

The Molina Theissen Case. An example of perseverance for victims of enforced disappearance worldwide

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Guatemala is the country with the highest number of victims of enforced disappearance in Latin America. As a result of the repression during the internal armed conflict (1960-1996), around 45,000 people were disappeared.¹ Despite this large number, only a few cases have been investigated and prosecuted. Besides the prevalent impunity, the government has not created a specialized institution in charge of searching the disappeared.² In spite of this situation, family members alongside human rights organizations have been persistent in their quest for justice and truth, no matter how long it takes.

A remarkable example of perseverance is the Molina Theissen family. The case refers to the 1981 illegal detention of Emma Guadalupe Molina Theissen, a militant of the youth wing of the Guatemalan Labour Party (*Partido Guatemalteco del Trabajo – PGT*). Due to her membership in this organization, she was deemed as “subversive”. After being detained at a military checkpoint, she was held captive in Military Zone No. 17 (MZ17), a military base where she was tortured and raped. After nine days without food, she managed to escape. As a form of retaliation, the military raided her home, beat her mother and kidnapped her young brother, 14-year-old Marco Antonio Molina Theissen, who to this date remains disappeared. As a result, Emma and the rest of the family were forced to flee the country.



Marco Antonio's mother and sisters. Copyright JLPOS El Periódico

¹ United Nations. Historical Clarification Commission, Guatemala: Memory of Silence, 1999.

² While there is not an institution tasked with searching victims of enforced disappearance during the internal armed conflict, it is worth mentioning that there are two laws regulating the search of missing persons: 1) The Alba Kenneth System Law (Decree 28-2010) which specializes in searching, finding and protecting children and teenagers after they have been reported as missing or kidnapped; and 2) The Immediate Search Law for Missing Women (Decree 9-2016) which provides a mechanism to speed up the search for women who have been reported as disappeared, finding them and providing them protection from further harm. Both laws demand the creation of an intergovernmental body to coordinate, implement and monitor all actions destined to find missing persons.

Case before the Inter-American Court of Human Rights

After tirelessly searching for Marco Antonio and using all legal means available without an answer, the family, represented by the NGOs Mutual Support Group (*Grupo de Apoyo Mutuo – GAM*) and the Center for Justice and International Law (CEJIL), brought the case before the Inter-American Commission on Human Rights (IACHR) in 1998. It was until 2001 that the case was deemed admissible and finally submitted to the Inter-American Court of Human Rights (IACtHR) in 2003. During the procedure, the Guatemalan State acknowledged partial international responsibility and a judgment was delivered in 2004.

In its [merits](#), the IACtHR found that Guatemalan state violated the rights³ of Marco Antonio, as well as the human rights⁴ of his family, specifically: Emma Theissen Alvarez (mother), Carlos Molina Theissen (deceased father), Emma Guadalupe, Maria Eugenia and Ana Lucrecia Molina Theissen (sisters). As a result, it ordered a series of economic, administrative, legal and symbolic measures, which the State has partially complied. Still pending are the following: to find and deliver Marco Antonio's remains, to create a Commission and Registry of disappeared persons, to establish a procedure to declare presumed death and to create a genetic information database to allow the identification of missing children.

Case before the domestic courts

After years of failing in its duty to investigate and prosecute the direct perpetrators and masterminds of the crimes, progress was made in January 2016. Four senior military officers were arrested: Manuel Antonio Callejas y Callejas, former chief of military intelligence and suspected leader of an organized crime syndicate; Francisco Luis Gordillo Martinez, former infantry colonel and commander of Military Zone 17; Hugo Ramiro Zaldaña Rojas, former major and intelligence official of Military Zone 17 and Edilberto Letona Linares, former colonel and deputy commander of Military Zone 17. In August that year, a fifth person was charged: Manuel Benedicto Lucas García, retired general, former Army Chief of Staff and brother of former dictator Fernando Romeo Lucas García. After reviewing evidence and deciding on its admissibility, the pre-trial judge decided to send all of them to trial, which started on March 1, 2018.

The trial lasted more than two months, where the parties presented several types of evidence. The prosecutors and civil parties relied on eyewitness statements, documents and witness expert testimonies. Regarding the latter and following the strategy set by previous transitional justice cases⁵, several professionals were called to give their testimony. Amongst them there were lawyers, psychologists, military officers, sociologists, historians and doctors who provided their expertise in order to enlighten the court about important topics surrounding the case. Among the subjects covered were the impact of impunity in enforced disappearance cases; the theory and practice of countersubversive war and its effects on the Molina Theissen case; the psychologic, physical and social effects of torture and an analysis of international humanitarian law.

³ Namely, Articles 4(1) (Right to Life), 5(1) and 5(2) (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 17 (Rights of the Family), 19 (Rights of the Child) and 25 (Judicial Protection) of the American Convention on Human Rights, and that it failed to comply with the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2) Immediate Search Law for Missing Women (Decree 9-2006) (Domestic Legal Effects). It also failed to comply with the obligation established in Articles I and II of the Inter-American Convention on Forced Disappearance of Persons.

⁴ Namely, Articles, 5(1) and 5(2) (Right to Humane Treatment); 8 (Right to a Fair Trial); 17 (Rights of the Family), and 25 (Judicial Protection) of the American Convention on Human Rights, and that it failed to comply with the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects)

⁵ The Ixil genocide and the Sepur Zarco sexual violence cases.

Finally, on May 23, 2018, High Risk Court "C" delivered its [judgment](#). It found four officials, Callejas y Callejas, Gordillo Martínez, Zaldaña Rojas and Lucas García, guilty of crimes against humanity⁶ against Emma Molina Theissen, sentencing them to 25 years in jail. In addition, it convicted them for the crime of aggravated rape against Emma, thus adding another 8 years to their sentence. Regarding the forced disappearance of Marco Antonio, the Court found three officials guilty: Callejas y Callejas, Zaldaña Rojas and Lucas García, sentencing them to 25 years in prison. One of the defendants, Letona Linares, was acquitted of all charged because command responsibility was not demonstrated.

In its verdict, the court relied on international criminal law jurisprudence. It mentioned the Nuremberg and Tokyo Trials' prosecution of individuals for crimes against humanity under the joint criminal enterprise doctrine; the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda about infractions against women's sexual liberty as tactics of war; hybrid courts such as the Special Tribunal for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia regarding infractions of fundamental rights against vulnerable populations and the International Criminal Court judgments in the cases of Thomas Lubanga Dyilo and Jean Pierre Bemba Gombo regarding different forms of individual criminal responsibility. Furthermore, the Court also used International Human Rights Law jurisprudence regarding the nature of victim's testimony as fundamental evidence on sexual violence cases as stated in the IACtHR judgment of Rosendo Cantú vs. Mexico.⁷

In addition, the Court also cited relevant domestic jurisprudence relating to crimes committed during the armed conflict. In this regard, it mentioned the Ixil Genocide and Crimes Against the Duties of Humanity case, Dos Erres massacre, Plan de Sánchez massacre, the extrajudicial execution of Mirna Mack Chang and José Miguel Mérida Escobar, the enforced disappearance of Saenz Calito and Fernando García, the burning and massacre of the Spanish Embassy in Guatemala and the Sepur Zarco case with regard to sexual violence and slavery. These cases demonstrate the participation of agents of the state security apparatus or with state acquiescence in the commission of grave crimes.

Reparations

After rendering the judgment and in accordance with Guatemalan law, a date was assigned for a dignified reparation hearing.⁸ Additionally, an innovative legal figure in the Guatemalan

⁶ Article 378 of the Guatemalan Criminal Code is titled: "Crimes against the duties of humanity" and states: "whoever violates or infringes humanitarian duties, laws or agreements with respect to prisoners or hostages of war, wounded during military actions, or who commits any inhumane act against civilians, or against hospitals or places intended for the wounded, shall be punished with prison of twenty to thirty years" (own translation). On this particular article, legal scholars have concluded that Article 378 "incorporates into domestic law, both war crimes and crimes against humanity ... while genocide has its own criminal offense in the Guatemalan legal system." See: International Commission of Jurists, *Comentario jurídico al artículo 378 del Código Penal de Guatemala. "Delito contra los deberes de la humanidad"*, 2014, p. 115

⁷ See Molina Theissen judgment, p. 1017-1040

⁸ The figure of dignified reparation is regulated in Article 124 of the Guatemalan Code of Criminal Procedure, which provides:

"The reparation to which the victim is entitled includes the restoration of the right affected by the criminal act, which starts from recognizing the victim as a person with all their circumstances as subject of rights against whom the criminal action fell, up to the alternatives available for their social reincorporation in order to enjoy or make use as soon as possible of the affected right, to the extent that such reparation is humanly possible and, where appropriate, compensation for the damages derived from the commission of the crime; To exercise this right, the following rules must be observed:

1. The action for reparation may be exercised in the same criminal process once the conviction has been handed down. The judge or court that issues the sentence of conviction, when there is a determined victim, in the report of the sentence will summon the procedural subjects and the victim or aggrieved to the hearing of reparation, which will be held on the third day.

code of criminal procedure was installed, which provides reparations that go beyond the mere recognition of criminal liability and reaching as far as obligating the state to implement measures to repair the damage done as well as to provide guarantees of non-recurrence. Consequently, on May 28, 2018 the Court ordered the following integral and transformative measures: a) Pass legislation that enables the creation of the National Registry of victims of enforced disappearances; b) Approve draft bill No. 3590 which regulates the creation of Commission dedicated to searching disappeared persons.⁹ Both of these measures are aimed at the Guatemalan Congress.

Other measures involve: the creation of a written and audiovisual documentary of the case by the University of San Carlos to give visibility to the case; translation of the judgment to the two predominant Maya languages in Guatemala City and Quetzaltenango; creation of a scholarship named Marco Antonio Molina Theissen by the Ministry of Education; creation of the Molina Theissen award to military officials and staff who perform humanitarian or human rights work; declaration of the 6 October as the National Day of Disappeared Children; provision of economic compensation to anyone who gives information regarding clandestine cemeteries; creation of a monument in the name of Emma Molina Theissen in Military Zone No. 17, where she was held in captivity, and compliance with all pending reparations ordered by the IACtHR in its 2004 judgment.

Relevance of the judgment

This case is important for several reasons. First, the fact that former high-ranking military officials were found guilty of crimes against humanity is a positive step in combating the climate of impunity prevalent in the Guatemalan justice system. It is important to highlight once again that one of the defendants, Benedicto Lucas García, was the head of the Army and the brother of Fernando Romeo Lucas García, a dictator during the worst years of the armed conflict. This sends the message that anyone can be held accountable for crimes committed during the armed conflict.

Second, the case acknowledges the permanent nature of enforced disappearance and highlights the forced disappearance of children during the armed conflict, which according to human rights organizations, amounts to 5,000 cases.¹⁰ Therefore, the Molina Theissen case can pave the way for similar cases.

Third, the case continues the judicial precedent set by the 2016 Sepur Zarco judgment, by ruling that rape and sexual violence were used as weapons of war during the internal armed

2. At the reparation hearing, the amount of the compensation, the restitution and, where appropriate, the damages under the evidentiary rules shall be accredited and the decision shall be pronounced immediately at the hearing itself.

3. With the decision of reparation, and the previously reported criminal responsibility and penalty, the written sentence is integrated.

4. Notwithstanding the foregoing, at any time during the criminal proceedings, the victim or aggrieved party may request the competent judge or court to adopt precautionary measures to ensure sufficient assets to cover the amount of the reparation.

5. The declaration of civil liability will be enforceable when the conviction is final.

⁹ The draft bill 3590 was submitted on 2007 by the Working Group Against Enforced Disappearance in Guatemala, a coalition of several human rights organizations. The main objective of the bill is the creation of an autonomous commission of humanitarian nature, tasked with establishing non-criminal investigation procedures in order to determine the whereabouts and the circumstances surrounding the disappearances as well as providing integral support for the victims. At the time of writing, the draft bill has two favorable opinions, one from the Finance Commission and the other from the Constitutional Points Commission, both of the Guatemalan Congress. A final third reading needs to be scheduled in order for it to be approved.

¹⁰ According to the UN truth commission report, 11% of the total of disappeared persons during the armed conflict are children. See. United Nations, Historical Clarification Commission, Guatemala Memory of Silence, para. 2505.

conflict.¹¹ In addition, the Court also found that sexual violence can be torture and used as a method to destroy women's will with the goal of gaining useful information for military intelligence.¹² This interpretation not only gives visibility to a crime that has not been duly investigated and prosecuted due to the fear and stigmatization that surrounds it, but also validates women's testimonies¹³ in cases of rape.

Fourth, the integral and transformative reparation measures are of crucial importance in order to fulfil the right to truth and non-repetition for the victims. They complement the reparations first granted in the IACtHR judgment by additionally pressuring authorities to comply with their obligations. An example of this is the order to approve the Law Project 3590 to create a commission of disappeared persons and to continue to clarify Marco Antonio's fate and to enact proceedings to declare his presumed death.

Finally, for the Molina Theissen family, the judgment represents a type of reparation in itself, as interpreted by previous IACtHR jurisprudence,¹⁴ because it not only provides legitimacy to their statements, but also acknowledges the family as right holders. It fulfils their right to truth and justice by identifying and judging the direct and indirect perpetrators of the crimes. However, it is important to highlight that these rights will only be completely satisfied when Marco Antonio's fate is revealed. And lastly, as international observers of the trial point out "The juridical truth' established in this judgment ... contributes to rewriting the history of the Guatemalan conflict."¹⁵

Conclusion

Despite being 37 years late, the Molina Theissen judgment comes at a time when the investigation and prosecution of international crimes is increasing in Guatemala. This tendency can help shrink the accountability gap if prosecutorial openness continues in the judicial system. Nevertheless, Guatemala still has a long way to go in order to fully observe international standards regarding enforced disappearances. First, a set of public policies aimed at finding disappeared persons is urgently needed. In this regard, political will is crucial to approve Law Initiative 3590 to create the Commission and Registry of Disappeared Persons, which at the time of writing has not advanced. Additionally, and as pointed out by numerous reports of the High Commissioner of Human Rights,¹⁶ the Guatemalan Government needs to ratify the United Nations Convention on Enforced Disappearance in order to improve their normative framework. In order to achieve these measures, victim and civil society participation needs to

¹¹ Tribunal Primero de sentencia penal, narcoactividad y delitos contra el ambiente, Sepur Zarco judgment, p. 494-495.

¹² High Risk Court C, Molina Theissen judgment, 2018, p. 1062.

¹³ Another important aspect in this regard is the respect of international standards during the trial, especially the ones pertaining to "not obligating the victim to repeat her testimony in court (her testimony before the preliminary judge was entered into evidence and presented during the proceedings) and for not subjecting her to confrontations with the accused" See: International Justice Monitor, *The Molina Theissen Judgment, Part I: Overview of the Court's Findings*, available at: <https://www.ijmonitor.org/2018/08/the-molina-theissen-judgment-part-i-overview-of-the-courts-findings/>

¹⁴ See *Espinoza González v. Perú, Human Rights Defender et al. v. Guatemala and Velásquez Paiz et al. v. Guatemala* for jurisprudence considering judgments as a form of reparation.

¹⁵ International Justice Monitor, *The Molina Theissen Judgment, Part II: The Court's Handling of Defense Arguments*, August 6, 2018, available at: <https://www.ijmonitor.org/2018/08/the-molina-theissen-judgment-part-ii-the-courts-handling-of-defense-arguments/>

¹⁶ Office of the United Nations High Commissioner of Human Rights, *Amicus Curiae presentado por la Alta Comisionada de las Naciones Unidas para los Derechos Humanos a la Corte de Constitucionalidad sobre el tema de desaparición forzada*, 2010, p. 4.

continue in order to pressure authorities to fulfil their international human rights obligations regarding truth, justice, reparation and guarantees of non-recurrence.