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Title/Style of Cause:	Carlos Roberto Moreira v. Brazil
Doc. Type:	Decision
Decided by:	President: Florentin Melendez; First Vice-President: Paolo Carozza; Second Vice-President: Victor Abramovich; Commissioners: Clare K. Roberts, Evelio Fernandez Arevalos, Freddy Gutierrez. As established in Article 17(2)(a) of the IACHR Rules of Procedure, Commissioner Paulo Sergio Pinheiro, a Brazilian national, did not participate in the decision regarding this petition.
Dated:	25 July 2007
Citation:	Roberto Moreira v. Brazil, Petition 12.293, Inter-Am. C.H.R., Report No. 59/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 (2007)
Represented by:	APPLICANTS: the Human Rights Task Force of the Office of the General Prosecutor of Sao Paulo State and the Center for Justice and International Law
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I. SUMMARY

1. On June 16, 2000, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “IACHR”) received a petition submitted by the Human Rights Task Force of the Office of the General Prosecutor of Sao Paulo State and the Center for Justice and International Law (CEJIL) (hereinafter “the petitioners”) alleging violation by the Federative Republic of Brazil (hereinafter “Brazil” or “the State”) of Article 8.2.h of the American Convention on Human Rights (hereinafter “the American Convention”), to the detriment of Carlos Roberto Moreira (hereinafter “the alleged victim”).

2. According to the petitioners, the alleged victim was given a two-year prison sentence on September 8, 1998, on the charge of carrying a firearm without the corresponding authorization. After the decision was handed down, the accused was arrested and filed an appeal. However, the subject escaped from jail. Based on this and pursuant to the provisions of Articles 594 and 595 of the Brazilian Code of Criminal Procedure, the appeal was vacated. This action leads the petitioners to believe that the alleged victim was deprived of access to a review of his conviction, thereby violating the right guaranteed under Articles 8.2.h and 1.1 of the American Convention.

3. The State claims that it will not express an opinion on the facts involved in the criminal action affecting the alleged victim, but the petition must be declared inadmissible because the provisions of Articles 594 and 595 of the Code of Criminal Procedure are not uniformly applied by local jurisprudence. However, aware of the conflict between these rules and the Federal Constitution that took effect in 1988, Draft Law No. 4.206/2001 has been proposed to facilitate the revocation of these rules; this will make domestic criminal procedures law consistent with the guidelines of the Convention.

4. In this report, the Commission analyzes the information submitted in the light of the American Convention and concludes that the petition does not reveal obvious violations of the rights enshrined in Articles 8.2.h and 1.1 of the American Convention invoked by the petitioners, and thus decides that this case is inadmissible under Article 47.b of the Convention. The Commission also decides to notify the parties of this decision, publish the decision and include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

5. On June 22, 2000, the Commission proceeded to process the petition under No. 12.293. The petitioners were so informed and the relevant sections were forwarded to the State, allowing a period of ninety days for the State to submit information relating to the case.

6. On April 17, 2001, the Commission repeated its request to the State to submit information on the facts in the complaint.

7. On December 18, 2002, not having received a response from the State, the Commission ordered the case opened and deferred study as to its admissibility to when it expressed an opinion regarding the merits of the case. The Commission informed both parties on the same date and allowed them a period of two months to submit information on the merits of the case.

8. On February 19, 2003, the petitioners submitted information on the merits of the case, receipt of which was acknowledged on March 17, 2003. This information was also forwarded to the State so that it could submit observations within a period of sixty days.

9. On June 19, 2003, the State submitted information on the merits of the case, receipt of which was acknowledged on July 7, 2003. On the same date, the petitioners were sent the State's information so that they could submit observations.

III. POSITIONS OF THE PARTIES

A. Petitioners

10. The petitioners claim that the alleged victim was arrested on April 11, 1998, having been caught by the police at 8:50 p.m. on that day bearing a permitted use firearm without the proper legal authorization. This took place on Oratorio Street in the Moóca neighborhood of the city of Sao Paulo, Sao Paulo State.

11. The petitioners state that because the weapon the alleged victim was carrying had the series number scratched out, the charge against the accused was based on the punishable action defined in Article 10.3 of Law 9.437/97, thus initiating process No. 227/98 before the Eighth Criminal Court of the Central District of the Sao Paulo Division, Sao Paulo State.

12. According to the petitioners, after the prisoner was questioned on May 26, 1998, it was determined that the Judicial Assistance Prosecutor's Office, a division of the Office of the General Prosecutor of the Sao Paulo State, which operates in defense of those without funds, would thereafter handle the defense for the accused. The petitioners indicate that the only hearing for testimony regarding the indictment occurred on June 22, 1998, on which date the preliminary criminal proceeding was concluded.

13. The petitioners maintain that on July 6, 1998, in view of a previous conviction of the alleged victim for robbery and drug trafficking, the Office of the Attorney General of Sao Paulo filed an indictment based on the punishable action defined in Article 10.3, paragraph IV of Law 9.437/97.

14. The petitioners indicate that after the parties submitted allegations in the criminal proceeding, the conviction was handed down on September 8, 1998, imposing on the alleged victim a two-year prison sentence to be served in the penitentiary system as well as a penalty of ten fine-days.

15. The petitioners state that since the alleged victim was a repeat offender, he was not allowed to remain free while awaiting review of the appeal filed against the prison sentence.

16. According to the petitioners, they were informed in the criminal process that on September 22, 1988 the alleged victim escaped from the police division where he was being detained.

17. The petitioners indicate that after the alleged victim was notified of his conviction by the court, his public defender filed an appeal on March 9, 1999, seeking to have the conviction overturned by the higher court, which would ensure the principle of the right to appeal to a higher court. However, the petitioners indicate that since the accused was not recaptured, the appeal was vacated based on Article 595 of the Code of Criminal Procedure, which establishes that an appeal shall be vacated if a convicted person flees after having filed his appeal; thus, the merits of the case were not reviewed.

18. The petitioners state that given the dissent from the decision of the first instance court that ordered the appeal vacated, based on the provisions of Article 5, number LXVIII of the Federal Constitution, and Articles 647 and 667 of the Code of Criminal Procedure, a habeas corpus appeal was filed on May 10, 1999 seeking review of the conviction by the Superior Court. The constitutional appeal was rejected by the First Criminal Chamber of Justice of Sao Paulo on June 14, 1999, based on the fact that the convicted individual did not have the right to remain free while awaiting the decision on the appeal challenging the conviction, without first submitting to imprisonment, in view of the provisions of Article 594 of the Code of Criminal Procedure.

19. According to the petitioners, when the decision indicated in the preceding paragraph became known, an ordinary appeal was filed before the Superior Court of Justice on August 10, 1999 and denied on November 18, 1999.

20. The petitioners conclude their presentation of the facts by asserting that the domestic remedies were exhausted with the publication of the decision of the Superior Court of Justice on December 17, 1999 in the Official Gazette, and it is their view that everything related here amounts to a violation of Articles 8.2.h and 1.1 of the American Convention, in that the alleged victim was not guaranteed access to a higher body for review of the conviction depriving him of his freedom. They cite a series of findings issued by domestic courts that have repeatedly denied access to appeal based on Articles 594 and 595 of the Code of Criminal Procedure.

21. The petitioners indicate that the petition satisfies the admissibility requirements under Articles 44, 46, and 47 of the American Convention, as well as Articles 37, 38, and 39 of the IACHR Rules of Procedure. In addition, they maintain that since the issue here is a restriction on the alleged victim's inherent right to appeal and resulting access to a higher court, as protected under Article 8.2.h of the American Convention, the admissibility requirement under Article 47.b of the Convention has been met.

B. The State

22. The State maintains that the instant case involves legal provisions contained in Articles 594 and 595 of the Brazilian Code of Criminal Procedure, establishing rules regarding the filing of appeals challenging convictions in the first instance court.

23. The State indicates that it will not express an opinion regarding the facts relating to the criminal action in which Carlos Roberto Moreira was convicted of carrying a weapon illegally, in that the conviction itself has not been disputed by the petitioners in the context of the petition submitted to the IACHR.

24. The State indicates that the application of the rules contained in Articles 594 and 595 of the Code of Criminal Procedure has been uneven in the domestic courts and has varied according to the understanding of the individual judge. Different interpretations can be seen in the decisions issued by the Courts of Justice within the individual States or even the decisions of the Federal Supreme Court.

25. The State indicates that, aware of the inconsistency between the legal articles cited and the principles of the Federal Constitution of 1988, the Federal Executive Branch submitted Draft Law No. 4.206 in 2001, expressly revoking Articles 594 and 595 of the Code of Criminal Procedure. These changes are included in the context of a proposed broad reform of the Code of Criminal Procedure, Decree Law No. 3.689 of October 3, 1941, promoted by the Ministry of Justice through the establishment of a commission of jurists specializing in substantive and procedural criminal law, among them Ada Pellegrini Grinover and Miguel Reale Junior.

26. According to the State, the draft law was submitted to the Chamber of Deputies on May 12, 2001, along with Statement of Purpose No. 24-MJ of January 25, 2001, paragraph 4 of which provides that it is fundamentally up to the Judge to decide on maintenance or, if applicable, the imposition of preventive detention or some other precautionary measure, without prejudice to the review on appeal. The State also indicates that the Statement of Purpose explicitly stipulates the revocation of the provision establishing that appeals are to be vacated in the event of flight.

27. According to the State, the proposed legislative amendment introduces consistency between Brazilian constitutional and infra-constitutional law, in that it separates the hearing of the appeal from the requirement that the convicted person be held in prison and establishes the possibility that the order to imprison will be taken as a precautionary measure and not based on repeat offenses as currently required.

28. The State indicates that the government supports Draft Law No. 4.206/2001 with respect to the suggested change in Articles 594 and 595 of the Code of Criminal Procedure and agrees to negotiate with members of parliament in order to ensure rapid passage of the bill.

29. In light of everything set forth above, the State asks the Commission to archive Case 12.293. The State's view is that once Draft Law No. 4.206/2001 was proposed, on a date after the petition was submitted, the question is pointless, since the petitioners sought to make Articles 594 and 595 of the Code of Criminal Procedure consistent with the Federal Constitution and the American Convention.

30. Regarding the specific case reported, the State concludes by asserting that the alleged victim was still evading justice as of the date the State submitted information on the merits of the case.

IV. ANALYSIS

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

31. Pursuant to Article 44 of the American Convention and Article 23 of the IACHR Rules of Procedures, the petitioners, as legally recognized non-governmental entities, are empowered to file petitions with the IACHR relating to alleged violations of the American Convention. With respect to the State, the Commission notes that the Federative Republic of Brazil is a State Party to the American Convention, having ratified it on September 25, 1992. The Commission finds that the petition indicates as the alleged victim Carlos Roberto Moreira, a native of Brazil, with respect to whom Brazil undertook to respect and guarantee the rights enshrined in the Convention. Therefore, the Commission is competent *rationae personae* to review the complaint.

32. The petition claims violations of rights protected under the American Convention. The Commission is thus competent *rationae materiae* to review the complaint.

33. The Commission is also competent *ratione temporis*, in that the facts alleged in the petition occurred when the obligation to respect and guarantee the rights established in the

Convention was already in effect for the State, which ratified the American Convention on the date indicated above.

34. Finally, the Commission is competent *rationae loci* to hear this petition in that it alleges violations of rights protected in the American Convention occurring within the territory of the Brazilian State.

B. Other requirements for admissibility of the petition

1. Exhaustion of domestic remedies

35. Article 46.1.a of the American Convention establishes that in order for a petition to be admitted, it shall be required “that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.”

36. With respect to this aspect of admissibility, the Commission notes that in the handling of this matter, at no point did the State move to object based on a failure to exhaust domestic remedies with respect to the domestic procedures involved.

37. Nonetheless, evaluating the question based on the evidence accompanying the petition, the Commission finds that the appeal challenging the conviction and prison sentence of the alleged victim was vacated on March 15, 1999.[FN2] Subsequently, in an attempt to remedy the consequences of that decision, a habeas corpus appeal was filed on May 10, 1999 and rejected on June 14, 1999.[FN3] An ordinary constitutional appeal was filed against this decision before the Superior Court of Justice. This appeal was denied on November 18, 1999 and published on December 17, 1999.[FN4]

[FN2] Copy of the decision issued in proceeding No. 227/98 by the Eighth Central Criminal Court was attached as an appendix to the petition.

[FN3] Copy of the decision issued in proceeding No 284.923-3/6 for the Court of Justice of Sao Paulo State was attached as an appendix to the petition.

[FN4] Copy of the decision issued in proceeding No. 1999/0085582-5 by the Federal Supreme Court was attached an appendix to the petition, along with proof of its publication.

38. Evaluating the question, the Commission believes that the aforementioned ordinary appeal denied by the Superior Court of Justice exhausted the judicial remedies that this body generally requires to deem that the requirement under Article 46.1.a of the American Convention has been met. Thus, the requirement is considered to have been met in this case.

2. Deadline for submitting the petition

39. Article 46.1.b of the American Convention establishes that in order for a petition or communication to be accepted by the Commission it shall be submitted within a period of six months from the date on which the alleged party whose rights were injured was notified of a

final decision. In the matter under review, the decision in the final court of review was issued by the Federal Supreme Court on November 18, 1999 and published on December 17, 1999 according to the record, so that the deadline should be calculated from that date. Since the petitioner submitted the complaint to the Commission on June 16, 2000, the IACHR considers the requirement indicated in Article 46.1.b of the Convention to have been met.

3. Duplication of international proceedings and res judicata

40. The file in which the petition appears does not contain any information that could lead to a determination that this matter is pending any other international proceeding or that it has been previously decided by the Inter-American Commission. Therefore, the IACHR concludes that the assumptions under Article 46.1.d and Article 47.d of the American Convention do not apply.

4. Characterization of the alleged facts

41. Article 47 de la Convention indicates that:

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 when:

- a. any of the requirements indicated in Article 46 has not been met;
- b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
- c. the statements of the petitioner or of the State indicate that the petition or communication is manifestly groundless or obviously out of order; and
- d. the petition or communication is substantially the same as one previously studied by the Commission or another international organization.

a. With respect to Articles 8.2.h and 25.1 of the American Convention

42. The Commission, based on the jurisprudence of the Inter-American Court, has interpreted Articles 8 and 25 of the Convention as rights that do not establish judicial measures *sensu stricto* but rather a series of requirements that must be observed in procedural bodies if we are to speak of true and proper judicial guarantees according to the Convention.[FN5]

[FN5] IACHR Report No. 50/00 Case 11.298 Reinaldo Figueredo Planchart, Venezuela, April 13, 2000, para. 84. I/A Court H.R., Judicial Guarantees in States of Emergency (Arts. 27.2, 25, and 8 of the American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A, No. 9, para. 27.

43. According to the Court's jurisprudence, these articles recognize:

...the concept of “due process of law,” which includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination.....[FN6]

[FN6] I/A Court H.R., Judicial Guarantees in States of Emergency (Arts. 27.2, 25, and 8 of the American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A, No. 9, para. 28.

44. This is why the existence in both the inter-American and the European system of provisions developing the procedural guarantees required for the benefit of the accused depends on the States’ conviction that effective protection of human right requires, in addition to proper observance of substantive rights, the establishment of procedural guarantees to ensure the protection of those substantive rights.[FN7]

[FN7] Report No. 55/97, Case 11.137, Juan Carlos Abella, Argentina, November 18, 1997, para. 251. Jacques Velu, *Rusen Ergec, La Convention Européenne des Droits de L’Homme*, Brussels, Bruylant, 1990, p. 335.

45. An essential aspect of due process is the right to have a higher court examines or re-examine the legality of any court sentence when it results in irreparable harm to someone, or when such harm affects fundamental rights or freedoms such as personal liberty.[FN8] Due process of law would be ineffective without the right to a defense at trial and the opportunity to challenge an adverse ruling.[FN9]

[FN8] IACHR, Report No. 55/97, Case 11.137, Juan Carlos Abella, Argentina, November 18, 1997, para. 252.
[FN9] *Idem* previous note.

46. Article 8.2.h of the American Convention establishes that:

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: h) the right to appeal the judgment to a higher court.

47. In addition, Article 25.1 of the American Convention establishes that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned, or by this Convention, even

though such violation may have been committed by persons acting in the course of their official duties.

48. In the case under review, the alleged victim was convicted and sentenced to imprisonment by the first instance court on September 8, 1998. In view of his escape from prison, the appeal filed challenging his conviction was vacated on March 15, 1999, pursuant to the provisions of Article 595 of the Brazilian Code of Criminal Procedure.

49. The Commission will proceed to examine whether the appeals under Brazilian law that were available to the alleged victim in this case effectively allowed him to seek to have his conviction reviewed by a higher court or tribunal. To this end, the Commission must analyze and define both the scope and the content, and the purposes and effects of this right enshrined under Article 8.2.h of the Convention.

50. The Court established that the right to appeal a decision is an essential guarantee that must be honored in the context of due process of law, in order to allow an adverse opinion to be reviewed by a different and hierarchically superior judge or tribunal. The right to file an appeal challenging a decision before any decision acquires *res judicata* status must be guaranteed. The intent is to protect the right of defense by allowing the ability to file an appeal during the process in order to prevent a decision issued with defects and errors leading to undue harm to someone's interests from becoming final.[FN10]

[FN10] I/A Court H.R., Herrera Ulloa Case. Judgment of July 2, 2004. Series C, No. 107, para. 158.

51. As regards an appeal filed on behalf of the accused, the Commission has deemed that this makes it possible to protect the rights of the interested party through another opportunity to put up a defense. The appeal against the final sentence seeks to give the party affected by an unfavorable decision the opportunity to challenge the sentence and obtain a review of the matter. This review itself seeks to check that the decision was the rational result of a fair trial consistent with the law, guarantees, and the correct application of criminal law.[FN11]

[FN11] IACHR, Report No. 55/97, Case 11.137, Juan Carlos Abella, Argentina, November 18, 1997, para. 252.

52. The Commission believes that in any judicial process the right of someone charged with a crime to appeal the result of the case to a higher court is essential to guarantee the right to a defense. The ability to appeal to a second instance court in the criminal process strengthens the protections against judicial error.[FN12]

[FN12] Idem previous note, para. 260.

53. The Commission has maintained that Article 8.2.h refers to the minimum characteristics of an appeal required to ensure the correction of both substantive and procedural errors. In this respect, from a formal point of view, the right to appeal a decision before a higher judge or tribunal, as referred to in the American Convention, must first proceed against any first instance decision, in order to examine the improper application, failure to apply, or misinterpretation of the rules of law that form the basis for the resolution in the decision. The Commission has also felt that in order to guarantee the full right to a defense, the appeal must include a material review of the interpretation of procedural rules that may have influenced the decision in the case, when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of such rules.[FN13]

[FN13] Idem previous note, para. 261.

54. Based on the foregoing, the right provided under Article 8.2.h requires the availability of a remedy that would at least allow for review by a higher court of the decision and all major procedural rulings. That review is especially relevant with respect to rulings that may result in defenselessness or cause irreparable damage in the final judgment, including the legality of the evidence. The remedy should also represent a relatively simple way for the appeals court to examine the general validity of the sentence being challenged and also to monitor respect for the fundamental rights of the accused, particularly the right of defense and the right of due process.[FN14]

[FN14] Idem previous note, para. 262.

55. Article 593 of the Brazilian Code of Criminal Procedure establishes that:

Appeal shall be allowed within five (5) days:

- I. on final conviction or acquittal decisions issued by a single judge;
- II. on final decisions or decisions with the force of final, issued by a single judge in the cases provided in the preceding chapter;
- III. on decisions issued by the Jury Court when:
 - a) nullity occurs after the decision is announced;
 - b) the decision of the presiding judge is contrary to express law or the decision of the jurors;
 - c) there is judicial error or injustice with respect to the application of the punishment or security measure;
 - d) the decision of the jurors is manifestly contrary to the evidence in the record.[FN15]

[FN15] Art. 593. Caberá apelação no prazo de 5 (cinco) dias:

- I - das sentenças definitivas de condenação ou absolvição proferidas por juiz singular;
 - II - das decisões definitivas, ou com força de definitivas, proferidas por juiz singular nos casos não previstos no Capítulo anterior;
 - III - das decisões do Tribunal do Júri, quando:
 - a) ocorrer nulidade posterior à pronúncia;
 - b) for a sentença do juiz-presidente contrária à lei expressa ou à decisão dos jurados;
 - c) houver erro ou injustiça no tocante à aplicação da pena ou da medida de segurança;
 - d) for a decisão dos jurados manifestamente contrária à prova dos autos.
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56. The inference drawn from the rule transcribed above is that Brazilian law formally provided the alleged victim an effective instrument to guarantee his right to appeal a decision before a higher judge or court. He filed that appeal on March 9, 1999. However, as the petitioners expressly acknowledge in the complaint, because the court was informed on September 22, 1998 that the alleged victim had escaped from the police division where he was being held, the appeal that had been filed was vacated in accordance with Article 595 of the Brazilian Code of Criminal Procedure.

57. The Commission has maintained that, given the subsidiary nature of the American Convention, the alleged victim should have recourse to and exhaust the remedies offered to him under domestic law in order to resolve alleged violations of due process.[FN16]

[FN16] IACHR, Report No. 82/98, Case 11.703, Gustavo Gómez López, Venezuela, September 28, 1998,

para. 21. Report No. 93/01, Petition 12.259, Alberto Dahik Garzosi, Ecuador, October 10, 2001, para. 30.

Report No. 43/99, Case 11.688, Alan García Pérez, Peru, March 11, 1999, para. 18.

58. Ruling on another situation similar to that which concerns us now, in which the alleged victim had evaded justice, the Commission determined that the affected party must seek to have the State resolve the point in dispute,[FN17] inferring from the transcribed jurisprudence that the individual must appear before domestic courts to enforce his rights.

[FN17] IACHR, Report No. 18/02, Inadmissibility, Petition 12.274, César Verduga Vélez , Ecuador, February 27, 2002, para. 29.

59. As has been determined, Brazil's system of positive criminal procedural law provided the alleged victim with the appropriate remedy for obtaining a review of his conviction. With his

escape, he violated the requirements imposed under Articles 594 and 595 of the Code of Criminal Procedure, establishing that:

Art. 594: The convicted person may not appeal if he does not enter prison or provide bail, unless he is a first offender with a good record, as recognized in the sentence handing down the conviction, or was convicted of a crime for which the penalty is discharged while at liberty.[FN18]

Art. 595: If the convicted person flees after having appealed, the appeal shall be vacated.[FN19]

[FN18] Art. 594. O réu não poderá apelar sem recolher-se à prisão, ou prestar fiança, salvo se for primário e de bons antecedentes, assim reconhecido na sentença condenatória, ou condenado por crime de que se livre solto.

[FN19] Art. 595. Se o réu condenado fugir depois de haver apelado, será declarada deserta a apelação.

60. Based on the analysis above, the Commission considers that it has not been presented sufficient elements that indicates over the course of the proceeding that the alleged victim was denied access to appeal or prevented from exhausting the appeal, but rather that the appeal was vacated based on his flight from justice, which determined his failure to appear before the court.

61. In the information it provided on the merits of the case, the State acknowledges that Articles 594 and 595 of the Code of Criminal Procedure, which were adopted under Law No. 263 of February 23, 1948, are not consistent with the Federal Constitution promulgated on October 5, 1988. It also states that the application of these rules by domestic courts is uneven and depends on the interpretation that each judge gives to these rules. It also maintains that Draft Law No. 4.206, revoking the two rules in question, was submitted to the Congress in 2001. That law has not been passed to date and the two articles remain in effect, according to information obtained by the Commission.

62. Analyzing the direction that domestic jurisprudence is taking, both the Supreme Federal Court (STF)[FN20] and the Superior Court of Justice (STJ)[FN21] have expressed their view that an unconditional right to appeal while remaining free does not always exist. Some precedents established by these bodies have maintained that the benefit of appealing while remaining free does not apply with respect to all appeals, which is inconsistent with the presumption of innocence provided under Article 5, LVII of the Federal Constitution. The full STF has maintained that the American Convention on Human Rights does not guarantee an unrestricted right to appeal while remaining free, safeguarding the provisions contained in the Constitutions and laws of the States Parties.[FN22] The full STF maintained that the American Convention does not prevent the court – with respect to the subject of protecting the status libertatis of the convicted individual (Article 7.2) – from ordering advance imprisonment of a suspect, accused, or convicted individual, provided that this restriction of personal freedom is consistent with the assumptions established under the domestic law of each signatory country of

the American Convention.[FN23] In addition, the Superior Court of Justice, invoking the precedents cited here, has expressed a similar view.[FN24]

[FN20] The Federal Supreme Court is the highest body within Brazil's Judicial Branch and combines the powers typical of the Supreme Court of Justice and the Constitutional Court. Its major institutional role is to serve as the protector of the Federal Constitution, evaluating cases that involve harm or threat to the Constitution.

[FN21] The Superior Court of Justice is one of the highest jurisdictions within the Brazilian Judicial Branch. Its primary function is to oversee the consistent interpretation of Brazilian federal law. It is the final arbiter of all infra-constitutional and unspecialized matters that lie outside the jurisdiction of labor, electoral, and military courts and are not addressed in the Federal Constitution. The STJ is also called the Tribunal da Cidadania. The final body for resolving constitutional matters is the Federal Supreme Court (STF).

[FN22] STF – HC 73.151 – RJ – 1^a T. – Rapporteur Min. Moreira Alves – DJU 19.04.1996

[FN23] STF– HC 72.610 – MG – 1^a T. – Rapporteur Min. Celso de Mello – DJU 06.09.1996)

[FN24] STJ – RHC 10278 – SP – 6^a T. – Rapporteur p/o Ac. Min. Fernando Gonçalves – DJU 26.03.2001 – p. 00474

63. Article 30 of the Convention establishes that:

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

64. The Commission's view has been that the State's interest in resolving alleged criminal cases cannot breach the reasonable restriction of the individual's basic rights.[FN25] In criminal matters, any restriction of the ensured rights and guarantees of the State's citizens must be framed within the so-called parameters of reasonableness and advisability.

[FN25] IACHR, Report No. 12/96 , Jorge A. Jiménez, Argentina, Case 11.245, March 1, 1996, para. 72.

65. The Court has maintained that reasonableness implies a value judgment and, when applied to a law, conformity to the principles of common sense. It is also used in reference to the parameters of interpretation of treaties and, therefore, of the Convention. In that what is just, proportionate, and equitable as opposed to unjust, absurd, and arbitrary is reasonable, reasonableness is a qualifier with an axiological content that implies opinion but, in some sense, may be employed juridical as, in fact, the courts frequently do, in that any state activity should be not only valid but reasonable. Regarding the "advisability" of a law, the question may lend itself to subjective assessments, unless the expression is used in the uncommon sense of "correlation" or "conformity" between internal norms and those based on the Convention.[FN26]

[FN26] I/A Court H.R., Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50, and 51 of the American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A, No. 13, para. 33.

66. Based on all the foregoing, the Commission believes that effective judicial protection is a right involving delivery that in order to be effective requires the mediation of the law ensuring access to legally provided remedies, provided there is compliance with and respect for the assumptions, requirements, and limits established by the law itself, and the competent judicial bodies are responsible for overseeing adherence thereto. Thus, in the instant case, since the alleged victim formally had available to him the remedy provided under Article 593 of the Code of Criminal Procedure in order to obtain a review of his conviction but, in accordance with the provisions of Article 595 of the Code of Criminal Procedure, was unable to benefit from what the Code provided because he had fled justice, at no time was he deprived of the remedy referred to in Article 8.2.h of the American Convention, and the Commission finds in the instant case that the restrictions imposed by the domestic norm in question were consistent with the indicated parameters of reasonableness and advisability, since the alleged victim evaded justice. The petition does not present allegations that could lead to a determination that the alleged affected party was the victim of torture or serious violations of due process had he appeared before the domestic courts. Thus, the alleged violation claimed in the situation reported does not exist since the accused could have had access to the remedy in question had he met the requirements and conditions under domestic law. In its jurisprudence, the Commission has maintained the rule that the affected party must appear before the domestic courts to claim his rights therein, since otherwise he would be committing an abuse of the right.

67. Finally, pursuant to the foregoing, the Commission concludes that this case satisfies the formal admissibility requirements under Article 46 of the Convention. However, since the alleged victim always had a formal and effective remedy with which to obtain a review of his conviction but was nonetheless unable to use it because he failed to comply with the requirements of the law, the Commission finds that the facts reported do not constitute violations of Articles 8.2.h and 25.1 of the American Convention as they relate to the general obligation contained in Article 1.1 thereof, and his petition should thus be declared inadmissible.

V. CONCLUSION

68. Given the preceding factual and legal considerations, the Commission decides that this case is inadmissible in accordance with Article 47.b of the American Convention,

69. Based on the factual and legal arguments presented,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this petition inadmissible.
2. To notify the petitioner and the State of this decision.
3. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed in the city of Washington, D.C., on the 25th day of the month of July, 2007.
(Signed): Florentín Meléndez, President; Paolo G. Carozza, First Vice-President, Víctor E. Abramovich, Second Vice-President; Clare K. Roberts, Evelio Fernández Arévalos, and Freddy Gutiérrez, Commissioners.