



## **Amicus Curiae Brief**

### **On the Abortion-Related Provisions of Law 603 of 2006 (Penal Code), presented by Human Rights Watch before the Supreme Court of Justice, Full Court**

#### **I. Introduction**

1. With reference to the petition regarding unconstitutionality presented by Marta María Blandón Gadea and others on January 8, 2007 (Appeal 01 against Law 603 of 2006), Human Rights Watch has the honor of submitting before the Supreme Court of Justice the following *amicus curiae* brief on the incompatibility of Law 603 of 2006 with international law.
2. Human Rights Watch is a nongovernmental organization that is dedicated, since 1978, to protecting human rights. The organization is independent and impartial with respect to any political, religious or economic organizations or movements. By mandate, the organization can receive no money, either directly or indirectly, from any government. It is headquartered in New York. Human Rights Watch enjoys consultative status with the United Nations Economic and Social Council, the Council of Europe and the Organization of American States, and maintains a working relationship with the Organization of African Unity.
3. As part of its mandate, Human Rights Watch is committed to using judicial and quasi-judicial tools of domestic and international law to contribute to protecting and promoting human rights. That commitment has motivated this specific Human Rights Watch petition. With this *amicus curiae* brief, Human Rights Watch wishes to demonstrate the incompatibility of Law 603 of 2006 with the Republic of Nicaragua's international obligations in protecting the rights of women in Nicaragua. The rights at stake are: the rights to life, health,

nondiscrimination and equality, freedom and privacy; the right to be free from torture and from cruel, inhuman or degrading punishment or treatment; and the right to make decisions on the number of children and spacing of children. The contested articles are the following:

**Para 1.** The need to reform Articles 162-165 of the Republic of Nicaragua's Penal Code, Decree 297, approved by the National Constituent Assembly on January 16, 1974, enacted by the Executive Power on April 1, 1974 and published in the *Gaceta Diario Oficial* (Official Legal Publication) No. 96 on May 3, 1974, which reads as:

**Article 162.** One who commits the crime of abortion by any method which causes the death of the unborn person during the time from its conception to its birth is committing a crime.

**Article 163.** The person who commits the crime of abortion will be imprisoned for a term of six (6) to fourteen (14) years.

**Article 164.** If an abortion results in the death of a mother, an additional penalty of twenty (20) years shall be added to the penalty specified in the previous article for those who carried out the abortion. If the mother experiences physical or psychological harm, an additional penalty of five (5) to ten (10) years shall be added to the penalty specified in the previous article. The sum of the first penalty plus this additional penalty shall not exceed thirty (30) years of imprisonment.

To apply a penalty of one (1) to four (4) years of imprisonment to one who causes an abortion through violence without having the intention to do so.

To apply a penalty of one (1) to four (4) years of imprisonment to a woman who induces her own abortion or consents to have an abortion. The attempt of the woman is not punishable.

**Article 165.** If the person who caused or cooperated in carrying out the crime

of abortion is a medical or health professional, pharmacist or midwife, in addition to the penalty outlined in Article 163, an additional penalty will be applied of a special prohibition to practice the job or work in the health profession for a period equal to the first penalty.

The establishment or location in which the crime of abortion occurred will be closed. The directors and administrators of said establishment or location who did not participate as authors in the crime will be considered as complacent or accomplices according to the case.

Para. 2. The present law will begin to reign from the date of its publication in the *Gaceta, Diario Oficial*.

4. The Republic of Nicaragua has ratified the following international human rights treaties: in 1979, the American Convention on Human Rights; in 1980, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; in 1981, the Convention on the Elimination of All Forms of Discrimination against Women; in 1990, the Convention on the Rights of the Child; in 1995, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; and, in 2005, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

## **II. Law**

### **General considerations**

5. It is a principle of international law, recognized in Nicaraguan constitutional law, that the Republic of Nicaragua has the obligation to have effective measures in the domestic law to protect and respect human rights, including the compatibility of its domestic legislation with international treaties.

The Political Constitution of Nicaragua, in Article 46, specifies that:

“In the national territory all people enjoy the protection of the State and the

recognition that the rights inherent to all humans, of unrestrictive respect, promotion and protection of human rights and the full force of the rights enumerated in the Universal Declaration of Human Rights; in the American Declaration of the Rights and Duties of Man; in the International Covenant on Economic, Social and Cultural Rights; in the United Nation's International Covenant on Civil and Political Rights; and in the American Convention on Human Rights.”

The Vienna Convention on the Law of Treaties consecrates this principle in its Article 27:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

According to Article 29 of the American Convention on Human Rights, when the provisions of internal law conflict with international law in the area of protecting human rights, that conflict shall be resolved by accepting the interpretation that extends, rather than restricts, the enjoyment of the rights guaranteed in the Convention.

The same line of reasoning is used in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), in both Covenants' Article 5, which are substantively identical:

“1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present

Covenant does not recognize such rights or that it recognizes them to a lesser extent.”<sup>i</sup>

6. In addition, it is a consecrated principle of international human rights law that States are obligated to adopt measures in their domestic law that guarantee the enjoyment and protection of human rights throughout their territory, and to refrain from enacting laws that deny the protection of these rights. The State does not have an unlimited margin of discretion in fulfilling this obligation. On the contrary, the measures, whatever their type, have to conform, or be adjusted to conform, to the requirements of international obligations. Thus, the Inter-American Court of Human Rights has affirmed that “the protection of human rights must necessarily comprise the concept of restriction of state power.”<sup>ii</sup> The Court has also observed that promulgating a law that clearly contradicts the obligations that a State assumes by ratifying or adhering to the American Convention of Human Rights constitutes a violation of that Convention.<sup>iii</sup>

## **A. Right to life**

7. Restrictive abortion laws have a devastating impact on women’s right to life. Evidence suggests not only that restrictive abortion laws drive women to unsafe abortion, but that women die from the consequences of such abortions. Approximately 13 percent of maternal deaths worldwide are attributable to unsafe abortion—between 68,000 and 78,000 deaths annually.<sup>iv</sup> These deaths are largely preventable. The U.N. Human Rights Committee and the Committee on the Elimination of Discrimination against Women have repeatedly expressed concern about the relationship between restrictive abortion laws, clandestine abortions, and threats to women’s lives.<sup>v</sup> To remedy the effects of the criminalization of abortion on women’s right to life, the committees have recommended the review or amendment of punitive and restrictive abortion laws.
8. Opponents of safe and legal abortions sometimes argue that the “right to life” of a fetus should take precedence over a woman’s human rights, in particular the rights to nondiscrimination and health. Some opponents cite a

supposed “fetal right to life” as an argument even against the use of contraceptives that work after fertilization but before implantation of a fertilized ovum (the medically accepted threshold for when pregnancy begins). Most international human rights instruments are silent concerning the starting point for the right to life. Meanwhile, the negotiating history of many treaties and declarations, international and regional jurisprudence, and most legal analysis suggest that the right to life as spelled out in international human rights instruments is not intended to apply before the birth of a human being.

*a. Sources in law*

9. The right to life is recognized in international law as a fundamental right, and it is enshrined in numerous international and regional treaties. The International Covenant on Civil and Political Rights (ICCPR) notes in its Article 6(1) 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 his life.” Article 6(1) of the Convention on the Rights of the Child (CRC) stipulates that “States Parties recognize that every child has the inherent right to life.” Finally, the American Convention on Human Rights affirms in its Article 4(1) that “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

*b. Interpretation and implementation*

10. The Human Rights Committee, which is charged with monitoring compliance with the ICCPR, has explained that “[t]he expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”<sup>vi</sup> In addition, in its General Comment No. 28 on the equality of rights between men and women, the Committee stipulates that for States Parties to be able to assess how well the right to life in the ICCPR is protected within their territory, they “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.”<sup>vii</sup> In the same document, the Human

Rights Committee establishes that the right to life may be in jeopardy when “States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion.”<sup>viii</sup> Such reporting requirements generally do not exist in countries where abortion has been decriminalized.

11. In 2004, the Human Rights Committee reviewed the Republic of Colombia’s fifth periodic report, a country which, at that time, had legislation very similar to the provisions currently contested in Nicaragua. The Human Rights Committee noted the following regarding legislation criminalizing all abortion in Colombia:

“The Committee notes with concern that the existence of legislation criminalizing all abortions under the law can lead to situations in which women are obliged to undergo high-risk clandestine abortions. It is especially concerned that women who have been victims of rape or incest or whose lives are in danger as a result of their pregnancy may be prosecuted for resorting to such measures (Art. 6) [the right to life]. The State party should ensure that the legislation applicable to abortion is revised so that no criminal offences are involved in the cases described above.”<sup>ix</sup>

12. The CEDAW Committee has expressed concern over the association between high levels of maternal mortality and the criminalization of abortion in many of its concluding observations for numerous countries, noting, in some cases, that these preventable deaths show that the State Party is not fully respecting women’s right to life.<sup>x</sup> As we show below at paragraph 18 of this *amicus curiae* brief, the CEDAW Committee considers that the provisions regulating abortion in Nicaragua pose a risk to women’s rights to life and health.<sup>xi</sup>

13. The American Convention on Human Rights is the sole international human rights treaty that allows, for an interpretation of the right to life to apply from the moment of conception, though not in an unlimited manner. In 1981, the Inter-American Commission on Human Rights, which monitors the protection and promotion of human rights in the region of the Americas, established that

Article 4(1) of the Convention could be compatible with a woman's right to legal, safe abortion. The Commission established the following:

“When dealing with the issue of abortion, there are two aspects of the Convention's elaboration of the right to life which stand out. First, the phrase ‘in general.’ It was recognized in the drafting sessions in San José that this phrase left open the possibility that states parties to a future Convention could include in their domestic legislation ‘the most diverse cases of abortion’ (Inter-American Specialized Conference on Human Rights, OEA/Ser.K/XVI/1.2, at 159). Second, the last sentence focuses on arbitrary deprivations of life. In evaluating whether the performance of an abortion violates the standard of Article 4, one must thus consider the circumstances under which it was performed. Was it an ‘arbitrary’ act? An abortion which was performed without substantial cause based upon the law could be inconsistent with Article 4.”<sup>xii</sup>

Moreover, the Inter-American Commission on Human Rights emphasized that an accurate reading of the American Convention on Human Rights must take into account the use of deliberate, qualifying language in the wording of the provision on the right to life:

“The addition of the phrase ‘in general, from the moment of conception’ does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogotá, when they approved the American Declaration.<sup>xiii</sup> The legal implications of the clause ‘in general, from the moment of conception’ are substantially different from the shorter clause ‘from the moment of conception’ ...”<sup>xiv</sup>

14. In other words, the current authoritative interpretation of the right to life is that an effective protection of women's right to life requires at least a partial decriminalization of abortion, and that the general protection of the right of life from the moment of conception, contained in applicable regional law, does not proscribe such decriminalization because (as applicable only to



pregnant women with crisis pregnancies, for example) it would not be arbitrary.

## **B. The right to enjoy the highest attainable physical and mental health**

15. The criminalization of abortion restricts the right of women and girls to physical and mental health, by prohibiting therapeutic abortion, abortion in circumstances where carrying the pregnancy to term may have serious psychological effects, and by impelling women to illegal, unregulated and often unsafe abortions that frequently endangers their health.

### *a. Sources in law*

16. The right to enjoy the highest possible standard of physical and mental health is recognized in a large number of international treaties. The International Covenant on Economic, Social and Cultural Rights (ICESCR) notes in Article 12(1) that States Parties recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also indicates, in its Article 12(1), that “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.” And in its Article 14(2)(b), the Convention establishes that States shall assure the elimination of discrimination against rural women by assuring that such women have, *inter alia*, “access to adequate health care facilities, including information, counselling and services in family planning.” As part of States’ obligations related to children’s right to enjoy the highest attainable health, Article 24(2)(d) of the Convention on the Rights of the Child (CRC) stipulates that States Parties take appropriate means to “ensure appropriate pre-natal and post-natal health care for mothers.” Finally, the Protocol of San Salvador, in its Article 10(1), stipulates that “[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.”

*b. Interpretation and implementation*

17. The Committee on Economic, Social and Cultural Rights (CESCR), which monitors compliance with and interprets the ICESCR, explains in its General Comment 14 that the right to health involves both freedoms as well as entitlements.

“The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, . . . By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”<sup>xv</sup>

The CESCR affirms that measures are required “to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.”<sup>xvi</sup> The CESCR recommends that States Parties remove “all barriers interfering with [women’s] access to health services, education and information, including in the area of sexual and reproductive health.”<sup>xvii</sup>

18. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) which monitors and interprets the United Nations Convention on the Elimination of Discrimination against Women (CEDAW) in its General Recommendation No. 24 on women and health, affirms States Parties’ obligations to respect women’s access to health services and to refrain from “obstructing action taken by women in pursuit of their health goals.”<sup>xviii</sup> The CEDAW Committee explains that “other barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”<sup>xix</sup> It further recommends that “[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion.”<sup>xx</sup>

19. In 2007, in examining the Republic of Nicaragua’s sixth periodic report, the CEDAW Committee expressed its concern “about the inadequate recognition

and protection of the reproductive health and rights of women in the State party [...] about the high maternal mortality rates, particularly the number of deaths resulting from illegal and unsafe abortion [...] and] about recent steps taken by the State party to criminalize therapeutic abortion.” A key reason for concern for the Committee are the health consequences of unsafe abortion: “[the criminalization of therapeutic abortion] may lead more women to seek unsafe, illegal abortions, with consequent risks to their life and health...”. In this connection, “[t]he 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 in accordance with the Committee’s general recommendation 24, on women and health, and the Beijing Platform for Action.”<sup>xxi</sup>

20. Additionally, in examining the Republic of Nicaragua’s fourth and fifth periodic reports, the CEDAW Committee expressed concern with the adverse consequences on women’s health of a lack of information on abortion:

“The Committee notes with concern a lack of information on abortions and on the incidence of related death or illness.”<sup>xxii</sup>

21. In 2003, the Committee on the Rights of the Child made public its position on how the right to health applies to adolescent development, stressing the need to adopt measures to reduce maternal mortality from unsafe abortion in adolescents:

“States Parties should take measures to reduce maternal morbidity and mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices.”<sup>xxiii</sup>

## C. Rights to nondiscrimination and equality

### a. Sources in law

22. The rights to nondiscrimination and equality are recognized in a large number of international treaties. Apart from the general provisions of protection from discrimination found in Articles 2(2) and 3 of the International Covenant on Civil and Political Rights, in Articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights, and Article 1 of the American Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) deals with the nature of these rights in great detail. In its Article 1, CEDAW defines discrimination against women as the following:

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

The provisions of CEDAW establish States’ obligations to eliminate discrimination against women in all spheres of life—the political, economic, familial, social and public, including the area of health.

### b. Interpretation and implementation

23. In 2004, the CEDAW Committee clarified that “the overall object and purpose of the Convention...is to eliminate all forms of discrimination against women with a view to achieving women’s *de jure* and *de facto* equality with men in the enjoyment of their human rights and fundamental freedoms.”<sup>xxiv</sup> As a result, the Committee explained, “[i]t is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account.”<sup>xxv</sup>

24. As we showed earlier, the CEDAW committee in its General Recommendation No. 24 on women and health implied that the criminalization of specific medical procedures that exclusively involve women is a form of discrimination against women. In that recommendation, the Committee commented that “[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion.”<sup>xxvi</sup> In addition, the CEDAW Committee concluded in 1999 that in Colombia, which, at the time, criminalized all abortion, abortion legislation constituted a violation of women’s right to access medical services free of discrimination.<sup>xxvii</sup>
25. In its General Comment No. 28 on the equality of rights between men and women, the Human Rights Committee explains that the Committee “needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape”<sup>xxviii</sup> to be able to assess whether a State Party has complied with Articles 7 (the right to be free from torture and from cruel, inhumane or degrading punishment or treatment) and 24 (the right of children to special protection) of the Covenant.
26. In many of its concluding observations on the periodic reports submitted by States that have signed the International Covenant on Civil and Political Rights, the Human Rights Committee has established the link between equality for men and women and access to reproductive health information and services, including abortion.<sup>xxix</sup> In 1997, the Committee reviewed the Republic of Colombia’s fourth periodic report on its implementation of the ICCPR and expressed on that occasion its concern about “the high mortality rate of women resulting from clandestine abortions.”<sup>xxx</sup> As mentioned beforehand, Colombia, at the time, maintained a full ban on abortion.

## **D. Right to liberty**

### *a. Sources in law*

27. The right to liberty is protected in, among others, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 7 of the

American Convention on Human Rights (ACHR). Article 9(1) of the ICCPR stipulates that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Article 7(2) of the ACHR establishes that “[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.”

### *b. Interpretation and implementation*

28. The criminalization of abortion is incompatible with the full protection of the right to liberty because a woman can be deprived of her liberty for the simple reason of having sought health services, an action that forms part of her right to enjoy the highest attainable physical and mental health. The criminalization of abortion also tends to dissuade women from seeking necessary medical treatment after a clandestine abortion out of fear for the legal consequences of those actions. In 2007, in its concluding observations on the sixth periodic report submitted by the Republic of Nicaragua, the CEDAW Committee noted:

“The Committee is concerned about the high maternal mortality rates, particularly the number of deaths resulting from illegal and unsafe abortion. It is further concerned about recent steps taken by the State party to criminalize therapeutic abortion, which may lead more women to seek unsafe, illegal abortions, with consequent risks to their life and health, and to impose severe sanctions on women who have undergone illegal abortions, as well as on health professionals who provide medical care for the management of complications arising from unsafe abortions.”<sup>xxxii</sup>

## **E. Right to privacy**

### *a. Sources in law*

29. The right to privacy is protected by many human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the American

Convention on Human Rights (ACHR). Article 17 of the ICCPR stipulates that “(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.” Article 11 of the ACHR states: (2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. (3) Everyone has the right to the protection of the law against such interference or attacks.”

*b. Interpretation and implementation*

30. When abortion is criminalized, medical personnel may be obligated to report to the authorities cases of women who come to the hospital for postabortion care. Such unauthorized disclosure of abortion-related medical information is incompatible with the right to privacy. In its General Comment No. 28 on the equality of rights between men and women, the Human Rights Committee observed that an “area where States may fail to respect women’s privacy relates to their reproductive functions, for example, . . . where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion.”<sup>xxxii</sup>

31. In its General Recommendation No. 24, the CEDAW Committee has expressed its concern over the link between protecting the right to privacy in health-related matters and outcomes in abortion and women’s health:

“While lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment and thereby adversely affect their health and well-being. Women will be less willing, for that reason, to seek medical care for diseases of the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence.”<sup>xxxiii</sup>

## **F. Right to be free from torture and from cruel, inhuman or degrading punishment or treatment**

32. The U.N. Human Rights Committee has indicated that restrictions on access to safe and legal abortion may give rise to situations that constitute cruel, inhuman, or degrading treatment. These situations include forcing a pregnant woman to carry an unwanted or health-threatening pregnancy to term. Human Rights Watch's research in Argentina suggests that restrictions on abortion can lead to restrictions on post-abortion care. These restrictions can also be incompatible with the right to be free from cruel, inhuman, or degrading treatment. This could, for example, be the case where post-abortion care is systematically denied, or where available pain medication is withheld. It could also be the case when women only have access to necessary post-abortion care if they testify in criminal proceedings.

### *a. Sources in law*

33. The right to be free from torture and from cruel, inhuman or degrading punishment or treatment is protected both by international customary law and several international and regional human rights treaties. Article 7 of the International Covenant of Civil and Political Rights (ICCPR) stipulates that: “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 5(2) of the American Convention on Human Rights (ACHR) establishes that: “[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”

### *b. Interpretation and implementation*

34. On several occasions the Human Rights Committee has indicated that Article 7 can be jeopardized by the criminalization of abortion. In its General Comment No. 28 on the equality of rights between men and women, the Committee noted that the right to not be subjected to torture or to cruel, inhuman or degrading punishment or treatment may be in jeopardy “where States impose a legal duty upon doctors and other health personnel to report



cases of women who have undergone abortion.”<sup>xxxiv</sup>

On repeated occasions, the Committee has also indicated that Peru’s abortion legislation—which is less restrictive than Nicaragua’s—is incompatible with Article 7 of the ICCPR. In 1996, the Committee observed:

“The Committee notes with concern that . . . abortion gives rise to a criminal penalty even if a woman is pregnant as a result of rape and that clandestine abortions are the main cause of maternal mortality. These provisions not only mean that women are subject to inhumane treatment but are possibly incompatible with articles 3 [equality of rights between men and women], 6 [right to life] and 7 [right to be free from torture] of the Covenant.”<sup>xxxv</sup>

In 2000, the Committee repeated its concerns on this matter:

“It is a matter of concern that abortion continues to be subject to criminal penalties, even when pregnancy is the result of rape. Clandestine abortion continues to be the main cause of maternal mortality in Peru. The Committee once again states that these provisions are incompatible with articles 3 [equality of rights between men and women], 6 [right to life] and 7 [right to be free from torture] of the Covenant and recommends that the legislation should be amended to establish exceptions to the prohibition and punishment of abortion.”<sup>xxxvi</sup>

35. In the context of reviewing Chile’s third periodic report, the Committee against Torture, which monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recently expressed its concern over the adverse effect of the criminalization of abortion on the relationship between medical personnel and women who seek postabortion care in hospitals:

“The Committee expresses concern about . . . [r]eports that life-saving medical care for women suffering complications after illegal abortions is

administered only on condition that they provide information on those performing such abortions. Such confessions are reportedly used subsequently in legal proceedings against the women and against third parties, in contravention of the provisions of the Convention.”<sup>xxxvii</sup>

## **G. The right to decide on the number and spacing of children**

### *a. Sources in law*

36. The Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, in its Article 16(1)(e) stipulates that “[s]tates Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ... [t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”

### *b. Interpretation and implementation*

37. In its General Recommendation No. 21 on equality within marriage and family relations, the CEDAW Committee specified the reasons why women have the right to decide independently on the number and spacing of their children:

“The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women’s lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children.”<sup>xxxviii</sup>

38. The CEDAW Committee has emphasized on numerous occasions that abortion should never be used as a method of family planning.<sup>xxxix</sup> At the same time, in recognizing the need to decriminalize abortion,<sup>xl</sup> the Committee has implied that abortion in some circumstances may be the only available means

through which a woman can fulfill her right to independently decide the number and spacing of her children.

### **III. Conclusions**

39. The committees that monitor compliance with human rights treaties have insisted on repeated occasions that access to safe and legal abortion is necessary to save lives and, as a result, that governments are obligated to assure that women have access to safe and legal abortion, at the very least in situations where the life or health of the woman is in danger or when the pregnancy is the result of rape or incest.<sup>xli</sup> Through their many concluding observations and general comments, the committees have also established a causal link between a pregnant woman's right to decide independently in matters related to abortion and the full exercise of the rights to nondiscrimination and to equal enjoyment of all other human rights. By identifying these obligations and causal links, the committees recognize that restrictive or punitive abortion laws can prevent the fulfillment of well-established and internationally recognized human rights that have been voluntarily accepted by the Republic of Nicaragua.

40. A review of the interpretation and implementation of international human rights law leads to the conclusion that any decisions about abortion must belong exclusively to the pregnant woman without any interference from the State or others. Restrictions on abortion that unduly interfere with women's ability to fully exercise and enjoy their human rights must be removed. Articles 162-165 of Law 603 of 2006 (Penal Code) of the Republic of Nicaragua unduly interfere with Nicaraguan women's ability to exercise many of their human rights by not taking into account the adverse effects that the criminalization of abortion has on the life and health of women, and on the infringement of rights to personal liberty, privacy and nondiscrimination. Thus, the articles are incompatible with both the international obligations in this area voluntarily assumed by the Republic of Nicaragua and with the Constitution of the Republic of Nicaragua. In consequence, we respectfully

request that the Constitutional Court find in favor of the unconstitutionality petition submitted by Marta María Blandón Gadea and others.

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<sup>i</sup> ICESCR, Article 5. Article 5 of the ICCPR stipulates: “1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.”

<sup>ii</sup> Inter-American Court of Human Rights, the Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, May 9, 1986, para. 21.

<sup>iii</sup> Inter-American Court of Human Rights, “Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights,” Advisory Opinion OC-13/93 of December 6, 1993, para. 26.

<sup>iv</sup> World Health Organization (WHO). *Unsafe Abortion: Global and Regional Estimates of Incidence of and Mortality Due to Unsafe Abortion with a Listing of Available Country Data*. Geneva, WHO, 1997.

<sup>v</sup> Committee on the Elimination of Discrimination against Women, “Report of the Committee on the Elimination of Discrimination against Women, Concluding observations on Nicaragua’s sixth periodic report,” UN Doc. CEDAW/C/NIC/CO/6, February 2, 2007, paras. 17-18.

<sup>vi</sup> Human Rights Committee, “General Comments Adopted by the Human Rights Committee, General Comment No. 6: Article 6 (Right to life),” UN Doc. HRI/GEN/1/Rev.7, 1982, para. 5.

<sup>vii</sup> Human Rights Committee, “General Comments Adopted by the Human Rights Committee, General Comment No. 28: Article 3 (The equality of rights between men and women).” UN Doc. HRI/GEN/1/Rev.7, 2000, para. 10.

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<sup>viii</sup> *Ibid.*, para. 20.

<sup>ix</sup> Human Rights Committee, “Concluding Observations of the Human Rights Committee: Colombia,” UN Doc. CCPR/CO/80/COL, May 26, 2004, para.13.

<sup>x</sup> See, for example, CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women,” UN Doc. A/54/38/Rev.1, July 1999, part 2, para. 56 (in its comments on Belize: “The Committee is concerned... at the restrictive laws in place in the State party. ... In this regard, the Committee notes that the level of maternal mortality due to clandestine abortions may indicate that the Government does not fully implement its obligations to respect the right to life of its female citizens.”); and CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women,” UN Doc. A/53/38/Rev.1, July 1998, part I, para. 337 (in its comments on the Dominican Republic: “The Committee expresses deep concern with respect to the high rate of maternal mortality which is caused, as is noted in the report, by toxemia, haemorrhages during childbirth and clandestine abortions; the Committee also notes that toxemia may be caused by induced abortions. The high rate of maternal mortality, in conjunction with the fact that abortions in the Dominican Republic are absolutely and under all circumstances illegal, cause very great concern to the Committee and draws attention to the implications of the situation for women’s enjoyment of the right to life.”)

<sup>xi</sup> Committee on the Elimination of Discrimination against Women, “Report of the Committee on the Elimination of Discrimination against Women, Concluding observations on Nicaragua’s sixth periodic report,” UN Doc CEDAW/C/NIC/6., February 2, 2007, para. 17.

<sup>xii</sup> Inter-American Commission on Human Rights, White and Potter [“Baby Boy” Case], Resolution N° 23/81, Case 2141, United States, March 6, 1981, OEA/Ser.L/V/II.54 Doc. 9 Rev. 1, October 16, 1981, para. 14(c).

<sup>xiii</sup> Regarding the American Declaration of the Rights and Duties of Man, the Inter-American Commission expressed, as in the “Baby Boy” case, that “the conferees in Bogotá in 1948 rejected language which would have extended that right [the right to life] to the unborn. . . . Thus it would appear incorrect to read the Declaration as incorporating the notion that the right to life exists from the moment of conception. The conferees faced this question and chose not to adopt language which would clearly have stated that principle.” Inter-American Commission on Human Rights, White and Potter [“Baby Boy” Case], Resolution N° 23/81, Case 2141, United States, March 6, 1981, OEA/Ser.L/V/II.54 Doc. 9 Rev. 1, October 16, 1981, para. 14(a).

<sup>xiv</sup> *Ibid.*, para. 30.

<sup>xv</sup> Committee on Economic, Social and Cultural Rights “The right to the highest attainable standard of health” (General Comments) General Comment 14, August 11, 2000, UN Doc. E/C.12/2000/4, para. 8.

<sup>xvi</sup> *Ibid.*, para. 14.

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

<sup>xviii</sup> Committee on the Elimination of Discrimination against Women, “General Recommendation No. 24, women and health (Article 12),” UN Doc. A/54/38/Rev.1, 1999, para. 14.

<sup>xix</sup> *Ibid.*, para. 14.

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<sup>xx</sup> *Ibid.*, para. 31(c).

<sup>xxi</sup> Committee on the Elimination of Discrimination against Women, “Report of the Committee on the Elimination of Discrimination against Women, Concluding observations on Nicaragua’s sixth periodic report,” UN Doc. CEDAW/C/NIC/CO/6, February 2, 2007, paras. 17-18.

<sup>xxii</sup> Committee on the Elimination of Discrimination against Women, “Report of the Committee on the Elimination of Discrimination against Women, Concluding observations on Nicaragua’s fourth and fifth periodic reports,” UN Doc. A/56/38, Part II, 2-20 July 2001, para. 300

<sup>xxiii</sup> Committee on the Rights of the Child, “Adolescent health and development in the context of the Convention on the Rights of the Child,” UN Doc. CRC/GC/2003/4, July 1, 2003, para. 31.

<sup>xxiv</sup> CEDAW Committee, “General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures,” UN Doc. No. CEDAW/C/2004/I/WP.1/Rev. 1, 2004, para. 4.

<sup>xxv</sup> *Ibid.*, para. 8.

<sup>xxvi</sup> Committee on the Elimination of Discrimination against Women, “General Recommendation No. 24, women and health (Article 12),” UN Doc. A/54/38/Rev.1, 1999, para. 31(c).

<sup>xxvii</sup> Committee on the Elimination of Discrimination against Women, “Report of the Committee on the Elimination of Discrimination against Women, Concluding observations on Colombia’s fourth periodic report,” UN Doc. A/54/38, July 9, 1999, para. 393.

<sup>xxviii</sup> Human Rights Committee, “General Comments Adopted by the Human Rights Committee, General Comment No. 28: Article 3 (The equality of rights between men and women),” UN Doc. HRI/GEN/1/Rev.7, 2000, para. 11.

<sup>xxix</sup> See, for example, Human Rights Committee, “Concluding observations of the Human Rights Committee: Argentina,” UN Doc. CCPR/CO/70/ARG, November 3, 2000, para. 14. (in its comments on Argentina: “On the issue of reproductive health rights, the Committee is concerned that the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, inter alia when there are clear health risks for the mother or when pregnancy results from rape of mentally disabled women. The Committee also expresses concern over discriminatory aspects of the laws and policies in force, which result in disproportionate resort to illegal, unsafe abortions by poor and rural women.); Human Rights Committee, “Concluding observations of the Human Rights Committee: Ecuador,” UN Doc. CCPR/C/79/Add.92, August 18, 1998, para. 11 (in its comments on Ecuador: “The Committee expresses its concern about the very high number of suicides of young females referred to in the report, which appear in part to be related to the prohibition of abortion. In this regard, the Committee regrets the State party’s failure 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. Such situations are, from both the legal and practical standpoints, incompatible with articles 3 [equality between men and women], 6 [right to life] and 7 [right to be free from torture and cruel, inhuman or degrading punishment or treatment] of the Covenant, and with article 24 [right to special treatment for children] when female minors are involved.”); and Human Rights Committee, “Concluding observations of the Human Rights Committee: Guatemala. UN Doc. CCPR/CO/72/GTM, August 27, 2001, para. 11 (in its comments on Guatemala: “The criminalization of all abortion, with the severe penalties imposed by the legislation in force except where the mother’s life is in danger, gives rise to serious problems, especially in the light of unchallenged reports of the serious impact

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on maternal mortality of clandestine abortions and the lack of information on family planning. The State party has the duty to adopt the necessary measures to guarantee the right to life (art. 6) of pregnant women who decide to interrupt their pregnancy by providing the necessary information and resources to guarantee their rights and amending the legislation to provide for exceptions to the general prohibition of all abortions except where the mother's life is in danger.”)

<sup>xxx</sup> Human Rights Committee, “Concluding observations of the Human Rights Committee: Colombia,” UN Doc. CCPR/C/79/Add.76, May 3, 1997, para. 24.

<sup>xxxi</sup> Committee on the Elimination of Discrimination against Women, “Report of the Committee on the Elimination of Discrimination against Women, Concluding observations on Nicaragua’s sixth periodic report,” UN Doc. CEDAW/C/NIC/CO/6, February 2, 2007, para. 18

<sup>xxxii</sup> Human Rights Committee, “General Comments adopted by the Human Rights Committee, General Comment No. 28: Article 3 (The equality of rights between men and women),” UN Doc. HRI/GEN/1/Rev.7, 2000, para. 20.

<sup>xxxiii</sup> Committee on the Elimination of Discrimination against Women, “General recommendation No. 24, Women and health (Article 12),” UN Doc. A/54/38/Rev.1, 1999, para. 12(d).

<sup>xxxiv</sup> Human Rights Committee, “General Comments adopted by the Human Rights Committee, General Comment No. 28: Article 3 (Equality of rights between men and women),” UN Doc. HRI/GEN/1/Rev.7, 2000, para. 20.

<sup>xxxv</sup> Human Rights Committee “Concluding observations of the Human Rights Committee: Peru,” UN Doc. CCPR/C/79/Add.72, November 18, 1996, para. 15.

<sup>xxxvi</sup> Human Rights Committee “Concluding observations of the Human Rights Committee: Peru,” UN Doc. CCPR/CO/70/PER, November 15, 2000, para. 20.

<sup>xxxvii</sup> Committee against Torture, “Conclusions and recommendations of the Committee against Torture: Chile,” UN Doc. CAT/C/CR/32/5, June 14, 2004, para. 6(j).

<sup>xxxviii</sup> CEDAW Committee, “General Recommendation No. 21, Equality in marriage and family relations, 1992, para. 21.

<sup>xxxix</sup> See, for example, CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women,” UN Doc. A/56/38, July 2001, paras. 62, 105 and 185; and CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women,” UN Doc. A/59/38, July 2004, paras. 355–356.

<sup>xi</sup> See especially CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women, Concluding observations on Colombia’s fourth periodic report,” UN Doc. A/54/38, July 9, 1999, para. 393.

<sup>xli</sup> See, for example, Human Rights Committee, “Concluding observations of the Human Rights Committee: Guatemala,” CCPR/CO/72/GTM, August 27, 2001, para. 11 (in its comments on Guatemala: “The State party has the duty to adopt the necessary measures to guarantee the right to life (art. 6) of pregnant women who decide to interrupt their pregnancy by providing the necessary information and resources to guarantee their rights and amending the legislation to provide for exceptions to the general prohibition of all abortions except where the mother’s life is in danger.”); Human Rights Committee, “Concluding observations of the Human Rights Committee: Sri Lanka,” CCPR/CO/79/LKA, December 1, 2003, para. 12 (in its comments on Sri Lanka: “The State party should ensure that women are not compelled to continue with pregnancies, where this would be incompatible with obligations arising under the Covenant (art. 7 and General Comment 28), and repeal the provisions criminalizing abortion.”); Committee on Economic, Social and Cultural Rights, “Concluding observations of the Committee on Economic, Social and Cultural Rights: Nepal,” E/C.12/1/Add.66, September 24, 2001, para. 33 (in its comments on Nepal: “The Committee notes with alarm that abortion is absolutely illegal and is

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considered a criminal offence, punishable by severe sentences, and cannot be carried out even when pregnancy is life threatening or the result of incest or rape.”); and CEDAW Committee, “Report of the Committee on the Elimination of Discrimination against Women, Concluding observations on Colombia’s fourth periodic report,” UN Doc. A/54/38, July 9, 1999, para. 393 (cited in the text).