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## **REPORT No. 53/23**

### **PETITION 353-08**

#### REPORT ON INADMISSIBILITY

JONATHAN CHINCHILLA JIMÉNEZ & MOISÉS GERARDO VIZCAYNO PORRAS  
COSTA RICA

Approved by the Commission electronically on May 10, 2023.

**Cite as:** IACHR, Report No. 53/23. Petition 353-08. Inadmissibility. Jonathan Chinchilla Jiménez and Moisés Gerardo Vizcayno Porras. Costa Rica. May 10, 2023.



**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Moisés Gerardo Vizcayno Porras
<b>Alleged victim:</b>	Jonathan Chinchilla Jiménez, Moisés Gerardo Vizcayno Porras and Moisés Gerardo Vizcayno Solano
<b>Respondent State:</b>	Costa Rica
<b>Rights invoked:</b>	Articles 5 (humane treatment), 8 (fair trial) and 25 (judicial protection) of the American Convention on Human Rights <sup>1</sup>

**II. PROCEEDINGS BEFORE THE IACHR<sup>2</sup>**

<b>Filing of the petition:</b>	March 25, 2008
<b>Additional information received at the stage of initial review:</b>	October 24, 2012, and June 14, 2016
<b>Notification of the petition to the State:</b>	July 8, 2016
<b>State's first response:</b>	November 8, 2016, and December 2, 2016
<b>Notification of the possible archiving of the petition:</b>	December 19, 2018
<b>Petitioner's response to the notification regarding the possible archiving of the petition:</b>	January 14, 2019, and May 16, 2020

**III. COMPETENCE**

<b>Competence <i>Ratione personae</i>:</b>	Yes
<b>Competence <i>Ratione loci</i>:</b>	Yes
<b>Competence <i>Ratione temporis</i>:</b>	Yes
<b>Competence <i>Ratione materiae</i>:</b>	Yes, American Convention (instrument of ratification deposited on April 8, 1970)

**IV. DUPLICATION OF PROCEDURES AND INTERNATIONAL *RES JUDICATA*, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

<b>Duplication of procedures and International <i>res judicata</i>:</b>	No
<b>Rights declared admissible</b>	N/A
<b>Exhaustion of domestic remedies or applicability of an exception to the rule:</b>	No, in the terms of Section VII
<b>Timeliness of the petition:</b>	N/A

**V. POSITIONS OF THE PARTIES***Allegations of the petitioner*

1. Mr. Vizcayno Porras denounces that the State criminally convicted him, along with his son, Mr. Vizcayno Solano, and Mr. Chinchilla Jiménez, after a process that did not respect the principle of impartiality,

<sup>1</sup> Hereinafter, "the American Convention" or "the Convention"

<sup>2</sup> The observations submitted by each party were duly transmitted to the opposing party.

and to the right to present evidence and to due motivation. Likewise, he argues that they did not have the opportunity to fully appeal their conviction.

2. He describes that on December 23, 2005, the San José Trial Court, Desamparados venue, sentenced him along with Messrs. Chinchilla Jiménez and Viscayno Porras to five years in prison for the crime of aggravated robbery. He states that on February 3, 2006, they filed an appeal, disputing the justification of the conviction and the sentence imposed, but on May 9, 2006, the Third Chamber of Cassation of the Supreme Court of Justice confirmed the conviction, considering that it was adequately motivated.

3. He affirms that all domestic remedies were exhausted with this last decision, leaving them without the possibility of fully appealing their conviction. Notwithstanding, he states that on November 17, 2006, his defense filed an appeal for review, alleging that the right to a tribunal established by law and to present evidence was infringed, but on February 11, 2008, the Third Chamber of Cassation of the Supreme Court rejected such action, considering that it did not meet the requirements established in domestic law for it to be admissible.

4. In addition to these events, in its additional observations, the petitioner adds that on December 20, 2006, the Trial Court of the First Judicial Circuit of San José, in another criminal case, sentenced Mr. Vizcayno Solano to seven years imprisonment for the crime of aggravated robbery. It holds that on March 1, 2007, the defense counsel of said alleged victim filed an appeal for review, alleging that irregularities were committed in this last criminal proceeding, but on May 12, 2009, the Third Chamber of the Supreme Court of Justice dismissed such action.

5. Based on these facts, the petitioner denounces that the State violated the right to appeal the conviction established in Article 8.2.h) of the Convention, alleging that in Costa Rica there is no ordinary remedy to challenge a first instance conviction, and, as a result, they had to directly file a cassation appeal. Likewise, it argues that the principle of impartiality was affected, since the court that sentenced him had previously heard a proceeding against him and, additionally, some of its members had filed a complaint against him, for which reason they were not objective. Likewise, he maintains that his right to present evidence and to due motivation were infringed, since the pertinent steps were not taken for a couple of key witnesses to appear in person and provide their statements in the proceeding.

#### *Allegations of the Costa Rican State*

6. The State, for its part, replies that the petition is inadmissible due to failure to exhaust domestic remedies. It affirms that the alleged victims did not comply with exhausting the domestic remedies before filing their petition, since they did not use the special review mechanisms based on the procedural reforms carried out in favor of people with a final judgment.

7. Regarding this point, it highlights that the alleged victims did not use them despite the fact that they are designed precisely for those people with final convictions and who consider their right to appeal their conviction violated, in accordance with the Article 8.2.h) of the Convention. Along these lines, the State states that at the time it was notified of this petition, Messrs. Chinchilla Jiménez and Vizcayno Porras, between 2006 and 2011, had the opportunity to file the procedure established in the transitory provisions of Law No<sup>9</sup> 8503<sup>3</sup> and, in the alternative, that they could use the special review mechanism provided for in Transitory III of Law No. 8837<sup>4</sup>. Therefore, it argues that the domestic law provided additional options for the alleged victim to use at the appropriate procedural moment, and despite this, the petitioner did not do so.

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<sup>3</sup> Law No. 8503.- Transitory 1.- Persons convicted of a criminal act with a date prior to this Law, who have been prevented from filing an appeal for cassation against the conviction, due to the rules that regulated its admissibility in that date, may raise the review of the conviction before the competent court, invoking in each case, the grievance and the factual and legal aspects that could not be heard in cassation.

<sup>4</sup> Law No. 8837.- Transitory III.- In all matters that have a final judgment at the time this Law enters into force, and in which the violation of Article 8.2.h) of the American Convention on Human Rights has previously been alleged, the convicted person will have the

[continues ...]

8. Lastly, it highlights that the alleged victims did not request a comprehensive review of their conviction or argued an infringement of Article 8.2.h) of the Convention when using the cassation appeal or extraordinary review remedies. Along these lines, the State points out that it was not until September 21, 2008, that the petitioner submitted an extension of the arguments in favor of Mr. Vizcayno Solano, in which it argued a violation of his right to appeal the conviction before the appropriate instances. In the State's opinion, the expansion of the petition after the resolution of the review procedure raises doubts as to the intention of the petitioner and could denote litigation strategy that is far from good faith.

9. Additionally, the State argues that the alleged facts do not characterize a human rights violation that is attributable to it. On the contrary, it argues that the petitioner wants the Commission to act as a fourth judicial instance and review the factual and legal assessments made by the domestic judges and courts that acted in the sphere of their competence.

10. In this regard, the State emphasizes that it is not valid to argue, as the petitioner does, that there is a breach of the obligation to respect the right to judicial guarantees, since the Costa Rican authorities have afforded administrative and judicial mechanisms which are respectful of the rules of due process, safeguarding the guarantees to an independent and impartial tribunal previously established by law, as well as the establishment of suitable mechanisms to determine the rights of citizens. The State stresses that if the alleged victims decided not to resort to these mechanisms or did not use them correctly, international responsibility cannot be attributed to it for such lack of diligence. For this reason, it requests the Commission to declare this matter inadmissible, and accordingly to order that it be archived.

## VI. PRELIMINARY CONSIDERATIONS

11. The Commission notes that the main purpose of this petition is to question the infringement of the right to appeal the conviction, enshrined in Article 8.2.h) of the American Convention. Because of this, given that different decisions have been issued within the Inter-American system on this matter, based on the changes implemented in the Costa Rican criminal procedure legislation, the IACHR deems it necessary to carry out a summary of these pronouncements in order to identify standards that allow to properly resolve this petition.

12. Thus, in its judgment of July 2, 2004, in the Case of *Herrera Ulloa v. Costa Rica*, the Inter-American Court of Human Rights<sup>5</sup> examined a regulation included in the Code of Criminal Procedure since 1998 and concluded that it did not possess “*a liberal remedy that would permit the higher court to do a thorough analysis or examination of all the issues debated and analyzed in the lower court*”, given the limitations of the appeal for cassation in the criminal jurisdiction<sup>6</sup>. Therefore, the Inter-American Court declared that the Costa Rican State violated articles 8.2.h) of the Convention in relation to its articles 1.1 and 2 to the detriment of Mr. Mauricio Herrera Ulloa, by not having guarantees his right to appeal the conviction; and order Costa Rica to “*adapt its domestic legal system to conform to the provisions of Article 8(2)(h) of the Convention, in relation to Article 2 thereof*”<sup>7</sup>.

13. As a consequence of this judgment, Costa Rica reformed the regulation of its criminal procedure to have a regulation in accordance with the obligations enshrined in Article 8.2.h) of the American Convention. Thus, on June 6, 2006, Law No. 8503, called the “*Law on the Opening of Criminal Cassation*”, came into force, which modified and added different articles of the Code of Criminal Procedure related to appeals

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right to file, only once, during the first six months, a review procedure that will be heard in accordance with the powers established in this Law, by the old Courts of Cassation or the Third Criminal Chamber. In matters that are pending resolution and in which the violation of article 8.2 h) of the American Convention on Human Rights has previously been alleged, the appellant will be given a period of two months to readapt his appeal for cassation to an appeal, which will be presented before the old Courts of Cassation or the Third Chamber, as appropriate, which will forward the file to the new Courts of Appeal for resolution. Under penalty of inadmissibility, the grievance must be specifically specified.

<sup>5</sup> Hereinafter, the “Inter-American Court” or the “I/A Court H.R.”.

<sup>6</sup> I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 167.

<sup>7</sup> I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para. 198.

and review appeals. Likewise, and in what is relevant to the present case, said legislation established in its Transitory I, a special review procedure for “*persons convicted of a criminal act with a date prior to this Law, who have been prevented from filing an appeal for cassation against the conviction, due to the rules that regulated its admissibility on that date [...] invoking, in each case, the grievance and the factual and legal aspects that could not be heard in cassation.*” In light of this, the Inter-American Court considered that “*through the grounds for review created by transitory provision I, a person convicted of a criminal offense could, in principle, obtain a comprehensive review of the judgment, including the factual and legal aspects*”<sup>8</sup>.

14. Additionally, both the Commission and the I/A Court HR also verified that Law No. 8837 was published on June 9, 2010, entitled “*Creation of the appeal of the conviction, other reforms to the challenge regime and implementation of new orality rules in criminal proceedings*”, effective as of December 9, 2011; which created and regulated the appeal. In addition, Transitory III of said norm regulated two additional cases: i) for persons whose convictions were final at the time the law entered into force, it was established that they may file, for a single time, a review procedure in the first six months; and ii) for persons whose appeals were pending resolution at the time the law entered into force, it was established that they could request the conversion of the appeal already presented to an appeal in accordance with the new norm.

15. As a consequence of the aforementioned modifications, in the judgment of the case of *Amrhein et al. v. Costa Rica* on April 25, 2018, the Inter-American Court re-evaluated the Costa Rican criminal procedure regulation; and expanded its legal criteria both regarding the exhaustion of domestic jurisdiction, as well as the analysis of the merits of cases on the same subject.

16. In relation to the first point, the Commission highlights that, in such case, the Inter-American Court considered that the alleged victims should have filed the appeal for special review based on Transitory I of Law 8503 of 2006 during the admissibility stage of the petition, since it was specifically intended for people with final convictions; and because of that, “*the fact that it is an exceptional remedy cannot be decisive, per se, to conclude that it is ineffective*”<sup>9</sup>. Consequently, following the aforementioned jurisprudence, the Commission considers that, in order to determine the admissibility of a matter on this subject, it must determine whether the aforementioned appeal was available to the alleged victims after the issuance of their conviction, and if so, verify whether or not they have exhausted such a remedy.

17. Finally, for the purposes of analyzing the characterization of the petitions, the Commission notes that the Inter-American Court concluded in the aforementioned judgment that it was not appropriate “*to declare a violation of Article 2 of the American Convention because of the way in which the Costa Rican appeals system is regulated, or because of the manner in which the State addressed the situation of persons whose convictions were already final prior to the entry into force of Laws 8503 and 8837 (...) because through said reforms, it remedied the deficiencies in the application of the appeal rules (...)*”<sup>10</sup>. Likewise, it recalls that in the supervision of compliance order of November 22, 2010, in the case of *Herrera Ulloa vs. Costa Rica*, the Court positively valued the reforms introduced in the criminal procedure legislation and, by virtue of such modifications, concluded that “*by ensuring increased monitoring of judgments issued by a trial court in criminal law matters at the domestic level*”<sup>11</sup>, Costa Rica had fully complied with adapting its internal legislation.

18. Notwithstanding this, the Commission emphasizes that the aforementioned norms granted those whose convictions had already acquired the status of *res judicata* the possibility of filing a review procedure, although subject to compliance with certain requirements. In the case of Law 8503, the Commission notes that the appellant was required to invoke in his presentation “*the grievance and the aspects of fact and law that could not be heard in cassation*”. For its part, Transitory III of Law 8837 demanded for the admissibility

<sup>8</sup> I/A Court H.R., Case of *Amrhein et al. v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 25, 2018. Series C No. 354, para. 262.

<sup>9</sup> I/A Court H.R., Case of *Amrhein et al. v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 25, 2018. Series C No. 354, para. 48.

<sup>10</sup> IHR Court, Case of *Amrhein and others vs. Costa Rica*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of April 25, 2018. Series C No. 354, para. 265.

<sup>11</sup> Corte IDH. Caso *Herrera Ulloa Vs. Costa Rica*. Supervisión de Cumplimiento de Sentencia. Resolución de la Corte Interamericana de Derechos Humanos de 22 de noviembre de 2010, párr. 16.

of the review procedure that the convicted person “*had previously alleged the violation of Article 8.2.h of the Convention*”.

19. In this vein, the Commission reaffirms that the way in which the review procedure set out by Transitory I provision of law 8503 could generate limitations with regard to the accessibility of the remedy and, therefore, it does not guarantee by itself the right to a thorough examination of the conviction of all those individuals that were convicted during the time that the original text of the Code of Criminal Procedure was in force<sup>12</sup>. An identical conclusion can be reached with regards to the motion for review enshrined in Transitory III provision of law 8837, given that the rule included the requisite to have previously alleged the violation of the right to appeal as a condition for admissibility of the motion.

20. Nevertheless, the Commission acknowledges, first, that the Constitutional Chamber of the Supreme Court of Justice of Costa Rica made reference, in repeated statements, to the need to “ensure the right to appeal, excluding formalities that prevent the review of convictions, with the purpose of fulfilling what is established by article 8.2.h of the Convention”<sup>13</sup>.

21. Additionally, the IACHR considers that, despite the obstacles to the admissibility of the procedure included in the drafting of Transitory I provision of law 8503, the review procedure recognized in it meant an opportunity which was additional to the writ of cassation for a convicted individual to obtain a thorough review of his or her conviction. Said thorough review was dependent, in essence, of the way in which judges in higher courts interpreted the procedural rules in force in light of the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, of article 8.2.h and of the decision of the Inter-American Court of Human Rights in the “Herrera Ulloa” case.

22. In particular, and in line with the decision of the Court, the Commission notes that, taking into account that such legislative reforms to the Costa Rican criminal appeal system were adopted as a result of the decisions of the Inter-American Human Rights System, it is reasonable to establish as a condition of admissibility of the review procedure that the interested party had to invoke the possible errors which the lower judge or court may have made.

23. Consequently, taking into account the existing specificities with regard to this matter in the Costa Rican system, resulting from the decisions adopted by the Inter-American System, and in line with the decision of the Inter-American Court of Human Rights in the “Amrhein” case, the Commission considers that it is not appropriate to undertake an abstract assessment of each of the remedies available in the law of criminal procedure, but rather, a “case by case analysis of the remedies actually filed by the alleged victims to determine if the way in which they were decided by the Costa Rican appeals system, taking its reforms into account, respected their right to a thorough review of their convictions”<sup>14</sup>. This in principle requires a substantive analysis by the IACHR, unless from the information of the parties it is observed that the facts raised by the petitioner do not characterize prima facie violations of the American Convention, in the terms of its Article 47.

## **VII. ANALYSIS OF EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION**

24. Based on the previously stated considerations, the Commission observes that, in this matter, on February 3, 2006, the Third Criminal Chamber of the Supreme Court of Justice dismissed the appeal for cassation filed by the alleged victims against their conviction of December 23, 2005. The IACHR also notes that, additionally, on May 12, 2009, the Third Chamber of the Supreme Court of Justice dismissed the appeal for review filed by Mr. Vizcayno Solano against the conviction imposed on him in another proceeding on December 20, 2006.

<sup>12</sup> IACHR. Report No. 33/14. Case 18.820. Merits. Manfred Amrhein and others. Costa Rica. April 4, 2014. Paras. 217-220.

<sup>13</sup> I/A Court H.R. Case of Amrhein and others v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 25, 2018. Series C No. 354, para 260.

<sup>14</sup> I/A Court H.R. Case of Amrhein and others v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 25, 2018. Series C No. 354, para 266.

25. On this point, the State submits, among other arguments, that the alleged victim could request a comprehensive review of his sentence through the special review mechanisms established in Transitory I of Law No. 8503 and in Transitory III of Law No. 8837 and, despite this, he did not use these remedies.

26. According to the arguments presented, the Commission observes that the State fulfilled its duty to specify the internal remedies that were not exhausted and the reasons why these were adequate and effective to address the legal situation of the alleged victim. Indeed, since its first jurisprudence, the Inter-American Court established that "*the State that alleges non-exhaustion has the burden of identifying the internal remedies that must be exhausted and their effectiveness*"<sup>15</sup>. Specifically, the information provided shows that, after the denial of their appeals, the alleged victims had the special review mechanism established in Transitory I of Law No. 8503 available to him to challenge his conviction and achieve a comprehensive review of such judgment, since this provision entered into force on June 6, 2006.

27. In this regard, the Commission reiterates that the Inter-American Court considered that the aforementioned mechanism, together with Transitory III of Law No. 8837, allows guaranteeing the right to a comprehensive review of a conviction and, therefore, complies with the obligation established in Article 8.2.h) of the American Convention. Under this understanding, the precedent of the Amrhein and others vs. Costa Rica case established that alleged victims who allege an impact on the right contemplated in said Article 8.2.h) and/or other related guarantees must use such remedies if they were available at the time of the events, or otherwise demonstrate their lack of accessibility or suitability. In a consistent sense, the Commission has also considered that when the State fulfills its duty to question in a timely manner the exhaustion of internal remedies, it is up to the petitioner to replicate this information<sup>16</sup>.

28. In that sense, since the petitioner does not present arguments aimed at replicating the arguments and information presented by Costa Rica, nor questions that, in the case at hand, the special review mechanism lacked any element that affects its suitability or effectiveness, the Commission concludes that, in application of the standards established by the Inter-American Court of Human Rights, the present case does not meet the requirement provided in Article 46.1.a) of the American Convention and, consequently, it is appropriate to declare the present petition inadmissible.

29. Finally, since the requirement of prior exhaustion of internal remedies was not met and none of the exceptions provided for in Article 46.2 of the Convention are configured, there is no basis for examining the requirement of presentation of the petition.

### VIII. DECISION

1. To find the instant petition inadmissible; and
2. To notify the parties of this decision; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 10<sup>th</sup> day of the month of May 2023. (Signed:) Margarete May Macaulay, President; Roberta Clarke, Second Vice President; Julissa Mantilla Falcón and Carlos Bernal Pulido, Commissioners.

<sup>15</sup> I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para 88; and Case of Cuya Lavy et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 28, 2021. Series C No. 438.

<sup>16</sup> IACHR, Report No. 168/17, Petition 1502-07. Admissibility. Miguel Ángel Morales Morales. Peru. December 1, 2017, para. 18.