The fight against terrorism and human rights in Spain

By

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The European Union's strategic commitment
"To combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice"

The EU counter-terrorism strategy

Brussels, 30 November 2005

Abstract

The objective of this study is to examine whether Spain is combating terrorism whilst simultaneously respecting fundamental human rights and liberties, in particular, with respect to the right to freedom from torture, the right of liberty and security of person, the right to a fair trial and the right to private and family life. This will be done by analyzing the Spanish anti-terrorism legislation and practices, together with their compatibility with Spanish obligations under international human rights laws.

The first chapter tackles the history of ETA as the major terrorist organization in the recent Spanish history and its status under the rule of General Franco.

The second chapter deals with the democratic transition in Spain, Spain's accession to international human rights legal instruments, domestic legislation, constitutional provisions and practices countering terrorism, with special analysis of the Spanish criminal justice system.

The third chapter discusses the fight against terrorism during the rule of the socialist party in the 1980s until mid 1990s, with a focus on the GAL strategy as a mechanism to counter-terrorism. The fourth chapter deals with the anti-terrorism fight under the popular party and the current socialist governments, with Islamic terrorism as a new dimension added to the Spanish fight against terrorism. The last chapter explores the role of the EU in combating terrorism, and the Spanish contribution in this regard.

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COUNCIL OF EUROPE:

- European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

European Union:

- Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.
- The European Union Counter-Terrorism Strategy 14469/4/05 REV 4 of 30 November 2005.

Spain:

- Spanish Constitution 1978.
- Spanish Penal Code *(Código Penal).*
- Spanish Code of Criminal Procedure *(Ley Enjuiciamiento Criminal).*
- Spanish General Penitentiary Law.

List of cases

European Court of Human Rights:

- Lawless v. Ireland (14 November 1960, Series A, No 3)
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- No. 77)
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- Van der Tang v. Spain (a3 July 1995, Series A, No 321)
- Igdeli v. Turkey (29296/95) (20 June 2002).

List of abbreviations

ECHR	European Convention on Human Rights
EU	European Union
ETA	Euskadi Ta Askatasuna (*Basque's homeland and liberty)*
GAL	Grupos Anti-Terrorsita de Liberación *(Anti-Terrorist Groups of Liberation)*
ICCPR	International Covenant on Civil and Political Rights
LECr	Ley Enjuiciamiento Criminal (*Code of Criminal Procedure)*
PNV	Partido Nacionalista Vasco *(Basque Nationalist Party)*
PP	Partido Popular (*Popular Party*)
PSOE	Partido Socialista Obrero Español (*Spanish Socialist Labour Party)*
UCD	Unión de Centro Democrático *(Union of Democratic Centre)*

Introduction: What is terrorism?

Since this study deals with the phenomenon of terrorism in Spain, defining terrorism is the point *de depart* of this study.

All terrorism experts confirm that terrorism is deeply woven into the history of human civilization; however terrorism in the modern age has more challenging characteristics, the "modern terrorism" can be described as follows;[1] it is loose, with cell-based networks and with minimal lines of command and control, it posses high intensity weapons and weapons of mass destruction, its politically vague, and has religious or mystical motivations, it uses "symmetrical" methods to maximize causalities, and it skillfully uses the internet and it can manipulate the media.

Traditional terrorism, in contrast, can be characterized as follows; [2]clearly identifiable organizations or movements, use of conventional weapons, usually small arms and explosives, explicit grievances championing specific classes or ethno-nationalities groups and relatively "surgical" selection of targets.

Defining terrorism, though, is not an easy process, and so far there is no widely accepted definition of terrorism because there is not one but different types of terrorism.[3]

The distinction is often unclear between terrorism, guerrilla warfare, conventional warfare, and criminal activity. Terrorist tactics are used frequently during wars, and the tactics used by violent criminals may be indistinguishable from those used by terrorists. Repressive regimes call those who struggle against them terrorists, but those who struggle to topple these regimes call themselves freedom fighters.[4]

Most people agree that terrorism exists, but few agree on its features, characteristics and components. The encyclopedia of terrorism states that most definitions of terrorism hinge on three factors: the method (violence), the target

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[1] Gus Martin *Understanding terrorism: challenges, perspectives and issues* California: sage publications, 2006, page 9-10.
[2] Ibid.
[3] Pamela L. Griest, Sue Mahan *Terrorism in perspective* California: sage publications, 2003, page xiii.
[4] Ibid.

(civilian or government) and the purpose (to instill fear and force political or social change).[5]

Actually more than a hundred definitions of terrorism exist. For instance: The illegitimate use of force to achieve a political objective when innocent people are targeted. Another definition describes terrorism as a strategy of violence designed to promote desired outcomes by instilling fear in the public at large. It is also known to be the use of force or threatened use of force designed to bring about political change.[6]

The difficulty in defining terrorism is not new. Cooper H.HA notes that "there has never been, since the topic began to command serious attention, some golden age in which terrorism was easy to define."[7]
The meaning of terrorism is embedded in a person's or nation's philosophy and the determinations of the "right" definition of terrorism are merely subjective.[8]

Grant Wardlaw, an Australian specialist in terrorism theory, says that we should apply the term terrorist even handedly to governments, groups and individuals.[9] The term terrorist can be applied to actions carried out by security forces: leaving a car bomb on a busy street, assassinating a political leader, shooting up a crowded bar, kidnapping, torturing and disappearing suspects- all these actions terrorize the civilian population for political goals, regardless of who carries them out.[10]

For the purpose of this study, the term terrorism will be used to describe the illegitimate use of force to achieve political ends whether exercised by a group of individuals, or by the state.

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[5]Vincent Burns and Kate Dempsy Peterson *Terrorism: a documentary and reference guide* Library of Congress, 2005, page 12.
[6]Gus Martin (no.1) page 40.
[7]H.HA. Cooper The problem of definition revisited *American behavioral scientist* vol. 44, no.6, 2001, page 881.
[8] Pamela L. Griest, Sue Mahan (no.3)
[9]Paddy Woodworth Using terror against terrorists: the Spanish experience in Sebastian Balfour (ed.) *the politics of contemporary Spain* UK: Routledge publications, 2005, page 62.
[10] Ibid.

Furthermore, this study deals more specifically with respecting human rights while countering terrorism.

Manfred Nowak, UN special rapporteur on torture, is concerned with the manner by which states counter terrorism. As he says "Since the terrorist attacks on the United States, Bali, Madrid and London, governments throughout the world have cited the need to have more effective measures and policies to counteract the increasingly transnational nature of terrorism on the 21st century. However, the tactics many countries have adopted in the interests of protecting national security have had negative consequences for human rights."[11]
Under the guise of the so-called 'war on terrorism', persons suspected of involvement in terrorist activities have been subjected to varying forms of humiliation and coercive interrogation methods, tactics which clearly violate international conventions and laws. States must be held accountable for their obligation to protect human rights.[12]

In the name of countering terrorism, states are violating their obligation to prohibit torture. Yet, the counter-terrorism strategies employed by many countries send the message that international conventions outlawing torture and ill-treatment are subject to amendment or interpretation or not applicable in times of insecurity.[13]

Perhaps just as alarming is that these counter terrorism tactics also have led to a shift in the mind-set of many citizens to accept torture as a necessary evil. Recent public polls worldwide show an increase in respondents agreeing with the statements that torture is an admissible form of interrogation when dealing with suspected terrorists. The repercussions of this changing world view are immense. In many counties, particularly in Western Europe, this has resulted in a new brand of xenophobia emerging whereby refugees or asylum seekers, particularly those from Muslim societies, are labeled potential terrorists before they arrive on foreign shores.[14]

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[11]Manfred Nowak 'A growing threat: countering torture while countering terrorism' *Preventing torture within the fight against terrorism newsletter* volume 1, issue 1, May 2007.
[12] Ibid.
[13] Ibid.
[14] Ibid.

Another dimension of human rights violations is related to the rights of migrants and refugees, as interests of national security are also being used to justify the turning away of legitimate migrants and refugees from countries where they seek work or asylum. Several countries, in the name of fighting terrorism, have established administrative procedures that bypass the safeguards set up by the 1951 refugee convention and thereby allow migrants and refuges to be detained in less than humane conditions.[15] At their most extreme, global counter-terrorism efforts have resulted in the breaking of international prohibition against *refoulement* that is the forcible return of refugees and asylum seekers to places where it is known that they may face torture or ill-treatment.[16]

In an attempt to make the world a safer place, counter terrorism strategies have done the reverse: as international laws are violated, their power to uphold human rights weakens. Likewise, outrage against the treatment of terror suspects does not quell terrorist acts, but fuels conflict further.[17]

Governments and their citizens must realize that protecting human rights and preventing torture is essential, not detrimental, to fighting terrorism. The notion that allowing torture and abuse, whether implicitly or explicitly, makes us safer is a fundamental lapse of reason. To remedy the present situation illegal transfer of prisoners must cease immediately, all places of detention must be opened to public scrutiny, and all terror suspects must be provided their inalienable right to fair trials.[18]

The following chapters try to explore whether Spain is respecting its obligations under human rights laws in its fight against terrorism.

[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] Ibid.

Chapter one: Origins of ETA

Section I: Terrorism in the Spanish recent history represented by ETA

Without question, the most prominent terrorist group in the Spanish recent history is ETA.

In 1959, a group of young Basque activists founded Euskadi Ta Askatasuna (ETA), which translates as 'Basque homeland and liberty', a group devoted to an armed struggle to win independence for the Basque region of Spain from the latest 'invader'-Spain's fascist dictator, General Francesco Franco. Since then, ETA has killed more than 800 people and has wounded thousands of others in its quest for an independent homeland.[19]

From the outset, the government of Spain has treated ETA as a terrorist organization. At times, the Spanish government has taken extreme police measures in its efforts to eliminate ETA. The organization has also been the target of several right wing groups who oppose the idea of a break up of Spain.[20] Over the years, thousands of ETA members and supporters have been killed, tortured or imprisoned by the Spanish governments; most of these actions took place during Franco's regime which was completely repressing any kind of a Basque nationalism manifestation, however, during the democratic transition these measures became an exception to counter the violent campaign of ETA. Despite a number of half-hearted peace negotiations between ETA and the Spanish government (that are always broken by ETA's persistence to continue its armed struggle), and in spite of several splits within ETA over the continued relevancy of the struggle, the Basque insurgency continues, and although the organization has not come close to achieving its goal, ETA still soldiers on.[21]

To understand the Basque's fierce quest for independence, it is essential to understand the geographical and historical factors which distinguish it from the other Spanish regions.

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[19] Wayne Anderson *The ETA: Spain's Basque terrorists* The Rosen publications group, 2003, page 4.
[20] Ibid.
[21] Ibid.

According to the radical nationalist sociologists, Basques are ancient people who were among the earliest settlers of an area that today straddles the border between Spain and France. They are ethnically distinct from the Spanish and French, possess an entirely different language, and are steeped in separate cultural traditions.[22] A fact that the earlier nationalists tried to construct for their independence cause, while in reality Spain has always been a multi-lingual and a multi-cultural society tolerating cultural differences.

The Basque nationalism developed during the late 19th century, when the urban industrialization, associated with an influx of Spanish migrants coming from other Spanish regions, began to threaten the rural economy and a system of cultural values deeply rooted among a large sector of the Basques[23].
The founder of the Basque nationalism, Sabino Arana, invented not only a flag but also a name, Euskadi, for the country he wanted to liberate from the Spanish domination.[24]

The nationalist historians and anthropologists were obsessed by the idea that the Basques existed before other inhabitants of the Iberical peninsula and thus have the right to form their own nation.[25]
Sabino Arana, the founder of the Basque Nationalist Party, PNV, in 1895 emphasized on the distinct "race" of the Basques as a key element of the Basque nationality. Arana identified the distinct characteristics of the Basque region in the following order;[26] firstly the "race", secondly the language, thirdly the government and laws, fourthly traditions and character, and finally the historical personality.

Arana put significant emphasis on the "race", to the extent that during the first years of the PNV he insisted that only those whose four grandparents have a Basque origin can affiliate to the PNV.[27]

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[22]Ibid page 8.
[23]Paddy Woodworth *Guerra sucia, manos limpias: ETA, el GAL, y la democracia española* Barcelona: Critica, 2002, page 5.
[24]Ibid.
[25]Ibid, page 6.
[26] Ibid, page 14
[27] Ibid.

Arana did not refer openly to religion in his list of the nationalist characteristics as he considered the rigid adhesion to the teachings of the Catholic morals as a fundamental part of the Basque historical personality.[28]

After the Basque government went into exile after its defeat in the Spanish civil war in 1937, there was no Basque resistance to speak of. Few of the then prominent Basque leaders had any experience in clandestine activities, and there existed no organizational framework within which to carry on an underground struggle. Indeed, the only organizational remains of the Basque political order were the shattered government of Euskadi, in Paris, the PNV, with most of its leaders imprisoned or in exile, and several labor organizations soon to feel the full weight of the oppression of Franco's regime.[29]

Yet within fifteen years ETA began to be created as the major armed group fighting against Franco's dictatorship.
ETA has its origins in a small group of students who began meeting in 1952 to discuss Basque politics, increase their awareness of the Basque nationalist movement, and promote the use of Euskera.[30]

From these discussions, the students began to publish an underground journal called Ekin (which in Basque means "to act"), a name by which the group would come to be known. They soon formed alliance with the PNV's youth movement but quickly withdrew out of frustration with the PNV's passive resistance to Franco's oppression[31]. Ekin believed that, as always, Basques would have to fight for Basque rights, not simply wait for them to be granted by the Spanish state.[32]

For a while, the PNV had been waiting for the United States and its World War II allies to overthrow Franco and restore democracy in Spain. In addition, the party's leaders claimed to have been assured by members of the ousted Spanish government that the autonomous status of the Basque region would automatically be restored if and when a democratic regime was reinstated. In exchange, the

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[28] Ibid.
[29]Robert P. Clark *The Basques the Franco years and beyond* University of Nevada, 1975, page 79.
[30] Wayne Anderson (no.19) page 16.
[31]Ibid.
[32]Ibid.

PNV promised not to seek further separation from Spain.[33]However, the hope for an autonomous status was devastated as the U.S ended up supporting Franco's anti-communist regime.

Therefore, in 1959 the new organization, Ekin, chose the name Euskadi Ta Askatasuna (ETA) to begin its struggle for the Basque independence.[34]
ETA was more radical than the PNV, as it sought for the full independence of the seven provinces that it considered Basque (Zuberoa, Lapurdi, Benafarroa, Vizcaya, Alava, Guipuzcoa and Navarra), and it rejected autonomy as a political goal.[35] ETA also replaced the emphasis on the "race" by the emphasis on the Euskera as a key element of the Basque nationality.[36]

ETA was deeply influenced by the achievements of the anti-imperialist movements in the French and British colonies at the time, and in particular, by the independence wars in both Algeria and Vietnam, that made ETA identify itself first as anti-colonialist and then as socialist. Another inspiring factor for ETA was the victory of Castro's guerillas in Cuba, a victory that legitimized the use of violence to achieve political goals.[37] Consequently, ETA adopted terrorism as a tactic in response to the Franco's violent repression of Basque nationalism and for the achievement of the Basque independence.

Thus, ETA became the most prominent armed group fighting against Franco's dictatorship (there were other armed groups fighting against Franco particularly during the first two decades of his dictatorship, these groups were known as the "Maquis"), and the most prominent terrorist organization in Spanish contemporary history that is still using violence for its cause[38].

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[33]Ibid.
[34]Ibid.
[35]Paddy Woodworh (no. 23) page 22.
[36]José María Garmendía *Historia de ETA* San Sebastián: R & B Ediciones, 1995, page 56.
[37]Paddy Woodwoth (no. 23) page 23.
[38] Ibid page 24.

Section II: ETA under the rule of Franco

Exile and repression

When Franco came into power at the end of the Spanish civil war in 1939, his main intent was to eliminate the Basque nationalism. He immediately abolished the Basque autonomy and enacted a policy of repression against not only Basque nationalism, but all expressions of Basque cultural identity (this policy of repression was also directed against nationalist expressions of the Catalan and Galician identities as well as the supporters of the legitimate Spanish Republic). This repressive policy led to the transformation of the Basque nationalist cause from a broken and dispersed government to an organized and experienced clandestine insurgency.[39] The fierce repression of Basque liberties and culture following the civil war galvanized anti-Spanish feeling in the Basque region and provided fuel for the fire of the resistance.[40]

Of the major acts of repression exercised by the forces of Franco was the attempt to destroy the Basque language as a functioning communication medium. Almost immediately after the fall of the Basque government, the use of Euskera was prohibited in all public places (also the use of the Catalan and Galician was not allowed).[41] Jail sentences were imposed for even casual conversations carried out in the language on public streets. Schools were not allowed to teach the language, and priests were prohibited from sermonizing in Euskera. In civil registries, entries of births, marriages and deaths which included Basque names were erased and replaced with their Spanish equivalents and Radio broadcasts in Euskera were proscribed.[42]

Since Basque nationalism leaned so heavily on the linguistic identification of race, culture and nation, Madrid placed special emphasis on the destruction of this central pillar of anti-Spanish sentiment.[43]

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[39] Robert P. Clark (no. 29) page 79.
[40] Ibid,
[41] Ibid page 81.
[42] Ibid.
[43] Ibid.

As is often the case, however, the very act of suppression provoked an attitude of resistance among the people, and Euskera survived clandestinely for over a generation before the Spanish State conceded the point that they could not abolish the language, and began to permit certain limited uses of the language once again.[44]

Within this context, ETA was born in 1959 as a response to the hostilities directed against the Basque people by Franco.
In 1961 ETA started its armed struggle against Franco by the emplacement of a number of explosives and the frustrated attempt to destroy a train carrying soldiers.[45]

The first killings took place in 1968, following recruitment and radicalization by ETA and repression by the state authorities. During this period, ETA seemed careful to target figures who had been identified with the Franco regime and the repression of Basques. In the early days, the assassinations of such figures gave ETA an image of heroic Basque resistance to fascism which resulted in other governments petitioning the Spanish government not to execute convicted ETA members. At this point, ETA was still regarded as a political group using violence to further and promote their mission. Finally, in 1973 ETA decided to target the Prime Minister, Admiral Luis Carrero Blanco, so that he would not continue the policies of Franco.[46]

After the assassination of Carrero, there was a period of few months in which terrorism, especially, ETA terrorism disappeared, and ETA was dedicated to the organizational work and to the ideological clarification. However, since April 1975, a number of assassinations carried out by ETA against police officers led to the imposition of a state of emergency for three months in the provinces of Vizcaya and Guipuzcoa and since then the repression against ETA was intensified. Reports show that during these three months in which the state of emergency was imposed 3000 persons were sent to the police stations.[47]

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[44]Ibid page 82.
[45] José María Garmendía (no.36)page 54.
[46] Alejandro Muñoz Alonso *El terrorismo en España* Barcelona, 1982, page 30.
[47] Ibid page 40.

As a response, ETA increased its attacks against security forces, and after the government lifted the state of emergency in 25, July, 1975 ETA began to target not only the security forces but also civilians who were accused of helping "the occupier".[48]

Two months later, a large number of ETA leaders and members were either detained or killed. Since October 1975, the terrorist activities of ETA were no longer considered sporadic; but rather systematic and permanent. Every week witnessed an assassination committed by ETA members. Even during the last days of Franco, ETA continued its armed struggle.[49]

Finally, on 20 November 1975, Franco died. With his death ended an extensive chapter of Spain's history that has started with the civil war and ended with terrorism that seemed to foretell violent times.[50]

[48] Ibid page 41.
[49] Ibid page 46.
[50] Ibid page 47.

Chapter two: The fight against ETA during the democratic transition

Section I: Democratic transition in Spain

The great majority of authors agree that the Spanish political transition is unique and unprecedented.[51]

The dramatic social and economic changes that occurred during the later years of Franco regime were important preconditions to the establishment of a democratic regime in Spain.[52] These changes had been in part the result of Franco's abandonment in 1959 of the policy of economic autarchy. In February 1957 he brought into the government a team of young technocratic ministers who drastically restructured Spain's approach to the government's economic role: in 1959 they adopted a stabilization program linked to economic liberation, and in 1963 they devised a strategy based on national economic planning.[53]

The series of development plans Franco's technocrats set in motion in the early 1960s also benefited from the mitigating of Spain's diplomatic isolation and the overall European bloom, in which Spain was able to participate. The key diplomatic events in Spain's political reintegration into the international system were the 1950 UN resolution lifting economic and diplomatic sanctions, the 1953 concordat with the Holy See, the 1953 defense agreement with the United States (pact of Madrid) and membership in the UN in 1955, World Bank and International Monetary Fund in 1958. As a consequence of these institutional changes, the economy grew rapidly in the 1960s and 1970s.[54]

In spite of the social and economic development that took place during the last days of Franco, there was no parallel development on the political level.[55] The whole situation that had accompanied the installation of Franco's regime had changed dramatically. Externally, other dictators that used to be Franco's main

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[51] Ramón Cotarelo *la transición política* in José Félix Tezanos, Ramón Cotarelo, Andrés de Blas (eds) *la transición democrática española* Madrid: Editorial sistema, 1990, page 31.
[52] Steven L. Spiegel, Kenneth R. Maxwell *The new Spain: From isolation to influence* USA: council on foreign relations, 1994, page 4.
[53] Ibid page 6.
[54] Ibid page 7.
[55] José Félix Tezanos *La crisis del Franquismo y la transición democrática en España* in José Félix Tezanos, Ramón Cotarelo, Andrés de Blas (eds.) *La transición democrática Española,* Madrid: Editorial sistema, 1990 page 24.

allies and added legitimacy to Franco's regime, namely Hitler and Mussolini, were no longer in power. That put Spain in a position isolated from the international community. Internally, the social classes that supported Franco during his first years, such as the church, had refrained from doing so, and that made Franco's regime suffer a political identity crisis.[56]

Therefore, it was not surprising that just after the death of Franco a quick process of socio-economic evolution occurred which is consistent with the circumstances of the new socio-economic reality of Spain in the last quarter of the 20th century. [57]

The transformations that took place in the Spanish society; the coordination among the democratic opposition from one side, and the internal necessities of reforming the political system inherited from Franco from the other, created the preconditions that made the King Juan Carlos able to use his power to nominate a prime minister. A policy of reform would then be imposed based on the liquidation of the institutions of the old regime, followed by a series of agreements between the main political and social forces in the country.[58]

In autumn 1976, the parliament essentially voted itself out of the business by passing a package of political reforms that legalized political parties, trade unions and other private associations, and that scheduled elections for the following year. In June 1977, Adolfo Suarez and his Democratic Center Union (UCD) emerged victorious from Spain's first free vote in four decades and began the arduous task of liquidating Franco's authoritarian regime. In December 1978, the Spanish people ratified a constitution, a major step toward completing the transition to a democratic rule.[59]

As far as the fight against terrorism during the change to democracy, it can be argued that Spain did not engage in widely applied indiscriminate or excessive force to combat its terrorist threat. In general, democratic Spain reacted to terrorism within its own constitutional bounds. This commitment to the law and

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56 Ibid page 27.
57 Ibid.
58 Ibid page 28.
59 Ibid.

due process helped to maintain a steady support for Spanish democracy, even among opposition political parties. Violence caused significant disturbance in Spain. However, the state attempted to remove the incentives to join violent groups. Compared with the Franco regime, the citizens had full political liberties. In addition, the previous restrictions on regional languages and cultures were abolished. Eventually the violence became less frequent, especially after 1980. The state's attempts at reinforcing the political community seemed to be working.[60]

Soon after the death of Franco, King Juan Carlos initiated a national reconciliation. Part of this included the commutation of death sentences to life in prison and the reduction of other sentences. In July 1976, the state announced an amnesty for all political and ideological crimes and allowed many exiles to return. However, those convicted of terrorist acts were not pardoned. Many Basques called for a complete amnesty for political prisoners. Another amnesty in March 1977 left only about twenty people jailed. Finally, in October 1977, and after pressure from the Basques, the state freed the remaining prisoners, on the condition that they left the country. In 1984, the Spanish state began to offer another form of amnesty called 'social reintegration' to ETA members who were ready to publicly renounce future acts of violence. Incarcerated ETA members and exiled ETA members were allowed to participate.[61]

In 1977 another tough issue was tackled: regional separatist demands. The new constitution allowed two procedures for each region to gain the status of autonomous community within Spain. The historical communities of Galicia, Catalonia and the Basque country granted the region more autonomy than ever before. The 1979 statute delegated to the Basque community the administration of justice, some control over economic policy and the creation of a Basque public television channel. The statute also established the Basque language as a joint official language, established a Basque government and gave the community the option of later joining with Navarra.[62]

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[60]Jennifer S. Holmes *Terrorism and democratic stability* Manchester University Press, 2001, page 105.
[61] Ibid, page 106.
[62] Ibid.

Political liberties were also restored by the new democracy. By the end of 1976, the King had abolished Franco's special courts for trying terrorists. In 1978, press censorship was greatly reduced from the policies created under Franco. Overall, the state did not implement indiscriminate repression. Although charges of torture were occasionally raised, most often in the Basque region.[63]

The state did institute some anti-terrorist legislation. In 1978, law 21/1978 was passed, giving the police new powers to arrest and detain. Suspects could be held for up to seventy two hours without charge. Judicial oversight of this practice was also established, but rarely invoked. The police could also intercept the mail and telephone messages of suspected terrorists. This law was supplemented by law 56/1978, 'Special Measures toward Crimes of Terrorism Committed by Armed Groups Act', which allowed detention up to ten days and the holding of suspects incommunicado. Also, the decree law 'On the Protection of Citizen Security' was instituted in January 1979; this increased penalties for terrorist crimes, restricted the rights of prisoners to seek provisional release from prison and criminalized statements that could be interpreted as defending terrorist acts or groups.[64]A 1980 law passed by the National Assembly allowed an extension of preventive detention, the searching of homes without warrant, and the violation of privacy of mail and communications. This suspension of rights could be applied to people suspected of complicity in or participation in terrorist acts.[65] (The last section of this chapter deals in more details with the Spanish anti-terrorist legislation).

Despite the efforts of the state in restoring liberties, declaring amnesties and granting autonomy, the actions of the state were not entirely nonviolent. The police and Civil Guard killed many in violent clashes. For example, between February 1976 and December 1979 forty people were killed in demonstrations in the Basque Provinces by police in spite of efforts at "reeducation". In March 1981, in response to a flood of ETA attacks and the attempted military coup, the state deployed army and navy troops to the Basque Provinces for the first time since the return to democracy. [66]

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[63] Ibid, page 107.
[64] Ibid.
[65] Ibid, page 108.
[66] Ibid, page 109.

In addition, a clandestine group, the Anti-Terrorist Groups of Liberation (GAL), with ties to the state, became active in 1983, killing suspected terrorists. GAL used illegal means, including assassination and kidnapping, to fight terrorism. GAL assassinated at least twenty six members of ETA. However, the actions of GAL were not widely known until the 1990s. Due to the relatively small number of dead, the ten to fifteen years delay until the actions became known and the location of occurrences, the Spanish state did not lose citizen support before the events became known. Many scholars partly attribute the loss of the socialists in the 1990s to the emergence of evidence linking the Spanish government to GAL.

However, overall, in spite of the deaths, GAL and the March 1981 military deployment, the Spanish state did not appear to be pursuing an indiscriminate repressive state response.[67]

Section II: The fight against ETA during the first years of the democratic transition:

Spanish democracy swung vertiginously from terror to celebration between the beginning of 1981 and the end of 1982. Since the start of the transition, the threat of a military coup had shadowed Spanish politics.[68] The savage escalation of ETA's campaign over this period inevitably exacerbated extremism within the armed forces and the police. A large number of the members of the security forces suffered appalling losses in 1980. The victims included senior officers, often retired men who were very soft targets.

The list of civilian victims grew longer. They ranged from politicians to alleged informers, from company directors to unfortunates who found themselves in the wrong place at the wrong moment.[69] Meanwhile, the Union of the Democratic Center, Adolfo Suarez's governing party, had begun to fall apart.

[67] Ibid, page 109-110.
[68] Paddy Woodworth, *Dirty war, clean hands: ETA, the GAL and Spanish Democracy* Cork University press, 2001, page 63.
[69] Ibid.

In January 1981, Suarez resigned and he was succeeded by Leopoldo Calvo Sotelo.[70] It was widely believed that Sotelo was operating only by the grace and favor of the army. Two of his major initiatives suggest that this was so. He took Spain into the NATO, at the time a deeply unpopular move with the Spanish populace, but one which gave the long isolated army a new and prestigious international role. He also introduced a controversial law, backed by the Socialists, which sought to slow down the process of granting autonomous powers to the Basques and Catalans. Meanwhile, the remarkable process known as 'social reinsertion' was largely negotiated under this government. This was the scheme whereby a sector of ETA (p-m) (political-military) abandoned armed struggle. In return, it got its prisoners out of the jail and its exiles home, and became integrated into normal democratic politics through Euskadiko Ezkerra.[71]

The anti-terrorist policy of the diverse governments of the UCD was rather erratic and coincided with the escalation of terrorism. The central government lacked the ability to negotiate with the Basque nationalist party (PNV). The PNV decided not to get involved in the project for a democratic constitution elaborated in 1978 and decided to abstain from the referendum celebrated in November of that same year. Only half of the Basque electorate participated in the referendum, 20%gave negative votes. It can be argued that the Basque population had rejected the Spanish constitution.[72]

Although the PNV accepted in a later stage the project of the autonomy statute for Euskadi, and asked for a favorable vote in the referendum of 1979, it continued questioning the constitution for its ambivalent attitude.[73]
The PNV refused to refer to ETA as a terrorist group, and during 1977-1980 almost half of the Basque population had not expressed a negative opinion about ETA.

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[70] Ibid.
[71] Ibid, page 64.
[72] Fernando Reinares *Democratización y terrorismo en el caso español* in José Félix Tezanos, Ramón Cotarelo, Andrés de Blas (eds.) *La transición democrática Española,* Madrid: Editorial sistema, 1990 page 631.
[73] Ibid page 632.

Those responsible for the public order during that time were unable to establish a coherent action capable of imposing interior security.[74] The security apparatus inherited from Franco was partially modified as a consequence of the legitimate pressures from the opposition. A number of security experts were displaced from their charges, producing a hierarchical alternation which was not accompanied with an adequate reorganization of the security forces. For example, the information networks necessary for the anti-terrorist fight were deficient and operated without control due to the lack of coordination among the intelligence services of the different security bodies and forces of the state. Thus, the Spanish government was obliged to ask help from the intelligence services of other Western countries.[75] In front of the escalation of the terrorism of ETA, the government of Spain finally decided to establish special police units in the Basque country, rather unsuccessfully trying to coordinate resources between agencies. It was not until mid-1980 a new Minister of the interior decided for the first time to create a unified command for fighting terrorism, headed by a police commissioner.[76]

Following the unsuccessful coup d'etat in February 1981, four army companies were assigned to an anti-terrorist operation in the Basque country. They were replaced later that year by units of the Guardia Civil. In 1982, military personnel were assigned to the protection of public buildings and installations. The democratic government of Spain was cautious during these years not to use the armed forces in internal security issues; however, with time they became more involved but proved to be inefficient in their tasks of investigating and prosecuting terrorism suspects.[77]

Furthermore, the validity of the legislative means adopted during the democratic transition years was limited. The anti-terrorist legislation was the result of the constitutional indications referred exceptionally to the suspension of certain fundamental rights, (concretely those related to the maximum duration of the preventive retention, the privacy of home and the secrecy of communication),

[74] Ibid page 634
[75] Ibid.
[76] Ibid.
[77] Ibid.

in relation to the investigations corresponding to the act of armed groups and terrorist elements.[78]

Although they established formal guarantees for such suspension, such as appealing to the judicial intervention and the adequate parliamentary control, in practice they were relative and insufficient, there were several abuses, and the 'incomunicación' of the detainees for many days left the doors open to the torture and degrading treatment.[79]

[78] Ibid.
[79] Ibid.

Section III: Spain's accession to international human rights instruments

Introduction: Sovereignty versus human rights in the ECHR:

Of the most prominent international Human Rights treaties that Spain ratified is the European Convention on Human Rights, which Spain signed in 1977 and it came into force in 1979.

The structure of the European Convention for the protection of human rights (ECHR) is characterized by ambiguity. While taking into account that 'the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms' (Preamble of the Convention), the Member States thereby do not intend to give up their sovereignty or the right to enact measures necessary in the public interest, even if this should entail the violation of the principles set forth in the convention.[80]

More than simply reinforcing the protection of persons, the ECHR affirms the intent to recognise the exigencies of the public interest- or sometimes the conflicting individual interests- and to favour them by the interplay of escape clauses, which can also be referred to as 'the justifying facts'.

The 'structural' ambiguity of the escape clauses is augmented by their 'functional' ambiguity. By their very existence, these clauses appear to function as a justification- in the name of the public interest- for practices consubstantial to the reason of the state. Yet, it is by virtue of their presence in the ECHR that European Court can exercise its control. Without directly calling into question the principle of national sovereignty, the convention specifies the conditions under which the public interest can be invoked. In this context, the control of these clauses constitutes a means of avoiding abuse of the reason of the state.[81]

Article 15 - the derogation clause:

Article 15 of the ECHR provides the possibility for states to derogate from the rights and liberties that the convention protects "in time of war or other public emergency threatening the life of the nation". There are limits; however, certain

[80] Mireille Delmas-Marty, Gerard Soulier 'Restraining or legitimating the Reason of the state' in Mireille Dlemas-Marty (ed.) *The European Convention for the protection of Human Rights: International protection versus national restrictions* Martinus Nijhoff Publishers, 1992, page 7.
[81] Ibid.

rights are not subject to derogations (prohibition against torture and inhumane or degrading treatment, slavery and servitude, and non retroactivity of the criminal law). Derogations from the other provisions of the convention are only permitted to "the extent strictly required by the exigencies of the situation".

Moreover, a state which invokes Article 15 is required to inform the Secretary General of the Council of Europe of the "measures which it has taken and the reasons therefor".[82]

The scope of Article 15 must be evaluated. There are limits on the state's prerogatives, and as such, necessity does not escape the law. Indeed, the problem can not be resolved in a purely speculative fashion. The state of necessity attests a paradox: control of the State's power to restrain rights is all the more necessary since this power is augmented in view of the circumstances, yet because of this increase, such control is all the more difficult to exercise. As such a situation is so eminently political, it can not be completely mastered by the law. Under such conditions, the importance of Article 15 cannot be underestimated. Essential questions are: how do we define the state of necessity? What control is exercised over the measures of exception taken in view of the circumstances? From this perspective, the problem is the same under both domestic and European law.[83]

As of the present time, the European institutions have had cognisance of five cases which pose the problem of Article 15. In three of these cases, the Court did not have to intervene (the first Cyprian case in 1956, the Greek Colonels case in 1967, and the second Cyprian case in 1974). However, the Court was called upon to decide on the merits of two cases which involved questions of terrorism: the *Lawless* case[84] (1 July 1961), and the *Ireland v. United Kingdom* case[85] (18 January 1978). On these two occasions, the Court endeavoured to specify the terms under which it intended to exercise its control.[86]

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[82] Ibid page 8.
[83] Ibid page 9.
[84] Lawless v. Ireland (14 November 1960, Series A, No3)
[85] Ireland v. UK (18 January 1978, Series A, No 25)
[86] Ibid page 10.

First, the Court exercised control over the very question of whether or not to invoke Article 15. This is no small matter, as the Court went beyond what was authorised for domestic jurisdictions. The Court sought first to specify the meaning of the expression "public danger threatening the life of the nation".

The Court analyzed it as a crisis or situation of an exceptional and imminent danger which affects the entire population and which constitutes a threat for the organized life of the community composing the state. [87]

The notion must be interpreted taking into account the Preamble of the ECHR, which while reaffirming the commitment of the European States to the fundamental freedoms, considers that they are best maintained "by an effective political democracy". This association of human rights with the notion of society is dually important. It is important, firstly, because it reaffirms the reciprocal involvement of human rights and democracy. Secondly, and most significantly, it is important insofar as it reintegrates the reference to a democratic society into the context of Article 15, which precisely avoids such reference, contrary to the numerous other articles of the ECHR.[88]

"Terrorism is a threat to democracy" is a frequently repeated assertion. However simple this affirmation may appear, it in fact means several things. In the first place it states a truth in authoritative terms: Terrorism tends to destroy democracy. At the same time it implies value judgment: Terrorism is "the evil" set against democracy which is "the good".[89] Finally, it suggests that "the good" must be defended –at all costs- against the evil. This is a striking example of political discourse in which complicated questions are oversimplified by the approximations or by attaching undue importance to one particular question.

Democracy is based on a certain conception of law; in particular it entails the recognition of human rights in the form of fundamental rights attaching to individuals who may rely on them against the state. How or in what sense does "terrorism" call in question or jeopardizes these fundamental rights, and more

[87]Ibid page 10.
[88] Ibid.
[89] Gerard Soulier 'Terrorism' in Mireille Dlemas-Marty (ed.) *The European Convention for the protection of Human Rights: International protection versus national restrictions* Martinus Nijhoff Publishers, 1992, page 15.

generally the juridico-political system which constitutes democracy, it is evident that terrorism as a phenomenon of violence can not be left without response.[90]

The European Court of Human Rights has clearly identified the problem: "the Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against terrorism, adopt whatever measures they deem appropriate" (*case of Klass and others*, 6 September 1978).[91] Thus, the Court would seem to be saying that it is in fact the response to terrorism which is the true threat to democracy.[92]

[90] Ibid.
[91] Ibid.
[92] Ibid page 16.

Section IV: Spanish anti-terrorist legislation:

Spanish Constitution:

The Spanish Constitution of 1978 is one of the few constitutions that refer to the suspension of individual rights for investigating terrorism suspects.[93]
According to Article 10.2 of the Spanish Constitution, the norms relative to fundamental rights and liberties shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.[94]

Article 55.2 of the Constitution stipulates that "An organic act may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognized in section 17, subsection 2, and 18, subsections 2 and 3, may be suspended for specific persons in connection with investigations of the activities of armed bands or terrorist groups."[95]

One year before declaring the Spanish Constitution, on 24 November 1977, Spain has signed the ECHR; however, it came into force one year after the elaboration of the Constitution, on 10 October 1979. Since then, the ECHR forms a part of the Spanish judicial order, and therefore, its application in the national territory is obligatory, "Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law."[96]

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[93] M. Elena Rebato Peno *La detencion desde la constitucion* Madrid: Centro de estudios politicos y constitucionales, 2006, page 110.
[94]Spanish Constitution 1978, Article 10.2.
[95] Spanish Constitution 1978, Article 55.2.
Article 17.2 of the constitution reads as follows "Preventive arrest may last no longer than the time strictly necessary in order to carry out the investigations aimed at establishing the events; in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours."
Article 18.2 reads as follows "The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto." Article 18.3 reads as follows "Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order."
[96] Spanish Constitution 1978, Article 96.1

Thus, all the constitutional provisions, concretely those related to the suspension of rights in connection with the investigation of terrorism offences, seem compatible with the provisions of the ECHR, in particular with Article 15.1 of the convention which reads as follows: "In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with its other obligations under international law."[97] It is precisely Article 15 of the ECHR that makes the measures adopted by the Spanish constitution in Articles 55 and 116 compatible with the international law. Spain has declared when ratifying the constitution that it will interpret the dispositions of Articles 15 and 17 in a sense that permits the adoption of measures contemplated in Articles 55 and 116 of the constitution.[98]

The European Court of Human Rights has manifested in its case-law that "in the general context of Article 15 of the Convention and in the normal sense of the words *any public emergency threatening the life of the nation* is sufficiently clear that it refers to an exceptional situation of a crisis or emergency that affects the entire population and constitutes a threat to the organized life of the community on which the state is based", *Lawless case v. Ireland* (judgment of 1 July 1961).

Therefore, we can interpret that the circumstances that led the Spanish Constitution and later the Spanish legislator with the intent to end the terrorist threat can be integrated within the scope of Article 15 of the ECHR.[99]
The European Court of Human Rights has understood from the cases *Askoy v. Turkey* (18 December 1996) and the case *Lawless v. Ireland* that the activities of terrorist groups are grave and can be considered as a situation of grave public emergency that threatens the life of the nation.[100]

[97] European Convention on Human Rights, 1950, Article 15.1
[98] M. Elena Rebato Peno (no.93), page 123.
[99] Ibid, page 124.
[100] Ibid.

Consequently, we can conclude that the Spanish terrorist phenomenon requires the suspension of fundamental rights, in particular, the modification of the normal sense of Article 5.3 of the ECHR which reads as follows[101]: "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."[102]

Spanish anti-terrorist legislation before the constitution:

- *The decree, law 10/1975:*

The Spanish law of public order determines that the maximum period of detention is seventy-two hours, which is also recognized in Article 17 of the Spanish Constitution of 1978.[103]

The law on the prevention of terrorism of 26 of August 1975 - bearing in mind that it was formulated in a non democratic context- contemplated for the first time the suspension of individual rights in favor of investigating terrorism suspects.[104]

Thus, Article 13 of the Organic Law 10/1975 permits the prolongation of the detention for another forty eight hours if the investigation so requires without the necessity for a judicial authorization, and for a total of ten days with an authorization of a judge. The petition for the prolongation of the detention should be written and should indicate the reasons for such prolongation. In other words, a terrorism suspect can be held in detention for a period of five days, by a decision from the executive authority, or for ten days when an authorization of a competent judge is available.[105]

- *The decree, law 21/1978:*

Although the law of political reform of 4 January 1977 had declared that the right of liberty of person as inviolable right, the royal decree-law 21/1978 of 30 of June 1978 allowed the possibility of prolonging the detention for as long as necessary for the purposes of investigation, however, such prolongation should be notified to a judge within the initial seventy two hours of the detention, and the judge may accept the prolongation or reject it.[106]

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[101] Ibid.
[102] European Convention on Human Rights, Article 5.3.
[103] M. Elena Rebato Peno (no.93), page 126.
[104] Ibid.
[105] Ibid.
[106] Ibid. page 127.

The main difference between the two decrees lies, principally, in the absence of determining the maximum period of the prolongation, as the second decree states that the prolongation can last the time necessary for the investigation purposes, moreover, it does not necessitate the authorization of a judge for the prolongation.[107]

Those two decrees form the basis for Article 55.2 of the Spanish Constitution.

- *The Law 56/1978:*

During the first years of the democratic transition, and before declaring the constitution in December 1978, the Law 56/1978 was the main anti-terrorist legislation. According to this law, the prolongation of detention can last for seven days, which means that a person suspected for a terrorism crime can be kept in detention for a total of ten days, this prolongation though has to be notified to a judge, and it is subjected to a permanent judicial control. The judge can ask at any moment for information about the situation of the detainee and he might revoke the prolongation of the detention. Thus, we can say that the Law 56/1978 is a return to the regime existed before by the decree of 10/1975.[108]

- *Organic development of Article 55.2:*

Organic Law 11/1980 is the first organic development of Article 55.2 of the Spanish Constitution. Just like the Law 56/1978 it permits the prolongation of detention for seven days, apart from the initial 72 hours of the detention, provided that such prolongation to be notified to a judge before the expiration of the first 72 hours of the detention.

With this first Organic Law, we find two weak points[109]:

1- the amplitude of the detention, which can last for ten days.

2- the automatic prolongation of the detention by a petition from the executive authority even before obtaining the approval from a judge which might come in a latter stage. That means if a prolongation was requested in the third day of the initial detention, and the judge approved it within the following 24 hours, in this case the detainee is kept in an unconstitutional detention for 24 hours.

[107] Ibid.
[108] Ibid page 128.
[109] Ibid page 141.

Four years later, Spanish legislation on terrorism was dominantly compiled in Organic Law 9/84 of 26 December 1984, called "Organic Law Against the Action of Armed Groups and Terrorist Elements, and developing Article 55.2 of the Constitution".[110]

The law, which is a commendable attempt at clarification of the subject, translates once again the concern of the authorities regarding this very thorny problem in the country and their intent to try to put an end to the violent acts of the armed faction of ETA.

As its name indicates, the law is a development of the constitutional clause which allows the constitutional provisions concerning detention and the protection of private and family life to be suspended for purposes of investigating the activities of armed groups and terrorist elements.[111]

The question of the compliance of this legislation with the provisions of the ECHR and the case-law of the European authorities is framed in a special light, Spain having issued an interpretive declaration in this regard:
"The Spanish Government declares that it interprets the provisions of Articles 15 and 17 (of the ECHR) to mean that they allow the adoption of the measures envisaged by Articles 55 and 116 of the Spanish Constitution."[112]
Spain therefore places the law of 26 December 1984 within the framework of the exceptional circumstances defined under Article 15 of the ECHR.

Although states enjoy a relatively broad margin of appreciation, the Court clearly stated in *Ireland v. United Kingdom:* "It does not follow that states enjoy unlimited power... The Court is competent to judge whether they exceeded the strict extent required by the crisis. The national margin of appreciation is accompanied by European control."
It would therefore be logical to examine whether the derogatory measures provided by the law of 26 December 1984 were prescribed to the strict extent necessitated by the situation.[113]

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[110]Mireille Delmas-Marty, Gerard Soulier 'Restraining or legitimating the Reason of the state' in Mireille Dlemas-Marty (ed.) *The European Convention for the protection of Human Rights: International protection versus national restrictions* Martinus Nijhoff Publishers, 1992, page 185
[111] Ibid.
[112] Ibid.

The problems essentially lie at the level of the procedural guarantees afforded to persons suspected of having committed an offence under the Armed Groups and Terrorist Elements Act, despite the fact that the material aspect of the law has come under fire in regard to the definition of certain offences, in particular, apologia of terrorism, and that the risk of such an offence encroaching on the freedom of expression is a real one.[114]

Furthermore, Article 16 of this law allows the police to arrest, without prior judicial authorization or warrant, anyone suspected of having committed any of the offences set out in Article 1 of the law, and to hold the suspect in custody for seventy two hours. The initial period of detention may be extended, for purposes of the investigation, for a further period of not more than seven days. However, the extension must be notified to a judge (prior to expiry of the initial seventy-two hour period) and the latter should authorize or refuse it within twenty-four hours.[115]

The authority which decided to detain a suspect may prohibit all communication during the time necessary for investigation.

Spanish law, and any application thereof, in my opinion, seriously conflicts with Article 5 sub-paragraph 3 of the ECHR for the following reasons.

Firstly, the law prescribes only that the detention be notified to the judge, whereas the European rule, as construed under the established case-law of the Court (*Winterwep case of 24 October 1979, Series A, No34)* requires the detainee to be brought before the judge.[116]

Secondly, if the practice described before the *Cortes* were perpetuated, it may be concluded that no effective judicial control is exercised for ten days, which raises the problem of respect of a trial within a reasonable time.[117]

We would add that various humanitarian associations have pointed out that most cases of torture, and even disappearance, occurred during police detention.

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[113]Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid page 186.

The Lawless case (14 November 1960, Series A, No3)[118] clearly established that in exceptional hypotheses, derogation from article 5 of the ECHR could be allowed "to the extent necessitated by the situation".[119]

Since the Organic Law 9/1984 admitted the possibility of prolonging the detention for a maximum of seven days, apart from the initial seventy-two hours, the Spanish Constitutional Court has declared that the Organic Law 9/1984 is unconstitutional and it was replaced by the Organic Law 4/1988 reforming the law of Criminal Procedure (Ley de Enjuiciamiento Criminal *LECr*) with respect to the individual suspension of rights.

Article 520 bis of the LECr introduced by the Organic Law 4/1988 contemplates the possibility of prolonging the detention the time necessary for the investigation purposes for a maximum of another forty eight hours, and such prolongation should be authorized by a judge.[120]

However, if we follow the case-law of the European Court of Human Rights, we find that in the *Brogan case* (judgment 29 November 1988) the Court declared that the detention period of four days and eleven hours for a terrorism suspect did not satisfy the requirements of "promptness" and "reasonable time" mentioned in Article 5.3 of the ECHR.[121] Therefore, following the jurisprudence of the European Court of Human Rights that accepts a period not exceeding 4 days, it may be argued that the 5 days as a maximum period for detention established by the Spanish legislator for terrorism cases could be incompatible with the requirements of Article 5.3 of the ECHR.[122]

[118]Lawless v. Ireland (14 November 1960, Series A, No 3).
[119] Ibid.
[120]M. Elena Rebato Peno (no.93), page 139.
[121] Case Brogan v. UK. (11209/84) [1988] ECHR 24 (29 November 1988).
[122] Ibid.

Spanish Criminal system and the incommunicado detention

In Spain, all terrorism cases are investigated and tried by the Audiencia Nacional *"National High Court"*. Created in 1977, the Audiencia Nacional has jurisdiction over crimes committed by person belonging to armed groups or related to terrorism or rebel elements when the commission of the crimes contributes to its activity. And by those who in some way cooperate or collaborate in the acts of these groups or individuals.[123]

The Audiencia Nacional has six examining magistrates and an equal number of criminal trial chambers, each presided over by a panel of three professional judges.

As far as the Spanish anti-terrorist legislation it is mainly covered by the Criminal Code of 1995 (*Código Penal*, CP Articles 571 to 580) which defines terrorism offences, and the Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal LECr* Articles 520 bis to 527) which establishes the power of law enforcement agencies and judicial authorities in investigating crimes of terrorism, while at the same time proscribing the rights of terrorist suspects.[124]

These special measures derive from Article 55.2 of the Constitution that allows for the suspension of the rights with respect to the length of detention, privacy of the home, secrecy of communications "as regards specific persons in connection with investigations of the activities of armed bands or terrorist elements."

Article 571 of the Criminal Code defines terrorists as "those who belonging, acting in the service of or collaborating with armed groups, organizations or groups whose objective is to subvert the constitutional order or seriously alter public peace"[125] commit the attacks described in Article 346 (attacks on buildings or transportation or communications infrastructure with the use of explosive devices) and Article 351 (causing risk of injury or death).

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[123] Organic Law 4/1988 of 25 May 1988, reforming the Code of Criminal Procedure.
[124] José Luís Gomara Hernández and David Agorrela Ruiz, *Prontuario de seguridad publica e intervención policial,* 2nd edición, DAPP publicaciones jurídicas, S.L, 2004, page 319.
[125] Código Penal Article 571.

Articles 572-579 establish the minimum and maximum prison sentences for different crimes when committed by members of the above-defined armed groups or those acting on their behalf. Article 580 allows Spanish courts to consider foreign convictions for activities related to armed groups as equivalent to convictions under Spanish law to enable citing recidivism as an aggravating factor.

The principal features of Spain's counter-terrorism provisions are the extended period of detention in police custody allowed before the prisoner must be brought before a judge, and the use of incommunicado detention.
Whereas the Code of Criminal Procedure (*LECr*) Article 520 bis 1 establishes that all persons arrested must be brought before a competent judge within seventy-two hours of the arrest, those detained on suspicion of membership or collaboration with an armed group or terrorist elements may be held for an additional forty-eight hours, upon an authorization of a judge. This means that terrorism suspects may be under police custody for five days before seeing a judge.[126]

The LECr stipulates that the competent judge may order that the detainee be held incommunicado while in police custody. Persons in incommunicado detention have the rights stipulated in Article 520 LECr they are[127]:

- Be informed immediately, in a manner that they can understand, of the grounds of the arrest and their rights.
- Remain silent until brought before a judge.
- Not incriminate themselves or confess guilt (the privilege against self-incrimination).
- The use, free of charge, of an interpreter, if necessary.
- Have their consulate notified in the case of foreign nationals.
- A medical examination by a state forensic medical officer, and to request a second examination by a different state forensic medical officer.

However, the incommunicado detainee can enjoy these rights with some restrictions stipulated in Article 527 of the LECr. These restrictions are:[128]

[126] Jose Luis Gomara Hernandez and David Agorrela Ruiz(no.124) , page 320.
[127] Ibid.
[128] Ibid.

- He cannot designate his own lawyer; he must be assisted by a legal aid attorney.
- He can not consult with his legal aid attorney in private at any time.
- Ha can not notify a relative or a third person of his choice about the arrest and place of detention.
- He can not receive and send correspondence or other communications.
- He can not receive visits from religious ministers, private doctor, relatives, friends or any other person.

Incommunicado detention:

The most significant and criticized feature of Spain's anti-terrorist legislation is the use of incommunicado detention. While there is no prohibition under international law of incommunicado detention per se, there is a significant consensus among United Nations Human Rights bodies that it can give rise to serious human rights violations and thus should be prohibited. Many countries apply incommunicado detention; its use is justified as a necessary measure in the fight against terrorism.[129]

As mentioned before, in Spain the LECr in Article 520 states that those suspected of terrorism acts can be held in police custody for up to 5 days (as the initial period of 72 hours can be extended by 48 hours).

The extension must be requested within the 48 hours of detention and authorized by a judge within the following 48 hours (Article 520 bis (1)). The judge may authorize that those suspected of terrorism acts be held incommunicado in police custody for a total of 5 days (Article 520 bis (2)). Persons held incommunicado do not have the right to notify a third party about their detention and its place, to receive visits from family members, spiritual advisors, or doctor of their own choice, or to communication or correspondence of any kind (article 527). Incommunicado detainees do not have the right to designate their own lawyer, but must be assisted by a legal aid attorney; however, they do not have the right to a private consultation with their lawyer.

[129] Spain: Counter terrorism measures infringe basic rights, Human Rights Watch Report on Spain, 27, January 2005. < http://hrw.org/english/docs/2005/01/27/spain10066.htm>

A November 2003 reform of the LECr amended Article 509 to allow the judge to impose an additional five days of incommunicado status in provisional prison on individuals suspected of membership in an armed band or terrorist elements, or having committed a crime in concert with two or more individuals.[130]
This means these individuals may be held in incommunicado detention for ten consecutive days. The amended Article also states that the competent judge or tribunal may order that the detainee returns to being incommunicado, even after having been placed in communication when the ongoing investigations so require. This final period may last for a period no longer than three days.[131]

Concerns about the incommunicado detention:

It can not be denied that terrorism cases are so complex and require different treatment than other criminal offences, however, the European Court of Human Rights has affirmed in its case law that States are not allowed to take whatever measures they deem necessary in their struggle against terrorism.[132] In spite of this affirmation, the incommunicado detention is commonly used by many countries in their anti-terrorism struggle. Although it is not internationally prohibited, it raises concerns in relation to several rights. Most importantly with regard to:

- The right to freedom from torture, degrading and inhuman treatment,
- The right to be brought promptly before a judge,
- The right to have a fait trial within a reasonable time,
- The right to challenge the lawfulness of the detention,

The right to freedom from torture and other inhuman or degrading treatment or punishment:

- International law and standards:

Article 10(1) of the ICCPR states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".[133] Article 10(2)(a) states that "accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to

[130] Organic law 15/2003 of 25 November 2003, reforming the Code of Criminal Procedure.
[131] Ibid.
[132] *Case of Klass and others*, 6 September 1978.
[133] ICCPR Article 10 (1).

separate treatment appropriate to their status as convicted person."[134] The Human Rights Committee has stated that this article expresses a norm of general international law not subject to derogation.[135]

It is not surprising that in the Strasbourg procedure Article 3 has frequently been an issue in connection with detained persons. Of course, as the Court held in the *Kudla* Case, "it can not be said that the execution of detention on remand in itself raises an issue under Article 3 of the Convention. Nor can that Article be interpreted as laying down a general obligation to release detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment."[136]

Nevertheless, a balancing of interests is necessary. In the *Krocher* and *Moller* Case the Commission opined that "the question that arises is whether the balance between the requirements of security and basic individual rights was not disrupted to the detriment of the latter."[137] In this case the prison conditions included, inter alia, isolation, constant artificial lighting, permanent surveillance and closed-circuit television, denial of access to newspapers and radio and the lack of physical exercise.[138]

Although the Commission expressed serious concern with the need for such measures, their usefulness and their compatibility with Article 3 of the Convention, it concluded that the special conditions imposed on the applicants could not be construed as inhuman or degrading treatment. This conclusion was reached after it had been sufficiently shown, in the opinion of the Commission, that these conditions were necessary to ensure security inside and outside the prison. Furthermore, the applicants were considered dangerous, they were alleged to be terrorists and there was a risk of escape and collusion. [139] Other factors that have been accepted by the Commission to justify stringent measures are the

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[134] ICCPR Article 10(2)(a).
[135] Human Rights Committee, General Comment No. 29.
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/71eba4be3974b4f7c1256ae200517361?Opendocument
[136] Judgement of 26 October 2000, para. 93.
[137] Report of 16 December 1982, D& R 34 (1983), page 52.
[138] Godofridus J.H. "van Hoof" (ed.) *Theory and practice of the European Convention on Human rights* Martinus Nijhof 1998, page 425.
[139] Ibid.

extremely dangerous behavior of the prisoner, the ability to manipulate situations and encourage other prisoners to acts of indiscipline, the safety of the applicant, and the use of firearms at the time of arrest.[140]

In the *Kudla* Case the Court held that "a State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, his health and well being are adequately secured by, among other things, providing him with the requisite medical assistance."[141]

In cases where the question was raised of whether solitary confinement of a detainee constituted an inhuman treatment, the Commission took the position that such confinement was in principle undesirable, particularly when the prisoner concerned was in detention on remand and might only be justified for exceptional reasons.[142] For the question whether an inhuman or degrading treatment is concerned, regard must be had to the surrounding circumstances, including the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned, and also the question of whether a given minimum of possibilities of human contact has been left to the person in question. Absolute sensory isolation combined with complete social isolation can destroy the personality and constitutes an inhuman treatment for which no security requirements can form a justification in view of the absolute character of the right laid down in Article 3.[143]

- Spanish Law and practice:

The General Penitentiary Law and its regulations govern the functioning of the prison system in Spain. The General Penitentiary Law requires respect for the human dignity of all inmates (Art. 3) and states that inmates in pre-trial detention must be held separately from those serving sentences (Art. 16). The Penitentiary

[140] Ibid.
[141] Judgement of 26 October 2000, para.94
[142] Godofridus J.H. "van Hoof" (ed.) (no.138), page 427.
[143] Ibid.

Regulations stipulate that "reinsertion and reeducation" are a fundamental objective of the penitentiary system (Art. 2); all inmates have the right to individualized rehabilitation programs, and the destination of an inmate within the prison system should be based on this program "taking into consideration, especially, the possibilities for family ties and its possible repercussions [on the inmate]" (Art. 81.2).

The General Penitentiary Law establishes different prison regimes for different categories of prisoners. Article 10 of the General Penitentiary Law states that a "closed regime" is reserved for prisoners – both pre-trial and convicted inmates – who are considered extremely dangerous or who have a demonstrated inability to adapt to the ordinary, or open, regime.[144] The Penitentiary Regulations specify that the closed regime is applied only to inmates classified as "first degree" (*primer grado*), a designation based on a variety of factors.[145] All presumed or convicted members of organized crime or armed groups are classified as first degree until they show "unequivocal signs of having extracted themselves from the internal discipline of said organizations or bands" (Penitentiary Regulations, Art. 102.5). The application of closed regime should be reviewed every three months (Art. 92.3). The General Directorate of Penitentiary Institutions decides whether to transfer an inmate from the ordinary, or open, regime to the closed regime on the basis of a recommendation from a prison committee (Art. 95.1).

The closed regime has two different levels. Under the most restrictive regime, inmates who are classified as extremely dangerous are housed in special departments (Art. 91.3). These inmates should be allowed only three hours outside their individual cell per day (with the possibility of three additional hours for programmed activities. There may be no more than two inmates in the prison yard at the same time (though again, this number may be increased to five for programmed activities); and there are daily cell and body searches (Art. 93).

A slightly less restrictive regime of separate modules or centres is reserved for those who are subject to the closed regime due to "demonstrated inadaptability" (Art. 91.2). Inmates in these modules also have individual cells

[144] Article 96(2) of the Penitentiary Regulations allows the closed regime to be applied to inmates awaiting trial. Penitentiary Regulations, Royal Decree 190/1996 of 9 February.
[145] Article 102(5) of the Penitentiary Regulations

and should be allowed a minimum of four hours communal life, with the possibility of an additional three hours for programmed activities. At least five inmates should be allowed to participate in collective activities (Art. 94).

Total solitary confinement is only contemplated as a punishment for very serious infractions of prison rules and "evident aggressiveness or violence" (Art. 233). While the normal period is set at six to fourteen days, in cases where the inmate is being punished for more than one infraction that carries the same penalty, he or she may be held for up to 42 days in solitary confinement upon authorization by the Penitentiary Oversight Judge (*Juez de Vigilancia Penitenciaria* - Art. 236). While in solitary confinement, the inmate should have the right to spend two hours alone in the prison yard (Art. 254).

The U.N. Committee against Torture has expressed concern over the rigors of the closed regime in Spanish prisons, in particular the limited number of hours outside per day; the exclusion from group, sport, or work activities; and the extreme security measures. "Generally speaking, it would seem that the physical conditions of imprisonment [of these prisoners] are at variance with prison methods aimed at their rehabilitation and could be considered prohibited treatment under Article 16 of the [Torture] Convention."[146]

As far as the locations of the prisons, Article 12 of the General Penitentiary Law states that the location of prison centres shall be determined by the penitentiary administration within the territorial areas which may be designated. In any case, there shall be an attempt for each one to have a sufficient number of those in order to meet penitentiary needs and in order to prevent the prisoners from loosing their social roots.

In 1987, there were 435 ETA prisoners in Spanish jails. 73% were kept in jail near Madrid. The rest were scattered about in 13 centres. At that time, ETA prisoners were bunched together.

Since 1989, Spain has implemented a policy of dispersing ETA inmates, both those in pre-trial detention as well as those serving sentences, all over the

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146 U.N. Committee against Torture, Conclusions and recommendations of the Committee against Torture: Spain, U.N. Doc CAT/C/CR/29/3 23 December 2002), para. 11(d). http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.29.3.En?OpenDocument

national territory. The government of Spain argues the policy is necessary to avoid the concentration of large numbers of ETA members, to break the control of the organization over individual members, to prevent the planning and execution of new crimes by ETA members from within prison, and to protect victims from potential secondary victimization[147]. ETA began to rail against such dispersal since it was being seriously harmed by this policy. Between 1989 and 1995, 112 ETA prisoners opted to reintegrate themselves back into society after declaring their break with the terrorist group.[148]

ETA has promoted pro-prisoner associations in order to organize individual and collective visits and to call for the prisoners to be regrouped in jails near the Basque region or in jails in the Basque country itself. The current and previous Spanish governments, in their unsuccessful negotiations with ETA, declared their will to discuss transferring ETA prisoners to jails that are closer to the Basque region, a promise that can not be fulfilled due to ETA's persistence on continuing its violence.[149]

To some extent, the relocations have made face-to-face visits between the defendants and their defense attorneys almost impossible. While prison visits between inmates and their lawyers are supposed to take place under conditions that ensure confidentiality, all phone calls placed by inmates, even those to their lawyers, are made within hearing of a prison guard.[150] While there may sometimes be legitimate reasons for dispersal, it appears to have been a widespread practice in relation to terrorism suspects, with negative consequences both for family visits and access to lawyers.

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[147] Spain: Counter terrorism measures infringe basic rights, Human Rights Watch Report on Spain, 27, January 2005. < http://hrw.org/english/docs/2005/01/27/spain10066.htm>

[148] http://www.bastaya.org/actualidad/Violencia/InformeTorturas/TheDispersal ofetaPrisoners.pdf

[149] Ibid.

[150] Penitentiary Regulations, Article 47(4).

The right to be brought promptly before a judge:

- International laws and standards:

The International Covenant on Civil and Political Rights (which Spain ratified in 1977), states in article 9.3 that "anyone arrested or detained in a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgment"[151]

The ECHR in Article 5(3) stipulates that "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".[152]Thus, paragraph 3 comprises, first of all, in addition to the right to prompt information conferred in the second paragraph, the right to be brought promptly before a judicial authority. It is obvious that a person can not always be heard by a judge immediately after being arrested. Unlike in the case of the obligation to inform him of the reasons of his arrest, there is a third person involved in his first contact with a judge. The word "promptly" therefore, must not be interpreted literally that the investigating judge must be virtually dragged out of bed to arraign the detainee or must interrupt urgent activities for this. However, adequate provisions will indeed have to be made in order that the prisoner can be heard as soon as may reasonably be required in view of his interests.[153]

The Court gave its opinion about the interpretation of the word "promptly" in the *De Jong*, *Baljet* and *Van den Brink* Case. The Court had to answer the question of whether the referral to a judicial authority, seven, eleven and six days, respectively, after the arrest was in conformity with the requirement of promptness of Article 5(3).

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[151] International Covenant on Civil and Political Rights 1966, article 9.3.
[152] ECHR Article 5(3).
[153] Godofridus J.H. "van Hoof" (ed) (no.138), page 494.

Although this question was answered in the negative, the Court refrained from developing a minimum standard. It only noted that "the issue of promptness must be assessed in each case according to its special features.[154] In other cases decided by the Court on the same day it also refrained from indicating a minimum standard.[155]

In the case of Brogan and others v. the U.K., the Court had to deal with the question of "promptness" in the case of arrest and detention, by virtue of powers granted under special legislation, of persons suspected of involvement in terrorism in Northern Ireland. The requirements under ordinary law in Northern Ireland for bringing an accused before a court were expressly made inapplicable to such arrest and detention. None of the applicants was in fact brought before a judge or judicial officer during his time in custody ranging from four days and six hours to six days and sixteen and a half hours. The Court accepted that the investigation of terrorist offences presented the authorities with special problems and that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland had the effect of prolonging the period during which the authorities may, without violating Article 5 (3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer. However, it also stressed that the scope for flexibility in interpreting and applying the notion of "promptness" is very limited, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody, fell outside the strict constraints as to time permitted by the first part of Article 5(3).[156]

The Court held as follows: "to attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". An interpretation to this effect would import into Article 5 para.3 a serious weakening of a procedural

[154]Judgement of 22 May 1984, para.52. See also judgement of 28 November 1991, *Koster*, para.24.
[155] Judgment of 22 May 1984, *Van der Sluijs, Zuiderveld and Klappe,* para.49, and *Duinhof and Duif,* para.41.
[156] Godofridus J.H. "van Hoof" (ed.) (no.138) page 495.

guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision."[157]

- Spanish law and practice:

In current Spanish law and practice, a terrorism suspect may be held incommunicado in police custody for five days before being brought before a judge. As established in the LECr, incommunicado detention must be the subject of a judicial order, either upon request by the police or Civil Guard, a public prosecutor, or on the instructing judge's own initiative. When the arresting agency sees fit, it can impose incommunicado detention immediately; the judge must ratify this decision within twenty-four hours of the arrest.[158]

The European Committee for the Prevention of Torture (CPT) has stated that five days of incommunicado detention before being a hearing with a judge may not be in conformity with Spain's obligations under international law and has recommended that "persons held incommunicado be systematically brought before the competent judge...prior to the taking of the decision on the issue of extending the detention period beyond 72 hours."[159]

[157] Brogan and others v. UK (11209/84) [1988] ECHR 24, (29 November 1988) para.61.
[158] Spain: Counter terrorism measures infringe basic rights, Human Rights Watch Report on Spain, 27, January 2005. < http://hrw.org/english/docs/2005/01/27/spain10066.htm>
[159] Report to the Spanish government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 26 July 2001. CPT/inf (2003) 22, para. 24. < http://www.cpt.coe.int/documents/esp/2003-22-inf-eng.htm>

The right to have a fair trial within a reasonable time:

- International law and standards:

International human rights law does not specify a maximum allowable period of detention before trial. The ICCPR requires that "anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall de detained in custody, but release may be subjected to guarantees to appear for trial."[160]

The third paragraph of Article 5 of the ECHR contains for the person detained on remand the right to be tried within a reasonable time or otherwise to be released pending trial, if necessary subject to certain guarantees for his appearance at the trial. The way this provision is formulated seems at first sight to leave a free choice to the judicial authorities: either to prolong the detention on remand, provided that it has been imposed in accordance with paragraph 1(c), up to the moment of the judgement, which must be given within a reasonable time, or to provisionally release the detainee pending trial, which trial would then no longer be subject to a given time-limit. Such an interpretation has been resolutely rejected by the Court.[161] In the *Neumeister* Case, the Court held with regard to Article 5(3) that "this provision can not be understood as giving the judicial authorities a choice between either bringing the accused person to trial within a reasonable time or granting him provisional release even subject to guarantees. The reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction he must be presumed innocent and the purpose if the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable."[162]

[160] ICCPR Article 9(3).
[161] Godofridus J.H. "van Hoof" (ed.), (no.138) page 497.
[162] Judgement of 27 June 1968, para.4.

And in the *Wemhoff* Case, the Court held as follows, "it is inconceivable that the contracting states should have intended to permit their judicial authorities, at the price of release of the accused, to protract proceedings beyond a reasonable time. This would, moreover, be flatly contrary to the provision in Article 6(1)."[163]

The reference to Article 6(1) is indispensable for the Court's interpretation of Article 5(3); the word "moreover", therefore, might as well have been omitted by the Court. In fact as soon as the accused has been released, Article 5(3) is no longer applicable.[164]

The obligation that in these cases, too, the trial takes place within a reasonable time, can be based on Article 6(1). But precisely because Article 6(1) applies to all criminal proceedings, it is evident that Article 5(3) does not contain a choice between either release or trial within a reasonable time, but the obligation to keep a prisoner no longer in detention on remand than is reasonable and to try him within a reasonable time.[165]

According to the quotation from the *Neumster* Case, the Court does not associate the word "reasonable" with the processing of the prosecution and trial, but with the length of the detention. The long delay of the trial may itself be reasonable in view, for instance, of the complexity of the case, or the number of witnesses to be summoned, but this does not mean that continued detention is therefore also reasonable.[166]

The Court takes the view that Article 5(3) refers to the latter aspect. This implies at the same time that the criteria for "reasonable" in Article 5(3) are different from those for the same term in Article 6(1) or at least have to be applied in different way. Some delays may in fact violate Article 5(3) and still be compatible with Article 6(1).[167]

The persistence of the "reasonable suspicion", as mentioned in subparagraph 5(1) under (c), is a condition *sine qua non* for the lawfulness of the continued detention. When the "reasonable suspicion" ceases to exist, the

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[163] Ibid, para.5.
[164] The judgement of 13 July 1995, *Van der Tang*, para. 58.
[165] Godofridus J.H. "van Hoof" (ed.) (no.138), page 498.
[166] Ibid.
[167] Judgment of 10 November 1969, *Matznetter*, para. 12.

continued detention becomes unlawful and accordingly the question as to the reasonableness does not arise at all. When is continued detention on remand to be considered reasonable? This question can not be answered in abstracto, the answer depends on the special features of the case. For each individual case and at each moment the interest of the accused person will have to be weighed against the public interest, with due regard to the principle of the presumption of innocence. The national authorities have to establish those relevant factors. It is not possible to shift the burden of proof to the detained person. That would be contrary to the principle that detention is an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.[168]

In the first instance this weighing is in the hands of the national authorities. They must set out the relevant arguments in their decisions on the applications for release. The Court has clearly shown that it considers itself competent, on the basis of the reasons given in these decisions and the statements of the applicant, to review for their compatibility with the convention the grounds on which a request has been rejected by the national authorities. The mere fact that the "reasonable suspicion" continues to exist is not sufficient, in the Court's opinion to justify, after a certain lapse of time, the prolongation of the detention. According to the Court's case law, the question whether the period spent in detention on remand is reasonable, consists of two separate questions. The first question to be answered is whether the grounds given by the national judicial authorities are relevant and sufficient to justify the continued detention. If so, the second question to be answered in whether the national authorities displayed special diligence in the conduct of the proceedings. If they did, the period spent in detention can be considered reasonable. However, in case the first or second question is to be answered in the negative, the period of detention on remand did exceed a reasonable time.[169]

[168] Godofridus J.H. "van Hoof" (ed.) (no.138), page 499.
[169] Ibid, page 500.

- Spanish law and practice:

Under Spanish law, pre-trial detention is considered a measure to be applied only when it is "objectively necessary and when there are no other less onerous measures to the right to liberty through which the same goals may be reached."[170] The LECr establishes the conditions under which pre-trial detention may be decreed: the alleged acts must be punishable by a maximum prison sentence of two or more years or a shorter sentence in the event the accused has a criminal record, and there must be enough motives to believe the accused is criminally responsible.[171] When both conditions are met, pre-trial detention may be imposed to avoid the risk that the accused will commit other criminal acts.[172] Pre-trial detention may also be decreed when it is deemed that the accused presents a flight risk, in order to avoid the hiding, alteration or destruction of evidence, and to avoid the accused taking action against the interests of the victim.[173]

Persons accused of serious crimes, those who carry a prison sentence of more than three years, may be held in pre-trial detention for up to four years. Article 504(2) of the LECr stipulates a maximum of two years pre-trial detention in such cases, however, this period may be extended by another two years where the circumstances indicate that is unlikely that the case can be brought to trial within that period. Fernando Flores Giménez, a high-ranking official in the Ministry of Justice, explained that while in theory two years should be enough to bring a case to trial; complex cases with many accused make the extension necessary.[174] Detainees must be released at the end of the permissible four-year period.

While prolonged detention pre-trial detention should be exceptional and imposed only when strictly necessary, in practice it occurs regularly in terrorism cases in Spain. A defence attorney for several Al Qaeda suspects alleged that the two year extension is practically automatic in terrorism cases.[175] (In this regard, it can be argued that terrorism cases, especially those related to 'international

[170] Ley Enjuiciamiento Criminal (LECr) Article 502(2).
[171] LECr Article 503 (1).
[172] LECr Artcile 503(2).
[173] LECr Article 503 (1) (3).
[174] Human Rights Watch interview with Fernando Flores Giménez, Madrid, July 13, 2004. http://hrw.org/reports/2005/spain0105/9.htm#_ftnref153
[175] Human Rights Watch interview with 11-S criminal defense lawyer, Madrid, June 21, 2004. http://hrw.org/reports/2005/spain0105/9.htm#_ftnref153

terrorism' are so complex due to the number of victims, the number of witnesses, and the existence of a possibility of committing more criminal offences in the future and that make the prolongation of pre-trial detention seem necessary).

The right to challenge the lawfulness of the detention:

- International law and standards:

The right to challenge the lawfulness of one's arrest is a fundamental right enshrined in Article 9.4 of the ICCPR: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[176] Article 5.4 of the ECHR establishes the same right, it states that "Everyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is unlawful."[177]

According to the jurisprudence of the European Court of Human Rights, the review of the lawfulness of a detention must have bearing on both "the procedural and substantive conditions" of the deprivation of liberty. In other words, a detained person should have "available a remedy allowing the competent court to examine not only compliance with the procedural requirements...but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and ensuing detention."[178]

- Spanish law and practice:

In Spain, as in many countries, this right can be exercised by filing a writ of *habeas corpus* through a simple, expedited procedure that allows the detainee, his or her lawyer, or a third party to demand that the detainee be brought as quickly as reasonably possible before a judge to determine the lawfulness of the detention.

Organic Law 6/1984, Regulation of the Procedure for Habeas Corpus, states in the exposition of motives that the law refers not only to illegal detentions, but also to "detentions which, having been originally legal, are

[176] International Covenant on Political and Civil Rights 1966, article 9.4.
[177] ECHR, Article 5.4.
[178] Brogan v. UK (11209/84) [1988] ECHR 24 (29 November 1988), para. 65.

maintained or prolonged illegally or take place under illegal conditions." Article 1 of the law defines illegally detained persons as[179]: 1) those who were detained by an authority, an agent of the same, a public official or a private individual, without a legal basis, or without compliance with the formalities and requisites established by law; 2) those who are illegally interned in any establishment or place; 3) those who were detained for a period longer than that established by law if, upon completion of the same, they were not released or delivered to the closest judge to the place of detention; and 4) those deprived of their liberty whose rights established in the Constitution and Procedural laws have not been respected.
The detainee, his or her spouse or companion, relatives, and, in the case of minors and incapacitated persons, their legal guardians; the Public Prosecutor; the Defensor del Pueblo(Ombudsman); and the competent instructing judge on his own initiative may all file a writ of habeas corpus[180]. The examining magistrate of the district where the detainee is being held is competent to review the petition, except in cases of detention of suspected members of armed groups or terrorists, whose writs of habeas corpus must be reviewed by the Central Instructing Judge, in other words, the same examining magistrate of the Audiencia Nacional who may have ordered the detention in the first place. By contrast, appeals against orders remanding a detainee into pre-trial detention issued by Audiencia Nacional magistrates are reviewed in the first instance by the same examining magistrate but in the second instance by a panel of three judges.[181]

We can conclude that the incommunicado detention violates the right to habeas corpus in many ways; firstly, persons held in incommunicado detention are not informed appropriately of this right. The right to challenge the lawfulness of the detention through a writ of *habeas corpus* is not among the rights that police are obligated to read to detainees at the time of arrest and before the official statement is recorded. Thus, we can assume that many detainees are not aware of this right or of the procedure for exercising it, particularly given that lawyers appear not to pay enough attention to the importance of this right.[182] Secondly, the fact that incommunicado detainees do not have the right to notify a person of

[179] Organic law 6/1984 Article 1.
[180] Organic Law 6/1984, Article 3
[181] Ibid, Article 2.
[182] Human rights watch interview with Rosa Ana Moràn Martìnez, attorney, Technical Secretariat, Attorney General's office, Madrid, 12 July 2004.
http://hrw.org/reports/2005/spain0105/9.htm#_ftnref153

their choosing about the arrest or the place of detention clearly undermines the ability of a third party to file a writ of habeas corpus on their behalf.
Thirdly, in most cases the detainee does not see a lawyer until the legally permissible period of incommunicado detention in police custody is almost over. Given that it is the lawyer who is in the best position to counsel the detainee about his various options, including that of filing a writ of habeas corpus, this delay has a direct impact on the detainee's ability to exercise this fundamental right. The European Court of Human Rights has held that "where a detained person has to wait for a period to challenge the lawfulness of his custody, there may be a breach of Article 5(4)." The Court considered that a period of seven days "sits ill with the notion of 'speedily'" under that article.[183]

The human rights committee concluded that article 9(4) of the ICCPR had been breached in a case where the applicant had the theoretical right to file a writ of habeas corpus but had been denied access to counsel throughout his detention.[184]

[183] Igdeli v. Turkey (29296/95) [2002] ECHR 507 (20 June 2002), paras. 34-35.
[184] Human Rights Committee, A. Berry v. Jamaica, Communication No. 330/1988, U.N. Doc CCPR/C/50/D/330/1988 (1994), para. 11.1. Berry was detained for two and a half months before he was brought before a judge.
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.50.D.330.1988.Fr?Opendocument

Chapter 3: The fight against ETA during the 1980s until mid-1990s

Section I: the fight against terrorism during the 1980s: *GAL*- State terrorism to counter terrorism:

The experience of recent Spanish history indicates that terrorism entails a dangerous threat. One of its greatest dangers lies in the way in which terrorism tempts democracies into taking shortcuts, to break their own best rules.[185]Terrorists begin to win when democracies become less democratic in response to the terrorist threat. Concepts such as pluralism, tolerance and respect for human rights must be numbered among the potential long-term casualties of car-bombs and assassinations. [186] The democratic state, the rule of law, can suffer three kinds of defeats in its fight against terrorism. First, when lacking capacity to adequately respond to private violence; second, when the response includes illegitimate violence; finally, when terrorists violence imposes its will to the democratic state. In all these three cases, there is something in common: the logic of war would prevail over the democratic construction of political society[187].

This section tackles the strategies applied by the first two Socialist governments (1982-86, 1986-92) to counter the violence of ETA, in particular, the GAL tactics used throughout the 1983 to 1987.

As was pointed out in chapter two, ETA began to escalate its violent campaign during the first years of the democratic transition. Statistics show that the average yearly number of fatalities attributed to ETA was 81 between 1978 and 1980, 34 between 1981 and 1990, and 16 between 1991 and 2000. It should be noted that ETA perpetrated just seven assassinations a year between 1968 and 1977 that is under the dictatorship and before Spain's first free elections.[188] ETA was practically the only terrorist organization active in Spain during the 1980s and

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[185] Paddy Woodworth 'Using terror against terrorists: the Spanish experience' in Sebastian Balfour (ed.) *The politics of contemporary Spain* UK: Routledge publications, 2005, page 61.
[186] Ibid.
[187] José Ramón Recalde 'Problemas de legitimidad: provocación terrorista y respuesta del Estado' in Fernando Reinares (ed.) *State and societal reactions to terrorism* Oñati: The International Institute for the sociology of law, 1997, page 34.
[188] Fernardo Reinares 'Democratization and state responses to protracted terrorism in Spain' in M.Van Leeuwen (ed.) *Confronting terrorism: European experiences, threat perceptions and policies* Netherlands: Kluwer law international, 2003, page 57.

1990s. In addition, the GAL (Grupos Antiterroristas de Liberación, *Anti-terrorist Liberation Groups*), a vigilante terrorist organization linked to security figures that were operating during Franco's dictatorship, caused the deaths of 27 people between 1983 and 1987, as a part of a campaign intended to intimidate members and sympathizers of ETA.[189]

When the socialist party (PSOE) with its president Felipe Gonzalez formed the executive as a result of the October 1982 elections, the new governing politicians initially opted for continuity in issues concerning police response to terrorism.[190] Soon, however, the new minister of interior decided to favor the Guardia Civil as the preferred agency in the fight against terrorist organizations for a number of reasons, in particular the remarkable discipline already existing within that agency.[191]

Actually, the first Socialist government has spared no effort to improve upon the laws against terrorism and to increase the efficiency of the security authorities entrusted with persecuting them.[192] During 1984 the exiting regulations against terrorism were intensified: the sentences against political violators were increased, a number of offences pertaining to terrorism were decreed (such as the prorogation and justification of terrorist actions), and the period of detention of persons suspected of terrorism was prolonged to ten days (according to the organic law 9/84 of 26 December 1984 mentioned before in chapter 2). During this time the accused was removed from any external contact and had no possibility of soliciting a judge to verify the legitimacy of his arrest, and therefore the critics reproached the government for opening the door to the abuse of police power in a variety of ways, including torture.[193] In order to obtain the speedy and fair trial of accused Etarras, a special court has been established for them far away from the Basque region where most of the incriminating terror acts are perpetrated. Madrid's distrust of the Basque judiciary, manifested in this settlement, has also for a long time guided its attitude towards the Basque police,

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[189] Ibid, page 58.
[190] Ibid, page 66.
[191] Ibid.
[192] Peter Waldmann 'From the vindication of honour to blackmail: the impact of the changing role of ETA on society and politics in the Basque region of Spain' in Noemi Gal-Or (ed) *Tolerating terrorism in the West* Routledge, 1991, page 25.
[193] Ibid, page 26.

as provided for in the autonomy legislation of 1979.[194] The organization and development of the Basque police authorities was delayed out of fear that their attitude towards ETA might be too lenient, and worst of all that it might serve as national Basque liberation force rebelling against the supremacy of Madrid.[195] For these reasons, the central government preferred to leave the responsibility for the fight against terrorism in the hands of all Spanish security force, including the civil guard (Guardia Civil), which has been the singularly detested in the Basque region since the Franco era.

Gal- 'Spanish dirty war'

The fight against terrorism took a new form during the 1983 and 1987, when a similar campaign of terrorist activity was carried out, for which the GAL claimed responsibility. GAL made its appearance shortly after the *Zona Especial Norte* (ZEN, Special Northern Zone) plan was put into effect in 1983. ZEN, a political plan created by the Spanish government. The ZEN plan, coordinated by the police and political institutions, sought the physical destruction of suspected ETA activists in the French Basque region.[196]Due to the GAL tactic, ETA had always claimed that little or nothing had changed in the Basque country since the Franco dictatorship. This terrorist organization was secretly arranged by police officials, who recruited mercenary assassins among organized criminals of Marseille and Lisbon, and targeted members and sympathizers of ETA who where living across the border in Southwestern France, although around half of the 28 people killed had no links with ETA.[197] Jose Ignacio Zabala and Jose Antonio Lasa, two refugees from the south living in Bayona were the first victims of GAL They were kidnapped by the paramilitary group in October 1983. In March 1995, two corpses were identified as being those of Lasa and Zabala. Both corpses showed signs of extensive beatings and torture.[198]

On June 14, 1984, France and Spain signed the "Acuerdos de la Castellana" (the Castellana Agreement), a cooperation agreement for stronger cooperation against the Basque violence. GAL killings stopped in 1987 when

[194] Ibid.
[195] Ibid.
[196] Fernando Reinares (no.188), page 67.
[197] Ibid.
[198] Paddy Woodworth, (no. 185) page 68.

France began to hand over Basque refugees connected to ETA and expelled others to Algeria. But sporadic attacks to Basque dissidents by paramilitary groups continued.[199]

Since the trial in 1991 of two Spanish policemen, José Amedo and Michel Dominguez, a clearer picture began to emerge on how the GAL death squads started and how they operated. But the two policemen claimed to have acted on their own. Police officials testified not having knowledge about GAL. A Spanish court sentenced the two policemen to 108 years imprisonment each but the Spanish government pardoned them three years later[200]. Information was revealed about the misuse of the secret state funds or "fondos reservados" that were intended to finance the dirty war against Basques and direct government involvement in the GAL affair began to come out in 1994 when Amedo and Dominguez decided to break silence and testified before the Spanish National Court[201].

The secret operation, for which more than 14 former police and senior government officials and a Civil Guard General have been indicted, brought the inquiry even closer to the prime minister, Felipe Gonzalez. But the National Court denied evidence against Gonzalez who in turn, has denied all knowledge or involvement with GAL.[202]The last trials related to the GAL only ended in the summer of 2002.[203]

Undoubtedly, the GAL affair represented a flagrant violation of the fundamental principle by which police forces operate in the modern democratic state: "minimum force". This essentially requires using the minimum level of force necessary to deter, restrain or contain violence and preserve public order, something that is vital if the state's agents of internal coercion are maintained in a firmly controlled and purely defensive role.[204]By establishing an anti-terrorist "hit squad" within its police structure, the Spanish state severely distorted this basic

[199] Euskal Herria Journal, < http://www.ehj-navarre.org/navarre/na_repression_dsquads.html>
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] El País, 7 June 2002:19.
[204] Peter Chalk 'The response to terrorism as a threat to liberal democracy' in Alan O'Day *War on terrorism* England: Ashgate publishing limited, 2001, page 92.

principle. Indeed, it came dangerously close to institutionalizing internal security on the basis of the militaristic (and authoritarian) ideal of maximum force.[205]

The GAL affair constituted a major departure from accepted liberal democratic constitutional principles of law and order. Revelations of the dirty war have not only served to legitimize ETA's armed struggle in the eyes of many sectors of the Basque population, who accuse the state of acting in a repressive and illegitimate manner. They were also instrumental in alienating popular support for the Felipe Gonzalez Government and ensuring its political demise in 1996.[206]

Section II: the fight against ETA after 1987 until mid 1990s:

Police counter terrorist operations became much more discriminate and selective after 1988. No single episode of illegal violence in the state's response to ETA has been reported since then.[207] Together with the decrease in the number of suspects arrested and the selective character of police detention since the late 1980s, ETA's terrorist activity continued to decline as well. This process was assisted by the increasingly more selective policing of terrorism, reforms operated within the state security agencies, and political decisions adopted with that purpose as part of the anti terrorism pact (the Pact of Ajuria Enea).[208]

The pact of Ajuria Enea was signed on 12 January 1988 by all the political parties with parliamentary representation, including all the Basque nationalist parties but excluding HB (the political wing of ETA). The document's full name is "Agreement for the Normalization and Pacification of Euskadi," but it became known as the Pact of Ajuria-Enea. The pact set out to establish a single strategy and give an image of unity and cohesion in the face of the violence of ETA, which was not involved in this process. It was based on the defense of the Statute of Autonomy, the need and the importance of police work in the eradication of violence, and the possibility of a solution through dialogue, provided that the will to abandon violence could be demonstrated. The pact also

[205] Ibid.
[206] Ibid.
[207] Fernando Reinares (no.188), page 67.
[208] Ibid, page 68.

reflected the recognition that there was indeed an unresolved dispute between the Basque people and the Spanish state.[209]

After signing the Pact of Ajuria Enea, ETA declared a cease fire that lasted only for one month; in that year ETA assassinated 21 persons.[210]

After the failure of the talks between ETA and the socialist government in Algiers in January 1989, the Spanish government deported six Basque exiles to the Dominican Republic, among them the three representatives in Algiers with whom it had been conducting a dialogue. The three were Eugenio Etxebeste, Belen Gonzalez, and Ignacio Arakama (*Antxon)*, who are now in Spanish prisons and continue to be considered by ETA as their official interlocutors for any attempt at dialogue. But in the period between 1990 and 1992, both sides continued to sound each other out. These contacts once again passed into the political domain, with the restart of conversations between nationalist parties in the summer of 1992. However, these conversations did not achieve the hoped-for results.[211]

In March 1992 the leadership of ETA was arrested in Bidart, a small French town, the biggest setback ever for the organization. ETA's leadership was dismembered and it necessitated a radical change in the organization's negotiating strategy. The change became evident with the appearance of the so-called Democratic Alternative. This document contained a new proposal for negotiations that envisaged two different scenarios: one between ETA and the Spanish state, and the other among the political players in the Basque Country. The proposal stated that, once the first stage was passed (in which the Spanish state "should recognize the right to self-determination of the Basque Country, and guarantee respect for what the Basque people decide democratically"), ETA would announce a "cease-fire."

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[209] Michael Cox, Adrian Guelke, Fiona Stephen *A farewell to arms? Beyond the Good Friday agreement* Manchester University press, 2006, page 381.
[210] reportaje: la ofensiva terrorista: Cinco treguas, 817 asesinatos *El País* 6 June 2007.
[211] Gorka Espiau Idoyaga *Spain and the Basque conflict: still looking for a way out, 2002* Global partnership for the prevention of armed conflict website, < http://www.conflict-prevention.net/page.php?id=40&formid=73&action=show&surveyid=18>.

This would then clear the way for a "democratic process in which Basque citizens would decide on all aspects related to the organization and the future of the Basque Country."[212]

But before any moves toward more dialogue or even an agreement were achieved, there was to be another violent phase in the conflict. In November 1993, the shooting of Joseba Goikoetxea, a sergeant in the Basque police force, was interpreted as another step in the strategy of ETA of attacking the Basque nationalist majority, which had stated it was against violence.

These differences within the nationalist sphere, which had existed for as long as ETA, would increase with time. Other major events were the actions carried out in 1995 against the conservative Popular Party *Partido Popular* (PP): the shooting of Gregorio Ordoñez, the president of the PP in Gipuzkoa, in January of that year and the failed attempt on the life of its president, Jose Maria Aznar. The assassination of the local councilor of the PP, Miguel Angel Blanco, brought thousands of citizens out onto the streets in protest.[213]

In 1995, which was the last year of the Socialist government, there was a frustrated contact, as the Nobel Prize for peace winner, Adolfo Perez Ezquivel, acted as mediator in a series of secret encounters between the government and the terrorist organization; however, these contacts had no significant results.[214]

By 1996, the PSOE was clearly compromised in the eyes of the electorate. Corruption scandals and the GAL issues raised questions over its honesty and respect for law, and the party lost the elections to the Popular Party (PP) of Jose Maria Aznar which continued the dialogue with ETA.[215]

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[212] Ibid.
[213] Ibid.
[214] El Pais 6 June 2007.
[215] Michael S. Radu *Dilemmas of democracy and dictatorship: Place, time and ideology in global perspective* Transaction Publishers, 2006, page 161.

Chapter Four: The fight against terrorism in the last two decades

Section I: Popular Party's approach to counter-terrorism

After assuming office in 1996, the Aznar government took a firm line on ETA and other organization associated with its cause. In his book, *ocho años de gobierno: una vision personal de España,* Aznar stated that his strategy against terrorism was based on four main elements, and they are[216]: 1) the belief that there is a possibility to get rid of terrorism, unlike the belief created during many years that terrorism is a problem that has no solution. 2) the set-up of a frontal battle against terrorism that would end up with the defeat of the terrorists. 3) to act within the law with a full respect to the elements of the rule of law and the guarantees of legality. 4) finally, to seek international cooperation for the fight against terrorism. Statements that there would be no negotiations with the separatists while they continued to use violence were seemingly more than rhetorical devices designed for public consumption, and indeed there were an apparent pay-off as ETA declared a unilateral ceasefire in September 1998.[217]

Shortly after the ceasefire declared by ETA, on 12 September 1998, the Declaration of Lizarra was issued which committed all parties to present to an inclusive approach to a peace process. The pact of Lizarra was signed among nationalist parties and organizations in the Basque region, mainly between the PNV, Herri Batasuna, and the Unión de la izquierda (the union of the left). The main claim was to articulate a political negotiation with the Spanish government on issues of political sovereignty, territoriality, and self-determination. After the Lizarra pact, political dialogue and negotiation among the Basque political forces themselves, and these with the Spanish government, has proved to be difficult. [218] Since then, ETA restarted a renewed terrorist campaign, killing mainly PSOE and PP local councillors. In this sense, the whole Lizarra peace process came to halt.

Instead, the conservative government under Aznar reinforced its position against ETA terrorism. First of all, it signed a pact with the PSOE against

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[216] Jose Maria Aznar *Ocho años de gobierno: una visión personal de España,* Barcelona: planeta, 2004, page 203.

[217] Paul Heywood 'Spain: Middle power or major player?' in Ronald Tiersky (ed) *Europe Today: National politics, European integration, and European security* Rowman and littelfield 2004, page 398.

[218] José María Magote, *Contemporary Spanish Politics* UK: Routledge, 2004, page 148.

terrorism. Second, it reinforced the struggle against terrorism by working more closely with the French police and taking hard line position against institutions related to ETA. Third, in 2002, it changed the law of political parties by introducing constraints to political organizations that support terrorism and violence. This led to the subsequent outlawing of Herri Batasuna. Fourth, Prime Minister Aznar used the international climate against terrorism after September 11 events to step up the pressure against ETA.[219]

After the deadly attacks of September 11 in the United States, Aznar allied himself with the American president Bush in the so-called 'war against terrorism', and in 2003, when the American troops invaded Iraq; Aznar was a major ally in this illegitimate war.

Section II: Islamic terrorism, a new dimension in the Spanish fight against terrorism

On 11 March 2004, four trains in Madrid were targeted simultaneously causing the death of 191 persons and the injury of another 1400, a massacre referred by the Spaniards as 11-M. Initially, the PP accused ETA of carrying out these attacks; however, due to the nature of these attacks, all the evidences showed the involvement of organization linked to Al Qaeda, as ETA has never committed such a large-scale attack.[220]

According to the Spanish authorities, Al Qaeda, in 1995, established a network in Spain by recruiting a number of Islamic fundamentalists living in Spain. Spain was converted into an important base for Al Qaeda in the European territory. A base that was established thanks to the geographical situation of Spain and to the increasing flow of Muslim immigrants, in particular, with the arrival during the 1980s of the expatriated Syrian Islamists, and later in the 1990s the Moroccans and Algerian Islamists[221].

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[219] Ibid.
[220] Fernando Reinares 'Al Qaeda, neosalafistas magrebíes y 11-M: Sobre el nuevo terrorismo islámico en España' in Fernando Reinares, Antonio Elorza (eds.) *El nuevo terrorismo islamista: Del 11-S al 11-M* Madrid: Ediciones Temas de Hoy, 2004, page 17.
[221] Ibid, page 30.

A large number if these immigrants managed to get the Spanish nationality, however, they maintained their affiliation to the fundamentalist neosalafist perception of Islam, and they rejected the integration of Muslims in the Western societies, and afterwards, they were recruited by fundamentalist organizations linked to Al Qaeda and became its associates and collaborates in Spain.[222]

The progressive implantation of the Islamic terrorism network in Spain favored, during the 1990s, from the installation and financing of almost 30 mosques in different Spanish localities subsidized directly by the Saudi authorities, or through international Islamic organizations operating under its control. In the majority of these mosques a neosalafist conception was reinforced and the extremist Wahabi docrtince was dominant. This Wahabism with its dogmatic contents is compatible with the Jihadist formulations of Osama Bin Laden.[223]

Since 2001, the Spanish police had detained a significant number of Algerians, Moroccans, Syrians and Pakistanis suspected of committing fraud to get funds for the cause of the Islamic terrorism. In September 2001, only 15 days after the attacks in the United States, the Spanish police was able to dismantle a cell, most probably, belonging to the Salafist group of Preaching and Combatting"*Grupo Salafista para la Predicación y el combate"*, whose components were found in five different provinces. All the detainees in this operation were Algerians. Weeks later, in November of that same year, a number of individuals were detained in Madrid, whose leader is a Spanish citizen of Syrian origin, they were connected with the Al Qaeda cell in Hamburg that perpetrated the attacks against the twin towers and the Pentagon. [224]

Since 1995, Al Qaeda has utilized the Spanish territory as one of its main bases in Europe, not only to facilitate fund raising and to offer logistics, but also as a center of operative activities.[225]

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[222] Ibid.
[223] Ibid.
[224] Ibid, page 31.
[225] Ibid, page 32.

In the wake of the attacks of 11-M, it became evident that the network of Islamic terrorism in Spain was more complex than was imagined, and it has the capacity to reconstruct making it possible for Al Qaeda and its associated groups to perpetrate a spectacular attack in a European country, concretely in the Spanish territory.

The question that many Spaniards were asking in the aftermath of 11-M was "why Spain became a target of Islamic terrorism." The answer that the majority of the Spanish population provided was the involvement of Spain in the war launched by the U.S against Iraq in 2003, and that the only way to avoid future attacks by Islamic terrorists was to withdraw the Spanish troops from there.[226]

Thus, three days after the massacre of 11-M, the majority of the Spaniards gave their votes to José Luis Rodriguez Zapatero of the PSOE Spanish Working-Class Socialist Party *(Partido Socialista Obrero Espanol)*, to be the prime minister as he was believed to be the adequate person to resolve the Spanish problems after the terrorist attacks of 11-M.[227]

[226] Ibid, page 33.
[227] Edurne Uriarte *Terrorismo y democracia tras el 11-M* Spain: Espasa, 2004, page 15.

Section III: Socialist party approach to counter terrorism:

The situation that Zapatero found when he came to power in March 2004 was not a peaceful one. The grave attacks of 11-M, the presence of the Spanish troops in Iraq, and the lack of deputies in the Parliament to guarantee an absolute majority made the start of the current administration one on the hardest in the history of Spanish democracy.[228]

When Zapatero assumed power, he made it clear that the fight against terrorism would be his priority, a fight in which he would employ all the resources that a democratic society could provide. Zapatero's fight against terrorism is based on four main elements: the need for a powerful action from the part of the State Security bodies and forces, the need for international cooperation, the need for a solid unity of the democrats, and the need to respect the legality both nationally and internationally with a full reject to the concept of preventive war which instead of eliminating terrorism in strengthens it.[229]
Concerning the fight against Islamic terrorism, on the international level, Zapatero withdrew the Spanish troops form Iraq as he believed that the war against Iraq was illegal and he called for the "Alliance of civilizations" as the best way to get rid of Islamic terrorism.[230]

On the internal level, Spain's strict anti-terrorism measures (mentioned in chapter 2) shaped by years of fighting against ETA have been applied to all those arrested for alleged links to Al Qaeda as well as for alleged participation in the 11-M bombings, which means those detained for membership in an armed group may be held incommunicado for up to 13 days, and maybe held in pre-trial detention up to 5 days. During the incommunicado detention, the detainees are denied a number of rights such as the right to counsel from the outset of detention or to a lawyer of their own choosing or the right to challenge the lawfulness of the detention.

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[228] Balstar Garzón *La lucha contra el terrorismo y sus límites* Madrid: Adhara Publicaciones, 2006, page 17.
[229] Interview with José Luís Rodríguez Zapatero in Balstar Garzón *La lucha contra el terrorismo y sus límites* Madrid: Adhara Publicaciones, 2006, page 19.
[230] Ibid, page 21.

The government of Zapatero does not envision making any changes to Spain's existing anti-terrorism measures, though the administration has announced plans for the creation of a National Anti-terrorism Center to coordinate intelligence work between the National Police, the Civil Guard, and the existing National Intelligence Center, as well as for increasing the number of agents in both agencies dedicated to intelligence gathering on international terrorism.[231]

The new government of Zapatero has adopted new policies to control the radical Islamic activities in Spain. This was declared by the Interior Minister José Antonio Alonso who confirmed the need to regulate Spain's mosques and the content of their religious speeches.[232]

Another policy adopted by the new government to control Islamic terrorism was the expulsion of foreign nationals suspected of links with Al Qaeda. According to Article 54(1) and Article 57(1) of the law on foreigners, the state has the right to expel foreign nationals who are considered to have participated in acts against national security or acts that might prejudice Spain's relations with other countries, as well as those implicated in activities against public order defined as very serious under the Organic Law on the protection of citizen's security.[233]

The Spanish authorities are cooperating with their French counterparts in fighting international terrorism, including the creation of a working group to cooperate on the deportation of suspected members of violent Islamic organizations.[234]

Concerning the fight against internal terrorism represented by ETA, Zapatero also adopted an approach totally different from that adopted by the previous government.

Unlike Aznar, Zapatero called for opening talks with ETA, and in May 2005, the Spanish Parliament approved a resolution supporting Zapatero's proposal to open talks with ETA, a proposal that was sharply criticized by the main opposition party, the PP. Zapatero's proposal calls for ETA to definitely

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[231] Europa press "Ministerio de Interior crea un Centro Nacional Antiterrorista que reúne Policía Nacional, Guardia Civil y C.N.I" *EL Mundo* 19, May, 2004 http://www.elmundo.es/elmundo/2004/05/19/espana/1084963494.html

[232] J.A Rodríguez and J.M Romera "Es necesaria una ley para poder controlar a los Imames de las pequeñas mezquitas" *El País* 2 May, 2004.

[233] Ley Orgánica 1/1992 de 21 de Febrero sobre protección de la seguridad ciudadana.

[234] Europa press " Francia y España intercambiarán sus listas sobre terrorismo Islámico" *El Mundo* 12, July, 2004 http://www.elmundo.es/elmundo/2004/07/12/espana/1089648286.html

renounce violence before the government will open talks. A temporary cease fire will not go far enough. If ETA complies, Zapatero says he is willing to negotiate, but he is willing to consider limited concessions. ETA´s goal of Basque independence is not to be considered not is the demand for a referendum on the Basque's region ties with the central government in Madrid.

But Zapatero has said he would be willing to discuss smaller issues, such as transferring ETA prisoners to jails that are closer to the Basque region, as many ETA prisoners are held outside of the region to limit the possibility of conspiracy.[235]

Actually, Zapatero is not the first prime minister to open formal talks with ETA. After the group declared a cease-fire in 1998, the government of Aznar held discussions with ETA leaders in France. Also, in the late 1980s, former prime minister Gonzalez held a series of meetings with ETA representatives. However, both efforts failed and many analysts say that they would be surprised if the current proposal brought success.[236]

As a consequence of Zapatero´s call to open talks with ETA, it had announced a permanent cease fire in the following year.

In June 2006, Zapatero had promised to start the talks in exchange for the permanent cease-fire which ETA declared in March of the same year, a move that deepened his government's divide in the parliament with the main opposition party, the PP. The PP believes that talking with ETA amounts to appeasing terrorists. Mariano Rajoy, president of the PP, criticized Zapatero´s decision to open talks with ETA saying that the government should not agree to meeting until the group disarms and promises to disband.[237]

Zapatero has offered vague descriptions of what the government will discuss with ETA during the talks, which officials have refused to describe as negotiations, preferring to call it dialogue. The broad goal is to persuade ETA to hand over weapons and dissolve, but it is unclear what the government is willing

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[235] Renwick McLean, Spain approves limited talks with ETA`*International Herald Tribunal* 18, May, 2005. http://www.iht.com/articles/2005/05/18/news/basque.php

[236] Ibid.

[237] Renwick Mclean, Zapatero announces ETA talks *International Herald Tribunal* 29, June, 2006. http://www.iht.com/articles/2006/06/29/news/basque.php.

to offer to achieve that objective[238]. Although the government and ETA had met a number of times, the talks made no significant progress as was expected.

Although ETA has announced a permanent cease-fire, 9 months later, on 30th December 2006, an explosion took place in Madrid's airport Barajas. Two were killed and 26 other people were injured.

After the bombing, the Socialist government said it had called an end to the peace process started with ETA following the cease-fire, maintaining that ETA had miscalculated and that violence was incompatible with negotiation; however, ETA claimed that its cease-fire was still in place.[239]

Finally, in June 2007, ETA called off its 15 months cease-fire and vowed to resume its violent struggle for a nation independent in Spain. ETA blamed the decision to end the truce on the government of Zapatero accusing it of repression and excluding ETA's supporters from politics.[240]
ETA said that the minimum conditions for continuing a process for negotiations do not exist. It said the government of Zapatero responded to its cease-fire with arrests, torture and persecution.[241]

In response to ETA's declaration, Zapatero said that the truce came to an end since the December bombing and he called for the unity of the political parties against ETA, and he pledged a firm response to possible attacks, vowing to strictly apply the state of law.[242]

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[238] Ibid.
[239] Victoria Burnett 'Basque separatist group ETA calls off cease-fire *International Herald Tribunal* 5, June, 2007. http://www.iht.com/articles/2007/06/05/europe/basque.php
[240] Ibid.
[241] http://english.aljazeera.net/NR/exeres/D84A7D84-B41E-4FA7-BFDC-45FA9D330A6A.htm
[242] Ibid.

Few days after ETA has called off its cease-fire, there was a meeting between the Prime Minister Zapatero and the leader of the PP Mariano Rajoy in which the latter has declared his support to the government in its fight against ETA under the condition that the government expressed its implacable will to defeat ETA.[243]

[243] Zapatero y Rajoy dan "un primer paso" para recuperar la unidad frente a ETA, *El País*, 11/6/2007.

Chapter five: The role of the EU in countering-terrorism

Since the attacks of 11 September 2001 in the U.S, the European Union has been determined to step up the fight against terrorism. It has adopted a Framework Decision urging Member States to align their legislation and setting out minimum rules on terrorist offences. After defining such terrorist offences, the Framework decision lays down the penalties that Member States must incorporate in their national legislation.[244]

The framework Decision is applicable to any terrorist offence committed or prepared with intent in a Member State; which may seriously damage a country or an international organization. These offences must be committed with the aim of intimidating people and seriously altering or destroying the political, economic or social structures of a country (murder, bodily injuries, hostage taking, extortion, fabrication of weapons, committing attacks, threatening to commit any of the above, etc.).[245]
The above offences may be committed by one or more individuals against one or more countries.

The Framework Decision defines terrorist group as a structured organization consisting of more than two persons, established over a period of time and acting in concert. Moreover, instigating, aiding, abetting and attempting to commit terrorist offences will also be punishable.
To punish terrorist offences, Member States must make provision in their national legislation for effective, proportionate and dissuasive criminal penalties, which may entail extradition and for mitigating circumstances (collaborating with the police and judicial authorities, finding evidence or identifying the other offenders, etc.). [246]

According to this Framework Decision, the Member States should take the necessary action: to establish their jurisdiction with regard to terrorist offences; to establish their jurisdiction if they do not, under their own law, extradite their own nationals; to coordinate their action and determine which of them is to prosecute

[244] http://europa.eu/scadplus/leg/en/lvb/l33168.htm
[245] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism
[246] Ibid.

the offenders with the aim of centralizing proceedings in a single Member state where several Member States are involved. [247]

The second development in the EU's policy to counter-terrorism took place after the Madrid bombings of March 2004. EU politicians have argued strongly in favor of greater European co-operation in fighting terrorism. In the EU terrorists- but not policemen- can move easily across national frontiers. Furthermore, AL Qaeda style cells operate across the globe and may attack anywhere in Europe, and on a much greater scale than long established European terrorist groups such as ETA and the IRA.[248]

There are many things the EU can do, and is doing, to help member-states counter terrorist groups. But the EU's ability to tackle terrorism is limited for two reasons. First, the EU is not a national government. It can not arrest or prosecute terrorists, nor can it use spies or satellites to track them. Local policemen and national intelligence officers carry out most counter-terrorism work, such as infiltrating cells and arresting suspects. During cross-border investigations, governments conduct most of their work bilaterally, rather than at the EU level. National intelligence services are often loath to share information with more than one other government.[249]

Second, the EU's difficulties are compounded because 'counter-terrorism' is not in itself a defined policy area. In its broadest and fullest sense 'counter-terrorism' spans a number of policy areas. It requires action from every government department, not only from those charges with law enforcement, border control, and foreign and defence policy. Finance ministries need to track terrorist funding, health ministries should have stockpiles of vaccines, and education ministries should fund academic research into Islamic groups. National governments find it hard to co-ordinate their own ministries and agencies involved in counter-terrorism. Trying to coordinate the collective efforts of 27 governments at the EU level is exponentially more difficult. [250]

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[247] Ibid.
[248] Daniel Keohane *The EU and counter-terrorism* Centre for European Reform, May 2005.
[249] Ibid, page 2.
[250] Ibid, page 3.

There is a paradox in the EU's role in counter-terrorism. On the one hand, the governments agree in principle that cooperation at the EU level is a goof thing because of the cross-border nature of the terrorist threat. On the other, they are slow to give the Union the powers it would need to be truly effective. This is because security policy -especially when it concerns protecting citizens- goes to the core of national sovereignty, and governments are reluctant to give the EU powers that could interfere with their existing laws and national security practices. The EU is working hard to coordinate national anti-terrorism policies, but it is only just starting to pursue its own counter-terrorism policies.[251]

EU governments prosecute terrorists in different ways. For instance, Germany, Belgium and the Netherlands have weak terrorism laws and therefore often have difficulty in keeping suspects in jail. In Britain, where the terrorism laws are tougher, it is the secret services that dominate the country's anti-terrorism efforts. In France and Spain, a special counter-terrorism judge investigates and prosecutes suspected terrorists. But, since all EU countries face a common threat, there should be a shared 'European approach' to counter-terrorism.[252]

EU member-states first started working together on terrorism in 1979, when they established the police working group on terrorism. The group brought together senior police officials to compare methods for combating the IRA in Britain and Ireland, the Red Brigades in Italy, and the Baadar Meinhof gang in Germany. The growth of cross-border organized crime in the 1980s further accelerated pan-European police cooperation. Member-states made police cooperation a formal EU policy area in the Maastricht treaty of 1991.[253]

After the 2001 attacks in the US, EU governments directed more resources at the fight against terrorism. They created an EU-wide arrest warrant, agreed on a common definition of 'terrorism' and a common list of terrorist groups, and drafted rules for joint operations between national police forces. Governments gave Europol, the EU police agency, extra resources, and set up a counter-

[251] Ibid.
[252] Ibid, page 5.
[253] Ibid, page 17.

terrorism task force consisting of national police officers. The governments also created Eurojust, the EU's nascent law enforcement agency, to help national magistrates work together on cross-border investigations.

In November 2004, the EU's interior and justice ministers, who work together in the justice and home affairs (JHA) council, agreed on a five-year plan known as the 'Hague programme'. The plan covers all aspects of their security and justice cooperation, and is supposed to be implemented by 2010. A number of measures contained in the Hague programme should prove useful in the fight against terrorism. For example, En governments have agreed that by 2008 national police officer will have the right to access information held by law enforcement agencies in other countries. The governments have also asked the Commission to draft proposals for sharing air passenger data, and for improving the security of storing and transporting explosives and chemicals. Furthermore, the interior ministers decided that they "should have the leading role in the EU's fight against terrorism, although they intend to take into account the views of EU foreign ministers."[254]

In the aftermath of the Madrid attacks, with the approval of the member-states, Javier Solana, the EU's foreign and security policy coordinator appointed Gijs de Vries as the EU's counter-terrorism coordinator. However, de Vries has virtually no powers, apart from that of persuasion, he has no budget and can not propose legislation, nor can he chair meetings of national justice or foreign ministers to set the anti-terrorism agenda. His first job is to define the EU's counter-terrorism role, and to encourage greater coordination of national policies at the EU level. For example, the member-states and the Council Secretariat have drawn up an extensive list of over 150 measures that the government and EU institutions should undertake, known as the EU counter-terrorism action plan.[255]

As a matter of fact, the EU does not, and probably never will, run its own counter-terrorist operations. But EU measures such as the common arrest warrant show that the Union can help the governments on their efforts to identify,

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[254] European Council, Presidency Conclusions, 5 November 2004, http://ue.eu.int/uedics/cmsUpload/EU_4.5-11.pdf.
[255] European Council, *EU plan of action on combating terrorism* December 2004. http://ue.eu.int/uedocs/cmsUpload/EUplan/16090.pdf.

extradite and prosecute terrorists. Just as importantly, the EU encourages smaller groups of governments to cooperate more closely on joint investigations and prosecutions. For example, in 2004 France and Spain set up a combined counter-terrorism unit, composed of judges and policemen, to run joint operations. This type of inter-governmental cooperation does not only take place on a bilateral basis. Since May 2003, the interior ministers from the five biggest EU member-states (Britain, France, Germany, Italy and Spain) have met regularly to discuss their counter-terrorism efforts, in the so-called G5 group. The EU rightly encourages these types of flexible arrangements, designed to encourage better cross-border cooperation, rather than relying solely on agreements between the 27 governments in Brussels.[256]

One of the latest developments on the EU level was the adoption by the Justice and Home Affairs Council of the European Union Counter-Terrorism Strategy in December 2005.[257] This strategy is based on four pillars; firstly it is just a question of preventing people from turning to terrorism by tackling the factors or root causes which can lead to radicalization and recruitment in Europe and internationally. Secondly, there is need for protecting citizens and infrastructure and reduce the possibility of attack, including through improved security of borders, transport and critical infrastructure. Thirdly, it is necessary to pursue and investigate terrorists across the borders and globally to impede planning, travel and communications; to disrupt support networks; to cut off funding and access to attack materials, and bring terrorists to justice. Fourthly, it is essential to manage and minimize the consequences of a terrorist attack, by improving capabilities to deal with the aftermath; the coordination of the response; and the needs of victims.[258]

The strategy requires work at national, European and international levels, to reduce the threat from terrorism. This strategy takes into the next phase the agenda of work set out at the March 2004 European Council in the wake of the Madrid bombings.

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[256] Daniel Keohane (no.246) page 21.

[257] http://ec.europa.eu/justice_home/fsj/terrorism/strategies/fsj_terrorism_strategies_counter_en.htm

[258] http://register.consilium.europa.eu/pdf/en/05/st14/st14469-re04.en05.pdf

In spite of all the agreements and initiatives issued by the EU, we can conclude that since the Madrid bombings, the EU has had mixed results in developing its counter-terrorism policies. The EU's counter-terrorism action plan, which the member-states updated in December 2004, looks impressive on paper. It contains over 150 measures, covering a broad range of counter-terrorism cooperation, from emergency response to curbing terrorist funding. But the EU does not have the powers, such as investigation and prosecution, to tackle terrorism like a national government. The EU can help governments to identify, extradite and prosecute terrorists, but it is only slowly developing its own anti-terrorism policies.[259]

There is still much the EU can do to help the member-states with their counter-terrorism efforts. As Gijs de Vries has advocated, the EU should take on a greater role in encouraging the member-states to build up their capacity to respond to terrorist attacks. And the governments should make counter-terrorism a greater priority for EU foreign policy. The EU's focus on counter-terrorism has been mainly on internal law enforcement policies. However, international cooperation is crucial in the fight against terrorism, and the EU should work more closely with other countries.[260]

[259] Daniel Koehane (no.246) page 37.
[260] Ibid, page 38.

Conclusion

There is no doubt that ETA's violence can never be justified and the Basque's claim to full independence is illegitimate. The Basque is the region that enjoys the maximum level of autonomy in the Spanish territory. On the other hand, the Basques are recognized as a minority in the Spanish constitution on 1978 and therefore they do not have the right to self-determination.

ETA, the "Basque Socialist Revolutionary Organization for National Freedom", has resorted to all kinds of criminal action to obtain its purpose, and has blatantly ignored the most rudimentary legal, moral and ethical rules. Neither the approval of the 1978 constitution, nor the entry into force of the Guernica Statute of Autonomy, nor the establishment of an Autonomous Police Force, nor the economic agreements between the central Administration and the Basque country, not the regular free autonomous elections that have brought the Basque Nationalist Party into regional powers, not the introduction of the Basque language, have served to halt the criminal career of this "armed organization that has to ensure the accumulation of coercive power" in order to achieve its final purpose.[261]

Generally speaking, the Spanish fight against terrorism does not violate international human rights law. However, the Spanish government has made some mistakes in its fight against terrorism. From the legal point of view, the first lack of political precaution was to include in the text of the Spanish 1978 Constitution a section such as 55.2 which stated: " An organic law may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognized in articles 17.2, 18.2 and 18.3 may be suspended as regards specific persons in connection with investigation of the activities of armed bands or terrorist groups".[262]

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[261] Santiago Sánchez 'Spain: Have we learnt anything from our experience?' in Fernando Reinares (ed.) *State and societal reactions to terrorism* Oñati: The International Institute for the sociology of law, 1997, page 42.

[262] Spanish Constitution 1978, Article 55.2

The mere mention of terrorism, which is unique in all the best and most modern constitutions, confers a special status on any actions involving it, and this leads not only to special legal treatment but also to the perpetrators finding a legal basis for receiving special attention, different from that awarded to other criminals.[263]

A second mistake, probably brought about by having accepted the political status of the criminal behavior of ETA terrorists, was, and still is, the various democratic governments' desire to negotiate. This desire, while its appearance and origins might lead one to thinks it is a gesture of goodwill aimed at healing old wounds, has not contributed to the success of anti-terrorist struggle.[264]

The major mistake the Spanish state has committed in its anti-terrorist struggle was resorting to a dirty war in 1983 which lasted until 1987. Of all the possible forms of anti-terrorist struggle, the only one that must be rejected from any legal view point is that which uses the same means as the enemy, i.e. assassinations, kidnap, extortion, etc. Although it may be "successful" it implies an open denial of the Constitutional State. Moreover, the GAL affairs has provided ETA and its sympathizers and followers with arguments with which to accuse the state of being totalitarian, repressive and a police state, and, in the eyes of certain sectors of the population, it has legitimized their so-called "armed struggle".[265]

For the Spanish government to act in full conformity with its obligations under international human rights law, it has to proclaim a determination to uphold the rule of law and constitutional authority and to demonstrate this political will in actions. There should be transparency in the performance of anti-terrorist policy. And a policy of collaboration between government bodies, justice and prisons administration, and the media on matters concerning the specific problems posed by ETA terrorists should be set up.[266]

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[263] Santiago Sánchez (no.259), page 44.
[264] Ibid, page 45.
[265] Ibid, page 54.
[266] Ibid, page 55.

Regarding the anti-terrorist legislation, the incommunicado detention should be abolished or to be reformed to allow terrorism suspects in police custody to have the right to access to legal assistance from the outset and throughout the period of detention. The detainees also should have the right to see a lawyer from the moment in which they are detained. And they should have the right to confer privately with their lawyer and to notify a third party of their own choice about the arrest and the place of detention.[267]

All detainees should be brought systematically before a judge. Any judge ordering a restricted regime should see the detainee in person when issuing the order and again before ordering an extension of the period in custody. The government should also ensure the availability and effectiveness of the right to habeas corpus as all detainees should be notified immediately, in a language they can understand of the right to habeas corpus and provided basic information about how to exercise this right.[268]

The Spanish government should improve the conditions in pre-trial detention through: firstly, clarifying in the Penitentiary Regulations how much time incommunicado detainees in pre-trial detention are allowed outside their cell each day, and ensure that this minimum is respected. Incommunicado prisoners should be entitled, at a minimum, to the same amount of time outside their cell as regular prisoners in solitary confinement (two hours). Where possible, they should be permitted the same amount of time guaranteed to prisoners in the restrictive closed regime (three or four hours). Secondly, ensuring that all prison facilities comply fully with penitentiary regulations regarding time outside the cell and participation in communal activities for inmates held under the high-security closed regime. Thirdly, considering the modification of the penitentiary regulations to increase the minimum amount of time inmates in the closed regime may spend outside their cell on a daily basis, as well as their access to programmed, communal activities. Finally, ceasing the practice of dispersing terrorism suspects. Decisions about the location of terrorism suspects should be made according to same criteria and principles used to determine the location of

[267] 'Setting an example? Counter-terrorism measure in Spain', Human rights watch report, January 2005. http://hrw.org/reports/2005/spain0105/2.htm
[268] Ibid.

regular prisoners, that is, they should be detained as close to their usual place of residence and their families as possible.[269]

The Spanish government should ensure that the expulsion of the foreign terrorism suspects conforms to Spain's *non-refoulement* obligations, as the government has to reaffirm the absolute nature of the obligation not to return any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or prohibited ill-treatment, in full conformity with international law.[270]

If the Spanish government conducts these reforms, it can actually be considered a leader in the fight against terrorism while simultaneously respecting fundamental human rights and liberties.

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[269] Ibid.

[270] Ibid.

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