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REPORT No. 56/23
PETITION 1487-08
REPORT ON INADMISSIBILITY

ARTUR CARL KANEV
COSTA RICA

Approved electronically by the Commission on May 12, 2023.

Cite as: IACHR, Report No. 56/23, Petition 1487-08. Inadmissibility. Arthur Carl Kanev.
Costa Rica. May 12, 2023.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Hugo Luis Levy Mena
Alleged victim:	Arthur Carl Kanev
Respondent State:	Costa Rica
Rights invoked:	Article 8 (right to a fair trial), 9 (freedom from ex post facto laws), 24 (right to equal protection) and 25 (right to judicial protection) of the American Convention of Human Rights ¹

II. PROCEEDINGS BEFORE THE IACHR²

Filing of the petition:	December 19, 2008
Additional information received at the stage of initial review:	November 23, 2015
Notification of the petition to the State:	August 26, 2016
State's first response:	December 2, 2016
Additional observations from the petitioner:	June 15, 2017, October 20, 2017, October 4, 2019, June 26, 2020, December 21, 2020 and February 18, 2022
Additional observations from the State:	July 14, 2018, May 25, 2020, September 22, 2020 and May 17, 2021

III. COMPETENCE

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

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

Duplication of procedures and International <i>res judicata</i>:	No
Rights declared admissible	Not applicable
Exhaustion of domestic remedies or applicability of an exception to the rule:	No, under the terms of section VII
Timeliness of the petition:	Not applicable

¹ Hereinafter, "the American Convention" or "the Convention".

² The observations submitted by each party were duly transmitted to the opposing party.

V. FACTS ALLEGED

Allegations from the petitioner party

1. The petitioner denounces that Mr. Kanev, a United States national, did not have access to a remedy that would have allowed for a comprehensive review of his sentence for the crime of supplying drugs to minors. Likewise, he affirms that said decision did not include a proper reasoning.

2. He explains that on January 5, 1999, the Public Ministry of Costa Rica began an investigation against Mr. Kanev, and after gathering the pertinent evidence, on August 30, 1999, charged him with the crimes of corruption of minors, rape, sexual abuse and supply of drugs for consumption, considering, among other events, that between 1997 and 1998 the defendant invited two young people aged 13 and 15 to his house to consume marijuana, which was produced in the same place. He affirms that on the recommendation of his defense attorney, the alleged victim left the country for the United States, considering that her life was in danger. However, Mr. Kanev was subsequently detained and agreed to be voluntarily extradited to Costa Rica.

3. After carrying out the respective oral trial, on October 20, 2004, the Puntarenas Trial Court, Aguirre y Parrita headquarters, acquitted the alleged victim of the crimes of corruption, rape and sexual abuse, but convicted him of two crimes on supply of drugs for consumption, imposing a sixteen-year prison sentence.

4. The petitioner points out that, based on the recommendation of his lawyer, the alleged victim did not appeal the sentence, and, on the contrary, on November 19, 2004, he requested that he be transferred to the United States in order to conclude his sentence referring to the Strasbourg Convention on the Transfer of Sentenced Persons. He maintains that, although on March 10, 2005, the Institute for Social Adaptation approved such request, on January 24, 2006, said authority, as he alleges, due to high-level pressure, ultimately denied Mr. Kanev's transfer. He points out that the alleged victim filed an appeal for reconsideration, but on March 2, 2006, this appeal was rejected.

5. In view of this, on April 20, 2006, Mr. Kanev's representation filed an appeal for review against his conviction, alleging that the testimony of a witness was not considered and that the proof of crime was not verified. However, on April 30, 2008, the Third Criminal Chamber of the Supreme Court dismissed these allegations, considering that they did not prove that the judgment was erroneous or lacked adequate motivation.

6. He also reports that in September 2008, Mr. Kanev requested by telephone the Public Defense of the State of Costa Rica to represent him in submitting this petition. However, the operator who answered him did not finish giving him an answer, committing to visit the prison of the alleged victim. However, he states that said official never visited him.

7. Based on these considerations, the petitioner party denounces that Costa Rica unduly sentenced Mr. Kanev, since it did not corroborate the existence of the crime of supplying drugs. In the opinion of the petitioner, this situation affected the principle of legality and procedural equality.

8. Finally, he argues that, at the time of his conviction, there were no appeal courts, and that in a similar sense, Law 8503 was not yet in force. Consequently, he considers that his claim should be admitted, while the exception provided for in article 46.2.c) is configured, since the Supreme Court took two years to resolve the review appeal that he filed.

Allegations of the Costa Rican state

9. The State, for its part, replies that the petition should not be admitted for analysis, since it was untimely submitted. It argues that despite the fact that the alleged victim was notified of the outcome of the review procedure on April 30, 2008, he only submitted his petition on December 19, 2008, exceeding the six-month term provided for in Article 46.1.b.) of the Convention. Consequently, it requests the Commission to declare this matter inadmissible for not complying with the cited article of the American Convention.

10. In the alternative, it alleges that the petitioner did not comply with exhausting the internal remedies at the time of filing the petition, since it had not adequately used the appeals and amparo remedies in order to question the alleged violations on the principle of equality before the law, the principle of legality and retroactivity and the right to judicial protection. Regarding the first, it states that it is the appropriate and effective way to revoke sentences based on their comprehensive review already handed down in criminal proceedings; while the remedy of amparo allows solving the other human rights violations.

11. In relation to the alleged violation of the right to appeal the sentence before a higher court, it stands out that the alleged victim did not use the special review mechanisms, 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 Article 8.2.h) of the Convention. Along these lines, it states that at the time he was notified of this petition, Mr. Kanev had had the opportunity to file the procedure established in the transitory provisions of Law No. 8503³ and, failing that, he could have subsequently used the special review mechanism provided for in Transitory III of Law No. 8837.⁴ Therefore, it argues that the domestic law provided additional options so that the alleged victim could use them at the appropriate procedural moment, and despite this, he did not use these avenues.

12. Additionally, it argues that the alleged facts do not characterize a human rights violation that is attributable to the state of Costa Rica. 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. It also highlights that various private attorneys assumed the technical defense of the alleged victim, after being freely designated by the petitioner. In this sense, the State emphasizes that the errors or omissions they have committed in representing the interests of Mr. Kanev are not attributable to the State. In addition, regarding the statement about a telephone contact between the alleged victim and a Public Defense official regarding a possible visit to the prison, it points out that it is not possible to verify such information because it is imprecise.

VI. PRELIMINARY CONSIDERATIONS

13. The Commission observes that the main purpose of this petition is to question the affectation of the right to appeal the ruling, contemplated 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 issue, based on the changes implemented in the Costa Rican criminal procedure legislation, the IACHR deems it necessary to carry out a recount of these pronouncements in order to identify standards that allow it to properly resolve this petition.

14. Thus, in the judgment in the case of *Herrera Ulloa v. Costa Rica* of July 2, 2004, the Inter-American Court of Human Rights⁵ examined the regulation established in the Criminal Procedure Code in force since 1998; and concluded that it did not have a “*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*” considering the limitations the regulations had over the writ of amparo in the criminal procedure.⁶ Consequently, the Inter-American Court declared that the Costa Rican State violated Article 8.2.h) of the Convention in relation to its Articles 1.1 and 2

³ Law No. 8503.- Transitory 1.- People convicted of a criminal act with a date prior to this Law, who have been prevented from filing an appeal against the sentence, due to the rules that regulated their admissibility on that date, may raise the review of the sentence before the competent court, invoking in each case, the grievance and the factual and legal aspects that were not possible to know in cassation.

⁴ Law No. 8837.- Transitory III.- In all matters that have a final judgment at the time this Law enters into force, and that the violation of Article 8.2.h) of the American Convention on Human Rights has previously been alleged, the convicted person will have the 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 that 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 to an appeal for review, 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.

⁵ Hereinafter “the Inter-American Court” or “I/A Court of HR”.

⁶ 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, par. 167.

to the detriment of Mr. Mauricio Herrera Ulloa, by not having guaranteed his right to appeal the ruling; and ordered 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”.⁷

15. As a consequence of this judgment, Costa Rica reformed the regulation of its criminal procedure system in order to have a regulation consistent with the obligations contemplated in Article 8.2.h) of the American Convention. Thus, on June 6, 2006, Law No. 8503, called the “Law for the Opening of Criminal Cassation”, entered into force, which modified and added different articles of the Code of Criminal Procedure related to appeals and review of appeals. Likewise, and in what is relevant to the present case, said legislation established in its Transitory I, a special review procedure for “people convicted of a criminal act with a date prior to this Law, who have been prevented from filing an appeal against the sentence, due to the rules that regulated their admissibility on that date, [...], invoking in each case, the grievance and the factual and legal aspects that were not possible to know in cassation”. Based on 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”.⁸

16. Additionally, both the Commission and the I/A Court HR also confirmed that Law No. 8837 was published on June 9, 2010, entitled “Creation of the appeal of the decision, other reforms to the challenge regime and implementation of new rules of oral procedure 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 sentences were final at the time the law entered into force, it was established that they could file, for a single time, a review procedure within the first six months; and ii) for persons whose appeals were pending a 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.

17. As a consequence of the aforementioned modifications, in the judgment of the case of Amrhein et al. vs Costa Rica of 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.

18. Regarding the first point, the Commission emphasizes that, in the cited 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 proceedings of the petition, since it was specifically intended for people with firm convictions; And because of that “*the fact that it is an exceptional remedy cannot be decisive, per se, to conclude that it is ineffective*”.⁹ Consequently, following the aforementioned jurisprudence, the Commission considers that, in order to determine the admissibility of a matter on these characteristics, it must determine whether the aforementioned remedy was available to the alleged victims after the issuance of their sentence, and if so, verify whether or not they have exhausted such a resource.

19. 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 did not correspond “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. This is because through said reforms, it remedied the deficiencies in the application of the appeal rules[...]”.¹⁰ Likewise, it recalls that in the compliance supervision resolution of November 22, 2010 in the case of Herrera Ulloa vs. Costa Rica, the Court

⁷ /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, par. 198.

⁸ 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, par. 262.

⁹ 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, par. 48.

¹⁰ 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, par. 265.

positively assessed 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*”.¹¹

20. Notwithstanding the foregoing, the Commission stresses 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 factual and legal aspects that were not possible to hear in cassation*.” For its part, Transitory III of Law 8837 demanded for the admissibility of the review procedure that the convicted person “*had previously alleged the violation of Article 8.2.h of the Convention*.”

21. 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.¹² 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.

22. 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”.¹³

23. 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.

24. 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.

25. 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”.¹⁴ This in principle requires a substantive

¹¹I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 22, 2010, par. 16.

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

¹³I/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.

¹⁴I/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.

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

26. Based on the previously stated considerations, the Commission observes that on April 30, 2008, the Third Criminal Chamber of the Supreme Court dismissed the appeal for review filed by the alleged victim against his conviction of October 20, 2004. 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 channels.

27. 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*".¹⁵ Specifically, the information provided shows that, after the denial of his cassation appeal, Mr. Kanev 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.

28. 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.¹⁶

29. 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.

30. 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.

¹⁵ 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.

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

Approved by the Inter-American Commission on Human Rights on the 12th 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.