

Background paper (Case study group 3 'Montesinos', Thursday 13:30 – 16:00)

The Peruvian efforts to recover proceeds from Montesinos' criminal network of corruption

Guillermo Jorge¹

Executive Director, Program on Corruption and Governance,
Universidad de San Andrés, Argentina

INTRODUCTION

Vladimiro Montesinos Torres, the *de facto* chief of intelligence and main advisor of former Peruvian President Alberto Fujimori, in office from 1990 to 2000, was the head of a corrupt network that penetrated most Peruvian State's structures, undermining all constitutional check and balances through violence and corruption. Since November 2000, the Peruvian authorities introduced several reforms in national legal system in order to prosecute their crimes and devoted a huge amount of energy to localize and repatriate the proceeds of corruption. So far, assets valued in USD 174 million were repatriated from the Cayman Islands, Switzerland and the United States, while accounts valued in USD 47 million remain frozen in Switzerland, Mexico, Luxembourg and Panama². The variety of jurisdictions and legal traditions from where the Peruvian authorities got cooperation to repatriate funds makes the Montesinos case an interesting account for our purposes.

In December 2005, the United Nations Convention against Corruption (UNCAC) came into force, and it has already been ratified by 95 States. It is the first global binding instrument that seriously addresses the complexities of corruption asset's recovery. The UNCAC not only declares that the return of proceeds of corruption to its country of origin is a fundamental principle of the treaty (art 51). It also devotes the rest of its Chapter V (arts. 51 to 59) to homogenize best and new practices across the world.

In a preliminary effort to test to what extent these new international rules will improve the outcome of future asset recovery cases, this paper performs the following exercise. It summarizes the complexities and obstacles faced by the Peruvian Government in repatriating the proceeds of Vladimiro Montesinos' criminal network, and sets some hypotheses about whether the same challenges would be eased by the entering into force of the UNCAC.

The paper is organized as follows. Section A summarizes the relevant features of the Fujimori's decade and the many ways in which the Montesinos' criminal network operated during the 90s. Section B highlights the legal developments introduced in the Peruvian legislation to improve the chances of efficiently prosecuting the crimes of Montesinos and his associates. Section C deepens into the legal proceedings and strategies taken by the Peruvian authorities to recover proceeds of corruption and other crimes, which were located

¹ Guillermo Jorge is a law professor at San Andres University in Buenos Aires and a consultant in anti-corruption issues.

² Official figures of the Peruvian Ad-Hoc Prosecutorial Office for the Cases of Fujimori and Montesinos, available at www.procuraduriaadhoc.gov.pe

in Switzerland, the Cayman Islands and the United States. Section D evaluates whether the legal avenues established by UNCAC would have facilitated such proceedings if they had been in force since the beginning of the proceedings and suggests ways in which UNCAC provisions can be of help in improving the outcomes of ongoing cases. Section E concludes.

A. CORRUPTION UNDER FUJIMORI

1. This section aims at introducing the reader into the facts of the case. We first summarize the main features of the Fujimori's regime that made the spread of large scale corruption possible. We then go into some schemes that show Montesinos' network in action, first as a bribe taker and then as a bribe giver³.

A.1. Montesinos' power accumulation

2. Vladimiro Montesinos Torres, the *de facto* head of the Peruvian intelligence service and main advisor to former President Alberto Fujimori (1990-2000), was the architect and manager of a wide-ranging web of official corruption and gross human rights violations, including involvements with the drug trade, the arms trade, extortion of high profile entrepreneurs, and bribery of all kind of public officials. Those beholden to him included judges, legislators, media barons, drug traffickers, captains of industry, and military leaders.
3. Montesinos' career showed a path of strong connections with serious crime, well before Fujimori's administration. As an army officer, his career's milestones include being accused of stealing classified documents of the Peruvian army and confined in military prison; being discharged from the Peruvian army on charges of treason; being accused of passing military secrets to the USA Government. After expelled from the army, Montesinos carved out a niche for himself as a defense lawyer, representing drug traffickers -including well known Colombian lords Evaristo Porras Ardilla and Jaime Tamallo- and army officers involved in covering and extorting tributes from the drug trade. His practice flourished because he had hundreds of contacts from his days as a closed advisor of *de facto* government of Velazco Alvarado in the 80s. He knew who to bribe to get a client out of jail, and which judges took payment for a quick trial or an acquittal. When bribery did not work, destruction of evidence, including witness assassinations will surely do.⁴
4. In June 1990, Alberto Fujimori, a political outsider, captured 57 percent of the vote to Vargas Llosa's 34 percent. After 10 years of economically ruinous civilian rule, Fujimori capitalized on the general disgust with politicians that showed incapable of curbing violent guerrilla groups⁵ and a penetrating drug-trafficking in a virtually non- existent legal economy⁶. After

³ This section is partially based on a case study prepared by Kirsten Lundberg, with the research assistance of the author, for the Case Studies Program on Public Policy Issues at the Kennedy School of Government, Harvard University. See: "Robust Web of Corruption: Peru's Intelligence Chief Vladimiro Montesinos," Kennedy School of Government Case Program, Case C14-04-1722.0.

⁴ On Montesinos career, cfr. Bowen, Sally, and Holligan, Jane, *The Imperfect Spy: The Many Worlds of Vladimiro Montesinos*, Lima, Peisa, 2003; Rospigliosi, Fernando. *Montesinos y las fuerzas armadas: Cómo controló durante una década las instituciones militares*. Instituto de Estudios Peruanos (2000), Lima, Peru; Gorriti, Gustavo, "Fujimori's Svengali; Vladimiro Montesinos: The Betrayal of Peruvian Democracy," *Covert Action Quarterly*, Summer 1994. Online summary available at: <http://fortunecity.de/olympia/beckenbauer/30/gorriti.html>.

⁵ Between 1980 and 1990, reports put the number of violent incidents at 20,465, which left 18,997 dead and disappearances allegedly in the hands of the military forces. Cfr. Inter-American Commission on Human Rights (IACHR), "Report on the situation of human rights in Peru," OAS, March 12, 1993. See: <http://www.cidh.oas.org/countryrep/93PeruS&E/index.peru.htm>

the first and before the second round of voting in the elections, Montesinos approached Fujimori with transcripts from a wiretap which revealed that a Congressman was planning to institute legal proceedings against the candidate for property-related tax fraud. Three days later, Montesinos delivered a court resolution that postponed the case until after the election⁷. Montesinos became Fujimori's personal legal counselor and, soon after Fujimori took office, his main advisor on security-related issues⁸.

5. Fujimori's drastic reformist approach towards the bureaucracy was an excellent opportunity for Montesinos' accumulation of power. In the second half of 1990 alone, Fujimori's administration dismissed 1,500 police officers for "unethical conduct"; another 400 followed in the first half of 1991. Montesinos ensured that his enemies were dismissed and his friends appointed as replacements. A similar process took place within the military. From 1990-1992, Montesinos set out to replace the military leadership with people he knew, preferably people who owed him favors. Montesinos also plotted against the authorities of the intelligence service and the Ministry of Defense, ensuring that their replacements would take orders from him.
6. With the intelligence and security forces under his control, Fujimori felt comfortable to handle the most urgent Peruvian problems. By November 1991, Montesinos had drafted and Fujimori had promulgated 123 decrees on terrorism and drug trafficking. Congress repealed the executive decrees and launched inquiries on the methods used to curb both narcotics trade and terrorism. Rumors of death squads conducted by Montesinos spread. In December 1991, tensions between Congress and Montesinos got its pick, when Congress disapproved the promotion to lieutenant general of the intelligence services (formal) Director because, Congress said, Montesinos had exerted undue influence. In Montesinos view, Congress posed "an obstacle to national pacification"⁹.
7. In response, on April 5, 1992, Fujimori surprised domestic and international observers by staging a self-*Coup d'Etat*. He abolished the Peruvian government as it existed and established a "Government of Emergency and National Reconstruction". He dissolved the Congress and the Judiciary, suspended the Political Constitution, purged the Supreme Court, and placed the press under censorship. The Legislative Palace and the Palace of Justice were taken over and closed. The chairmen of both Houses of Congress, as well as other parliamentarians, were placed under house arrest. Well-known opposition leaders were arrested. Two news agencies were closed down and military personnel was dispatched to other media offices¹⁰. Fujimori would rule by decree.
8. Right after the "self-coup", Montesinos took over the judicial system. The Palace of Justice and the offices of the Attorney General were closed.¹¹ Soldiers stood guard while military intelligence agents went in by night and systematically ransacked the files. By the time they

⁶ In the 80s, Peru was said to supply 60% of the coca market, which provided support for most of its rural economy. In parallel, the narcotics trade permeated Peru's political elite, its most powerful law firms, and its wealthiest families. Representatives from Huallaga Valley –where coca grows- had at that time open links to the drug world. An indicator of this situation is that from 1986 to 1991 there was only one criminal conviction on drug-trafficking charges. Cfr. "Peru. Coca curiosities," *The Economist*, August 31, 1996, p.39.

⁷ Gorriti, *cit.* in note 2.

⁸ As reported by a declassified US State Department cable of August 16, 1990, titled "Man behind Fujimori's throne", in file with the author.

⁹ Declaration of Montesinos before the investigations subcommittee of the Peruvian congress, December 20, 2001, available at www.agenciaperu.com.pe

¹⁰ Inter-American Commission on Human Rights (IACHR), "Report on the situation of human rights in Peru," OAS, March 12, 1993. See: <http://www.cidh.oas.org/countryrep/93PeruS&E/index.peru.htm>

¹¹ Gorriti. *Cit* in note 2.

were done, one-third of the nearly 30,000 files of active court cases had been removed, including those concerning Montesinos and Fujimori. In addition, files that could be useful for future blackmail were missing. Judges and Prosecutors were removed *en masse*, starting with the dismissal of a majority of the Supreme Court judges.

9. On April 9th, 1991, all members of the Constitutional Tribunal as well as members of the National Council of the Judiciary, the Attorney General and 134 Magistrates were dismissed. The executive appointed their replacements and instituted a system of “provisional appointments” that was going to last until the end of the regime, virtually abolishing judicial independence. A close associate of Montesinos was appointed Attorney General, serving in this capacity three times between 1992 and 2000. Finally, Fujimori’s administration instituted summary tribunals - courts where judges wearing masks, typically handed down long prison sentences after very short trials. Other decrees allowed for use of evidence obtained by torture, for trying civilians before military tribunals, and for the appointment of provisional judges and prosecutors.¹²
10. Such was the state of public disillusion with the political system that Fujimori’s actions were supported by 75 percent of the population. A few months after the Coup, Fujimori announced the capture of the guerilla leader Abimael Guzman. Ten days after the capture, on November 22nd, 1992, Peruvians turned out to vote for a new Constitutional Congress to replace the one Fujimori had dissolved. The president’s ratings were high - his government had broken the back of “Shining Path” –the biggest guerrilla group- restoring hope of a normal existence to millions of people. Fujimori’s economic policies had also driven inflation down from a rampant 60 percent a month in mid-1990 to a manageable 3.6 percent in October 1992¹³. The international business community supported Fujimori because he adhered to the neo-liberal program of privatization of public enterprises and opened the economy to foreign investment in mining, fishing and farming. Fujimori’s party won a solid majority in the new Congress. The body opened officially at the end of 1992 and would run until presidential elections in 1995.
11. The picture completed with a constitutional reform at the end of 1993 which notably broke with a time-honored tradition in Latin America of single presidential terms by allowing the president to seek a second five-year term in office, a precedent that was subsequently emulated by many other Latin American countries.
12. Fujimori was re-elected with 64% of the votes in 1995. Despite his prestigious opponent – well respected Javier Perez de Cuellar, former Secretary-General of the United Nations-, voters were apparently pleased by Fujimori’s record so far. One anecdote suffices to characterize how seriously Fujimori took the constitutional check and balances during his second term. In June 1995, a Judge challenged as unconstitutional a law granting amnesty to soldiers and policemen accused of human rights violations from 1980-1995. The law had been neither publicly announced nor debated, coming into force the day after it was presented to Congress and promulgated by Fujimori. To overcome the Judge’s scruples, Fujimori simply pushed a second law through the Congress commanding the Courts to obey.¹⁴ The Court of Appeals declared the amnesty law constitutional and sanctioned the Judge who had questioned it.

¹² See Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000 (Original: Spanish), available at www.oas.org

¹³ “Peru’s benevolent dictator,” *The Economist*, November 14, 1992.

¹⁴ *Ibid.* [“The dark side of the boom,” *The Economist*]

13. The 1993 Constitution also cleared up the way for pro-market reform and a massive privatization process. When Fujimori took office, public owned enterprises controlled up to 20% of GDP, 28% of exports and 26% of imports. The State monopolized the areas of energy, oil and telecom services and accounted for 60% of the financial sector, 35% of the mining, fishing and food industry. Fujimori sold 51 State-owned companies, cheap and fast¹⁵. For the purpose of this paper, it is worth noting that one third of the revenues of the privatization process, estimated in more than USD 1 billion, went directly to the budget of the Ministries of Interior and Defense¹⁶, which later on became an important under-the-table source of Montesinos' money for his clandestine operations, as we will see in following sections.

A. 2. Montesinos' many forms of corruption

14. Montesinos enriched himself from many different sources. His options included:

a. Free drugs-trade zones

Rumors about Montesinos' increasing contacts with the drug were fluttering the whole decade. Probably the most notable account was the confession of Demetrio Chavez Pennaherrera, a drug dealer known as "Vaticano". Under oath before a civil Court, Vaticano said that, at least in 1991-1992, his drug ring had enjoyed the full protection of Montesinos. He claimed that he had paid Montesinos \$50,000 monthly through an intermediary for unhampered use of an airstrip to ship drugs to Columbia¹⁷. Apparently, the relationship had ended, and he had fled to Columbia, when Montesinos demanded double the amount and Vaticano could not afford it. Ten days after the confession, Vaticano returned to Court and retracted all his statements. His lawyer reported Vaticano was tortured in prison between the two contradictory statements.

b. Military and police pension funds.

From 1991 to 2000, the Pension Fund of the Police and the Army was a "black box" from where Montesinos embezzled public funds in different ways. For example, Montesinos' front-man Victor Venero Garrido and other associates used pension fund money and their own money to buy a majority interest in a Peruvian banking institution, Financiera del Sur (FinSur). Venero was in charge of seeking investments on behalf of FinSur and identified construction and real estate projects for the bank and pension fund to finance. He also controlled the construction companies which built those projects. The costs of the projects were inflated by an average of 25 percent. Projects recommended by Venero were automatically approved by the board members at the Pension Fund, as several of them received regular kickbacks. In addition, Venero covertly formed and controlled several front companies used to broker loans from FinSur in exchange of kickbacks from borrowers. When some loans defaulted, Venero would purchase the busted projects at extremely low prices for resale at a profit. The Congressional Commission that investigated the case estimated the proceeds of these crimes in around USD 300 million.

¹⁵ Cfr. Manzzeti, L., "Privatizations South American Style", Oxford: Oxford University Press, 1999; Ruiz Caro, Ariela, "Las privatizaciones en Perú. Un proceso con luces y sombras", in NUEVA SOCIEDAD, N° 207, January-February 2007, ISSN: 0251-3552. Also available online at http://www.nuso.org/upload/articulos/3410_1.pdf

¹⁶ See the final report of the Comision Investigadora de Delitos Economicos y Financieros (Congressional Investigative Commission on Economic and Financial Crimes), June 2002, available at <http://www.congreso.gob.pe/comisiones/2002/CIDEF/index1a.html>

¹⁷ State Department cable, "Intelligence chief Montesinos accused of protecting drug traffickers," September 6, 1996.

c. *Bribes in arms trafficking to Ecuador, in an armed conflict with Peru.*

In 1995, in the middle of a Peruvian-Ecuadorian border conflict, Argentina illegally sold arms to Ecuador – while Argentine President Menem offered himself as the mediator of the conflict. Montesinos, as chief of Peruvian intelligence, was informed and, instead of taking measures to protect Peru, is said to have asked a \$ 2 millions bribe in exchange of his silence¹⁸.

d. *Overvalued purchasing of defense equipment.*

Montesinos's associates in defense armament set up more than 30 corporate vehicles in the Bahamas, Panama and the Virgin Islands for mediating in the purchasing of defense equipment. The funds for purchasing 18 MIG-29 and 18 SU 25 to Belarus plus 3 fighter-bombers to Russia were channeled through these companies. Bribes and commissions in these operations exceeded USD 120 million.

e. *Selling arms to the Colombian guerrillas*

In 1999, using fake Peruvian official documents issued by Montesinos, a group of his associates bought 10,000 AKM to the Jordan government on behalf of the Peruvian Government. However, the arms were dropped from an airplane in flight in Colombian territory controlled by the guerrilla movement FARC (Fuerzas Armadas Revolucionarias de Colombia). In September 21st, 2006, Montesinos was convicted to 20 years of imprisonment plus a USD 3 million fine for this crime.

15. The proceeds of those crimes were partially deposited or transferred outside Peru. Nonetheless, Montesinos set up several schemes to launder the proceeds and make the funds available in Peru for his personal or political use. For instance, he set up two shell companies called "*Institute of Specialized International Studies Inc.*" from where he received open transfers -and pay taxes- as if they were fees for academic presentations or consultancies. Montesinos and his associates also benefited from a regulation encouraging "repatriation of assets" that, as a fiscal incentive, did not ask for the origin of the money. The provisions were supposed to inject capital into the Peruvian economy after inflation was under control. However, it was annually prorogated by Congress until the end of the regime.

A.3. Fujimori's third term plan: Montesinos' shift to bribe-giver

16. A third presidential term for Fujimori becomes a more tangible objective of Montesinos' activities since 1996. As an observer remarked, "[t]here was no obvious heir apparent to Fujimori. There was no one who could guarantee future election victories and provide cover for the expanding array of criminal activities (extortion, money laundering, and arms trafficking) directed by Montesino"¹⁹. From 1997 on, most of the administration's actions seemed to revolve around the goal of a third term.
17. It would not be easy. The 1993 Constitution simply forbids a third term. There was no public constituency for a longer presidency. The legal route to amend the Constitution would have required either a two-thirds congressional vote in two successive legislative sessions, or a

¹⁸ La Republica, November 22, 2001, reproduced in

<http://www.aprodeh.org.pe/fujimori/corruccion/noticias/22nov2001iv.htm>

¹⁹ Catherine M. Conaghan, *Making and Unmaking Authoritarian Peru*, The North-South Agenda Papers #47, University of Miami, May 2001..

national referendum followed by congressional ratification.²⁰ Montesinos and Fujimori knew either approach would fail: Fujimori's majority in Congress was insufficient to pass a constitutional amendment, and a poll in January 1996 showed that the public opposed to a third term. Another route remained: to undermine the autonomy of those organizations and institutions legally responsible for ensuring free and fair elections.

18. So, throughout 1998 and 1999, Montesinos stepped up his efforts to ensure that the administration controlled all key institutions associated with elections. Montesinos had, of course, been consolidating the administration's hold on the Congress, the Supreme Court, the military and other key players since 1990. For 1997-2000, however, an audiovisual record exists of Montesinos in action —videotapes he made of meetings in his office. The majority of the available tapes (thousands more may have been hidden or destroyed) chronicle meetings in 1998 and 1999 providing a detailed account of how Montesinos conducted business during those years.²¹

19. A first step was to block the opposition's efforts for a popular referendum on a third term. By July 1998, despite considerable legal obstacles thrown in its way, the campaign had collected the required signatures. In addition, the National Elections Board —responsible for ruling on electoral matters- had declared that the law requiring congressional approval would not apply in this case, as it was passed after signatures started to be collected. As if democracy was a chess-game, the videos showed Montesinos removing and appointing new members of the National Election Board, bribing the two —out of five- old members that did not respond to the government. producing a ruling against the referendum from an agency without authority to it, anticipating that the opposition would appeal that decision to the Board —the competent authority- which, in its new integration, finally contradicted the previous ruling and required Congressional approval for the referendum to be legal. On August 27th, 1998, the Congress voted 67 to 45 to block the referendum (the law required a minimum of 48 supporting votes for the referendum to proceed). Fujimori announced his candidacy and civil society groups filed eighteen separate challenges, but the Board rejected them all. Montesinos had won. The operation costed less than USD 150,000 in bribes²².

A second step was to control the media for the coverage of the campaign. Montesinos knew that this would not be as cheap as bribing Judges, but he was not short of money to carry out his clandestine operations. During the regime, the intelligence service increased its budget by 50 to 60 times. By 2000, the official budget of SIN went to around USD 18 million, of which about a quarter went to operational costs and salaries, leaving more than 13 million for Montesinos to spend. In addition, Montesinos requested under-the-table sums to his allies in the Ministry of the Interior and the military forces. Along the decade, only the SIN received more than USD 66 million from these other government agencies. When he needed more, he requested contributions from his accomplices in other illegal businesses. As his principal fornt man testified before a Congressional Commission, Montesinos requested USD 5 million

²⁰ The 1993 constitution allowed citizens to initiate referendums to change law or amend the constitution. In April 1996, congress passed Law 26592 (reinforced by Law 26670) which required prior congressional approval for a referendum.

²¹ The Special Prosecution Office handling Montesinos' case classified the 720 tapes in its possession into three categories: private matters (affairs, indiscretions); criminal (bribes of private sector firms and individuals); and public interest (politics and the judiciary). The great majority of the public sector tapes concern the reelection effort.

²² National Election Board Members Alipio Montes de Oca received USD 50,000 and Luis Serpa Segura USD 45,000. Victor Castillo, President of the Supreme Court, USD 35,000. Cfr. Mc. Millan, J. and Zoido, P., "How to subvert Democracy. Montesinos in Peru", Working Paper, Center for Democracy, Development, and the Rule of Law at the Stanford Institute for International Studies, available at http://iis-db.stanford.edu/evnts/3823/Montesinos_0421.pdf

from his associates when he decided to buy the media. Montesinos bookkeeper testified that in 2000 more than USD 100 million was flowing into the SIN.

20. With all that unchecked money at his hands, Montesinos negotiated and signed formal contracts with the media owners. He first met with Jose Francisco Crousillat, CEO and majority shareholder of America Television (Channel 4). The two men arranged that Channel 4 would support the reelection project. Over time, Crousillat received \$10 million for his station's reelection support²³.
21. Similar contracts were signed with most private-owned TV Channels. Frecuencia Latina (Channel 2) received \$3,000,000 in a signed contract executed from November 1999 to April 2000, plus \$3,073,407 on December 1999 for an increase of capital that gave 27% of shares to Montesinos; Panamericana Television (Channel 5) received a \$9,000,000 contract, plus \$350,000 handed by Montesinos to its owner in cash; Cable Canal De Noticias CCN received \$2,000,000 for selling his shares to the Ministry of Defense in November 1999; Andina Television received \$50,000 to fire two opposing journalists. Montesinos also fixed judicial problems of Red Global (Channel 13) in exchange of firing popular commentator Cesar Hidelbrandt²⁴. The print media was somehow cheaper to buy. Newspaper Expreso (mainstream newspaper) received \$1,000,000 in two installments, while several popular newspapers distributed around \$2,500,000 between 1998 and 2000.
22. The final step took place between the first and second round of the votes. In the first round Fujimori won 52 of the 102 seats in Congress, which denied him the decisive majority he had enjoyed from 1995-2000. To strengthen the administration's hand, Montesinos began what he termed the "recruitment operation"²⁵. His goal was to persuade, with economic incentives, both current Congressmen and candidates for the Congress either to join Fujimori's party or to work secretly for Fujimori's reelection as "moles" from within their original parties.
23. At least 12 elected representatives received monthly bribes ranging from USD 10,000 to 50,000 between May and September 2000. When necessary, "campaign" contributions of one installment up to USD 100,000 were added. The Recruitment operation cost around USD 5 million, a sixth part of the cost of buying the press²⁶.
24. Montesinos' unmasking came, ironically, only weeks after his plans of reelecting Fujimori and controlling the majority of Congress succeeded. In September 2000, one of the videos showing Montesinos paying a bribe to a Congressman went public and the regime started to fall down.
25. Ten days after the video went public, Montesinos was relieved of his duties and fled out of the country. On November 16th, 2000, Fujimori departed for an Asia-Pacific summit, but he headed Japan, from where he tried to resign via fax, but the Congress - finally in the hands of the opposition - refused to accept it. Instead, on November 22nd, 2000, a majority of legislators voted to remove Fujimori from office.
26. Montesinos was tracked down on June 23rd, 2001 in Venezuela, where he had undergone plastic surgery to alter his appearance. He returned to Peru as a prisoner, incarcerated in the same prison he had designed for Shining Path terrorist Abimael Guzman.

²³ Cfr Transcript of Video 1200, October 14, 1998, Montesinos and Jose Francisco Crousillat; Transcript of Video 1347, February 26, 1999. Montesinos and Crousillat.

²⁴ Cfr. Mc. Millan, J. and Zoido, P., cit in note 22.

²⁵ Montesinos' declaration before the Subcommittee of Investigation of the Peruvian Congress, December 20, 2001. Available at www.agenciaperu.com/actualidad/2002/ene/vladi_com_estrada.htm

²⁶ Mc. Millan, J. and Zoido, P., cit in note 22.

27. At the time this paper is written, he has been convicted on 13 different trials and will serve at least 20 years of imprisonment. He was also fined in more USD 20 million. More than 70 trials are still ongoing, for charges ranging from drug and arms trafficking to embezzlement, from directing death squads to corruption.

B. IMPROVING THE PERUVIAN CRIMINAL LEGAL SYSTEM FOR PROSECUTING ORGANIZED CRIME AND SYSTEMIC CORRUPTION

28. The conditions in which Peruvian institutions were left by the Fujimori's regime were, by far, the less appropriate to carry out independent inquiries against those suspected of having participated in, and benefited from, criminal acts. Most institutions were packed as early as 1992.
29. Unlike most corruption cases, Montesinos left an impressive record of (part) of his acts. Most of what was described under section **A.3.** was on the tapes, which were soon available to the press, augmenting public pressure to prosecute him. Only in the videos, there were more than one thousand individuals, many of them high rank public servants. Figure 1, elaborated with 110 videos found at Montesinos's house, gives a glance of the complexities of "reconstructing the truth" –the goal of Peruvian criminal procedure- in such a context.
30. Regardless the institutional capture to which it was subjected, the Peruvian legal system itself was not equipped to confront a criminal network of such proportions. From the point of view of the criminal law, in 2000, the Peruvian Criminal Code did not provide for detailed organized crime legislation capable of capturing the private-public nature of the Montesinos' arrangements. Beyond classic definitions of bribery, embezzlement and peddling on influence and illicit enrichment, there was almost nothing. Sanctions were not proportionate to the outrageous acts that the public was watching every night at TV news. Case law was almost inexistent, confirming a large tradition of tolerated public corruption. For the same reason, the Peruvian preventive system was also very precarious, lacking of precise definitions and administrative procedures for addressing conflicts of interests, incompatibilities and other breaches of public duties.
31. From the standpoint of the criminal procedure, the situation was not better. Peruvian Criminal Procedure Code belongs to the tradition of inquisitorial models of prosecution –as opposed to adversarial models. Within this system, the criminal procedure is conceived as an official inquiry aiming at determining the truth. The whole procedure is structured and conceived as a unitary investigation. Prosecution is compulsory and cases can only be dismissed when there is no evidence that an offense has been committed. The concept of the guilty plea does not exist as such. Consequently, there are no plea bargains, not only because there are no guilty pleas, but also because the truth cannot be negotiated and compromised.
32. Finally, there was no legal framework for inter-institutional collaboration among State agencies. Even more, as nobody knew who would be the next one broadcasted in the news receiving money from Montesinos there was an evident distrust among State officials.
33. As early as November 2000, the Peruvian authorities started to deal with the main deficiencies. While many other shortcomings have been addressed since then, we will summarize the four most important legal reforms adopted at the very beginning of the procedures²⁷. A first step was to set up trustfully and specialized anticorruption authorities, a specialization unknown to the Peruvian judiciary. Thus, an "Ad-hoc Prosecutorial Office" was

²⁷ All the legal reforms adopted in relation with the investigation of corruption and organized crime can be consulted, in Spanish, at <http://www.procuraduriaadhoc.gob.pe/marcolegal/index.php>

first established to handle the high profile cases. Ad-hoc Prosecutors were picked up from a well respected law firm, who signed a contract with the Ministry of Justice. Almost simultaneously, a newly appointed Attorney General set up a working team of specialized Prosecutors, complemented by financial consultants and technical personnel from the National Police. A year later, the Transitional Council of the Judiciary created a Special Criminal Court of Appeal and six anti-corruptions Courts of first instance, to judge the cases. The creation of new specialized Prosecutors and Courts was a rational response to an increasingly work-load of complex cases, in a context in which many judicial authorities were under investigation.

34. A second important step, taken also at the very beginning of the proceedings, was the adoption, by law, of a sort of plea bargaining mechanism available for investigations involving organized crime –“Law 27.738, on Effective Collaboration”. Except from criminal bosses and constitutionally designated high rank public officials –subject to a specific constitutional procedure- members of the criminal organization facing the prospect of criminal charges were encouraged to provide information in exchange of a mitigated sentence or immunity from prosecution.
35. The law on effective collaboration represents a highly innovative legal mechanism for Latin American criminal procedures. While in the last two decades several bargaining forms were adopted in Latin American criminal procedures²⁸, they were more directed to alleviate the Court workload produced by the principle of “compulsory investigation” than to get information on criminal organizations.
36. Under the Peruvian regime, the negotiations take place between the defendant and the Prosecutor in a specific procedure where the Prosecutor enjoys real bargaining power and the competence to establish the terms of the negotiation. The granting of the benefit is conditional upon the positive result of procedural collaboration. The role of the Judge is limited to examine whether the collaborator entered into the agreement in a free and voluntary manner and to whether he was aware of what he was forgoing by agreeing to collaborate. There is no jurisdictional room for adjudicating the usefulness of the collaboration. If the agreement entails full exemption from sentence, the Judge grants immediate freedom to the beneficiary and orders the cancellation of their legal records. If the agreement contemplates attenuation of sentence, the Judge declares the criminal liability of the collaborator and imposes the corresponding sanction according to the terms of the agreement. In any case, the Judge cannot change the terms of the agreement.²⁹
37. The hundreds of videos taped by Montesinos provided an important amount of information about corrupt participants and cash transactions, but they said nothing about where the money was hidden. The law on effective collaboration was the perfect complement for such a situation. While the videos were useful in identifying prospect collaborators, the new law was the key instrument for succeeding in recovering the proceeds. Prosecutors benefited from the information of more than 100 collaborators, including some prominent figureheads of Montesinos, his personal bookkeeper, several arm traffickers and some media barons. The information provided by collaborators was key to freeze assets in foreign jurisdictions.

²⁸ For an analysis of this trend, cfr. Langer, Maximo, “From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure”, *45 Harvard International Law Journal* 1-64 (2004); Langer, Maximo, “Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery”, *UCLA School of Law Public Law & Legal Theory Research Paper Series*, Research Paper No. 07-22 (2007).

²⁹ Calderón Navarro , N. “FIGHTING CORRUPTION. The Peruvian Experience”, *4 J. Int'l Crim. Just.* 488, July, 2006.

38. A third important step taken by Peruvian authorities was the adoption of measures related to securing the evidence. The Peruvian criminal procedure allowed for investigative measures once the legal proceedings had been instituted. Therefore, the fact that crimes of Montesinos were broadcasted world-wide increased the risk of losing crucial evidence. In December 2000, law 27.379 provided for exceptional prosecutorial powers, allowing Prosecutors to require restrictive provisional measures before instituting criminal complaints. Therefore, a Prosecutor was able to apply for judicial orders aiming at preventive arrests, restrictions to leave the jurisdiction, search of houses and offices, seizure of documents, accounting books and private correspondence, measures restricting the transfer of property, lifting bank and fiscal securities, and broad powers for accessing information in hands of public and private institutions. In 2002, the prosecutorial powers were extended to wiretapping communications in preliminary investigations.
39. A four remarkable improvement to deal with high rank corruption took place on January 2001, when Congress passed law 27.399³⁰, allowing the Attorney General to initiate preliminary inquiries against high rank public officials that, according to the Constitution³¹, can only be accused by a permanent Congressional Commission and judged by Congress. In his preliminary inquiries, the General Attorney was authorized to apply the preliminary measures established in law 27.379 –see above-, with previous authorization of a Supreme Court Judge. In addition, Congressional Investigative Commissions, also created to investigate corruption, were similarly allowed to require the same measures if previously authorized by a member of the Supreme Court.

C. GETTING THE MONEY BACK

40. This section provides a factual and technical analysis of the actions put in place to recover proceeds of corruption from Switzerland, the Cayman Islands and the United States. Each subsection first presents the facts of the case and then goes to the analysis as to how the assets were located, frozen, forfeited and repatriated.

C.1. Assets returned from Switzerland

Location and freezing of assets

41. In spite of the fact that Swiss banks have been obliged to report suspicious transactions since 1997³², it was not until Montesinos was worldwide broadcasted paying a bribe to a Congressman that the Swiss Money Laundering Reporting Office³³ received a suspicious transaction report from CAI Suisse Ltd. Bank, regarding assets connected to Montesinos.

³⁰ Cfr. Law 27399 (January 13, 2001), available at www.procuraduriaadhoc.gov.pe

³¹ According to Article 99 of the Peruvian Constitution, the President, members of Congress, Ministries, Constitutional Court Judges, members of the Judicial Council, Supreme Court Judges, Superior Prosecutors, the national Ombudsman and the General Comptroller only can be accused by a Permanent Congressional Commission and tried by Congress for crimes committed while in office and until 5 years after leaving office.

³² Swiss anti-money laundering act of 1997, Section 9, reads as follows: "A financial intermediary who knows or presumes, on the basis of funded suspicion, that assets involved in the business relationship are related to an offence under Section 305bis of the penal code [money laundering], that they are proceeds of a crime, or that a criminal organization has a right of disposal over them...shall without delay notify the reporting Office for Money Laundering.

³³ The Money Laundering Reporting Office is at the Federal Office of Police is Switzerland's central money laundering office responsible for receiving and analyzing suspicious activity reports in connection with money laundering and, when appropriate, forwarding them to the law enforcement agencies.

Under Swiss law, banks are obliged to freeze the reported assets for 5 working days³⁴. The acting Examining Magistrate of Zurich opened an investigation for suspected money laundering activities and ordered the bank to hold the assets frozen. This first set of transactions amounted to USD 48 million. A month later, Switzerland requested Peruvian authorities, through a diplomatic letter, to investigate the origin of the funds and invited Peru to request for judicial assistance. It was November of 2000: Montesinos was a fugitive and there were not trustful anticorruption authorities in Peru.

42. Before December 19th, 2000, the Swiss Magistrate had issued 19 orders to Banks in Switzerland. The initial analysis showed that three major suspense accounts³⁵ had been used to distribute money transferred into Switzerland from the US, Russia, Luxembourg and Peru among several individuals, including Montesinos. International cooperation requests were sent to Luxembourg and the United States. Other suspicious transactions were reported by Fibi Bank, and further investigations leads to funds in Bank Leumi le Israel and Credit Lyonnais. Those banks reported 12 accounts, amounting for a total of USD 22 million, under the names of General Hermoza Rios, Alberto Venero Garrido, Luis Enrique Duthurturu and Victor Joy Way.
43. As soon as Peruvian authorities were finding evidence about the origin of the money, they submitted requests of MLA. By June 2001, five different requests for assistance, containing information about the origins of the seized money as well as about new accounts, were filed by Peruvian authorities. This information led to the discovery of new hiding proceeds. In total, Swiss authorities froze USD 113 million.
44. Assets in Switzerland were located thanks to a combination of efforts made by the Swiss anti-money laundering system and the Peruvian rules adopted for prosecuting this case. The information got by the Peruvian authorities came from a combination of avenues, all of them opened by the laws introduced to fight this criminal network: bargaining with collaborators led to financial institutions which were obliged to lift bank secrecy in preliminary inquiries³⁶.
45. There were two different grounds for freezing assets in Switzerland. The assets reported by Swiss financial institutions were automatically frozen on grounds of money laundering. The assets discovered by the Peruvian authorities, were frozen upon mutual legal assistance requests.
46. Swiss anti-money laundering legislation provides for automatic freezing of assets related to a suspicious report. In other words, anytime a financial institution reports a transaction, it is obliged to freeze the amount for 5 working days. If, within that lapse, the authorities open a criminal case, the financial institution is notified and the assets remain frozen.

³⁴ Swiss anti-money laundering act of 1997, Section 10, reads as follows: "1. A financial intermediary shall immediately freeze assets entrusted to him if they are linked to the reporting. It shall continue to freeze the assets until receipt of a decision by the competent prosecuting authority, but for a maximum of five working days from the notification of the reporting office. 3. For so long as assets are frozen, the financial intermediary shall not notify the persons concerned or third parties of the reporting".

³⁵ Suspense accounts are temporary accounts in which entries of credits or charges are made until their proper disposition can be determined. They are just one type of omnibus or concentration accounts legitimately used by banks, among other things, to hold funds temporarily until they can be credited to the proper account. However, such accounts can be used to purposefully break or confuse an audit trail, by separating the source of the funds from the intended destination of the funds. This practice effectively prevents the association of the customers's name and account numbers with specific account activity, and easily masks unusual transactions and flows that would otherwise be identified.

³⁶ It is worth noting that Peru did not enacted anti-money laundering legislation until 2002, so banks were not obliged to report suspicious transactions.

47. More than USD 33 million remained frozen in Switzerland. The holders of some of these accounts challenged the provisional measures. At least in two instances the Swiss Supreme Court rejected the challenges, allowing Switzerland to continue granting assistance to Peru. In a first case³⁷, ruled in 2003, the Court upheld the freezing order on the following basis:
- a. For providing assistance, including adopting provisional measures, it is enough for Peru to give a description of the facts under investigation. In the case, the description of the Peruvian investigation over illegal commissions obtained by public servants involved in purchasing defense equipment from Russia is enough for the Swiss authorities to control that the investigation is consistent. Requiring a more detailed description would run against the purpose and goals of the treaty.
 - b. By the same token, the description of specific behavior or conducts carried out by those whose accounts had been frozen is not required. That would be a matter of further investigation.
 - c. Dual criminality does not require identical legal description of offences. On the contrary, the description of the facts is enough for evaluating whether they subsume under a criminal offense as described by the Swiss Criminal Code. To that extent, getting illegal commissions from government purchasing falls under description of corruption in the Swiss Criminal Code (arts. 322, ter and quarter).
 - d. Appellants also argued that Peru had not a legitimate interest in prosecuting the crime, Rather, they argued that, if a bribe were in place, it would be the seller, the Russian Government, who will have a legitimate interest to recover it.. The Court ruled that the crime taken into account does not require an economic damage to the requesting State. Rather, it was a crime against ethical behavior in the conduct of public officials. To that extent, the requesting State proved a legitimate interest in pursuing the case.
 - e. Against the challenge that the Peruvian investigation was politically biased, the Court ruled that the appellants did not offer concrete facts to prove it.
 - f. Finally, appellants required that, if the assistance is granted, the evidence must be conditioned to specific uses –the speciality principle-. The Court also ruled against this petition. Conditioning the evidence beyond what was agreed upon in the treaty would only be necessary if there was an indication that the Peruvian authorities would use the evidence for different purposes, which was not proved in the case.
48. In 2005, the Swiss Federal Court³⁸ rejected new challenges against another request of assistance from Peru, which lead to the freezing order of accounts valued in USD 6.5 million. In *obiter dictum*, the Court highlighted that the assets should remain frozen until the Peruvian authorities were in the position of issuing a final decision or the crime reached the statute of limitations, according to Peruvian laws. This may serve as an important precedent against lifting provisional measures while the victim country is still investigating the crime.

³⁷ Swiss Federal Supreme Court, Case 1A.70/2003, available (in German) at <http://www.bger.ch/it/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>

³⁸ Swiss Federal Supreme Court, Case 1A.43/2005, available (only in German) at <http://www.bger.ch/it/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>

Forfeiture and repatriation

49. The first return of assets from Switzerland to Peru consisted of USD 77.5 million and took place on August 2002, less than two years after the case initiated. The return of assets had two different basis:
- a. Some collaborators agreed to waive their rights over their illicit money in favor of the Peruvian State, in exchange for a reduced sentence. A General and an intermediary in arms dealings were among those that waived their rights for a total of around USD 28 million.
 - b. The rest of the money was returned upon clear evidence that it was originated in illegal commissions in the purchasing of defense equipment. In a decision issued on June 12, 2002, the Swiss Magistrate assessed the evidence sent by Peru. She was satisfied with evidence showing that Montesinos received "commissions" on arms deliveries to Peru and had this bribe money paid to his bank accounts in Luxembourg, the USA and Switzerland, at least in 32 transactions, each worth 18% of the purchase price. Montesinos also collected 10.9 million US dollars in "commissions" on the purchase of three MIG29 planes, bought by the Peruvian airforce from the State-owned Russian arms factory "Rosvoorouzhenie". In return, Montesinos used his position to ensure that certain arm dealers were given preference when these orders were issued. The decision was not appealed and has since come into force.
50. It is interesting to recall that, in the case of Switzerland, there were no forfeiture or confiscation orders, as there were no final decisions in any case. Once the Swiss Magistrate acknowledged that it was clear and convincing evidence that the money proceeded from corruption, the Swiss inquiry on money laundering was dropped to give room to the repatriation stage. Thus, the repatriation effort from Switzerland was a *sui generis* one as it was neither based on criminal nor on civil forfeiture actions, but rather on waivers of those holding proceeds of corruption and on "clear evidence" that the the money proceeded from corruption-related offences –even when that fact was not supported by a criminal conviction.
51. As we will see in Section D, the solution adopted by Switzerland was totally consistent with current provisions of the UNCAC, art 57.3) which provides that, for returning proceeds of corruption confiscated upon international cooperation, the requested country can waive the requirement of a final judgment in the requesting country.

Spontaneous cooperation

52. A highlight in this case was the use of a spontaneous cooperation mechanism. As described, Swiss took the initiative of inviting Peru to request mutual legal assistance. While the Bilateral Agreement between Switzerland and Peru does not have a rule for spontaneous cooperation, the Swiss Federal Act on International Mutual Assistance in Criminal Matters, of subsidiary application, provides that "A prosecution authority may spontaneously transmit to a foreign prosecutorial authority information or evidence that it has gathered in the course of its own investigation when it determines that the transmittal will permit the opening of a criminal proceeding or facilitate a pending criminal investigation"³⁹ (ICAM, Art. 67).

³⁹ Swiss Act on International Mutual Assistance in Criminal Matters, Art. 67a.

C. 2. Recoveries from the United States

Location of assets

53. As early as November 2000, when Montesinos was still fleeing from the Peruvian justice, Citibank New York filed two suspicious transaction reports (STR) concerning Victor Venero-Garrido, Montesinos' associate. Venero had asked the bank to withdraw nearly \$10 million and close the accounts. The reports were forwarded to the FBI agents, who set up a sting operation to arrest Venero Garrido. Venero was able to withdraw the funds because the agents could not get an arrest warrant on time. They followed Venero up to his Miami's apartment where he was finally arrested. The search in Venero's apartment led to documents that aided the FBI in identifying Montesinos' financial holdings in several countries.
54. Following that trail, the investigation led to another individual that, in the name of Montesinos, was trying to liquidate assets for USD 46 million hold at the Pacific Industrial Bank branch of Miami. Another sting operation led to the arrest of this individual, another front-man of Montesinos who, facing charges of extortion, entered in a plea bargaining. The bargaining led in the end to the capture of Montesinos in Venezuela and his extradition to Peru where he was put into prison.
55. In this case, assets were again located thanks to a STR filed by a financial institution, which was followed by a very effective investigation. At this point, it is worth noting that, according to US legislation, STR are filed with FINCEN, an agency that by year 2000 was receiving around 250,000 reports a year⁴⁰. It seems that, given the international importance of the case, US authorities were specifically attentive to Montesinos' movements. The obvious question for a victim country is whether the same efforts will be put in place in a case of less international interest.

Freezing and forfeiting the assets

56. The investigation of assets conducted the United States Attorney's Office for the Southern District of Florida, -with assistance from its peer in California and the Asset Forfeiture and Money Laundering Section of the Criminal Division of the US Department of Justice- to restrain more than USD \$20 million related to Montesinos' figurehead Venero Garrido.
57. With the collaboration of the Peruvian authorities, the assets were identified as proceeds of commissions and bribes taken by Venero in the fraudulent schemes he organized with the Military Pension Fund. As described before, they consisted of real estate projects, usually over-valuated by 25%, and of a set of front companies used to broker loans from the pension, in exchange of kickbacks from borrowers.
58. Freezing orders over the accounts and the apartment were presumably issued without a judicial warrant, because, under US law, it is possible to seize property when is made pursuant a lawful arrest or search. In addition, the US authorities were in contact with the Peruvian Prosecutors. The fact that the case was publicly known helped the investigators to rely on evidence that was informally transmitted.
59. The US investigation proved that a relative of Venero, who worked in a Californian based financial institution, had helped him to conceal more than \$20 million in the United States.

⁴⁰ Official figures of FINCEN for 2000-2001. By 2006, FINCEN reported receiving more than 1,000,000 reports. Cfr. http://www.fincen.gov/sars/btn_8/sar_btn_issue8.pdf

Funds at Bank of Hacienda and Bank of America were tracked down. In addition, Venero's penthouse in Miami was seized.

60. The US Department of Justice filed two civil forfeiture actions, one in Miami, one in California, for forfeiting the described assets. With information about the probable criminal origin of the assets, the US Department of Justice filed two different civil forfeiture actions. Civil forfeiture actions (USC title 18, 981-982) are *in rem* actions subjected to a balance of probabilities standard of proof. Moreover, as the actions were *in rem –real* or “*against the assets*”- and Venero was under arrest, it was highly probably that nobody showed up to confront the grounds for forfeiting the property.

Repatriation of assets

61. Repatriations of assets to Peru were made on the base of a specific agreement signed between the US and Peru⁴¹ on January 2004. Peru agreed to invest the money in anti-corruption efforts in exchange of the U.S. transferring 100% of the assets forfeited in the case. The statutory basis for the transfer under U.S. law was the civil forfeiture rules, (Title 18, United States Code, section 981(i)(1)) which authorizes the Attorney General to transfer proceeds of money laundering to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property.
62. Under U.S. law, the Attorney General enjoys discretionary authority to return assets confiscated by him on the base of a request of assistance concerning a corruption offence committed against another country, as long as the other country assisted in the proceedings leading to the forfeiture⁴². As forfeiture requires to establish the origins of the assets –even with the lowered standard of evidence required by civil or administrative forfeiture actions-, the victim country will almost invariably assist the U.S. in the proceedings. The Attorney General has also authority to restore property to victims, including foreign governments⁴³. The same flexible authority applies in cases in which the United States is enforcing a foreign confiscation order, on behalf of a foreign country, as if it had been entered by a U.S. Court.⁴⁴

C.3. Assets returned from the Cayman Islands

63. The repatriation of money from the Cayman Islands involved two different sets of transactions. First, the funds held by the Pacific Industrial Bank, that Montesinos was trying to recover while he was hidden in Venezuela, which were discovered by the FBI in the investigation summarized *supra*. Second, money supposedly transferred from the Wiese Sudameris Bank in Lima to its headquarters in Grand Cayman. Both cases contain features that are worth of analysis.

Location of assets at the Pacific Industrial Bank

64. Montesinos greed led to the discovery of funds in the Cayman Island's Pacific Industrial Bank. After fleeing Peru and while being a fugitive of the Peruvian justice, Montesinos tried to

⁴¹ The agreement was signed by then Secretary of State Collin Powell and Peruvian Foreign Minister Manuel Rodriguez, in presence of Peruvian President Toledo at the Summit of the Americas, 2004. Cfr. <http://www.state.gov/r/pa/prs/ps/2004/28114.htm>

⁴² Cfr. 18 U.S.C. 981(i) and 18 U.S.C. 982(b)(1), through reference to 21 U.S.C. 853(i) referencing 21 U.S.C. 881(e)(1)(E)).

⁴³ Cfr. 18 U.S.C. 981(e)(6),

⁴⁴ Cfr. 28 U.S.C.2467

extort the Chairman of the Pacific Industrial Bank in Miami, United States, to force him to transfer the amount of USD 46 million to Venezuela, where he was hidden.

65. Montesinos threatened the chairman with informing both U.S. and Peruvian authorities that the Pacific Industrial Bank had been clandestinely operating in Lima for 10 years, under his protection. Indeed, the bank was captivating Peruvian funds without authorization of the Peruvian financial supervisor. Funds were usually not declared to the tax authorities and transferred to the Cayman Islands⁴⁵.
66. The extortion was discovered by the FBI investigation in Miami and informed to the Peruvian authorities. An anticorruption Peruvian Judge confirmed that the Bank had no authorization for captivating funds, notwithstanding it was receiving deposits from the entourage of Montesinos. After being deported to Peru, Venero confirmed that Juan Valencia, another Montesinos associated, had deposited USD 30 million dollars in the Cayman's Branch of PIB. Valencia was also a broker of the projects from the Military Pension Fund. After several negative searches, the Peruvian authorities located the computers used by the clandestine bank and were able to track the transactions.
67. Facing severe penalties both in Peru and in the US, the authorities of the bank fully collaborated with the investigation. An audit of the bank revealed deposits of USD 44 million in accounts connected to relatives of Victor Malca Villanueva –former Minister of Defense-, Victor Alberto Venero and Juan Valencia. Unlike the cases of the Switzerland or the USA, where due diligence performed by financial institutions led to the assets, the location of assets in Cayman Islands the results of the US and the Peruvian investigations.
68. At this point, it is worth to note that, in June 2000, the Financial Action Task Force had labeled the Cayman Islands as a Non Cooperative Jurisdiction. As reported by FATF, until the end of 2000, the Cayman Islands did not have a sound anti-money laundering system in place. There was not any legal requirement for customer's identification and record keeping. And even if financial institutions were to identify their customers, supervisory authorities could not, as a matter of law, readily access to the information. In addition, the Cayman Islands lacked a mandatory regime for the reporting of suspicious transactions. Moreover, a wide range of management companies were unregulated. The Pacific Industrial Bank was created and had been comfortably operating under such relaxed rules.
69. Thus, by the time of the case under analysis, the Cayman Islands were under careful international monitoring and pressure for implementing a sound anti-money laundering system. Laws providing for customer due diligence, record keeping and suspicious transactions reporting to a newly created financial intelligence unit were soon enacted under FATF pressure. The new laws also deal with the power of the financial supervisory authority to monitor compliance with the regulations and sanctions for failure to report a suspicious transaction. According to a 2001 FAFT Report, the Cayman Islands had not only significantly increased the human and financial resources dedicated to financial supervision but also initiated an ambitious program for prohibiting shell banks and for identifying pre-existing accounts⁴⁶.
70. Upon the findings of the audit of the Bank, the Peruvian authorities requested further assistance from the Cayman Islands' authorities.

⁴⁵ This is a regular practice of foreign Financial Institutions encouraging capital flight from developing countries. Under the facade of an office of representation, they capture and transferred funds to safe jurisdictions. The bulk is money of legal origin that left the country undeclared and consequently does not pay income taxes. But these structures are ideal places for laundering money.

⁴⁶ Cfr. FATF, NCCT 1999-2000 at <http://www.fatf-gafi.org/dataoecd/56/43/33921824.pdf>

Freezing and returning assets

71. The Cayman Islands did not have provisions for adopting provisional measures. An order of restraint could only be made where it was shown that there were already proceedings instituted, which would lead to an outright confiscation order. However, the Peruvian request for lifting bank secrecy and freezing assets was creatively transformed *ex officio* into a criminal complaint of money laundering. Thus, instead of awaiting a judgment *in personam* from Peru, assets were restrained *in rem*, with the assistance of the newly created Financial Intelligence Unit.
72. The Peruvian authorities then moved to offering the account holders reduced sentences in exchange of collaboration, including waiving their rights over the money. The money was finally returned to Peru upon waivers signed by the account holders. As in the case of Switzerland, in the repatriation of assets from the Cayman Islands there were not criminal convictions or forfeiture orders.

Money is not always where the papers say it is.

73. The second set of transactions “repatriated” from the Cayman Islands is related to the Wiese Sudameris Bank. Montesinos enjoyed a privileged relationship with this Bank. Two of his front-men at the Military and Police Pension Fund frequently used the bank for their “projects”. The CEO of the Bank appeared in several videos taped by Montesinos exchanging favors and advising him on how to hide his money *offshore*⁴⁷. As soon as the law authorizing the lifting of bank secrecy in preliminary investigations was passed, the Peruvian newly designated anti-corruption authorities required the Bank to release the bank records over the accounts of several public figures.
74. The records showed several transfers to a Cayman Island’s Bank, called Wiese Sudameris International. The bank was not registered by the Financial Peruvian authorities as a branch or subsidiary of the Wiese Sudameris. In other words, it was another “undeclared” financial institution, owned by the same shareholders as the Peruvian institution. However, the Peruvian Directors of Wiese Sudameris claimed not having any influence over the Caymanian Bank to get the money back. Immediately, the then Prosecutor of the Montesinos case traveled to the Cayman Islands, entered in direct contact with the Cayman authorities and hired legal counseling with instructions as to study the best legal avenue to get the money back. In the following months, several meetings between the Prosecutor and the Cayman Attorney General and the Director of the Financial Intelligence Unit took place⁴⁸.
75. Initially, the Attorney General in Cayman took the same legal avenue adopted with regard of the Pacific Industrial Bank: a criminal complaint against Wiese Sudameris International for suspicions of money laundering. The Cayman Grand Court admitted the complaint and issued a freezing order, *in rem*, against accounts identified as belonging to Montesinos and his associates. After a couple of months of financial analysis, however, it was discovered that the money was never transferred to Cayman.
76. The scheme was as follows: the money remained physically in Peru. In the papers, the money was transferred to the Cayman bank but in parallel, the Cayman bank loaned the same amount of money to the Peruvian Bank. In that way, the Peruvian individuals could enjoy their assets in Peru while the papers protected them from any inquiry. That was the

⁴⁷ See, e.g., Video 1790, taped on November 11, 1999, available at

http://www.aprodeh.org.pe/democracia/democracia2/c_op_18abr2001ix.htm

⁴⁸ Phone interview with Jose Ugaz, former Prosecutor of the case (August 17, 2007)

case, e.g. of some USD 14 million belonging to General Malca Villanueva, former Minister of Defense -at the time of the purchasing of defense equipment from Belarus and of the initial real estate projects of the Military pension funds. It took one year for the investigation to discover the scheme. Upon discovering the fraudulent scheme, confiscation orders against the funds located in Lima were issued. Some USD 33 millions had been “repatriated” in that way.

77. To conclude this section, it is worth noting that after the described cases, other governments tried to get cooperation from the Cayman Islands in a similar fashion the Peruvian government did⁴⁹. They have, however, failed. As recognized by the Caymanian authorities, “*the outcome in the Montesinos matter must all the more be regarded as exceptional and there is currently being prepared draft legislation which will clearly spell out the Court’s jurisdiction to enforce foreign in rem warrants in all matters involving the proceeds of serious crime*”⁵⁰.

D. THE CASES UNDER THE LIGHT OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

78. This concluding section is devoted to speculate whether the entering into force of the UNCAC would ease the described asset recovery actions, and whether it would be of help for future actions.

Location and detection of assets

79. The two mechanisms envisaged by UNCAC for detecting assets in foreign jurisdictions were in place both at the Swiss and the USA described cases. Article 14 of UNCAC requires State Parties to have in place a comprehensive supervisory and regulatory system to prevent money laundering. Such a system must oblige financial institutions to know their clients, keep records, and report those transactions that are suspicious of being of criminal origin. In addition, in order to prevent transnational movement of proceeds of corruption, article 52 of the UNCAC requires State Parties to make their financial institutions take appropriate measures to identify the beneficial owners of high valued accounts and to enhance scrutiny over the accounts of politically exposed persons –prominent public figures, their families and close associates. The USA adopted customer due diligence covering politically exposed persons in 2001⁵¹; Switzerland in 2003⁵².
80. Montesinos had hidden money in both jurisdictions at least since 1996. Reporting obligations are in place in both countries since 1998. The first, obvious, question is why the banks only reported Montesinos once the scandal went public. There are two possible speculations:

⁴⁹ Cfr., e.g., the decision of the Cayman Grand Court *in the matter of Falcone*, a case of bribery in arms purchasing from the Angolan Government, where cooperation requested from the French and the Swiss Government was refused on grounds of lacking of authority to enforce *restraint* orders unless proceedings had been instituted in the requesting country. Cit by Anthony Smellie, “Enforcement of Judgements in Practice”, paper presented at the Seminar “Forfeiting the Proceeds of Corruption”, May 2-5, Miami, USA.

⁵⁰ Cfr. Hon. Anthony Smellie, “Enforcement of Judgements in Practice”, paper presented at the Seminar “Forfeiting the Proceeds of Corruption”, May 2-5, Miami, USA. Mr. Smellie was speaking in his capacity of Chief Justice and Mutual Legal Assistance Authority of the Caymen Islands. Available at http://www.gov.ky/portal/page?_pageid=1142,1687439&_dad=portal&_schema=PORTAL

⁵¹ Cfr. US PATRIOT Act, (HR 3162 RDS, 107th CONGRESS, 1st Session), October 24, 2001, Title III, Section 312.

⁵² Cfr. Ordonnance de la Commission fédérale des banques en matière de lutte contre le blanchiment d’argent, available at <http://www.admin.ch/ch/fr/rs/9/955.022.fr.pdf> Unofficial English translation available at http://www.kpmg.ch/library/pdf/20030401_MLO_SFBC.pdf

either the banks only reviewed its files as the news appeared in the press, or the bank only felt itself facing legal risks when the scandal took wide proportions.

81. In any case, a second, more important question, is what would have happen if the Swiss banks would have reported Montesinos as early as 1998. Just for the sake of this exercise, one can speculate that, on the Swiss part, an investigation on money laundering would be opened and a request for assistance to Peru forwarded in order to determine the origins of the assets. However, in 1997, with Montesinos in power, one can be almost sure that Peru would not had been able to provide accurate information on the origins of the assets.
82. The precedent paragraph highlights an issue that is arising more and more in asset recovery cases, namely how to manage the discovery of assets of high rank officials still in power. So long as financial institutions are becoming more and more conscious of the legal and reputation risks they face for holding proceeds of corruption, the frequency in which an acting public official is reported abroad augments. More and more financial centers are opening criminal cases on grounds of money laundering of foreign public figures or figureheads. However, when asking for cooperation, the cases are put at risk if the officials involved are still in power.
83. This poses a challenge for global policy makers, as to how to evolve from a few multi-billion cases against “kleptocrats” in the euphoria of a regime change –Montesinos, Abacha, Marcos- to a much more regular, more ample, less prominent-figures, less money-involved base of cases, within the same political regime.
84. With regard of domestic mechanisms for detecting assets, the Peruvian most effective strategy was the offering of “effective collaboration” and the widening of prosecutorial powers. Both mechanisms are also contemplated by UNCAC. Art. 37 (1) of UNCAC requires State Parties to “*take appropriate measures to encourage persons who participate or who have participated in the commission of any offence established in accordance with [the] Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds*”. As mentioned before, the Peruvian system of effective collaboration, which proved most useful for recovering assets, is a total novelty in Latin American criminal procedural codes.
85. From a more general standpoint, it seems obvious that developments in the area of money laundering, both in victim, as well as in recipient. countries, will increase the chances of detecting and locating proceeds of crime. While the paradigm is fully receipted by UNCAC, it has not yet been internalized by operators and practitioners of most developing countries as the main strategy for reducing acquisitive crimes. In many States, rather than a new paradigm with specific policy objectives –confiscation of ill-gotten gains-, money laundering has been understood just as a new crime, and subjected to all the general principles regulating traditional criminal law. When a criminal investigation does not contemplates how to locate and freeze the proceeds to be subject to confiscation in its strategy from the very beginning, the risks of dissipation are extremely high.
86. With regard of the Cayman Islands, while it is not yet a signatory of UNCAC, it is worth noting that, in addition of the anti-money laundering system adopted upon FATF blacklisting, a program for withdrawing authorization to shell banks was implemented in 2001. As a result, banks and trust licenses decreased from 426 in 2001 to 291 in 2006. The banks used by

Montesinos were shut down. Thus, it seems that the Cayman Islands is now in a better position to identify assets of criminal origin⁵³.

87. As for provisional measures, the automatic freezing mechanism established in Switzerland proved to be a very effective way of complying with art. 31.2 of the UNCAC, which requires States parties to enable freezing of proceeds and instrumentalities of corruption and embezzlement.

International cooperation with the purpose of confiscation

88. Peru requested assistance from Switzerland and Cayman Islands. The Peruvian Prosecutor traveled to both jurisdictions and maintained several meetings with authorities of both countries to inform himself about the best legal avenues to get fast cooperation. In both cases, even when he was providing concrete evidence of the financial institutions, the authorities in the requested countries asked for concrete evidence involving the account holders or potential beneficiaries of the accounts the Peruvian Prosecutor was trying to freeze⁵⁴. In other words, what in the view of the Peruvian Prosecutor was a solid case, in the view of the authorities of the requested country was a fishing expedition.
89. In many jurisdictions, specially financial centers, the concept of fishing expedition does not usually take into account that there are many instances in which the evidence of a corrupt deal is not available in the victim country –think in a bribe paid by transferring funds between two jurisdictions different from the victim country-, notwithstanding there is enough rationale in requesting an investigation to that particular jurisdiction. Moreover, the financial transactions might only be untangled if cooperation is requested. While in this concrete case the Swiss Federal Supreme Court seems to have adopted an ample criterion⁵⁵, many experienced practitioners coincide in pointing out that reasonably formulated requests have been denied under very strict and close concepts of fishing expeditions.
90. The entering into force of the UNCAC might help to overcome these obstacles as, giving the importance and extent of international cooperation, strict concepts of fishing expeditions will be in the future difficult to reconcile with the terms of art. 55, which requires a duty to provide assistance “to the greatest extent possible”. Specifically, requesting States looking for a freezing measure must provide, in addition to the requirements of art. 46, 15, “a statement of the facts relied upon and a description of the actions requested and, when available, a legally admissible copy of an order on which the request is based (art. 55.3(c))”.
91. A highlight of the cooperation granted by Switzerland to Peru was the use of spontaneous cooperation in accordance with its domestic law, notwithstanding the bilateral treaty was silent to that respect. Spontaneous cooperation is an important recommendation of UNCAC (art. 56) which, under the heading of “Special cooperation” encourages State parties “to forward...information on proceeds of offences established in accordance with [this] Convention to another State party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out

⁵³ Cfr. Official figures provided by the Cayman Islands Monetary Authority, Banking Supervision Division, available at <http://www.cimoney.com.ky/section/regulatoryframework/sub/default.aspx?section=BK&id=62>

⁵⁴ Phone interview with Jose Ugaz, August 17, 2007 and email exchanges with Sonia Nieto, current Peruvian Prosecutor in charge of the asset recovery section, of August 15, 2007.

⁵⁵ Swiss Federal Supreme Court, Case 1A.43/2005, available (only in German) at <http://www.bger.ch/it/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>

investigations, prosecutions or judicial proceedings or might lead to a request by that State Party [under this chapter of the Convention].

92. The outcome of future cases may be improved if recipient countries, specially financial centers, include in their domestic legislation proactive cooperation provisions and specific procedures allowing prosecutorial and appropriate regulatory and judicial authorities, to forward information considered of interest for the purposes of Chapter V of the Convention to victim countries' authorities.

Returning assets after confiscation on money laundering basis

93. The principle of returning confiscated proceeds of corruption is a significant departure from two established practices: a) the practice according to which confiscated assets belong to the country whose Courts have issued the confiscation order and b) the practice of asset sharing.
94. When confiscating upon a foreign request or when enforcing a foreign confiscation order, it is clear that the requested country is acting on behalf of the requesting State. However, when confiscation is the consequence of a civil forfeiture action or of a domestic money laundering investigation, to which the victim country may not even be aware of, it is advisable to check whether legislation of all State Parties have a general provision allowing the return of assets to the victim country.
95. While in the case of Peru all jurisdictions returned 100% of the assets in conditions of being repatriated, it is worth noting that in the case of the USA, the agreement signed conditioned the uses of the money. Given the fact that the authority of the US Attorney General is discretionary, a question arises with regard to cases in which there are concerns about the integrity of the government seeking repatriation of the funds, disagreements with the other country on how to use the funds, or where transferring assets would be inconsistent with US efforts to remove other core obstacles to law enforcement cooperation with the country in question. This situation is addressed by UNCAC, art. 57, which set up less discretionary rules. Under Art. 57.3. (a) in case of embezzlement of public funds or of laundering of embezzled public funds there is an international obligation to return the assets, (b) in case of proceed of other offences covered by the Convention, return of assets is conditioned to the establishment of prior ownership or recognition of damages. However, as article 57.5 provides for case-by-case agreements for the final disposal of confiscated proceeds of corruption, it remains an open question which rules will be used by U.S. authorities, and other countries, when confronted with the described situations.

Specialized bodies and specific legal instruments in the victim country

96. The measures adopted by Peru in order to effectively prosecute the criminal organization show the necessity of specialized anticorruption bodies. Specialized competent bodies as well as specific investigative and procedural mechanisms. While exceptional prosecutorial powers allowed for getting crucial information for requesting assistance, a fundamental part of the assets were recovered through waiver mechanisms got through effective collaboration.

Direct means of recovery

97. While Peru reorganized his State structures, specifically its authorities, with competence over criminal proceedings, it does not seem to have devoted enough efforts to explore the possibility of using other, civil ways for asset recovery.
98. The Convention, art 53, provides for direct means of recovery in both civil and criminal proceedings. Being as a plaintiff in a civil action (Paragraph a), as a party claiming compensation or recovering damages caused by criminal offences (Paragraph b), or as a third party claiming ownership rights in a confiscation procedure (Paragraph c), article 53 ensures victim countries a range of legal remedies to initiate direct means of recovery. Prior ownership, damage recovering, compensation, disposal of confiscated assets are different legal grounds for the victim State Party to claim in the Courts of the party to where the property in question was exported.
99. Therefore, victim countries should organize the necessary mechanisms for civilly and criminally standing before foreign Courts. Though in many instances domestic legal counsel might be required, as a matter of law, it is advisable that State Parties count on a designated authority for representing the State in asset recovery claims, being them a claim of prior ownership, the establishment of damages, a claim of compensation or as a third party in a confiscation procedure conducted after a criminal conviction.
100. The counterpart of the precedent suggestion requires recipient countries to allow victim countries to have legal standing before their Courts. In some cases, such as when claiming damages or compensation to convicted offenders, a traditional concept of legal standing – e.g., requiring showing of suffered injuries over protected, concrete and particularized interests and a close causal connection between the injury and the conduct complained of – may not satisfy the purpose of article 53.

E. CONCLUDING REMARKS

101. The case of Montesinos is usually presented as a successful experience in the field of assets recovery. At a glance, an specially compared with other (in)famous cases, it is undeniable that in less than three years, USD 175 millions from three different jurisdictions have been recovered. Several factors have contributed to that success.
102. First, the peculiarity that Montesinos video-taped his meetings made the case attractive to the international media, which in turn severely increased the risk of financial institutions. Bankers in Switzerland, the US and Panama⁵⁶ reported transactions related to Montesinos while he was a fugitive. Second, several journalistic sources suggested an special interest in the USA to help Peru to get rid of Fujimori and Montesinos. Whatever the reasons, the diligent efforts of the FBI to capture Montesinos outside the United States are eloquent in this regard. These two factors, which in my view were determinant to the success of the case, are very random and can not be taken for granted for future cases. There is, nonetheless, a lesson to be learnt: the greatest the international attention and press coverage of the case, the greatest the chances of getting initial information from foreign financial institutions. However, in many instances, this principle conspired against the investigation.

⁵⁶ The Financial Intelligence Unit of Panama initiated a case for suspected money laundering upon receiving several reports from its financial institutions. Most accounts in Panama had been closed by the time the reports were made. Interview of the author with Maribel Cornejo Batista, anticorruption prosecutor in Panama City, August 5 2007.

103. There are, in addition, other factors contributing to the success of the case that will last. The case exploited at the time the Financial Action Task Force was pressing for reducing anonymity in offshore centers through the Non Cooperative Countries and Territories Initiative. Two of the jurisdictions were Montesinos operated –Bahamas, Panama and the Cayman Islands- were at that time working hard to reverse their status. Though, as mentioned before, the disposition of the Cayman authorities might be changed after de-listed from FATF, some 25 jurisdictions have excluded official corruption of their business of providing complete anonymity. Several steps have been taken towards reducing anonymity in the financial sector, including stringent provisions to identify the beneficial owner, enhanced scrutiny over politically exposed persons, enhanced scrutiny over corporate vehicles used as shell companies, prohibition of shell banks, prohibition of denying cooperation on grounds of bank secrecy.
104. In addition, several international initiatives to increase knowledge, capacities, cooperation and even to help with case management in the area of asset recovery have proliferated in the last 5 years, all of them working close to learn from each other and with the common goal of using UNCAC as a navigation chart. As mentioned, UNCAC not only facilitates traditional avenues for asset recovery by means of removing obstacles –e.g. relaxing dual criminality when providing assistance in non coercive measures, art. 46.9- and homogenizing concepts –e.g. requisites for requiring assistance which circumscribes the lax concept of fishing expeditions-. The treaty also has several innovative and still unexplored avenues for asset recovery –e.g., direct civil recovery of art. 53.a.
105. Taking that into account, and notwithstanding the aforementioned reasons, the case of Montesinos may also be regarded as a starting effort for asset recovery, if measured for the amount recovered *vis a vis* the scale of corruption described in Section A. This is, indeed, the case. Since its creation at the end of 2000, the Office of the Ad-hoc Prosecutor has obtained 107 convictions against 83 different persons, of which 17 had been extradited from 6 different countries. However, there are still more than 200 ongoing investigations, including 40 pending extraditions from 14 different countries.
106. As described in Section C of this paper, most of assets recovered by Peru are related either to bribes taken in arms contracts with Belarus and Russia or to money embezzled from the military and police pension fund. As described in Section A, Montesinos resorted to several other schemes of corruption. In addition, there is enough evidence of Montesinos bribing other people, from politicians to media owners. Most of the assets involved are believed to be outside Peru. Therefore, providing it do not interfere with defense rights, Peru has an enormous opportunity for using the new avenues envisaged by the UNCAC for recovering the proceeds of the massive corruption it suffered during the 90s.