

OAS/Ser.L/V/II  
Doc. 60  
10 May 2023  
Original: Spanish

**REPORT No. 52/23**  
**PETITION 1461-07**  
REPORT ON INADMISSIBILITY

ANTONY MIRON BENDER  
COSTA RICA

Approved electronically by the Commission on May 10, 2023.

**Cite as:** IACHR, Report No. 52/23, Petition 1461-07. Inadmissibility.  
Antony Miron Bender. Costa Rica. May 10, 2023.

**I. INFORMATION ABOUT THE PETITION**

<b>Petitioner:</b>	Rafael Ángel Guillen
<b>Alleged victim:</b>	Anthony Miron Bender
<b>Respondent State:</b>	Costa Rica
<b>Rights invoked:</b>	Articles 8 (fair trial), 24 (equality before the law) 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>	November 13, 2007
<b>Additional information received at the stage of initial review:</b>	February 15, 2017, and April 11, 2017
<b>Notification of the petition to the State:</b>	April 10, 2017
<b>State's first response:</b>	July 18, 2017
<b>Additional observations from the petitioner:</b>	April 2, 2020
<b>Additional observations from the State:</b>	August 5, 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 (deposit of the instrument of ratification made 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. POSITION OF THE PARTIES***Allegations of the Petitioner*

1. The petitioner claims that Mr. Miron Bender did not have access to a remedy that would allow for a full review of his conviction for the crime of rape. The petitioner also claims that the decision was not duly motivated and did not respect the alleged victim's rights to defense and consular assistance.

<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.

2. The petitioner holds that on July 25, 2005, members of the National Police arrested the alleged victim, a U.S. national, on the grounds that he was the perpetrator of the crime of rape. As a result, after an investigation and criminal proceedings, on May 18, 2006, the Criminal Court of Golfito sentenced Mr. Miron Bender to thirty years imprisonment, finding that he had committed the crime of rape against the same victim on three occasions. The representation of the alleged victim filed a cassation remedy against this decision, questioning factual and legal issues of the judgment, but on June 29, 2007, the Third Criminal Chamber of the Supreme Court of Justice confirmed the sentence.

3. The petitioner holds that with this last decision, all domestic remedies were exhausted, leaving Mr. Miron Bender with no possibility to appeal his conviction in full. Without prejudice to the foregoing, the Petitioner states that Mr. Miron Bender's defense filed an motion for review, but holds that the authorities rejected said action, in considering that it did not meet the requirements established in the domestic legislation for it to be admissible.

4. Based on these factual considerations, the petitioner alleges that the State violated the right to appeal the conviction established in Article 8.2.h) of the Convention, since in Costa Rica there is no ordinary remedy for contesting a first instance conviction; and, as a result, the alleged victim had to file a cassation remedy directly. Petitioner also argues that the alleged victim's right to defense was affected, since the complainant was allowed to give her testimony via video conference, despite the fact that domestic legislation does not contemplate such a possibility, and that her statement was ambiguous, not being sufficient to convict Mr. Miron Bender. Similarly, the Petitioner holds that the principle of proportionality of the sentence was affected, since the authorities imposed a sanction comparable to homicide in the domestic venue. Finally, without providing many details, the Petitioner mentions that the right to consular assistance was infringed.

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

5. The State, for its part, replies that the petition is inadmissible for failure to exhaust domestic remedies. It holds that Mr. Miron Bender failed to exhaust domestic remedies before filing his petition, since he did not use the ordinary remedy of review or the special review mechanisms created as a result of the procedural reforms made in favor of persons with final judgments.

6. With regard to the first remedy, it specifies that only on April 26, 2016, that is, eight years and five months after filing this claim, the alleged victim filed the procedure for review of the sentence before the Third Chamber of the Supreme Court of Justice, which on June 10, 2016, declared the remedy inadmissible.

7. With respect to the special review mechanisms, the State stresses that the alleged victim did not use these channels, despite the fact that they are designed precisely for those persons with final convictions who consider that their right to appeal their conviction in accordance with Article 8.2.h) of the Convention has been violated. Along these lines, the State holds that at the time it was notified of this petition, Mr. Miron Bender had the opportunity between 2006 and 2010 to file the procedure established in the transitory provisions of Law No. 8503<sup>3</sup>, and, failing that, it could subsequently use the special review mechanism provided for in Transitory III of Law No. 8837<sup>4</sup>. Therefore, the State argues that the domestic legal system provided additional options for Mr. Miron Bender to use at the appropriate procedural moment; however, he failed to do so.

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<sup>3</sup> Law N.º 8503.- Transitory I.- Persons convicted of a criminal act prior to this Law, who have been prevented from filing a cassation remedy against the sentence, due to the rules that regulated its admissibility at that date, may file a review of the sentence before the competent court, invoking in each case, the grievance and the aspects of fact and law that were not possible to be heard in cassation.

<sup>4</sup> Law No. 8837.- Transitory III.- In all cases that have a final judgment at the time of entry into force of this Law, and that the violation of Article 8.2.h) of the American Convention on Human Rights has been previously alleged, the convicted person shall have the right to file, once only, during the first six months, a review procedure that shall be heard according to the competencies established in this Law, by the former Courts of Cassation or the Third Criminal Chamber. In cases that are pending resolution and that the violation of Article 8.2 h) of the American Convention on Human Rights has been previously alleged, the appellant shall be given a term of two months to readapt his cassation appeal to an appeal, which shall be filed before the former Courts of Cassation or the Third Chamber, as appropriate, which shall forward the file to the new Courts of Appeal for its resolution. Under penalty of inadmissibility, the grievance must be specifically stated.

8. Without prejudice to the foregoing, the State adds that the petitioner also failed to make adequate use of the remedies available to him in the constitutional jurisdiction. It explains that on October 31, 2008, and September 17, 2008, Mr. Miron Bender filed two amparo actions, alleging, respectively, the violation of his right to health and the right not to be subjected to torture and discrimination. However, the State specifies that on September 18, 2008 and September 24, 2010, the Constitutional Chamber of the Supreme Court addressed such claims, by means of resolutions that: i) ordered a medical appointment in favor of the alleged victim because she suffered from lumbar scoliosis and ordered the Costa Rican Social Security Fund to pay costs, damages and prejudices for not attending to such situation in a timely manner; and ii) established that the alleged victim's equality or integrity was not affected by not having a television set in his bedroom. In this regard, Costa Rica considers that the alleged victim did not adequately exhaust these remedies, in which he alleged breaches of Articles 5 and 7 of the American Convention, since they were not exhausted prior to the filing of this petition. For the foregoing reasons, it requests the IACHR to declare the instant case inadmissible for not complying with the requirement set forth in Article 46.1.a) of the Convention and, consequently, to order it to be archived.

9. In addition, Costa Rica argues that the alleged facts do not characterize a human rights violation attributable to it. On the contrary, it argues that the petitioner seeks to have the Commission act as a fourth judicial instance and review the assessments of fact and law made by the domestic judges and courts which acted within the sphere of their competence.

10. With regard to the allegations on the alleged violation of Article 7 of the Convention, the State argues that Mr. Miron Bender did not use the remedies under domestic jurisdiction in an adequate manner, and therefore, domestic remedies cannot be considered exhausted with respect to this claim. It explains that on January 19, 2007, he filed a *habeas corpus* remedy, alleging the wrongful application of pretrial detention against him. However, on February 2 of that year, the Constitutional Chamber of the Supreme Court of Justice rejected it, arguing that the authorities justified and imposed this precautionary measure on Mr. Miron Bender in a legal manner, respecting the time periods established in domestic legislation. In relation to this point, Costa Rica considers that the Constitutional Chamber of the Supreme Court of Justice dismissed the *habeas corpus* petition filed by the defense of the alleged victim, adequately grounding its decision, without affecting any of his rights.

11. Finally, the State highlights that *"it is not valid to argue, as the petitioner does, that there is a breach of the obligation to respect the right to a fair trial, since the Costa Rican authorities have provided administrative and judicial mechanisms that respect the rules of due process, safeguarding the figure of the natural, independent and impartial judge, and have created suitable means for the determination of the rights of citizens"*. It stresses that, if the alleged victim decided not to resort to these mechanisms or used them correctly, international responsibility cannot be attributed to the State for such lack of diligence. Therefore, it requests the Commission to declare the present case inadmissible and, consequently, to order it to be archived.

## VI. PRELIMINARY CONSIDERATIONS

12. The Commission observes that the main purpose of the instant petition is to question the violation of the right to appeal a judgment, as provided for in Article 8.2.h) of the American Convention. Therefore, since different decisions have been issued within the inter-American system on this matter, in light of the amendments implemented in Costa Rican criminal procedure legislation, the IACHR deems it necessary to review these rulings in order to identify standards that will allow it to adequately resolve the present petition.

13. Thus, in the judgment in the case of *Herrera Ulloa vs. Costa Rica* of July 2, 2004, the Inter-American Court of Human Rights<sup>5</sup> examined the regulation set forth in the Code of Criminal Procedure in force since 1998; and concluded that it did not have *"a remedy that would allow the higher court to conduct a comprehensive and integral analysis or review of all the issues debated and analyzed by the lower court"* given

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<sup>5</sup> Hereinafter the "Inter-American Court" or the "IHR Court".

the limitations that the regulation of the cassation remedy had in the criminal field<sup>6</sup>. Consequently, the IACHR declared that the Costa Rican State violated Article 8.2.h) of the Convention in relation to its Articles 1.1 and 2 to the detriment of Mr. Mauricio Herrera Ulloa, by failing to guarantee his right to appeal the judgment; and ordered Costa Rica to “*adapt its domestic legal system to the provisions of Article 8.2.h) of the American Convention, in relation to Article 2 thereof*”<sup>7</sup>.

14. As a consequence of this judgment, Costa Rica reformed the regulation of its criminal procedure system in order to have a regulation in accordance with the obligations contemplated in Article 8.2.h) of the American Convention. Thus, on June 6, 2006, Law No. 8503, known as the “Law on the Opening of Criminal Cassation” entered into force, which modified and added several articles of the Criminal Procedural Code related to the remedies of cassation and review. Likewise, and relevant to the present case, such law established in its Transitory I, a special review procedure so that “*persons convicted of a criminal act prior to this Law, who have been prevented from filing an appeal in cassation against the sentence, due to the rules that regulated its admissibility on that date [...] invoking, in each case, the grievance and the aspects of fact and law that could not be heard in cassation*”. By virtue of this, the Inter-American Court considered that “*through the ground for review created by Transitory I, a person criminally convicted could, in principle, obtain a comprehensive review of his or her sentence that includes both factual and legal issues*”<sup>8</sup>.

15. In addition, both the Commission and the IHR Court also noted that on June 9, 2010, Law No. 8837 was published, entitled “Creation of the appeal of the sentence, other reforms to the challenge regime and implementation of new rules of orality in criminal proceedings,” in force as of December 9, 2011, which created and regulated the appeal. In addition, Transitory III of said law regulated two additional assumptions: i) for persons whose sentences were final at the time the law came into force, it was established that they may file, for one time only, a review proceeding within the first six months; and ii) for persons whose cassation appeals were pending resolution at the time the law came into force, it was established that they may request the conversion of the cassation appeal already filed to an appeal under the new norm.

16. As a consequence of the aforementioned modifications, in the judgment of the case of *Amrhein and others vs. Costa Rica* of April 25, 2018, the Inter-American Court re-evaluated the Costa Rican criminal procedural regulation; and expanded its legal criteria both with respect to the exhaustion of domestic jurisdiction, as well as the analysis of the merits of cases on the same subject matter.

17. In relation to the first point, the Commission emphasizes that, in the aforementioned case, the Inter-American Court considered that the alleged victims should have filed the special appeal for review based on Transitory I of Law 8503 of 2006 during the admissibility process of the petition, since it was specifically intended for persons with final convictions; and therefore, “*the fact that it is an extraordinary remedy cannot be decisive, per se, to conclude its ineffectiveness*”<sup>9</sup>. Consequently, in accordance with the aforementioned jurisprudence, the Commission considers that, in order to determine the admissibility of a case on this issue, it must determine whether or not the aforementioned remedy was available to the alleged victims after the issuance of their conviction, and if so, whether or not they exhausted said remedy.

18. Finally, for the purposes of the analysis of the characterization of petitions, the Commission notes that the Inter-American Court concluded in the aforementioned judgment that it was not applicable to “*declare a violation of Article 2 of the American Convention for the way in which the Costa Rican remedies system is regulated, nor for the way in which said State addressed the situation of persons whose sentences had already become final prior to the entry into force of Laws 8503 and 8837, since, through said reforms, it redressed the*

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<sup>6</sup> IHR Court, *Case of Herrera Ulloa vs. Costa Rica*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para.167.

<sup>7</sup> IHR Court, *Case of Herrera Ulloa vs. Costa Rica*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, para.198.

<sup>8</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.262.

<sup>9</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.48.

*deficiencies in the application of the recourse norms [...]*<sup>10</sup>. Likewise, it recalls that in the compliance monitoring resolution of November 22, 2010, in the case of *Herrera Ulloa vs. Costa Rica*, the Court positively assessed the reforms introduced in the criminal procedural legislation and, by virtue of such modifications, concluded that “*by guaranteeing the possibility of a broad review of the sentence issued by a criminal trial court at the domestic level*”<sup>11</sup>, Costa Rica had complied with adapting its domestic legislation.

19. Without prejudice to the foregoing, the Commission notes that the aforementioned laws allowed those whose convictions had already acquired *res judicata* status the possibility of filing a review proceeding, although conditioned to the fulfillment of certain requirements. In the case of Law 8503, the Commission emphasizes that the appellant was required to invoke in its 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 required for the review procedure to proceed that the convicted person “*has previously alleged the violation of Article 8.2.h of the Convention*”.

20. 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.

21. 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>.

22. 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.

23. 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.

24. 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,

<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> IHR Court. Case of 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.

<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.

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 FILING

25. Based on the foregoing considerations, the Commission notes that in the instant case, on June 29, 2007, the Third Criminal Chamber of the Supreme Court of Justice dismissed the cassation remedy filed by Mr. Miron Bender against his conviction on May 18, 2006. On this point, the State argues, in other allegations, that the alleged victim could request a full review of his conviction through the special review mechanisms established in Transitory I of Law No. 8503 and in Transitory III of Law No. 8837, and yet he did not resort to these channels.

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 his cassation appeal, Mr. Miron Bender 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

<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.

<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.

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 10th 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.