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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

Based on comments by Ms Finola FLANAGAN (Member, Ireland) Mr Hans-Heinrich VOGEL (Substitute Member, Sweden)

Introduction

1. By letter dated 13 December, the Chairperson of the Committee on Equal Opportunities for Women and Men of the Parliamentary Assembly of the Council of Europe, Ms. Cliveti, requested the Venice Commission to prepare an opinion on the question of constitutional reform in Mexico related to the distribution of powers between the Federation and the States regarding the investigation and punishment of serious and systematic human rights abuses such as the disappearance and murder of a great number of women and girls in Ciudad Juarez and Chihuahua – as well as the investigation and punishment of officials involved in the investigation and prosecution of these crimes. The request was accompanied by an introductory memorandum by the by the rapporteuse Ms Vermot-Mangold (AS/Ega (2004) 39).

2. Following a visit by the President of the Parliamentary Assembly to Mexico, the Commission also received a revised introductory memorandum (AS/Ega (2005) 8) and a draft Presidential decree amending Article 73 of the Mexican Constitution as well as a draft amendment to the Federal Code of Criminal Procedure and the Judicature Act of the Federation (CDL(2005)022).

3. The Commission appointed Ms Flanagan and Mr Vogel as rapporteurs. Their comments figure in documents CDL(2005)023 and 025 respectively. The present opinion has been adopted by the Commission at its ...th Plenary Session (Venice, ...).

Background

4. The Committee on Equal Opportunities for Women and Men of the Parliamentary Assembly of the Council of Europe is preparing a report on the "disappearance and murder of a great number of women and girls in Mexico", which have taken place since 1993 and are referred to as "feminicides". According to the revised introductory memorandum (the "memorandum"), the criminal investigation of these cases in the northern Mexican border state of Chihuahua, and specifically in and around the border town of Ciudad Juarez and the state capital of Chihuahua, is seriously ineffective.

5. The memorandum describes the circumstances surrounding these murders and disappearances in considerable detail and requires to be read in order to understand the extent of the problem and the various issues of controversy associated with them. Several other studies, by international bodies like the CEDAW Committee, NGOs and state bodies, have been produced on the matter. Whilst the nature of the problem appears to be widely accepted, nonetheless the numbers of women who have been murdered and who have disappeared remains a matter of considerable controversy – Ms Vermot-Mangold comments (para.6) that "…different authorities (both state and federal) and NGOs (including those founded by victims' families) supplied vastly differing figures to [her] last year." Estimates of the numbers of those murdered in the past 10 years or so run from 263 to 400 with between 34 and 70 described as "missing". However, the National Human Rights Commission states that there have been 4,581 cases of missing women and girls registered in Ciudad Juarez alone.

6. This opinion is based on the facts as set out in the memorandum which have been assumed for the purposes of this opinion to be correct. However the Venice Commission has not conducted its own investigation.

7. The memorandum presents the facts (at para.4) as follows:

> "*Since 1993, hundreds of women and girls have been brutally murdered in the northern Mexican border state of Chihuahua. Most of them were killed in or around the border town of*

Ciudad Juarez, others in the state capital of Chihuahua. Many were abducted and sexually abused before they were killed and their bodies dumped in the desert; others became victims of domestic violence taken to the extreme; a few seem to have been involved in the drugs trade and revenge killings. Some were maquilladoras workers [assembly plants for the export trade], others students and schoolchildren; many were young mothers; most were poor, and aged between 13 and 30. In addition to the hundreds of women and girls killed, many disappeared (presumed abducted) and are still missing."

8. Ms Vermot-Mangold concludes that the "women were killed **because they were women" (**para.7**)** hence the use of the term "feminicides". She states that "*[e]veryone admits that the social fabric of these two cities…is all but in tatters" (para.8).* The rule of law is considered to have broken down and many (though not all (para.2)) consider that these murders and abductions of women arise because of entrenched inequality between the sexes and "*the pervasive disregard of women and their needs and rights."* As a result "*they can be used, abused, raped, beaten and finally killed and "thrown away" with impunity"* (para.9).

9. The State of Chihuahua has jurisdiction to prosecute these crimes. There is currently no jurisdiction at federal level to do so in the great majority of cases. However, the memorandum makes clear that the state authorities have made no adequate effort to investigate these crimes and prosecute the perpetrators. Indeed, it is considered that the state authorities sought to hide the problem and minimise its scope and attempted to keep it out of federal jurisdiction (para.16) though it is now accepted that there have been some improvement in approach in recent times (para.17). A new Prosecutor General of the State of Chihuahua and a Special Federal Prosecutor for the Homicides and Cases of Missing Women in Ciudad Juarez have both identified state officials responsible for investigating the murders and abductions who have failed in their responsibilities and who are considered "guilty of botching the investigations" (para.17). Incompetence, wilful neglect, corruption and direct involvement are referred to in the memorandum as reasons for the State's failure to investigate and prosecute (para. 13). Serious shortcomings exist at all stages, from receiving missing person reports, to opening a criminal investigation, to gathering evidence and taking criminal prosecutions. The notorious failure of the authorities to carry out effective searches has led families to organise their own searches for bodies and for physical evidence[1]. An important consequence is, as the NGOs complain, that the impunity with which these crimes can be committed has itself fostered a climate of violence against women (para.13).

10. The memorandum states (para.22) that "[in] accordance with Mexican law, the Federal Prosecutor's Office (PGR) can only take over ("attract") those cases where organised crime is involved". Therefore, according to Mexican law as it currently stands, only the individual states have jurisdiction to prosecute the majority of these crimes as they have been found by the Special Federal Prosecutor's Office not to have any component of organised crime and therefore have been sent back to the state level for further investigation by the same officials who, it would appear, previously mishandled the investigations. The PGR has taken over 24 murder cases which are apparently linked to organised crime.

11. The rapporteuse was unimpressed at her meeting with the state criminal court judges whom she criticises for a lack of due process and for not having proper regard to the presumption of innocence (para.19).

12. The memorandum concludes in paras 44 and 45 with a number of recommendations and proposals, of which the rapporteuse considers the most important to be

[1] Amnesty International Report, 11 August 2003, Mexico – Intolerable Killings

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

- to itself investigate the reported "feminicides", 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.

13. Ms Vermot-Mangold comments that this would probably involve a reform of the Mexican Constitution which "would have to be retroactive" though, she comments that "this should be possible as there is no change of material criminal law involved, only a change of investigating/prosecuting authority (and possibly of jurisdiction) – which is a purely procedural matter" (para.45.A).

Proposed amendments to the Mexican Constitution and the law

14. The President of the Parliamentary Assembly has received (1) a draft Presidential decree amending Article 73 of the Mexican Constitution and (2) a draft amendment to the Federal Code of Criminal Procedure and the Judicature Act of the Federation (CDL(2005)022) the intended effect of which would be to give to the Federal authorities the power to prosecute "*ordinary offences related to human rights violations when they transcend the powers of the States*." However, the amendments expressly provide that the federal jurisdiction would only apply to offences committed after the entry into force of implementing secondary legislation. This proposed secondary legislation amending the Criminal Code provides that federal jurisdiction in relation to ordinary offences will apply where it "*is necessary for compliance with international obligations derived from international treaties to which Mexico is a party...*" The human rights violation must be "*…derived from a situation of persistent perpetration of the same type of offence, where the local authority has failed to investigate the offences…*" Alternatively, the human rights violation must have "*…an impact, at the national or international level, on Mexico as a whole, by its nature transcending the interest of the…federal entity*."

15. The draft explanatory memorandum accompanying these proposed amendments (only available in Spanish from the Secretariat) emphasises the sovereign nature, in all matters that concern their internal affairs, of the individual states or entities making up the federation (article 40 of the Constitution) and adverts to the fundamental norm of the distribution of competencies between the states and the federation that powers not expressly conceded by the Constitution to federal officials are reserved to the states (article 124). This memorandum explains that the Constitution permits the Federation to create offences committed against the Federation. However, at the same time the individual states have power to create offences in relation to matters within their sphere of responsibility. Nonetheless, exceptions can be made to this distribution of competencies such as where the national interest requires and international agreements giving rise to international obligations of the Mexican State so require. The American Convention on Human Rights Article 28 is referred to. This requires that in cases of federal states the national government must ensure, in accordance with its constitutional laws that the entities take all necessary measures to comply with obligations under the Convention. It is stated that the proposed amendment to Article 73 of the

Constitution is in order to avoid any doubt about the validity of the Criminal Code giving to the federal authorities the power to prosecute the crimes in question. The explanatory memorandum refers to several human rights treaties to which Mexico is a party. It recalls that Article 133 of the Constitution provides that the Constitution, the laws of Congress and international treaties are "the Supreme Law of all the Union" of Mexico and, in effect, superior to inconsistent provisions in the constitutions and laws of the states that make up the Union.

Analysis

16. Mexico has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 23 March 1981.[2] 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;
> (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

> 17. "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."

18. 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.

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[2] According to http://www.un.org/womenwatch/daw/cedaw/states.htm as updated on 10 February 2005.

19. In CEDAW the term "discrimination against women" means “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

20. The UN General Assembly Declaration on the Elimination of Violence against Women[3] was agreed as a measure to assist in the effective implementation of CEDAW which, it was recognized, would contribute to the elimination of violence against women. The Declaration recognizes that some groups of women, including migrant and destitute women, “are especially vulnerable to violence” and that “violence against women in the family and society…had to be matched by urgent and effective steps to eliminate its incidence”. Article 3 specifically refers to the fact that women are entitled to the equal enjoyment and protection of all human rights and that these include the “right to equal protection under the law”. It recognizes that States should “…punish acts of violence against women, whether those acts are perpetrated by the State or by private persons” and that women are entitled to “just and effective remedies for the harm that they have suffered” (article 4).

21. It is therefore clear that an effective guarantee of the human rights and fundamental freedoms of women is required by states in order to fulfil their international obligations and states must take all necessary measures to ensure that rights are upheld whether at local or central level, at state or federal level. It is clear from the memorandum that this has not happened in the Chihuahua state.

22. This apparently systemic failure to investigate and prosecute murders of women in the Chihuahua state and beyond amounts, arguably, to a distinction made on the basis of sex which impairs or nullifies the enjoyment of a woman’s right to life and other human rights and fundamental freedoms. The obligation imposed by the Convention to achieve the ‘practical realization’ of non-discrimination, requires Mexico to ensure by appropriate means the effective investigation and prosecution of these murders. If fulfillment of this international law obligation requires constitutional change and change of prosecuting authority then this should be done.

23. Having regard to the memorandum of Ms Vermot-Mangold, which clearly describes the serious nature of the offences, the systemic incapacity of the state of Chihuahua to bring those responsible to justice and the implications that this fact has for the position, including the safety, of women in society in that state, effective action must be taken by Mexico to fulfil its obligations to enforce the human rights of those whose rights are infringed. To do so, both Ms. Vermot-Mangold and the President of Mexico consider it is essential for jurisdiction in relation to the cases in question to be transferred to the Federation. It is desirable that the federal power to prosecute these offences against women be put beyond dispute and an appropriate amendment to the Constitution is therefore to be recommended.

Retroactivity and change of prosecuting authority

24. The Venice Commission has been specifically asked to comment on whether there would be any unlawful retroactivity in the proposal to change the prosecuting authority. It is to be recalled that the amendments proposed by the Mexican authorities would apply only in relation to offences committed after their adoption and have no effect in relation to offences already committed.

25. The main rationale against retrospective criminal law is the need for certainty in the law in order to permit people to regulate their conduct in accordance with the law. Therefore, and crucially, the Mexican Authorities must minutely examine whether there is any difference between Mexican state

[3] General Assembly resolution 48/104 of 20 December 1993

and federal prosecutions which might materially affect the alleged offender *to his or her disadvantage or detriment* e.g. change in definition of the crime, a broader penalty or difference in the 'ingredients' of liability, and ensure that no such material differences exist.

Retroactivity in International Human Rights Law

26. It could be argued, however, that the obligation to act in a way which is consistent with the CEDAW 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 CEDAW[4] 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."*

27. For many years the interpretation of this Article has been somewhat vague.[5] However, the Article was subject to examination just over a year ago by the Human Rights Committee[6]. The author of the communication to the Committee complained that he was the victim of an impermissible application of a retroactive criminal law. The question put to the Committee was whether a lifting of a stay on prosecution and the conviction of the author resulting from the admission of formerly inadmissible evidence was a retroactive criminalization of conduct not criminal at the time it was committed. Whilst the facts do not concern a change of prosecutorial jurisdiction, the comments of the Committee on retroactive criminal law are pertinent. At paragraph 7.4 they state that the provisions of the offence in question at the time of commission "*remained materially unchanged throughout the relevant period from the offending conduct through to the trial and conviction*". Therefore, the Committee found that Article 15 was not violated in this case. The reasons that the Committee gave for non-violation were 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*". Despite the retrospective change of law in relation to the Court's treatment of evidence, the Committee considered that the author was convicted "*according to clearly applicable law*".

Retroactivity in jurisprudence of the European Convention on Human Rights (ECHR)

28. It is of course the case that the ECHR does not bind Mexico, however the Court's reasoning might be persuasive and thus applied to the Mexican context. ECHR Article 7 prohibits retrospectivity of the criminal law in terms similar but not identical to Article 15 of ICCPR –

> *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*

[4] http://www.ohchr.org/english/countries/ratification/4.htm
[5] Cf. Sarah Joseph et al.: The International Covenant on Civil and Political Rights, Oxford University Press, Oxford 2000, p. 340–346.
[6] Communication No. 1080/2002: Australia 24/03/2004; CCPR/C/80/D/1080/2002 (Jurisprudence) 24 March 2004

was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.

29. According to the memorandum, murder, whether of women or others, is currently a criminal offence under the law of the individual Mexican states, but is not prosecutable under federal law in the cases in question here.

30. In *Kokkinakis v Greece*[7] the Court, commenting on article 7 stated –

"The Court points out that Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's ***disadvantage****. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's* ***detriment****, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[Emphasis added]*

31. In *SW v United Kingdom*[8] the European Court of Human Rights held, in relation to the removal of the marital rape exemption by the House of Lords ie by judicial interpretation, that this did not amount to a retrospective change in the elements of the offence.

"Article 7 (art. 7) of the Convention cannot be read as outlawing the ***gradual clarification of the rules*** *of criminal liability through judicial interpretation from case to case, provided that* ***the resultant development is consistent with the essence of the offence and could easonably be foreseen"*** *[Emphasis added]*

32. In applying this to the circumstances in Mexico as presented in the memorandum, a strong argument can be made that the essential conditions to permit retroactive criminal law are satisfied: (1) the change should not disadvantage the accused (2) the definition of the crime should remain unchanged (3) the penalty should remain unchanged (4) the accused already should have knowledge (from the wording of the existing state provision) what the ingredients of liability are, and these should not change. In general, it can be said that a change of prosecuting authority does not retrospectively 'apply' criminal law − the particular criminal law has always applied, the change is a purely procedural or administrative one.

[7] (1993) 17 EHRR 397 at paragraph 52
[8] [1995] [ECHR 20166/92 paragraph 36.

Proposed wording of constitutional amendments and law

33. Subject to the comments above concerning retrospectivity, taken together, the proposed amendments to the Constitution and the law would seek to meet the requirements of the situation described in the memorandum. What is essential is that criminal justice be brought to bear in relation to the offences in an effective manner so as to vindicate the human rights of those affected. It is for the Mexican authorities to ensure that the transfer in the terms suggested, to the Federal authorities of the power to "*hear and determine ordinary offences related to human rights violations when they transcend the powers of the State or the Federal District*", is sufficient to meet the international human rights obligations of Mexico.

34. According to the memorandum, it is the case that the prosecution authorities in Chihuahua currently have the power and laws to investigate and prosecute the human rights violations in question namely murder, disappearances etc. It is therefore not necessarily the case that these violations "transcend the powers" of the State of Chihuahua. The problem is that the state authorities seem to have failed to exercise the powers that they already have. This wording may therefore present difficulties. However, when the constitutional amendment is read with the draft amendment of the Federal Code which expands on the meaning of the constitutional amendment, it seems to be intended that jurisdiction be transferred

- where compliance with international obligations concerning human rights so requires provided:
    - there is persistent perpetration of the same type of offence and the local authority has failed to investigate or
    - the human rights violation has an impact, at the national or international level, on Mexico as a whole by its nature transcending the interest of the corresponding federal entity.

35. It would be important that the decision whether there is a "situation of perpetration of the same type of offence" and there is a failure by the local authority to investigate, and the human rights violation transcends the interest of the federal entity be taken by the federal authorities and not be left to the states. This requirement should perhaps be made explicit in the law itself.

Conclusions

36. 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. Without further research on the details of administrative and judicial regulation and on political feasibility of intended reforms it will not be possible 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.

37. It would appear that there are international law arguments and persuasive ECHR jurisprudence to support the transfer of prosecutorial authority from the Mexican states to the Mexican federal power by means of constitutional amendment in order more effectively to prosecute the perpetrators of horrific and apparently systemic murder of women in Mexico.

38. It is reasonably foreseeable that where state prosecution for a crime has proved ineffective, where the elements of the offence remain the same, federal prosecution is not an unreasonable response. On the basis of the information available, it would appear that the change proposed in the Mexican law does not seem to retrospectively affect the existing criminal law to the extent that it

does not impair or remove rights, does not create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction. In the circumstances, it appears to be a procedural change of the prosecutorial jurisdiction: a proportionate change for a legitimate reason and therefore permissible.

39. In the circumstances, there does not appear to be any prohibition in international law on making retrospective the transfer to the federal prosecution authorities of those offences. Article 15 of the International Covenant on Civil and Political Rights in the case of the Mexican feminicides does not limit Mexicos obligations under Article 2 of the CEDAW. Indeed, in order to fulfil its obligation to enforce human rights and to give practical realisation to them a retrospective transfer is necessary in order to vindicate past wrongs.