U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 19, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Chairman Nadler and Chairman Graham:

The Department of Justice (Department) writes to provide our views on H.R. 3583 and S. 2017, the "Federal Prohibition of Female Genital Mutilation Act of 2019." The Department strongly supports enactment of a bill to create a federal criminal offense for the act of female genital mutilation (FGM). However, the Department has significant legal concerns about any amendments to these bills, or other legislative language, that improperly cite the International Covenant on Civil and Political Rights (ICCPR) as a legal basis for criminalizing FGM under the Treaty Power.

FGM is an especially heinous practice—permanently mutilating women and young girls—that should be universally condemned. It is a form of gender-based violence and child abuse that harms victims not only when they are girls, suffering the immediate trauma of the act, but also throughout their lives as women, when it often results in a range of physical and psychological harms. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, div. C., tit. VI, § 644(a), 110 Stat. 3009, 3009-708 (1196) (18 U.S.C. 116 note). The Centers for Disease Control and Prevention estimates that more than half a million women and girls in the United States have already suffered FGM or are at risk for being subjected to FGM in the future. *See* Howard Goldberg et al., Centers for Disease Control and Prevention, *Female Genital Mutilation/Cutting in the United States*, 131 Public Health Reports 340 (2016). The Department, therefore, condemns this practice in the strongest possible terms.

As you are aware, the Department brought the first federal prosecution for FGM under 18 U.S.C. § 116(a). The district court dismissed the FGM charges, holding that Section 116(a) was beyond Congress's power to enact, either as an exercise of the Treaty Power or Commerce Clause Power, particularly because the statute as enacted did not have an express jurisdictional

element that relied on the latter power. *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018). As the Department explained in an April 10, 2019 letter to Congress, the Department determined that there were no reasonable defenses of the provision that would provide the basis for an appeal of the district court's decision. In that same letter, the Department provided a legislative proposal that would re-establish FGM as a federal offense, with an appropriate jurisdictional basis in Congress's Commerce Clause Power. That proposal is reflected in H.R. 3583 and S. 2017.

The Department is concerned about any amendments to those bills, or provisions in different bills, that improperly cite the ICCPR as a legal basis for criminalizing FGM under the Treaty Power. The citation is directly contrary to the district court's decision in *Nagarwala*. In *Nagarwala*, the district court rejected the United States' argument that Section 116(a) was rationally related to the United States' obligations under the ICCPR. In fact, the district court found that the relationship between the FGM statute and ICCPR Article 24—the specific provision cited in the bill—was "tenuous." 350 F. Supp. 3d at 618. The court wrote that:

> Article 24 is an antidiscrimination provision, which calls for the protection of minors without regard to their race, color, sex, or other characteristics. As laudable as the prohibition of a particular type of abuse of girls may be, it does not logically further the goal of protecting children on a nondiscriminatory basis.

Id. Given the fact that this bill would be directly responsive to the court's decision in *Nagarwala*, it would be incongruous to cite to the ICCPR and invoke the Treaty Power as a legal basis for criminalizing FGM.

Furthermore, the Department's letter notifying Congress of its determination that it would not appeal the district court's decision observed that the Department "does not have an adequate argument that Section 116(a) is within Congress's authority to enact legislation to implement the ICCPR, which does not address FGM. None of the ICCPR's provisions references FGM at all. Nor do they provide a basis for the federal government itself (rather than the individual States) to criminalize FGM of minors by private parties." It is, therefore, deeply problematic to include such a provision in FGM criminalization legislation.

If the amended statute includes the interstate-commerce requirements proposed by the Department, prosecutions of individual cases will not be affected by the additional treaty-related language, because the Department's prosecutors will rely on the Commerce Clause, rather than the Treaty Power as the basis for the amended statute. However, the inclusion of such language remains problematic, because it is inconsistent with the United States' interpretation of its legal obligations under the ICCPR. Separate from litigation interests in domestic criminal cases, the language would also create a disconnect between Congress and the position of the United States regarding its legal obligations under the ICCPR as a matter of international law, with harmful effects to representing United States' interests in the international community—a concern that the Department of State shares with the Department of Justice.

The United States takes the position, which it has shared on multiple occasions with the Human Rights Committee (the Committee) charged with monitoring the ICCPR's

implementation by States Parties, that the ICCPR's obligations apply only to government conduct and not to acts by private parties against other private parties, except where the treaty's language indicates otherwise, such as its prohibition of slavery. *See, e.g., Observations by the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (Dec. 27, 2007) (noting that, "[f]or purposes of interpreting the Covenant, it is essential... to bear in mind the legal distinction that governmental enforcement [i.e., private violent acts against other private parties] has been and will remain a matter of criminal law in the fulfillment of a state's general responsibilities incident to ordered government, rather than as a requirement derived from their obligations under the Covenant"); *Observations by the United States of America on the Human Rights Committee's Draft General Comment 35: Article 9 (Liberty and Security of Persons)* (June 10, 2014) (noting that there is "no legal basis for the assertions...that States Parties have Covenant obligations to take measures to deal with threats of death or injury by private actors, whether in situations involving an individual victim or patterns of violence directed at categories of victims, including violence against women and children").

Maintaining consistency with the United States' longstanding position on its legal obligations under the ICCPR is crucial to defending the United States interests, including on occasions when the United States is criticized for not implementing purported treaty obligations. The Committee and non-governmental organizations routinely cite provisions of the ICCPR in order to unfairly criticize the United States regarding matters that are clearly outside the scope of the ICCPR. For example, the Committee invoked articles 2, 6, and 26 to call upon the United States to end "gun violence" by adopting gun control measures that would restrict private ownership of firearms. *See Human Rights Committee, Concluding Observations on the Fourth Periodic Report of the United States of America*, CCPR/C/USA/CO/4 (Apr. 23, 2014). The United States' response was that—regardless of the merits of any particular policy—there is no *legal* obligation under the ICCPR to adopt those measures, because the relevant provisions of that treaty do not require the government to address violence between private persons. *See Reply of the United States of America to the Special Rapporteur for Follow-up on Concluding Observations of the Human Rights Committee on its Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights* (Oct. 9, 2015); *Third Round: Follow-up Additional State Party's Follow-up Report*, CCPR/C/USA/CO/4/Add.1 (Nov. 28, 2017). Accordingly, adding language in the FGM legislation indicating that the ICCPR provides a legal basis for criminalizing FGM under the Treaty Power would be inconsistent with the longstanding legal position of the United States regarding the ICCPR's scope. The Committee and critics of the United States could attempt to cite the FGM legislation as evidence of a perceived change in the United States' position concerning its obligations under the ICCPR with respect to the conduct of private parties. Adding such language would also risk lending support to similarly erroneous claims that the ICCPR should be understood to require the United States to regulate the conduct of private actors in other areas. The Department considers defending United States sovereignty against unwarranted international censure to be an important responsibility.

The original draft legislation submitted by the Department is legally sufficient to create a Federal criminal offense for the act of female genital mutilation. Since there is no benefit to the Department's practical ability to criminally prosecute FGM offenders, and because it would

undermine consistent U.S. government positions with regard to the Nation's international legal obligations, we recommend against the inclusion of any language that improperly cites the ICCPR as a legal basis for criminalizing FGM under the Treaty Power.

Please do not hesitate to contact this office if we can be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Mary Blanche Hankey /FOR

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: Ranking Member Collins
Ranking Member Feinstein