

Institution:	Inter-American Commission on Human Rights
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Session:	Hundred and Fourteenth Regular Session (25 February – 15 March 2002)
Title/Style of Cause:	Sergio Andres Schiavini and Maria Teresa Schnack v. Argentina
Doc. Type:	Decision
Decided by:	First Vice-President: Marta Altolaguirre; Commissioners: Robert K. Goldman, Julio Prado Vallejo, Clare K. Roberts. The President of the Commission, Juan E. Mendez, an Argentine national, did not take part in the discussion of and decision on this report, in keeping with Article 17(2)(a) of the Commission's Rules of Procedure.
Dated:	27 February 2002
Citation:	Schiavini v. Argentina, Petition 12.080, Inter-Am. C.H.R., Report No. 5/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by:	APPLICANTS: the "Comision de Familiares de Victimas Indefensas de la Violencia Social e Institucional de la Republica Argentina COFAVI", the "Centro de Estudios Legales y Sociales CELS", the Center for Justice and International Law, and Human Rights Watch/Americas
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I. SUMMARY

1. On February 3, 1998, the Inter-American Commission on Human Rights (hereinafter the "Inter-American Commission," the "Commission," or the "IACHR") received a complaint that the "Comisión de Familiares de Víctimas Indefensas de la Violencia Social e Institucional de la República Argentina COFAVI" [Argentine Commission of Families of Defenseless Victims of Social and Institutional Violence], the "Centro de Estudios Legales y Sociales CELS" [the Center for Legal and Social Studies], the Center for Justice and International Law (CEJIL), and Human Rights Watch/Americas, hereinafter the petitioners, filed against the Republic of Argentina (hereinafter "the State," the Government" or "Argentina"). The complaint concerned the death of Sergio Andrés Schiavini on May 29, 1991, during a clash between members of the Buenos Aires Provincial Police and a gang of thieves. The latter were holding a number of people hostage inside a patisserie, one of whom was the young Schiavini. The petition also denounced the failure to provide judicial protection and denial of the guarantees of due process, and the persecution that María Teresa Schnack has suffered since the death of her son, Sergio Schiavini, because of her actions to press for investigation.

2. The petitioners contend that the State is responsible for violating the rights to life, humane treatment, a fair trial and judicial protection, recognized in Articles 4, 5, 8 and 25, respectively, of the American Convention on Human rights (hereinafter the "Convention" or the "American Convention"), all in relation to its general obligation to respect the rights recognized

in the Convention and ensure their free and full exercise to all persons subject to its jurisdiction, recognized in Article 1(1) of the Convention, to the detriment of Sergio Andrés Schiavini and his mother María Teresa Schnack de Schiavini (hereinafter “the victims”).

3. The State asked the Commission to declare the petition inadmissible on the grounds of a failure to exhaust the local remedies supposedly available under domestic law; subsidiarily, should the Commission find that the local remedies were exhausted, the State asks that the petition be declared inadmissible on the grounds that it was lodged after the deadline established in Article 46(1)(b) of the American Convention.

4. Without prejudging the merits of the complaint, the Commission concludes in this report that the petition is admissible inasmuch as it meets the requirements established in Articles 46 and 47 of the Convention. The Commission will, therefore, proceed with the analysis of the alleged violations of Articles 4, 5, 8, 25 and 1(1) of that instrument.

II. PROCESSING WITH THE COMMISSION

5. In communications dated January 14, 1999, the Commission informed the petitioners that the processing of the petition had been initiated and sent the pertinent parts of the petition to the State. It gave the Government 90 days to provide whatever information it deemed relevant concerning the facts denounced and the requirement of exhaustion of domestic remedies. On May 7, 1999, the State requested an extension of the deadline for submitting the corresponding information. By note of May 10, 1999, the Commission acceded to the State’s request by granting it a 60-day extension. It also informed the petitioners that this action had been taken.

6. The Government submitted its response to the complaint via a communication dated July 7, 1999. The pertinent parts were then forwarded to the petitioners on July 9, 1999, with the request that they submit the corresponding comments with regard to the State’s answer. On August 6, 1999, the petitioners asked the Commission for a 30-day extension of the deadline for submitting their observations, which the Commission granted by note of August 9, 1999.

7. On September 8, 1999, the petitioners submitted their observations on the State’s answer. Those observations were forwarded to the Government by a communication dated September 13, 1999. In that note the Commission advised the State that it had 60 days in which to supply additional information or make observations on the petitioners’ submissions.

8. The State submitted its observations in a communication dated November 19, 1999. The pertinent parts were then forwarded to the petitioners on November 24, 1999. They were advised that they had 30 days in which to submit their views on the State’s observations or to provide additional information. On January 21, 2000, the petitioners requested that the deadline for submitting their observations be extended. The Commission granted them a 45-day extension by a letter dated February 14, 2000.

9. On March 3, 2000, the Commission received another communication from the petitioners, this one containing their observations on the State’s latest submission. The pertinent parts of that memorial were sent to the State on May 10, 2000.

10. The State filed its third presentation of observations on May 23, 2000. Its contents were forwarded to the petitioners by note of May 30, 2000.

11. In a communication dated September 29, 2000, the petitioners supplied the Commission with additional information. That information was sent to the State on October 10, 2000, with a request that any observations in response be submitted within 60 days. In a communication of December 15, 2000, the State requested an extension of the deadline for submitting its observations. By communication dated December 18, 2000, it was granted a 30-day extension.

12. The Government responded to the petitioners' most recent submission by a communication dated January 26, 2001, the pertinent parts of which were sent to the interested parties on March 26, 2001. The latter were given 30 days to submit their observations.

13. By note of May 29, 2001, the petitioners forwarded their observations on the Government's most recent submission. In a letter dated June 27, 2001, they supplied additional information relevant to the case. The pertinent parts of those communications were forwarded to the State on September 10, 2001, with a one month time period within which to make its observations. The State was also asked to supply copies of the judicial file in the case concerning the death of young Schiavini within that same one-month period. As of the date of the present report, those copies have not been supplied.

14. Argentina answered the petitioners' latest submissions on October 10, 2001. The State's response was sent to the petitioners on October 23, 2001.

15. At the petitioners' request, the Commission convened the parties for a hearing held during its 113th regular session to discuss matters related to the petition's admissibility and to take direct testimony from Mrs. María Teresa de Schiavini. The hearing was held on November 15, 2001. At that time the State presented additional information concerning the case.

16. The information supplied by the State at the hearing on November 15, 2001, was sent to the petitioners via a communication dated December 3, 2001. The petitioners were given one month in which to submit their observations. On January 2, 2002, the petitioners submitted a communication reiterating previously stated positions. This was transmitted to the State for its information.

III. POSITION OF THE PARTIES

A. The position of the petitioners

17. The petitioners contend that the State is responsible for Mr. Sergio Schiavini's death due to the bullet wounds he sustained during the clash between the police and a gang of thieves who had taken Schiavini and others hostage. They assert that Argentina failed to comply with its duty to adequately investigate this homicide, as a result of which the victim's family was denied justice

18. The petitioners report that at approximately 1:30 a.m. on May 29, 1991, four armed subjects entered the patisserie “Dalf”, located at the intersection of Sáenz and Pellegrini streets in the county of Lomas de Zamora, Province of Buenos Aires. Their intention was to hold up the business. Once inside, they threatened the owner of the business, its customers and employees, and stole the money and personal effects of all those present (some 20 people in total).

19. According to the petitioners, the thieves had just about completed the theft of the money and personal effects of the people inside the patisserie when a Buenos Aires Police patrol car drove up. One of the thieves noticed the patrol car and alerted his associates. Following a brief conversation, the thieves decided to hold off the three police officers in the patrol car, and then get away.

20. The petitioners report that the three police officers got out of the patrol car and, in a loud voice, ordered the thieves to surrender. The thieves fired a gunshot in reply. That shot was followed by a prolonged exchange of fire. Within a few short minutes, another 15 to 17 patrol cars arrived on the scene, and around 45 more police officers, some in uniform, others in civilian dress. They, too, opened fire on the patisserie “Dalf”, using highly sophisticated and heavy weaponry. The petitioners contend that the armed confrontation lasted more than 30 minutes. They indicate that, during that time, not one police official took command of the operation in order to protect the lives and safety of the 20 hostages inside the patisserie.

21. The petitioners argue that the police firepower was excessive. The gunfire left bullet holes from the floor up to even the signs that the patisserie had mounted on the roof of the building. They argue that the action was so out of control that, at one point, the police officers who had positioned themselves on Sáenz Street opened fire on their fellow police officers positioned on Pellegrini Street; one of the police officers even shot up his own vehicle. In short, the petitioners contend that the measures taken by the Buenos Aires Police in response to the one shot fired by the thieves were completely disproportionate.

22. The petition states that the criminals used a number of the hostages, Sergio Andrés Schiavini among them, as human shields against the shots fired by the Police. The petitioners state that the thieves decided to give up when they ran out of bullets and called out to the police requesting the presence of a judge. They told the police that they had a number of hostages. Even so, the Police continued to shoot, without any regard for the lives of the hostages.

23. The petitioners contend that when Sergio Andrés Schiavini tried to leave the patisserie, he headed for the main entrance, which faces Carlos Pellegrini street. Although he had his hands in the air, the police positioned on the sidewalk opened fire. He eventually died from the serious wounds he sustained in the area of the right eyebrow and right thigh. Then, more than thirty minutes after the shooting started, one of the officers present on the scene fired teargas into the patisserie. With that, the petitioners assert, the exchange of gunfire came to a stop. That exchange left hostages José Porta (the owner of the shop), Juan Carlos Cáceres and Sergio Schiavini wounded, and the material damage done was extensive.

24. According to the petitioners, Mr. Schiavini was rushed to Luisa Gandulfo Hospital in Lomas de Zamora, where he died at around 8:15 a.m. on May 29, 1991. A number of physicians

worked to save his life, but he died from the very serious bullet wound he sustained in the area of the right eye.

25. The petitioners assert that a criminal case was instituted to investigate the “Dalf” assault, the wounds sustained by some of the hostages and the death of Mr. Sergio Schiavini. They allege that the father of one of the police officers who participated in the shootout acted as police examiner in charge of compiling material evidence and arresting suspects.

26. The petitioners believe that the purpose of the initial investigation was to eliminate any evidence that would implicate the police in the excessive use of force in the shootout on May 29, 1991. They contend that not all those who participated in the event were identified, arrested or charged; instead only 15 officers were prosecuted, and then on charges of homicide resulting from a fight, as if Mr. Schiavini had been an intentional participant in the clash. The petitioners contend that the police personnel in charge of gathering evidence at the scene of the shootout were the very same police officers who had participated in it.

27. According to the petitioners, the autopsy done on the body of Mr. Schiavini was so flawed that two other autopsies eventually had to be conducted to determine where the bullets that shot the victim were fired from. They explain that when the first autopsy was done, no photographs or x-rays of the victim’s skull were taken, and the bones of the right orbital cavity were destroyed using a hammer and chisel, a fact uncovered during the second autopsy and later admitted by the experts who took part in the first autopsy and who eventually stood trial on charges of destruction of evidence. The petitioners assert that during the second autopsy, the hands and head of the body were removed, supposedly for subsequent analysis. These were then retained in the Morgue of the Judiciary for several months for no reason. The petitioners state that at the time of the third autopsy, requested by the physicians on trial for destruction of evidence, it was found that Mr. Schiavini’s tomb had been violated and that the bones of the cranium, particularly the right orbital cavity, were either missing or destroyed.

28. According to the petitioners, it was not until May 16, 1997 that a judgment was delivered in the homicide of Sergio Schiavini. Only the thieves were convicted, and only of the crime of larceny. They were given sentences of 16 to 18 years in prison. The police officers involved in the shootout were acquitted for lack of evidence, even though their conduct was considered excessive, wrong and illegitimate.

29. The petitioners contend that, among others, the following constitute arbitrary judicial actions attributable to the State: the failure to take or consider certain evidentiary measures; the refusal to allow the family’s defense attorney to question the witnesses; the fact that persons with a direct or indirect interest in the case were in charge of the investigation; the irregularities in the proceedings conducted for the oral arguments hearing; the contradictions contained in the judgment from the murder trial; the acquittal of the police officers involved in the shootout; and the acquittal of the physicians who destroyed evidence related to Mr. Schiavini’s murder.

30. The petitioners affirm that even though complaints were filed promptly to report the threats, persecution and harassment against the Schiavini family, particularly against the victim’s

mother for having pressed for the investigation and eventual punishment of those responsible for the murder, those complaints were not properly investigated.

31. The petitioners maintain that the petition satisfies the admissibility requirements established in the American Convention and the Commission's Rules of Procedure. They point out that the victim's next of kin were never able to get the courts to clarify the facts denounced because the competent authorities did not conduct a proper investigation. The petitioners argue that the system of criminal procedure in force in the Province of Buenos Aires at the time did not afford Mr. Schiavini's family the guarantees of due process of law necessary for the determination of the rights of the victim or even their own rights as his next of kin, to have the facts of the case clarified, those responsible punished and to receive compensation.

B. The State's position

32. The State, for its part, contends that Mr. Sergio Andrés Schiavini sustained the bullet wounds that ultimately caused his death while being held hostage by the thieves who entered the premises of the "Dalí" patisserie in the early morning hours of May 29, 1991. It affirms that the clash that occurred between the robbers and the police left only three people wounded. The shots that wounded those three people were all fired by the criminals.

33. The State points out that it was not lack of control or coordination or apparent lack of skill on the part of the police officers that put Mr. Schiavini's life in peril, or in greater peril than it was in at the hands of the criminals. It denies that the police investigation was intended to erase any evidence that might point to excessive force on the part of the police or implicate them in Schiavini's death. It also denies that members of the judicial branch of government failed to honor their obligation to investigate the facts; attempted to destroy evidence; desecrated the victim's body; failed to conduct a fair trial to punish the guilty parties; or that its agents harassed or persecuted the Schiavini family in any way.

34. According to the State, it was shown at trial that the thieves fired the shots that wounded Mr. Schiavini and the other two hostages wounded. Those thieves were prosecuted and sentenced according to the law. The State, therefore, cannot be accused of violating Articles 4 and 5 of the Convention. The State also contends that the victim's next of kin were able to intervene in all phases of the court proceeding, to propose experts and appoint attorneys, as well as to file suit against the persons convicted under criminal law of the murder to seek financial compensation.

35. The State contends that the Commission should declare the petition inadmissible because the petitioners failed to properly exhaust local remedies in the criminal case that resulted in the conviction of the persons alleged to be responsible for Sergio Schiavini's death. In the Government's opinion, the remedy invoked by the victim's next of kin – a *recurso de inaplicabilidad de la ley* -- was not filed within the time period prescribed in Article 361 of the Code of Criminal Procedure of the Province of Buenos Aires in force at that time. It also points out that even though Article 87 of the Code of Criminal Procedure expressly limited the intervention of the injured private parties in the proceedings, it is no less true that under certain circumstances, a court could grant an appeal filed by the family.

36. The State contends that because the alleged aggrieved parties did not attach to their submission the copies necessary to effect the necessary transfers, as required under Articles 257 and 120 of the National Code of Civil and Commercial Procedure, the high court was unable to grant certiorari in response to the extraordinary federal appeal filed by Mr. Schiavini's family once the *recurso de inaplicabilidad de la ley* was denied. The Government contends that at the time, it notified the petitioners that they were required to supply the copies in question within 48 hours. That notification was directed to the case file, since under the procedural law in force at the time the court was under no obligation to serve notification at the registered domicile. It therefore considers that this federal extraordinary appeal, too, was filed incorrectly, and was denied accordingly, a fact not attributable to the State but to the carelessness of the petitioners themselves.

37. According to the State, the petitioners were also late in filing an appeal of complaint [*recurso de queja*], which is why the Supreme Court refused to hear it. In short, the State considers that, as evidenced by the petitioners' own statements, the appeals used by the next of kin of Sergio Schiavini were either filed late or did not meet the requirements stipulated by law. For these reasons, the State considers that the petition should be declared inadmissible.

38. In addition, the Argentine State argues that the petition is inadmissible because it was lodged after the expiration of the six-month time period provided for in Article 46(1)(b) of the American Convention. The petitioners tacitly consented to the lower court's ruling of May 20, 1997. The ruling became final on that date because the reservation provided for in Article 361 of the Code of Criminal Procedure of the Province of Buenos Aires was not filed[FN1]. However, it was not until February 3, 1998 that the petition was lodged with the Commission.

[FN1] The provision in question reads as follows: "Article 361. The time period for filing appeals challenging constitutionality and applicability is ten days counted from the date of notification of judgment. However, if, within three days of notification of the judgment the parties do not indicate that they will file an appeal, the judgment shall become final."

39. Concerning criminal case No. 30,193, "Amoroso re complaint," brought against the physicians who conducted the first autopsy on the body of Sergio Schiavini and who were charged with destruction of evidence and adulteration of the findings, the State asserts that the rights of the victim's family were not affected. To support its claim it points out that the alleged aggrieved parties appointed experts and did not challenge the verdict of acquittal delivered on November 17, 1994. Here again, the Government argues that the petition was filed after the six-month period provided for under Article 46(1)(b) of the American Convention had expired.

40. Finally, the State contends that the supposed persecution and harassment of the Schiavini family, particularly Mrs. Teresa Schnack, has not been proved. The State initially argued that the alleged victim failed to indicate whether any complaint had been filed with the authorities and if so what the outcome had been. Consequently, it argued that this allegation of the petitioners

should be rejected as generic. Since that time, the State has not supplied any additional information on the investigations undertaken into this matter.

IV. ANALYSIS ON ADMISSIBILITY

A. Competence of the Commission *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*

41. The Commission is competent to examine the petition in question. Under Article 44 of the Convention and Article 23 of the Rules of Procedure of the Commission, the petitioners are authorized to file complaints alleging violations of rights protected under the American Convention. The alleged victims, Sergio Andrés Schiavini and María Teresa Schnack, are persons whose rights were protected under the Convention, the provisions of which the State had undertaken to respect. Argentina has been subject to the jurisdiction of the Commission, under the terms of the Convention, since September 5, 1984, the date on which it deposited its instrument of ratification.

42. Inasmuch as the petitioners have filed complaints alleging violation of Articles 4, 5, 8, 25 and 1(1) of the American Convention, the Commission is competent *ratione materiae* to examine the complaint.

43. The Commission is competent *ratione temporis* to examine the complaints because the petition alleges facts that occurred since May 29, 1991, the date on which Mr. Schiavini sustained the injuries that ultimately produced his death. The facts alleged, therefore, occurred subsequent to the date on which Argentina's obligations as a State party to the American Convention took effect.

44. Finally, the Commission is competent *ratione loci*, given that the petition indicates that the alleged victims were under the jurisdiction of the Argentine State at the time the alleged events occurred, which reportedly took place within the territory of that State.

B. Admissibility requirements

a. Exhaustion of local remedies

45. Article 46(1)(a) of the American Convention provides that the admissibility of a petition depends directly of the fact "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." [FN2] Both the Inter-American Court of Human Rights (hereinafter "the Court") and the Commission have repeatedly held that "(...) under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it before it has had the opportunity to remedy them by internal means. [FN3] However, the very same Convention provides that this provision will not apply when there are no local remedies to be exhausted, whether because of factual circumstances or points of law. To be more specific, Article 46(2) provides exceptions to

the general principle of exhaustion of local remedies when the domestic law of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; when the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or when there has been unwarranted in rendering a final judgment under the aforementioned remedies.

[FN2] See IACtHR, Exceptions to the Exhaustion of Domestic Remedies (Article 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, Ser. A No. 11, paragraph 17.

[FN3] See IACtHR, In the Matter of Viviana Gallardo et al., Decision of November 13, 1981, Ser. A No. G 101/81, paragraph 26.

46. In the instant case, although the Public Prosecutor's Office had delivered an indictment in trial N° 31,360, "Villarroel, Miguel et al. re aggravated robbery and homicide," it did not appeal the ruling handed down on May 16, 1997 which acquitted the police officers involved in the shootout that left Sergio Schiavini mortally wounded. When this happened, notwithstanding that they lacked procedural standing,[FN4] the family of the victim attempted to seek review of the decision on appeal. Accordingly, they filed the following recourses: 1) an appeal challenging the applicability of the law (an extraordinary appeal at the provincial level), filed on May 30, 1997 and denied on June 6, 1997 on the grounds that it was filed after the deadline; 2) an extraordinary federal appeal, filed on June 23, 1997 and denied on August 19, 1997, and 3) an appeal of complaint, filed on September 10, 1997 and denied on September 22, 1997.

[FN4] Articles 87 and 350 of the Code of Criminal Procedure of the Province of Buenos Aires, in force at the time the trial judgment was handed down did not give an aggrieved private party procedural standing to file appeals challenging the trial ruling.

47. In summary, what the State argues is that the petitioners improperly filed the appeals that were supposedly available to them to challenge the lower court ruling delivered in criminal trial N° 31,360, "Villarroel, Miguel et al. re aggravated robbery and homicide." The State also alleges that the petitioners did not challenge the legitimacy of the verdict of acquittal delivered in trial N° 30,193 "Amoroso re complaint." The State therefore concludes that the petition should be declared inadmissible.

48. For their part, the petitioners assert that under the criminal procedural law in effect at the time in the Province of Buenos Aires, they did not have standing to file any appeal against the ruling delivered in case N° 31,360 "Villarroel, Miguel et al. re aggravated robbery and homicide." The petitioners contend that lacking such standing, they did not have effective access to the remedies under domestic law. Nevertheless, they did try to give the State the opportunity to review the ruling and awaited the outcome of appeals that were not available to them directly. As they explain, under the existing criminal procedural law, it was the Public Prosecutor's Office that had the standing to challenge the verdict. Under the law in force at that time, if the Public

Prosecutor's Office intended to challenge the verdict of the court, it was to so inform the court within three days of the notification of judgment. But the Public Prosecutor's Office did not invoke that competence. Even though the petitioners filed their appeal challenging the applicability of the law within the 10-day period required under Article 361 of the Code of Criminal Procedure of the Province of Buenos Aires, the aforementioned three-day deadline to notify the court had passed and the petitioners' challenge was denied on that account.

49. This Commission has already held that: "In terms of the burden of proof with respect to the requirements of Article 46, it should be noted that, when a petitioner alleges that he or she is unable to prove exhaustion, Article 31 of the Commission's Rules of Procedure establishes that the burden then shifts to the State to demonstrate which specific domestic remedies remain to be exhausted and offer effective relief for the harm alleged. Where the State then makes a showing that a certain remedy should have been used, the burden shifts back to the petitioner to show that it was exhausted or that one of the exceptions under Article 46 applies." [FN5]

[FN5] IACHR, Report N°72/01 (Admissibility), Case 11.804, Juan Ángel Greco, Argentina, October 10, 2001, paragraph 46. See also, for example, IACtHR, Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C No. 4, paragraphs 60 and 64.

50. As for the filing of appeals against the trial verdict in criminal case N° 31,360 "Villarroel, Miguel et al. re aggravated robbery and homicide," the Commission notes that the State has not clarified how those appeals could have been filed and effectively pursued under the then applicable law in the Province of Buenos Aires. The pertinent part of Article 87 of the Code of Criminal Procedure of the Province of Buenos Aires was as follows:

A private party wronged by a crime that the State must prosecute may intervene in the criminal trial, either on his own –assisted by legal counsel- or through an attorney acting on his behalf, but only with the faculties that this code prescribes... (emphasis added by the Commission)

Those faculties did not include the authority to challenge a verdict of conviction or to file an appeal challenging the applicability of a law, provided for in Article 350 of the Code of Criminal Procedure, or follow-up appeals when an appeal challenging the applicability of a law is denied.

51. At the hearing held on November 15, 2001, the State pointed out that there is some precedent in the case law of the Argentine courts, where a private party who was a crime victim filed an appeal to challenge the applicability of the law, and the appeal was granted. Therefore, in the instant case, had the appeals challenging the verdict of trial No. 31,360 been filed on time, the domestic courts might have granted them. Here, the Commission concurs with the finding of the European Court of Human Rights in the judgment in the Brozicek v. Italy case:

The only remedies that Article 26 of the Convention requires be exhausted are those that are available and sufficient and relate to the breaches alleged (...)

In the circumstances of the case, the Court does not consider that the appeal in question was sufficiently available. At the time, the possibility of bringing such an appeal was not expressly provided for in the legislation, but was based only on judicial interpretation of Articles 500 and 199 of the Code of Criminal Procedure in the version then in force. (emphasis added by the Commission).[FN6]

[FN6] ECHR, *Brosicek v. Italy* Case, Merits and Just Satisfaction Judgment, December 12th, 1989, Ser. A N° 167, paragraph 32.

In other words, where there are procedural rules that limit the standing to bring and act upon a given appeal, that standing cannot be conditioned on court decisions made on a case-by-case basis.

52. Under the rules of criminal procedure in effect at the time of the events in the Province of Buenos Aires, the family of Sergio Schiavini did not have the legal standing necessary to file a challenge. That standing was reserved for the Public Prosecutor. However, the latter did not challenge the decision even though it disregarded his indictment. The Commission considers that the admissibility of the present petition cannot be conditioned on the exhaustion of remedies that lacked efficacy because the petitioners were themselves procedurally barred from exercising them.

53. It is worth noting that in Argentina an appeal challenging the applicability of a law is an extraordinary remedy, as stated in Article 362 of the Code of Criminal Procedure of the Province of Buenos Aires in force at the time the events occurred. It is not the purpose of such an appeal to remedy alleged serious irregularities in the investigative stage of a criminal case. The jurisprudence of the system has established that while in some cases these extraordinary remedies may be suitable for addressing human rights violations, as a general rule the only remedies that need be exhausted are those whose function within the domestic legal system is appropriate for providing protection to remedy an infringement of a given legal right. All domestic systems have multiple remedies, but not all are applicable in all circumstances. If, in a specific case, the remedy is not appropriate, then obviously it need not be exhausted.[FN7]

[FN7] See in this regard, IACtHR, *Velásquez Rodríguez* Case, Judgment of July 29, 1988, Ser. C N° 4, paragraph 63; IACHR, Report on Admissibility N° 68/01, Case 12.117, *Santos Soto Ramírez et al.*, Mexico, June 14, 2001, paragraph 14; and Report N° 83/01 (Admissibility), Case 11.581, *Zulema Tarazona Arriate et al.*, Peru, October 10, 2001, paragraph 24.

54. For all these reasons, the Commission concludes that the exceptions provided for in Article 46(2)(a) and (b) of the American Convention apply in the present case. As it has on previous occasions, the Commission would like to point out that the application of the exceptions allowed under Article 46 of the Convention to determine the admissibility of a petition does not imply any prejudgment of the merits of the petition. The criterion used by the Commission to

analyze the petition during the admissibility phase is preliminary in nature. Consequently, while the Commission concludes that the record of the case supports its admissibility, the causes and effects that prevented exhaustion of local remedies will be examined, as appropriate, when dealing with the merits of the dispute, in order to determine whether they constitute violations of the American Convention.

b. Time period for submitting a petition

55. Article 46(1)(b) of the Convention states that for a petition to be admissible, it 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. However, Article 46(2) of the Convention and Article 32(2) of the Commission's Rules of Procedure provide that this "rule does not apply when it has been impossible to exhaust internal remedies due to a lack of due process, denial of access to remedies, or unwarranted delay in issuing a final decision (...) Nor does this rule apply where the allegations concern a continuing situation--where the rights of the victim are allegedly affected on an ongoing basis."[FN8]

[FN8] See IACHR Report N° 72/01, Op. Cit., paragraph 54; Report N° 31/99 (Admissibility), Case 11.763, Plan de Sánchez Massacre, Guatemala, April 16, 1999, paragraphs 29 and 30.

56. In the instant case, the State has argued that the verdict became final on June 20, 1997 because the petitioners did not properly file their appeals challenging the verdict in trial N° 31,360 "Villarroel, Miguel et al re aggravated robbery and homicide". Therefore, the State contends that this petition, which the Commission received on February 3, 1998, was received after the deadline and must be declared inadmissible.

57. In the instant case, the Commission is of the opinion that, in application of Articles 46(2) of the Convention and 32(2) of its Rules of Procedure, the requirement stipulated in Article 46(1)(b) of the American Convention does not apply, for the following reasons: 1) as the petitioners did not have legal standing to challenge the verdicts of the domestic courts, they cannot be required to exhaust those remedies under domestic law; 2) Mr. Schiavini's family has continued their efforts to obtain a full clarification of the facts; 3) a continuing denial of justice has been alleged; and 4) a failure to properly investigate the complaints of harassment and persecution has been alleged. The Commission therefore finds that the petition was filed within a reasonable time from the date on which the alleged human rights violations occurred.

c. Duplication of proceedings and res judicata

58. There is nothing in the case file to suggest that the petition is pending in another international proceeding for settlement or that it is substantially the same as one previously studied by the Commission or by another international organization. Therefore, the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been satisfied.

d. Characterization of the facts alleged

59. The Commission considers that, if proven, the petitioners' allegations regarding the alleged violations of the rights of Sergio Schiavini and María Teresa Schnack de Schiavini, could constitute violations of the right to life, the right to humane treatment, the right to a fair trial and the right to judicial protection, guaranteed by Articles 4, 5, 8 and 25 of the Convention in relation to Article 1(1) thereof. Furthermore, there is nothing to indicate that the petition is manifestly groundless or out of order. The Commission, therefore, considers that the requirements established in Article 47(b) and (c) of the American Convention have been satisfied.

V. CONCLUSION

60. The Commission concludes that it is competent to hear this case and that the petition is admissible under the provisions of articles 46 and 47 of the American Convention.

61. Based on the foregoing arguments of fact and of law, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible with respect to the alleged violations of Articles 4, 5, 8 and 25, in relation to Article 1(1) of the American Convention on Human Rights.
2. To notify the State and the petitioners of this decision.
3. To proceed with its analysis of the merits of the case.
4. To publish this decision and include it in the Annual Report of the IACHR to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., the 27th day of February 2002. (Signed): Marta Altolaguirre; First Vice-President, Robert K. Goldman, Julio Prado Vallejo, and Clare K. Roberts, Commission members.