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HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

TÉLÉCOPIE • FACSIMILE TRANSMISSION

DATE: 22 May 2020

A/TO: His Excellency
Mr. Andrew Bremberg
Ambassador
Permanent Representative
Permanent Mission of the United States of America
to the United Nations Office and other international organizations in Geneva

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OBJET/SUBJECT: **JOINT COMMUNICATION FROM SPECIAL PROCEDURES**

Please find attached a joint communication sent by the Working Group on discrimination against women and girls; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Special Rapporteur on violence against women, its causes and consequences.

I would be grateful if this letter could be transmitted at your earliest convenience to His Excellency Mr. Michael Richard Pompeo, Secretary of State.

UNITED NATIONS
HUMAN RIGHTS
SPECIAL PROCEDURES
SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS & WORKING GROUPS

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Mandates of the Working Group on discrimination against women and girls; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Special Rapporteur on violence against women, its causes and consequences

REFERENCE:
AL USA 11/2020

22 May 2020

Excellency,

We have the honour to address you in our capacities as Working Group on discrimination against women and girls; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Special Rapporteur on violence against women, its causes and consequences, pursuant to Human Rights Council resolutions 41/6, 42/16 and 41/17.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **restrictions taken in the context of the COVID-19 pandemic impeding access to abortion services.** Similar attempts to restrict women's sexual and reproductive rights in Texas and other states were already brought to your Government's attention by the Working Group on discrimination against women and girls in the report on its visit to the United States (A/HRC/32/44/Add.2) and previous communications (USA 4/2015, OL USA 8/2017).

According to the information received:

Since March 2020, emergency orders have been issued to respond to the pandemic of COVID-19 throughout the country. In some states, including Texas, Oklahoma, Alabama, Iowa, Ohio, Arkansas, Louisiana and Tennessee, these orders have been interpreted to restrict access to essential abortion care. As a result, clinics were compelled to cancel the appointments of hundreds of patients, many of whom were already scheduled to undergo abortion procedures and did not have alternative options. Other patients have had to travel long distances to reach other States in order to access these services under great difficulties imposed by restrictions on people's freedom of movement and increasing their risk of exposure to the coronavirus.

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His Excellency
Mr. Michael Richard Pompeo
Secretary of State

In Texas, on 22 March, the Governor issued temporary Executive Order No. GA-09, with the validity of one month subject to renewal, suspending all surgeries and procedures that are purportedly not immediately medically necessary. On 23 March, the Attorney General of Texas interpreted this Order to classify abortion care as nonessential health care, threatening that any type of abortion that is not medically necessary to preserve the life or health of the woman would be considered a violation of the Executive Order and would be sanctioned. This threat of serious penalties of up to $1,000 or 180 days of jail time specified in the Executive Order prompted hundreds of women to cancel their appointments at clinics providing abortion care across Texas.

On 30 March, the Federal District Court held that the Attorney General's interpretation of the Executive Order violated the U.S. Constitution and issued a temporary restraining order (TRO) blocking it from taking effect. On 31 March, the Fifth Circuit Court of Appeals granted a temporary administrative stay, essentially pausing the TRO from going into effect, while continuing to examine the case. On 20 April, the Fifth Circuit Court of Appeals ruled in favor of the restrictive interpretation of the Executive Order making abortion for women in Texas practically inaccessible, except for those women who will hit the legal limit (20 weeks gestational age), prior to the expiration of the Executive Order. The ruling of the Fifth Circuit Court of Appeals caused confusion and uncertainty for hundreds of patients in need of essential, time-sensitive abortion care. On 22 April, a new Executive Order was issued allowing procedures that do not deplete hospital resources to resume, including abortions. Texas authorities abandoned their efforts to include abortion in a list of medical procedures that must be delayed during the Coronavirus pandemic.

Similarly, on 1 April, Oklahoma's Executive Order No. 2020-07 suspended elective surgeries until 30 April. Even before the Order was issued, Oklahoma's Governor announced in a press release dated 27 March that all abortion procedures would fall within this order, implying that they would have to be suspended. As with Texas, this resulted in hundreds of cancelled appointments for abortion care. On 30 March, an emergency lawsuit was filed against Oklahoma requesting a temporary injunction, noting that even a temporary delay in accessing abortion services could adversely impact the health and quality of life of women seeking abortions. On 6 April, a federal district court judge granted the request for a temporary restraining order and allowed medication abortions (a non-surgical procedure to end a pregnancy through pills) to resume in the state, along with abortion procedures for patients who would pass the gestational limit of eleven weeks for medication abortion, concluding that the state of Oklahoma had acted in an 'unreasonable,' 'arbitrary,' and 'oppressive' way —and imposed an 'undue burden' on abortion access—in inflicting requirements that effectively deny the right of access to abortion. On 20 April, a federal district judge in Oklahoma granted a preliminary injunction allowing abortion procedures to resume fully in the state on 24 April. The 6 April temporary restraining order had already allowed

most abortion procedures to continue through 20 April, and the later decision extended that relief until the case concludes.

In Arkansas, the Eighth Circuit Court of Appeals issued an opinion on 22 April permitting the state of Arkansas to ban procedural abortions during the COVID-19 pandemic, despite a previous ruling by the District Court for the Eastern District of Arkansas allowing them during the crisis.

In Tennessee, the Sixth Circuit Court of Appeals affirmed on 24 April a preliminary injunction granted by a lower court, allowing abortion clinics to continue providing time-sensitive abortion services during the COVID-19 pandemic. This decision came after the Governor issued Executive Order 2020-07 on 8 April banning all abortion procedures other than medication abortion (available until 11 weeks of pregnancy).In its decision, the Court affirmed "The State has never, at any point in this litigation, attempted to support its policy choice with expert or medical evidence. This is unsurprising because, as far as we can tell, every serious medical or public health organization to have considered the issue has said the opposite."

Other states, including Alabama, Iowa, Louisiana and Ohio, have issued executive orders, de facto limiting access to abortion care during the pandemic. However, on 30 March, Alabama and Ohio courts issued temporary restraining orders allowing abortion care to proceed. Lawsuits are ongoing in most of the states mentioned above.

Without prejudging the accuracy of the information mentioned above, we believe that the situation in the United States concerning women's access to essential reproductive health services has become increasingly difficult, in particular as a result of the regression and the arbitrariness in relation to the regulation of women's access to legal abortion services. We regret that the above-mentioned states, with a long history of restrictive practices against abortion, seem to have been manipulating the crisis to severely restrict women's reproductive rights.

The way these measures have been interpreted, even if in some cases subsequently rectified by the courts, have had a chilling effect on women seeking access to abortion care. Such measures could potentially leave millions of women across the country without access to essential reproductive health services.

This situation is also the latest example illustrating a pattern of restrictions and retrogressions in legal access to abortion care across the country as already observed by Special Procedures and particularly the Working Group. We fear that, without adherence to the legal precedents that constitutionally protect women's right to abortion and clear political will to reverse such restrictive and regressive trends, states will continue pursuing this pattern.

We take this opportunity to commend the legal actions taken by CSOs and some of the positive judicial decisions to ensure women's access to abortion services in this time of crisis when women are having to grapple with new restrictions on their mobility, due to lockdowns and orders to shelter-in-place which have also caused disruptions in transportation services and are likely to significantly impede women's access to health care services.

We also express serious concern that, by denying access to time-sensitive abortion care, officials are placing the health and economic security of women at risk, exacerbating systemic inequalities. For many women in the U.S., bans on abortion during the COVID-19 pandemic will delay abortion care beyond the legal time limit or render abortion services completely inaccessible. Although abortion is a very safe medical procedure, the methods become more invasive and there is a higher risk of complications with gestational age. Denying abortion care in a timely manner can pose a risk to the physical and mental health and safety of a pregnant woman, risks that are heightened during a pandemic.

In addition, restrictions on essential health care services, such as abortion, undermine public health efforts to respond to COVID-19. Where bans on abortion are being implemented, women will be forced to travel out of state to obtain abortion services, thereby risking their own health and undermining public health guidelines to stay at home. Further, access to essential sexual and reproductive health services during a pandemic is crucial for preventing maternal morbidity and mortality.

The World Health Organization and the Inter-Agency Working Group on Reproductive Health in Crises (IAWG) have established that, even in emergencies, abortion care is essential for preventing maternal mortality and morbidity and protecting the right to life with dignity and thus should remain available. Similar statements have been issued by the International Federation of Gynecology and Obstetrics and the Royal College of Obstetricians and Gynecologists. Prominent U.S. medical organizations including the American College of Obstetricians and Gynecologists and the Society for Maternal-Fetal Medicine assert that to the extent that hospital systems or ambulatory surgical facilities are categorizing procedures that can be delayed during the COVID-19 pandemic, abortion should not be categorized as such a procedure. As such, officials should ensure that COVID-19 responses do not interfere with women's access to sexual and reproductive health services and that they are not used as a pretext to deny the health and rights of pregnant women. The American Medical Association has issued a statement opposing restrictions on reproductive health care and asserting that decisions about which medical procedures are "non-urgent" should continue to be made by physicians and their patients, not by politicians.

We would like to remind U.S. authorities, that abortion care constitutes essential health care and must remain so and available during the COVID-19 crisis. Restrictions on access to comprehensive reproductive health information and services including abortion as well as contraception, constitute human rights violations and can cause irreversible harms, in particular to those women experiencing multiple and intersecting forms of

discrimination such as low-income women, women of color, immigrants, women with disabilities and LBTI people (see A/HRC/32/44/Add.2). We urge officials in the United States to ensure uninterrupted and timely access to the full range of abortion procedures, information and related services during this public health emergency and after, including by removing all medically unnecessary restrictions and addressing the prevailing as well as new physical barriers and economic barriers.

As stressed in the Working Group report on its visit to the United States (A/HRC/32/44/Add.2), women seeking abortion services were already facing numerous obstacles before the crisis which delay care, including unnecessary requirements for multiple visits to abortion providers, excessive limits on medication abortion, and, as reported by some organizations, prohibitions on the use of telemedicine. Rather than obstructing access to time-sensitive abortion care, government officials should remove unnecessary restrictions on reproductive health services by lifting such restrictions and allowing medical abortion to be sent by mail, expanding medication abortion provision through telemedicine, and lifting other medically unnecessary requirements. Doing so is essential to guaranteeing safe access to abortion care while minimizing contact with health care personnel.

We are concerned about these measures as they undermine women and girls' equal rights to health, and specifically their right to reproductive health, as well as their right to physical integrity and reproductive autonomy. Such measures run contrary to international human rights standards and to the obligations undertaken by the United States, including through its ratification of the International Covenant on Civil and Political Rights (ICCPR).

Finally, we are extremely concerned about the request made by USAID[1] on 18 May 2020 to remove any reference to sexual and reproductive health from the Global Humanitarian Response Plan (HRP) on COVID-19, April-December 2020. As stressed above, sexual and reproductive health services, including access to safe and legal abortion are essential and must remain a key component of the UN's priorities in its responses to the COVID-19 pandemic, in order to avert the preventable health risks and deaths of women and girls. Compelling the removal of references to sexual and reproductive health from the HRP would have devastating consequences for women worldwide and would generate another public health crisis. It would lead to a clear regression in the international community's joint effort to respond to women's needs in this context of crisis and instead put their lives at risk.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

[1] https://www.usaid.gov/news-information/press-releases/may-18-2020-acting-administrator-john-barsa-un-secretary-general-antonio-guterres

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all information brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.

2. Please indicate the steps taken at the Federal level to ensure that women's human rights, in particular their sexual and reproductive health rights, are duly protected in the context of the current COVID-19 crisis, in compliance with the US constitutional safeguards and international standards.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to guarantee women and girls' equal rights to health, including reproductive health, and to physical integrity. We also take this opportunity, duly referencing our earlier communications and country visit report, to encourage your Excellency's Government to firm its commitment to these rights through the ratification of CEDAW and ICESCR.

We may publicly express our concerns in the near future with a view to alert the wider public on the potential implications of the above-mentioned measures and the international human rights norms and standards applicable in such situations. In this case, the press release may indicate that we have been in contact with your Excellency's Government's to clarify the issues in question.

Please accept, Excellency, the assurances of our highest consideration.

MeskeremTechane
Chair-Rapporteur of the Working Group on discrimination against women and girls

DainiusPuras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

DubravkaŠimonovic
Special Rapporteur on violence against women, its causes and consequences

Annex
Reference to international human rights law

In connection with above alleged facts and concerns, we would like to recall that criminalization of abortion and the failure to provide adequate access to services for the termination of an unwanted pregnancy constitute discrimination on the basis of sex, in contravention of ICCPR article 2.

While not a State party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) nor to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the United States, as signatory to both instruments since 1977 and 1980 respectively, is bound to ensure that nothing is done which would defeat the object and purpose of either treaty, pending a decision on ratification. Both treaties are relevant to this matter, given that they oblige States to eliminate discrimination against women and girls (CEDAW art. 2) and to realize the right of women and girls to the highest attainable standard of health (ICESCR art.12).This comprises an obligation on the part of all States Parties to ensure that measures are taken to ensure that access to health services is available to everyone, especially those in the most vulnerable or marginalized situations, without discrimination. In its General Comment 3, the Committee clarified that any retrogressive measure would contravene the principles of the Covenant.

In its General Recommendation 35 on gender-based violence against women, the CEDAW Committee provides that violations of women's sexual and reproductive health and rights, such as forced sterilization, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.

In its report to the Human Rights Council on women's health and safety(A/HRC/32/44) and in its paper on Women's Autonomy, Equality and Reproductive Health[2], the Working Group on discrimination against women and girls stressed that abortion is a health care matter and access to safe and legal abortion is intrinsically linked to women and girl's right to life, health, equality, dignity and privacy. States have the obligation to respect, protect and fulfill women's right to equal access to health-care services and eliminate all forms of discrimination against women in relation to their health and safety. This obligation entails providing women with autonomous, effective and affordable access to health and ensuring that barriers to women's enjoyment of the right to the highest attainable standard of physical and mental health are dismantled, including by exercising due diligence. Denying women access to information and services which only they require and failing to address their specific health and safety, including their reproductive and sexual health needs, is inherently discriminatory

[2] http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx

and prevents women from exercising control over their own bodies and lives. Furthermore, women may be denied such services through the reduction of availability and accessibility, deterrence from health care professionals and deprivation of women's autonomous decision-making capacity.

The Working Group has observed with concern that throughout their life cycle, women's bodies are instrumentalized and their biological functions and needs are stigmatized. The instrumentalization on women's bodies is often reflected on practices such as the withholding or delay in treatment, curtailment of women's autonomy and denial of respect for privacy and obstructing their access to reproductive and sexual health care. Furthermore, the legal restrictions to regulate women's control over their own bodies has been identified by the Working Group as a severe and unjustified form of State control, this can include regulations governing the provision of information related to sexual and reproductive health and termination of pregnancy. The enforcement of such provisions generates stigma and discrimination and violates women's human rights, by particularly infringing their dignity and bodily integrity and restricting their autonomy to make decisions about their own lives and health.(See (A/HRC/32/44) and http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx)

Following its country visit to the United States in 2015(A/HRC/32/44/Add.2), the Working Group regretted that throughout the years, women in the United States have seen their rights to sexual and reproductive health significantly eroded since the 1973 decision by the Supreme Court in *Roe v. Wade* that a woman has a constitutional right to choose to terminate a pregnancy in the first trimester prior to viability. In addition, the Working Group noted that many of the clinics providing abortion care work in conditions of constant threats, harassment and vandalism, too often without any kind of protection from law enforcement officials. The Experts were concerned at acts of violence, harassment and intimidation against those seeking or providing such care. The Experts reminded the Government of its due diligence obligation and encourage it to investigate and prosecute violence or threats of violence occurring in this context. Furthermore, the Working Group deplored the adoption in 1973 of the Helms Amendment to the Foreign Assistance Act, which was intended to prohibit foreign aid extended by the United States from being used to pay for the use of abortion "as a method of family planning", but is being used to justify a complete ban on using those funds for abortions, even when a pregnancy is a result of rape or incest or when a pregnancy is a threat to the life of a woman or girl.

The Working Group recommended to the authorities to ensure that women can, in practice, exercise their existing constitutional right to choose to terminate a pregnancy. The experts also recommended (a) increasing funding of clinics under the Title X Family Planning Program in order to expand coverage for low-income women who lack insurance so they can access preventive care, including sexual and reproductive health services, and to reduce maternal mortality; (b) Preventing politically motivated actions to exclude women's health providers from federally supported public health programmes. The Experts expressed the opinion that, the United States, which was a leading State in terms of formulating international human rights standards, is allowing women in the

country to lag behind. While all women are victims of these “missing” rights, women living in poverty, Native American, African-American, Hispanic and Asian women; women who are members of ethnic minorities; migrant women; lesbian, bisexual, transgender or intersex persons; women with disabilities; and older women are in a situation of heightened discrimination

In a press statement of 20 April 2020, the Working Group noted that, as Governments attempt to tackle the unprecedented public health and economic crises caused by the COVID-19 pandemic, women and girls are suffering even more egregious violations of their human rights. In the absence of gender sensitive intersectional responses, different forms of systemic discrimination already faced by women and girls are exacerbated. The measures taken by Governments to mitigate the risks to health and life posed by COVID-19 must take into account the specific attributes and circumstances faced by women and girls. Restrictions on the provision of health services essential to women and girls, imposed in many countries to address the excessive demands on health services caused by the pandemic, also affects women and girls’ health disproportionately. The crisis is an opportunity to address structural inequalities and deficits that have consistently held women back, and to re-imagine and transform systems and societies. In order to fully comprehend the gendered impact of the crisis, it is crucial to understand the structural discrimination underlying this emergency which is not only causing but exacerbating serious violations of women and girls’ human rights (https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25808&LangID=E)