

Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 102/05; Petition 12.080
Session:	Hundred Twenty-Third Regular Session (11 – 28 October 2005)
Title/Style of Cause:	Sergio Andres Schiavini and Maria Teresa Schnack v. Argentina
Doc. Type:	Decision
Decided by:	President: Clare K. Roberts; First Vice-President: Susana Villaran; Second Vice-President: Paulo Sergio Pinheiro; Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.
Dated:	27 October 2005
Citation:	Schiavini v. Argentina, Petition 12.080, Inter-Am. C.H.R., Report No. 102/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by:	APPLICANTS: the Comision de Familiares de Victimas Indefensas de la Violencia Social e Institucional de la Republica de Argentina, el Centro de Estudio Legales y Sociales, 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 lodged by the Comisión de Familiares de Víctimas Indefensas de la Violencia Social e Institucional de la República de Argentina – COFAVI [“Committee of Relatives of Defenseless Victims of Social and Institutional Violence of the Republic of Argentina]; el Centro de Estudio Legales y Sociales –CELS [Center for Legal and Social Studies [CELS]; the Center for Justice and International Law - CEJIL; and “Human Rights Watch/Americas” (hereinafter “the petitioners”), against the Republic of Argentina (hereinafter “the State”, “the Government” or “Argentina”). The petitioners claimed that the State was responsible for 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 who had taken a number of people hostage, among them the young Schiavini. The petition also denounced the denial of judicial protection and due process guarantees, and the persecution that María Teresa Schnack suffered since the death of her son, Sergio Schiavini, as a result of her actions to press for investigation.

2. On February 27, 2002, the Inter-American Commission on Human Rights adopted Report 5/02 deciding to admit the petition in relation to the alleged violations of Articles 1(1), 4, 5, 8, and 25 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”). Subsequently, in response to the IACHR’s proposal and on the occasion of

a working visit by the IACHR in August 2002, the petitioners and representatives of the State agreed to establish a process of dialogue aimed at evaluating the possibility of arriving at a friendly settlement in accordance with the provisions of Article 48(1)(f) of the American Convention. The Commission facilitated this process through the exchange of written information and through various working meetings held in Buenos Aires and at the headquarters of the IACHR.

3. On March 2, 2005, a friendly settlement agreement was signed at IACHR headquarters between COFAVI, represented by Mrs. María Teresa Schnack, mother of Sergio and petitioner, and representatives of the State. Through the publication of Decree 574/2005, signed by the President of the Argentine Republic, Néstor Kirchner, the State officially authorized the friendly settlement agreement, and pledged to comply fully with the commitments assumed therein.

4. Pursuant to Article 49 of the Convention and 41(5) of the Commission's Rules of Procedure, this friendly settlement report includes a summary of the petitioners' allegations, the friendly settlement agreement reached, and the IACHR's decision to publish it.

II. PROCESSING BEFORE THE COMMISSION

5. Following approval of Admissibility Report 5/02, in communications dated April 2, 2002, the Commission granted the petitioners a two-month period to submit their observations on the merits and, in accordance with Article 38(2) of its Rules of Procedure, it consulted the two parties as to their interest in initiating a friendly settlement process. In August 2002, in the framework of a meeting held in Buenos Aires during a working visit by the IACHR, the parties expressed their willingness to participate in a friendly settlement process.

6. This process included the exchange of written communications and proposals between the parties, a series of meetings and negotiations between the parties, the working meetings held at IACHR headquarters during its 117th session in February 2003, 118th session in October 2003, 119th session in October 2004, and 121^o session in October 2004, and those held in Argentina on the occasion of the IACHR's working visits in August 2002, August 2003, and December 2004. On October 6, 2004, representatives from CEJIL and CELS notified the IACHR of their withdrawal as co-petitioners in the case.

7. On March 2, 2005, in the framework of a working meeting held at IACHR headquarters, a friendly settlement agreement between the parties was signed with the participation of COFAVI, represented by Mrs. María Teresa Schnack as the victim's mother and petitioner; Ambassador Horacio Méndez Carreras, Special Representative for International Human Rights, Dr. Andrea Gualde, representative of the Ministry of Justice and Human Rights of the Nation; and Commissioner and Rapporteur for Argentina, Florentín Meléndez.

III. THE FACTS

8. The petitioners claim that the State is responsible for violating the rights to life, personal integrity, due process guarantees and judicial protection, in relation to the general obligation to respect and ensure rights, enshrined in Articles 4, 5, 8, 25, and 1(1), respectively, of the

American Convention on Human Rights (hereinafter, the “Convention” or the “American Convention”), to the detriment of Sergio Andrés Schiavini and his mother, María Teresa Schnack, (hereinafter “the victims”).

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

10. They report that, at approximately 1:30 a.m. on May 29, 1991, four armed subjects entered the patisserie “Dalí,” located at the intersection of Sáenz and Pellegrini streets in the Lomas de Zamora district of the 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).

11. 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 the others. Following a brief conversation, the thieves decided to hold off the three police officers in the patrol car, and then get away.

12. 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 minutes, another 15 to 17 patrol cars arrived on the scene, with approximately 45 more police officers, some in uniform and others in civilian dress. They too opened fire on the patisserie “Dalí, 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.

13. 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, and 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.

14. 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.

15. 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 later 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.

16. 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 serious bullet wound he sustained in the area of the right eye (eyebrow).

17. 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 the police examiner in charge of compiling material evidence and arresting suspects.

18. The petitioners believe that the initial investigation aimed 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.

19. According to the petitioners, the autopsy done on the body of Mr. Schiavini was so seriously flawed that two other autopsies eventually had to be conducted to determine from which direction the bullets that shot the victim were fired. 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.

20. 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.

21. 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.

22. The petitioners maintain 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 criminal procedure system in force in the Province of Buenos Aires at the time did not afford Mr. Schiavini's family the due process guarantees 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.

23. The petitioners also affirm that, while 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.

IV. FRIENDLY SETTLEMENT

24. The petitioners, represented by Mrs. María Teresa Schnack, and the representatives of the State, Ambassador Horacio Méndez Carreras, Special Representative for International Human Rights, and Dr. Andrea Gualde, representative of the Ministry of Justice and Human Rights of the Nation, signed the friendly settlement agreement, the text of which provides as follows:

FRIENDLY SETTLEMENT AGREEMENT

The parties to case N° 12.080 in the register of the Inter-American Commission on Human Rights - Sergio Andrés Schiavini and María Teresa Schnack - : La Comisión de Familiares de Víctimas Indefensas de la Violencia Social (COFAVI), represented in this act by Mrs. María Teresa Schnack, as the petitioners, and the Government of the Argentine Republic, in its capacity as State Party to the American Convention on Human Rights, hereinafter "the Convention," acting under the express mandate of Articles 99 subparagraph 11 and 126 of the Constitution of the Argentine Nation and in accordance with the provisions of Article 28 of the Convention, represented by the Special Representative for International Human Rights, Ambassador Horacio Méndez Carreras and the representative of the Ministry of Justice and Human Rights of the Nation, Dr. Andrea Gualde, have the honor of informing the illustrious Inter-American Commission on Human Rights that they have reached a friendly settlement agreement in the petition, the contents of which are provided below. They request that the Commission accept it as a reflection of the consensus they have achieved and adopt the relevant report, in conformity with Article 49 of the Convention.

I. The responsibility of Buenos Aires Provincial Police agents in the death of Sergio Andrés Schiavini

1. In light of report N° 5/02 adopted by the Inter-American Commission on Human Rights declaring the admissibility of the Schiavini case, in the framework of the IACHR's working visit to the Republic on August 5, 2002, the Ministry of Foreign Affairs, International Trade, and Worship proposed to the petitioners and to the Commission a dialogue aimed at evaluating the possibility of reaching a friendly settlement in the case.

2. Through the process initiated, it was possible to: reopen the administrative investigations of the police personnel involved in the incident; modify the procedural norms granting relatives of victims legal standing to participate in such proceedings; and, analyze and review the laws governing the use of force by police personnel. It even created the possibility, in light of what had transpired, for the Provincial Criminal Court of Cassation to order the criminal case reopened, a matter currently being examined by that high tribunal.

3. Moreover, after having scrupulously reviewed the legal case file in the light of international human rights law, the Ministry of Foreign Affairs, International Trade, and Worship of the Argentine Republic concluded that there are sufficient grounds to assert the objective responsibility in this matter of the Province of Buenos Aires and, ultimately, of the national State.

4. For his part, the Minister of Justice and Human Rights of the Argentine Republic, in a note dated August 30, 2004, informed the Ministry of Foreign Affairs [Cancillería] of the opinion issued by the Secretary of Human Rights of the former Ministry, which concludes that "...Consequently, and given the circumstances of the case brought before this Ministry of Justice and Human Rights...the conditions exist for the Foreign Affairs Ministry to pursue a friendly settlement, including express recognition of the objective responsibility of the national State in the case in point."

5. In attention to the foregoing, and in keeping with the international character of the previously acknowledged violations of rights that occurred in the jurisdiction of the Province of Buenos Aires, the Government of the Argentine Republic declares its willingness to accept that, based on the record of the case and the legal significance attached to it throughout these proceedings, it can be understood that the use of excessive force by provincial police agents has been established. These circumstances are sufficient for the national State, as a subject bound by the Convention, and in its capacity as a State Party to the Convention and in accordance with the constitutional norms cited herein, to request that the illustrious Inter-American Commission on Human Rights take as recognized the facts of what transpired in the aforementioned jurisdiction and the attendant violation of the rights and guarantees recognized by the American Convention on Human Rights as described in Admissibility Report N° 5/02, adopted by the IACHR during its 114^o regular session.

II. Measures to be adopted

A. Economic reparation

1. The parties agree to set up an “ad-hoc” Arbitration Tribunal to determine the amount of economic reparation due Sergio Andrés Schiavini’s heirs, in keeping with the rights acknowledged to have been violated and the applicable international standards.

2. The Tribunal shall be made up of three independent experts, with recognized expertise in human rights and of the highest moral caliber. The petitioners will designate one expert, the national State shall propose a second, and the third shall be proposed by the two experts designated by the parties. The Tribunal shall be formed no later than 30 days following the approval of this agreement by Decree of the Executive Branch of the Nation.

3. The procedure to be followed shall be determined by common agreement among the parties, and set forth in writing, a copy of which shall be submitted to the Inter-American Commission on Human Rights. To this end, the parties shall designate a representative to participate in the discussions of the procedure. In representation of the National State, the Ministry of Foreign Affairs, International Trade, and Worship and the Ministry of Justice and Human Rights shall be charged with designating an official in the area with competence in human rights matters in both Ministries.

4. The arbitration tribunal’s award shall be final and not subject to appeal. It shall contain the amount and type of monetary reparation agreed upon, the beneficiaries thereof, and a calculation of any applicable costs and fees incurred in the international proceeding and by the arbitration entity. These shall be submitted to the Inter-American Commission on Human Rights for evaluation in the framework of the process to follow up on compliance with the agreement, in order to verify whether the latter is consistent with the applicable international parameters. The payments set forth in the award shall be immune from seizure and shall not be subject to currently applicable taxes, contributions, or fees, or any that may be imposed in the future.

5. The petitioners relinquish, definitively and irrevocably, the ability to initiate any other claim of a monetary nature against the national State associated with the instant case. In addition, they cede and transfer to the national State all litigation rights they may have in the framework of the civil suit brought against the government of the Province of Buenos Aires, currently in process before the courts of the Province of Buenos Aires. To this effect, they shall sign the respective instrument before a national Notary Public within ten working days following the effective delivery of the payment resulting from the arbitration award.

6. Without prejudice to the foregoing transfer in its favor, the national State declares that it reserves its right to recover the amounts actually paid out to the petitioners as determined by the Arbitration Tribunal from the Government of the Province of Buenos Aires by subtracting those amounts from the totals that might correspond to that province under the federal sharing law [ley de coparticipación], and/or any other lawful means.

B. Measures of non-monetary reparation

1. The parties agree to form a technical working group, in which the Government of the Province of Buenos Aires shall be invited to participate, to carry out the studies and take such

other steps as may be necessary to submit for the consideration of the Legislature and, where appropriate, the competent federal authorities, the following initiatives, aimed at implementing the necessary measures to bring existing law into harmony with international standards, in accordance with point 2 of the Act dated November 11, 2004:

- a) Draft legislative reform bill making it mandatory, with no exceptions, to perform and autopsy in all cases of violent or criminally suspicious deaths. It will also prohibit members of the security forces from being involved in this process with respect to facts in which they have participated;
- b) Draft reform of the Criminal Procedures Code of the Nation granting a victim's relatives the right to choose to designate their own expert before the autopsy is performed;
- c) Analysis of the legislation in force on the procedures followed by the forensic medical office to evaluate possible modifications that could contribute to ensuring transparency and effectiveness in its performance;
- d) Draft reform of the Criminal Procedures Code of the Nation to incorporate the violation of human rights as grounds for review;
- e) Draft reform of the Criminal Procedures Code of the Nation incorporating the violation of human rights as grounds for the immediate suspension or interruption of the statute of limitations;
- f) Evaluation of domestic law concerning hostage-taking and the use of force to bring it into harmony with international standards in accordance with principle N° 3 of U.N. Resolution 1989/65;
- g) Proposal that, in the event that the appeal for review in the Schiavini case filed by the Provincial Office of the General Prosecutor before Chamber 111 of the Criminal Court of Cassation of Buenos Aires Province is unsuccessful, a "Truth Commission" is established at the federal level to help effectively safeguard that right;
- h) Development of draft reforms setting forth the procedures for processing and responding to petitions under study by the Commission and before the Inter-American Court of Human Rights, that includes the establishment of a specific entity with jurisdiction in the decision-making process—including the institution of "friendly settlement"—and a mechanism to ensure compliance with the recommendations and/or judgments of the Commission and/or the Inter-American Court of Human Rights.

2. The Government of the Argentine Republic pledges to facilitate the activities of the working group and make available the technical support and facilities it requires in order to perform its task. It also pledges to periodically inform the Inter-American Commission on Human Rights regarding the outcomes of the task entrusted to the technical group and invites the Commission to participate actively in evaluating the draft reforms as well as the follow-up, and evolution of these initiatives.

3. The Government of the Argentine Republic pledges to publish this agreement in the Official Gazette of the Argentine Republic, in the newspapers "La Unión" of Lomas de Zamora, "Clarín", "La Nación," and "Página/12", once it has been approved by the Inter-American Commission on Human Rights in accordance with the provisions of Article 49 of the American Convention on Human Rights.

III. Petition

The Government of the Argentine Republic and the Petitioners sign this agreement, expressing their full acceptance of its content and scope and mutually value the good will that was evident during the negotiation process. They attest that in order to finalize the agreement, it must be approved by executive decree, at which time the Inter-American Commission on Human Rights will be asked to ratify the friendly settlement agreement reached through the adoption of the report stipulated in Article 49 of the American Convention on Human Rights.

Washington D.C, March 2, 2005

25. In accordance with the terms of the signed agreement, it was finalized through the approval of Decree 574/2005, duly signed by President of the Republic, Néstor Kirchner, and published in the Official Gazette [Boletín Oficial] N° 30.667 of June 3, 2005.

26. The Commission would like to point out that, in accordance with the terms of Article 28, both the Federal Government as well as the Government of Buenos Aires Province must take the necessary steps to ensure compliance with the obligations set forth in the American Convention.

V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE

27. The IACHR reiterates that, under Articles 48(1)(f) and 49 of the Convention, this procedure has the objective of “reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.” The State’s consent to pursue this avenue is evidence of its good faith to honor the Convention’s purposes and objectives, based on the principle of *pacta sunt servanda*. According to that principle, States must comply in good faith with the obligations undertaken in treaties. The IACHR also wishes to point out that, with the friendly settlement procedure provided for in the Convention, individual cases can be settled in a non-contentious manner. In cases involving a number of countries, the friendly settlement procedure has proven to be a useful vehicle that both parties can utilize to arrive at a solution.

28. The Inter-American Commission has closely monitored the development of the friendly settlement arrived at in the present case. The Commission greatly values the efforts that both parties made to reach this settlement, which is compatible with the object and purpose of the Convention.

VI. CONCLUSIONS

29. For all the foregoing reasons, and in keeping with the procedure provided for in Articles 48(1)(f) and 49 of the American Convention, the Commission would like to reiterate that it is very appreciative of the efforts made by the parties and is satisfied that the friendly settlement arrived at in the present case is consistent with the object and purpose of the American Convention.

30. For the reasons and based on the conclusions explained in this Report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To approve the terms of the friendly settlement agreement that the parties signed on March 2, 2005.
2. To continue to monitor and supervise each and every point of the friendly settlement agreement and, in this context, to remind the parties of their commitment to regularly inform the IACHR as to compliance with this friendly settlement.
3. To make the present report public and 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 Washington, D.C., on the 27 day of the month of October of 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice President; Paulo Sérgio Pinheiro, Second Vice President; Commissioners Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez, and Florentín Meléndez.