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File Number(s):	Report No. 13/04; Petition 136/03
Session:	Hundred and Nineteenth Regular Session (23 February – 12 March 2004)
Title/Style of Cause:	Eduardo Nicolas Cruz Sanchez and Herma Luz Melendez Cueva v. Peru
Doc. Type:	Decision
Decided by:	President: Jose Zalaquett; First Vice-President: Clare K. Roberts; Commissioners: Evelio Fernandez Arevalos, Paulo Sergio Pinheiro, Freddy Gutierrez, Florentin Melendez. In keeping with Article 17(2)(a) of the Commission’s Rules of Procedure, Commission member Susana Villaran, a Peruvian national, did not participate in the discussion or decision of the present case.
Dated:	27 February 2004
Citation:	Cruz Sanchez v. Peru, Petition 136/03, Inter-Am. C.H.R., Report No. 13/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004)
Represented by:	APPLICANT: Juan Miguel Jugo Viera
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I. SUMMARY

1. On February 3, 2003, Juan Miguel Jugo Viera -representing the Asociación Pro Derechos Humanos [Pro Human Rights Association] (APRODEH)-, Edgar Cruz Acuña–brother of Eduardo Nicolás Cruz Sánchez- and Herma Luz Cueva Torres–mother of Herma Luz Meléndez Cueva- (hereinafter the “petitioners”) filed a petition with the Inter-American Commission on Human Rights (hereinafter the “Commission,” “Inter-American Commission” or “IACHR”) against the State of Peru (hereinafter “Peru,” the “State” or the “Peruvian State”). The petition alleges that Peru violated certain rights recognized in the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), to the detriment of Eduardo Nicolás Cruz Sánchez and Herma Luz Meléndez Cueva (hereinafter the “alleged victims”), by detaining them and then summarily executing them when Peruvian Army troopers stormed and retook the residence of the Ambassador of Japan in Peru on April 22, 1997, which had been in the hands of members of the Tupac Amaru Revolutionary Movement (MRTA) since December 17, 1996.

2. The Peruvian State built its defense against the petitioners’ complaint using a variety of arguments. On the question of the admissibility requirements, its contention was that the petition should be considered inadmissible on the grounds that a criminal case was pending in the domestic criminal courts and, therefore, internal remedies had not yet been exhausted.

3. In this Report the Commission concludes that the petition is admissible in respect of the alleged violations of the right to life, the right to judicial guarantees and the right to judicial protection, upheld, respectively, in Articles 4, 8 and 25, of the American Convention, in relation to Article 1(1), to the detriment of Eduardo Nicolás Cruz Sánchez and Herma Luz Meléndez Cueva and David Peceros Pedraza.

II. PROCESSING BY THE COMMISSION

4. By note dated February 3, 2003, received at the IACHR on February 19, 2003, Mr. Juan Miguel Jugo Vera, representing APRODEH, Edgar Cruz Acuña, -brother of Eduardo Nicolás Cruz Sánchez- and Herma Luz Cueva Torres -mother of Herma Luz Meléndez Cueva- lodged a petition against the Peruvian State for the detention and execution of Eduardo Nicolás Cruz Sánchez and Herma Luz Meléndez on April 22, 1997. On March 3, 2003, the Commission sent a note to the petitioners acknowledging receipt of the petition.

5. On September 9, 2003, the Commission began the initial processing of petition 136/03 and forwarded the pertinent parts thereof to the State on September 10, 2003, with the request that it provide information. That same day, it advised the petitioners that the case had been opened and requested additional information.

6. By a communication of November 10, 2003, the State requested an extension, on the grounds that it was gathering information from the Attorney General's Office, the Office of the Ad Hoc Prosecutor of the Ministry of Justice and the Supreme Council of Military Justice, in order to give a full response. By note dated November 11, 2003, the Commission acceded to the request and gave the State a twenty-day extension.

7. By a communication dated December 1, 2003, the State submitted Report No. 077-2003-JUS/CND-SE, prepared by the Executive Secretariat of the National Human Rights Council in response to the complaint filed. The information supplied by the State was forwarded to the petitioners by note of December 4, 2003. On December 10, 2003, the Commission received a communication from APRODEH conveying its observations on the State's reply.

III. POSITIONS OF THE PARTIES

A. The petitioners

8. The petitioners reported that on December 17, 1996, a commando of the Tupac Amaru Revolutionary Movement (MRTA), under the command of a Peruvian citizen by the name of Néstor Cerpa Cartolini, attacked the residence of the Ambassador of Japan in Peru as a party celebrating the birthday of Emperor Akihito was in progress. They initially took 379 people—Peruvian citizens and foreign nationals—hostage. These people were slowly released because the guerrilla group had entered into talks with government emissaries.

9. On the afternoon of April 22, 1997, an operation was conducted to rescue the hostages. In that operation, called "Chavín de Huántar," all members of the MRTA who had seized the residence died. According to the official account, the assailants died fighting the military forces.

In an interview with the newspaper *El Comercio*, published on December 17, 1997, then President Alberto Fujimori stated that shortly after the embassy residence was seized, the President, the National Intelligence Service headed by Julio Salazar Monroe and Vladimiro Montesinos Torres, and the Joint Command of the Armed Forces under Army Commander General Nicolás de Bari Hermoza Rios had planned the operation to retake the residence.

10. Among the military commandos who participated in the rescue operation was Peruvian Army Colonel Roberto Huaman Azcurra, tried for his involvement in the corruption scandal and implicated in the Barrios Altos and La Cantuta massacres. Also taking part was Peruvian Army Colonel Jesús Zamudio Aliaga, now a fugitive from justice. He was known as "ZAJ" and as "El Chacal", from his time in Ayacucho in the mid 1980s where he formed "Lince," an anti-subversive group known for its involvement in human rights violations.

11. When the military rescue operation was over, the bodies were removed by military prosecutors; representatives from the Attorney General's Office were not permitted entry. The corpses were not taken to the Institute of Forensic Medicine for the autopsy required by law; in a highly irregular move, the bodies were taken instead to the morgue at the Police Hospital. It was there that the autopsies would be performed. The autopsy reports were kept secret until 2001. Next of kin of the deceased were not allowed to be present for the identification of the bodies and the autopsies. The bodies were buried in secrecy in various cemeteries throughout Lima. The mother of one of the victims, Mrs. Eligia Rodríguez Bustamante, and the Deputy Director of APRODEH asked the Attorney General's Office to take the necessary steps to identify those who died when the ambassador's residence was retaken, but the Attorney General's Office conceded its jurisdiction to identify the deceased members of the MRTA, handing it over to the military justice system instead.[FN2]

[FN2] On orders from Attorney General Miguel Aljovin Swayne, on May 7 the Deputy Supreme Prosecutor forwards the resolution issued that same date, May 7, 1997, which reads as follows: "Having seen official memorandum zero seventeen hyphen FG SCJM, sent by Navy Captain Moisés Pérez Díaz (CJ), Deputy Prosecutor General for the Supreme Council of Military Justice, in connection with the status of the proceeding in the military courts concerning the military raid on the residence of the Japanese ambassador on the twenty-second of April of nineteen hundred ninety-seven: NOTIFY the Deputy Director of the Pro Human Rights Association and doña Eligia Rodríguez Bustamante of this resolution, so that they can exercise their right before the Special Military Tribunal of the Army's second military zone; a copy of the memorandum is to be sent to the Ombudsman for his information and the pertinent purposes."

12. The truth about what happened in the rescue operation remained secret until the fall of the Fujimori regime. However, stories of extrajudicial executions of surrendered MRTA members began to circulate not long after the rescue operation. On December 18, 2000, the newspaper *El Comercio* carried a story in which the former first secretary of the Japanese Embassy in Peru, Hidetaka Ogura, flatly states that he and other hostages—members of the Supreme Court, the Vice Minister of the Office of the President and two colonels—saw three people from the subversive group captured alive, one called "Tito."

13. On January 2, 2001, APRODEH filed a criminal complaint against Alberto Fujimori Fujimori, Vladimiro Montesinos Torres, Nicolás De Bari Hermoza Ríos, Julio Salazar Monroe and anyone else found to be guilty of the crime of the qualified homicide of Eduardo Nicolás Cruz Sánchez, alias "Tito," and two other members of the Tupac Amaru Revolutionary Movement (MRTA) who took part in the taking of the residence of the Japanese Ambassador in December 1996. Special Provincial Prosecutor Richard Saavedra was put in charge of the preliminary inquiry into the complaint.

14. In the inquiries conducted by the Prosecutor's Office, Mr. Ogura sent a letter notarized by the Peruvian Consulate in Tokyo wherein he confirmed the account he gave to the press and stated that in the midst of the rescue operation, as he was being evacuated with other hostages, he caught sight of two MRTA rebels whom the commandos had surrounded and disarmed. He heard the woman cry "don't kill me or don't kill him." Later, in the neighboring residence, he saw "Tito" or Eduardo Cruz Sánchez, who had been caught and turned over to a commando, who took him back to the residence. He later heard the account that claimed that all the MRTA rebels had died in battle, which is why he was confirming his account of the extrajudicial executions.

15. In the Prosecutor's inquiries, the bodies of the deceased MRTAs were exhumed and examined by forensic physicians and forensic anthropologists, experts from the Institute of Forensic Medicine, from the Criminology Division of the National Police and from the Peruvian Forensic Anthropology Team, some of whom have served as experts for the International Tribunal for the former Yugoslavia. Another member of the group was a foreign expert, Dr. Clyde Snow. Statements were taken from various officers who took part in the rescue operation and from some of the rescued hostages.

16. In their statements to the Prosecutor's Office, non-commissioned National Police officers Raúl Robles Reynoso and Marcial Teodorico Torres Arteaga stated that they took Eduardo Cruz Sánchez alive, as he was attempting to get away by mingling with the hostages when they were at the house in back of the Japanese Ambassador's residence. His capture was reported to the superior officer, Jesús Zamudio Aliaga, who ordered that he be handed over to a commando. The latter took Cruz Sánchez back to the residence. Cruz Sánchez later turned up dead. The examination done by the forensic anthropologists and forensic physicians revealed that the deceased had been shot once, while in a defenseless posture vis-à-vis his assailant.

17. Based on this evidence and invoking Law No. 27379, a law enacted during the democratic transition Government authorizing the adoption of special measures to restrict liberty, Prosecutor Saavedra petitioned the court seeking the preliminary detention of 11 officers in the Armed Forces. Judge Cecilia Polack of the Third Special Court for Anti-Corruption Cases granted the request and issued arrest warrants for those officers. Attorney General Nelly Calderón supported the measure. In a statement made on May 20, 2002, to Radio Programas del Perú (RPP) she said the following: "We prosecutors are supporting the action taken by prosecutor Saavedra, because he has done a careful investigation (and) unfortunately the evidence suggests culpability. That evidence has to be collated to determine what degree of responsibility each arrested officer bears."

18. The petitioners pointed out that the arrest warrants ordered by the court elicited strong reactions within the executive branch of government, particularly from the Minister of Defense, who publicly expressed his support for the officers named in the judge's order. The minister of justice, the minister of the interior and the prime minister also questioned the arrest warrants issued by Judge Cecilia Polack, arguing that the arrests would be detrimental to the anti-subversive campaign. On May 15, Congressmen José Barba Caballero and Rafael Rey introduced a petition in Congress seeking amnesty for Peruvian Army General José Williams Zapata and for the official personnel who participated in the release and rescue of the hostages. Aprista Congressmen also introduced a bill seeking amnesty for the armed forces officers who participated in the release of the hostages held at the residence of the Japanese Ambassador. The legal argument underlying both bills was that the facts attributed to the military were not common crimes and were related to political phenomena. Later, the Minister of Defense told the media that members of the SIN had infiltrated the rescue operation at the residence of the Japanese Ambassador "Chavín de Huántar", and had acted as "buzzards" to execute any surviving subversives; he argued that the investigations should center around those members of the National Intelligence Service.

19. The petitioners pointed out that despite these pressures, the Attorney General's Office filed charges against 19 people, among them the commandos who the investigation revealed had participated in the execution of Herma Luz Meléndez Cueva "Melisa" and David Peceros Pedraza. Also charged were the officers who, based on the military's own structure and hierarchy, must have known of these captures. The Third Examining Judge ordered trial proceedings to begin, issuing subpoenas to the commandos and ordering the preventive detention of Jesús Zamudio Aliaga.

20. The petitioners stated that for its part, on May 28, 2002, military justice began legal proceedings against 140 commandos who took part in the Chavín de Huántar operation, charging them with abuse of authority and violation of international law. The preliminary inquiry did not include Vladimiro Montesinos Torres, Nicolás Hermosa Ríos, Jesús Zamudio Aliaga and Roberto Huaman Ascurra, echoing the suggestion put forward by the Minister of Defense. Thus began the legal challenge over jurisdiction.

21. On June 7, 2002, at the ceremony organized by the army to commemorate loyalty to the National Flag, the commandos were honored and decorated, including those whom the judicial branch had under investigation for alleged involvement in the extrajudicial executions. On July 29, 2002, the Commando Chavín de Huántar was selected to lead the military parade celebrating independence. This was done to exert more pressure on the Supreme Court justices who had to decide the jurisdiction question raised by the military court, all in order to make certain that it would be the military court that investigated the extrajudicial executions.

22. On August 16, 2002, the Supreme Court convened to hear the oral arguments of the parties to the jurisdictional challenge brought by the military tribunal. The military prosecutor heading up the parallel inquiry being conducted in the military court and who had to bring the charges and prove them, was the person arguing the military's challenge. However, in his oral arguments he made a defense for the commandos, stating that "heroes must not be treated like villains."

23. In its August 16, 2002 ruling, the Supreme Court held that the military court system had jurisdiction over the 19 commandos, thus declining jurisdiction in favor of the military tribunal. It held that the events had occurred in a district that at the time was under a state of emergency, and were part of a military operation conducted on orders from above. It further held that any crimes that the 19 commandos may have committed were the jurisdiction of the military courts. It also ruled that the civilian criminal courts should retain jurisdiction over anyone else, other than the commandos, who may have violated civilian laws.

24. These arguments had the effect of removing certain agents from the jurisdiction of the military courts, so that they could continue to be investigated in the civilian court system: Vladimiro Montesinos Torres, Roberto Huaman Ascurra, Nicolas Hermosa Ríos and Jesús Zamudio Aliaga, who had a direct hand in the execution of Eduardo Cruz Sánchez and gave the order to execute Herma Luz Meléndez Cueva and Víctor Peceros Pedraza. But the commandos who carried out the orders and the military chiefs who transmitted the orders were investigated by the very same Military Prosecutor who portrayed them as heroes in his arguments before the Supreme Court. In the end they were tried by military judges appointed by the Ministry of Defense.

25. The petitioners reported that the September 2002 issue (417) of the publication "Actualidad Militar", put out by the Army's Information Office, flatly defended the commandos and stated that common sense had prevailed when the Supreme Court decided the jurisdictional challenge in favor of the military courts, as the commandos' actions would now be judged in the context of wartime.

26. In October 2002, Prosecutor Richard Saavedra Luján, who had been subjected to pressure and threatened with investigation because of his conduct of this case, was removed without cause by the National Judiciary Council. There was nothing in the prosecutor's record to suggest that he had ever been sanctioned or investigated for misconduct.

27. In reply to the Peruvian State's response, the petitioners stated that the Supreme Court's August 16, 2002 ruling, to divide the case in two and hand over the authors of the extrajudicial executions to the jurisdiction of the military courts, is the reason why they filed a complaint with the Inter-American Commission, as Supreme Court rulings are final and not subject to any kind of appeal.

28. They emphasized that the military courts do not have jurisdiction to investigate violations of human rights like extrajudicial execution, since under its own Code of Military Justice, they only have jurisdiction to take up cases that meet three basic criteria: The active subject is a member of the military or police; the conduct or action is related to the military function, and the passive subject is a member of the police or military. Inasmuch as the conduct must be service related, i.e., associated with the purpose, organization and functions of the armed forces, the present case cannot be classified as a service-related crime.

29. The petitioners reiterated that military courts are not competent, independent and impartial bodies, since under the Organic Law of Military Justice –Decree-Law No. 23,201- they

are answerable to the Ministry of Defense. Military jurisdiction is therefore subordinate to an arm of the executive branch of government, as it is the Minister of Defense who appoints military court judges. The latter are members of the armed forces.

30. The petitioners' contention was that the proceedings in the military court system cannot be an effective recourse for the protection of the rights of the victims and their next of kin and for reparation of the damages caused. The military system of criminal justice claimed jurisdiction over the case to protect those involved; hence, the military court proceedings do not afford the minimum guarantees of independence and impartiality required under Article 8(1) of the Convention.

31. The very same day Prosecutor Saavedra filed formal charges in civilian court against the military on May 24, 2002, Prosecutor Juan Pablo Ramos Espinoza filed a complaint against all the commandos involved in the operation, but not Vladimiro Montesinos, Nicolás Hermoza Ríos, Roberto Huaman Ascurra and Jesús Zamudio Aliaga. On May 28, 2002, this complaint made its way through all the various levels of the military justice system in order to open the criminal case before the civilian court ruled on the complaint brought by the Office of the Special Prosecutor. The Office of the Military Prosecutor issued its finding that same day, at 2:00 p.m. The case went to Brigade General Rodríguez Colchado, President of the Court-martial, who immediately issued his ruling and sent the case to the Office of the Prosecutor for the Court-martial for its ruling. At 3:30 p.m., that Office issued an opinion to the effect that the military courts had jurisdiction to hear the case. At 4:30 p.m., the court record was delivered to the Inspector General, who hastily gave his opinion and referred the case to the Office of the President of the Court-martial. Before the close of working hours that day, that Office had instituted proceedings against the officers charged in the civilian courts, and the more than one hundred commandos who participated in the operation.

32. On another point, the petitioners noted that the information the State supplied to the effect that proceedings against Nestor Cerpa Cartolini and others for the crime of treason began in the military courts on December 18, 1996, was incorrect. On the contrary, when the events occurred it was a Military Judge who gave the order not to send the bodies to the Institute of Forensic Medicine, which would have been the proper procedure; instead, he ordered them sent to the Police Hospital, where physicians on the police force conducted incomplete autopsies. It was the military judge who ordered the remains buried, unidentified, in remote cemeteries. All this was to give the impression that the Military Courts had instituted proceedings before the civilian courts. The sole purpose was to cover up the crimes committed.

33. The petitioners stress that the military courts never intended to investigate its members. Indeed, two of the accused - José Williams Zapata and Manuel Paz Ramos- were promoted on November 8, 2003. The promotions were criticized in the press since the two men were to stand trial in the military courts. Soon thereafter, a decision was handed down on October 15, 2003, in which the Military Court-martial decided to dismiss the charges of violation of international law, abuse of authority and qualified homicide against all those accused. The decision was not made public until November 12, after the promotions had gone into effect.

34. The petitioners consider that these events simply confirm that the military justice system cannot be regarded as competent to investigate and prosecute the members of the armed forces who took part in the Chavín de Huántar operation. Hence, it cannot be regarded as an effective recourse, precisely because it lacks impartiality and objectivity. They therefore ask the Inter-American Commission to declare the complaint admissible.

B. The State

35. The State, for its part, argued that on December 17, 1996, members of the “Tupac Amaru” Revolutionary Movement, armed with AKM rifles, UZI sub-machine guns, rocket-propelled grenades (RPG), Browning automatic rifles, revolvers, hand grenades, explosives, anti-gas masks, and other armaments, used force to enter the property through a number of areas. They managed to overpower the security guards. They stormed the residence and took hostage all residents and guests. Their purpose was to force the Government to meet a number of demands, mainly having to do with the release of MRTA members being held in various prisons across the country, and to win certain concessions in the conduct of their subversive activities. When a high level commission was formed to negotiate with the leaders of the terrorist commando group, the majority of those being held hostage in the residence were released. When negotiations stalled on January 17, 1997, 72 people remained hostage.

36. The “Chavín de Huántar” operation’s raid was on April 22, 1997; “(...) some of the hostages, who frequently sent messages to the Armed Forces intelligence team through microphones installed in the residence, reported that only one subversive was on the second floor of the residence, looking after the hostages; the others, including their leader, Nestor Cerpa Cartolini, were on the first floor (...). Peruvian Army Major Jose Luis Cortijo Arbulu and Peruvian Army Lieutenant Colonel Roberto Huaman Ascurra received the messages. The latter immediately reported the news to Peruvian Army Colonel Williams Zapata, Peruvian Army Colonel Robles del Castillo and Peruvian Army Colonel Cabrera Pino. The message was also transmitted to the advisor at the time, Vladimiro Montesinos Torres, so that he might coordinate the operation with former president Alberto Fujimori and Army General Commander Nicolás de Bari Hermoza Ríos ...”

37. A total of 71 people were released in that action. But the raid also claimed the lives of the President of the Supreme Court at the time, Dr. Carlos Giusti Acuña, commandos Army Lieutenant Colonel Juan Valer Sandoval and Army Lieutenant Raúl Jiménez Chávez and the fourteen MRTA rebels.

38. On May 24, 2002, the Special Criminal Prosecutor Richard Saavedra Lujan filed formal charges against Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Edmundo Huaman Ascurra, Augusto Jaime Patiño, José Williams Zapata, Luis Alatrística Torres, Carlos Tello Aliaga, Benigno Leonel Cabrera Pino, Jorge Orlando Fernández Robles, Hugo Víctor Robles Del Castillo, Víctor Hugo Sánchez Morales, Jesús Zamudio Aliaga, Raúl Huarcaya Lovon, Walter Martin Becerra Noblecilla, José Alvarado Díaz, Manuel Antonio Paz Ramos, Jorge Feliz Díaz, Juan Carlos Moral Rojas, and Tomas Cesar Rojas Villanueva. The charges were crimes against the life, body and health –qualified homicide- of Nicolás Eduardo Cruz Sánchez, Herma Luz Meléndez Cueva and another as yet unidentified person (preliminarily

identified as Víctor Salomón Peceros Pedraza). He also filed formal charges against Juan Fernando Dianderas Ottone, Martin Solari De La Fuente and Herbert Danilo Angeles Villanueva. The charge against them was obstruction of justice by concealing the evidence.

39. On June 11, 2002, in case number 019-2002, the Judge of the Third Special Criminal Court issued the order to begin the evidentiary phase of the proceedings against Vladimiro Montesinos Torres and others, on charges of murder; he also ruled that there were no grounds to begin examining proceedings against Juan Fernando Dianderas Ottone, Martin Solari De La Fuente and Herbert Danilo Angeles Villanueva, for crimes against the administration of justice-obstruction of justice by concealing, destroying, covering up evidence.

40. The Office of the Ad Hoc Prosecutor for the Montesinos and Fujimori Cases filed an appeal seeking revocation of the June 11, 2002 order to begin the evidentiary phase of the proceedings. By a decision dated April 2, 2003, the Special Criminal Chamber of the Lima Superior Court overturned that part of the challenged order that found no grounds to commence evidentiary proceedings against Juan Fernando Dianderas Ottone, Martín Solari De la Fuente and Herbert Danilo Angeles Villanueva on charges of obstruction of justice. The Superior Court amended the lower court decision and thus ordered commencement of the evidentiary phase of the proceedings against the above-named persons, on charges of obstruction of justice.

41. The State informed that on June 30, 2002, the Judge of the Third Special Criminal Court opened the evidentiary phase of the trial against Juan Fernando Dianderas Ottone, Martin Solari De La Fuente and Herbert Danilo Angeles Villanueva, as if it were a separate, independent proceeding. The case was assigned number 024-2003. By order of August 12, 2003, the Criminal Chamber ordered joinder of case 024-2003 and case 019-2003[FN3], the latter being the principal case.

[FN3] Information provided by the State, which seems to be made to case 019-2002.

42. Concerning the jurisdictional challenge raised in the case, the State indicated that the Prosecutor for the Special Court-Martial accused Nestor Cerpa Cartolini and others of the crime of treason because of the raid on the residence of the Japanese Ambassador in Peru. The Special Supreme Military Tribunal therefore gave jurisdiction to the Army Court-Martial on December 18, 1996. The Chamber of the Army's Special Court Martial named a Special Ad Hoc Military Criminal Judge to preside over the case, opening the proceedings and informing the Special Military Prosecutor. That case ended with the death of the MRTA rebels during the raid to retake the residence of the Japanese Ambassador.

43. The State informed that on June 26, 2002, the Office of the President of the Supreme Council of Military Justice decided that the Third Special Criminal Court of the Lima Superior Court should refrain from hearing case No.019-2002. He reasoned that the Armed Forces personnel named in that case were also named in the order to commence proceedings in the Court-Martial of the Supreme Council of Military Justice. In accordance with Article 23 of the Code of Criminal Procedure and in response to the request from the Supreme Council of Military

Justice, the Third Special Criminal Court held that the jurisdictional challenge should run its course.

44. On August 16, 2002, the Transitory Criminal Law Chamber of the Supreme Court decided the jurisdictional challenge in favor of the military court system. It held that the preliminary proceedings being conducted in the military courts were to continue there, which meant that the Third Special Criminal Court was to transmit to the Office of the Chief Military Judge for Preliminary Proceedings of the Supreme Council of Military Justice, a certified copy of all preliminary proceedings conducted in the case against Augusto Jaime Patiño, José Williams Zapata, Luis Alatriza Rodríguez, Carlos Tello Aliaga, Víctor Robles Del Castillo, Víctor Hugo Sánchez Morales, Raúl Huarcaya Lovón, Walter, Becerra Noblecilla, José Alvarado Díaz, Manuel Paz Ramos, Jorge Félix Díaz, Juan Carlos Moral Rojas, Tomas Cesar Rojas Villanueva, Jorge Orlando Fernández Robles and Benigno Leonel Cabrera Pino. The Supreme Court's Criminal Law Chamber also ordered that preliminary proceedings were to continue in the case against Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Huaman Ascurra and Jesús Zamudio Aliaga.

45. By Memorandum No. 427-P-CSJM, dated November 3, 2003, the Office of the President of the Supreme Council of Military Justice (CSJM) reported that case No. 52000-2002-0071 prosecuted against (r) Division General Augusto Jaime Patiño et al. on charges of abuse of authority, and the record of the proceedings on the jurisdictional challenge, were in a Final Report prepared by the Chief Military Judge for Preliminary Proceedings of the CSJM. By Memorandum No. 345-S-CSJM, dated December 1, 2003, the General Secretariat of the CSJM reported that case No. 52000-2002-0071 had been submitted to the corresponding Chamber for consultation.

46. Further, as noted in the Expert Forensic Medical Report prepared by the Division of Autopsies and Related Examinations, of “the fourteen bodies autopsied, eight (NN two, NN three, NN six, NN seven, NN ten, NN eleven, NN twelve, and NN fourteen), representing fifty-seven percent of the cases, had bullet wounds where the entry wound was on the back of the neck, injuring cervical vertebrae; exit wounds were on the front or side of the head, which meant that the persons in question were shot from behind; the frequency and repetition of this type of head and neck wounds determined the wound pattern in these segments (...).”

47. As a criminal case was pending in the domestic courts, the State's contention was that internal remedies had not been exhausted. It therefore asked the Honorable Commission to declare petition No. 136/2003 inadmissible, in accordance with Articles 46 (1)(a) of the American Convention and 31 of the Commission's Rules of Procedure.

IV. ANALYSIS

A. The Commission's competence *ratione personae*, *ratione loci*, *ratione temporis* and *ratione materiae*

48. The Commission observes that Peru has been a State party to the American Convention since July 28, 1978, the date on which its instrument of ratification was deposited.

49. Under Article 44 of the American Convention, the petitioners are authorized to lodge petitions with the Inter-American Commission on Human Rights. The alleged victims named in the petition are persons whose Convention-recognized rights and freedoms Peru undertook to respect and ensure. Therefore, the Commission is competent *ratione personae* to examine the petition.

50. The Commission is competent *ratione loci* to take up this petition, inasmuch as it alleges violations of rights protected under the American Convention said to have occurred within the territory of a State party to the Convention. The Commission is competent *ratione temporis* inasmuch as the facts alleged in the complaint occurred when the obligation to respect and ensure the rights recognized in the American Convention was already binding upon for the Peruvian State. Finally, the Commission is competent *ratione materiae* because the petition alleges violations of human rights protected under Articles 4, 8 and 25 of the American Convention.

B. Requirements for the petition's admissibility

1. Exhaustion of remedies under domestic law

51. Article 46 of the American Convention provides the following:

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

- a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
 - b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
- (....)

2. The provisions of paragraphs 1.a and 1.b of this Article shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- (.....)
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

52. The Article cited above requires exhaustion of the remedies under domestic law, in accordance with generally recognized principles of international law. The case law of the Inter-American Court of Human Rights has established that the rule requiring exhaustion of domestic remedies is for the State's benefit and hence it may waive the rule either expressly or by implication. The objection asserting non-exhaustion of domestic remedies, to be timely, must be made early in the Commission's proceedings, lest waiver of the rule be presumed; merely

submitting information on the progress of domestic court proceedings is not the same as expressly invoking the ruling requiring exhaustion of domestic remedies.[FN4]

[FN4] Inter-American Court of Human Rights, Castillo Páez Case, Preliminary Objections, Judgment of January 30, 1996, par. 40; Loayza Tamayo Case, Preliminary Objections, Judgment of January 31, 1996, par. 40; Castillo Petruzzi Case, Preliminary Objections, Judgment of September 4, 1998, par. 56; Comunidad Mayagna (Sumo) Awas Tingi Case, Judgment of February 1, 2000, paragraphs 54 to 56.

53. In the petition under study, the Commission observes that in its first response, the State built its case for the inadmissibility of the petition on the grounds that a criminal case about these facts was pending in the domestic courts. Hence, the Commission believes that the conditions attending the exhaustion of domestic remedies need to be examined, first in the case of the proceedings conducted in the military criminal courts and then the investigations and proceedings in the civilian courts. All this to determine how effective they might be.

54. The State has reported that on December 18, 1996, the day after the Japanese Ambassador's residence was taken over by the MRTA subversives, the Special Military Prosecutor filed a complaint, whereupon the Special Military Tribunal assigned jurisdiction to the Army Court-Martial. The latter named a Special Ad Hoc Military Criminal Judge to preside over the case, who instituted proceedings against Néstor Cerpa Cartolini and others for the crime of treason. Hence, when the events occurred at the Embassy residence, their investigation was alleged to have been under the jurisdiction of the military criminal justice system right from the start.

55. But the petitioners assert that that information is not correct. They claim that on April 22, 1997, when the "Chavín de Huántar" operation was conducted to retake the Ambassador's residence, a military judge gave the order to send the bodies not to the Institute of Forensic Medicine, as should have been done, but to the Police Hospital instead. There, partial autopsies were conducted. The same judge ordered the bodies buried in a distant cemetery. Next of kin were not allowed to identify them much less know where they were.

56. The petitioners assert that the criminal proceedings in the military courts against the Army personnel in the "Chavín de Huántar" Commando were instituted precisely in order to oust those responsible for the executions of the alleged victims from the jurisdiction of the civilian courts. To make their point, the petitioners describe how on the very day that Special Provincial Prosecutor Richard Saavedra Luján filed charges in the civilian court against all those associated with the event, among them members of this command, the Military Prosecutor also filed charges in the military criminal court in connection with the very same events, but only against the military commandos. He did not charge Vladimiro Montesinos, Nicolás Hermoza Ríos, Roberto Huaman Ascurra and Jesús Zamudio Aliaga. All the procedures to put that jurisdiction in motion and institute the inquiry into the crimes of abuse of authority and violation of international law were accomplished in just one day. Then came the jurisdictional challenge to wrest the case from the civilian courts.

57. As the petitioners report, the Supreme Court's August 16, 2002 decision on the jurisdictional challenge went in favor of the military criminal justice system, but came in the midst of pressure from certain government ministers and failed attempts to pass amnesty bills on behalf of the accused. The ruling from the Supreme Court, which is the court of last resort, sealed the question of jurisdiction.

58. In the end, on October 15, 2003, the Chamber of the Supreme Council of Military Justice dismissed the case against the commandos, who had been charged with violation of international law, abuse of authority and qualified homicide. It did so on the grounds that the presence of a crime and the guilt of the accused had not been proved. The Inspector General of the Superior Council of Military Justice has had that ruling under review since November 30, 2003.

59. The Commission has always held that the military courts are not the proper forum and are not an effective recourse for investigating, prosecuting and punishing violations of the human rights protected under the American Convention and that are alleged to have been committed by members of the forces of law and order or with their help or acquiescence.[FN5] Similarly, the Inter-American Court of Human Rights has ruled that military criminal justice is an appropriate forum for prosecuting members of the military for committing offenses or crimes that are violations of military rules.[FN6] It follows, then, that the investigation and prosecution of Army personnel in the military justice system for the events related to the alleged executions of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and David Peceros Pedraza, is not an adequate remedy for ascertaining their responsibility in the serious violations denounced, in the sense of Article 46(1) of the American Convention.

[FN5] IACHR, Admissibility Report N° 41/02, Case 11.748 Pueblo Bello, Colombia (2002), para. 24. Third Report on the Situation of Human Rights in Colombia (1999), p. 175; Second Report on the Situation of Human Rights in Colombia (1993), p. 246; Report on the Situation of Human Rights in Brazil (1997), pp.40-42.

[FN6] Inter-American Court of Human Rights, Durand and Ugarte Case, Judgment of August 16, 2000, paragraph 117.

60. As for the proceedings conducted in the civilian courts, the Commission notes that because examining proceedings are in progress against Vladimiro Montesinos Torres, Roberto Huaman Ascurra, Nicolás Hermosa Ríos and Jesús Zamudio Aliaga, a case might be made for failure to exhaust the remedies under domestic law. However, it is also true that in the inquiry being conducted against Juan Fernando Dianderas Ottone, Martin Solari De La Fuente and Herbert Danilo Angeles Villanueva for the crime of obstruction of justice for their handling of the victims' bodies, the scene of the events and the chain of custody of the evidence, the Third Anti-Corruption Judge issued a decision on October 17, 2003, dismissing the criminal case against the accused on grounds that they were acting on the orders of a court.[FN7]

[FN7] “Juez Barreto ignoró pruebas para exculpar a ex Ministro Dianderas.” [Judge Barreto ignored the evidence in order to clear former Minister Dianderas], La República, November 20, 2003.

61. In a criminal investigation of this nature, from the moment the authorities enter the crime scene, its preservation, the way the forensic personnel handle the bodies, autopsy procedures—which must meet international standards—and the chain of custody of the evidence gathered, are functions that, in combination with other investigative procedures, are essential to establish what happened and to identify the authors, in order to bring them to trial. In the instant case, the absence of all this activity at the time and, worse still, the measures these State agents allegedly took to hide the facts, combined with the amount of time that passed before these facts were uncovered, does not augur well for the effectiveness of the domestic remedy to meet the requirement established in Article 46(2) of the American Convention.[FN8] The Inter-American Court of Human Rights has held that while every criminal investigation must meet a number of legal requirements, the rule of prior exhaustion of the remedies under domestic law must never lead to a halt or delay that would render international action in support of victims useless.[FN9]

[FN8] IACHR, Admissibility Report N° 57/00, La Granja, Ituango, Colombia, (2000), para. 44.

[FN9] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Preliminary Objections, Judgment of June 26, 1987, para. 93.

62. The Commission therefore considers that the exceptions provided for in Article 46(2)(a) and (c) of the American Convention do apply, and that the rule requiring exhaustion of the remedies under domestic law does not apply to the present case in regard to the investigation and prosecution of the members of the “Chavín de Huántar” Commando Group who took part in the events denounced, or in regard to the State agents who had a hand in the cover-up once the alleged extrajudicial executions occurred.

2. Time period for lodging the petition

63. The Commission also considers that the requirement set forth in Article 46(1)(b) of the Convention to the effect that a petition must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment that exhausted domestic remedies, does not apply inasmuch as the petition was lodged within the reasonable time period referred to in Article 32(2) of its Rules of Procedure for cases in which no final ruling has been delivered prior to presentation of the petition.

3. Duplication of international proceedings and international res judicata

64. It is the Commission’s understanding that the subject matter of the petitions is not pending with another international arrangement for settlement and is not substantially the same as one previously examined by the Commission or by another international organization.

Therefore, the requirements established in Articles 46(1)(c) and 47(d) of the Convention have been met.

a. Characterization of the facts alleged

65. The petitioners are alleging violations of the right to life, the right to judicial guarantees and the right to judicial protection recognized in Articles 4, 8 and 25, respectively, of the American Convention, in connection to Article 1(1) of the Convention.

66. The Commission considers that the debate over the existence of violations of Articles 4, 8 and 25 of the American Convention in connection to Article 1(1) must be examined when the merits of the case are analyzed. For admissibility purposes, the Commission concludes that the petition does state facts that tend to establish violations of human rights and that the petition is not obviously groundless or patently out of order.

V. CONCLUSIONS

67. In the present report, the IACHR has established that it is competent to examine the petition lodged alleging violation of the right to life, the right to judicial guarantees and the right to judicial protection, to the detriment of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and David Peceros Pedraza. While not named in the petition, Mr. Peceros Pedraza's rights also appear to have been violated in these same events and in the same way.

68. The Commission concludes that the petition is admissible under Article 47(a) of the American Convention. Based on the foregoing arguments of fact and of law,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the present case admissible, which concerns the alleged violation of Articles 4, 8, 25 of the American Convention on Human Rights in connection to Article 1(1).
2. To notify the petitioners and the State of this decision.
3. To continue with the analysis of the substance of the question.
4. To place itself at the disposal of the parties with a view to achieving a friendly settlement based on respect for the rights enshrined in the American Convention on Human Rights and to invite the parties to decide on this possibility.
5. To publish this decision and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 27th day of February in the year 2004. Signed: José Zalaquett, President; Clare K. Roberts, First Vice-President; and Commission members Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutiérrez and Florentín Meléndez.