman or degrading treatment or punishment, as defined in Article 16, and has stated, "Whereas the Committee against Torture often does not specify whether a violation amounts to torture or to other forms of ill-treatment, it has stressed that ill-treatment is often conducive to torture, and therefore torture and cruel, inhuman and degrading treatment are closely intertwined."⁶²

This Committee has taken a strong stance in the past on state violations of women's rights in relation to aspects of abortion services in relation to Chile.⁶³ In relation to restrictions on access to safe abortion services in Peru, the Committee found that "the State party has failed to take steps to prevent acts that put women's physical and mental health at grave risk and that constitute cruel and inhuman treatment."⁶⁴ In Nicaragua the passage of the new law has intentionally caused physical and psychological suffering to women and girls in Nicaragua, resulting in a breach of article 16 and, as discussed above, of article 1. The enactment of the law constitutes not only an *omission* to provide an essential medical service but also an active *commission*. When the legislature approved the ban on abortion, it denied essential medical services to women and girls, causing them severe physical and psychological pain and suffering, often for long periods of time. The law even causes women and girls to die, either as a result of being denied medical treatment during complications, as a consequence of unsafe abortions, or committing suicide in desperation as a result of the pain and suffering they experience.

V. THE NEW LAW VIOLATES THE STATE'S OBLIGATION TO PREVENT ACTS OF TORTURE UNDER ARTICLE 2 OF THE CONVENTION

Nicaragua is obligated under article 2 of the Convention against Torture to take "effective legislative, administrative, judicial or other measures to prevent acts of torture." In its General Comment 2, this Committee has explained that article 2 requires states to ensure "implementation of ... positive

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⁶² See paragraph 33, Page 8 of the Report to the General Assembly by Manfred Nowak, Special Rapporteur on Torture titled "Strengthening the protection of women from torture." A/HRC/7/3 15 January 2008 available from: <http://www.univie.ac.at/bim/php/bim/get.php?id=829>

⁶³ Supra N41 CAT concluding observations, Chile 2004.

⁶⁴ Concluding observations by the Committee Against torture on Peru, CAT/C/PER/CO/4 25 July 2006, at para.23. Available from: [http://www.unhcr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/5ffe189c6ee40f89c12571e700279022/\\$FILE/Go643246.doc](http://www.unhcr.ch/TBS/doc.nsf/e121f32fbc58faafc1256a2a0027ba24/5ffe189c6ee40f89c12571e700279022/$FILE/Go643246.doc)

measures of prevention and protection.”⁶⁵ These are to be motivated by “continual evaluation” to “identify, compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed.”⁶⁶ In the context of the regulation of abortion, remedial measures against discriminatory treatment that threatens women’s right to freedom from torture and other cruel, inhuman or degrading treatment include the decriminalisation of abortion in all circumstances.⁶⁷ Positive measures of prevention and protection against torture and other cruel, inhuman or degrading treatment include ensuring women and girl’s access to safe and legal abortion services.

This Committee’s assessment of the remedial and positive measures required under article 2 of the convention should be informed by the position set forth in the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, the most recent human rights treaty to address state obligations relating to sexuality and women’s reproductive lives. That instrument requires states parties to take appropriate measures to “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”⁶⁸

In addition, this Committee’s article 2 analysis may appropriately refer to the approach taken by the Human Rights Committee in its assessment of state obligations under article 7 of the ICCPR. Calling for information on measures to help women prevent unwanted pregnancies and ensure they do not have to undertake life-threatening clandestine abortions, the Human Rights Committee has indicated that protection measures, including legal remedies, are required for women and girls pregnant as a result of rape whose rights under article 7 of the ICCPR have been violated by denial of access to safe abortion.⁶⁹

By changing the law to remove the legal entitlement of women to access safe abortion services in specific circumstances, and, further, by introducing criminal sanctions against medical professionals and women found to have provided or to have sought abortions, Nicaragua causes women and girls to suffer torture and other cruel, inhuman or degrading treatment. The complete criminalisation of abortion constitutes a retrogressive measure under international law.⁷⁰

VI. THE NEW LAW DENIES A REMEDY TO RAPE VICTIMS, IN VIOLATION OF NICARAGUA’S OBLIGATION UNDER ARTICLE 14 OF THE CONVENTION

The Beijing Platform of Action of the Fourth World Conference on Women recognised that “[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.”⁷¹ Rape is the ultimate denial of this right. In specific circumstances it constitutes a form of torture and other cruel, inhuman or degrading treatment.⁷² In such cases, a

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65 UN Committee against Torture, General Comment no. 2, Implementation of article 2 by States parties, UN Doc CAT/C/GC/2, 24 January 2008, para. 21

66 *Id.*, para. 23

67 CEDAW General Recommendation 24: “legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion”. Fourth World Conference on Women (1995), Platform for Action, paragraph 106k: States are to “consider reviewing laws containing punitive measures against women who have undergone illegal abortions.”

68 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, art. 14(2)(c).

69 Human Rights Committee, General Comment 28 (The quality of rights between men and women), paragraphs 10 and 11

70 “There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party’s maximum available resources” General Comment ESCR Article 12 Right to Health, paragraph 45

71 See Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at para.97. Available at: <http://www1.umn.edu/humanrts/instree/e5dplw.htm>

72 “It is widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials.” (Report of the UN Special Rapporteur on torture, Manfred Nowak, to the 7th Session of the Human Rights Council, UN Doc. A/HRC/7/3 15 January 2008, paragraph 34.) The Special Rapporteur on torture has also recognised

rape victim is entitled under article 14 of the Convention against Torture to “the means of as full rehabilitation as possible.”

To ensure a gender-inclusive approach to torture, the UN Special Rapporteur on torture has underlined “the need to perceive it [torture] as a process”, explaining that mental trauma and stigma attached to sexual violence and its impact are continuous in nature.⁷³ The means of the fullest possible rehabilitation for the rape victim need to respond to the continuous impact of the initial violation and its sequelae, including pregnancy which the concerned woman or girl may or may not want to bring to term.

The World Health Organisation’s Guidelines for the Medico-Legal Care for Victims of Sexual Violence identify sexual violence as a “violent, aggressive and hostile act used as a means to degrade, dominate, humiliate, terrorize and control women.”⁷⁴ The guidelines advise: “Victims of sexual assault require comprehensive, gender sensitive health services in order to cope with the physical and mental health consequences of their experience and to aid their recovery from an extremely distressing and traumatic event.”⁷⁵ Any woman who has become pregnant as a result of sexual violence, including incest, must, the WHO Guidelines conclude, have the option of accessing safe and legal abortion services as part of a range of support services, including treatment and follow-up care for physical injuries, pregnancy prevention and management, sexually transmitted infections and counselling and social support.⁷⁶

Best practice models in medical ethics and public health have been endorsed by international and regional human rights mechanisms. In its General Comment No. 28, for example, the Human Rights Committee states:

To assess compliance with article 7 (prohibition of torture) of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape.

The Human Rights Committee has criticised Ecuador for failing to “address the resulting problems faced by adolescent girls, in particular rape victims, who suffer the consequences of such acts for the rest of their lives.” The Committee linked its concerns to the prohibition of torture and other cruel, inhuman or degrading treatment, stating: “Such situations are, from both the legal and practical standpoints, incompatible with articles 3, 6 (right to life) and 7 (prohibition of torture) of the Covenant, and with article 24 when female minors are involved.” It recommended that Ecuador “adopt all necessary legislative and other measures to assist women, and particularly adolescent girls, faced with the problem of unwanted pregnancies to obtain access to adequate health and education facilities.”⁷⁷

The European Union has stated that safe and legal abortion services should be made available to women and girls in States party to the European Convention on Human Rights. The Council of

domestic violence as one of the “forms of violence that may constitute torture or cruel, inhuman and degrading treatment” (id, paragraph 44) and

elaborated on different manifestations of state acquiescence in domestic violence (id, paragraph 46) He has further drawn attention to the feeling of protection protected from social stigmatization which victims of sexual violence in Guatemala have reported feeling when the crime is defined as torture rather than rape, forced impregnation or sexual slavery (id, paragraph 66)

⁷³ Report of the UN Special Rapporteur on torture, Manfred Nowak, to the 7th Session of the Human Rights Council, UN Doc. A/HRC/7/3 15 January 2008, paragraph 70

⁷⁴ WHO Guidelines for Medico-Legal Care for Victims of sexual violence. Page 9

⁷⁵ Ibid.

⁷⁶ World Health Organisation, *Guidelines for medico-legal care for victims of sexual violence*, http://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en/index.html

⁷⁷ See Concluding observations of the Human Rights Committee on Ecuador, CCPR/C/79/Add.92 18 August 1998, at para.11. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.92.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.92.En?Opendocument)

Europe Parliamentary Assembly urged member States to “recognise the inalienable right of women who have been raped to undergo voluntary termination of pregnancy if they wish, *this right arising automatically from the rape*”.⁷⁸

Similarly, in its decision to end the criminalisation of abortion, the Constitutional Court of Colombia also commented on the entitlement of rape victims to have the option to have a safe and legal abortion if they decide that they do not want to continue with the pregnancy:

It is hard to imagine a more serious violation and a conduct more blatantly against social harmony among equals. A woman who becomes pregnant as a result of rape cannot be legally required to act as a heroine and take on the burden that continuing with the pregnancy entails. Nor can her fundamental human rights be disregarded as would be the case if she were required to carry the pregnancy to term against her will, turning her into a mere instrument of procreation.

Further, the Court stated, “[S]he cannot be obligated to procreate nor be subjected to criminal sanctions for exercising her constitutional rights while trying to lessen the consequences of the crime of which she was victim.”⁷⁹

Unnecessary obstacles frustrating access to safe abortion services and lack of access to effective remedy were the focus for the European Court of Human Rights in the case of *Tysiac v Poland*. In this case the European Court of Human Rights considered that Poland provided no effective mechanism to ensure the availability or legality of therapeutic abortion either in a consultation process between the woman and her doctors or between doctors themselves. The Court recognised that Alycia Tysiac had suffered severe distress and anguish and her right to privacy, enshrined in article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), had been violated, in particular due to the lack of procedural fairness. Retroactive civil and criminal remedies were not sufficient.

In the case of Nicaragua, there is now no remedy at all, as there is no mechanism for accessing a legal abortion.

VII. CONCLUSION AND RECOMMENDATIONS

Nicaraguan law now criminalises certain medically indicated treatment only required by women and girls as a result of their pregnancy, placing women and girls’ life and health at risk.

The Nicaraguan Government must repeal Articles 143, 145, 148 and 149 of the Penal Code. It must reform the Penal Code to ensure that women and girls are not subject to criminal sanctions for seeking or obtaining an abortion under any circumstances. It must also ensure that medical practitioners are not criminalised solely for providing abortion services that are safe.

The criminalisation of abortion places Nicaraguan health professionals in legal jeopardy. It obliges them to act unethically and deny treatment to ensure the best possible outcome for their patients. It forces them to risk imprisonment if they act in accordance with official procedures and protocols for best practice to end a pregnancy which poses a risk to the life or health of a woman or girl.

The Nicaraguan Government must promote and support the full implementation of the best practice Obstetric Protocols issued by the Ministry of Health, and ensure that every girl or

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⁷⁸See Resolution 1212 (2000) Rape in Armed Conflicts (emphasis added). Text available from:

<http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/taoo/ERES1212.htm> and further Sexual assaults linked to Date-Rape Drugs Recommendation 1777 (2007) full text available from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj-s-vict/Rec%201777.pdf

⁷⁹ See Colombian Constitutional Court Decision C-355/2006, *Excerpts of the Constitutional Courts Ruling*, published by Women’s Link Worldwide at page 52##

woman in need is counselled on and able to access comprehensive life-saving obstetric care, including where indicated safe abortion services.

Nicaraguan law now criminalises an internationally recognized aspect of reparation for the human rights violation of torture, when that torture is perpetrated in the form of rape, irrespective of whether the rapist is a state or non-state actor.

The Nicaraguan Government must take all corrective measures necessary to ensure that safe and legal abortion services are accessible without unreasonable restrictions to all girls and women who require them in cases of pregnancy resulting from rape or incest and in circumstances where continuation of pregnancy would put the health or life of the woman or girl at risk.

The high teenage pregnancy rate, as well as the rise in teenage maternal deaths from pre-eclampsia and suicide, are a serious cause for concern.

In particular, the Nicaraguan Government must remove the legal obligation, and any practical obstacles, that compel women and girls who are pregnant, as a result of rape to continue involuntarily with the pregnancy. The law must also be amended because it creates an environment in which women and girls with unwanted pregnancies resort to unsafe and illegal abortions. To this end, it must undertake immediate law reform to ensure rape victims' access to a comprehensive remedy to which they are entitled under international human rights law. Rape victims must be provided with comprehensive counselling, medical care and psycho-social and legal support. They must be fully supported to make free and informed choices on how to manage the consequences of rape, including continuation or termination of pregnancy. In view of the apparent link between maternal mortality, unwanted pregnancy and suicide, the Government must ensure full investigations are conducted in cases of suicide or homicide of girls or women of reproductive age.

The Nicaraguan Government did not formulate this policy based on data collection, best practice and evidence. The Nicaraguan authorities ignored the needs of those who this law immediately impacts upon, and did not engage with women and girls or medical health experts in a meaningful consultation.

The Nicaraguan Government must ensure that all laws and policies governing the provision of sexual and reproductive health services and related data collection are evidence-based and reflect medical ethics, clinical and public health best practice.