20YEARS CENTER FOR REPRODUCTIVE RIGHTS

June 15, 2012

Ms. Margaret Sekaggya, Special Rapporteur on Human Rights Defenders
Office of the High Commissioner for Human Rights – Palais Wilson
United Nations Office at Geneva
CH 1211 Geneva 10
Switzerland

Dear Ms. Sekaggya,

Please accept the following selected responses to your "Questionnaire on use of legislation to regulate activities of human rights defenders" requested to inform your 2012 Annual Report to the U.N. General Assembly. The answers below pertain to reproductive rights defenders in the United States of America, particularly reproductive health professionals whose human rights work is impeded by legislation that restricts their ability to practice medicine or otherwise assist women in exercising their right to reproductive health services.

1. (a) Please indicate if your country has a specific legal framework, laws or regulations that aim to facilitate or protect the activities and work of human rights defenders. Please cite the names of any such laws or regulations in full.

The Special Rapporteur on Human Rights Defenders has recognized the risks faced by reproductive health professionals around the world.[1] In the United States, physicians and other reproductive health professionals who provide abortion services consistently face violence, intimidation, harassment, and legal restrictions on their work in defense of human rights. In the U.S., women have a constitutionally protected right to terminate a pregnancy, but persons opposed to abortion use a variety of strategies – some legal and some not – to prevent women from obtaining an abortion. Many opponents engage in the political process to advocate for laws that restrict access for certain women (including low-income women, minors, and women seeking abortions after a certain gestational limit) or to push for burdensome and medically unnecessary regulation of abortion provision that makes it very difficult, and in some cases nearly impossible, for physicians to offer abortion services.

A minority of abortion opponents resort to violence to deter providers from offering legal abortions. Following a wave of violence in the early 1990s against reproductive health

[1] *Report of the Special Rapporteur on the situation of human rights defenders* (by Margaret Sekaggya), para. 45, U.N. Doc. A/HRC/16/44, 20 Dec. 2010 (recognizing that "medical and health professionals, by providing sexual and reproductive health services, ensure that women can exercise their reproductive rights. In certain countries, these health professionals, as a result of their work, are regularly targeted and suffer harassment, intimidation and physical violence. In some countries, these attacks perpetrated by non-state actors have led to killings and attempted killings of medical professionals.").

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professionals and clinics, the U.S. Congress enacted federal legislation to protect reproductive healthcare providers and patients against some of the more severe forms of violence. The 1994 Freedom of Access to Clinic Entrances (FACE) Act[2] created civil and criminal penalties for, among other things, intentional acts committed in order to prevent people from providing reproductive healthcare services. FACE violators may be prosecuted by the Department of Justice, potentially resulting in prison sentences and/or fines, or they may be sued in civil court by federal or state governments, or by injured individuals or clinics, for injunctive relief, damages and/or civil fines. In addition, some state and local legislative bodies have enacted laws regulating the time, place and manner of anti-abortion protests. One of the more effective types of local legislation is a "buffer zone" ordinance, which establishes a protective space to allow patients and providers to enter reproductive health facilities without interference by protestors.

These legal protections strike a constitutional balance between the right to reproductive choice and anti-abortion protestors' freedom of expression. Often, however, law enforcement, public officials and judicial actors privilege protestor's speech rights over women's reproductive rights because of the robust nature of the freedom of speech under the U.S. Constitution and fears of a counter lawsuit. In the state of Pennsylvania, for example, protestors at the Allentown Women's Clinic sued the clinic administrator and the city after the police attempted to enforce a local law prohibiting protests on city sidewalks. The city offered the protestors a sizeable settlement in order to avoid a protracted and expensive litigation process. The protestors' clear strategy in Pennsylvania and elsewhere is to deter local enforcement of protective laws and drain reproductive health clinics of resources that would otherwise be dedicated to patient services.

FACE and local laws can help protect clinics and abortion providers against harassment, intimidation and violence, but their effectiveness is limited by the willingness of federal, state and local authorities to enforce the law. Local and state police are often unfamiliar with FACE and misunderstand it as applying only to complete blockades across clinic entrances, or refuse to enforce it at all because it is a federal statute. In some localities, law enforcement's negative attitude towards abortion providers as provoking or deserving of harassment inhibits their willingness to respond to providers when they call for help. A 2009 nationwide Center for Reproductive Rights fact-finding investigation found that police indifference or hostility towards providers in Texas is a key barrier to effective enforcement of the law in that state.[3] Similarly, when staff of the Philadelphia Women's Center in Pennsylvania call local police to ask for assistance, the police routinely refuse to investigate their complaints. A physician who works at that clinic asked police for protection after being stalked and was told simply, "That's what you get for what you do."[4]

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[2] 18 U.S.C. § 248 (2006).

[3] Center for Reproductive Rights, *Defending Human Rights: Abortion Providers Facing Threats, Restrictions and Harassment* (2009) [hereinafter, *Defending Human Rights*], at 57-60.

[4] *Defending Human Rights*, at 88.

Lack of enforcement has failed to deter attacks against providers in many localities and may even contribute to the stigma that fuels the attacks. In 2010, severe violence affected 23.5 percent of the nation's reproductive health clinics where abortions are performed, the highest percentage of clinics affected since 1997.[5]

(b) Please indicate how these laws and regulations are in line with international human rights standards, including, but not limited to, the Declaration on Human Rights Defenders.

The U.S. lacks a comprehensive legal framework to protect human rights defenders. Although the FACE Act is an important legislative tool to protect reproductive rights professionals, it is not envisaged as implementing legislation for the Declaration. Consequently, it does not provide explicit protection for the work of reproductive health providers as human rights defenders, nor pay sufficient attention to some of the guarantees set forth in the Declaration. For example, the Declaration specifically protects the right of defenders "to the lawful exercise of his or her occupation or profession" (article 11) and places an obligation on the state to ensure that public officials and others responsible for upholding public trust and safety receive adequate human rights training (article 15).

The lack of a comprehensive framework recognizing the rights and responsibilities of human rights defenders, as well as state obligations towards them, both hinders the work of human rights defenders and enhances the risks and vulnerabilities they face. While all defenders are affected by a weak protective regime, those working on highly stigmatized rights, such as reproductive health professionals, are disproportionately impacted. Implementing the Declaration would help the U.S. address critical gaps in protection through legislative and other measures, taking steps to, *inter alia*, recognize defenders for the important work they do, develop urgent response mechanisms to aid defenders at risk, launch public education campaigns to address stigma and other underlying causes of attacks, and provide trainings and technical assistance to public officials in implementing human rights.

(c) Please also indicate what legal or administrative safeguards are put in place to prevent baseless legal action against and/or prosecution of human rights defenders for undertaking their legitimate work.

Opponents of women's reproductive freedom are often able to manipulate the legal system and use it as a tool to harass and stigmatize reproductive health providers. In the state of Kansas, for example, an overly zealous and vocally anti-abortion state Attorney General named Phill Kline

[5] Feminist Majority Foundation, *2010 National Clinic Violence Survey* (2010), at 3 (noting "[s]evere violence includes 11 tactics: blockades, invasions, arson, chemical attacks, stalking, physical violence, gunfire, bomb threats, death threats and arson threats").

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abused his office to launch a multi-year, aggressive inquisition into alleged violations of Kansas abortion law by Dr. George Tiller, a prominent physician in Wichita, Kansas. Kline issued subpoenas for 90 private medical records of Dr. Tiller's patients and eventually charged him with 30 misdemeanor crimes. Kline's successor as Attorney General convinced the Kansas Supreme Court to drop the misdemeanor charges against Dr. Tiller because the basis of the charges was "absolutely inaccurate and false" and "based on a political agenda."[6] Nevertheless, defending against the prosecution burdened Dr. Tiller with enormous legal fees, threatened harm to his professional reputation, and fueled the stigma against abortion providers generally and Dr. Tiller in particular. Tragically, Dr. Tiller was assassinated by an anti-abortion extremist in May 2009 shortly after the charges were dismissed.

Extremist groups such as "Operation Rescue" flood state agencies with baseless complaints against providers in order to tie up clinic resources in handling administrative complaints. In Texas, New Mexico and Maryland, such groups have filed numerous complaints to the state environmental board and state health department, often using records its members obtain through illegal tactics like "dumpster diving." Sometimes these actions manage not only to distract and harass physicians but to stop them from providing medical care altogether. In Kansas, the Board of Healing Arts –the state agency that regulates abortion practice – initiated an investigation into Dr. Ann Kristin Neuhaus, who served as a second opinion physician for Dr. Tiller. The investigation was based on a complaint filed not by a patient of Dr. Tiller's but rather by Operation Rescue's "senior policy advisor." (The complainant was also a convicted felon who served prison time for conspiring to blow up an abortion clinic in 1988 and whose phone number was later found in the car of Dr. Tiller's assassin.) Dr. Neuhaus is accused of failing to keep adequate records of 11 minor patients whom she evaluated and certified met the requirements to obtain a "medically necessary" later abortion at Dr. Tiller's clinic. Neuhaus testified at the administrative hearing that she deliberately withheld identifying information about the patients for fear her opponents would acquire the information and make it public in violation of their privacy rights (a fear that later manifested when some of the patients' circumstances were mysteriously leaked to the Associated Press). The state's primary expert lacked the requisite experience to comment on medical exams of women seeking abortions, and at the hearing she expressed her anti-abortion views. The Board will issue a decision on whether to revoke Dr. Neuhaus' medical license on June 22, 2012.[7]

In many states, inconsistent and arbitrary inspections of reproductive health facilities have created heavy burdens on providers. In Alabama, political pressure exerted by anti-abortion public officials on the state department of health combined with the power of abortion opponents within the agency has led to arbitrary inspections and citations for infractions, some of which do not even

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[6] Emily Friedman, *Could One Man Influence Abortion Law?,* ABCNEWS.COM (Oct. 22, 2007) (quoting the new Attorney General's spokeswoman, Ashley Anstaett); Emily Bazelon, *Record Shopping*, SLATE (Apr. 8, 2008).

[7] Justin Kendall, *The state of Kansas is still chasing one of the last links to George Tiller*, THE PITCH NEWS (Nov. 29, 2011); *Board delays decision on Tiller associate*, ASSOCIATED PRESS (Apr. 13, 2012).

exist in the regulatory code. A clinic administrator in Huntsville, Alabama said, "It's overwhelming because we never know how [regulations] are going to be interpreted. One time everything's in order and the next time they change… So, you are really at [the inspector's] mercy."[8] In Texas, lack of uniform training of inspectors and unchecked power of individual inspectors means that clinics across the state have different rules to meet from inspection to inspection.[9] The task of complying with regulations that are subject to change at a moment's notice, often on the whim of state inspectors, is extremely time consuming and detracts from the time reproductive health professionals would otherwise devote to medical care.

8. (a) Please indicate if any other type of legislation is used to regulate the activities of human rights defenders in your country and how the application of the legislation mentioned affects the activities of human rights defenders. Please cite the names of any such legislation in full.

Since 1973, when the U.S. Supreme Court recognized that women have a constitutional right to terminate their pregnancies,[10] opponents of abortion have adopted a strategy of gradually eroding abortion access through state laws that make abortion increasingly difficult and/or expensive to obtain or provide. From 2009-2011 states enacted at least 133 new restrictive abortion laws.[11] Restrictions on abortion have become not only more numerous, but also more extreme, regulating a broader set of activities and in some cases placing physicians in the untenable position of having to comply with legal requirements that run counter to professional standards of care.

Abortion clinics are singled out in many states for discriminatory medical practice and facility requirements (commonly referred to as "TRAP" laws – Targeted Restrictions on Abortion Providers). These laws and regulations bear no relationship to medical evidence concerning the safety of abortion services and are not imposed on the provision of other healthcare services that carry comparable medical risks. While serving no medical purpose, the requirements impose a significant burden on providers and jeopardize women's access to abortion.

In Virginia, new regulations went into effect on January 1, 2012, that subject abortion clinics to regulations that, in some cases, are even more stringent than the regulations applicable to

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[8] *Defending Human Rights*, at 51.

[9] *Id.*

[10] Roe v. Wade, 410 U.S. 113 (1973).

[11] Ctr. for Reprod. Rts., *2009 Legislative Wrap Up* (2010), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/2009%20Year%20End%20Summary%20FINAL.pdf; Ctr. for Reprod. Rts., *2010 State Legislative Wrap Up* (2011), *available at* http://reproductiverights.org/en/feature/2010-state-legislative-wrap-up; Ctr. for Reprod. Rts, *2011: A Look Back* (2012), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/endofyear_2011_FINAL.pdf.

hospitals.[12] Generally, health care facilities are regulated based on the nature of the procedures provided. Thus, inpatient hospitals, which are the setting for highly complex and invasive surgeries necessitating an overnight stay, are required to have the most sophisticated facilities and are tightly regulated. First-trimester abortion, in contrast, is a simple surgical or medical procedure that is typically provided in free-standing clinics or office-based settings. However, the new Virginia regulations impose on abortion clinics incredibly burdensome architectural requirements that even hospitals are not subjected to, and create significant problems with respect to confidentiality for patients and providers. It remains to be seen whether state agencies will modify the regulations in a way that would allow clinics to continue providing care to women in the state, as they have safely done for almost 40 years.

Many states try to force abortion providers out of business by imposing unreasonable requirements for medical licensure. For example, this year the state of Mississippi passed a law that requires all physicians who perform an abortion to be board certified or eligible in obstetrics and gynecology and possess privileges at a local hospital.[13] "Admitting privileges,"[14] which are not required for physicians performing similar office-based surgeries, can be very difficult for physicians providing abortions in Mississippi to obtain for many reasons, including that Catholic and Baptist affiliated hospitals will not grant privileges to doctors performing abortions; public hospitals typically grant privileges only to doctors on their faculty, and exceptions are rarely granted; and some hospitals apply criteria that are very difficult or impossible to satisfy if the doctor does not live in the state. Lt. Governor Tate Reeves explained the strategy of the bill's proponents: "If we require [abortion providers] to have admitting privileges, and the hospitals don't provide them, and I don't think they will, then we can end abortion in Mississippi. That should be our No. 1 priority."[15] Consequently, this law puts Mississippi at risk of becoming one of the only U.S. states without a facility where abortions may be performed.

Other states have restricted reproductive health services by limiting how or if a medical procedure can be performed. Since 2010, nine states have passed legislation banning abortion after 20 or 22 weeks gestational age, carrying penalties of criminal charges, civil fines, and/or loss of medical licensure.[16] These laws contain very limited exceptions, typically allowing providers to

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[12] SB 924, amending VA. ADMIN. CODE § 32.1-127 (2011).

[13] H.B. 1390, amending MISS. CODE ANN. § 41-75-1 (1972).

[14] "Admitting privileges" is the right of a doctor, by virtue of membership as a hospital's medical staff, to admit patients to a particular hospital or medical center for providing specific diagnostic or therapeutic services to such patient in that hospital.

[15] Jessica Bakeman, *Abortion clinic struggling to meet new law's hospital privileges requirement*, THE CLARION LEDGER (June 9, 2012).

[16] The states with recently enacted bans include Alabama, Idaho, Indiana, Kansas, Nebraska, and Oklahoma; North Carolina enacted a similar statute in 1973. Guttmacher Institute, *State Policies on Later Term Abortions* (June 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf. Three additional bans will go into effect in Arizona, Georgia and Louisiana later in 2012.

proceed with an abortion only where necessary to save the woman's life or to avert serious and irreversible damage to her health.[17] These laws interfere with the physician's ability to practice medicine by inserting politicians directly in the middle of the physician-patient relationship.

Recent violence in the state of Georgia illustrates the connection between criminalization and violence against reproductive health professionals. In May 2012, Georgia enacted a highly restrictive ban on abortion after 20 weeks gestational age that carries a felony charge with up to 10 years imprisonment for physicians who violate the act.[18] During the legislative debate and shortly thereafter, there has been a series of burglaries, arson and other forms of harassment targeting facilities which provide abortions and groups and individuals who publicly opposed the legislation. Prior to the vote, in March 2012, three burglaries were reported, two at reproductive health clinics and one at the office of the Georgia Obstetrical and Gynecological Society. Computers were stolen at all locations, including a laptop containing member information at the Society. The 950-member Society had been highly critical of the criminal ban on abortion and some members had testified against it. Another professional group of physicians – the Infertility and Perinatology Consortium of Georgia – also publicly opposed the legislation. Some of its members received threatening phone calls and other forms of intimidation, prompting the Consortium to sign an opinion letter anonymously in the Atlanta newspaper rather than listing the names of its members. The physicians targeted in these attacks – many of whom do not perform abortions but oppose legislative interference in doctors' decision-making – have raised concerns they are being retaliated against for their opposition to the ban.[19]

Following the Georgia governor's signature of the bill into law, two reproductive health clinics were targeted with arson attacks, one during business hours (fortunately injuring no one). The Federal Bureau of Investigation is currently conducting an investigation into possible connections between the fires and burglaries. However, it is unclear what other steps, if any, federal and/or state authorities are taking or will take to investigate any connections between the persons behind these events and the political process, or any links between the perpetrators and anti-abortion groups.

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[17] The health exception is worded differently in each state law, but it is generally highly restrictive. For example, the ban in Kansas allows for abortion post 22 weeks in cases where necessary to preserve the woman's life or where "a continuation of the pregnancy will cause a substantial and irreversible physical impairment of a major bodily function of the pregnant woman." KAN. STAT. ANN. § 65-6724(a).

[18] H.B. 954, amending GA. CODE ANN. § 16-12-414.

[19] See the following articles in the ATLANTA JOURNAL CONSTITUTION: Christopher Seward, *Break-in suspects still sought, Laptops taken from offices of OB-GYN trade group* (March 21, 2012); Andria Simmons, *No suspects in clinic break-ins, Burglars also hit OB/GYN Society* (March 28, 2012); Tom Sabulis, *Pregnant women suffer law's unjust consequences* (April 6, 2012); Andria Simmons, *Coincidence or connections? Outspoken doctors' clinics hit by crimes* (May 24, 2012); Andria Simmons, *New details: Clinics hit by crime, Clinics across U.S. on guard* (May 25, 2012).

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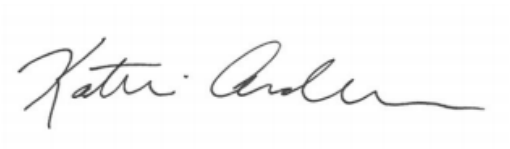
Thank you for the opportunity to submit information to assist in the preparation of your annual report. Please do not hesitate to contact us if you require additional information or supplementary materials.

Best regards,



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