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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**CONSTITUTIONAL REFORMS
RELATING TO THE DISAPPEARANCE AND MURDER
OF A GREAT NUMBER OF WOMEN AND GIRLS
IN MEXICO**

**Comments by
Mr Hans-Heinrich VOGEL (Substitute Member, Sweden)**

1. The revised introductory memorandum on the Disappearance and murder of a great number of women and girls in Mexico (document AS/Ega (2005) 8 of 26 January 2005) by the rapporteuse, Mrs Vermot-Mangold concludes in paragraphs 44 and 45 with a number of recommendations and proposals, of which the rapporteuse considers the most important to be

a) that the Federal Prosecutor's Office – preferably the Special Federal Prosecutor – be given the power

- to itself investigate the reported “femicides”, i.e. according to para. 7 of the memorandum the killing of women “because they were women”, and disappearances and

- to investigate the failings of state officials who reportedly have botched investigations in the first place;

b) that the Special Federal Commissioner's mandate should be enlarged to allow her Commission to act as a kind of “truth Commission” after the Special Federal Prosecutor has completed her tasks (which would involve granting her access to all case files, as well as the necessary means to carry out her tasks effectively; and

c) that victims' families should be granted effective and co-ordinated aid, preferably by one body (while type and amount of aid offered should not be dependent on particular aspects of the crime), and victims' families should also be regularly informed about any progress made with regard to investigative or judicial proceedings.

2. One specific question put forward to the Venice Commission in para 45 has been whether the transfer to the Federal Prosecutor's Office of powers to investigate and to prosecute the reported femicides would have to involve a reform of the Mexican Constitution, which would have to be retroactive and therefore may be unacceptable.

3. Mexico has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 23 March 1981.¹ According to Article 2 – one of the core provisions of this Convention –

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

¹ According to <http://www.un.org/womenwatch/daw/cedaw/states.htm> as updated on 10 February 2005.

- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.”

And Article 133 of the Mexican Constitution provides

“This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it, that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States.”

These two provisions combined place obligations not only on Mexican legislators but also on all other officials on both the State and the Federal level to act in a way which is consistent with the CEDAW.

4. It could be argued, however, that these obligations may be limited by other provisions in instruments of international law. One such instrument is the International Covenant on Civil and Political Rights, which Mexico ratified on the same day as the CEDAW² without declaration or reservation concerning Article 15 – the Article of the Covenant which deals with the question of retroactivity in criminal matters:

- “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
- 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

5. For many years the interpretation of this Article has been somewhat vague.³ However in 2004, in an Australian matter concerning a drug smuggling offence, the Human Rights Committee found that

“all of the elements of the crime in question existed at the time the offence took place and each of these elements were proven by admissible evidence by the rules applicable at the time of the author’s conviction.”⁴

² <http://www.ohchr.org/english/countries/ratification/4.htm>

³ Cf. Sarah Joseph et al.: The International Covenant on Civil and Political Rights, Oxford University Press, Oxford 2000, p. 340–346.

⁴ Document CCPR/C/80/D/1080/2002, Communication No. 1080/2002 : Australia. 24/03/2004, para 7.7. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/91fa54adff4132acc1256eb60045c958?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/91fa54adff4132acc1256eb60045c958?Opendocument).

In my view, this case and the quoted concluding statement indicate that the legislative and constitutional changes which are discussed or proposed in the Revised Introductory Memorandum do not affect existing material criminal law. Therefore, I do not think, that Article 15 of the International Covenant on Civil and Political Rights in the case of the Mexican feminicides limits Mexico's obligations under Article 2 of the CEDAW.

7. As I have pointed out in another matter concerning Mexico, the Mexican Constitution is very complex – as obviously are the Mexican rules and legislative acts on cooperation and interaction of federal and state authorities and courts of law which were mentioned or referred to in this matter concerning feminicides. I therefore do not think that it will be possible without further research on the details of administrative and judicial regulation and on political feasibility of intended reforms to express a firm opinion on which path of legislative or constitutional reform to choose in order to achieve the goals envisaged in the Memorandum. However, there cannot be any doubt concerning the obligations of Mexico as a State Party to the CEDAW to take the necessary measures concerning the feminicides as reported in the Memorandum.

Hans-Heinrich Vogel
23 February 2005