

Mandates of the Working Group on discrimination against women and girls; the Working Group on Arbitrary Detention; 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 25/2021

10 September 2021

Excellency,

We have the honour to address you in our capacities as Working Group on discrimination against women and girls; Working Group on Arbitrary Detention; 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, 42/22, 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 a recently enacted law severely limiting access to abortion in Texas. 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 and AL USA 11/2020).

According to the information received:

The recently enacted law, Texas State Senate Bill 8 (S.B. 8), which was signed by Texas Governor on 19 May and entered into force on 1 September 2021, effectively bans abortion as early as six weeks of pregnancy and includes an unprecedented provision that encourages private individuals to file lawsuits against those involved in abortion procedures to enforce the law. S.B. 8 will cause severe harm to pregnant women in Texas who seek abortion considering that approximately 85 to 90% of women who obtain abortions in Texas are at least six weeks pregnant. This implies that in practice, the new law would de facto prohibit nearly all abortions in the state. Abortion is already extremely difficult to access in Texas, where nearly 96% of counties lack a clinic that provides abortion care and patients face countless barriers to care, including another law that forces them to receive in-person, biased counselling and to wait twenty-four hours before obtaining an abortion. It also requires that a clinician providing medication abortion be physically present during the procedure, effectively prohibiting the use of telemedicine for abortion. Pregnant women in Texas who are under the age of eighteen must also obtain written parental authorization or a court order before obtaining abortion care.

S.B. 8 is the latest in a series of numerous attempts by the Texas legislature to severely restrict access to safe and legal abortion and it signals retrogression in the United States on the right to abortion, notwithstanding constitutional recognition of the right. This year alone state legislatures in the United States have enacted a historic number of highly restrictive abortion laws and bans on abortion services. S.B. 8 bans abortion at a point before many women even know they are pregnant and around four months before viability. S.B. 8

contains no exception for pregnancies that result from rape or incest, or for foetal health conditions that are incompatible with sustained life after birth. The only exception is for a medical emergency.

Further, S.B. 8 is likely to lead to the harassment and prosecution of abortion providers and incite violence against them as well as women seeking abortion. Furthermore, it isolates pregnant women in Texas who seek abortion care by making those assisting in the procurement of an abortion liable to legal action. The law includes a uniquely harmful provision that encourages private individuals to file lawsuits seeking “enforcement” of the ban. The law creates monetary rewards for any member of the public who successfully sues an abortion provider or anyone who “aid[s] and abet[s]” someone in getting an abortion after six weeks of pregnancy. Any person who successfully sues another person or provider will be entitled to at least \$10,000 in “damages.” S.B. 8 does not expressly require the claimant to allege or prove any injury to obtain an award.

Under this new law, abortion providers, clinic staff, and abortion funds could be burdened with endless lawsuits that consume their time and resources and prevent them from providing health care services to their patients, ultimately forcing them to shut down. The law could also incentivize anyone who disapproves of a patient’s abortion – a relative, an abusive partner, or a total stranger – to sue the provider and obtain a court order stopping the abortion. Lawsuits could be filed against a broad range of people, including inter alia, a person who drives a friend to obtain an abortion, organizations that provide financial assistance to clients seeking abortion care, health center staff, or anyone who counsels or assists a person seeking an abortion. In effect, S.B. 8 will isolate pregnant women in Texas seeking an abortion from their communities and networks and deny them critical support in exercising their constitutional right to an abortion.

S.B. 8 law will have a particularly devastating harm on women experiencing multiple and intersecting forms of discrimination. Women with low incomes, women living in rural areas, and women from racial and ethnic minorities as well as immigrant women will be disproportionately harmed by this ban. The law effectively makes abortion care unavailable to pregnant women who cannot afford to travel outside the state of Texas, where the poverty rate for women of African and Latino-American descent is high (19% of Black women and 20% of women of Latino-American origin live in poverty). Black, Latino-American, and Indigenous pregnant women, who already face substantial barriers to accessing reproductive health care because of systemic sex and gender-based discrimination and racism, will struggle to overcome the tremendous financial and logistical hurdles of seeking care outside of Texas, and may be forced to carry an unwanted pregnancy, including those resulting from rape or incest, to term. Black women will also disproportionately suffer the gravest consequences of forced pregnancy, in light of the long-standing maternal mortality crisis in Texas. Black women experience significantly higher rates of maternal mortality and morbidity than white women in the state and throughout the country, as noted in the Working Group country visit report (A/HRC/32/44/Add.2) which is an issue that has not been adequately addressed.

On 13 July 2021, several organizations filed a lawsuit in the federal district court in Texas to block S.B. 8 based on its unconstitutional character, on behalf of a coalition of Texas abortion clinics, doctors, health center staff, abortion funds, practical support networks and clergy. On 25 August 2021, the district court issued an order denying the Defendants' motions to dismiss for lack of jurisdiction. On 27 August 2021, the Fifth Circuit Court of Appeals issued an order halting all proceedings in the district court, including a hearing that the district court had scheduled to determine whether to block the law before it was set to take effect. It also denied the plaintiffs' request to expedite the appeal of defendants' motion to dismiss. Pre-viability abortion bans have been blocked by federal courts when challenged, however S.B. 8 was specifically designed to be difficult to block before it took effect. Similar bans in other states are all explicitly enforced by government officials – such as the state attorney, local prosecutors, and the health department – allowing plaintiffs to directly sue the state officials responsible for enforcing the law by seeking injunctive relief to block the law before it takes effect. With S.B. 8, Texas has instead created an enforcement scheme of private lawsuits brought by the public. In doing so, it sought to insulate the law from judicial review and to evade all legal accountability before the law takes effect. The Texas legislature enacted the law in clear defiance of nearly 50 years of unbroken U.S. Supreme Court precedent protecting the constitutional right to decide whether to continue a pregnancy pre-viability.

On 30 August, the plaintiffs filed an emergency request with the U.S. Supreme Court, asking it to block the law before it could take effect on September 1 and allow district court proceedings to resume. On 1 September, the Supreme Court denied the emergency request thus enabling the entry into force and application of the law. The case will now continue before the Fifth Circuit Court of Appeals.

Without prejudging the accuracy of the information received, we would like to express our serious concerns about this new law and the increasingly retrogressive measures severely restricting access to abortion care. Restrictions on abortion access, a reproductive health service predominantly needed by women and adolescent girls, are discriminatory. They subject women to unnecessary barriers to essential reproductive health care as well as degrading treatment. They fuel abortion stigma, which in turn contributes to a prohibitive and punitive environment fraught with intimidation and violence. Legal restrictions on abortion such as those contained in Texas S.B. 8 violate the rights of pregnant women to life, health (including sexual and reproductive health), privacy, bodily integrity, equality and non-discrimination, and freedom from cruel, inhuman, and degrading treatment as well as gender-based violence. In particular, denying abortion to women that have become pregnant because of rape and incest risks exacerbating their trauma as well as their mental and physical suffering, thereby subjecting them to additional psychological forms of violence. With the passage of the Texas law, the United States stands in violation of international law. We deeply regret that the majority of Supreme Court justices denied the emergency request and refused to stop this extremely retrogressive law from taking effect. We hope that in the future, the venerated Supreme Court will unanimously uphold existing constitutional protections and reaffirm their commitment to protecting women's rights and ensuring gender equality.

We urge the United States' Federal Government to pay greater attention to the human rights violations and harms that bans and medically unnecessary restrictions on access to comprehensive reproductive health, including abortion, have on women, particularly those experiencing intersectional discrimination. We urge the Government to prevent retrogression in access to abortion in the United States and instead enact positive measures to ensure access to safe and legal abortion in order to respect, protect and fulfil the rights to life, health, including sexual and reproductive health, privacy, bodily integrity, equality and non-discrimination, and freedom from cruel, inhuman, and degrading treatment. We welcome the recent steps taken by the Justice Department in this regard and hope that such efforts will be sustained and successful.

We also urge the relevant judicial authorities to halt the implementation of S.B. 8 in Texas. 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.

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. 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.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases 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 regarding the impact of the new law and specific measures being taken to prevent harm to women through the enforcement of the new law.
2. Please indicate the steps being taken at the federal level to ensure that women's human rights, in particular their sexual and reproductive health rights and their right to equality and non-discrimination, are duly protected 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 the country visit report of the Working Group on discrimination against women and girls, to encourage your Excellency's Government to firm its commitment to these rights through the ratification of the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Economic, Social and Cultural Rights.

We will publicly express our concerns in the near future as, in our view, the information upon which the statement will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The statement will 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.

Melissa Upreti

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

Miriam Estrada-Castillo

Vice-Chair of the Working Group on Arbitrary Detention

Tlaleng Mofokeng

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

Reem Alsalem

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 article 2 of the International Covenant on Civil and Political Rights (ICCPR).

In its General Comment No. 36: article 6 of the ICCPR, on the right to life, the Human Rights Committee stressed that although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl nor jeopardize their lives, subject them to physical or mental pain or suffering, discriminate against them or arbitrarily interfere with their privacy. State parties must provide safe, legal and effective access to abortion including where the pregnancy is the result of rape or incest and also should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion.

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 General Comment 14 and 22, the Committee on Economic, Social, and Cultural Rights clarified that the right to sexual and reproductive health, as an integral part of the right to health, entails a set of freedoms and entitlements. Sexual and reproductive freedoms include “the right to control one's health and body” and “the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health”. Under the right to health the entitlements encompass unhindered access to a whole range of quality sexual and reproductive health facilities, services,

goods, including essential medicines, and programmes, including access to safe abortion care, medicines for abortion and quality post-abortion care;

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, 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 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 on discrimination against women and girls 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 encouraged it to investigate and prosecute violence or threats of violence occurring in this context.

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 its reports, the Working Group on discrimination against women and girls has demonstrated the persistence of a global discriminatory cultural construction of gender, often tied to religion, and the continued reliance of States on cultural justifications for adopting discriminatory laws or for failing to respect international human rights law and standards. Within the United Nations system, the Working Group has observed that States have misused references to culture, religion and family in an effort to dilute their international obligations to fulfil women's rights and achieve gender equality. While the Working Group is committed to the principle of upholding freedom of religion or belief as human rights to be protected, it regrets the increasing challenges to gender equality in the name of religion. It joins other international human rights expert mechanisms in reiterating that freedom of religion or belief should never be used to justify discrimination against women. Women's human rights are fundamental rights that cannot be subordinated to cultural, religious or political considerations (see A/HRC/38/46).

Finally, in her 2021 report to the General Assembly, the Special Rapporteur on the right to health underlined States' obligations to decriminalize abortion, to prevent unsafe abortion and to provide safe, legal and effective access to abortion, in a manner that does not result in the violation of women's rights to life and other human rights enshrined in ICCPR (A/76/172, paras 22, 40-41).