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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 98/06; Petition 45-99
Session:	Hundred Twenty-Sixth Regular Session (16 – 27 October 2006)
Title/Style of Cause:	Rita Ortiz v. Argentina
Doc. Type:	Decision
Decided by:	President: Evelio Fernandez Arevalos; First Vice-President: Paulo Sergio Pinheiro; Second Vice-President: Florentin Melendez; Commissioners: Freddy Gutierrez, Paolo G. Carozza. Commission member Victor Abramovich, an Argentine national, did not participate in the discussion or the decision rendered in this report, in compliance with Article 17.2.a of the Rules of Procedure of the Commission.
Dated:	21 October 2006
Citation:	Ortiz v. Argentina, Petition 45-99, Inter-Am. C.H.R., Report No. 98/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006)
Represented by:	APPLICANT: Marcelo Ezequiel Bustos Fierro
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I. INTRODUCTION

1. On April 14, 1999, Marcelo Ezequiel Bustos Fierro (hereinafter “the petitioner”), acting on behalf of Mrs. Rita Ortiz, lodged a complaint with the Inter-American Commission on Human Rights (hereinafter “the Commission”) against the Republic of Argentina (hereinafter “the State of Argentina”).

2. The petitioner alleges that the State of Argentina has violated Articles 5 (right to humane treatment), 8 (right to a fair trial), 9 (freedom from ex post facto laws), 21 (right to property), 24 (right to equal protection), and 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter “the Convention”). The petitioner also states that Articles 1 (obligation to respect rights) and 2 (domestic legal effects) of the American Convention were violated because of a failure to adopt the legislative measures necessary to give effect to the rights established in the Convention. The petition goes on to state that Articles II, V, XVII, and XVIII of the American Declaration of the Rights and Duties of Man, and Articles 7, 8, 10, and 17 of the Universal Declaration of Human Rights were all violated by the Supreme Court of the Nation through a judgment which it qualifies as completely arbitrary and bereft of all legal or factual basis, all of which constitutes a miscarriage of justice by the State of Argentina.

3. The State, for its part, maintains that the petition was filed with the Commission outside the time frame set forth in Article 46.1.b of the Convention, rendering it inadmissible. The State further argues that the petitioner’s complaints fall under the so-called fourth instance formula

and that the petitioner seeks to use this international body as a court of appeal from the domestic jurisdiction, seeking from this body a review of the legal assessment made by the Supreme Court of Justice of the Nation, which was performed within a framework of absolute and complete respect for due process.

4. The Commission concludes in this report that the petition is inadmissible under Article 47(b) of the American Convention, because it does not state facts that tend to establish violations of the rights protected under that international instrument. The Commission decides further to notify this decision to the parties, to publish it, and to include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

5. On April 20, 1999, the Executive Secretariat received the petition, dated April 15 of that year, which was forwarded to the State of Argentina on June 4, 2002. On August 15, 2002, a reply was received from the State, which was complemented by a brief received on August 26, 2002.

6. In a document dated December 18, 2002, and received by the Executive Secretariat on December 26, 2002, the petitioner transmitted his observations on the information submitted by the State. On February 14, 2003, the petitioners' observations on the reply dated August 14 and 23, 2002, were sent to the State of Argentina.

7. In documents dated March 14 and April 3, 2003, and received by the Executive Secretariat on March 17 and April 9, 2003, the State sent its observations on the additional information provided by the petitioners. These were transmitted to the petitioners for their respective observations. The observations sent by the petitioners were received on June 16, 2003, and were forwarded to the State on January 22, 2004.

8. On June 24, 2004, the Executive Secretariat received the additional information provided by the State of Argentina regarding this petition. On September 2, 2004, the Commission transmitted the information received to the petitioners, who in turn made comments in a brief dated September 29 of that year. Said information was transmitted to the State on November 22, 2004.

III. POSITIONS OF THE PARTIES

A. Position of the petitioner

9. The petitioner and representative of the alleged victim accused the State of Argentina of malpractice, delays, negligence, and incompetence against Mrs. Rita Ortiz before, during, and after the surgery performed on May 10, 1994, which damaged her sciatic nerve, as evidenced in the case file of the proceedings before the Supreme Court of the Nation.

10. The alleged victim was admitted to the Hospital Interzonal de Agudos "Vicente López y Planes" in the General Rodríguez district of General Rodríguez county, Province of Buenos

Aires, on April 13, 1994, for a total left-hip replacement, due to a fracture of the femoral head with bone destruction.

11. The petitioner stated that, because of a lack of equipment, the operation scheduled for April 19, 1994 was postponed and rescheduled for April 28. However, it was not actually performed until May 10, 1994, 27 days after the patient was admitted to the hospital. The uncertainty over when she would undergo surgery caused the patient severe depression. The petitioner asserted that after the operation, the surgical report mentions the total hip replacement with an uncemented prosthesis, deliberately omitting the serious injury that had been caused, thus “committing a flagrant act of malpractice, which can be qualified as negligent (...) as necessary care was not taken to prevent the aforementioned cut.” The petition asserts that the surgical team performed ineptly, since what occurred demonstrates a lack of technical capacity to practice the profession or art of surgery. The petitioner stated that the surgeon was also remiss in informing the patient’s relatives of the tragic consequences of the operation, which under normal circumstances would not entail such complications, and that post-operative assessments by the surgeons took place on an alternating basis and not every day.

12. The petitioner indicated that the medical auditor’s report, which was part of the clinical history presented as evidence in the proceedings before the Supreme Court of the Nation, confirmed that there was a lesion of the sciatic nerve and the external popliteal sciatic nerve after the hip operation. This lesion was also verified in the electromyography report. The neurological evaluation, for its part, reported that the patient had peripheral paralysis in the area of the left external popliteal sciatic nerve, whereupon the petitioner alleges that all of the doctors who cared for Mrs. Ortiz after the operation diagnosed the lesion.

13. The petitioner indicated that finally, on July 30, 1994, the patient once again underwent surgery, and in a post-operative evaluation she was once again diagnosed with a partial lesion of the great sciatic nerve.

14. On May 9, 1996, the petitioner’s representative filed a suit with the Supreme Court of the Nation against the Province of Buenos Aires, which is responsible for the hospital in question. The suit sought compensation for damages and the case was filed under the title “Ortiz Rita v. Province of Buenos Aires (Hospital Interzonal de Agudos Vicente López y Planes) for collection of damages.” It should be clarified that this is the Court of first instance given that a province of the State of Argentina is one of the parties to the suit.

15. The petitioner stated that the evidence submitted in the case before the Supreme Court of the Nation confirmed the serious injuries suffered by the alleged victim, resulting from poor performance by the professionals at the Hospital Interzonal de Agudos.

16. The petitioner asserted that in the “whereas” clauses of its decision of September 24, 1998, the Court stated that there was no dispute over the fact that a large lesion of the sciatic nerve had been found after the surgery. It was verified that the surgical report prepared by neurosurgeon Alejandro F. Sánchez alluded to a post-surgical lesion of the sciatic nerve following hip surgery, with a post-operative diagnosis of a partial lesion of the great sciatic nerve.

17. The petitioner found the decision to be contradictory, since the Court ruled that the cutting of Mrs. Ortiz's sciatic nerve had not been convincingly determined, nor was it proven that the injury indicated incompetence on the part of the surgeon or that Mrs. Ortiz had been neglected during her hospitalization. Thus the decision contradicts the Court's own legal reasoning in the preamble, which the petitioner stated "constitutes a violation of the most fundamental guarantees of substantive due process and of the principle of legality and reason that should characterize all judicial pronouncements, particularly those from the highest body of the national judiciary."

18. The petitioner cited his country's jurisprudence regarding the work of physicians or medical professionals who must take the utmost care in performing their duties, and who, should they cause any harm to a patient through deficient care or unprofessional conduct, must make reparations to patients for those damages. In this regard, the petitioner alleged that the Supreme Court acted in violation of its own precedents, which constitutes a miscarriage of justice.

B. Position of the State

19. In the reply dated August 23, 2002, the State affirmed, as a preliminary matter, its concern that the petition submitted to the Inter-American Commission on April 20, 1999, was reported to the State on June 4, 2002. Despite the fact that deadlines or time frames for conducting the initial review of complaints are not established in the Convention, the Statute, or the Rules of Procedure, this should not be interpreted as constituting unlimited discretionary authority as to the time allowed to consider petitions before proceeding with the established procedure should they meet the minimum requirements. In this regard, the State believes that the Commission should refrain from continuing its examination of this complaint and should archive it.

20. Moreover, the State observed that the petition was submitted outside the time frame set forth in Article 46.1.b of the Convention, rendering it inadmissible. The State maintains that the court file documenting the domestic proceedings show that the decision of the Supreme Court of the Nation was reported to the plaintiff on October 16, 1998, and, according to the document transmittal papers, the petition was officially lodged on April 20, 1999.

21. The State further deemed that there was no justification for the late lodging of the complaint, particularly in light of the fact that the domestic remedy was sought through the single, original instance of the Supreme Court and was therefore not subject to appeal. This means that once notice of the Court's ruling was received, the petitioners were free to seek recourse through the inter-American system.

22. The State also contended that the petitioner's complaint could be classified within the doctrine of the fourth instance of review, as it was a clear attempt to use this international body as a court of appeal from the domestic jurisdiction. The State called this an attempt to use this forum to review legal assessments made by the Supreme Court of the Nation regarding the plaintiff's allegations.

23. The State further indicated that, from an analysis of the case, it was apparent that the complainant had access to the legal system, had adequate legal representation, and was able to argue in defense of her rights and to offer and produce evidence, and that her complaint was the subject of a final decision rendered within a reasonable period of time. All of this falls within a framework of absolute and unrestricted due process. Furthermore, there was no specific evidence that may lead one to suspect bias or any departure from the laws in force.

24. The State affirmed that the Supreme Court's ruling was the result of a legal analysis of the arguments put forth by the parties. During the proceeding the plaintiff was not able to prove grounds for liability based on a breach of duty, pursuant to the provisions of Article 512 of the Civil Code. In the opinion of the high court, the plaintiff had not proven the incompetence, negligence, or lack of due care on the part of hospital staff required to justify the compensation she sought. Therefore, since the debate revolves around issues related to the assessment of evidence, the petition is clearly inadmissible in light of the aforementioned fourth instance formula.

IV. ADMISSIBILITY

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

25. The petitioners are entitled in principle, under Article 44 of the American Convention, to lodge petitions with the Inter-American Commission on Human Rights (IACHR). The petition indicates the alleged victim to be an individual whose State has undertaken to respect and guarantee the rights enshrined in the American Convention. Regarding the State, the Commission notes that Argentina has been a State Party to the American Convention since September 5, 1984, the date of deposit of its instrument of ratification. Therefore, the Commission is competent *ratione personae* to examine the petition.

26. The Commission is competent *ratione loci* to examine the complaint because said complaint alleges that rights protected in the American Convention were violated within the territory of a State Party to said treaty. The IACHR is competent *ratione temporis* since the obligation to respect and guarantee the rights protected in the American Convention was in force for the State in question on the date when the events alleged in the petition occurred. Finally, the Commission is competent *ratione materiae* because the petition alleges violations of human rights protected by the American Convention. Regarding the alleged violations of the American Declaration of the Rights and Duties of Man, it should be noted that, as established by the Inter-American Commission, once the American Convention enters into force for a State, the primary source of applicable law shall be that treaty and not the American Declaration[FN2], so long as the petition refers to a violation of virtually identical rights embodied in both instruments[FN3]. In the case at hand, therefore, the Inter-American Commission asserts that it is competent *ratione materiae* as the petition refers to alleged violations of human rights protected under the American Convention.

[FN2] See, for example, IACHR Report N° 3/01, P 11.670, Amílcar Ménendez et al., January 19, 2001, par. 41.

[FN3] IACHR Report N° 36/05, P 12.170, Colmenares Castillo, March 9, 2005, par. 29, which cites IACtHR, Advisory Opinion OC-10/89, par. 46.

B. Admissibility Requirements

1. Exhaustion of domestic remedies

27. Article 46.1.a of the American Convention establishes that the admissibility of a given petition is directly contingent upon whether the remedies under domestic jurisdiction have been used and exhausted, in accordance with generally recognized principles of international law. Both the Inter-American Court of Human Rights (hereinafter “the Court”) and the Commission have maintained on repeated occasions 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.”[FN4]

[FN4] See IACtHR, Viviana Gallardo et al. Decision of November 13, 1981, Ser. A No. G 101/81, para. 26.

28. In this case, the petitioners confirmed that on September 24, 1998, the Supreme Court of the Nation ruled against the plaintiff and stated that since it was a case to which a Province was party, the Supreme Court has original jurisdiction according to Articles 116/117 of the National Constitution of Argentina. Domestic remedies were therefore exhausted. The State, for its part, did not in any way refute the allegations of the petitioners in that regard, asserting that in fact, once the Supreme Court handed down its decision, the petitioners were eligible to lodge a petition with the IACHR. The Commission therefore deems that the appropriate remedies regarding the alleged violations were duly exhausted.

2. Characteristics of the alleged facts

29. Article 47.b of the Convention states that the Commission shall consider inadmissible any petition or communication submitted under Articles 44 and 45 if it “does not state facts that tend to establish a violation of the rights guaranteed by this Convention.”

30. After studying the arguments of fact and law presented by the parties and the body of evidence before it, the Commission finds that the facts set forth by the petitioners do not constitute violations of Articles 1, 2, 5, 8, 9, 21, 24, and 25 of the American Convention on Human Rights (hereinafter “the Convention”).

31. The petitioner's central argument is that the State is liable to pay compensation for damages to the health of the alleged victim, due to the negligence and incompetent service provided to her before, during, and after her surgery at the Vicente López y Planes public hospital in the General Rodríguez district of the Province of Buenos Aires.

32. The petitioner argued that, owing to surgical malpractice, Mrs. Rita Ortiz suffered damage to her sciatic nerve, which led her to file a civil suit before the Supreme Court of Justice. The serious injuries caused the alleged victim by the poor performance of the medical professionals at the Vicente López y Planes hospital were confirmed in the Court's own legal reasoning. However, when issuing its decision—which the petitioner considered to be arbitrary and bereft of any legal or factual basis—the Court contradicted itself and ruled that there was no convincing proof regarding the cutting of Mrs. Ortiz's sciatic nerve, nor did the injury reveal incompetence on the part of the medical personnel or show that the patient was neglected. Therefore, the decision contradicted itself, which violates the right to a fair trial and the principle of legality and reason that should characterize all judicial pronouncements, and thus a miscarriage of justice occurred.

33. The State in turn argued that the petitioner's complaints fall within the so-called fourth instance formula, as they seek to get the IACHR to review the legal conclusions reached by the Supreme Court of the Nation regarding the parties' allegations. The State further argued that it was apparent from an analysis of the case that the complainant has had access to the courts, has enjoyed adequate legal representation, has been able to argue in defense of her rights, and has been able to present evidence, and that her complaint has been the subject of a final decision rendered within a reasonable period of time, all within a framework of due process. The State goes on to assert that there has been no suspicion of bias on the part of the judges or evidence that they departed from the laws in force.

34. Among the papers in the court file are court documents issued throughout the civil case and the decision handed down by the Supreme Court of the Nation on September 24, 1998. A reading of them shows that in addition to the complaint, which was forwarded in timely fashion to the Province, the petitioner had the opportunity to annex his own documentary evidence and offer evidence from third parties, as well as replies to interrogatories, medical and accounting expert evidence, and testimony—all of which were admitted with the exception of the accounting expert report in a document dated February 14, 1997. This court document also appointed an expert in trauma, physical therapy, and rehabilitation, and another in psychiatry. The information in the file shows that the reports from the experts in trauma and psychiatry were duly submitted and were challenged by the petitioner on April 29, 1997. Finally, the case file contains a document dated April 23, 1997, from the hearing in which the aforementioned witness had the opportunity to answer questions.

35. The decision handed down by the highest judicial body reveals that the Court analyzed the positions of both parties. The legal reasoning states that there was no doubt that the surgical report confirms a significant lesion of the sciatic nerve. However, while the plaintiff considered it to be the result of malpractice, the Province of Buenos Aires classified it as a possible risk of this kind of surgery, which coincided with the opinion of the court-appointed medical expert. It

should be clarified that the representative of the victim had earlier challenged the report of the medical expert and the psychiatrist.

36. It is also evident that the Court considered the clinical history of the patient as well as the expert evidence submitted, and even cited the specialized literature to support the decision. It ultimately ruled that the complaint was denied because the petitioner “failed to prove that the consequences which she feels resulted from an act performed during surgery constitute inadequate service delivery by the hospital where she was a patient.” The Court further concluded that the patient received normal post-surgical care.

37. The Commission, in turn, cannot review judgments handed down by national courts acting within their jurisdiction and respecting the right to a fair trial, unless it considers that there may have been a violation of the Convention.[FN5]

[FN5] See Report No. 39/96, case 11.673 Argentina, 1996 Annual Report of the IACHR, pp. 79 ff.

38. The role of the Commission is to guarantee fulfillment of the obligations undertaken by the States Parties to the Convention. However, it cannot become a court of appeals to review alleged errors of fact or law that may have been committed by the national courts acting within their jurisdiction.[FN6] In this same vein, the European Commission of Human Rights stated that:

Insofar as the applicants complain of errors of fact and law committed by the Brussels Court of Appeal, the Commission recalls that, in accordance with Article 19 of the Convention, its only task is to ensure the observance of the obligations undertaken by the Parties in the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts.[FN7]

[FN6] Ibid.

[FN7] Application No. 10785-84, (1986), European Commission of Human Rights, D.R., 48, 150.

39. Thus the Commission lacks the competence to substitute its judgment for that of national courts on issues involving the interpretation and explanation of domestic law or assessment of the facts.

40. In addition, the mere fact that the plaintiff received an unfavorable ruling does not, in and of itself, constitute a miscarriage of justice and therefore a violation of the right to a fair trial set forth in Articles 8 and 25 of the Convention. The State’s obligation to administer justice is a matter of means and not results; thus noncompliance does not exist simply because the outcome was unsatisfactory for the petitioner.[FN8] Mere dissatisfaction with the result obtained from the administration of justice does not suffice to label it arbitrary. In this regard, the Commission

observes that in her complaint, the petitioner bases her allegations on the ruling by the Supreme Court and its assessment of the evidence, but does not present allegations on the conduct of the trial or the impartiality or competence of the Court. The judicial protection recognized in the Convention encompasses the right to fair, impartial, and swift proceedings, which entail the possibility, but never the guarantee, of a favorable outcome.[FN9]

[FN8] I/A Court H.R., Godínez Cruz Case. Judgment of January 20, 1989. Series 6 No. 5, para. 188.

[FN9] IACHR Report No. 39/96, Case 11.773 (S. Marzióni), Argentina, October 15, 1996; IACHR Report No. 48/98, Case 11.403 (Carlos Alberto Marín Ramírez), Colombia, September 29, 1998, para. 42.

41. According to this analysis, the Commission has not been able to identify any reported facts that constitute a possible violation of Articles 25 and 8 of the Convention. It is therefore not possible to consider any violations of Articles 5, 9, 21, and 24.

V. CONCLUSIONS

42. The Commission concludes that this case does not meet the formal admissibility requirements set forth in Article 46 of the Convention. However, the analysis in this report of the information available in the file leads the Commission to conclude that the facts of the complaint do not constitute a violation of the American Convention under Article 47 of the Convention. Consequently it is not necessary to examine whether the other requirements of admissibility have been met.

43. In light of the aforementioned considerations,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present petition inadmissible pursuant to Article 47(b) of the Convention.
2. To notify the parties of this decision.
3. To publish the present report in its Annual Report.

Done and signed in the city of Washington, D.C., on the 21st day of the month of October, 2006. (Signed): Evelio Fernández Arévalos, President; Paulo Sérgio Pinheiro, First Vice-President; Florentín Meléndez, Second Vice-President, Freddy Gutiérrez and Paolo G. Carozza, Commissioners.