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Center for Human Rights



Trial Observation Report: Mexico v. Kenia Hernandez

July 2022

TRIALWATCH FAIRNESS REPORT

A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHORS:

Staff at the **American Bar Association's (ABA) Center for Human Rights (Center)** helped draft this report. The **ABA** is the world's largest voluntary association of lawyers and legal professionals and the national voice of the legal profession. It accredits law schools, provides continuing legal education, promotes policies and programs supporting the work of lawyers and judges, and works to improve the administration of justice and public understanding of the rule of law's importance, nationally and around the world. The **Center** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries, including as an implementing partner for the **TrialWatch** initiative.

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ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE:

The **Clooney Foundation for Justice** (CFJ) advocates for justice through accountability for human rights abuses around the world. **TrialWatch** is an initiative of the Clooney Foundation for Justice. Its mission is to expose injustice, help to free those unjustly detained, and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable – including journalists, protesters, women, LGBTQ+ persons and minorities – and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and supporting advocacy for systemic change.

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EXECUTIVE SUMMARY



Marta Rodriguez de Assis Machado, who is a member of the TrialWatch Experts Panel, assigned this trial a grade of D:

This case amounted to a series of violations of Kenia Hernandez's human rights, subjecting her to unjustified detention, prosecution, and conviction based on flawed evidence. Hernandez was subjected to inhuman treatment, including the denial of medical care, as well as a prosecution that failed to comply with international and regional standards of procedural fairness. She was denied her right to be present at trial, and to properly exercise her right to a full defense, suffering discrimination in the process. As an indigenous person, she faced several obstacles in exercising her right to speak in her own language at trial and be assisted by an interpreter. In sum, the judicial process was riven with illegalities, and appears to be a façade for a campaign of persecution against an indigenous rights activist, reflecting a pattern of criminalization of the right to protest in Mexico.

The trial of indigenous human rights defender Kenia Hernandez for aggravated robbery in Ecatepec, Mexico was riddled with irregularities, including the denial of her right to be present at trial, to effective participation in the proceedings, and to confidential communication with counsel. These violations of rights guaranteed Hernandez under the International Covenant on Civil and Political Rights and the American Convention, coupled with a lack of evidence and the broader context – ten criminal cases opened against her in the last two years -- are suggestive of abuse of process. In other words, Hernandez's trial for aggravated robbery appears to have been a means of retaliation in response to her human rights activism. In March 2022, Hernandez was convicted and sentenced to 11 years and 3 months in prison. In light of the violations in Hernandez's case, the verdict lacked the requisite guarantees of fairness and her conviction should be overturned.

Hernandez is a leader in Zapata Vive, a land rights organization, and the co-founder of the National Movement for the Freedom of Political Prisoners. In June 2020, she was arrested for aggravated robbery, which carries a potential sentence of 18 years in prison, on the basis of a complaint filed by two individuals.

The alleged victims, a couple, claimed that while driving up to the Las Americas tollbooth in Ecatepec municipality on March 19, 2020, they witnessed an ongoing demonstration by the National Movement for the Freedom of Political Prisoners: it is a common tactic for protesters in Mexico to surround tollbooths and secure the free passage of cars. The couple alleged that they were accosted by Hernandez and an unidentified male accomplice, who

held them at gunpoint and stole a wallet and cellphone. Hernandez was released on bail a few days after her arrest.

In October 2020, Hernandez was arrested and detained on charges of aggravated robbery in a different case, based on allegations that she instructed two accomplices to rob a tollbooth during a demonstration.

The day Hernandez was due to be released on bail in this second aggravated robbery case, she was arrested and detained again, this time on a charge of attacks on public roads: the allegation in the attacks on public roads case was that Hernandez and other activists had held a protest near a tollbooth in the State of Guerrero in early 2020 and obstructed the passage of cars. She was subsequently transferred to a maximum-security prison, the Federal Center for Social Readaptation in Coatlán del Río, Morelos (henceforth referred to as “CEFERESO”). In the months to come, six other criminal cases against Hernandez for attacks on public roads were opened. Throughout the course of her trial in Ecatepec, Hernandez remained detained on the basis of the detention order in the Guerrero attacks on public roads case.

Hernandez’s trial for aggravated robbery in Ecatepec began in February 2021. Based on CEFERESO’s assessment that transporting her to court posed a significant risk that others would attempt to break her free, she was not allowed to attend the trial and was forced to participate via video-conference from the detention facility. In March 2022, Hernandez was convicted and sentenced to 11 years and three months in prison. She has appealed the verdict. Meanwhile, several other criminal cases against her are ongoing.

Throughout the course of the proceedings, Hernandez was subject to a range of fair trial abuses, including violation of her right to be physically present at trial. Under international standards, criminal defendants are almost always entitled to attend their trials excepting limited circumstances, such as where they are incapacitated or where they decline to exercise this right. In Hernandez’s case, CEFERESO refused to transport her to trial against her wishes (and the judge denied defense requests to bring her to trial) because of the supposed risk of a violent rescue attempt – despite no concrete indicia of such and despite withholding this assessment from the defense. The judge further refused to move Hernandez to a detention facility closer to the court to allow her to attend the trial, which might have mitigated the risks allegedly posed by transporting her over a longer distance, stating that this would cause problems for the other proceedings against her. None of the reasons given by CEFERESO or the judge constituted an exception that would justify depriving Hernandez of her right to be present at trial.

Having prevented Hernandez from attending the trial, the authorities failed to ensure the quality of the internet connection at the prison. This meant that Hernandez struggled to understand and follow the proceedings, violating her right to effective participation.

Additionally, hearings had to be adjourned on 9 occasions because of connection failures, unduly delaying the process.

Moreover, Hernandez – confined to the detention facility – was unable to confidentially communicate with her defense team during the trial. CEFERESO did not allow counsel to enter the prison to sit with her on trial days, citing COVID concerns. Instead, counsel could only consult with Hernandez during short breaks in the trial over the open video feed set up by CEFERESO, with no guarantee that the conversations were not being listened to or recorded. Hernandez would legitimately have felt ill at ease in discussing strategy and courtroom developments with her lawyers, in violation of her right to communicate with counsel.

As a result of the above, Hernandez’s case has been irreparably prejudiced.

On the whole, the proceedings reflect significant indicia of an abuse of process. In conjunction with the aforementioned irregularities and violations, there was a lack of evidence supporting the aggravated robbery conviction. The prosecution’s case relied almost entirely on the eyewitness testimony of the alleged victims, who identified Hernandez only after looking online for information about the National Movement for the Freedom of Political Prisoners and who at trial struggled to provide specifics about her appearance. No other evidence placed Hernandez at the scene and, indeed, an expert who had analyzed Hernandez’s cellphone geolocation data testified that she appeared to have been in another state roughly 8-9 hours away by car at the time of the alleged offense. More broadly, this trial is one of ten criminal cases opened against Hernandez in the past two years.

Finally, the authorities adjudicating the various cases against Hernandez failed to uphold the guarantee of non-discrimination. In imposing Hernandez’s pretrial detention, a judge in one of the attacks on public roads cases reportedly relied on archaic gender stereotypes, stating that he would not incorporate a gender perspective into his decision on detention because Hernandez was insufficiently submissive and too intelligent. Meanwhile, the trial judge in the Ecatepec trial repeatedly impeded Hernandez’s efforts to obtain the assistance of an interpreter in her native Amuzgo language, as is her right as an indigenous person under the Mexican Constitution and Mexican law.

In light of the myriad violations in Hernandez’s case, her conviction did not possess the requisite guarantees of fairness. It should be overturned. More broadly, the Mexican authorities must ensure that defendants are not forced to participate in their criminal trials via video-conference in lieu of physical presence.



A. POLITICAL AND LEGAL CONTEXT

Arbitrary Arrest and Detention

Concerns about arbitrary arrest and detention in Mexico are widespread. The U.S. State Department's 2020 Country Report on Human Rights Practices noted that "significant human rights issues included ... arbitrary arrest and lengthy pretrial detention."¹ The National Human Rights Commission (CNDH) of Mexico registered 132 complaints of arbitrary detention from January to August 2019 alone.²

Human rights organizations have highlighted the problem of excessive pretrial detention. In particular, the practice of mandatory pretrial detention has contributed to high numbers of pretrial detainees.³ In 2018, for example, nearly 40% of those imprisoned were pretrial detainees.⁴ Until recently, pretrial detention was solely mandatory "for the most serious crimes like murder, kidnapping and treason."⁵ However, in 2019, the Mexican legislature voted to approve a bill⁶ sponsored by Mexican President Andrés Manuel López Obrador,⁷ which expanded the crimes "subject to pretrial detention without bail."⁸ Among these crimes are cargo theft, armed robbery, the possession of weapons, and burglary.⁹ In response, the UN Human Rights Committee's 2019 report on Mexico condemned the amendment and noted "the large numbers of people held in pretrial detention."¹⁰

Women are disproportionately detained pretrial;¹¹ according to the Secretariat of Security and Civilian Protection, "54 percent of women in federal prison and 46 percent in municipal

¹ U.S. State Department, "2020 Country Report on Human Rights Practices: Mexico", 2021, pgs. 1-2. Available at <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/mexico/>.

² *Id.* at pg. 8.

³ Human Rights Watch, "Mexico: Justice System Proposals Violate Fundamental Rights", January 30, 2020. Available at <https://www.hrw.org/news/2020/01/30/mexico-justice-system-proposals-violate-fundamental-rights#>.

⁴ *Id.*

⁵ Associated Press, "Mexican Congress Expands Pre-Trial Detention to More Crimes", February 21, 2019. Available at <https://apnews.com/article/4b3f978f3457407683afefb760aaf3af>.

⁶ *Id.*

⁷ Associated Press, "Mexican Rights Agency Appeals Against Pre-Trial Detention", March 22, 2021. Available at <https://federalnewsnetwork.com/world-news/2021/03/mexican-rights-agency-appeals-against-pre-trial-detention/>.

⁸ Associated Press, "Mexican Congress Expands Pre-Trial Detention to More Crimes", February 21, 2019.

⁹ *Id.* See also Associated Press, "Mexican Rights Agency Appeals Against Pre-Trial Detention", March 22, 2021.

¹⁰ Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Mexico, U.N. Doc. CCPR/C/MEX/CO/6, December 4, 2019, paras. 34-35.

¹¹ Fair Trials, "Commentary: The Mexican Senate Expands Mandatory Pre-Trial Detention Amid the COVID-19 Pandemic", July 31, 2020. Available at <https://web.archive.org/web/20210307024143/https://www.fairtrials.org/news/commentary-mexican-senate-expands-mandatory-pre-trial-detention-amid-covid-19-pandemic>.

state prisons were in pretrial detention, while 39 percent of men in the federal and local judicial system were in pretrial detention.”¹² The disparity is partly because impoverished women often cannot afford to post bail or to hire a defense lawyer.¹³

Conditions of detention generally fail to meet international standards. The U.S. State Department has described “conditions in [some] prisons and detention centers” as “harsh and life-threatening,”¹⁴ while the UN Human Rights Committee has characterized “living conditions” as “precarious.”¹⁵ Due to policies like mandatory pretrial detention, many such facilities are overcrowded.¹⁶ Other issues include understaffing and a lack of proper sanitation.¹⁷

Notably, it is not rare for human rights defenders to be detained without cause in maximum security prisons. A joint study by national and international human rights groups cited “inhuman conditions during detention—which usually takes place in maximum security prisons” as part of a pattern of the criminalization of human rights defenders.¹⁸ For example, with respect to the 2014 arrest of indigenous journalist and activist Pedro Celestino Canché Herrera, who was accused of “sabotage” after he reported on anti-government protests, the study characterized his transfer to a maximum security cell as “an unjustified punishment.”¹⁹ In another example, in May 2013, indigenous rights defender Damián Gallardo Martínez²⁰ and environmental rights activist Enrique Guerrero Aviña²¹ were charged with “organized crime and kidnapping of minors”²² and detained in a maximum security prison for five years²³ before the prosecution dropped the case and they were released.²⁴

¹² U.S. State Department, “2020 Country Report on Human Rights Practices: Mexico”, 2021, pg. 13.

¹³ See North American Congress on Latin America, “In Mexico, the Threats and Failures of Pre-Trial Detention”, January 13, 2020. Available at <https://nacla.org/news/2020/01/13/mexico-threats-and-failures-pre-trial-detention>.

¹⁴ U.S. State Department, “2020 Country Report on Human Rights Practices: Mexico”, 2021, pg. 1.

¹⁵ Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Mexico, U.N. Doc. CCPR/C/MEX/CO/6, December 4, 2019, para. 36.

¹⁶ Comisión Nacional de los Derechos Humanos, “Diagnóstico Nacional de Supervisión Penitenciaria”, 2019, pg. 465. Available at https://www.cndh.org.mx/sites/all/doc/sistemas/DNSP/DNSP_2019.pdf. See also U.S. State Department, “2020 Country Report on Human Rights Practices: Mexico”, 2021, pg. 9.

¹⁷ *Id.*

¹⁸ Article 19 Office for Mexico and Central America, et al., “Criminalization: A State Policy to Hindrance the Defense of Human Rights in Mexico”, 2016, pg. 17. Available at <https://www.refworld.org/pdfid/57ea860e4.pdf>.

¹⁹ *Id.* at pgs. 35-36.

²⁰ Front Line Defenders, “Arbitrary Detention of Damián Gallardo Martínez”, December 31, 2018. Available at <https://www.frontlinedefenders.org/en/case/case-history-damian-gallardo-martinez>.

²¹ Front Line Defenders, “Enrique Guerrero Aviña”, last accessed January 21, 2022. Available at <https://www.frontlinedefenders.org/en/profile/enrique-guerrero-avina>.

²² Front Line Defenders, “Arbitrary Detention of Damián Gallardo Martínez”, December 31, 2018.

²³ See International Federation for Human Rights, “Mexico: National Human Rights Commission Cites Federal Authorities’ Responsibility for Serious Violations Committed Against Human Rights Defenders Damián Gallardo and Enrique Guerrero”, April 25, 2018. Available at <https://www.refworld.org/docid/5bc83c7f9.html>.

²⁴ Milenio, “ONU Pide No Criminalizar a Defensores de Derechos Humanos por Case Damián Gallardo”, December 14, 2021. Available at <https://www.milenio.com/politica/onu-pide-criminalizar-defensores-derechos-humanos>.

Detainees also face violence at the hands of security forces. The UN Human Rights Committee has cited “reports of widespread use of torture, ill-treatment and excessive use of force by the police, armed forces and other public officials, particularly during arrest and the initial period of detention,”²⁵ noting that at times torture is “used to extract information or confessions which are then used in court as evidence.”²⁶ Security forces largely commit these offenses with impunity; investigations into allegations of torture are inadequate and rarely result in punishment. For example, in 2019, the Prosecutor General’s Office brought charges in one case of alleged torture out of over 4,000 cases it was investigating.²⁷ The UN Human Rights Committee has flagged several issues in this regard: “a failure to assign the necessary resources to those responsible for investigations; a lack of autonomy, independence, impartiality and promptness in carrying out investigations; a lack of prosecutors’ offices and units specializing in serious crimes and recurring human rights violations in the State party; the limited training received by public officials in charge of investigations; a lack of autonomy and independence among experts in charge of investigations; and the very low number of prosecutions and convictions.”²⁸

Fair Trial Rights

The Mexican judicial system has been criticized for failing to uphold fair trial rights. It is not uncommon for the authorities to deny detainees access to legal counsel,²⁹ to block the defense from “present[ing] essential exonerating evidence,”³⁰ and to violate the privilege against self-incrimination.³¹

Prosecutorial and judicial independence is also of concern. In 2021, the U.S. State Department noted that “court decisions [are] susceptible to improper influence by both private and public entities ... as well as by transnational crime organizations.”³² The same year, President Obrador himself publicly called for disciplinary action against a judge based on the judge’s ruling against a policy favored by Obrador’s government.³³ This occurred in

²⁵ Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Mexico, U.N. Doc. CCPR/C/MEX/CO/6, December 4, 2019, para. 30.

²⁶ *Id.*

²⁷ U.S. State Department, “2020 Country Report on Human Rights Practices: Mexico”, 2021, pgs. 8-9. See also Human Rights Watch, “World Report 2022: Mexico”, 2022. Available at <https://www.hrw.org/world-report/2022/country-chapters/mexico>.

²⁸ Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Mexico, U.N. Doc. CCPR/C/MEX/CO/6, December 4, 2019, para. 22.

²⁹ U.S. State Department, “2020 Country Report on Human Rights Practices: Mexico”, 2021, pg. 12.

³⁰ See Organization of American States, “IACHR Brings Mexico Case Before the IA Court”, May 20, 2021. Available at https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/130.asp.

³¹ See Mexican Law Review, “Criminal Justice, Due Process and the Rule of Law in Mexico”, Vol. 11 No. 2, June 2019. Available at http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-05782019000100147.

³² U.S. State Department, “2020 Country Report on Human Rights Practices: Mexico”, 2021, pg. 13. See also Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Mexico, U.N. Doc. CCPR/C/MEX/CO/6, December 4, 2019, para. 40.

³³ Due Process of Law Foundation, “Threats to Judicial Independence in Mexico: Worrying Political Pressure Against Judge Who Provisionally Suspended the Reform of the Electricity Industry Law”, March

the context of attacks on those in the legal profession more broadly.³⁴ Organizations like Human Rights Watch and the Instituto Interamericano de Responsabilidad Social y Derechos Humanos (IIRESODH) have also raised concerns about judicial and prosecutorial independence, with Human Rights Watch characterizing a recent bill to extend the term of the Supreme Court President as an “assault on the rule of law in Mexico”³⁵ and with IIRESODH stating that “the Judiciary in Mexico is under constant attack, mainly by acts of the Executive and the Legislature.”³⁶

Harassment of Female Human Rights Defenders

Human rights defenders in Mexico, many of whom are female, routinely face criminal charges for their work. As stated by the UN Special Rapporteur on the situation of human rights defenders, Mexican human rights defenders are subjected to the “criminalization of their activities through the deliberate misuse of criminal law and the manipulation of the state’s punitive power by both State and non-State actors, to hinder and even prevent the legitimate activities of defenders to promote and protect human rights.”³⁷ According to Human Rights Watch, Mexico is “one of the most dangerous countries in the world for human rights defenders.”³⁸

For example, in October 2019 Asunción Gómez Sánchez and her husband, Venturino Torres Escobar, were arrested for taking part in a National Front in the Struggle for Socialism (FNLS) protest.³⁹ Sánchez is a member of the FNLS,⁴⁰ which works to “denounce and publicly condemn violations of human rights perpetrated by the Mexican government, specifically those related to enforced disappearances, extra-judicial killings, arbitrary

25, 2021. Available at <https://www.dplf.org/en/news/threats-judicial-independence-mexico-worrying-political-pressure-against-judge-who>.

³⁴ Law.com, “Mexican Lawyers Raise Voices to Defend Judicial Independence”, March 18, 2021. Available at <https://www.law.com/international-edition/2021/03/18/mexican-lawyers-raise-voices-to-defend-judicial-independence/?sreturn=20220018155256>.

³⁵ Human Rights Watch, “Lopez Obrador Threatens Judicial Independence”, April 26, 2021. Available at <https://www.hrw.org/news/2021/04/26/lopez-obrador-threatens-judicial-independence>.

³⁶ IIRESODH, “NGO Shadow Report Concerning the Independence of the Judiciary in Mexico”, September 16, 2019, para. 5. Available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MEX/INT_CCPR_CSS_MEX_37128_E.pdf.

³⁷ United Nations Office of the High Commissioner for Human Rights, “Mexico/Rights Defenders: ‘The Best Way to Protect Them is Fighting Impunity’ - UN Expert”, January 25, 2017. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=21117>.

³⁸ Human Rights Watch, “World Report 2021: Mexico”, 2021. Available at <https://www.hrw.org/world-report/2021/country-chapters/mexico#>.

³⁹ La Iniciativa Mesoamericana de Mujeres Defensoras de Derechos Humanos, “[WHRD Alert] Mexico/Asunción Gómez Sánchez Arbitrarily Arrested and Criminalized for Defending Land and Life of Dignity”, November 2, 2021. Available at <https://im-defensoras.org/2021/11/whrd-alert-mexico-asuncion-gomez-sanchez-arbitrarily-arrested-and-criminalized-for-defending-land-and-life-of-dignity/>.

⁴⁰ Chiapas Paralelo, “Detienen a Asunción Gómez, Defensora y Campesina de Chiapa de Corzo”, October 28, 2021. Available at <https://www.chiapasparalelo.com/noticias/chiapas/2021/10/detienen-a-asuncion-gomez-defensora-y-campesina-de-chiapa-de-corzo/>.

detentions and political prisoners.”⁴¹ Escobar and Sanchez were charged with dispossession of property⁴² and remained in detention until October 2021, when the presiding judge acquitted both of the charges on the basis of insufficient evidence.⁴³

In another case, on June 8, 2020, activist and labor lawyer Susana Prieto Terrazas was arrested in the state of Tamaulipas just hours after she met with factory workers about organizing for better working conditions and wages.⁴⁴ She was charged with inciting a riot, coercion, and “making threats against members of the Local Conciliation and Arbitration Board”⁴⁵ in connection with a March 2020 protest by factory workers that the authorities alleged Terrazas had instigated.⁴⁶ Terrazas was held in custody until July 1, when she was released under the condition that she pay 66,000 pesos (around \$2900 USD),⁴⁷ and – for the next 2.5 years – not travel internationally, not leave her home state of Chihuahua, and not visit the Labor Court, which certifies trade unions.⁴⁸

Notably, while Terrazas was in detention during the month of June, two separate judges in the state of Chihuahua issued warrants for her arrest.⁴⁹ The first warrant was issued for the charge of “lying to authorities,” while the second was issued for the charges of “causing the temporary illegal detention of a public servant”⁵⁰ and the “illegal exercise of one’s rights” in connection with two April 2020 protests by factory workers that the authorities claimed

⁴¹ Front Line Defenders, “FNLS: Frente Nacional de Lucha por el Socialismo”, last accessed January 21, 2022. Available at <https://www.frontlinedefenders.org/en/profile/fnls>.

⁴² Milenio, “Exigen la Liberación de Asunción Gómez en Chiapas”, March 7, 2020. Available at <https://www.milenio.com/politica/exigen-liberacion-asuncion-gomez-presa-chiapas>.

⁴³ Rebelión, “Detención Arbitraria: Testimonio del Ex Preso Político Venturino Torres Escobar”, December 15, 2021. Available at <https://rebelion.org/detencion-arbitraria-testimonio-del-ex-presopolitico-venturino-torres-escobar/>.

⁴⁴ KHON2, “Labor Lawyer Charged with Inciting Riot; Arrest Prompts Outrage, Protest Marches”, June 9, 2020. Available at <https://www.khon2.com/news/national/labor-lawyer-charged-with-inciting-riot-arrest-prompts-outrage-protest-marches/>.

⁴⁵ Maquila Solidarity Network, “UPDATE: Labour Activist Susana Prieto Terrazas Released”, June 11, 2020. Available at <https://www.maquilasolidarity.org/en/update-labour-activist-susana-prieto-terrazas-released>.

⁴⁶ El Paso Times, “Mexican Border Labor Lawyer Susana Prieto Terrazas’ Arrest Leads to Calls for Her Release”, June 20, 2020. Available at <https://www.elpasotimes.com/story/news/2020/06/20/susana-prieto-terrazas-mexico-border-labor-lawyer-arrest-demands-release/3231058001/>.

⁴⁷ Maquila Solidarity Network, “UPDATE: Labour Activist Susana Prieto Terrazas Released”, June 11, 2020.

⁴⁸ Public Citizen, “As Mexican President Comes to D.C., Abuse of Mexican Labor Activist Susana Prieto Escalates, Casting Pall on New NAFTA”, July 6, 2020. Available at <https://www.citizen.org/news/as-mexican-president-comes-to-d-c-abuse-of-mexican-labor-activist-susana-prieto-escalates-casting-pall-on-new-nafta/>. See also El Paso Times, “Juarez Labor Attorney with Ties to El Paso Faces Arrest Days After Winning Release from Jail”, July 10, 2020. Available at <https://www.elpasotimes.com/story/news/2020/07/10/susana-prieto-terrazas-juarez-labor-lawyer-faces-new-charges/3287089001/>. Terrazas was released under a “provisional suspension of the process.” This legal process “is akin to a plea bargain and in the past has been used to suspend criminal charges pending completion of probationary terms and payment of restitution.”

⁴⁹ Public Citizen, “Statement: Susana Prieto Terrazas on Panista Persecution Against Defense of Workers Rights”, July 6, 2020. Available at <https://www.citizen.org/news/panista-persecution-against-defense-of-workers-rights/>.

⁵⁰ Border Report, “Juarez Labor Lawyer Braces for Possible New Arrest in Chihuahua”, July 6, 2020. Available at <https://www.borderreport.com/regions/mexico/juarez-labor-lawyer-braces-for-possible-new-arrest-in-chihuahua/>. See also Public Citizen, “Statement: Susana Prieto Terrazas on Panista Persecution Against Defense of Workers Rights”, July 6, 2020.

Terrazas instigated (Terrazas acknowledged giving a speech at the protests that was broadcast online but said she “never told anyone to block managers’ exit or entry.”).⁵¹

Also in June 2020, human rights lawyer Claudia Elizabeth Hernández Herrera was arrested⁵² while serving as a human rights observer in a protest against police brutality.⁵³ She was held incommunicado for eight hours, during which time she was reportedly “physically assaulted by police officers.” Hernandez was subsequently “charged with rioting and property damage” and detained for two days before being released. No further procedural action was taken.⁵⁴

Once criminal cases reach the justice system, female defenders are likely to face discrimination. In its most recent report on Mexico, the UN Committee on the Elimination of Discrimination against Women highlighted “discriminatory stereotypes ... among members of the judiciary, legal practitioners and law enforcement officers” as well as “stereotypical interpretive criteria and judicial bias in the resolution of cases.”⁵⁵ The Inter-American Commission on Human Rights has likewise documented “discriminatory attitudes and behaviors on the part of the authorities,” in reference to women reporting the disappearances of women and girl family members.⁵⁶

In light of generally high rates of gender-based violence and abuse in Mexico,⁵⁷ female human rights defenders are often the targets of violence. The Special Rapporteur on the situation of human rights defenders has noted the “extraordinary risks faced by women human rights defenders and those dedicated to fighting for women’s rights” in Mexico.⁵⁸

⁵¹ See also El Paso Times, “Juarez Labor Attorney with Ties to El Paso Faces Arrest Days After Winning Release from Jail”, July 10, 2020.

⁵² Front Line Defenders, “Arbitrary Detention, Physical Assault and Judicial Harassment of Kenia Inés Hernández and Claudia Elizabeth Hernández”, June 10, 2020. Available at <https://www.frontlinedefenders.org/en/case/arbitrary-detention-physical-assault-and-judicial-harassment-kenia-ines-hernandez-and-claudia-0>.

⁵³ La Iniciativa Mesoamericana de Mujeres Defensoras de Derechos Humanos, “[WHRD Alert] MEXICO/Defender Claudia Hernández Was Illegally Arrested, Tortured and Criminalized in San Luis Potosí for Participating in a Protest Against the Murder of Giovanni López”, June 9, 2020. Available at <https://im-defensoras.org/2020/06/whrdalert-mexico-defender-claudia-hernandez-was-illegally-arrested-tortured-and-criminalized-in-san-luis-potosi-for-participating-in-a-protest-against-the-murder-of-giovanni-lopez/>.

⁵⁴ Front Line Defenders, “Arbitrary Detention, Physical Assault and Judicial Harassment of Kenia Inés Hernández and Claudia Elizabeth Hernández”, June 10, 2020.

⁵⁵ Committee on the Elimination of Discrimination against Women, Concluding Observations on the Ninth Periodic Report of Mexico, U.N. Doc. CEDAW/C/MEX/CO/9, July 25, 2018, para. 13.

⁵⁶ Inter-American Commission on Human Rights, “Violence and Discrimination Against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean”, November 14, 2019, para. 167. Available at <http://www.oas.org/en/iachr/reports/pdfs/ViolenceWomenGirls.pdf>.

⁵⁷ See United Nations Office of the High Commissioner on Human Rights, “UN Experts Call on Mexican Police to Protect Women Protesters”, November 20, 2020. Available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26525&LangID=E>. See also Harvard International Review, “Machismo, Femicides, and Child’s Play: Gender Violence in Mexico”, May 19, 2020. Available at <https://hir.harvard.edu/gender-violence-in-mexico-machismo-femicides-and-childs-play/>.

⁵⁸ United Nations Office of the High Commissioner on Human Rights, “Mexico: UN Expert Urges Guaranteed Protection for Women Human Rights Defenders”, June 29, 2020. Available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26012&LangID=E>.

For instance, in September 2017, women’s rights activist Yndira Sandoval was forced into a car and detained by police officers in the municipality of Tlapa. According to the Washington Office on Latin America, Sandoval was physically assaulted and raped while in detention.⁵⁹ After reporting her experiences to the General Prosecutor’s Office and the Special Prosecutor’s Office for Violence against Women and Trafficking of Persons, Sandoval received death threats and her house was broken into several times.⁶⁰ Although the authorities opened an investigation into her case,⁶¹ no criminal charges were brought. In 2021, Sandoval received a public apology from the Tlapa authorities “for an act of violence and sexual torture committed against her.”⁶²

In December 2019, human rights lawyer and indigenous rights defender Teodomira Rosales Sierra and other members of the José María Morelos y Pavón Regional Center for the Defense of Human Rights were barred from entering the Ministry of Public Security by security officers. The Center was escorting individuals displaced by conflict with local armed groups to the Ministry. Sierra was beaten, held at gunpoint, sexually assaulted, and robbed.⁶³

In 2020, as documented by Amnesty International, the Mexican security forces employed “unnecessary and excessive force, arbitrary detentions and even sexual violence” against women who carried out country-wide protests against gender-based violence. According to the Amnesty report, security forces “arrested more than a dozen women without duly identifying themselves, held them incommunicado for long periods of time, [and] transferred them using unusual routes without telling them where they were taking them, and in some cases without bringing them before the relevant authorities.”⁶⁴ Women protesters were subjected to various forms of sexual harassment and violence “as a tactic to teach them a lesson about daring to go out to protest in public and for behaving in ways that are counter to gender stereotypes according to which women should stay at home and ‘not go out

⁵⁹ Washington Office on Latin America, “WOLA’s Statement on Violence Against Journalists and Human Rights Defenders in Mexico”, December 19, 2017. Available at <https://www.wola.org/2017/12/wolas-statement-violence-journalists-human-rights-defenders-mexico/>.

⁶⁰ *Id.*

⁶¹ El Sol de México, “Fiscalía de Guerrero Investiga Abuso Sexual de la Activista Yndira Sandoval”, October 22, 2017. Available at <https://www.elsoldemexico.com.mx/mexico/justicia/fiscalia-de-guerrero-investiga-abuso-sexual-de-la-activista-yndira-sandoval-302262.html>.

⁶² La Jornada, “Activista Yndira Sandoval Recibe Disculpa Pública de Autoridades de Guerrero”, June 18, 2021. Available at <https://www.jornada.com.mx/notas/2021/06/18/sociedad/activista-yndira-sandoval-recibe-disculpa-publica-del-municipio-de-tlapa-guerrero/>.

⁶³ La Iniciativa Mesoamericana de Mujeres Defensoras de Derechos Humanos, “#WHRDAlert MEXICO/Guerrero State Police Commit Physical, Sexual and Patrimonial Violence Against Indigenous Defender Teodomira Rosales”, January 8, 2020. Available at <https://im-defensoras.org/2020/01/whrdalert-mexico-guerrero-state-police-commit-physical-sexual-and-patrimonial-violence-against-indigenous-defender-teodomira-rosales/>.

⁶⁴ Amnesty International, “Mexico: Authorities Used Illegal Force and Sexual Violence to Silence Women Protesting Against Gender-Based Violence”, March 3, 2021. Available at <https://www.amnesty.org/en/latest/news/2021/03/mexico-autoridades-usaron-violencia-sexual-para-silenciar-mujeres/>.

looking for trouble.”⁶⁵ At the time, multiple UN Special Rapporteurs also commented on the Mexican authorities’ actions, stating: “[v]iolence absolutely cannot be used to repress women who only want to live a life free of violence for themselves and all women and girls, and who protest against femicide, the most lethal form of violence against women, and demand justice for victims.”⁶⁶

Harassment of Indigenous Accused

Like female human rights defenders, indigenous rights defenders, who have mobilized for issues such as land ownership, access to natural resources, sustainable development, self-determination and autonomy, cultural rights, and economic justice,⁶⁷ face unique risks. As stated by the UN Committee on the Elimination of Racial Discrimination, “indigenous and Afro-Mexican human rights defenders are subjected to violence, threats, and attacks on their lives, as well as criminalization of their activities.”⁶⁸

Those who are prosecuted for their work are likely to encounter structural marginalization and harmful stereotypes. Indigenous defendants, for example, do not always receive interpretation services,⁶⁹ a right protected by the Mexican Constitution (“[t]he right to a translator or interpreter is not contingent on an indigenous person’s level of Spanish but is, rather, an automatic right”).⁷⁰ For example, the Open Society Foundation reported that 60% of indigenous individuals accused of a crime in the state of Oaxaca “had no access to an interpreter”: of those who did, 46 percent “still did not understand the information they were being given.”⁷¹ Moreover, indigenous defendants often lack meaningful representation; there are few lawyers who can speak their respective languages and an insufficient number of interpreters.⁷²

As documented by the Miguel Agustín Pro Juárez Human Rights Center, indigenous peoples also face harmful stereotyping, such as being arrested by the police for having a

⁶⁵ Amnesty International, “Mexico: The Age of Women”, 2021, pgs. 5, 9. Available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/AMR4137242021ENGLISH.pdf>.

⁶⁶ United Nations Office of the High Commissioner on Human Rights, “UN Experts Call on Mexican Police to Protect Women Protesters”, November 20, 2020.

⁶⁷ Latin American Perspectives, “The Indigenous Movement in Mexico: Between Electoral Politics and Resistance”, Vol. 33 No. 2, March 2006, pgs. 120-122, 125. Available at <https://www.jstor.org/stable/27647926>.

⁶⁸ Human Rights Watch, “World Report 2020: Mexico”, 2020. Available at <https://www.hrw.org/world-report/2020/country-chapters/mexico#>.

⁶⁹ U.S. State Department, “2020 Country Report on Human Rights Practices: Mexico”, 2021, pg. 14.

⁷⁰ Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Mexico, U.N. Doc. CERD/C/MEX/18-21, August 25, 2017, para. 79.

⁷¹ Open Society Foundations, “A Travesty of Justice for Indigenous People in Mexico’s Prisons”, March 18, 2021. Available at <https://www.opensocietyfoundations.org/voices/a-travesty-of-justice-for-indigenous-people-in-mexicos-prisons>.

⁷² See Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Mexico, U.N. Doc. CERD/C/MEX/18-21, August 25, 2017, paras. 79-80; Equis, “Access to Justice for Indigenous Women: Shadow Report for the UN Committee on the Elimination of Racial Discrimination”, 2019, pgs. 4-5.

“suspicious manner,” “a highly discretionary criterion used in practice to arbitrarily arrest members of indigenous peoples or people with low economic resources.”⁷³

As a result of the above issues, indigenous peoples are frequently wrongfully accused and/or convicted. Between 2012 and 2015, the National Commission for the Development of Indigenous Peoples secured the release of 2,773 indigenous defendants “who were unfairly imprisoned.”⁷⁴ Many more, however, remain in detention. Univision reported in 2017 that over 8,000 indigenous people were “imprisoned while waiting for rulings on their cases” in processes that can take years.⁷⁵

Notable cases against indigenous human rights defenders include that of José Ramón Aniceto Gómez and Pascual Agustín Cruz, who in 2010 were charged and convicted of stealing a car following a trial Amnesty International described as “unfair.”⁷⁶ They were accused of the crime by a strongman group⁷⁷ that had restricted access to water in the local community: Gómez and Cruz had worked to bring free water to homes.⁷⁸ Amnesty International documented multiple fair trial violations and concerns: among other issues, the defendants were not given access to interpreters in their native Nahuatl language nor a lawyer who spoke Nahuatl, and the “judge ignored the defense’s evidence while accepting the prosecution’s case without question” despite a lack of evidence.⁷⁹ In 2012, after Aniceto and Cruz had served two years of their sentence, the Supreme Court of Mexico overturned the conviction and ordered their release,⁸⁰ noting inconsistencies in the prosecution’s evidence as well as violation of the accuseds’ due process rights, such as the right to an interpreter.⁸¹

⁷³ Miguel Agustín Pro Juárez Human Rights Center, “Imprisoned by Discrimination: The Arbitrary Detention and Conviction of Innocent Indigenous People in Mexico”, January 2012. Available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/MEX/INT_CERD_NGO_MEX_80_9642_E.pdf.

⁷⁴ El Universal, “A Different Justice for Indigenous People in Mexico”, April 13, 2015. Available at <https://archivo.eluniversal.com.mx/in-english/2015/injustice-indigenous-people-104181.html>.

⁷⁵ Univision, “In Mexico, 8000 Indigenous People Are Imprisoned Without Having Been Convicted of a Crime”, April 12, 2017. Available at <https://www.univision.com/noticias/criminalidad-y-justicia/in-mexico-8-000-indigenous-people-are-imprisoned-without-having-been-convicted-of-a-crime>.

⁷⁶ Amnesty International, “Mexico Must Free Indigenous Activists Jailed on Trumped-Up Charges”, June 13, 2012. Available at <https://www.amnestyusa.org/press-releases/mexico-must-free-indigenous-activists-jailed-on-trumped-up-charges/>.

⁷⁷ Amnesty International (in note 66) reports that the case was brought by a local “cacique” group. Caciques are a type of local boss or strongman originating from a colonial-era system: Bulletin of Latin American Research, “Caciquismo and Democracy: Mexico and Beyond”, Vol. 28. No. 3, July 2009, pgs. 411-412. Available at <https://www.jstor.org/stable/27734176>.

⁷⁸ Amnesty International, “Americas: Human Rights Defenders Increasingly Targeted and Attacked”, December 6, 2012. Available at <https://www.amnesty.nl/actueel/americas-human-rights-defenders-increasingly-targeted-attacked>. See also Amnesty International, “Mexico Must Free Indigenous Activists Jailed on Trumped-Up Charges”, June 13, 2012.

⁷⁹ Amnesty International, “Mexico Must Free Indigenous Activists Jailed on Trumped-Up Charges”, June 13, 2012.

⁸⁰ Amnesty International, “Americas: Human Rights Defenders Increasingly Targeted and Attacked”, December 6, 2012.

⁸¹ The Wrongful Convictions Blog, “Convicted for Not Speaking Spanish”, January 24, 2013. Available at <https://wrongfulconvictionsblog.org/2013/01/24/convicted-for-not-speaking-spanish/>.

In February 2012, indigenous rights activist Lucila Bettina Cruz Velázquez was arrested while leaving a meeting of the Assembly of the Indigenous Peoples of the Tehuantepec Isthmus in Defense of Land and Territory, of which she is a member. Velasquez was reportedly not informed of the reason for her arrest and was subsequently “held incommunicado for four hours before being taken to the Tehuantepec prison.”⁸² She was charged with illegally detaining staff of the Federal Electricity Commission (CFF) and with “acts or omissions gravely affecting the ‘national consumption and national wealth’” in connection with her participation in a protest in front of the CFF against the construction of wind farms on indigenous land.⁸³ Velasquez was released on bail shortly thereafter.⁸⁴ In February 2015, the District Court in the State of Oaxaca acquitted Velázquez on all charges.⁸⁵

On October 15, 2020, José Luis Gutiérrez and César Hernández – both indigenous land rights defenders – were arrested and detained during a demonstration “against the construction of a National Guard (NG) station” on indigenous lands⁸⁶ and accused of rioting.⁸⁷ As of October 2021, the proceedings were still ongoing.⁸⁸ The World Organization against Torture has documented fair trial violations, such as defense counsel being denied access to investigation files.⁸⁹

Indigenous defenders also face the threat of violence and even death in retaliation for their work. In 2017 alone, the Washington Office on Latin American documented the killings of the following indigenous activists: Isidro Baldenegro López, Juan Ontiveros Ramos, José Alberto Toledo Villalobos, Miguel Vázquez Torres, Agustín Vázquez Torres, Guadalupe Huet Gómez,⁹⁰ and Marcela de Jesus Natalia.⁹¹ In the rare instance where the authorities have opened investigations into these killings, such as in the case of Juan Ontiveros Ramos, the quality of the inquiry was likely dubious; the office of the Attorney General of

⁸² Front Line Defenders, “Case History: Lucila Bettina Cruz Velásquez”, April 30, 2017. Available at <https://www.frontlinedefenders.org/en/case/case-history-lucila-bettina-cruz-vel%C3%A1zquez>.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Front Line Defenders, “Arbitrary Detention and Physical Attacks Against Indigenous Defenders”, October 22, 2020. Available at <https://www.frontlinedefenders.org/en/case/arbitrary-detention-and-physical-attacks-against-indigenous-defenders>.

⁸⁷ Id.

⁸⁸ International Federation for Human Rights, “MÉXICO: Exigimos el Fin de la Criminalización Contra los Defensores Maya-Tseltales de Chilón”, October 20, 2021. Available at <https://www.fidh.org/es/region/americas/mexico/mexico-exigimos-el-fin-de-la-criminalizacion-contra-los-defensores>.

⁸⁹ World Organization Against Torture, “Ataques Contra Personas Defensoras de la Tierra y el Territorio del Pueblo Maya Tseltal de Chilón y Hostigamiento Contra Integrantes del Frayba”, October 21, 2020. Available at <https://www.omct.org/es/recursos/llamamientos-urgentes/ataques-contra-personas-defensoras-de-la-tierra-y-el-territorio-del-pueblo-maya-tseltal-de-chil%C3%B3n-y-hostigamiento-contra-integrantes-del-frayba>.

⁹⁰ Washington Office on Latin America, “WOLA’s Statement on Violence Against Journalists and Human Rights Defenders in Mexico”, December 19, 2017.

⁹¹ teleSUR, “Mexican Indigenous Radio Host Murdered in Guerrero,” June 3, 2017. Available at <https://web.archive.org/web/20200115210154/https://www.telesurenglish.net/news/Mexican-Indigenous-Radio-Host-Murdered-in-Guerrero--20170603-0014.html>.

Chihuahua, for example, identified the perpetrator in Ramos’s case “only one day after the killing, indicating the strong possibility of the absence of an exhaustive, impartial and transparent investigation.”⁹²

B. CASE HISTORY

Kenia Inés Hernández Montalván is an indigenous land rights defender. She is the Coordinator of the Colectivo Libertario Zapata Vive (hereafter Zapata Vive), which defends land rights and promotes “different forms of peaceful resistance against neoliberal development models imposed by the Mexican State.” She is also one of the leaders of the National Movement for the Freedom of Political Prisoners.⁹³ In 2019, after receiving death threats in her home state of Guerrero, Hernandez moved to Mexico City under protective measures.⁹⁴

According to Front Line Defenders, Hernández was first arrested on June 6, 2020 while “peacefully demonstrating at the Hortaliza-Valle de Bravo toll booth in the State of Mexico, to demand the release of political prisoners from the State of Guerrero”⁹⁵ for “her probable participation in the crime of violent robbery.”⁹⁶ The arrest warrant was based on an accusation by two individuals, a couple, that Hernández had robbed them of 500 pesos and a cell phone at gunpoint in March 2020.⁹⁷

Specifically, as detailed in the indictment, the prosecution alleged that on March 19, 2020, Miguel and Carmen (names changed) were in a car near the Las Americas tollbooth in the municipality of Ecatepec when they encountered a group of people demonstrating and holding banners indicating their affiliation with the National Movement for the Freedom of Political Prisoners:⁹⁸ one mode of protest carried out by human rights groups in Mexico, including the National Movement for the Freedom of Political Prisoners, is to surround tollbooths and give cars free passage,⁹⁹ while also asking for contributions to support the relevant campaign. The indictment states that Carmen started filming the demonstration,

⁹² Front Line Defenders, “Environmental and Indigenous Rights Defender Juan Ontiveros Ramos Killed”, February 7, 2017. Available at <https://www.frontlinedefenders.org/en/case/environmental-and-indigenous-rights-defender-juan-ontiveros-ramos-killed>.

⁹³ Front Line Defenders, “New Arrest and Judicial Harassment Against Woman Human Rights Defender Kenia Inés Hernández”, April 13, 2021. Available at <https://www.frontlinedefenders.org/en/case/new-arrest-and-judicial-harassment-against-woman-human-rights-defender-kenia-ines-hernandez>.

⁹⁴ Transcript of June 11, 2020 Hearing.

⁹⁵ Front Line Defenders, “New Arrest and Judicial Harassment Against Woman Human Rights Defender Kenia Inés Hernández”, April 13, 2021.

⁹⁶ International Service for Peace, “Guerrero: Human Rights Defender Kenia Ines Hernández Montalban Arrested”, June 11, 2020. Available at <https://sipazen.wordpress.com/2020/06/11/guerrero-human-rights-defender-kenia-ines-hernandez-montalban-arrested/>.

⁹⁷ Gatopardo, “La Persecución Contra la Activista Kenia Hernández”, April 7, 2021. Available at <https://gatopardo.com/noticias-actuales/la-persecucion-contra-la-activista-kenia-hernandez/>.

⁹⁸ Public Prosecutor’s Office of Ecatepec de Morelos, Charge Sheet, August 7, 2020; Monitor’s Notes, July 8, 2021.

⁹⁹ Gatopardo, “La Persecución Contra la Activista Kenia Hernández”, April 7, 2021.

at which point Hernández approached the car from the driver's side, where Miguel was sitting, threatened him, and ordered Carmen to stop recording.¹⁰⁰

According to the indictment, shortly thereafter an unidentified man wearing a mask and holding a gun approached the car from Carmen's side and threatened both Miguel and Carmen.¹⁰¹ He allegedly seized Carmen's cellphone.¹⁰² The indictment also alleges that Hernandez took Miguel's wallet, which contained 500 pesos and a credit card.¹⁰³ After Miguel and Carmen returned home, they looked up the National Movement for the Freedom of Political Prisoners online, saw Hernandez's photograph, and learned that she was a leader in the organization.¹⁰⁴

Miguel and Carmen subsequently filed a complaint with the Public Prosecutor's Office and identified Hernandez in a photo identification procedure.¹⁰⁵ Notably, the authorities were unable to find video or photographic evidence of Hernandez's presence at the tollbooth. Further, they never unearthed the gun, the wallet, the cellphone, or the identity of the man who was allegedly Hernandez's accomplice.

On June 8, Hernandez appeared in court for her arraignment on the charge of aggravated robbery, which carries a sentence of up 18 years in prison.¹⁰⁶ At the hearing Hernandez testified that that she did not commit the offense.¹⁰⁷ She further stated that she was arrested with force, that she was not shown an arrest warrant at the time of arrest, and that the authorities had not attempted to summon her to the police station before forcibly arresting her.¹⁰⁸ The court ordered that Hernandez be remanded to pretrial detention, noting that it did not have any discretion in this regard due to the requirement of mandatory pretrial detention for the crime of aggravated robbery.¹⁰⁹

Hernandez remained in pretrial detention until June 11, when she was again brought before the court for an evidentiary presentation.¹¹⁰ The judge, having received a communication from the Public Prosecutor's Office that pretrial detention was not necessary, ordered Hernandez's release on the condition that she not participate in demonstrations at tollbooths and not approach Miguel or Carmen.¹¹¹

¹⁰⁰ Public Prosecutor's Office of Ecatepec de Morelos, Charge Sheet, August 7, 2020.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Monitor's Notes, July 8, 2021.

¹⁰⁵ Id.

¹⁰⁶ Transcript of June 8, 2020 Hearing.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Transcript of June 11, 2020 Hearing.

¹¹¹ Id.

On October 18, 2020, Hernández was re-arrested while traveling with other Zapata Vive members in a vehicle in the Puebla municipality.¹¹² According to Front Line Defenders, she was not informed of the charges or the reason for her arrest, and was held incommunicado until the next day.¹¹³ She was subsequently charged with aggravated robbery (Case Number 630/2020) in connection with February 2020 demonstrations demanding the release of political prisoners.¹¹⁴ On October 24, a court in Toluca granted Hernandez bail.¹¹⁵ As with Hernandez's previous aggravated robbery charge, the Public Prosecutor's Office stated that detention was not necessary, allowing the judge to exercise discretion and order Hernandez's release, which was scheduled for October 25.¹¹⁶

On October 25, however, a federal judge issued a warrant for Hernandez's arrest in a different case relating to attacks on public roads – based on Zapata Vive demonstrations in March 2019 in the State of Guerrero.¹¹⁷ Hernández was transferred to Acapulco, Guerrero, where she was formally charged with attacks on public roads (Case 322/2020),¹¹⁸ which is not an offense carrying mandatory pretrial detention. The prosecution requested a penalty of five years' imprisonment.¹¹⁹ As of the writing of the report, the proceedings were ongoing.

According to the defense, at a hearing on October 26 (the ABA Center for Human Rights had not started its observation at this point and did not have access to the transcript of the hearing), the judge in the Guerrero attacks on public roads case issued an oral order for Hernandez's pretrial detention on the basis that i) she protests a lot, putting the community at risk; and that ii) she had previous offenses.¹²⁰ Notably, Hernández had yet to be convicted of a criminal offense and only had pending charges. During the hearing, defense counsel reportedly stated – in addition to other arguments – that it was important to take a gender perspective into account because Hernandez's status as a female human rights defender might subject her to particular risks and harms in pretrial detention.¹²¹ Again

¹¹² Gatopardo, "La Persecución Contra la Activista Kenia Hernández", April 7, 2021.

¹¹³ Front Line Defenders, "New Arrest and Judicial Harassment Against Woman Human Rights Defender Kenia Inés Hernández", April 13, 2021.

¹¹⁴ Animal Politico, "FGR Pide Nueva Orden Aprehensión Contra la Activista Kenia Hernández; La Envián a Cárcel de Acapulco", October 25, 2020. Available at <https://www.animalpolitico.com/2020/10/libertad-kenia-hernandez-carcel-acapulco/>.

¹¹⁵ Front Line Defenders, "New Arrest and Judicial Harassment Against Woman Human Rights Defender Kenia Inés Hernández", April 13, 2021.

¹¹⁶ Conversation with Defense Counsel, February 17, 2022.

¹¹⁷ See Front Line Defenders, "New Arrest and Judicial Harassment Against Woman Human Rights Defender Kenia Inés Hernández", April 13, 2021. See also Gatopardo, "La Persecución Contra la Activista Kenia Hernández", April 7, 2021.

¹¹⁸ Id.

¹¹⁹ Reporte Indigo, "FGR Exonera a Cienfuegos...Per Pide Encarcelar a la Activista Kenia Hernández", January 16, 2021. Available at <https://www.reporteindigo.com/reporte/fgr-exonera-a-cienfuegos-pero-pide-encarcelar-a-la-activista-kenia-hernandez/>.

¹²⁰ Conversation with Defense Counsel, March 2021; Gatopardo, "La Persecución Contra la Activista Kenia Hernández", April 7, 2021; CimaNoticias, "Por 'Incómoda e Insumisa' Defensora Kenia Hernández Deberá Seguir en Prisión y No Será Juzgada con Perspectiva de Género, Afirma Juez", November 3, 2020. Available at <https://cimanoticias.com.mx/2020/11/03/por-incomoda-e-insumisa-defensora-kenia-hernandez-debera-seguir-en-prision-y-no-sera-juzgada-con-perspectiva-de-genero-afirma-juez>.

¹²¹ Id.

according to counsel, the judge responded that a gender perspective was unnecessary because Hernández was not submissive, knew how to defend herself, and was intelligent, thereby implying that she was not vulnerable.¹²²

Hernández was subsequently transferred to the maximum-security Federal Center for Social Readaptation in Coatlán del Río, Morelos (henceforth referred to as “CEFERESO”), where she has remained to date.¹²³

In March 2021, an investigation into a different case of obstructing public roads was opened, and Hernandez’s lawyers were notified.¹²⁴ Later that month, a federal judge in the State of Guerrero charged Hernández with attacks on public roads, in connection with events that took place in May 2019 (Case Number 83/2021).¹²⁵ As of the writing of this report, the proceedings were ongoing.

In April 2021, three separate investigations were opened into potential criminal cases of attacks on public roads in the State of Guanajuato as well as one investigation into a potential criminal case of attacks on public roads in the State of Morelos.¹²⁶ The Guanajuato cases ultimately did not proceed to trial after the prosecution requested their dismissal prior to the bringing of formal charges, but the cases could be reopened at any time.¹²⁷ As of the writing of this report, proceedings in the Morelos case were ongoing.

In February 2021, Hernandez’s trial for aggravated robbery in Ecatepec began before a district court. At the first hearing on February 18, Hernandez was not brought to court. The judge instructed CEFERESO to either bring Hernandez to court for the next hearing or produce her via video-conference if necessary.¹²⁸ Indeed, CEFERESO had performed an assessment concluding that Hernandez could not be transferred to the court to participate in the proceedings because of the danger that others would attempt to break her out.¹²⁹ This assessment was not provided to the defense, despite multiple requests to CEFERESO. Additionally, the presiding judge refused multiple defense requests that Hernandez be permitted to attend her trial regardless of the CEFERESO assessment.¹³⁰ As a result, Hernandez participated in all of the hearings via video-conference from the detention center.¹³¹

¹²² Id.

¹²³ Front Line Defenders, “New Arrest and Judicial Harassment Against Woman Human Rights Defender Kenia Inés Hernández”, April 13, 2021.

¹²⁴ Front Line Defenders, “New Criminal Proceeding Against Woman Human Rights Defender Kenia Inés Hernández Montalván”, March 26, 2021. Available at <https://www.frontlinedefenders.org/en/case/new-criminal-proceeding-against-woman-human-rights-defender-kenia-ines-hernandez-montalvan>.

¹²⁵ Defense Counsel, “Information Sheet, Kenia Inés Hernández Montalván”, December 9, 2021.

¹²⁶ Id.

¹²⁷ Id.

¹²⁸ Transcript of February 18, 2021 Hearing.

¹²⁹ See Conversation with Defense Counsel, February 17, 2022; National Human Rights Commission, Precautionary Measures, December 6, 2021.

¹³⁰ Conversation with Defense Counsel, April 6, 2022; District Court of Ecatepec, Ruling, December 15, 2021.

¹³¹ Id; Monitor’s Notes.

Also at the February 18 hearing, defense counsel requested that Hernandez be provided with an interpreter in her native Amuzgo language.¹³² As noted above, the Mexican Constitution obligates courts to provide indigenous defendants with an interpreter in their native languages regardless of their Spanish abilities. The judge asked “how [Hernandez was a] human rights defender if she d[id] not speak Spanish” and questioned why Hernandez did not request an interpreter at the pretrial stage.¹³³ After defense counsel responded that Hernandez was entitled to an interpreter in any event, the judge ordered that an interpreter be procured for the next hearing.¹³⁴

At the subsequent hearing on February 27, the interpreter was present, but the prison’s internet connection failed, prematurely ending the hearing.¹³⁵ At the hearing on March 16 there was again a connectivity issue and the proceedings were adjourned.¹³⁶ At the hearing on April 5, connectivity problems persisted. Hernandez, struggling to hear and be heard, stated that she was having “tremendous pain in her stomach” and was suffering from diarrhea, as were other female inmates, and that they were receiving insufficient medical attention.¹³⁷ The judge sent a notice to the CEFERESO director to ensure Hernandez’s medical care.¹³⁸ In early April 2021, Front Line Defenders correspondingly reported that Hernández had fallen seriously ill with a fever, chills, and a stomachache due to a lack of potable water and the poor conditions in detention.¹³⁹ In the Front Line Defenders report, defense counsel characterized the medical care provided at CEFERESO as poor, noting that Hernandez had yet to receive the appropriate medication.¹⁴⁰

Also at the hearing on April 5, after the judge instructed the prosecution to read out its indictment, Hernandez informed the court that her interpreter was not present.¹⁴¹ The judge responded: “Let’s go straight into the evidence ... an interpreter is not needed, since you know Spanish perfectly well ... she was in technical school in Spanish and has a bachelor’s degree in law ... it will delay the proceedings very much.”¹⁴² The judge again stated that Hernandez had not requested a lawyer at the pretrial stage and further noted that the interpreter had to travel a long way to the hearings. In the words of the judge: “you are not someone in a vulnerable situation. You are as qualified as the lawyers.”¹⁴³ The defense and Hernandez continued to insist on the right to an interpreter.¹⁴⁴ As the connectivity

¹³² Transcript of February 18, 2021 Hearing.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Transcript of February 27, 2021 Hearing.

¹³⁶ Transcript of March 16, 2021 Hearing.

¹³⁷ Transcript of April 5, 2021 Hearing.

¹³⁸ Id.

¹³⁹ Front Line Defenders, “New Arrest and Judicial Harassment Against Woman Human Rights Defender Kenia Inés Hernández”, April 13, 2021.

¹⁴⁰ Id.

¹⁴¹ Transcript of April 5, 2021 Hearing.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id.

issues worsened, the judge ordered that the hearing be adjourned due to Hernandez's poor health.¹⁴⁵

At the hearing on April 15, the trial was adjourned to April 29 because the prison had poor internet connectivity.¹⁴⁶ At the April 29 hearing, the first hearing at which a TrialWatch monitor was in attendance, Hernández's interpreter was not present. The judge stated that Hernández had the right to an interpreter but did not need one because she understood Spanish, and again raised concerns about delays to the trial and the fact that Hernandez did not request an interpreter at the pretrial stage.¹⁴⁷ The judge nonetheless ordered the interpreter to attend the next hearing or otherwise face a fine.¹⁴⁸ The judge further ordered counsel to request CEFERESO to provide Hernandez with access to better internet connectivity.¹⁴⁹ Subsequently, the hearing was postponed because Hernandez could hear neither the judges or the parties nor herself be heard.¹⁵⁰

At the next hearing on May 13, although the prison's internet connection was working, the interpreter in attendance did not speak the same indigenous language as Hernández.¹⁵¹ The judge reiterated that Hernandez understood Spanish, asking the interpreter as well as the trial monitor for their opinions on whether Hernandez spoke Spanish and emphasizing that Hernandez did not request an interpreter in the pretrial hearings.¹⁵² Additionally, the judge stated that if counsel did not bring his own separate court interpreter to the following hearing for the purposes of communicating with Hernandez, he would face contempt of court and be fined or imprisoned (Article 113 of the Criminal Procedure Code of Mexico provides that a lawyer must have an interpreter if necessary to communicate with an indigenous accused: Hernandez spoke Spanish and although she wanted her own Amuzgo interpreter for the court proceedings, she did not consider it necessary for her lawyer to have a separate interpreter to communicate with her. In any event, interpreters should be appointed by the court, not secured by counsel). The hearing was postponed.¹⁵³

On May 27, the hearing was suspended early because of the prison's poor internet connection. Hernandez's interpreter as well as an interpreter for defense counsel were present, as previously requested by the judge.¹⁵⁴ Before the hearing was terminated, the judge asked Hernandez if she required her lawyer to have his own interpreter, separate from Hernandez's interpreter.¹⁵⁵ Hernandez responded that this was not necessary and the judge reversed his ruling on mandating a separate interpreter for counsel.¹⁵⁶ The next

¹⁴⁵ Id.

¹⁴⁶ Transcript of April 15, 2021 Hearing.

¹⁴⁷ Monitor's Notes, April 29, 2021; Transcript of April 29, 2021 Hearing.

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ Monitor's Notes, May 13, 2021.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Monitor's Notes, May 27, 2021.

¹⁵⁵ Id.

¹⁵⁶ Id.

hearing on June 10 was again suspended because of the prison's poor internet connection.¹⁵⁷ The hearing on June 24 saw the departure of the old defense team and the first appearance of new defense counsel, who requested access to the case file.¹⁵⁸

At the next hearing on July 8, the prosecution and defense gave their opening arguments. The defense stated that it could prove that Hernández was in the State of Guerrero at the time of the alleged offense, some 8 hours distance from the Las Americas tollbooth.¹⁵⁹ Miguel and Carmen, the two alleged victims, testified.¹⁶⁰ Their testimony about the alleged offense largely tracked the indictment's account of events.¹⁶¹ As stated by Carmen, the couple positively identified Hernandez after returning home, searching online for information about the National Movement for the Freedom of Political Prisoners, and seeing Hernandez's photograph.¹⁶² Carmen struggled to recall details of Hernandez's appearance, stating that she had dark hair, had dark skin, and was short and stocky.¹⁶³ She also stated that one of Hernandez's distinguishable features was the mole above her lip, but misplaced it as being on the left side of her mouth as opposed to the right side.¹⁶⁴

Next, Juan (name changed), a representative of the company that ran the Las Americas tollbooth, testified that on March 19 he witnessed a demonstration on behalf of the National Movement for the Freedom of Political Prisoners in which approximately 30-40 people participated.¹⁶⁵ On questioning by the defense, however, Juan was unable to positively identify Hernandez as having been present at the demonstration.¹⁶⁶ The subsequent witness was an investigating police officer who had obtained photographs of a demonstration held by a group of hooded individuals carrying sticks in the vicinity of the Las Americas tollbooth.¹⁶⁷ The defense noted that the photograph did not contain a date or time stamp.¹⁶⁸ Further, Hernandez was not shown in the photograph.¹⁶⁹ Finally, a prosecution expert testified about the value of the cellphone allegedly stolen from Carmen, relying on an invoice obtained from Carmen and introduced into evidence by the prosecution.¹⁷⁰ The defense challenged the invoice, stating that it did not contain normal characteristics of an invoice, such as the equipment price, and suggesting that it might have been fabricated.¹⁷¹

¹⁵⁷ Monitor's Notes, June 10, 2021.

¹⁵⁸ Transcript of June 24, 2021 Hearing.

¹⁵⁹ Monitor's Notes, July 8, 2021.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Id.

¹⁶⁸ Id.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Id.

Throughout the July 8 hearing, internet connectivity cut in and out, as raised several times by Hernandez and others, and it was unclear if Hernandez was able to hear all of the evidentiary presentation.¹⁷²

The next hearing took place on August 6. The prosecution presented as witness a policeman who had examined Miguel's car after the alleged offense and had taken pictures of the area surrounding the tollbooth at which the demonstration allegedly took place on March 19.¹⁷³ However, the pictures were taken days after the event and their relevance was unclear.¹⁷⁴ The defense presented a witness, Diana (name changed), who testified that Hernández was with her in the State of Guerrero, not in the State of Mexico – where the Ecatepec municipality is located – at the time of the alleged crime. Diana stated that she had met Hernandez at a market in the afternoon and had asked Hernandez to meet her at her house in the evening to discuss a legal case relating to her cousin's femicide.¹⁷⁵ Diana testified that Hernandez indeed met her in the evening in Guerrero.¹⁷⁶ The prosecution noted that Diana had received support from Hernandez and would thus be motivated to testify in her favor.¹⁷⁷ Because a defense expert and defense witness scheduled to testify were awaiting COVID-19 test results and not in attendance, the hearing was adjourned.¹⁷⁸

At the next hearing on August 19, Hernández's lawyers informed the judge that Hernández was ill but not receiving adequate medical attention.¹⁷⁹ The judge sent a communication to CEFERESO about Hernandez's need for medical care.¹⁸⁰ The defense expert and defense witness were not in attendance, having contracted COVID-19, and the hearing was adjourned.¹⁸¹

At the hearing on September 2, the defense presented an expert, who gave testimony that he had analyzed Hernández's cellphone and geolocation and had verified that she was in Guerrero at the time of the crime and could not feasibly have been at the Las Americas tollbooth in Ecatepec.¹⁸² The expert's examination of the phone was conducted before new counsel assumed control of the case and the new defense did not introduce the phone into evidence, having not been able to locate it.¹⁸³ The expert additionally referred to photographs that showed Hernandez in Guerrero on March 19.¹⁸⁴ The judge, however, declined to admit this portion of the testimony into evidence because of Mexican legislation

¹⁷² Id.

¹⁷³ Monitor's Notes, August 6, 2021.

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Monitor's Notes, August 19, 2021.

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² Monitor's Notes, September 2, 2021.

¹⁸³ Conversation with Defense Counsel, April 4, 2022.

¹⁸⁴ Monitor's Notes, September 2, 2021.

requiring that supporting documentary evidence already have been introduced at the pretrial stage for admission into evidence at trial (the previous defense had not referenced or presented the photographs at the pretrial stage).¹⁸⁵

At the hearing on September 8, the judge stated that although he had received a response from CEFERESO stating that a general practitioner visited the prison several days a week, CEFERESO had not indicated whether Hernández had been treated by a doctor or tested for COVID-19.¹⁸⁶ The judge thus requested that the prison provide more detailed information on Hernandez's medical care.¹⁸⁷ The hearing was suspended because the internet connection was poor and the interpreter was ill.¹⁸⁸

The next hearing was scheduled for September 22 but was postponed to October 6.¹⁸⁹ No reason was provided. On October 6, Hernández gave testimony that she was in Guerrero all day on March 19 to pick up her children from their father's house and that the prosecution had fabricated evidence to punish her for her human rights activism.¹⁹⁰ Hernandez corroborated Diana's testimony that she met Diana at a market in Guerrero and that Diana asked her to meet later that evening about her cousin's femicide.¹⁹¹ Hernandez stated that she departed for Mexico City from Guerrero on the night of March 19.¹⁹² Notably, when Hernandez started to speak in Amuzgo the judge asked her to speak in Spanish.¹⁹³ From that time on she gave her testimony in Spanish. In addition to addressing the substance of the case against her, Hernandez stated that she had not been given regular medical care or potable water in detention.¹⁹⁴

Hernández began a hunger strike on October 17, as “a way of demanding due process be respected in her federal trial ... and that restorative rather than punitive justice be considered for her; that her right to defend her rights be respected, as well as her right to demonstrate freely, to protest, to defend the freedom of imprisoned but innocent people, and to seek a fairer and more egalitarian economic system.”¹⁹⁵

The next hearing, scheduled for October 20, was postponed to November 17 because the judge was having surgery.¹⁹⁶ On November 17, Hernández had a hearing in a different

¹⁸⁵ Id.

¹⁸⁶ Monitor's Notes, September 8, 2021.

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ Monitor's Notes, September 22, 2021.

¹⁹⁰ Monitor's Notes, October 6, 2021.

¹⁹¹ Id.

¹⁹² Id.

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ Cimacnoticias, “Defensora Kenia Hernández Concluye Huelga de Hambre que Duró Dos Meses”, December 20, 2021. Available at <https://cimacnoticias.com.mx/2021/12/20/90125>.

¹⁹⁶ Monitor's Notes, October 20, 2021.

case on the same day at the same time, so did not attend.¹⁹⁷ The matter was postponed to December 1.¹⁹⁸

At the December 1 hearing, the defense asked to present expert testimony to dispute the validity of the invoice that the prosecution had introduced to prove the existence of Carmen's stolen cell phone.¹⁹⁹ The prosecution argued that it was too late to submit new evidence, while the defense argued that the expert's testimony constituted rebuttal evidence and was not new.²⁰⁰ When the judge asked Hernández for her input, the connectivity was poor and she could not be heard.²⁰¹ The matter was postponed until December 15, with the judge stating that he would impose a fine on CEFERESO if it did not secure the internet connection for the next hearing.²⁰²

On December 15, Hernández appeared online in a wheelchair, having been on hunger strike for 58 days, and stated that she was suffering from liver failure.²⁰³ The defense filed a motion to transfer Hernández to another prison closer to the court so that she could attend and participate in the hearings.²⁰⁴ Due to the prosecutor's unexpected absence (the prosecutor was attending a matter in a different courtroom), the hearing was adjourned.²⁰⁵

On December 17, Hernández ended her hunger strike at the urging of other human rights defenders.²⁰⁶

The subsequent hearing on January 12 was suspended due to Hernández's poor internet connection. The defense asked the judge to impose a fine on the prison if it failed to secure a good internet connection at the next hearing, scheduled for January 26.²⁰⁷ The hearing on January 26 was postponed until February 9, as defense counsel had contracted COVID-19.²⁰⁸ The hearing scheduled for February 9 was again postponed, this time to February 23, because the interpreter had COVID-19.²⁰⁹

¹⁹⁷ Monitor's Notes, November 17, 2021.

¹⁹⁸ Id.

¹⁹⁹ Monitor's Notes, December 1, 2021.

²⁰⁰ Id.

²⁰¹ Id.

²⁰² Id.

²⁰³ Monitor's Notes, December 15, 2021.

²⁰⁴ Id.

²⁰⁵ Id.

²⁰⁶ Cimacnoticias, "Defensora Kenia Hernández Concluye Huelga de Hambre que Duró Dos Meses", December 20, 2021.

²⁰⁷ Monitor's Notes, January 12, 2022.

²⁰⁸ Monitor's Notes, January 26, 2022.

²⁰⁹ Monitor's Notes, February 9, 2022.

On February 5, Hernandez was convicted of aggravated robbery in the case in Toluca (the second aggravated robbery case).²¹⁰ On February 19, she was sentenced to ten years and six months in prison.²¹¹

On February 23, the aforementioned expert proposed by the defense to assess the validity of the invoice testified that it did not meet relevant criteria for such a document, as provided by domestic legislation.²¹² On March 10, the defense and prosecution gave closing arguments and the judge soon thereafter found Hernandez guilty, announcing that she would receive a sentence of 11 years and 3 months in prison.²¹³ The written decision was issued on March 17.²¹⁴ Hernandez has appealed her conviction.

It is worth noting that although CEFERESO refused to transport Hernandez to trial on the basis of alleged safety concerns, forcing her to participate via video-conference, Hernandez was never provided with a private channel through which she could communicate with her lawyers in real time. According to counsel, CEFERESO declined a defense request that Hernandez's lawyers be permitted entry to the prison for the purposes of real-time consultation during the trial, citing COVID protocols.²¹⁵ Instead, during short breaks in the proceedings the judge ordered everyone but the defense to leave the room and counsel used the same video feed used for the trial to briefly speak with Hernandez.²¹⁶

Because this link was set up by CEFERESO, it was unclear whether officials were listening or the conversations were being recorded. On the basis that CEFERESO denied Hernandez her right to participate in the trial and right to confidential communication with a lawyer, the defense has initiated litigation in separate proceedings, which are ongoing.²¹⁷ According to the defense, CEFERESO has cut off communication between Hernandez and her lawyers entirely, prohibiting even phone calls.²¹⁸

On March 18, 2022, a ninth criminal investigation was opened against Hernandez, this time in the State of Guerrero for the alleged offense of attacks on public roads.²¹⁹ Those proceedings are ongoing.

²¹⁰ Front Line Defenders, "Kenia Inez Hernandez Montalvan Sentenced to Ten Years and Six Months in Prison." Available at <https://www.frontlinedefenders.org/en/case/new-arrest-and-judicial-harassment-against-woman-human-rights-defender-kenia-ines-hernandez>.

²¹¹ Id.

²¹² Monitor's Notes, February 23, 2022.

²¹³ Monitor's Notes, March 10, 2022.

²¹⁴ District Court of Ecatepec, Judgment, March 17, 2022.

²¹⁵ Conversation with Defense Counsel, February 17, 2022.

²¹⁶ Monitor's Notes. See also Transcript of July 8, 2021 Hearing.

²¹⁷ Conversation with Defense Counsel, February 17, 2022.

²¹⁸ Conversation with Defense Counsel, April 4, 2022.

²¹⁹ Front Line Defenders, "New Criminal Investigation of Kenia Ines Hernandez Makes 9 Total Cases Against the WHRD", March 24, 2022. Available at <https://www.frontlinedefenders.org/en/case/new-criminal-investigation-kenia-ines-hernandez-montalvan-makes-9-total-cases-against-whrd>.

As of July 2022, a total of ten cases have been opened against Hernandez in the preceding two years. In addition to being prohibited from speaking with her lawyer for over three months, she has also not been allowed visits from her children or other loved ones.²²⁰

²²⁰ Conversation with Defense Counsel, June 16, 2022

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's (CFJ) TrialWatch initiative, the American Bar Association Center for Human Rights deployed monitors to observe the trial of Kenia Hernandez before the District Court in Ecatepec. The trial was held in person, albeit with Hernandez and certain witnesses participating via video-conference. The monitors were fluent in Spanish and able to understand the proceedings. The trial started in February 2021. Monitors first started attending on April 29 and audio transcripts of prior hearings were obtained.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, TrialWatch Expert Marta Rodriguez de Assis Machado reviewed an analysis of the case and the political and legal context in Mexico prepared by staff at the American Bar Association Center for Human Rights. Dr. Rodriguez de Assis Machado concluded that:

This case amounted to a series of violations of Kenia Hernandez's political and civil rights, subjecting her to unjustified detention, prosecution, and conviction based on flawed evidence. Hernandez was subjected to inhuman treatment, including the denial of medical care, as well as a prosecution that failed to comply with international and regional standards of procedural fairness. She was denied her right to be present at trial, and to properly exercise her right to a full defense, suffering discrimination in the process. As an indigenous person, she faced several obstacles in exercising her right to speak in her own language at trial and be assisted by an interpreter. In sum, the judicial process was riven with illegalities, and appears to be a façade for a campaign of persecution against an indigenous rights activist, reflecting a pattern in Mexico of criminalization of the right to protest.



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (ICCPR); jurisprudence from the United Nations Human Rights Committee (HRC), tasked with monitoring implementation of the ICCPR; the American Convention on Human Rights; jurisprudence from the Inter-American Court of Human Rights (I/A Ct. H.R.), tasked with interpreting and enforcing the American Convention; reports and jurisprudence from the Inter-American Commission on Human Rights (IACHR), which monitors the human rights situation in the Americas, including compliance with the American Convention; and jurisprudence from the European Court of Human Rights (ECtHR), which Inter-American bodies have deemed relevant for interpreting the American Convention.²²¹ Mexico acceded to both the American Convention and the ICCPR in 1981. Lastly, the report references relevant provisions in Mexican legislation.

B. INVESTIGATION AND PRETRIAL VIOLATIONS

Arbitrary Detention

Article 9(1) of the ICCPR stipulates: “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”

The United Nations Human Rights Committee has noted that with respect to detention, the concept of “arbitrariness” must be “interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”²²² Not only should pretrial detention be the exception and as short as possible, but also detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”²²³ This means that pretrial detention is appropriate for only a limited number of purposes: namely, to prevent flight, interference with evidence, and the recurrence of crime.²²⁴

²²¹ See I/A Ct. H.R., Case of Yvon Neptune v. Haiti, Merits, Reparations, and Costs, Judgment of May 6, 2008, Series C No. 180, para. 107; I/A Ct. H.R., Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 21, 2007, Series C No. 170, para. 91.

²²² Human Rights Committee, İsmet Özçelik et al v. Turkey, U.N. Doc. CCPR/C/125/D/2980/2017, September 23, 2019, para. 9.3.

²²³ Human Rights Committee, Cedeño v. Bolivarian Republic of Venezuela, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

²²⁴ Human Rights Committee, Mikhail Marinich v. Belarus, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4.

In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an “individualized determination” of the accused’s particular circumstances.²²⁵ “Vague and expansive [justifications] such as ‘public security’” fail to meet this standard.²²⁶ Reference to the severity of the charges is likewise insufficient. As stated by the Committee, “[p]retrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.”²²⁷

Courts must additionally examine whether non-custodial alternatives, such as bail and monitoring devices, “would render detention unnecessary in the particular case.”²²⁸

Like the ICCPR, the American Convention protects against arbitrary detention. Under Article 7(3) of the Convention, “[n]o one shall be subject to arbitrary arrest or imprisonment.” This means that deprivation of liberty must be “exceptional”²²⁹ and “[t]he rule must be the defendant’s liberty while a decision is made regarding his criminal responsibility.”²³⁰ A defendant may only be remanded to pretrial detention where it is “absolutely essential” to “ensuring that the accused does not prevent the proceedings from being conducted or evade the judicial system.”²³¹ Courts must thus evaluate whether there is a less “burdensome” alternative to detention that will fulfill the objectives of preventing flight or interference with the proceedings.²³²

Crucially, “[t]he procedural risk cannot be presumed, but must be verified in each case, based on the real and objective circumstances of the specific case.”²³³ The Inter-American Court of Human Rights has made clear that courts cannot base detention decisions solely on the personal characteristics of the accused or on the severity of the crime.²³⁴

²²⁵ See Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38. See also Human Rights Committee, *Cedeño v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10; Human Rights Committee, *Van Alphen v. the Netherlands*, U.N. Doc. CCPR/C/39/D/305/1988, July 23, 1990, para. 5.8; Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, July 16, 2010, para. 10.4; Human Rights Committee, *Mukong v. Cameroon*, U.N. Doc. CCPR/C/51/D/458/1991, August 10, 1994, para. 9.8.

²²⁶ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ I/A Ct. H.R., *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 21, 2007, Series C No. 170, para. 93; I/A Ct. H.R., *Case of Lopez Alvarez v. Honduras*, Merits, Reparations, and Costs, Judgment of February 1, 2006, Series C No. 141, para. 67; I/A Ct. H.R., *Case of J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 27, 2013, Series C No. 275, para. 159.

²³⁰ I/A Ct. H.R., *Case of Lopez Alvarez v. Honduras*, Merits, Reparations, and Costs, Judgment of February 1, 2006, Series C No. 141, para. 67.

²³¹ I/A Ct. H.R., *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 21, 2007, Series C No. 170, para. 93.

²³² *Id.*; I/A Ct. H.R., *Case of J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 27, 2013, Series C No. 275, para. 157.

²³³ *Case of J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 27, 2013, Series C No. 275, para. 159.

²³⁴ *Id.* See also I/A Ct. H.R., *Case of Lopez Alvarez v. Honduras*, Merits, Reparations, and Costs, Judgment of February 1, 2006, Series C No. 141, para. 69.

Additionally, in order to impose detention there must be reasonable suspicion that the accused has committed the crime with which he is charged.²³⁵ According to the Inter-American Court, “the suspicion must be based on specific facts, expressed in words; that is, not on mere conjectures or abstract intuitions. Consequently, the State should not detain someone to investigate him; to the contrary, it is only authorized to deprive a person of liberty when it has sufficient information to be able to commit him to trial.”²³⁶

As detailed by Inter-American bodies, arbitrary detention also violates the presumption of innocence: “the general rule should be the liberty of the accused ... because the latter enjoys the legal status of innocence, which signifies that he or she must be treated by the State in a manner that accords with their condition of a person who has not been convicted.”²³⁷ When detention is imposed even though it is unnecessary to prevent the accused from fleeing or interfering with the proceedings, this is “tantamount to anticipating the punishment, which violates general principles of law that are widely recognized, including the principle of presumption of innocence.”²³⁸

In the present case, a court reportedly ordered that Hernandez be detained pretrial despite a lack of adequate justification, rendering the measure arbitrary. According to counsel, at a hearing in the Guerrero attacks on public roads case (Case 322/2020) on October 26, the judge imposed pretrial detention on Hernandez on the basis that i) she protests a lot, putting the community at risk; and that ii) she had previous offenses. The offense of attacks on public roads is not a crime subject to mandatory pretrial detention.

During the hearing, defense counsel reportedly stated – in addition to other arguments – that it was important to take a gender perspective into account given that this might preclude pretrial detention and militate towards a non-custodial alternative. Notably, a Protocol issued by the Supreme Court of Mexico in 2013 established that judicial actors should incorporate a gender perspective into their work, including by considering the ways in which certain measures and rulings might have a different impact on the basis of gender.²³⁹ In Hernandez’s detention hearing, the judge reportedly responded that a gender perspective was unnecessary because Hernández was not submissive, knew how to defend herself, was intelligent, and was thereby not vulnerable.

²³⁵ *Id.*

²³⁶ I/A Ct. H.R., Case of Chaparro Álvarez and Lapo Ñíguez v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 21, 2007, Series C No. 170, para. 103.

²³⁷ I/A Ct. H.R., Case of J. v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 27, 2013, Series C No. 275, para. 157.

²³⁸ I/A Ct. H.R., Case of Bayarri v. Argentina, Merits, Reparations, and Costs, Judgment of October 30, 2008, Series C No. 187, para. 110.

²³⁹ Supreme Court of Mexico, “Judicial Decision-Making with a Gender Perspective: A Protocol”, 2013. Available at https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf.

First, as discussed in this section, the ICCPR and American Convention only permit pretrial detention for the purposes of preventing the accused's flight, of preventing the accused's interference in the proceedings, and (with respect to the ICCPR), preventing the accused's participation in further crime. As such, the grounds reportedly provided for Hernandez's detention – that she protested too much and that she had previously committed offenses – were not legitimate objectives for imposing detention under either the ICCPR or American Convention. With respect to the justification that Hernandez protested “a lot,” it is worth noting that protesting does not constitute a criminal offense but is a protected right, and that the objective of preventing the recurrence of crime, as provided for under the ICCPR, would not apply. With respect to the justification that Hernandez had prior offenses, it is worth noting that Hernández had yet to be convicted of a criminal offense and only had pending charges against her at that time.

Second, as alleged by the defense, the court failed to provide any explanation for why detention was necessary and why less burdensome alternatives were not possible, as required under the ICCPR and American Convention. Instead, the judge appeared to impose detention automatically, without regard to Hernandez's specific circumstances, violating the standard that detention be the exception and not the rule.

Third, in reportedly stating that a gender perspective was irrelevant – i.e., that it was unnecessary to undertake a vulnerability assessment that might preclude pretrial detention and militate towards a non-custodial alternative – because Hernandez was intelligent, not submissive, and not vulnerable, the judge unjustifiably took into account Hernandez's supposed personal characteristics in ordering detention (more below on how this implicated the right to freedom from discrimination by relying on stereotypes of women's inherent submissiveness).

Assuming the conduct alleged, Hernandez's detention – which has now lasted more than a year and a half (as of the writing of this report the basis of her detention remains the Guerrero pretrial order) – was arbitrary under the ICCPR and American Convention. Because her detention was not necessary to fulfill objectives deemed legitimate under these treaties, it also violated the presumption of innocence – more “tantamount to anticipating the punishment” than a legitimate precautionary measure.

Detention For Exercise of Rights

The UN Human Rights Committee has made clear that “[a]rrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (art. 19), freedom of assembly (art. 21), [and] freedom of association (art. 22).”²⁴⁰ The UN Working Group on Arbitrary Detention likewise deems detention resulting from “the legitimate exercise of human rights, such as arresting peaceful

²⁴⁰ UN Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, 2014, paras. 17, 53.

protesters for the mere exercise of their rights to freedom of opinion and expression, freedom of assembly and freedom of association” to be arbitrary.²⁴¹ The Working Group “applies a heightened standard of review in cases in which the freedom of expression and opinion is restricted or in which human rights defenders are involved.”²⁴²

Similarly, the Inter-American Court of Human Rights has found detention used to retaliate against and silence human rights defenders to be arbitrary. In *Lysias Fleury v. Haiti*, the Court ruled that the detention of a human rights lawyer violated Article 7(3) of the American Convention because its purpose was “never to press charges or to bring him before a judge for his alleged or possible perpetration of an unlawful act, but had other reasons ... in the context of the threats against and harassment of human rights defenders, to intimidate him and dissuade him from carrying out his work.”²⁴³

Assuming the conduct alleged, Hernandez’s deprivation of liberty was likewise rooted in the exercise of protected rights: namely, the right to peaceful assembly. In imposing detention, the judge reportedly stated that incarceration was warranted because of Hernandez’s frequent participation in protests. This pronouncement did not include information indicating that the protests were violent, apart from a vague warning that they “put the community at risk.” The imposition of detention on the basis of Hernandez’s right to protest, without indication that said protests were not going to be peaceful, would violate the ICCPR and American Convention.

Conditions of Detention

Under Article 10(1) of the ICCPR, “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” According to the United Nations Human Rights Committee, detainees may not be “subjected to any hardship or constraint other than that resulting from the deprivation of liberty ... Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”²⁴⁴ Humane treatment of persons in detention requires the provision of necessary medical care: failing to provide such care amounts to a violation of Article 10(1).²⁴⁵

²⁴¹ UN Working Group on Arbitrary Detention, Revised Fact Sheet No. 26, February 8, 2019. Available at <https://www.ohchr.org/Documents/Issues/Detention/FactSheet26en.pdf>.

²⁴² UN Working Group on Arbitrary Detention, Opinion No. 5/2021 Concerning Erzhan Elshibayev (Kazakhstan), U.N. Doc. A/HRC/WGAD/2021/5, para. 60. See also UN Working Group on Arbitrary Detention, Opinion No. 43/20 Concerning Serikzhan Bilash (Kazakhstan), U.N. Doc. A/HRC/WGAD/2020/43, December 14, 2020, para. 59.

²⁴³ I/A Ct. H.R., Case of *Lysias Fleury et al. v. Haiti*, Merits and Reparations, Judgment of November 23, 2011, Series C No. 236, para. 59.

²⁴⁴ Human Rights Committee, General Comment No. 21, April 10, 1992, para. 3.

²⁴⁵ Human Rights Committee, *Umarova v. Uzbekistan*, U.N. Doc. CCPR/C/100/D/1449/2006, November 3, 2010, para. 8.7; Human Rights Committee, *Simpson v. Jamaica*, U.N. Doc. CCPR/C/73/D/695/1996, October 31, 2001, para. 7.2.

Poor detention conditions can also violate Article 10(1): small cells, lack of natural light, deprivation of sleep, deprivation of food/water, and limitations on bathroom access.²⁴⁶ In *Pavlyuchenkov v. Russia*, for example, the UN Human Rights Committee found a violation of Article 10(1) where “the detention facility did not have a functioning ventilation system, adequate food or proper hygiene,” while the author “remained inside his cell at all times, with no opportunity for outdoor exercise,” and “had to eat his meals and use the toilet in cramped conditions in one room.”²⁴⁷

The American Convention, like the ICCPR, guarantees humane treatment in detention. Under Article 5(1) of the Convention, “[e]very person has the right to have his physical, mental, and moral integrity respected,” while under Article 5(2) “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” According to the Inter-American Court, these provisions mean that “all persons detained have the right to live in prison conditions that are in keeping with personal dignity, and the State must guarantee their right to life and personal integrity,”²⁴⁸ including by “ensur[ing] the manner and method of deprivation of liberty does not exceed the inevitable level of suffering inherent in detention.”²⁴⁹ Notably, “a person illegally detained [...] is in a situation of heightened vulnerability in which there is a high risk of his/her rights being violated, such as the right to physical integrity and to be treated with dignity.”²⁵⁰

The Inter-American Court has found violations of the right to humane treatment where prisons failed to provide detainees with adequate food or drinkable water²⁵¹ as well as where prisons failed to provide adequate medical attention, including “regular medical examinations and care ... [and] adequate treatment when required.”²⁵²

In the present case, Hernandez as well as her lawyers repeatedly alleged that CEFERESO had failed to provide her with potable water,²⁵³ leading to a deterioration in her health.

²⁴⁶ See Human Rights Committee, *Barkovsky v. Belarus*, U.N. Doc. CCPR/C/123/D/2247/2013, July 13, 2018, paras. 6.2-6.3; Human Rights Committee, *Xavier Evans v. Trinidad and Tobago*, U.N. Doc. CCPR/C/77/D/908/2000, May 5, 2003, paras. 2.3, 6.4; Human Rights Committee, *Sannikov v. Belarus*, U.N. Doc. CCPR/C/122/D/2212/2012, April 6, 2018, paras. 2.9, 6.2 (finding a violation of Article 7 and thereby finding it unnecessary to examine potential violations under Article 10).

²⁴⁷ Human Rights Committee, *Pavlyuchenkov v. Russia*, U.N. Doc. CCPR/C/105/D/1628/2007, July 20, 2012, para. 9.2.

²⁴⁸ I/A Ct. H.R., *Case of Cantoral-Benavides v. Peru*, Merits, Judgment of August 18, 2000, Series C No. 69, para. 87.

²⁴⁹ I/A Ct. H.R., *Case of Landaeta Mejias Brothers et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of August 27, 2014, Series C No. 281, para. 198.

²⁵⁰ I/A Ct. H.R., *Case of Cantoral-Benavides v. Peru*, Merits, Judgment of August 18, 2000, Series C No. 69, para. 90.

²⁵¹ I/A Ct. H.R., *Case of Lopez Alvarez v. Honduras*, Merits, Reparations, and Costs, Judgment of February 1, 2006, Series C No. 141, para. 108; I/A Ct. H.R., *Case of Lysias Fleury et al. v. Haiti*, Merits and Reparations, Judgment of November 23, 2011, Series C No. 236, paras. 86-87.

²⁵² I/A Ct. H.R., *Case of Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 7, 2004, Series C No. 114, paras. 156-157. See also I/A Ct. H.R., *Case of Velez Looor v. Panama*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 23, 2010, Series C No. 218, para. 198.

²⁵³ See Monitor’s Notes, October 6, 2021. See also Front Line Defenders, “New Criminal Proceeding Against Woman Human Rights Defender Kenia Inés Hernández Montalván”, March 26, 2021.

Further, after Hernandez fell ill, her lawyers stated that despite requests CEFERESO did not provide her with a doctor or medication.²⁵⁴ In response to the judge's subsequent inquiry to the prison, CEFERESO merely communicated that a general practitioner visited the prison several times a week but did not confirm that Hernandez had either been treated or tested for COVID-19.²⁵⁵

The conduct alleged – the lack of potable water and the lack of adequate medical care – violates the right to humane treatment protected by the ICCPR and American Convention. In line with precedent set by the Inter-American Court, Hernandez was in “a situation of heightened vulnerability in which there [was] a high risk of [] her rights being violated, such as the right to physical integrity and to be treated with dignity”²⁵⁶ because there was reportedly no basis for her detention (discussed in the section above on arbitrary detention).

C. VIOLATIONS AT TRIAL

Right to Trial Without Undue Delay

Article 14(3)(c) of the ICCPR provides that in the determination of any criminal charge, defendants are entitled to trial without undue delay. This right is geared towards limiting the uncertainty faced by an accused.²⁵⁷

The relevant time period for assessing undue delay begins to run as soon as a person is charged and ends at the final judgment on appeal.²⁵⁸ The calculus as to what constitutes a “reasonable time” between an indictment and the conclusion of proceedings entails consideration of factors such as the “complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.”²⁵⁹ The burden of proof to show that a delay is justifiable rests on the State.²⁶⁰ Notably, where a defendant is in detention, the State's responsibility to proceed without undue delay is heightened.²⁶¹

²⁵⁴ Monitor's Notes, August 19, 2021; Monitor's Notes, September 8, 2021; Monitor's Notes, October 6, 2021.

²⁵⁵ Monitor's Notes, September 8, 2021.

²⁵⁶ I/A Ct. H.R., Case of Cantoral-Benavides v. Peru, Merits, Judgment of August 18, 2000, Series C No. 69, para. 90.

²⁵⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 35.

²⁵⁸ Id.; Human Rights Committee, Barroso v. Panama, U.N. Doc. CCPR/C/54/D/473/1991, July 19, 1995, para. 8.5.

²⁵⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 35.

²⁶⁰ Human Rights Committee, Barroso v. Panama, U.N. Doc. CCPR/C/54/D/473/1991, July 19, 1995, para. 8.5.

²⁶¹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 35.

The UN Human Rights Committee has found a delay of 22 months unreasonable where the defendant was charged with a serious crime and held in custody until trial, and “where the factual evidence was straight forward and apparently required little police investigation.”²⁶²

The American Convention also guarantees the right to trial without undue delay. Under Article 8(1) of the Convention, “[e]very person has the right to a hearing, with due guarantees and within a reasonable time ... in the substantiation of any accusation of a criminal nature made against him.” According to the Inter-American Court of Human Rights: “the reasonability of the time period referred to in this precept must be analyzed with regard to the total duration of the process, from the first procedural act up to the issuing of a definitive judgment, including the recourses that could be presented. In this sense, the Court has ruled that, in criminal matters, the term starts on the date of the arrest of the individual.”²⁶³

The goal of ensuring that trial proceeds within a reasonable time is to “prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of.”²⁶⁴ In assessing whether there has been an unreasonable delay under Article 8(1), three factors are relevant: the complexity of the case, the conduct of the accused, and the conduct of the authorities.²⁶⁵ Additionally, where the accused is in detention, “special diligence and haste” is required.²⁶⁶ In the case of *Herrera Espinoza v. Ecuador*, for example, the Inter-American Court found a violation of Article 8(1) where the accused was detained; where the evidence presented by the prosecution at trial had already been obtained at the beginning of the process, meaning that “substantive investigative actions or procedural acts” did not necessitate the delay; and where the defendant himself had not attempted to “hinder” the process.²⁶⁷

In the present case, Hernandez was first arrested for the crime at issue on June 6, 2020. The trial judgment was only issued in March 2022 and the appellate process is ongoing.

Examining the elements of the complexity of the case, the conduct of Hernandez, and the conduct of the authorities, there are serious concerns regarding Hernandez’s right to trial without undue delay. First, as was true in *Herrera Espinoza v. Ecuador*, the evidence that

²⁶² Human Rights Committee, *Sextus v. Trinidad and Tobago*, U.N. Doc. CCPR/C/72/D/818/1998, July 16, 2001, para. 7.2 (defendant was charged with murder).

²⁶³ I/A Ct. H.R., *Case of Acosta-Calderon v. Ecuador*, Merits, Reparations, and Costs, Judgment of June 24, 2005, Series C No. 129, para. 104.

²⁶⁴ I/A Ct. H.R., *Case of Suarez-Rosero v. Ecuador*, Merits, Judgment of November 12, 1997, Series C No. 35, para. 70.

²⁶⁵ I/A Ct. H.R., *Case of Acosta-Calderon v. Ecuador*, Merits, Reparations, and Costs, Judgment of June 24, 2005, Series C No. 129, para. 105.

²⁶⁶ See I/A Ct. H.R., *Case of Herrera Espinoza et al v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of September 1, 2016, Series C No. 316, para. 204. See also I/A Ct. H.R., *Case of Garcia-Asto and Ramirez-Rojas v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 25, 2005, Series C No. 137, para. 171.

²⁶⁷ *Id.* at paras. 204-206.

was presented by the prosecution at trial was almost identical to that already gathered at the beginning of the investigation. In hearings in early June, for example, the prosecution presented the testimony of the alleged victims, photographs taken of the Las Americas tollbooth by investigators, testimony from a representative of the private company that manages the tollbooth, photographs of demonstrators obtained from the company, and an invoice provided by Carmen with respect to her phone.²⁶⁸ The prosecution did not put forward any other significant evidence in the subsequent trial proceedings, meaning that the bulk of investigative actions had already been undertaken in June 2020, despite the fact that the trial only concluded nearly two years later and a final – i.e., appellate judgment – has yet to be delivered.

Second, the delays were almost entirely attributable to the conduct of the authorities. The failure of CEFERESO to ensure the quality of Hernandez’s internet connection at the prison resulted in numerous adjournments: specifically, in the trial being postponed on 9 different occasions, usually for weeks at a time.

That Hernandez was detained not on the basis of the aggravated robbery charge but on the basis of a different attack on public roads case is notable as a factor weighing against a finding of undue delay. At the very least, however, her right to trial without undue delay has been undermined.

Right to Be Present at Trial

Hernandez was denied the right to be physically present at her own trial.

Under Article 14(3)(d) of the ICCPR, an accused has the right to be “tried in his presence.” Although the United Nations Human Rights Committee has noted that proceedings “in the absence of the accused may in some circumstances be permissible,”²⁶⁹ this exception is primarily applicable when the accused declines to exercise his or her right to be present.²⁷⁰

In *Benhadj v. Algeria*, for example, the accused was prosecuted before a military tribunal for, among other things, “crimes against state security.”²⁷¹ He disputed the legitimacy of the court and the case against him, deeming it politically motivated.²⁷² Although he was notified sufficiently in advance of the proceedings, neither he nor his lawyer showed up to trial.²⁷³ He was subsequently convicted. The Committee did not find a violation of Article 14(3)(d),

²⁶⁸ See Transcript of June 8, 2020 Hearing; Transcript of June 11, 2020 Hearing.

²⁶⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2017, para. 36.

²⁷⁰ *Id.*

²⁷¹ Human Rights Committee, *Benhadj v. Algeria*, U.N. Doc. CCPR/C/90/D/1173/2003, July 20, 2007, para. 2.2. See also Human Rights Committee, *Mbenge v. Zaire*, U.N. Doc. CCPR/C/18/D/16/1977, March 25, 1983, para. 14.1.

²⁷² *Id.*

²⁷³ *Id.* at para. 8.9.

citing the fact that the defendant “refused to attend” the proceedings.²⁷⁴ While the European Convention on Human Rights – like the American Convention on Human Rights – does not explicitly provide for the right to be present at trial, the European Court of Human Rights’ jurisprudence makes clear that fair trial guarantees almost always require an accused facing criminal charges to be physically present in the courtroom. As stated by the Court, “[i]n the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial ... both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses.”²⁷⁵

Although an accused can waive his right to be present if the waiver is established in an “unequivocal manner and attended by minimum safeguards commensurate to its importance,”²⁷⁶ the right to a fair trial is generally violated where the authorities prevent an accused from attending his trial against his wishes. In the case of *Romanov v. Russia*, for example, the European Court found a violation of the right to a fair trial in a case in which the trial court had refused to order the accused’s transport to trial on the grounds that the detention facility had a policy against transporting mentally ill detainees and that the statement of a mentally ill accused could not be admitted into evidence.²⁷⁷ The Court has indicated that it is only in limited circumstances, such as where a defendant is incapacitated and a representative is appointed to protect his or her interests, that a hearing may be held in a defendant’s absence and that in any event, this exception should be confined to one/several hearings, not extended to the entire trial.²⁷⁸

Various international bodies have developed guidelines regarding video-conferencing in light of the heightened need for remote hearings because of the COVID-19 virus. These guidelines, drawing on the right to be present at trial, have established that the non-consensual imposition of video-conferencing against the wishes of the accused violates fair trial rights: that the right to physical presence at trial not only encompasses situations in which the accused does not participate in the proceedings at all but also situations in which the accused participates remotely. In September 2020, for example, the European Criminal Bar Association (ECBA) issued a set of fair trial principles for a “[p]ost-Covid-19 world,” including that:

a trial conducted remotely may not, in any event, be considered the full equivalent of a trial in the physical

²⁷⁴ *Id.*

²⁷⁵ European Court of Human Rights, *Marcello Viola v. Italy*, App. No. 45106/04, October 5, 2006, para. 50. See also European Court of Human Rights, *Golubev v. Russia*, App. No. 26260/02, Decision on Admissibility, November 9, 2006; European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 96.

²⁷⁶ European Court of Human Rights, *Salduz v. Turkey*, App. No. 36391/02, November 27, 2008, para. 59.

²⁷⁷ European Court of Human Rights, *Romanov v. Russia*, App. No. 63933/00, October 20, 2005, paras. 23-24, 106-113.

²⁷⁸ European Court of Human Rights, *Proshkin v. Russia*, App. No. 28869/03, February 7, 2012, paras. 100-105; European Court of Human Rights, *Ninn-Hansen v. Denmark*, App. No. 28972/95, Admissibility Decision, May 18, 1999.

presence of the accused person. Trial in the physical presence of the accused should remain and always be the rule ... and a remote trial should never be conducted without the presence of the accused if he or she did not consent to it.²⁷⁹

As stated by the ECBA, given that “punishment imposed by video dehumanizes the accused and weakens the effect of the trial procedure in restoring legal peace,”²⁸⁰ “[t]he more serious the offense, the more important is the need to ensure that the person is physically present.”²⁸¹

The International Commission of Jurists (ICJ) likewise published guidance on trial via video-conference in late 2020, stating that it was “unaware of any case in which the Human Rights Committee, the European Court of Human Rights or any other regional human rights court has found the non-consensual imposition of videoconferencing on the accused and/or his lawyer in a criminal trial, to be compatible with the right to a fair trial.”²⁸² Amongst the ICJ’s recommendations to States was:

The right of any person to be physically present for his or her trial on criminal charges should be fully respected, including in situations of crisis or emergency such as the COVID-19 pandemic. In particular, national laws and rules should not permit, and in practice courts and other authorities should not proceed with, criminal trials in which an accused is denied the right to be physically present for the trial and is instead forced to participate by means of a video link or similar technology without his freely given and fully informed consent.²⁸³

In the present case, Hernandez was forced to participate in her criminal trial via videoconference against her wishes. Namely, CEFERESO, the detention facility where she is being held, performed a risk assessment upon Hernandez’s arrival and stated that she could not be transferred to the court to participate in the proceedings because of the danger that others would attempt to break her out.²⁸⁴ The presiding judge subsequently rejected various requests by the defense that Hernandez be permitted to attend the hearings.

²⁷⁹ European Criminal Bar Association, “Statement of Principles on the Use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World”, September 6, 2020, paras. 28-29, 57-58. Available at https://www.ecba.org/extdocserv/20200906_ECBAStatement_videolink.pdf.

²⁸⁰ *Id.* at para. 65.

²⁸¹ *Id.* at para. 63.

²⁸² International Commission of Jurists, “Videoconferencing, Courts and COVID-19: Recommendations Based on International Standards”, November 2020, pg. 9. Available at https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf.

²⁸³ *Id.* at pg. 15.

²⁸⁴ Conversation with Defense Counsel, February 17, 2022; National Human Rights Commission, Precautionary Measures, December 6, 2021.

As a baseline matter, the right to be present at one's criminal trial prohibits the State from denying an accused's attendance excepting limited circumstances. In rejecting a request from Hernandez to be moved from CEFERESO to a facility closer to the Ecatepec court, which would potentially have enabled her to attend the trial, the judge emphasized that there were other ongoing proceedings against Hernandez in the vicinity of CEFERESO and that Hernandez's transfer would cause difficulties for these cases.²⁸⁵ However, logistical issues posed by the barrage of criminal proceedings brought against Hernandez would not qualify as an exception justifying her absence, nor would CEFERESO's dangerousness assessment.

Indeed, none of the narrow exceptions to the right to be present applied to Hernandez's case. Hernandez did not waive her right to be present; she was not suffering from any health issues that would preclude her attendance; and, in any event, she was prevented from attending not just one or two hearings but the entire trial. Her right to be present was thereby violated. This precedent raises further concerns.

First, CEFERESO's assessment of the supposed dangerousness of transporting her to court was not provided to the defense, despite multiple requests, meaning that the defense did not have a meaningful opportunity to challenge a key decision. Second, with respect to the conclusion that transporting Hernandez to court might result in a violent effort to free her, there was no indicia of such. Over the course of the various criminal cases against her, Hernandez had been moved to and from prisons several times without any breakout attempt. At the time that CEFERESO made the assessment, she had never been convicted of a criminal offense, such as association with organized crime or participation in violent activity, that would suggest there was a risk of a breakout attempt. It is unclear what evidence, if any, CEFERESO relied on in making this finding which, as discussed below, impacted other fair trial rights, such as Hernandez's right to effectively participate in the proceedings against her and to communicate with counsel.

Right to Effective Participation

An accused's ability to effectively participate in the proceedings against her is widely considered a key component of the right to a fair trial. As stated by the European Court of Human Rights, Article 6 – the European Convention's elaboration of the right to a fair trial – “read as a whole, guarantees the right of an accused to participate effectively in a criminal trial, which includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings.”²⁸⁶ This understanding of the right to a fair trial is reflected in various subcomponents of Article 14 of the ICCPR: the right to interpretation in court, which aims to ensure that the accused is able to follow the proceedings;²⁸⁷ the right to be tried in one's

²⁸⁵ District Court of Ecatepec, Ruling, December 15, 2021.

²⁸⁶ European Court of Human Rights, *Murtazaliyeva v. Russia*, App. No. 36658/05, December 18, 2018, para. 91.

²⁸⁷ ICCPR, Article 14(3)(f).

presence, which implies the ability to hear and follow the proceedings;²⁸⁸ the right to defend oneself in person, which of necessity assumes the ability to hear and follow the proceedings;²⁸⁹ and the right to communicate with counsel, which likewise assumes that the accused is able to hear and follow the proceedings and confer with counsel accordingly.²⁹⁰ This understanding of the right to fair trial is likewise reflected in various subcomponents of Article 8 of the American Convention: the right to interpretation in court;²⁹¹ the right to defend oneself in person;²⁹² and the right to communicate with counsel.²⁹³

As stated by the European Court of Human Rights, where proceedings are conducted by video feed the State must ensure that “the applicant is able to follow the proceedings and to be heard without technical impediments.”²⁹⁴

The repeated disruptions to the prison’s internet connection described above meant that Hernandez was often unable to hear witnesses, her own lawyers, the prosecutor, and the judge – and that they were equally unable to hear her. This violated her right to effective participation in the trial.

On December 1, for example, Hernandez’s counsel made arguments regarding the invalidity of the phone invoice submitted by the prosecution: the invoice was evidence supporting the charge that Hernandez committed aggravated robbery by stealing Carmen’s cellphone and a rebuttal of defense arguments that the phone never existed in the first place. As reported by the trial monitor, when the judge asked Hernandez if she agreed with her lawyers, “the sound fail[ed] a lot,” and it was difficult for all parties to “understand what [was] being said.”²⁹⁵ Hernandez stated that the equipment provided to her was “not functional.”²⁹⁶ Although the judge adjourned the hearing due to the quality of the internet connection, at the next hearing on December 15, “[t]he conditions of the video [were] better but there [was still] a failure in the audio.”²⁹⁷

On May 27, a hearing at which issues regarding interpretation were discussed, the trial monitor noted that “[the] hearing was suspended at 5 pm due to internet connectivity with Kenia. It was impossible to hear her correctly, and she had problems following up on what was happening at the Court.”²⁹⁸ On July 8, the hearing at which the bulk of the prosecution’s

²⁸⁸ Id. at Article 14(3)(d).

²⁸⁹ Id.

²⁹⁰ Id. at Article 14(3)(b).

²⁹¹ American Convention, Article 8(2)(a).

²⁹² Id. at Article 8(2)(d)

²⁹³ Id.

²⁹⁴ European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 98. See also European Court of Human Rights, *Marcello Viola v. Italy*, App. No. 45106/04, October 5, 2006, paras. 53, 74.

²⁹⁵ Monitor’s Notes, December 1, 2021.

²⁹⁶ Id.

²⁹⁷ Monitor’s Notes, December 15, 2021.

²⁹⁸ Monitor’s Notes, May 27, 2021.

evidence against Hernandez was presented, the internet repeatedly cut out. As recorded in the audio transcript of the hearing, at various points throughout witness testimony it was unclear whether Hernandez could hear the parties or be heard herself. After Carmen's testimony, for example, Hernandez asked the court, "Can you hear me?"²⁹⁹ The judge responded: "Allow me, we can't hear you very well. Give me a second. We can't hear her. Can you improve the sound?"³⁰⁰ Hernandez then requested a recess so she could confer with her attorneys. Similarly, soon after the testimony of the representative for the tollbooth company, Hernandez stated "I simply cannot hear you at all. I can't hear you at all ... I understand that I can't ask [the witness] questions directly, that's why I ask for time with my lawyers, to see if [UI] my lawyers can [UI] ask him questions."³⁰¹ If Hernandez indeed was unable to hear parts of witness testimony in real-time or be heard herself in real-time, this would have prevented her from understanding the evidence against her and/or instructing her lawyers accordingly.

In sum, the authorities did not ensure that Hernandez "[was] able to follow the proceedings and to be heard without technical impediments."³⁰² This issue was all the more problematic because Hernandez's defense team was not able to communicate with Hernandez regularly or privately in real-time (as will be discussed in the section below), meaning that her immediate thoughts and reactions to developments in the trial were at risk of being lost pending lengthy gaps during which she could not confer with counsel.

Right to Communicate with Counsel

Under Article 14(3)(b) of the ICCPR, a defendant is entitled to "to communicate with counsel of his own choosing." Under Article 8(2)(d) of the American Convention, an accused person is guaranteed the same right. According to the United Nations Human Rights Committee, this provision requires that a defendant be afforded sufficient opportunity to meet with counsel and discuss the case. In *Rayos v. The Philippines*, for example, the Committee found a violation of Article 14(3)(b) where a defendant "was only granted a few moments each day during the trial to communicate with counsel."³⁰³ As stated by the European Court of Human Rights, defendants must be able to confer with counsel in real-time during the proceedings.³⁰⁴

²⁹⁹ Transcript of July 8, 2021 Hearing.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 98. See also European Court of Human Rights, *Marcello Viola v. Italy*, App. No. 45106/04, October 5, 2006, paras. 53, 74.

³⁰³ Human Rights Committee, *Rayos v. Philippines*, U.N. Doc. CCPR/C/81/D/1167/2003, July 27, 2004, para. 7.3.

³⁰⁴ See European Court of Human Rights, *Yaroslav Belousov v. Russia*, App. Nos. 2653/13 & 60980/14, October 4, 2016, paras. 149–154; European Court of Human Rights, *Mariya Alekhina and Others vs. Russia*, App. No. 38004/12, July 17, 2018, paras. 169–73. See also Organization for Security and Cooperation in Europe, "Results of Trial Monitoring in the Republic of Kazakhstan", 2007, pgs. 97–98, 102–103. Available at <https://www.osce.org/astana/24153?download=true>.

Article 14(3)(b) also requires that defendants “be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.”³⁰⁵ Article 8(2)(d) of the American Convention likewise obligates the State to guarantee the accused’s right to communicate “privately and freely with his counsel.” The Inter-American Court has found violations of Article 8(2)(d) where conversations between the accused and her lawyers were supervised by police officers.³⁰⁶

The right to confidential communication with counsel applies to proceedings conducted via video link. As stated by the European Court of Human Rights, with respect to remote criminal trials the authorities must ensure “that effective and confidential communication with a lawyer is provided for.”³⁰⁷ Notably, in cases where a video-link “system is installed and operated by the State,” the Court has found a violation of the right to confidential communication because an accused “might legitimately [feel] ill at ease when he discussed his case.”³⁰⁸ According to the Court, “[i]f a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness.”³⁰⁹

With respect to the courtroom proceedings in the present case, the authorities did not afford Hernandez sufficient opportunity to communicate with counsel.³¹⁰ She was only permitted to speak to her lawyers in a handful of instances, during short breaks in the trial (almost never confidentially, as discussed below). The deprivation of such consultations parallels that condemned by the UN Human Rights Committee in *Rayos* as a violation of Article 14(3)(b). Moreover, the authorities did not set up any channel for Hernandez to either provide real-time input in response to courtroom developments or receive the benefit of real-time legal expertise and assistance. According to counsel, CEFERESO denied the defense request that Hernandez’s lawyers be permitted entry to the prison for the purposes of consultation during the trial, citing COVID protocols³¹¹ and no other means of real-time communication was established.

³⁰⁵ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 34.

³⁰⁶ See I/A Ct. H.R., Case of *J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 27, 2013, Series C No. 275, paras. 204-206. See also I/A Ct. H.R., Case of *Cantoral-Benavides v. Peru*, Merits, Judgment of August 18, 2000, Series C No. 69, para. 127; I/A Ct. H.R., Case of *Suarez-Rosero v. Ecuador*, Merits, Judgment of November 12, 1997, Series C No. 35, para. 83.

³⁰⁷ European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, para. 98.

³⁰⁸ *Id.* at paras. 104-107, 109.

³⁰⁹ *Id.* at para. 97. See European Court of Human Rights, *Moiseyev v. Russia*, App. No. 62396/00, October 9, 2008, paras. 209-210; European Court of Human Rights, *S. v. Switzerland*, App. Nos. 12629/87 and 13965/88, November 28, 1991, para. 48.

³¹⁰ With respect to the pretrial detention center, defense counsel relayed that they were not able to visit Hernandez because of COVID-19 protocols and that they were able to speak to her via the prison’s telephone approximately once a week. Because the phone is operated by the prison, counsel is unsure whether the calls are listened to or recorded. Conversation with Defense Counsel, February 17, 2022.

³¹¹ Conversation with Defense Counsel, February 17, 2022.

With respect to the confidentiality of the communications, Hernandez was restricted to discussing the case with her lawyers over the open video feed during court breaks, with the judge ordering everyone but the defense to leave the room. Because the link was set up by CEFERESO and was indeed the very link used for the trial itself, it is unclear whether CEFERESO officials listened in or whether the conversations have been recorded. Consequently, Hernandez “might legitimately have felt ill at ease when [she] discussed h[er] case.”³¹²

In light of the above, Hernandez’s right to confidential communication with counsel was violated.

D. OTHER FAIRNESS CONCERNS

Right to Freedom from Discrimination

Hernandez’s right to freedom from discrimination was undermined throughout the proceedings against her: first, with respect to gender stereotypes that affected the imposition of pretrial detention, and second, with respect to the trial court’s obstruction of her right to interpretation as an indigenous person.

Gender Discrimination

Article 1 of the American Convention provides: “States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” Under Article 24 of the Convention, “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” The Inter-American Court has drawn clear distinctions between Article 1 and Article 24, stating:

Article 1(1) refers to the State’s obligation to respect and ensure, ‘without discrimination,’ the rights contained in the American Convention. In other words, if a State discriminates in the respect or guarantee of a treaty-based right, it would violate Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to unequal protection of domestic law or its application, the fact must be examined in light of Article 24.³¹³

³¹² European Court of Human Rights, *Sakhnovskiy v. Russia*, App. No. 21272/03, November 2, 2010, paras. 104-107, 109.

³¹³ See I/A Ct. H.R., *Case of Veliz Franco et al. v. Venezuela*, Judgment of May 19, 2014, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 277, para. 214. See also I/A Ct. H.R., *Case of Atala Riffo and Daughters v. Chile*, Judgment of February 24, 2012, Merits,

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belem Do Para) specifically proscribes discrimination on the basis of gender. Article 6(b) stipulates that the “right of every woman to be free from violence” encompasses “[t]he right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.” Under Article 7 of the Convention, States are required to take appropriate measures to eliminate such patterns and practices.³¹⁴

The ICCPR contains parallel guarantees. Article 2 mandates that States Parties treat all individuals equally, regardless of distinctions such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 3 requires States Parties to “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant,” while Article 26 provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) complements the right to equality set forth in the ICCPR. Article 2 obliges States to eliminate discriminatory practices by, among other things, “establish[ing] legal protection of the rights of women on an equal basis with men and ... ensur[ing] through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”; “refrain[ing] from engaging in any act or practice of discrimination against women and ... ensur[ing] that public authorities and institutions shall act in conformity with this obligation”; “tak[ing] all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”; and “tak[ing] all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”³¹⁵ Article 5(a) requires States Parties to eliminate prejudices as well as practices based on stereotypes.

The UN Committee on the Elimination of Discrimination against Women has characterized state actors’ use of gender stereotypes in legal proceedings as a breach of Article 2 and Article 5(a).³¹⁶ In *Belousova v. Kazakhstan*, for example, the Committee considered a case

Reparations, and Costs, Series C No. 239, para. 82; I/A Ct. H.R., Case of Flor Freire v. Ecuador, Judgment of August 31, 2016, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 315, paras. 111-112.

³¹⁴ Convention of Belem Do Para, Article 7. See IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 151.

³¹⁵ CEDAW, Article 2(c)(d)(e)(f).

³¹⁶ See Committee on the Elimination of Discrimination against Women, *V.K. v. Bulgaria*, U.N. Doc. CEDAW/C/49/D/20/2008, September 27, 2011, paras. 9.11-9.12; Committee on the Elimination of Discrimination against Women, *S.T. v. Russia*, U.N. Doc. CEDAW/C/72/D/65/2014, April 8, 2019, paras. 9.6-9.9, 9.11-9.12; Committee on the Elimination of Discrimination against Women, *R.K.B. v. Turkey*, U.N. Doc. CEDAW/C/51/D/28/2010, April 13, 2012, paras. 8.6-8.8. The Committee does not always clearly distinguish between which acts are violations of Article 2 provisions and which acts are violations of Article 5(a).

in which a woman alleged that her employer had sexually harassed her. The authorities failed to adequately investigate the claim. Subsequently, the woman's employer initiated a defamation suit against her.³¹⁷ The Committee noted that the presiding court, which ultimately ruled in favor of the employer, "referred to the fact that [the woman] did not complain about the alleged sexual harassment while she was still employed, but only after her dismissal, as a circumstance rendering her allegation less credible."³¹⁸ This reasoning, based in trope, displayed a disregard for the woman's "vulnerable position as a solo female wage earner subordinate to [the alleged perpetrator]."³¹⁹ Taking these circumstances into account, the Committee found that national institutions' failure to handle the case with the requisite sensitivity – a failure "influenced by stereotypes" – violated Article 2 and Article 5(a).³²⁰

The Inter-American Commission and Court have identified potential manifestations of gender discrimination within the context of criminal proceedings:

(i) improper assessment of evidence that is based on ideas that generalize social behavior and roles; (ii) the closure of potential lines of investigation into circumstances of the case and identification of the perpetrators; (iii) the lack of exhaustive analysis of the scene of a crime and failures in the collection, documentation, and preservation of evidence, as well as irregularities in forensic medical examinations; (iv) failure to take investigative steps as a result of judgments regarding the social behavior of men and women; (v) tacit assumptions that women are responsible for the facts because of the way they dress, their jobs, their sexual behavior, etc., or convictions based on negative stereotypes of certain groups that invite attribution of criminal responsibility.³²¹

Other forms of discrimination include "the use of gender stereotypes as grounds for a legal decision," thus "reveal[ing] that the decision was based on preconceived beliefs rather than relevant facts."³²²

As reported by the defense, the imposition of detention on Hernandez relied on gender stereotypes, violating both her right to freedom from discrimination in the exercise of her

³¹⁷ Committee on the Elimination of Discrimination against Women, *Belousova v. Kazakhstan*, U.N. Doc. CEDAW/C/61/D/45/2012, August 25, 2015, para. 2.10.

³¹⁸ *Id.* at para. 10.10.

³¹⁹ *Id.*

³²⁰ *Id.* at paras. 10.8-10.10.

³²¹ IACHR, *Manuela and Family v. El Salvador*, Case 13.069, December 7, 2018, para. 152 (citing supporting caselaw from both the Commission and Court). See also *I/A Ct. H.R., Case of Veliz Franco et al. v. Venezuela*, Judgment of May 19, 2014, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 277, para. 213.

³²² *Id.* at paras. 151, 155.

right to a fair trial, as protected by ICCPR and American Convention and her right to freedom from discrimination in the enforcement of domestic laws and practices. According to the defense, at a hearing on October 26 the judge in the Guerrero attacks on public roads case ordered Hernandez's pretrial detention (the ABA Center for Human Rights did not have access to the transcript). During the hearing, defense counsel reportedly stated – in addition to other arguments – that it was important to take a gender perspective into account because Hernandez's status as a female human rights defender might subject her to particular risks and harms in pretrial detention.³²³ Counsel referenced a Protocol issued by the Supreme Court of Mexico in 2013 establishing that judicial actors should incorporate a gender perspective into legal proceedings, including by considering the ways in which certain measures and rulings might have a different impact on the basis of gender.

Correspondingly, under the National Code of Criminal Procedure, the proportionality of any precautionary measure (including detention) with respect to the harm borne by the defendant must be considered:

The Control Judge, when imposing one or more of the precautionary measures provided for in this Code, shall take into consideration the arguments that the parties offer or the justification for the Public Ministry to carry out, applying the criterion of minimum intervention according to the particular circumstances of each person, in terms of the provisions of Article 19 of the Constitution.

In order to determine the appropriateness and proportionality of the measure, the risk assessment analysis carried out by specialised personnel may be taken into account. material, in an objective, impartial and neutral manner in terms of the applicable legislation.

In the respective judgment, the Control Judge must justify the reasons why the precautionary measure is the one that is less harmful to the defendant.³²⁴

According to counsel, the judge reportedly responded that a gender perspective was unnecessary because Hernández was not submissive, knew how to defend herself, and was intelligent, thereby meaning that she was not vulnerable.³²⁵

³²³ Conversation with Defense Counsel, March 2021.

³²⁴ National Code of Criminal Procedure, 2014, Article 156.

³²⁵ Conversation with Defense Counsel, March 2021. See also Gatopardo, "La Persecución Contra la Activista Kenia Hernández", April 7, 2021; Cima Noticias, "Por 'Incomoda e Insumisa' Defensora Kenia Hernández Deberá Seguir en Prisión y No Será Juzgada con Perspectiva de Género, Afirma Juez", November 3, 2020. Available at <https://cimanoticias.com.mx/2020/11/03/por-incomoda-e-insumisa-defensora-kenia-hernandez-debera-seguir-en-prision-y-no-sera-juzgada-con-perspectiva-de-genero-afirma-juez>.

This reasoning clearly draws on gender tropes, concluding that an assessment of the impact of detention should apply only to women who conform to traditional gender roles. As reported by the defense, the judge ruled that Hernandez did not merit such protection because she transcended gender stereotypes: she was not submissive, she was not vulnerable, “she knew how to defend herself,” and she was intelligent. The conduct alleged reveals not only a violation of freedom from discrimination in that gender stereotypes infected the legal process but also a violation of freedom from discrimination in the court’s enforcement of domestic law and practices.

Discrimination on the Basis of Ethnicity

The right to freedom from discrimination protects individuals from discrimination on the basis of ethnicity. While ethnicity is not listed as a protected category in either the ICCPR or American Convention, both the UN Human Rights Committee³²⁶ and Inter-American bodies³²⁷ have, respectively, made clear that the treaties prohibit discrimination stemming from ethnic origin. In this regard, the Inter-American Court has specifically noted that “the indigenous peoples fall within this category, and the Court has recognized that they have specific characteristics that constitute their cultural identity, such as their customary law, their economic and social characteristics, and their values, practices and customs.”³²⁸

Hernandez is an indigenous person: a member of the Amuzgo people of the State of Guerrero. Her native language is Amuzgo, although she understands and can speak Spanish. Under the Mexican Constitution and Mexican National Code of Criminal Procedure, indigenous individuals, even if they speak Spanish, have the right to an interpreter who “has knowledge of their language and culture” where requested.³²⁹ The judge presiding over Hernandez’s case, however, repeatedly attempted to dissuade her from exercising this right even though she requested an Amuzgo interpreter at the outset of trial.

At the hearing on April 5, after the judge instructed the prosecution to read out its indictment Hernandez informed the court that her interpreter was not present.³³⁰ The judge responded: “Let’s go straight into the evidence ... an interpreter is not needed, since you know Spanish perfectly well ... she was in technical school in Spanish and has a bachelor’s degree in law ... it will delay the proceedings very much.”³³¹ The judge stated that Hernandez had not requested an interpreter at the pretrial stage and further noted that the interpreter had to travel a long way to the hearings. In the words of the judge: “you are not someone in a

³²⁶ See Human Rights Committee, *Rosalind Williams v. Spain*, U.N. Doc. No. CCPR/C/96/D/1493/2006, August 17, 2009, para. 7.2.

³²⁷ See I/A Ct. H.R., *Case of Norin Catriman et al.*, Judgment of May 29, 2014, Merits, Reparations, and Costs, Series C No. 279, paras. 203-206.

³²⁸ *Id.* at para. 204.

³²⁹ National Code of Criminal Procedure, 2014, Article 45; Mexican Constitution, Article 2(A)(VIII).

³³⁰ Transcript of April 5, 2021 Hearing.

³³¹ *Id.*

vulnerable situation. You are as qualified as the lawyers.”³³² The defense and Hernandez continued to insist on the right to an interpreter. Ultimately, the judge adjourned the hearing due to Hernandez’s ill health. At the hearing on April 29, the judge again asserted that Hernandez did not need an interpreter because she understood Spanish.³³³ The hearing was ultimately adjourned due to connectivity problems.

At the next hearing on May 13, the interpreter in attendance did not speak the same indigenous language as Hernández.³³⁴ The judge reiterated that Hernandez understood Spanish, asking the interpreter as well as the trial monitor for their opinions on whether Hernandez spoke Spanish and emphasizing that Hernandez did not request an interpreter in the pretrial hearings.³³⁵ The judge nonetheless ordered that an Amuzgo interpreter be present at the next session. At the hearing on October 6, Hernández testified.³³⁶ When she started to speak in Amuzgo the judge asked her to speak in Spanish.³³⁷ Hernandez subsequently testified in Spanish.

Although the judge generally allowed Hernandez to be assisted by an interpreter, Hernandez had to first overcome his resistance. If Hernandez was not a lawyer with knowledge of her rights as an indigenous person – indeed, an indigenous rights defender – it is possible that the outcome could have been different.

As such, the court undermined the right to equal protection in domestic law and its enforcement by obstructing Hernandez’s exercise of her right to an interpreter and to communicate in her own language under Mexican legislation.

E. Abuse of Process

Although the UN Human Rights Committee has repeatedly held that the ICCPR proscribes improperly motivated prosecutions,³³⁸ it has yet to establish clear criteria for assessing such situations. Meanwhile, the American Convention on Human Rights and the European Convention on Human Rights contain specific provisions relating to improper motive. Article 18 of the European Convention states: “The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.” Similarly, under Article 30 of the American Convention, “[t]he restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise

³³² *Id.*

³³³ Monitor’s Notes, April 29, 2021.

³³⁴ Monitor’s Notes, May 13, 2021.

³³⁵ *Id.*

³³⁶ Monitor’s Notes, October 6, 2021.

³³⁷ *Id.*

³³⁸ Human Rights Committee, *Khadzhiyev and Muradova v. Turkmenistan*, U.N. Doc. CCPR/C/122/D/2252/2013, April 6, 2018, para. 7.7. See also Human Rights Committee, *Melnikov v. Belarus*, U.N. Doc. CCPR/C/120/D/2147/2012, September 4, 2017, para. 8.8; Human Rights Committee, *Nasheed v. Maldives*, U.N. Doc. CCPR/C/122/D/2851/2016, April 4, 2018, paras. 2.19, 8.7.

of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

Thus far, Inter-American bodies have almost exclusively analyzed improper state action in the context of other Articles, such as Article 8 on the right to a fair trial³³⁹ and Article 24 on the right to equal protection of the law.³⁴⁰ As such, the European Court’s jurisprudence on Article 18 and indicia of improper motive is useful.

The European Court has found that in evaluating whether an ulterior motive for prosecution exists, circumstantial evidence – including the political climate and timing of the proceedings,³⁴¹ whether there were reasonable grounds to bring the charges,³⁴² how the proceedings were conducted,³⁴³ and whether the ultimate decision was well-reasoned and based on law³⁴⁴ – may be probative. The seemingly selective targeting of a specific individual may also be relied upon as a circumstantial indicator.³⁴⁵

In analyzing prosecutions that may have been brought for improper aims, the Court has emphasized that cases that implicate democratic values should be subjected to heightened scrutiny.³⁴⁶ The Court has further held that improper motive need not be the sole purpose for the prosecution, but the predominant one: in other words, even a prosecution that possesses a legitimate aim can be rendered unlawful due to ulterior motive.³⁴⁷

³³⁹ I/A Ct. H.R., Case of Granier et al. (Radio Caracas Television) v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment of June 22, 2015, Series C No. 293, paras. 184-199; I/A Ct. H.R., Case of Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, Preliminary Objection, Merits, Reparations and Costs, Judgment of August 23, 2013, Series C No. 266, paras. 173-179; I/A Ct. H.R., Case of Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 28, 2013, Series C No. 268, paras. 210-219.

³⁴⁰ I/A Ct. H.R., Case of Norin Catriman et al, Merits, Reparations, and Costs, Judgment of May 29, 2014, Series C No. 279, paras. 222-230

³⁴¹ See European Court of Human Rights, Selahattin Demirtaş v. Turkey (no. 2), App. No. 14305/17, December 22, 2020, para. 429; European Court of Human Rights, Merabishvili v. Georgia, App. No. 72508/13, 2017, November 28, 2017, paras. 320-322; European Court of Human Rights, Nastase v. Romania, App. No. 80563/12, December 11, 2014, para. 107; European Court of Human Rights, Rasul Jafarov v. Azerbaijan, App. No. 69981/14, March 17, 2016, paras. 159-161; European Court of Human Rights, Mammadli v. Azerbaijan, App. No. 47145/14, April 19, 2018, para. 103.

³⁴² See European Court of Human Rights, Khodorkovskiy v. Russia, App. No. 5829/04, May 31, 2011, para. 258; European Court of Human Rights, Khodorkovskiy and Lebedev v. Russia, App. Nos. 11082/06 and 13772/05, July 25, 2013, para. 908.

³⁴³ European Court of Human Rights (Grand Chamber), Navalnyy v. Russia, App. No. 29580/12, November 15, 2018, para. 171.

³⁴⁴ European Court of Human Rights, Nastase v. Romania, App. No. 80563/12, December 11, 2014, para. 108.

³⁴⁵ European Court of Human Rights (Grand Chamber), Navalnyy v. Russia, App. No. 29580/12, November 15, 2018, paras. 168-170.

³⁴⁶ See *id.* at paras. 173-175.

³⁴⁷ European Court of Human Rights, Merabishvili v. Georgia, App. No. 72508/13, November 28, 2017, paras. 292–308.

Per the guideposts set forth by the European Court and as discussed in detail below, there are significant indicia that the prosecution of Kenia Hernandez meets the standards for an abuse of process.

First, with respect to the timing and broader political context, the case against Hernandez is consistent with documented patterns of the State bringing trumped-up criminal cases against human rights defenders. Moreover, the aggravated robbery trial in Ecatepec is just one of ten criminal cases initiated against Hernandez over the past two years. As noted by the European Court, the selective targeting of a specific individual is a circumstantial indicator of improper motive. The barrage of cases brought against Hernandez, all of which relate to her activism on behalf of political prisoners and indigenous rights, is therefore worth noting. Crucially, Hernandez's pretrial detention was ordered on the very day that she was due to be released on bail in a different aggravated robbery case, indicating some form of coordination.

Second, the charges were poorly substantiated by the State. As discussed at length above, the prosecution's case rested almost exclusively on the testimony of the alleged victims, Carmen and Miguel. However, both individuals testified that they only identified Hernandez after looking up pictures of leaders of the National Movement for the Freedom of Political Prisoners online. Further, their descriptions were vague at best, stating that Hernandez had dark hair, dark skin, and was stocky. Carmen got confused on cross-examination about one of Hernandez's most distinguishing features – the mole above her lip.

Meanwhile, the prosecution failed to produce any other evidence proving Hernandez's guilt. As noted in the case history section, the identity of Hernandez's alleged accomplice has yet to be discovered and the gun, wallet, and cellphone have yet to be found. There is likewise no evidence of Hernandez's presence at the Las Americas tollbooth on March 19. One police investigator who testified, for example, produced photographs taken of the Las Americas tollbooth after the alleged incident, while another produced a picture of hooded demonstrators carrying sticks that was not date-stamped or time-stamped and, in any event, did not depict Hernandez. The representative of the company who runs the tollbooth also could not confirm Hernandez's presence in the area on March 19.

To support its case, the defense called an expert who testified that, on the basis of geo-location technology in Hernandez's phone, it appeared she was in Guerrero, 8-9 hours away, on the date in question. As noted above, Diana testified that she met Hernandez in Guerrero on the day in question, and Hernandez's testimony largely tracked Diana's count. In light of the above, there were grave doubts as to Hernandez's guilt.

Third, regarding the conduct of the proceedings, the case has been riddled with irregularities from its outset. When Hernandez was arrested in June, for example, it was unclear why the police had not summoned her to the station instead of forcibly detaining her. Subsequently, CEFERESO refused Hernandez's transport to trial based on vague allegations of risk and likewise refused to move her to a prison closer to the court. The

presiding judge rejected all requests from the defense that Hernandez be allowed to attend the trial absent sufficient justification, with the result that her right to be present was violated. The authorities further failed to ensure the quality of the internet connection at the prison, unduly delaying the proceedings as well as undermining Hernandez's ability to understand and follow the trial. Hernandez's right to confidential consultation with her lawyers during the trial was also violated due to the State's failure to establish a channel of private communication.

Against this backdrop, there are strong grounds to conclude that the proceedings against Hernandez were initiated as a means of retaliating against her for her activism on behalf of indigenous populations and political prisoners. The case is particularly concerning in that it implicates democratic values – the right to peaceful protest against state abuses.

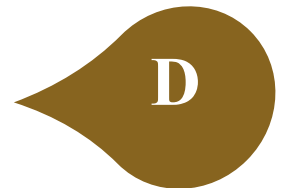
CONCLUSION



Throughout the course of her aggravated robbery trial before the District Court in Ecatepec, the rights of indigenous activist Kenia Hernandez were severely violated. Stepping back, the trial in Ecatepec is just one of ten criminal cases opened against Hernandez in the past two years. Over the course of these various proceedings, Hernandez has encountered discrimination on the basis of her gender as well as her ethnic origin.

In light of the irregularities and rights violations documented in this report, the fairness of the aggravated robbery trial in Ecatepec was compromised such as to call into question the verdict convicting Hernandez. The decision should be overturned. More broadly, the Mexican authorities must ensure that defendants are not forced to participate in their criminal trials via video-conference in lieu of physical presence.

GRADE:





GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, considering, *inter alia*:

- The severity of the violation(s) that occurred
- Whether the violation(s) affected the outcome of the trial
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”³⁴⁸ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted)
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges), and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- **A:** A trial that, based on the monitoring, appeared to comply with international standards.
- **B:** A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- **C:** A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- **D:** A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- **F:** A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

³⁴⁸ ICCPR, Article 26.