

REPORT N° 79/01
CASE 12.101
MARCO ANTONIO MOLINA THEISSEN
GUATEMALA
October 10, 2001¹

I. SUMMARY

1. On September 8, 1998, the Center for Justice and International Law (CEJIL) and the *Grupo de Apoyo Mutuo* (GAM) (hereinafter "the petitioners") submitted a petition to the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission," or "the IACHR") denouncing the forced disappearance of Marco Antonio Molina Theissen (hereinafter "the alleged victim"), a 14-year-old child who was allegedly abducted from his parents' home by members of the armed forces of the Republic of Guatemala (hereinafter "the State" or "the Guatemalan State") on October 6, 1981.

2. The petitioners allege that the following rights enshrined in the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") were violated: the right to life (Article 4), the right to humane treatment (Article 5), the right to personal liberty (Article 7), the rights of the child (Article 19), the right to a fair trial (Article 8), and the right to judicial protection (Article 25), all this in conjunction with the State's duty of respecting and ensuring the cited rights set forth in Article 1(1). They also claim that the right to juridical personality, protected by Article 3 of the American Convention, was violated. With respect to the admissibility of this case, the petitioners claim to have filed five *habeas corpus* remedies and two special investigation procedures.

3. The State provided information about the latter investigation procedure, but it did not expressly raise the matter of due exhaustion of domestic remedies.

4. After analyzing the parties' arguments and their compliance with the admissibility requirements set forth in the Convention, the Commission has decided to declare the petition admissible.

II. PROCESSING BY THE COMMISSION

5. The complaint was submitted to the IACHR on September 8, 1998, and its appendices on September 14 of that same year. The relevant parts of those communications were forwarded to the State on February 2, 1999.

6. On April 26, 1999, the State provided some preliminary information and requested a 60-day extension for presenting a more complete reply. On May 6, 1999, the Commission forwarded the State's report to the petitioners and granted them a period of 30 days within which they were requested to present their comments.

7. On June 17, 1999, within an extension granted by the Commission the petitioners submitted their observation on the State's reply. On July 2 the State supplied information. On July 16 the petitioners' comments were forwarded to the State. On August 19, the State sent information again. On August 23, the petitioners submitted what they claimed were their final comments.

¹ Commissioner Marta Altolaguirre, a Guatemalan national, did not participate in discussing and deciding on this case in accordance with Article 17(2)(a) of the Commission's new Rules of Procedure, which came into force on May 1, 2001.

8. On September 7, 1999, the State was sent the petitioners' comments on its reply of August 19. On October 15, the State submitted a new document containing information. That document was forwarded by the Commission to the petitioners on October 28, 1999.

9. On July 28, 2000, the IACHR put itself at the disposal of the parties with a view to reaching a friendly settlement. On March 2, 2001, the Commission held a meeting at its headquarters in order for the parties to discuss the terms of a possible friendly settlement.

10. On October 13, 2000, during the Commission's 108th session, the petitioners signed a document setting the foundations for a friendly settlement agreement that they pledged to draw up.

11. On April 30, 2001, the petitioners informed the IACHR about their intention to withdraw from the friendly settlement procedure undertaken with the State of Guatemala.

III. POSITIONS OF THE PARTIES

A. Petitioners

12. The petitioners claim that on October 6, 1981, at around 1:30 p.m., three men, armed with automatic pistols, entered the home of the Molina Theissen family. The men handcuffed Marco Antonio Molina Theissen, who at that time was 14 years old, tied him to the arm of a chair, and gagged him with a strip of masking tape. They stayed in the house for about 40 minutes before leaving in a pick up truck taking the boy, who still was handcuffed and gagged. Members of the family wrote down the truck's license plate that according to the investigations carried out by the alleged victim's parents at the General Directorate of Internal Revenue and the General Directorate of the National Police was identified as belonging to a Guatemalan army vehicle. To date the whereabouts of Marco Antonio Molina Theissen remains unknown.

13. The petitioners suggest that the abduction of Marco Antonio Molina Theissen was carried out as a retaliation after his sister, Emma Guadalupe, a former student leader, managed to escape from the hands of the army. Some days before the kidnapping of Marco Antonio Molina Theissen, his sister had been imprisoned for nine days in which she was interrogated, tortured, and raped, before she could escape. Her brother Marco Antonio was abducted the day after she escaped.

14. The petitioners report that the alleged victim's family filed several *habeas corpus* with the judiciary. The first one was lodged on the day of the kidnapping, October 6, 1981; another on June 23, 1997;² and the last one on August 12.³ They also claim that they filed two special investigation procedures, but none of them lead to a positive result. The first special procedure was lodged on January 14, 1998,⁴ and the second one on February 5 of the same year. The petitioners state that the failure of these remedies and the State's unwillingness to investigate the disappearance constitute grounds for resorting to the exception to the rule of the previous exhaustion of domestic remedies, in as much as those remedies have proved to be ineffective.

15. Regarding the rights that the petitioners claimed have been violated, they note that Marco Antonio Molina Theissen was last seen in the hands of State agents and so it can be assumed that his life was taken arbitrarily and illegally, breaching Article 4 of the Convention. They allege that the boy's forced disappearance constitutes a violation of his right to human treatment, and that the circumstances in which the alleged victim was detained, handcuffed, and gagged, all together with the fact that torture was a common practice in Guatemala at

2 Appendix to the petition, submitted on September 14, 1998. Recorded as received by the clerk of the Supreme Court on July 9, 1997.

3 Appendix to the petition, submitted on September 14, 1998. Recorded as received by the clerk of the Supreme Court on August 11, 1997.

4 Appendix to the petition, submitted on September 14, 1998. Recorded as received by the clerk of the Supreme Court on January 20, 1998.

that time, lead to the assumption that Marco Antonio Molina Theissen was tortured. The petitioners add that Marco Antonio Molina Theissen's disappearance also violated the right to human treatment of his parents and other family members, pursuant to Article 5 of the Convention. The disappearance, they say, also constituted an arbitrary denial of liberty, thus a violation of Article 7 of the Convention. The State, according to the petitioners, also violated Article 19 of the Convention by failing to provide special measures of protection for children, bearing in mind that Marco Antonio Molina Theissen was 14 years old when he was kidnapped. They also claim that the State has violated Articles 8 and 25 of the Convention by denying Marco Antonio Molina Theissen and his family effective remedies, since they filed several *habeas corpus* recourses that failed to lead to an appropriate investigation. Finally, invoking an emerging principle within international law, they allege that there was a violation of the right to truth. Later, the petitioners additionally invoked a violation of Article 3 of the American Convention (the right to juridical personality) as a result of the forced disappearance of Marco Antonio Molina Theissen.⁵

B. State

16. The State of Guatemala, in all its communications, provided the Commission with information regarding only the Special Investigation Procedure 2-98, lodged with the criminal chamber of the Guatemalan Supreme Court on February 5, 1998.

17. The State said that as a part of that special investigation procedure, on April 5, 1999, María de la Cruz Ortiz, a prosecution agent with the Public Prosecution Service, reported to the Supreme Court on the steps taken therein and concluded that they had been unable to establish the boy's whereabouts.⁶ The Supreme Court's criminal chamber issued a resolution convening a hearing for April 26, 1999.⁷ At that hearing, the State said, "the special investigation procedure was ruled admissible and the Human Rights Attorney [Guatemala's Ombudsman] was instructed to begin an investigation. Jurisdictional control over the Special Investigation Procedure No. 2-98 was given to the Fifth First-Instance Court for Criminal, Drug, and Environmental Offenses." At the hearing, the representative of the *Grupo de Apoyo Mutuo* (GAM) requested a new hearing for the submission of evidence, which was set for May 7, 1999. At that hearing, the Supreme Court of Justice asked the Human Rights Attorney to present his report on June 25, 1999. On that date, the Ombudsman requested a three-month extension.⁸

18. Finally, on October 12, 1999, the State reported that the Attorney had presented the relevant documents on September 25, 1999, and that they were being studied by the judge. It also said that the results of the proceedings would be forwarded to the Commission once they were handed down by the court; however, the State has not yet forwarded them.

19. In its communications, the State failed to provide the IACHR neither with information on an earlier special investigation procedure that was lodged with the Supreme Court of Justice on January 14, 1998, or with information on the processing and results of the five *habeas corpus* remedies filed on Marco Antonio Molina Theissen's behalf. With respect to the latter recourses, the State neither refutes that they were actually lodged on behalf of the alleged victim, nor does it argue a failure to exhaust domestic remedies.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission

⁵ Communication of June 17, 1999, p. 3.

⁶ Report from the Government of Guatemala of July 1, 1999, p. 2.

⁷ Note of April 26, 1999.

⁸ Report from the Government of Guatemala of July 1, 1999, pp. 2-3, and its Report of August 16, 1999, in which the State said that: "Only when the Human Rights Attorney submits his report on the special investigation procedure will we be able to provide additional information on this case."

20. The petitioners are entitled, under Article 44 of the American Convention, to lodge complaints with the IACHR. The petition refers, as alleged victims, individual persons with respect to whom Guatemala had assumed the obligation to respect and ensure the rights enshrined in the Convention. As regard to the State, the Commission observes that Guatemala has been a state party to the American Convention since its ratification on May 25, 1978. The Commission, therefore, has competence *ratione personae* to examine the instant petition.

21. The Commission has competence *ratione loci* to examine this petition since the alleged violation to the rights protected by the American Convention occurred within the territory of a state party to that instrument.

22. The Commission has competence *ratione temporis* since the alleged incidents took place at a time when the obligation of respecting and guaranteeing the rights enshrined in the Convention was already into force for the State.

23. Finally, the Commission has competence *ratione materiae*, since the petition describes violations of human rights that are protected by the American Convention.

B. Admissibility requirements

1. Exhaustion of domestic remedies

24. Article 46(1)(a) of the American Convention stipulates that one of the requirements for a petition to be admitted is that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness. Adequate domestic remedies within the domestic legal system are those that are suitable to redress an infringement of a legal right. An effective remedy is one that is capable of producing the result for which it was designed.⁹

25. Members of the alleged victim's family claim to have filed a total of five *habeas corpus* remedies, from which the petition reports only on three and attaches records on two. The first one was presented the same afternoon as the disappearance occurred; the second one on June 23, 1997; and the third one on August 12 of the same year. The latter remedy was declared inadmissible, while the IACHR is unaware of the results of the others. The petitioners also filed a special investigation procedure¹⁰ before the Supreme Court of Justice on January 14, 1998, and another one with the Supreme Court's criminal chamber, on February 5, 1998. The latter one was lodged with the criminal chamber of the Supreme Court on May 7, 1999.¹¹ In that procedure, the Attorney for Human Rights was instructed to begin the investigation, while the jurisdictional control over the proceedings was given to the Fifth First-Instance Court for Criminal, Drug, and Environmental Offenses. However, in spite of the indications that a disappearance had happened, the State has not ordered an investigation to determine the

9 Inter-Am.Ct.H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C Nº 4, paragraphs 63-64; *Godínez Cruz Case*, Judgment of January 20, 1989, Series C Nº 5, paragraphs 66-67; *Fairén Garbí and Solís Corrales Case*, Judgment of March 15, 1989, Series C Nº 6, paragraphs 87-88.

10 Article 476 of the Code of Criminal Procedure provides that if a *habeas corpus* remedy is lodged and fails to locate the individual in question, and there are sufficient grounds for believing that said individual has been arrested or illegally kept in detention by a public official, members of the state security forces, or regular or irregular agents, and no explanation of the individual's whereabouts is given, the Supreme Court of Justice may, following a request made by any person: (1) Call on the Public Prosecution Service to report to the Court, within a period of five days, on the progress and results of the investigation, and on the measures taken and ordered and on those still awaiting execution. The Supreme Court of Justice may, when necessary, shorten the period of time allowed. (2) Order the investigation (preparatory procedure) to be conducted solely by: (a) the Attorney for Human Rights; (b) an agency or association legally existing in the country; (c) the victim's spouse or relatives.

11 Resolution of May 7, 1999, from the Supreme Court of Justice's criminal chamber, attached to the petitioners' note of June 17, 1999.

whereabouts of Marco Antonio Molina Theissen, as required by Article 109 of the Law on Amparo, *Habeas Corpus*, and Constitutionality.¹²

26. With respect to the instant aspect on admissibility, the Commission observes that, at no time during the processing of this case, the State argued that domestic remedies had not been exhausted neither in the *habeas corpus* applications nor in the special investigation procedures. The State of Guatemala merely reported, inconclusively, on the formalities already pursued and those pending execution regarding the Special Investigation Procedure 2-98.

27. It is for the IACHR to determine whether the State tacitly waived the right to invoke such an objection. The Inter-American Court has ruled, in the case of the Mayagna (Sumo) Awas Tingni Community, that "in order to validly oppose the admissibility of the petition... the State should have expressly and in a timely manner invoked the rule that domestic remedies should be exhausted."¹³ Similarly, the Court has also ruled that: "The objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed."¹⁴ Consequently, the IACHR rules that in the case subjudice, the Guatemalan State has not invoked the exception in question and has, in fact, tacitly waived it by failing to raise it expressly and in a timely manner in any of its communications sent to the Commission.

2. Filing period

28. According to Article 46(1)(b) of the American Convention, the general rule is that a petition must be lodged within a period of six months "from the date on which the party alleging violation of his rights was notified of the final judgment." According to Article 32(2) of the Commission's Rules of Procedure, this deadline shall not apply when exceptions to the requirement of prior exhaustion of domestic remedies are applicable. In such situation, the Rules of Procedure stipulate that the petition must be lodged within a reasonable period of time, considering the date on which the alleged violation of rights occurred and the specific circumstances of the case.

29. The Commission notes that neither Marco Antonio Molina Theissen's family nor the petitioners were notified by means of a final decision reached in any of the remedies invoked under the domestic jurisdiction, because in none of them the judiciary reached a final decision.

30. With respect to the date on which the alleged violations of Marco Antonio Molina Theissen's rights occurred, the petitioners report that the forced disappearance took place on October 6, 1981. The State, in turn, at no time questioned that date before the IACHR. Under Article III of the Inter-American Convention on Forced Disappearance of Persons,¹⁵ the instrument that codifies the inter-American system's jurisprudence and practice in this regard, forced disappearance is a crime that "shall be deemed continuous or permanent as long as the fate or

12 Decree Nº 1-86 of the Constituent National Assembly; Art. 109: Investigation with respect to disappeared persons. Should the proceedings followed reveal the disappearance of the person on whose behalf the habeas corpus was filed, the court shall immediately order an investigation of the case.

The police authorities shall be required to report to the court, to the Attorney for Human Rights, and to the parties involved, regarding the investigations carried out, which shall be ongoing until the truth is secured with respect to the whereabouts of the disappeared person; in turn, the Tribunal of Habeas Corpus shall report to the Supreme Court of Justice regarding all the formalities and any emerging circumstances.

13 Inter-Am.Ct.H.R., *Mayagna (Sumo) Awas Tingni Community Case*, Preliminary Objections, Judgment of February 1, 2000, Series C Nº 67 paragraphs 54-55. The Court notes that: "Although it is true that the briefs presented by Nicaragua to the Commission while the petition was being processed indicated, among other information, the progress of the proceedings before the domestic courts... it is evident that the State did not clearly file the objection that domestic remedies had not been exhausted during the first stages of the proceeding before the Commission. There is no record in the file that this objection had been invoked expressly until the end of 1997." (Emphasis added.)

14 Inter-Am.Ct.H.R., *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, Series C Nº 1, paragraph 88; *Godínez Cruz Case*, Preliminary Objections, Judgment of June 26, 1987, Series C Nº 3, paragraph 90; *Fairén Garbi and Solís Corrales Case*, Preliminary Objections, Judgment of June 26, 1987, Series C Nº 2, paragraph 87; *Loayza Tamayo Case*, Preliminary Objections, Judgment of January 31, 1996, Series C Nº 25, paragraph 40.

15 Adopted at Belém do Pará, Brazil, on July 9, 1994, during the twentieth regular session of the General Assembly. In force since March 28, 1996; ratified by Guatemala on February 25, 2000.

whereabouts of the victim has not been determined.”¹⁶ “In addition, under Guatemala’s domestic legislation, Article 201 TER of the Penal Code [...] stipulates in the pertinent part that the crime of forced disappearance ‘shall be deemed to be continuing until such time as the victim is freed’.”¹⁷

31. Consequently, in order to determine the date on which the alleged violation of rights occurred, the IACHR must consider first October 6, 1981 as the moment when the perpetration of the alleged violation began and second, all the time that has elapsed since then, because the effects of such infringements “may be prolonged continuously or permanently until such time as the victim’s fate or whereabouts are established.”¹⁸

32. The Commission notes that, since Marco Antonio Molina’s disappearance, his family has, on several occasions, resorted to the Guatemalan justice system in order to establish his whereabouts. Thus, as stated above, the family not only filed *habeas corpus* remedies on the very day that the allegedly continuous violation began; in 1997 they repeated twice the *habeas corpus* application. In addition, in 1998, the alleged victim’s relatives filed two special investigation procedures; the latter was admitted by the Supreme Court’s criminal chamber on May 7, 1999. All this indicates that the alleged victim’s relatives first resorted to the domestic courts in search of justice and, later, since no adequate resolution was forthcoming, they took their case to the inter-American system for the protection of human rights.

33. Consequently, in light of the date on which the perpetration of the alleged crime began and taking into account the specific circumstances of this case—particularly the continuous nature of the alleged violations and the failure of the different remedies pursued under the domestic jurisdiction—the Commission rules that the petition was lodged within a reasonable period of time.

3. Duplication of proceedings

34. Nothing in the case file indicates that the substance of this petition is pending in any other international settlement proceeding or that it is substantially the same as any other petition already examined by the Commission or other international body. The Commission therefore concludes that the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the alleged facts

35. Article 47(b) of the Convention states that a petition shall be declared inadmissible when it “does not state facts that tend to establish a violation of the rights guaranteed by this Convention.” The petitioners claim that the forced disappearance of Marco Antonio Molina Theissen at the hands of agents of the State of Guatemala constitutes a violation of the right to juridical personality (Article 3), the right to life (Article 4), the right to humane treatment (Article 5), the right to personal liberty (Article 7), the rights of the child (Article 19), the right to a fair trial (Article 8), the right to judicial protection (Article 25), and the right to truth, all in conjunction with the State’s duty of respecting and ensuring those rights set forth in Article 1(1) of the Convention. The Commission considers that the allegations made by the petitioners, if true, could tend to establish violations of rights protected by the American Convention. Moreover, the Commission considers that the allegations tend to establish a violation of the commitments set forth in Article 1 of Inter-American Convention on Forced Disappearance of Persons, which the Guatemalan State assumed by ratifying that international instrument. The IACHR therefore considers that this requirement has been met.

V. CONCLUSIONS

¹⁶ *Ibid.*

¹⁷ Inter-Am.Ct.H.R., *Blake Case*, Preliminary Objections, Judgment of July 2, 1996. Series C N° 27, paragraph 38.

¹⁸ *Ibid.*, paragraph 39.

36. The Commission concludes that it is competent to examine this petition and that the petition is admissible, according to Articles 46 and 47 of the American Convention.

37. Based on the foregoing considerations of fact and law, and without prejudging the merits of the case,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
DECIDES:**

1. To declare this case admissible with respect to the alleged violations of Articles 3, 4, 5, 7, 8, 19, 25, and 1(1) of the American Convention and of Article 1 of the Inter-American Convention on Forced Disappearance of Persons.

2. To give notice of this decision to the parties.

3. To continue with its analysis of the merits of the complaint.

4. To publish this decision and to include it in its Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the tenth day of October, 2001. (Signed): Claudio Grossman, President; Juan E. Méndez, First Vice-President; Commissioners Robert K. Goldman, Peter Laurie, Julio Prado Vallejo, and Hélio Bicudo.