



*Jean - Monnet - Lehrstuhl  
für Europäische Integration*

Freie Universität



Berlin

## *Berliner Online-Beiträge zum Europarecht Berlin e-Working Papers on European Law*

herausgegeben vom  
edited by

Lehrstuhl für Öffentliches Recht und Europarecht  
Chair of Public Law and European Law

Prof. Dr. Christian Calliess, LL.M. Eur  
Freie Universität Berlin

Nr. 46

19.05.2006

José Martínez Soria:

**Fight Against Terrorism in Europe: The Spanish Way**

Zitiervorschlag:

Verfasser, in: Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.



# Fight Against Terrorism in Europe: The Spanish Way

*José Martínez Soria\**

This article was also published by *Walter/Vöney/Röben/Schorkopf*,  
Terrorism as a Challenge for National and International Law :  
Security versus Liberty?, Berlin/Heidelberg 2004, pp. 517-556.

<b>I. INTRODUCTION</b> .....	<b>3</b>
1. THE CONCEPT OF TERRORISM IN SPANISH LAW .....	3
2. THE LEGAL APPROACH TO DEAL WITH NATIONAL AND INTERNATIONAL TERRORISM.....	4
<i>a. General Approach</i> .....	4
<i>b. Special Legal Instruments after September 11<sup>th</sup></i> .....	6
3. SPECIFICS OF NATIONAL TERRORISM .....	7
4. LONG TERM STRATEGIES TO FIGHT TERRORISM .....	11
<i>a. Penitentiary Policy</i> .....	11
<i>b. Reinsertion Programs</i> .....	12
<i>c. More Self-government / Autonomy</i> .....	13
<i>d. National Isolation</i> .....	14
<i>e. International Isolation</i> .....	15
5. SUCCESS IN FIGHTING TERRORISM THROUGH THE LEGAL APPROACH OR LONG TERM STRATEGIES .....	17
<b>II. PARTICIPATION ON INTERNATIONAL CONVENTIONS DEALING WITH TERRORISM</b> .....	<b>17</b>
1. INTERNATIONAL ACTIVITY BEFORE SEPTEMBER 11 <sup>TH</sup> .....	17
2. INTERNATIONAL ACTIVITY AFTER SEPTEMBER 11 <sup>TH</sup> .....	18
<b>III. REPRESSIVE MEASURES</b> .....	<b>18</b>
1. OVERVIEW .....	18
2. TERRORIST OFFENCES .....	19
3. SPECIFIC MEASURES .....	21
<i>a. Combating Financial Resources of Terrorist Organisations</i> .....	21
<i>b. Extradition Law</i> .....	23
<i>c. Procedural Specifics</i> .....	24
<i>d. Limitations on Fundamental Rights</i> .....	26

<b>IV. PREVENTIVE MEASURES .....</b>	<b>26</b>
1. GENERAL MEASURES .....	26
2. SPECIFIC MEASURES .....	28
3. NEW MEASURES AFTER SEPTEMBER 11 <sup>TH</sup> .....	28
<i>a. Financial Resources</i> .....	29
<i>b. Electronic Information</i> .....	29
4. PREVENTIVE AND REPRESSIVE MEASURES AGAINST POLITICAL PARTIES	29
<i>a. Preventive Measures</i> .....	29
<i>b. Repressive Measures</i> .....	31
<b>V. ASYLUM LAW, REFUGEE LAW AND IMMIGRATION LAW AND MEASURES TO FIGHT TERRORISM .....</b>	<b>33</b>
<b>VI. EMERGENCY LEGISLATION AS A MEASURE TO FIGHT TERRORISM.....</b>	<b>34</b>
1. MAXIMUM DURATION OF PREVENTIVE DETENTION / INCOMMUNICADO .....	35
2. INVIOABILITY OF THE HOME .....	36
3. FREEDOM OF COMMUNICATION .....	37
4. LIMITATIONS OF FUNDAMENTAL RIGHTS .....	38
<b>VII. STATE PRACTICE WITH REGARD TO QUESTIONS OF INTERNATIONAL TERRORISM AND INTERNATIONAL LAW ...</b>	<b>39</b>
<b>VIII. SUMMARY .....</b>	<b>40</b>

## I. Introduction

### 1. The Concept of Terrorism in Spanish Law

The Spanish Constitution refers to terrorism in Article 55 (2), but does not define it. However, the Spanish Constitutional Court developed the concept of terrorism on the basis of this article in numerous judgements.<sup>1</sup> Terrorism is the systematic, repeated and often arbitrary use of violence by means of firearms, bombs, shells, explosive means or inflammable materials by criminal organisations with the aim of causing emergency situations or feelings of insecurity within the society.<sup>2</sup> According to this jurisprudence, it is no compelling requirement of the definition of terrorism that it pursues political goals.<sup>3</sup> However, the definition of terrorism in Spanish Criminal Law

---

\* Institute for International Law and European Law – Department of European Law

<sup>1</sup> Constitutional Court, Judgements, No. 11/1983 of 21 February 1983 (published in Boletín Oficial del Estado- BOE (Spanish Official Journal), on 23 March 1983); No. 73/1983 of 30 July 1983 (BOE on 18 August 1983); No. 159/1986 of 16 December 1986 (BOE on 31 December 1986); No. 199/1987 of 16 December 1987 (BOE on 8 January 1988); No. 59/1990 of 29 March 1990 (BOE on 4 May 1990); No. 193/1991 of 14 November 1991 (BOE on 15 November 1991); No. 241/1992 of 21 December 1992 (BOE on 20 January 1993); No. 83/1993 of 12 March 1993 (BOE on 15 April 1993); No. 71/1994 of 3 March 1994 (BOE on 24 March 1994); No. 183/1994 of 20 June 1994 (BOE on 26 July 1994); No. 54/1996 of 26 March 1996 (BOE on 27 April 1996); No. 175/1997 of 27 October 1997 (BOE on 28 November 1997); No. 200/1997 of 24 November 1997 (BOE on 30 December 1997); No. 58/1998 of 16 March 1998 (BOE on 22 April 1998); No. 144/1998 of 30 June 1998 (BOE on 30 July 1998), No. 136/1999 of 20 July 1999 (BOE on 18 August 1999); No. 141/1999 of 22 July 1999 (BOE on 26 August 1999); No. 91/2000 of 30 March 2000 (BOE on 4 May 2001); No. 127/2000 of 16 May 2000 (BOE on 20 June 2000); No. 69/2001 of 17 March 2001 (BOE on 6 April 2001); No. 169/2001 of 16 July 2001 (BOE on 14 August 2001); see *F. Bueno Ariús*, Aspectos Jurídicos del Terrorismo, *Revista de Estudios Penitenciarios*, 228-231 (1980), 51-89; *C. Lamarca Pérez*, Tratamiento jurídico del terrorismo, 1985, 429.

<sup>2</sup> Constitutional Court Judgement No. 83/1993 of 12 March 1993 (published in BOE on 15 April 1993), F.J. 4.

<sup>3</sup> *J.C. Remotti Carbonell*, Constitución y medidas contra el terrorismo – La suspensión individual de derechos y garantías, 1999, 302; with a critical point of view *E. Virgala Foruria*, La suspensión de derechos por terrorismo en el ordenamiento

includes the political aspects of terrorism. Chapter VIII of the Penal Code<sup>4</sup> carries the heading: "Criminal Offences concerning Terrorism". It defines terrorist crimes in Article 571: Terrorists crimes are those which are committed by a person who acts in the name of, or collaborates with armed bands, organisations or groups whose aim is to disturb the constitutional order or the public peace severely. According to Article 572 of the Penal Code, all those individuals are also considered as terrorists who are linked with a terrorist organisation.

This broad definition, which declares all actions in support of terrorist organisation as actions of terrorism, is remarkable. The legislator's intention was to extend the concept to individuals who, not being members of the terrorist organisation, support them indirectly by their actions, i.e. by defending or exalting terrorist activities<sup>5</sup>. This national approach makes the Spanish point of view in the European Union understandable which favours such broad definition of terrorism.<sup>6</sup>

## 2. The Legal Approach to Deal with National and International Terrorism

### *a. General Approach*

The fight against terrorism in Spain concentrates exclusively on national terrorism. Spain emphasises the criminal aspect of Anti-terror legislation<sup>7</sup>.

---

español, *Revista Española de Derecho Constitucional*, 40 (1994), 61-132 (77); C. Ramón Chornet, *Terrorismo y respuesta de fuerza en el marco del Derecho Internacional*, 1993, 100.

<sup>4</sup> Organic Law No. 10/1995 of 23 November on Penal Code (BOE of 24 November 1995) as amended by Organic Law No. 3/2002 of 22 May 2002 (BOE 23 May 2002).

<sup>5</sup> Article 578 Penal Code.

<sup>6</sup> Council Framework Decision on 13 June 2002 on combating terrorism OJ L 164, 22.6.2002, p.3; see also the Initiatives of Spain ; JAI (2002) OJ C 126, p.22, JAI (2002) 10, OJ C 151, p. 14; JAI (2002) 15, OJ C 160, p. 5., JAI (2002) 16, OJ C 160 of 2002, p. 7.

<sup>7</sup> F.J. Alvarez /M.A. Cobos, *La legislación antiterrorista: Una huida hacia el Derecho Penal*. *Revista de la Facultad de Derecho de la Universidad Complutense* 68 (1983), 161-191 (162); F. Bobillo, *Constitución y legislación antiterrorista*", *Revista de Estudios Políticos* 48 (1985), 47-76 (50); F. Bueno Arús, *Principios generales de la legislación antiterrorista*, *Revista de la Facultad de Derecho de la Universidad*

Thus, the penal code contains specific terrorist offences. This approach corresponds to the general security policy of the Spanish Government after the democratisation, strengthening the Courts and limiting the power of the police administration.<sup>8</sup>

A characteristic of the Spanish counter-terrorist legislation is the possibility of suspending fundamental rights of individual persons if such person has committed terrorist actions. The authorisation is laid down in Article 55 (2) of the Spanish Constitution, which contains special procedural prerequisites for suspending fundamental rights in such cases.<sup>9</sup> A further, new element is the possibility forbidding a party which supports terrorist organisations. The authorisation was introduced in the Party Act in 2001 and is presently applied to the ETA –related Batasuna Party.<sup>10</sup>

Another counter terrorist strategy was the so-called “Dirty War Strategy”.<sup>11</sup> Anti-Terrorist Liberation Groups - GAL (Grupos Antiterroristas de Liberación) - killed 27 persons between 1983 and 1987, including 10 persons with no connections to ETA, the ostensible target of the GAL.<sup>12</sup> The GAL operated almost exclusively in the French Basque Country, where ETA maintained its organisational bases. This strategy seems to have been directed at least as much at persuading the French authorities to take a tougher line against ETA as at weakening the organisation itself. GAL’s activities ceased in 1986, at precisely the moment when Paris began to implement a much more vigorous extradition policy.<sup>13</sup>

Neither the Government nor the governing Socialist Party (PSOE) never acknowledged responsibility for the GAL, but the Supreme Court has convicted most of the senior members of the 1980s anti-terrorist high com-

*Complutense* 11 (1986) 135-145 (135 et seq.); *Lamarca Pérez*, see note 1, 35; *D. López Garrido*, *Terrorismo, Política y Derecho. La legislación Antiterrorista en España, Reino Unido, República Federal de Alemania, Italia y Francia 1987*, 20 et seq.

<sup>8</sup> *J. Martínez Soria*, *Die Garantie des Rechtsschutzes gegen die öffentliche Gewalt in Spanien*, 1997, 42.

<sup>9</sup> *P. Cruz Villalón*, *La protección extraordinaria del Estado*, in: *A. Predieri/E. García de Enterría* (ed.), *La Constitución española de 1978*, 2. ed., 1981, 687-717; *Remotti Carbonell*, see note 3, 302; *F. Fernández Segado*, *La suspensión individual del ejercicio de derechos constitucionales*, *Revista de Estudios Políticos* 35 (1983), 123-182.

<sup>10</sup> See above Chapter IV. D.

<sup>11</sup> *P. Woodworth*, *Dirty War, Clean Hands – ETA, the GAL and Spanish Democracy*, Cork 2001; *M. Cerdán/A. Rubio*, *El Origen del GAL*, Madrid 1997.

<sup>12</sup> See a chronology in *Woodworth*, see note 11, 434.

<sup>13</sup> *Woodworth*, see note 11, 118 et seqq.

mand, up to and including the Interior Minister, José Barrionuevo, for GAL-related crimes.<sup>14</sup> In April 2000, the National Court (Audiencia Nacional) sentenced the former General of the Guardia Civil (Civil Guard), Enrique Rodríguez Galindo, and the former Civil Governor of the province of Guipuzcoa, Julen Elgorriaga, to a total of 71 years' imprisonment each for the illegal detention and murder of ETA suspects in 1983.<sup>15</sup> However, the court set aside charges of torture on the grounds of insufficient evidence and, more controversially, ruled that there was not enough evidence to prove that the accused had been members of GAL.<sup>16</sup> And while the Spanish Government denied it knew about the group, an investigation revealed that the money for its operation came from the manipulation of existing government accounts.<sup>17</sup>

Ironically, however, the GAL was a major factor in ensuring ETA's survival well into the 1990s and beyond, because "the use of state terrorism by Madrid" was a propaganda tool for the supporters of radical nationalist terrorism.<sup>18</sup>

#### *b. Special Legal Instruments after September 11<sup>th</sup>*

Unlike other states, Spain has so far not enacted any anti-terror legislation after September 11<sup>th</sup>. There was no need to do so because of the existing Spanish anti-terror legislation triggered by the Basque terrorism. Nevertheless, Spain used the international sensibility for counter-terrorist policy, in order to increase its activities on the international and national level. In the first half of 2002, using its Presidency in the European Union, Spain set the fight against terrorism on the European level into the centre of co-operation in the context of the third column.<sup>19</sup> This policy, however, is not primarily directed against international terrorism, but intends to exert stronger pres-

---

<sup>14</sup> Supreme Court, Judgement 2/1998, Sala de lo Penal, Causa Especial No. 2530/95 of 29 July 1998.

<sup>15</sup> Audiencia Nacional (Juzgado Central de Instrucción No. 1), Judgement, Sumario 15/95, of 26 April 2000.

<sup>16</sup> Ibid.

<sup>17</sup> Constitutional Court Judgement No. 69/2001 of 17 March 2001, F.J. 21 (published in BOE on 6 April 2001).

<sup>18</sup> *Woodworth*, see note 11, 408.

<sup>19</sup> The first priority of the Spanish Presidency was to combat terrorism in the Area of Freedom, Security and Justice, Program of the Spanish Presidency of the EU, p. 8 et seq., <http://www.ue2002.es> visited on 15 November 2002.

sure on national terrorism, i.e. on the ETA, in the context of a global anti-terror campaign.

### 3. Specifics of National Terrorism

In Spain, terrorist activities concentrate in fact on the actions of the Basque separatist ETA organisation. Other terrorist groups, e.g. the GRAPO<sup>20</sup>, are of only small importance.

Obviously, the history of ETA is linked to the history of Basque nationalism.<sup>21</sup> Spain officially recognizes three Basque Provinces, Alava, Guipuzcoa and Vizcaya. A fourth neighbouring province, Navarre, is of Basque heritage, although the population does not speak Basque. Separatists consider these four provinces plus three in France -- Basse Navarre, Labourd and Soule -- as the Basque country, with a population approaching 3 million.

The extensively centralised state during Francisco Franco's dictatorship was highly repressive in its treatment of the Basque nationalism.<sup>22</sup> The use of written Basque was outlawed and the schooling system taught only in Castilian Spanish. Many nationalists were executed or imprisoned and eventually the only expression of nationalist politics and the Basque language was among exiles or in private behind closed doors.<sup>23</sup>

The suppression of their language, culture and political freedom led some Basques to violently oppose the dictatorship.<sup>24</sup> They organised themselves in one group called Euskadi Ta Askatasuna (E.T.A. - Basque Homeland and Liberty) on 31 July 1959. Over time, the ETA developed an ostensibly Marxist-Leninist ideology in reaction to the traditional political and social conservatism of the leading nationalist party, Partido Nacionalista Vasco -

---

<sup>20</sup> The First of October Antifascist Resistance Group (GRAPO) was formed in 1975 as the armed wing of the illegal Communist Party of Spain of the Franco era. Advocating the overthrow of the Spanish Government and its replacement with a Marxist-Leninist regime, GRAPO has killed more than 80 persons and injured more than 200. The group's operations have been designed customarily to cause material damage and gain publicity rather than inflict casualties, but the terrorists have conducted lethal bombings and close-range assassinations.

<sup>21</sup> A. Elorza/ J. M. Garmendia/G. Jáuregui/F. Domínguez, *La historia de ETA*, 4th ed. 2000, 34.

<sup>22</sup> G. Carrión, *ETA en los archivos secretos de la policía política de Franco – 1952-1969*, Alicante 2002, 22 et seqq.

<sup>23</sup> M.v.Tangen Page, *Prisons, Peace and Terrorism*, 1998, 120.

<sup>24</sup> Tangen Page, see note 23., 120.



PNV.<sup>25</sup> The assassination of Franco's Prime Minister, Luis Carrero Blanco, in 1973 led to a conflict within ETA that splitted the organisation.<sup>26</sup> Ultimately, to guarantee its autonomy, the military front split from the movement and formed its own group (ETA-Militar or ETA-M), which is the only existing branch of ETA since the rest of ETA, the ETA-Politico Militar or ETA-PM, dissolved itself in 1982.<sup>27</sup>

The Spanish Constitution of 1978 grants a high level of autonomy to the Basque Country, but without recognising the right of self-determination.<sup>28</sup> Another substantial nationalist grievance was the division between Navarre, which is hostile to Basque nationalism, and the other three Spanish Basque regions.<sup>29</sup> Thus, from the point of view of ETA-M, the democratisation of Spain did not change the legitimacy of its political aims and terrorist measures.

The ETA-M eventually saw the need to have a legal political ally, and in 1978 a political party was founded.<sup>30</sup> This political party has changed its name several times over the past few years in an effort to avoid being banned. Formerly known as Herri Batasuna (HB - People's Unity), the party first changed its name to Euskal Herritarrok (Basque Citizens) in 1998, and then reverted to Batasuna. This party participates in the elections to the regional Parliament as well as to the national Parliament and is represented on the national level in both Chambers by delegates. To this day, Batasuna acts as the political arm of the terrorist group. Batasuna's declarations and publications venerate ETA terrorists; it is the only political party in Spain that refuses to condemn ETA attacks. Likewise, the party has never demanded ETA to refrain from violence. In fact, Batasuna leaders said the Government was responsible for ETA's attacks, because it ignored the group's demands. Due to this unmitigated support of ETA, Herri Batasuna's leaders have even been arrested for taking part in terrorist squads. On 29 November 1997, the Supreme Court condemned each of the 23 members of Herri Batasuna's National Committee to 7 years in prison for collaboration with an armed group

---

<sup>25</sup> *Elorza/Garmendia/Gurutz/Domínguez*, see note 21, 215; *Tangen Page*, see note 23, 121.

<sup>26</sup> *Elorza/Garmendia/Gurutz/Domínguez*, see note 21, 260; *Tangen Page*, see note 23, 126.

<sup>27</sup> *Elorza/Garmendia/Gurutz/Domínguez*, see note 21, 260 *Tangen Page*, see note 23, 121.

<sup>28</sup> *P. Pérez Tremps*, *Organización Territorial*, in: *L. López Guerra* (ed.), *Derecho Constitucional*, 1998, 307 et seq.

<sup>29</sup> Article 4 of the Transitional Provisions of the Spanish Constitution permits the incorporation if the population of Navarra accepts this by referendum.

<sup>30</sup> *Tangen Page*, see note 23, 122.

- more specifically, for the decision of those accused to "grant the free electoral spaces which corresponded to HB as a political formation to a terrorist group", adopting their proposals and thus providing "unconditional support to ETA".<sup>31</sup>

Since 1979, the support of Batasuna has remained at around 150 thousand votes. It is in regional politics that the party holds the most power, usually taking up from 10 to 18 percent of the votes. Batasuna currently controls 62 local councils, and has seven seats in the 75-member Basque parliament.<sup>32</sup> ETA-M's clandestine status combined with the granting of regional autonomy have led to a decline in support, which the militant nationalists have difficulty responding to.<sup>33</sup> This has led ETA-M to use increasingly violent and unpopular tactics within the Basque Country as it tries to replace popular support with dominance through terror.<sup>34</sup> ETA-M believes that terrorist attacks against members of the Security Forces and the Armed Forces would convert their fight to an isolated war against the police and the army, a war that the State could resist indefinitely without hardly any internal opposition. So ETA-M decided to design a new so-called strategy of destabilization which allows a reduction of risks keeping up pressure on the Government.<sup>35</sup> As a means of this strategy, political leaders of the Spanish parties, i.e. the Socialist Party Working Spanish (PSOE) and Partido Popular (PP), journalists, industrialists and even some members of the Basque Police Force (the "Ertzaintza") are included in the list of terrorist objects of ETA-M.

The new ETA campaign is accompanied by an escalation in "street violence" ('kale borroka, violencia callejera), carried out by young people who do not belong directly to ETA. These acts of violence aim at creating an atmosphere of intimidation and fear. They are carried out not only against the people accused of being "pro-Spain" or in favour of the current constitution, but also against their families and property. This violence takes place in a climate of almost total impunity, because of the passiveness of the autonomous Basque Police Force in containing effectively the actions of these

---

<sup>31</sup> Because of formal defects, the Constitutional Court reversed this judgement in 1999: Constitutional Court, Judgement No. 136/1999 of 20 July 1999 (published in BOE on 18 August 1999).

<sup>32</sup> Source: Ministry of the Interior: <http://www.mir.es/oris/infoeta/esp/p14-esp.htm> visited on 15 November 2002.

<sup>33</sup> *Tangen Page*, see note 23, 124.

<sup>34</sup> *Elorza/Garmendia/Gurutz/Domínguez*, see note 21, 383 et seq.; *Tangen Page*, see note 23, 124.

<sup>35</sup> *G. Gastaminza*, La izquierda arbertzale acentúa el sometimiento a ETA con un partido más radical, EL PAIS 24 June 2001, 28.

groups and carrying out the necessary investigations.<sup>36</sup> As a further strategy, ETA pursues presently a policy of civil disobedience. The project includes a multiplicity of gestures and attitudes, from refusing to use the Castilian language to ignoring police agents, boycotting the Spanish institutions or introducing a Basque identity card<sup>37</sup>.

The peace agreement in Northern Ireland heavily influenced ETA. In September 1998, ETA announced its first cease-fire. The cease-fire was meant to lay the foundation for talks between the organisation's political wing, Herri Batasuna and the Spanish Government. The Spanish Government, however, dismissed the cease-fire as stalling tactic to allow ETA to take advantage of the truce to rearm and reorganise in preparation for a return to the armed struggle.

ETA had been involved in 3,391 terrorist attacks, in which 2,367 people were injured and 813 died since it began its lethal attacks in 1968. In addition, there were 3,761 acts of street violence attributed to youth organisations with links to ETA.<sup>38</sup>

Neither ETA-M nor Batasuna demand independence any longer but instead call for the right to national self-determination,<sup>39</sup> the union of the province of Navarre with the Basque Country and the regrouping of imprisoned ETA activists in the Basque region who serve sentences in prisons in Spain.

ETA finances its activities through kidnappings, robberies, and extortion of Spanish businesses. Although ETA receives only little support within the Basque society, open criticism of ETA and its activities is comparatively rare in the Basque country. On the one hand, Basque nationalists tolerate ETA's activities. Although they oppose terrorism as a measure to achieve Basque independence, they do not want to fight it actively. On the other hand, all parts of the Basque society fear denunciation and revenge by ETA. This is particularly evident at the universities.<sup>40</sup> A change of attitude was expected to take place after massive anti-ETA demonstrations in 1997, which were directed against the kidnapping of a prison officer and the killing of a local councillor. The officer was held in an underground bunker and

---

<sup>36</sup> Report by Mr. *Alvaro Gil-Robles*, Commissioner for Human Rights, on his visit to Spain and the Basque Country 5 - 8 February 2001 for the Committee of Ministers and the Parliamentary Assembly, CommDH (2001)2, 3; *O. Jaime Jiménez*, *Policía, terrorismo y cambio político en España, 1976-1996*, 2002, 256.

<sup>37</sup> Report of the Spanish Ministry of the Interior, *Lucha Antiterrorista 2000*, 15, <http://www.mir.es/oris/lucha/2000/lucha00.pdf>, visited 22 November 2002.

<sup>38</sup> Source: Ministry of the Interior: <http://www.mir.es/oris/infoeta/esp/p12b-esp.htm>, visited 22 November 2002.

<sup>39</sup> *Tangen Page*, see note 23, 123.

<sup>40</sup> *A. Gil-Robles*, see note 36, 4.

deprived of light for 532 days.<sup>41</sup> Directly after his liberation, ETA kidnapped a local councillor whom the terrorists shot after the expiry of a 24-hours ultimatum.<sup>42</sup> Nonetheless, public criticism of ETA is dwindling.

#### 4. Long Term Strategies to Fight Terrorism

Due to the focus on national terrorism, Spain does not develop any proper long-term strategy for the fight against international terrorism. The national counter terrorism strategy is essentially based on coherent judicial criminal measures. This core range is supplemented by the following strategies: a penitentiary policy, exit programs and the national and international isolation of ETA.

##### *a. Penitentiary Policy*

In 1989, the Government policy of holding politically motivated Basque prisoners together in the same high security prisons was ended.<sup>43</sup> It was decided that this practice gave ETA-M too much control over individual members and peer pressure could be used against those who might want to seek social reinsertion.<sup>44</sup> Moreover, it was possible for the arrested leaders of ETA to control and direct non-arrested members. The intention of the Government policy was to destroy group cohesiveness and thus encourage the prisoners to defect and accept social reinsertion.<sup>45</sup>

Since then, ETA prisoners have been subdivided into small groups and distributed across the entire Spanish prison system. They do not receive special treatment any longer, but they are usually mixed together with other non-terrorist prisoners. This policy became known as dispersion. The distance of the place of confinement to the place of residence and the level of security depend on the prisoner's behaviour as well as on his attitude towards ETA. Because of this policy, numerous prisoners are classified in the lowest security level.<sup>46</sup>

---

<sup>41</sup> *Elorza/Garmendia/Gurutz/Domínguez*, see note 21, 406.

<sup>42</sup> *Tangen Page*, see note 23, 143.

<sup>43</sup> *Elorza/Garmendia/Gurutz/Domínguez*, see note 21, 314.

<sup>44</sup> *Tangen Page*, see note 23, 135.

<sup>45</sup> *Tangen Page*, see note 23, 141.

<sup>46</sup> *Bueno Arús*, see note 1, 69.

In view of this success, ETA reacted with a terror wave against law enforcement officers in order to provoke the officers' resistance. However, this strategy was not successful. In September 1999, the Government met criticism of human rights organisations<sup>47</sup> on the policy of dispersion and decided to transfer 105 ETA prisoners to prisons closer to their homes, including prisons in the Basque Country.

However, neither the Constitution nor the legislation on the prison system considers the serving of sentences in prisons in the Basque Country close to detainees' homes to be an individual right, but they see it as an objective of prison policy with a view to promoting the rehabilitation of convicted persons.<sup>48</sup>

#### *b. Reinsertion Programs*

Social reinsertion is a major cornerstone of Spain's counter-terrorist strategy.<sup>49</sup> It is based on the experience of Italy's repentance laws and its counter-terrorism strategy that pardons had proved to be a successful way of fighting the Red Brigades.<sup>50</sup> At first, the exit program of 1984<sup>51</sup> was only addressed to prisoners. It was extended in the following years to active members of ETA. It is backed by Article 579 of the Penal Code. This provision gives judges and courts the discretion to reduce the sanction for any of the crimes of terrorism, when a terrorist voluntarily gives up their criminal activities and presents themselves to the authorities to confess their crimes. They must collaborate with the authorities to impede new crimes. They must assist them in obtaining evidence which can be used to capture other criminals and to hinder the further development of terrorist groups with whom they were affiliated. In cases in which a terrorist is not accused of a capital crime, the Court can renounce a punishment, if the attained information were of special importance for the fight against terrorism. Moreover, according to Article 98 of the Penal Code, a premature release after serving a third of the sentence is possible. In the success of this strategy ETA saw a

---

<sup>47</sup> Amnesty International recommended that the authorities reverse the practice of dispersing Basque prisoners throughout the Spanish Peninsula, Islands and the Spanish North African enclaves of Ceuta and Melilla, Amnesty International Report 2000 – Spain, AI index: POL 10/001/00 p. 1.

<sup>48</sup> A. *Gil-Robles*, see note 36, 3.

<sup>49</sup> *Tangen Page*, see note 23, 139.

<sup>50</sup> P. *Wilkinson*, *Terrorism versus Democracy – The Liberal State Response*, 2000, 98; F. *Bueno Arús*, *Legislación penal y penitenciaria comparada en materia de terrorismo*, in *S. del Campo* (ed.), *Terrorismo Internacional*, 1984, 113-152 (120).

<sup>51</sup> Ley Orgánica 9/1984 of 26 December 1984 (BOE of 29 December 1984).

major threat to their survival. ETA responded by issuing death threats against any member who accepted the Government's offer.

*c. More Self-government / Autonomy*

While the Spanish Government signalled willingness to negotiate with ETA questions of a penitentiary policy, it refuses categorically to negotiate with ETA over the status of the Basque country. The regionalization of Spain, which completely divides Spain in regions with broad competences, is not - as ETA argues - an answer to terrorism, but constitutionally required.<sup>52</sup> The Constitution guarantees the right to self-government of all nationalities and regions of Spain<sup>53</sup> and establishes an open and flexible system to facilitate this self-government. In principle, the regions have the power to draft, approve and enact their own laws.<sup>54</sup> Nevertheless, it must be underlined that the Constitution grants a discretion to the Central State, when and how many individual competencies the autonomous regions will receive. It is important to underline that the Basque country was granted the most far-reaching autonomy rights together with Catalonia. The Central State uses this discretion in order to influence the strife for independence in the Basque society.<sup>55</sup> The strategy destroyed much of the social support which ETA had at times of the Franco regime.

The Basque Autonomy is based on the Statute of Autonomy of Euskadi - known as the Statute of Guernica - which was approved by Organic Law No. 3/1979 on 18 December 1979<sup>56</sup>. In accordance with this Organic Law, the Autonomous Region is made up of the historical territories of Alava, Guipúzcoa and Vizcaya.<sup>57</sup> Its own language, Euskera, holds the same official status as Spanish.<sup>58</sup> The Statute of Autonomy provides that power in the Basque Country is to be exercised through its Parliament, its Government and its President (Lehendakari).<sup>59</sup> Furthermore, the Basque Parliament has

---

<sup>52</sup> Article 148 (1) and Article 149 (1) of the Spanish Constitution; *L. López Guerra*, La distribución de competencias, in: *L. López Guerra* (ed.), *Derecho Constitucional*, 1998, 337.

<sup>53</sup> Article 2 of the Spanish Constitution; *Pérez Tremps*, see note 28, 309.

<sup>54</sup> Article 143 et seq. of the Spanish Constitution.

<sup>55</sup> *López Guerra*, see note 52, 338.

<sup>56</sup> BOE of 22.12.1979.

<sup>57</sup> Article 2 of the Statute of Autonomy.

<sup>58</sup> Article 3 (2) of the Spanish Constitution and Article 6 of the Statute of Autonomy.

<sup>59</sup> Article 24 et seq. of the Statute of Autonomy.

the right to designate the Basque senators for the second Spanish Representative House, the Senate.<sup>60</sup>

The Statute of Guernica stipulates that for the adequate exercising of its authority, Euskadi should have its own Revenue Service (Hacienda).<sup>61</sup> Very importantly, the Basque country has its own long-standing institutions such as the Ertzaintza, the autonomous police force, which has more than 7000 officers at its disposal and has taken most powers away from the Guardia Civil. It has full authority in matters such as public order, public safety, and traffic regulations.<sup>62</sup>

#### *d. National Isolation*

On a long-term basis, the most effective strategy would be the political consensus of the democratic parties in the Basque country. In particular, the inclusion of the Basque National Party – PNV, which forms the Government of the Basque country, would be a substantial goal. Since 1987, numerous attempts have been made to reduce the social acceptance of terrorism and its goals by pacts. These pacts have further reduced ETA's social acceptance. In the Pact of Madrid of 5 November 1987, it was decided not to make the policy of counter terrorism an issue of the political debate in the national Parliament.<sup>63</sup> On the regional level, parallel agreements were concluded with the so-called Pact of Ajuria Enea of 12 January 1988<sup>64</sup> and the Pact of Navarre of 7 October 1988<sup>65</sup>, which all political parties, except for Herri Batasuna, signed.<sup>66</sup> These agreements clearly state that no political objective, however legitimate it may be, justifies the use of violence and categorically rule out the possibility of political negotiation with terrorists. However, they still leave a door open for a negotiated end to the violence, on the condition that ETA shows unequivocally that it is willing to cease its terrorist activities. A further pertinent agreement, the Agreement in favour of Liberty and

---

<sup>60</sup> Article 28 of the Statute of Autonomy.

<sup>61</sup> Article 40 of the Statute of Autonomy.

<sup>62</sup> Article 17 of the Statute of Autonomy.

<sup>63</sup> *Elorza/Garmendia/Gurutz/Domínguez*, see note 21, 349 et seq.; the Document is published at: <http://www.mir.es/oris/paz/pmadrid.htm> visited on 15 November 2002.

<sup>64</sup> The Document is published at: <http://www.mir.es/oris/paz/Pajuria.htm>, visited on 15 November 2002.

<sup>65</sup> The Document is published at: <http://www.mir.es/oris/paz/pnavarr.htm>, visited on 15 November 2002

<sup>66</sup> *Elorza/Garmendia/Gurutz/Domínguez*, see note 21, 350.

against Terrorism (Acuerdo por las libertades y contra el terrorismo) was concluded between the most important political parties on 8 December 2000.<sup>67</sup>

The Spanish Government has attempted to isolate those organisations and parties which are considered to be linked with ETA, in particular its political arm, Herri Batasuna, now Batasuna.<sup>68</sup> The Basque autonomous Government has also adopted this strategy.<sup>69</sup> Essentially, the representatives of the PNV, the Spanish Socialist Party (PSOE), and the conservative Popular Party (Partido Popular - PP) will not appear in television debates or programmes that feature HB members, thus isolating them from normal television programmes.<sup>70</sup>

This consensus broke, however, in particular due to the non-uniform attitude of the PNV. On the one hand inspired by the "Good Friday Agreement" in Northern Ireland of 10 April 1998, the nationalist parties PNV (Basque Nationalist Party), EA (Euskal Alkartasuna), HB (Herri Batasuna) and IU (United Left) - although they later withdrew - signed the Estella/Lizarra Declaration on 12 September 1998, which proclaims the integral nature of the Euskadi region, including Navarre and the French Basque Country, and recognises the right of Euskadi to have self-determination<sup>71</sup>. Moreover, in September 2002 the Prime Minister of the Basque Country, Ibarretxe (PNV) announced to hold a referendum on his proposal of a shared sovereignty. He also called for the Basque country to become a self-governing state that would be "freely associated" with Spain and would also be "associated" with the European Union.

#### *e. International Isolation*

Apart from national isolation, the Spanish Government pursues the strategy of the international isolation of ETA. The Government has been able to prove ETA's presence in nearby countries, such as France or Germany, as well as in Belgium, Mexico, Venezuela or Uruguay, where members of the terrorist group seek a hideout and political support.

---

<sup>67</sup> The document is published at: <http://www.mir.es/oris/paz/docs/treg-25.htm>, visited on 15 November 2002.

<sup>68</sup> *Tangen Page*, see note 23, 124.

<sup>69</sup> *Tangen Page*, see note 23, 124.

<sup>70</sup> *Tangen Page*, see note 23, 124.

<sup>71</sup> <http://www.terra.es/actualidad/terrorismo/documentacion/documento13.htm> visited on 15 November 2002.



The fight against terrorism in Spain was obstructed by France's attitude to the ETA.<sup>72</sup> France accepted that the terrorists used the French Basque country as retreat area until 1984. Therefore Spain strove intensively for a cooperation with France. During the socialist Government of Prime Minister González, France changed slowly its position towards Spain. However, until 1989, France refused to extradite ETA terrorists to Spain and sent them to third states (Panama, Venezuela, Ecuador, Cuba, Dominican Republic, Togo and Cape Verdian Islands). Besides, Belgium did not extradite ETA terrorists to Spain. In 1996, Spain suspended judicial cooperation following a Belgian court's refusal of a request to extradite two ETA-terrorists. Belgium eventually gave up this position by the Convention on Extradition between the Member States of the European Union<sup>73</sup>.

In the European Union, Spain has promoted the adoption of two instruments -the European Arrest Warrant<sup>74</sup> and the Council Framework Decision on Combating Terrorism<sup>75</sup>. The Spanish Presidency of the European Union, from 1 January 2002 to 31 June 2002, has focused its strategy on security aspects, in particular to strengthen the role of the EU in the fight against the international terrorist network. Spain convinced the other Member States to consider ETA as part of international terrorism. The greatest success of Spain's policy was the elaboration of an EU-Common Position on a list of international terrorist groups, which includes ETA<sup>76</sup> and the political party Batasuna.<sup>77</sup>

---

<sup>72</sup> *Jaime Jiménez*, see note 36, 271 et seq.; *Elorza/ Garmendia/ Gurutz/ Domínguez*, see note 21, 290.

<sup>73</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union of 27 September 1996, OJ C 313 of 23.11.1996, p. 11 et seq.; *Jaime Jiménez*, see note 36, 299 et seq.

<sup>74</sup> Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18.7.2002, p. 1 et seq.; *Jaime Jiménez*, see note 36, 288 et seq.

<sup>75</sup> Council Framework Decision (2002/475/JHA) of 13 June 2002 on combating terrorism, OJ L 164 of 22. 6.2002, p.3 et seq.

<sup>76</sup> Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344, 28.12.2001, p. 93, updated by Council Common Position 2003/402/CFSP of 5 June 2003, OJ L 139 6.6.2003, p. 35.

<sup>77</sup> Council Common Position 2003/402/CFSP of 5 June 2003 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2002/976/CFSP, OJ L 139 6.6.2003, p. 35

## 5. Success in Fighting Terrorism through the Legal Approach or Long Term Strategies

Although ETA still exists and continues to be active, long-term strategies were much more successful than the repressive law approach. Reinsertion combined with the granting of political autonomy to the Basque Country and the gradual replacement of the Guardia Civil by the Ertzaintza as a counter-insurgency policy have reduced the social acceptance of ETA in the Basque country.<sup>78</sup> In particular ETA's international isolation and the Government's strategy to integrate its national counter-terrorism policy in the global antiterrorism campaign creates fundamental problems for ETA to maintain the organisation efficiently.

## II. Participation on International Conventions Dealing with Terrorism

### 1. International Activity before September 11<sup>th</sup>

Spain promotes international cooperation in the struggle against terrorism through its participation in international conventions, especially those adopted by the United Nations. Spain has ratified all 12 United Nations conventions on terrorism.

In the European context, Spain signed the European Convention on the Suppression of Terrorism of 27 January 1977<sup>79</sup> in 1980. With regard to extradition, Spain has signed the Council of Europe Convention on Extradition. In recent years, Spain has signed several bilateral agreements that are directly or indirectly related to the struggle against terrorism.

There also is a Conference of the Ministers of the Interior of Western Mediterranean Countries, an informal forum for cooperation created in 1995, which meets annually. This group currently includes the Ministers of the Interior of Algeria, France, Italy, Libya, Malta, Morocco, Portugal, Tunisia, and Spain. Terrorism is one of the issues the ministers consider at their annual meetings.

---

<sup>78</sup> *Tangen Page*, see note 23, 142; with a critic point of view *Bobillo*, see note 7.

<sup>79</sup> Ratified on 9 May 1980.

## 2. International Activity after September 11<sup>th</sup>

Spain has also been an active supporter of the comprehensive draft International Convention on Terrorism, which is being negotiated in the United Nations on the basis of an Indian proposal. Spain has played a decisive role in the adoption of declarations against terrorism by different international organisations<sup>80</sup>.

As regards the North Atlantic Treaty Organisation (NATO), Spain promoted the NATO statement of 12 September 2001 stating that the terrorist attack of September 11<sup>th</sup> should be regarded as an action covered by Article 5 of the Washington Treaty.

## III. Repressive measures

### 1. Overview

As stated previously, the Spanish emphasis with regard to specific anti-terror measures lies within the repressive range.<sup>81</sup> Concerning these measures, Spain does not differentiate between national and international terrorism. Only with regard to the competent police authorities Spanish law makes a difference between international and national/regional terrorism. The regional police authorities are competent for terrorist activities on the regional level, while the struggle against terrorism on the national and inter-

---

<sup>80</sup> Code of Conduct against Terrorism adopted by the Meeting of Experts on Terrorism of the Mediterranean Forum (22 February 2000); United Nations Educational, Scientific and Cultural Organization (UNESCO) Resolution Condemning Terrorism (20 October 2001); Council of Europe Statement on International Action against Terrorism at the 109th session of the Committee of Ministers (8 November 2001); Political Declaration against Terrorism by the Heads of State and Government of the Ibero-American Community meeting in Lima (24 November 2001); Ministerial Declaration adopted in Bucharest by the Ministerial Council of the Organization for Security and Cooperation in Europe (OSCE) (3-4 December 2001); OSCE Decision containing a Declaration and Plan of Action against Terrorism (3-4 December 2001)

<sup>81</sup> *Bueno Arús*, see note 7, 135-145.

national level is the task of the national police authorities (Cuerpo Nacional de Policia) or the Guardia Civil.<sup>82</sup>

Universal Jurisdiction over terrorist offences is a special characteristic of Spanish Criminal Law. In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. Instead, Spanish criminal law considers any terrorist act as universally prosecutable. Article 23 (4) of Organic Law 6/1985 of 1 July 1985 on the Judiciary<sup>83</sup> states that Spanish courts have international jurisdiction over offences that are committed outside Spain by Spanish or foreign nationals, if the Spanish Penal Code characterises these offences as terrorist acts. Moreover, under the Spanish Penal Code, in all cases of terrorist offences, a sentence handed down by foreign courts is treated like an equivalent Spanish sentence when the judge must determine whether the accused has repeatedly committed crimes so that aggravating circumstances exist (Article 580).

## 2. Terrorist offences

Spanish law includes a very broad range of criminal offences, which provide protection against terrorism. Most of these provisions are included in the second section of the Spanish Penal Code, (Chapter V, Title XII, Book II). As previously described, terrorist offences are specifically defined and harsher penalties are prescribed for them than for ordinary offences that are not committed for terrorist purposes.<sup>84</sup>

Article 571 of the Penal Code defines the objective elements of the crimes of terrorism. These offences appear separately in another part of the Penal Code; they are considered as crimes of terrorism only when other elements are present. Those additional elements are that the author of the crime must belong to, act in the name of, or collaborate with armed bands, organisations or groups whose goal is to disturb the constitutional order or public peace. Article 572 of the Penal Code penalises any individual who acts against the life, health or freedom of any person when the author of the crime is linked with an armed or terrorist organisation. The Jurisprudence recognises an “armed group” as an association with permanent structures and concentrating on armed action. Hierarchy and discipline are important to armed

---

<sup>82</sup> Article 11 Organic Law No. 2/1989 of 13 March 1986 on Security Agents and Corps (BOE of 4 March 1986).

<sup>83</sup> BOE of 2 July 1986.

<sup>84</sup> *C. Rey González*, Agravación de los delitos relacionados con bandas armadas o elementos terrorista, in *M. Cobo del Rosal* (ed.). *Comentarios a la legislación penal*, 1990, 27-36.

groups. Their actions are usually numerous and unpredictable, and they use these instruments of violence, which are provided by their criminal organisation.<sup>85</sup>

When the criminal act causes the death of a person, the sanctions outlined in the Penal Code for crimes of terrorism can reach a maximum of 30 years of prison. For terrorist acts consisting of arson and destruction, the sanctions range from 15 to 20 years in prison. When a person is seriously injured, the sanction is also 15 to 20 years. When an injury is minor, or the actor who belongs to the armed group threatens, coerces or illegally detains another person, the sanction ranges from 10 to 15 years in prison. These prison terms can be even longer if terrorist actions are directed against government officials.

Article 573 of the Penal Code provides penalties for the storing of weapons or munitions and the possession or storage of explosive, flammable, incendiary or asphyxiating substances or devices or components thereof. Likewise, their manufacture, trafficking, transport or supply, in any form, and the mere placement or use of such substances or of other means or contrivances for achieving the same purpose is penalised. The authors of these crimes must be persons acting at the service of or in collaboration with armed groups, organisations, or terrorist groups.

Article 577 of the Penal Code, concerning acts designed to disturb the constitutional order and public peace, is the reaction of the State to ETA's new strategy of street violence which is realised by juveniles who are not necessarily members of an armed group or a terrorist organisation. The Article was introduced by Organic Law No. 7/2000 of 23 December<sup>86</sup>, which, in general, provides for special measures in cases involving persons less than 18 years of age who commit terrorist offences. The law seeks to increase the length of detention for minors convicted of terrorist offences and to create a special Juvenile Court within the Audiencia Nacional (National Court).<sup>87</sup>

The legislature has also framed the "crime of collaborating with an armed group" (Article 576 of the Penal Code). The enumeration of the second paragraph, which defines the collaboration, is an opened formula. The sanction is minor compared to the other sanctions for a crime of terrorism. The Spanish doctrine has discussed the question whether the payment of the so-called "revolutionary tax" constitutes collaboration by means of economic cooperation. ETA extorts the "revolutionary tax" from Basque businesses.

---

<sup>85</sup> *J.L. Rodríguez Villasante y Prieto*, Colaboración con banda armada, in: *M. Cobo del Rosal* (ed.) *Comentarios a la legislación penal 1990*, 121-154.

<sup>86</sup> Published in BOE of 23 December.2000.

<sup>87</sup> Amendment of Organic Law 5/2000 of 12 January on Criminal Responsibility of Minors (BOE of 13 January 2000).

Although the doctrine differs over the legal reasoning, it agrees unanimously that the payment of this “tax” is not subject to punishment.<sup>88</sup>

There is one special collaborative act in Article 578: the apology. It consists in either directly addressing a large group of persons, or using a subversive medium that includes ideas or doctrines that exalt the terrorist crime and its author. It has been proven very difficult to apply this law<sup>89</sup>. For example, on 23 May 2002 the Spanish Supreme Court (Tribunal Supremo) rejected the penal case against Arnaldo Otegi, Batasuna’s spokesman, who took part in a meeting in France in which he reportedly shouted a slogan in support of ETA. The Spanish Public Prosecutor (Ministerio Fiscal) lodged a complaint with the Supreme Court according to which Arnaldo Otegi had committed an apology and therefore a “crime of terrorism”. However, the Supreme Court rejected the complaint on the grounds that the alleged crime, the apology, was one of opinion and not of terrorism. Since the deed was committed abroad, the Spanish courts have no jurisdiction over the matter, as they would definitely have in acts of terrorism under Article 23 (4) of the Organic Law 6/1985, of July 1st, on the Judiciary.<sup>90</sup>

### 3. Specific Measures

#### *a. Combating Financial Resources of Terrorist Organisations*

The legislature has realised that a terrorist group cannot act without a good infrastructure and, above all, without substantial economic resources. Therefore, “crimes of terrorism” include attempts to steal property with the goal of obtaining funds to aid terrorist groups”.<sup>91</sup> This crime is laid down in Article 575 of the Penal Code in which the legislature determines the sanctions for crimes against property; it is supplemented with the regulations on

---

<sup>88</sup> J.L. Rodríguez Villasante y Prieto, *Colaboración con banda armada*, in: M. Cobo del Rosal (ed.) *Comentarios a la legislación penal 1990*, 121-154.

<sup>89</sup> Constitutional Court, Judgement No. 136/1999 of 20 July 1999 (published in BOE on 18 August 1999).

<sup>90</sup> Supreme Court, Judgement No. 29/2002 of 23 May 2002, published [http://criminet.ugr.es/recpc/jp04/2002\\_autots05%B723.pdf](http://criminet.ugr.es/recpc/jp04/2002_autots05%B723.pdf), visited on 15 November 2002.

<sup>91</sup> Report Submitted by Spain pursuant to Security Council Resolution 1373 (2001) of 28 September 2001, UN Doc. S/2001/1246 of 26 December 2001, p. 3 et seq.

money laundering set out in the Penal Code itself, particularly Articles 301 et seqq. Sanctions for crimes against property are increased when the crime is classified as a crime of terrorism.

The initiation of criminal proceedings for the aforementioned offences entails seizing the money, effects or other assets used to commit the terrorist act, the proceeds of such acts, and the effects thereof. Such seizure may be undertaken as a precautionary measure for the duration of the proceedings.<sup>92</sup> This is allowed and justified in Articles 13, 326, 334 and 589 of the Criminal Prosecution Act (*Ley de Enjuiciamiento Criminal*)<sup>93</sup>. Given the need to safeguard the effects and instruments used to commit the offence, the means of proof and the pecuniary liabilities arising from it, the authorities may swiftly proceed to blocking bank accounts and taking other precautionary steps to control the offenders' funds.<sup>94</sup> Once the Court's final ruling is handed down, the assets and funds used in furthering terrorist goals will be subject to seizure if they represent the effects of the offence, the instruments used to commit it and the profits thereof, regardless of any changes they may have undergone (Article 127 of the Penal Code).<sup>95</sup> Since the criminal prosecution of terrorism begins at the very earliest stage, the seizure extends to all items used in preparing the act. Accordingly, the Court ordered "freezing of assets" covers all such items.<sup>96</sup>

In addition to these measures, the freezing of funds and assets in third-party countries with respect to persons involved in terrorist acts is provided for in Article 2 (3) and (4), of Law No. 40/1979 of 10 December 1979 on Exchange Controls<sup>97</sup> which were added by Law No. 41/1999 of 12 November 1999<sup>98</sup> on Payment Systems. Paragraph 3 provides for the domestic application of measures aimed at freezing the movement of funds to and from other countries, when such measures have been adopted by the European Union; paragraph 4 deals with measures adopted by international organisations of which Spain is a member.

---

<sup>92</sup> UN Doc. S/2001/1246 of 26 December 2001, see note 90, 4.

<sup>93</sup> *Ley de Enjuiciamiento Criminal* of 14 September 1882, as amended by Law No. 38/2002 of 24 October 2002, de reforma parcial de la *Ley de Enjuiciamiento Criminal*, sobre procedimiento para el enjuiciamiento rápido e inmediato de determinados delitos y faltas, y de modificación del procedimiento abreviado (BOE of 28 November 2002).

<sup>94</sup> UN Doc. S/2001/1246 of 26 December 2001, see note 90, 4.

<sup>95</sup> UN Doc. S/2001/1246 of 26 December 2001, see note 90, 4.

<sup>96</sup> UN Doc. S/2001/1246 of 26 December 2001, see note 90, 4 et seq.

<sup>97</sup> BOE of 13 December 1979.

<sup>98</sup> BOE of 13 November 1999.

*b. Extradition Law*

Article 2 of the Passive Extradition Act No. 4/1985 of 21 March 1985<sup>99</sup> provides that terrorist acts may not be considered political offences for the purpose of refusing extradition. With regard to the relationship with the countries that are signatories to the European Convention on Extradition of 13 December 1957<sup>100</sup>, it is pointed out that extradition shall be granted in respect of offences that are punishable, under the laws of the requesting Party and those of the requested Party, by deprivation of liberty or detention order for a period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months. Many bilateral treaties on extradition provide for similar measures.

Special mention should be made of the treaties between Spain and Italy<sup>101</sup> and between Spain and the United Kingdom<sup>102</sup> concerning accelerated surrender procedures (which, under the Common Legal Space, would replace extradition) for offences punishable by a penalty of deprivation of liberty for at least 12 months, which presupposes the inclusion of terrorist offences. Finally, the Framework Decision of the European Council concerning a European Arrest Warrant and Surrender Procedures between Member States provides for the surrender of any person sought for an offence, including terrorism, under a European arrest warrant and does not require that the offence be characterised as such under the laws of both States.

---

<sup>99</sup> BOE of 26 March 1985.

<sup>100</sup> ETS No. 024, ratified by Spain on 21 April 1982.

<sup>101</sup> Tratado entre el Reino de España y la República Italiana para la persecución de delitos graves mediante la superación de la extradición en un espacio de justicia común, in: <http://www.mju.es/prensa/acuerdo%20italia%202.htm> visited on 15 November 2002.

<sup>102</sup> At present, Spain and the United Kingdom are negotiating a new bilateral treaty based on an agreement of 21 March 2001, in: <http://www.mju.es/prensa/acuerdo%20reino%20unido.htm> visited on 15 November 2002.



*c. Procedural Specifics*

aa. Exclusive Jurisdiction

While Italy has always rejected the introduction of special judges and in France the Court of the State Security was abolished in 1981, the Organic Law on the Judiciary assigns the exclusive jurisdiction for terrorist offences to a Court, which has jurisdiction throughout the national territory, the Audiencia Nacional.<sup>103</sup> For this reason, this organ has been object of harsh criticism ranges. Some consider it as an enforcement organ of an exceptional legislation. Others categorise it as an exceptional organ that denies the right to fair trial.<sup>104</sup>

However, the Audiencia Nacional is a regular Court, which is formally integrated into the ordinary jurisdiction by Organic Law No. 9/1984 of 26 December. Its jurisdiction, like the jurisdiction of any other Spanish court, is laid down in the Organic Law on the Judiciary. Finally, the Court is an independent and impartial tribunal so that it cannot be used by the Executive.<sup>105</sup>

bb. Suspension of the Exercise of Public Functions and Positions

Already the indictment and the order of detention on suspicion in cases of terrorist crimes leads automatically to the suspension of the rights to exercise public functions or public offices (Article 384 bis Criminal Prosecution Act)<sup>106</sup>. It is not necessary that courts order this suspension. Therefore, the courts have no margin of appreciation in order to take into account particular circumstances of the specific case. The doctrine qualifies this rule as a violation of the principle of the presumption of innocence.<sup>107</sup>

---

<sup>103</sup> Article 65 Organic Law No. 6/1985 BOE No. 73 of 26 March 1985.

<sup>104</sup> *J.M. Olarrieta*, *Ley Antiterrorista*, Audiencia Nacional y derecho de defensa, *Revista de la Facultad de Derecho de la Universidad Complutense*, 74 (1988-1989), 477-503.

<sup>105</sup> *E. Mestre Delgado*, *Delincuencia terrorista y Audiencia Nacional*, 1987.

<sup>106</sup> As amended by Law No. 4/1988 of 25 May 1988, on the Reformation of the Law of Criminal Judgment on the Automatically Suspension of the Exercise of Public Positions; *J. Terradillo Basoco*, *Terrorismo y Derecho*. Comentario a las leyes Orgánicas 3 y 4/1988, de reforma del Código Penal y de la Ley de Enjuiciamiento Criminal, 1988.

<sup>107</sup> *Vírgala Foruria*, see note 3, 118; *P. García Ballester*, *La suspensión provisional de cargo y funciones públicas en la normativa procesal penal vigente*. Examen

The extend of the concept “public position” is also problematic. The Constitutional Court<sup>108</sup> considers even the function Parliamentarian as a public office in the sense of Article 384 bis (2) Criminal Prosecution Act. The Court argued that “the exceptional threat that this criminal activity entails for our democratic State justifies, without any doubt, a provisional measure, such as the suspension of the parliamentarian functions.” So the Audiencia Nacional confirmed the suspension of an ETA prisoner’s status as member of the Basque Parliament in 1999.<sup>109</sup>

#### cc. Covered investigations

Article 282 bis of the Criminal Prosecution Act authorises the Judge or the Public Prosecution Service (Ministerio Fiscal)<sup>110</sup>, to allow Police agents to act under covered identity. The Judge and the Public Prosecution Service must provide reasons for this decision which prove the necessity of the measure for the aims of investigation.

#### dd. Summary Proceedings

In general, Article 779 of the Criminal Prosecution Act simplifies the procedural requisites in cases of crimes of minor importance<sup>111</sup> or in flagrant cases. From the point of view of the legislator, it is not necessary to exhaust all the procedural steps when the facts are already evident. Yet, summary proceedings are also used in flagrant cases of terrorist offences. On the one hand, the guarantees set forth in Article 24 of the Constitution are provided for during these proceedings, namely effective protection, a judge presiding over ordinary proceedings as established by law, right to legal counsel and assistance, public trial without undue delay and with guarantees, use of means of proof for the defence, right not to incriminate oneself and not to confess guilt, and right to the presumption of innocence. On the other hand, summary proceedings do not seem a suitable procedure for judgment on

---

especial del artículo 384 bis LECR, in: *M. Cobo del Rosal* (ed.), *Comentarios a la Legislación Penal*, 1990, 345-433; *M. Boronat Tormo / R. Manzana Laguarda*, Constitución, legislación antiterrorista y marginación del juez, *Boletín de Información del Ministerio de Justicia*, 1318 (1983), 3-18 (10).

<sup>108</sup> Constitutional Court, Judgement No. 71/1994 of 3 March 1994, FJ. 5 et seq.

<sup>109</sup> Audiencia Nacional, Auto, Sala de lo Penal of 3 February 1999.

<sup>110</sup> The Public Prosecution Service must immediately report to the competent Judge about the measures taken.

<sup>111</sup> Crimes with penalties minor than nine years.

crimes that carry as serious sentences as those of terrorism and affect human rights. In addition, proceedings against terrorist usually involve difficulties of inquiry and establishment of facts.

#### *d. Limitations on Fundamental Rights*

Although in the last two decades, non-governmental organisations complained periodically about the limitation of fundamental rights by the use of repressive measures, this criticism has recently ceased regarding ordinary proceedings.<sup>112</sup> So the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment found that the new legislation “has introduced a more developed framework penalising the offences of torture/ill-treatment and ‘violations of constitutional safeguards’ by an authority or public official”, and that, “in the course of the visit, the CPT’s delegation received no allegations of torture from persons interviewed who were or who had recently been detained by the Spanish law enforcement agencies”.<sup>113</sup> Presently, criticism focuses on the specific procedural measures based on the Emergency Legislation.<sup>114</sup>

## **IV. Preventive Measures**

### **1. General Measures**

Organic Law No. 1/1992 of 21 February on the Protection of Public Safety<sup>115</sup> contains in Chapter III the general authorisation to carry out actions aimed at maintaining or restoring public safety, particularly at times of serious mass disturbances or threats to public order. Article 14 contains the general authorisation clause: “The competent authorities, acting in accordance with the laws and regulations, may issue the orders, impose the pro-

---

<sup>112</sup> Report of 13 April 2000 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 November to 4 December 1998 Doc.CPT/Inf(2000)5, p.47.

<sup>113</sup> Doc.CPT/Inf(2000)5, see note 111, 47.

<sup>114</sup> See below Chapter VI.

<sup>115</sup> BOE of 22 February 1992.

hibitions and call for the police measures that are strictly required to ensure the achievement of the purposes provided for in Article 1 of this Law.”

In addition to this general clause, the Act authorises the police agents to use specific preventive measures. For example, the authorities are authorised to close premises or establishments and to evacuate buildings during emergency situations or in circumstances that warrant it,<sup>116</sup> and also to order the suspension of shows and spectacles, the vacating of premises and the temporary closure of establishments whenever they have become the scene of serious disturbances of public order. There is also a provision for the limitation or restriction of movement or presence in streets or public places in situations in which public order and safety have been disrupted.<sup>117</sup> The Law permits the introduction of controls on the streets and in public places or establishments for the purpose of discovering and apprehending the participants in a crime and of securing the instruments, property or evidence connected therewith.<sup>118</sup> Moreover, agents of the Security Forces and Bodies may, whenever it is necessary, require persons to identify themselves.<sup>119</sup> The Police agents are not authorised, neither in urgent nor other exceptional circumstances, to dispense with a court-ordered warrant to enter homes in order to combat crimes. The Constitutional Court considers such an authorisation as an unconstitutional limitation of the fundamental right to respect one’s home.<sup>120</sup>

Of special importance for counter-terrorism are the rules about the control of arms in Articles 6 and 7 of the Law No. 1/1992, establishing strict guidelines for preventive action and vigilance with respect to the manufacture and repair of weapons, imitations and reproductions thereof and their basic components, explosives, cartridges and pyrotechnic devices, and the circulation, storage and merchandising, acquisition, sale, possession and use of such items.<sup>121</sup> Article 7 provides for the following steps to be taken to prevent the procurement of weapons: (a) registration or classification, licensing, reporting, inspection, oversight and control of all factories, workshops, storage facilities, sales establishments, shooting galleries and related activities, (b) licenses or permits for the possession and use of firearms are mandatory and are issued subject to certain restrictions, especially in the case of weapons of personal defence, for which licenses or permits are issued only

<sup>116</sup> Article 13 of the Organic Law No. 1/1992.

<sup>117</sup> Article 16 of the Organic Law No. 1/1992.

<sup>118</sup> Article 19 of the Organic Law No. 1/1992.

<sup>119</sup> Article 20 of the Organic Law No. 1/1992.

<sup>120</sup> Constitutional Court, Judgement No. 341 of 18 November 1993, BOE of 10 December 1993.

<sup>121</sup> UN Doc. S/2001/1246 of 26 December 2001, see note 90, 6.

when strictly necessary; (c) certain especially dangerous weapons, munitions and explosives are prohibited, as is their storage.<sup>122</sup>

## **2. Specific Measures**

Spain's law on the prevention of money laundering<sup>123</sup> takes a unified approach towards money-laundering operations and other economic consequences of activities involving organised crime, terrorism and illegal drug trafficking. Article 3 imposes a number of obligations on financial entities and other persons involved in the transfer of capital, collection, payments and other transactions that are a part of every-day life. Such entities and individuals must refrain from conducting any transaction in which the issuer or recipient of funds might be a person linked to activities involving armed groups or terrorist organisations or groups. This obligation may be interpreted as including the freezing of balances. Such freezing would be effective even in the case of domestic movements of funds. Naturally, this includes operations carried out through financial entities on behalf of charitable associations. In addition, charitable associations that are foundations are subject to the supervision by the public administration, which may, if necessary, summon the foundation to appear in court.<sup>124</sup>

## **3. New Measures after September 11<sup>th</sup>**

After September 11<sup>th</sup> Spain has not fundamentally changed its legislation on preventive security measures, except for two sectors: financial resources of terrorists organisations and the Internet sector.

---

<sup>122</sup> UN Doc. S/2001/1246 of 26 December 2001, see note 90, 6.

<sup>123</sup> Law No. 19/1993 of 28 December 1993, sobre determinadas medidas de prevención del blanqueo de capitales, BOE 29 December 1993.

<sup>124</sup> Article 34 of the Law No. 30/1994 de fundaciones y de incentivos fiscales a la participación particular en actividades de interés general of 24 November 1994, BOE of 25 November 1994.

#### *a. Financial Resources*

According to the draft legislation on Prevention and Blockade of the Financing of Terrorism<sup>125</sup>, the Government will be able to block financial accounts and operations when it considers that such a step might prevent terrorist activities. The bill authorises the Administration to act not only against terrorist groups, but also against those who support or help them. So far, only judges can block accounts as a preventive or repressive measure if they are convinced that the accounts have been used to finance terrorist acts. This is the first competence that the Government withdrew from the judges in order to combat terrorism in Spain since the events of September 11<sup>th</sup>. However, the decisions of the Administration remain under judicial control of the Audiencia Nacional. Moreover, this competence of the administration is temporary; the maximum term of blockade is six months.

#### *b. Electronic Information*

The Law No.34/2002 on Services of the Information Society approved on 27 June 2002,<sup>126</sup> forces Internet Service Providers to retain and to conserve the data of connections and traffic for at least one year, although the police will not have access to the data without judicial permission.

### **4. Preventive and repressive measures against political parties**

#### *a. Preventive Measures*

Although it has been obvious that Batasuna and ETA were one and the same organisation, or at least part of the same terrorist-network, neither the State nor the doctrine considered a prohibition of the party as a possible instrument of the terror fight. However, the State has changed his opinion after September 11<sup>th</sup> and both houses of the Spanish Parliament approved a new Party Act in June 2002.<sup>127</sup>

---

<sup>125</sup> Proyecto de Ley de prevención y bloqueo de la financiación del terrorismo A, núm. 72-1, of 25 of March 2002.

<sup>126</sup> Ley de servicios de la sociedad de la información y de comercio electrónico, BOE of 12 July 2002.

<sup>127</sup> Organic Law 6/2002 of 27 June 2002 on Political Parties, BOE of 28 June 2002.

According to Article 9, a political party will be declared illegal if it fails to respect democratic principles and constitutional values, i.e. if it systematically harms fundamental rights and freedoms by promoting, justifying or exonerating attacks against the right to life and the integrity of the individual, if it foments, facilitates or legitimises violence, or complements and supports the actions of "terrorist organisations".

The following institutions are legitimised to apply for the declaration of a political party's illegality and its consequent dissolution: the Government itself or upon formal request of the Congress of Deputies or of the Senate, and also the Public Prosecution Service. A Special Chamber of the Supreme Court must order the dissolution of the party. This Special Chamber, laid down in Article 61 of the Organic Law No. 6/1985 on the Judiciary, represents the plenary of the Supreme Court. It is composed by an 16-judge panel.

The new Party Act prohibits the creation of a new political formation under a different denomination which would be a successor of the prohibited party. There will be no recourse against the sentence of the Special Chamber of the Supreme Court. Only individual members could bring an action for infringement of fundamental rights and freedoms before the Constitutional Court. On 12 March 2003, the Spanish Constitutional Court ruled that the Party Act is in accordance with the Spanish constitution.<sup>128</sup>

The process against Batasuna began on 26 August 2002 when the Spanish Parliament, by 295 votes to 10, with 29 abstentions, formally requested the Spanish Government to apply to the Supreme Court to declare Batasuna illegal. The Public Prosecution Service separately submitted a request to the Supreme Court for the dissolution of Batasuna.

On 27 March 2003 the Supreme Court approved the government's request and banned the Basque separatist party Batasuna permanently. The decision was unanimous and was executed at once. It is the first time since the 1975 death of dictator General Francisco Franco that a political party has been banned.

So far, there has been only little public criticism of this act. In addition to the members of Batasuna themselves, also the nationalist Basque government and the socialist mayor of Bilbao have protested against the illegalisation of the party. Amnesty International stated that the ambiguity of some wording in the law could lead to the outlawing of parties with similar political goals to those of armed groups, but which did not advocate or use violence.<sup>129</sup>

---

<sup>128</sup> STC 48/2003 of 12 March 2003 (BOE on 13 March 2003)

<sup>129</sup> AI-index:EUR 41/011/2002 of 12 September 2002.

The Court called upon the Basque parliament to enforce the dissolution, but the president of the Basque Parliament, Juan Maria Atutxa declared that he will rather withdraw from his post than "abandon his obligation to defend the dignity of this parliament."<sup>130</sup> Supported by the nationalist parties he has refused to follow the order of the national court to dissolve the parliamentary group of the terrorist party. The leader of the Basque government, Ibarretxe, has offered political negotiations on the court order, but the Spanish government replied that the parties cannot modify or change court decisions. The nationalist Basque parliament is still paying the assignments to the parliamentary group of the dissolved party. It is obvious that the Basque government and the nationalist parties are seeking a constitutional conflict with the Spanish government, as a basis for their demand for self-determination for the Basques.

Batasuna tried to present candidate lists under another name in the regional and local elections of 25 May 2003. The Supreme Court struck 241 candidates off the electoral lists on the grounds that they were ex-Batasuna activists standing under other party names.<sup>131</sup> The Constitutional Court<sup>132</sup> later reinstated 16, six of whom won the elections. On 5 June 2003 the EU decided, at the request of the Spanish Government, to add the party Batasuna to its list of terrorist organisations.<sup>133</sup>

#### *b. Repressive Measures*

Articles 517 and 518 of the Penal Code prohibit terrorists group and the membership in such groups. Article 520 enables the Court to dissolve the illicit association and to impose any of the other accessory consequences, i.e. temporary or definite shut-down of companies related to the association, its establishments and suspension of the activities of the association for a period that will exceed five years. In Spain, a political party is simply considered as an association to which these criminal law provisions apply. Thus, a political party may be dissolved for being a criminal association, particu-

---

<sup>130</sup> El Mundo of 23 May 2003: <http://www.elmundo.es/elmundo/2003/05/22/espana/1053595388.html>

<sup>131</sup> Tribunal Supremo Sala Especial del art. 61 LOPJ, Sala Especial, Judgement of 3 May 2003, Recursos contencioso-electorales 1-2003 and 2-2003, <http://www.elmundo.es/documentos/2003/03/espana/batasuna.pdf>.

<sup>132</sup> STC 85/2003, de 8 de mayo de 2003, <http://www.tribunalconstitucional.es/Stc2003/STC2003-085.htm>

<sup>133</sup> Council Common Position 2003/402/CFSP of 5 June 2003 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2002/976/CFSP, OJ L 139 6.6.2003, p. 35



larly when its purpose is to commit or help to commit a crime or if it is an armed group or a terrorist group or terrorist organisation.

On 26 August 2002, the Judge Garzón of the Audiencia Nacional filed an accusation that Batasuna was part of "the terrorist complex led by ETA", financed terrorism and was involved in the group's terrorist activities. The judge requested consent for a formal criminal investigation.<sup>134</sup> Moreover, on the basis Article 520 and 129 of the Penal Code, he ordered the suspension for three years, extendable to five years, of the political and economical activities of Batasuna, on the grounds that it formed an important and intrinsic part of the structure of ETA. This order included the closure of all the organisation's offices, web sites, various companies and even 70 "people's taverns" ("Herriko Tabernas"), allegedly used as fund-raising and recruitment centres by ETA.<sup>135</sup>

Judge Garzón further ordered that Batasuna's finances and possessions are to be claimed by the Spanish state. Finally, the order included a prohibition of any gathering or demonstration held either by groups or by individuals on Batasuna on its suspension. Batasuna had attempted to pre-empt the Judge's order by moving much of its operations north into the French Basque region. Efforts to close down the party's web site also prove to be more difficult as it is registered with an Australian company, but served from a Californian firm which is owned by another firm in Virginia and finally administered from Bayonne (France).

On 2 September 2002, Judge Garzón issued a Court Order that appeared to widen the scope for the prohibition of "any gathering or demonstration", which was contained in the Order of 26 August 2002. The judge stated explicitly that the order suspending Batasuna's activities included those that were either directly or indirectly driven or inspired by Batasuna or its members or leaders. Any symbols, logos, posters, placards, announcements, etc., referring to Batasuna, were also prohibited. A further decision of the Audiencia Nacional of 6 September stated that demonstrations by other parties or individuals were not covered by the prohibition of 2 September 2002.<sup>136</sup> Concerning these prohibitions, Amnesty International urged the Spanish and

---

<sup>134</sup> Prosecution Decree of the Judge Baltasar Garzón of the Juzgado Central de Instrucción No. 5, Audiencia Nacional, Sumario 35/02 Y, 26 August 2002 (not yet published).

<sup>135</sup> Prosecution Decree of the Judge Baltasar Garzón of the Juzgado Central de Instrucción No. 5, Audiencia Nacional, Sumario 35/02 Y, 26 August 2002, p. (not yet published).

<sup>136</sup> Auto del Juzgado Central de Instrucciones No. 5, Audiencia Nacional (not yet published).

Basque authorities to ensure that the fundamental rights of freedom of expression and peaceful protest are not undermined by these legal moves.<sup>137</sup>

## V. Asylum Law, Refugee Law and Immigration Law and Measures to Fight Terrorism

The Spanish Law on the Right of Asylum and the Status of Refugees<sup>138</sup> stipulates that asylum shall not be granted to persons covered by Articles 1F and 33 (2) of the 1951 Geneva Convention relating to the Status of Refugees<sup>139</sup>. These provisions refer to acts of terrorism. Article 5.6 of the Law on Asylum provides that in the aforementioned cases, even a request for asylum may be directly dismissed. The Organic Law on the Rights and Liberties of Foreigners in Spain and their Social Integration<sup>140</sup> provides that foreigners shall be refused entry into Spain when there are legally established grounds for doing so or when such action is allowed under international agreements (Article 26). Likewise, they may be refused entry under the provisions of international agreements to which Spain is a party, unless it is considered necessary to make an exception for humanitarian reasons or on grounds of the national interest. Article 54 of the Law establishes as a serious offence participation in activities that threaten the external security of the State or which might be detrimental to the relations of Spain with other countries. Such activities are punishable with expulsion from the Spanish territory (Article 57).

---

<sup>137</sup> AI Index: EUR 41/011/2002 of 12 September 2002; see also *F. Hernández Gil*, *Suspensión del derecho a la libertad de expresión: Sus efectos*, 1988.

<sup>138</sup> Law 5/1984 of 26 March 1984 reguladora del Derecho de Asilo y de la Condición de refugiado, (BOE of 27 March 1984) as amended by Law No. 9/1994 of 19 May 1994 (BOE of 23 May 1994).

<sup>139</sup> 18 UNTS 3, ratified by Spain on 14 August 1978.

<sup>140</sup> Organic Law No. 4/00 of 11 January 2000, on the Rights and Liberties of Foreigners in Spain and their Social Integration (BOE of 12 January 2000) amended by Organic Law No. 8/00 of 22 December 2000 (BOE of 23 December 2000).

## VI. Emergency Legislation as a Measure to Fight Terrorism

As part of the emergency legislation based on Article 55 (2) of the Spanish Constitution<sup>141</sup>, the Spanish procedural system provides for certain steps to be taken in connection with the investigation of terrorist offences.<sup>142</sup> Article 55 (2) of the Spanish Constitution states: “An organic law may determine the manner and the cases in which, in an individual manner and with the necessary judicial intervention and adequate parliamentary control, the rights recognised in Article 17 (2) [maximum duration of preventive detention] and 18 (2) and (3) [inviolability of domicile and secrecy of communications] may be suspended for certain persons with respect to investigations having to do with the activities of armed bands or terrorist elements.” It is not necessary to declare the emergency case previously. Actually, there is no formal anti-terrorist legislation as such, since there is no law or legal regulation in force dedicated exclusively to the matter. However, there are legal provisions in the general Criminal Prosecution Act which are applied exclusively to anti-terrorist matters.

This emergency legislation is not comparable with the emergency legislation known in other countries.<sup>143</sup> Spain has a so-called concrete-individual emergency legislation.<sup>144</sup> Police agents controlled by judges have to estimate in each particular case if there is a situation which requires the applicability of the emergency legislation for this particular case. In practice, emergency legislation is reservedly used, since the courts interpret the conditions very narrowly.<sup>145</sup>

---

<sup>141</sup> *Vírgala Foruria*, see note 3, 66 et seq.; *F. Fernández Segado*, Artículo 55. La suspensión de Derechos in: *O. Alzaga Villaamil* (ed.), *Constitución Española de 1978. Comentarios a las Leyes Políticas*, Vol. IV, 1984, 575-665; *J.M. Serrano Alberca*, Artículo 55.2, in: *F. Garrido Falla* (ed.), *Comentarios a la Constitución*, 2 ed. 1985, págs. 916-933.

<sup>142</sup> *P. Cruz Villalón*, *Estados excepcionales y suspensión de garantías*, 1984, 1 et seqq.; *P. Pérez Tremps*, *La suspensión de los derechos fundamentales*, in: *L. López Guerra* (ed.), *Derecho Constitucional Vol. I.*, 1998, 358.

<sup>143</sup> *López Garrido*, see note 7; *Bueno Arús*, see note 50, 140; *A. Baratta / M. Silbernagl*, *La legislazione dell'emergenza e la cultura giuridica garantista nel processo penale*, *Dei Delitti e Delle Pene* 3 (1983), 543-580 (545 et seq.); *O.A. Echappe*, *Tableau comparé des systèmes d'exception*, *Pouvoirs* 10 (1979), 115-122; *Vírgala Foruria*, see note 3, 91.

<sup>144</sup> *Fernández Segado*, see note 9; *Remotti Carbonell*, see note 3, 212.

<sup>145</sup> *Vírgala Foruria*, see note 3, 123 et seq.; *Remotti Carbonell*, see note 3, 242.

### 1. Maximum Duration of Preventive Detention / Incommunicado

Article 17 (2) of the Spanish Constitution guarantees that preventive detention may not last for more than the time strictly necessary for the investigations which aim to clarify the facts. Within a maximum period of 72 hours, the person detained must be freed or brought before a judicial authority.<sup>146</sup> Based on Article 55 (2) of the Spanish Constitution, Articles 520 bis and 527 of the Criminal Prosecution Act reduce this standard, regulating that a detention by the police in respect of collaboration with a terrorist group may be extended for 48 hours beyond the initial 72 hours. It is provided that such extension is requested in a formal, well-founded communication within the first 48 hours of detention and that the judge authorises it within the next 24 hours (Article 520 bis of the Criminal Prosecution Act).

In general, the Spanish doctrine has strongly opposed to the extension of the preventive detention beyond 72 hours. The doctrine sees a contradiction in an exceptional mechanism which tries to obtain the detainee's confession within a system that proclaims the right of the prisoner not to incriminate himself. Moreover, the risk of torture would be considerable.<sup>147</sup>

The Constitutional Court, in its sentence of 16 December 1987 has been receptive to the critical arguments. In accordance with Article 17 (2) of the Constitution it emphasises, the exceptional nature of the prolongation of the preventive detention beyond 72 hours, which is only justified when it is strictly necessary for the investigation of the facts.<sup>148</sup> Developing Article 55 (2) of the Constitution, "the ordinary legislator can surpass that maximum temporal, but not arbitrarily, although he has a certain margin of appreciation. In this sense, Article 9 (3) of the International Covenant on Civil and Political Rights<sup>149</sup> and Article 5 (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>150</sup>, both ratified by Spain, are still relevant points of reference, and oblige the police administration to

---

<sup>146</sup> Constitutional Court, Judgement No. 199/1987 of 16 December 1987, BOE of 8 January 1988, F.J. 8; *Fernández Segado*, Reflexiones en tomo a la interpretación por el Tribunal Constitucional de la Legislación antiterrorista, in: *Dirección General del Servicio Jurídico del Estado* (ed.), *Introducción a los Derechos Fundamentales* (X Jornadas de Estudio) vol. III., 1988; *Remotti Carbonell*, see note 3, 220.

<sup>147</sup> *Vírgala Foruria*, see note 3, 94 et seq.; *J. Querol y Lombardero*, Detención preventiva e incommunicación por razón de terrorismo", in: *M. Cobo del Rosal* (ed.), *Comentarios a la legislación penal 1990*, 435-468.

<sup>148</sup> Constitutional Court, Judgement No. 199/1987 of 16 December 1987, BOE of 8 January 1988, F.J. 8.

<sup>149</sup> UNTS Vol. 999 No. 14668, p. 171 and Vol. 1057, p. 407, ratified by Spain on 27 April 1977.

<sup>150</sup> ETS No. 005, ratified by Spain on 4 October 1979.

bring the prisoner before a Judge as soon as possible.” In accordance with these international standards, the Court concludes that “the triplication of the maximum term <sup>151</sup>of 72 hours recognised by our Constitution (which is already longer than the period provided for in other Constitutions) is excessive and leads to additional and unjustified pressure on the prisoner, incompatible with his rights to refuse testimony and to not incriminate himself”.

The cited articles of the Criminal Prosecution Act also affect the right of the arrested person to seek the assistance of a legal counsel during police and judicial proceedings. These articles determine that the police can formally request from the competent court an order to hold the detainee incommunicado. Although the detainees are granted most of the defence rights provided for other detainees in ordinary police custody, they are not allowed to choose their own lawyer of confidence. During police custody, the lawyer is officially assigned and the detainee is not allowed to have a private conversation with them (as it is the case for ordinary detainees).<sup>152</sup> Neither will the fact or place of detention be communicated to a nominated relative or other person. A medical examination would only be conducted by a forensic medical examiner. During the detention, the Judge will at any moment be able to request information on the prisoner’s concrete situation.

## 2. Inviolability of the Home

Article 18 (2) of the Spanish Constitution guarantees the respect for people’s home.<sup>153</sup> “No entry or search may be made without legal authority except with the express consent of the owners or in the case of a flagrant crime.” Therefore, in any case the police must request an order from the competent court. With regard to terrorist acts, the police authorities may detain suspected terrorists in cases of exceptional urgency and necessity in whatever place or domicile they may be hiding or taking refuge and, in connection with the detention, they may conduct searches in those places and seize the effects and instruments they may find there which might be linked

---

<sup>151</sup> As regulated in the former Criminal Prosecution Act No. 9/1984 and enacted by the Police authorities: *Vírgala Foruria*, see note 3, 96.

<sup>152</sup> A critical analyse in: *J.L. Gómez Colomer*, La exclusión del abogado defensor de elección en el proceso penal, 1988.

<sup>153</sup> *P. González-Trevijano*, La inviolabilidad del domicilio, 1992; *E. Espín Templado*, Fundamento y alcance del derecho fundamental a la inviolabilidad del domicilio, *Revista del Centro de Estudios Constitucionales*, 8 (1991), 152 (155); *Remotti Carbonell*, see note 3, 307.

to the offence committed (Article 553 of the Criminal Prosecution Act). The competent Court has to be informed immediately.<sup>154</sup>

The question arises, whether the police can use this power in any case which concerns terrorist offences. The Constitutional Court declared in a sentence of December 1987<sup>155</sup> that the use of this competence requires the presence of specific exceptional circumstances. These circumstances must force the police to act urgently so that there is no time left to seek anterior judicial authorisation. By such an interpretation, it is possible to reconcile both elements, the inviolability of the home and the right to judicial intervention, sacrificing only the anterior character of the judicial intervention in strictly defined limits.

### 3. Freedom of Communication

In Spanish law, restrictions of the freedom of communication are only permissible on the basis of a judicial order, since Article 18 (3) of the Constitution states<sup>156</sup>: "Secrecy of communications, particularly regarding postal, telegraphic, and telephone communication, is guaranteed, except for infractions by judicial order." Based on Article 55 (2) of the Spanish Constitution, Article 579 of the Criminal Prosecution Act allows for observations that can be ordered by the administrative authority, especially by the Minister of the Interior or, alternatively, the Director of State Security, in relation to investigations concerning armed bands or terrorist elements. "Eavesdropping is allowed when ordered by the Minister of the Interior or, in his absence, by the Director of State Security; the relevant order must be immediately transmitted in writing to the competent judge, who must either revoke or

---

<sup>154</sup> *Vírgala Foruria*, see note 3, 105 et seq.; *A. Zamarriego Fernández*, Régimen legal de la inviolabilidad del domicilio", in: *M. Cobo del Rosal* (ed.). *Comentarios a la Legislación Penal 1990*, 469-494.

<sup>155</sup> Constitutional Court, Judgement No. 199/1987 of 16 December 1987, BOE of 8 January 1988, F.J. 9.

<sup>156</sup> *J. Barcelona Llop*, Escucha telefónica y acción de policía de seguridad (A partir de la sentencia del Tribunal Europeo de Derechos Humanos sobre el caso Malone), *Revista de Administración Pública* 112 (1987), 34 (45); *Remotti Carbonell*, see note 3, 312; *J. Jiménez Campos*, La garantía constitucional del secreto de las comunicaciones, *Revista Española de Derecho Constitucional* 20 (1987); *Vírgala Foruria*, see note 3, 112 et seq.

confirm it within a maximum period of 72 hours, clearly stating the reasons for his decision” (Article 579 (4) of the Criminal Prosecution Act).<sup>157</sup>

#### 4. Limitations of Fundamental Rights

As seen previously, neither has declared the Spanish Constitutional Court these rules unconstitutional, nor has the European Court of Human Rights issued a judgement against Spain on this matter to date. Non-governmental organisations issued information on allegations that ETA suspects were being tortured by Civil Guards or police officers while being held incommunicado under "anti-terrorist" legislation. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>158</sup> made certain recommendations in its report on the Basque Country about the possibility of cutting periods of detention to the minimum strictly necessary for the efficient conduct of the investigations, as well as about the practice of involving forensic medical examiners. Among the recommendations of the Committee against Torture were that Spain should record interrogations of detainees and make these recordings available to judges. The Committee urged Spain to take precautions concerning incommunicado detention and to make it possible for a detainee to be examined both by a State doctor and by a doctor of the detainee's choice.<sup>159</sup>

Amnesty International published a report urging the Spanish authorities to revoke immediately the laws under which terrorist suspects can be held incommunicado for up to five days with access only to officially appointed lawyers, subject to special restrictions. It also recommended abandoning the practice of “incommunicado detention” and that of blindfolding and hooding detainees. It called for interrogations to be recorded on video both as a safeguard for detainees and as a means of protecting Civil Guards and police officers from false accusations.<sup>160</sup>

---

<sup>157</sup> *J. Rojas Caro*, La intervención judicial y gubernativa de las comunicaciones en la Ley de enjuiciamiento criminal, in: *M. Cobo del Rosal* (ed.), *Comentarios a la legislación penal 1990*, 495-536.

<sup>158</sup> Report of 13 April 2000 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 November to 4 December 1998 Doc.CPT/Inf(2000)5, p.47.

<sup>159</sup> Press Release HR/4628 of 22 November 2002.

<sup>160</sup> Amnesty International Report 2000 – Spain, AI index: POL 10/001/00 p. 1.

## VII. State Practice with Regard to Questions of International Terrorism and International Law<sup>161</sup>

After the attacks of September 11<sup>th</sup>, the Spanish Government offered its complete support to the United States in the fight against international terrorism, as well as its disposition to act in the political, diplomatic, financial, police, judicial and military fields. This solidarity was reaffirmed upon the beginning of the armed intervention in Afghanistan on 7 October 2001. Since then, Spain has supported the international coalition in the operation Enduring Freedom. In addition, a Spanish contingent forms part of ISAF. Spain also collaborates in the fight against terrorism in the operations "Activates Endeavour" and "Coherent Behaviour" for the monitoring of the naval traffic in the Eastern Mediterranean. In the NATO, Spain supported the activation of Article 5 of the NATO-Treaty to consider the attack in the United States as an attack on all NATO Member States. The Spanish military collaboration within the framework of NATO consists of the displacement of permanent naval forces to the Eastern Mediterranean and in the shipment of a series of AWACS aeroplanes to the US. In addition, Spain permits the US military to use bases and ports in Spain.

Regarding the intelligence services, there also is a permanent cooperation with other States which has contributed to the prohibition of several organisations related to the terrorist network Al-Qaida on Spanish territory: Spain collaborated with Italy in breaking up the "Varesse" group. The terrorist Mohamed Bensakhria, who entertains links to Bin Laden and is the leader of the "Meliani" group, was arrested and extradited to France. In September 2001, members of a cell of the Algerian Salafist Group for Call and Combat were arrested in different cities in Spain. In November, 11 citizens who had ties with Al-Qaida were arrested in Madrid.

At present, Spain holds eight suspected members of the terrorist organisation Al-Qaida. The Spanish Government maintains its opinion that the European human rights legislation hinders Spain from extraditing these suspects in the September 11<sup>th</sup> terrorist attacks to the US since they could face

---

<sup>161</sup> One of the most spectacular cases concerning public international law was initiated by Spain by the indictment issued by the Judge of the Audiencia Nacional Garzón against former Chilean President Augusto Pinochet. Garzon's indictment detailed his reasons for charging Pinochet with the offences of terrorism et al. The Audiencia Nacional accepted its Jurisdiction in this case on 5 November 1998. Spain applied to the United Kingdom to extradite Pinochet to Spain. Instead, the House of Lords did not refer to the terrorist offences as possible extradition crimes and concentrated on the crime of torture in its judgement of 24 March 1999 (*Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*).



the death penalty there. Article 3 of the European Convention on Human Rights bars Spain and the other signatories from extraditing prisoners if they could face capital punishment. Moreover, the Spanish Constitution prohibits categorically that civilians are subjected to trial by military commissions (Article 117 (5) and (6)). Therefore, the Spanish Government expressed reluctance to extradite the eight suspected terrorists in its custody without the necessary assurances that they would not be subject to capital punishment and that they be subjected to trial by the regular Courts, as a Spanish Foreign Ministry spokesman said on 23 November 2001.<sup>162</sup>

Spain supported the USA in its policy on Iraq outside the United Nation. Spain is also giving logistic assistance, with warships, airplanes and 900 specialised troops. Prime Minister Jose Maria Aznar said in September 2002 that while common agreement among Security Council members would be "desirable" before any US military action against Iraq, it would not be indispensable. Again, Aznar combines the national counter-terrorism policy and the global fight against international terrorism, arguing that Spain had enjoyed US support in the fight against ETA terrorist attacks.

## VIII. Summary

Basque terrorism is national terrorism since it is exclusively directed against Spain. Nonetheless, it shows elements of international terrorism because, as stated above, ETA uses the French Basque country as refuge and as a base for the preparation of new terrorist acts. The Spanish anti-terror legislation responded to these specific characteristics by using a broad definition of the legal terms "Terrorism" and "Terrorist" and by introducing universal jurisdiction for terrorist activities including preparatory acts. Thus, before September 11<sup>th</sup>, Spain had already available all necessary competencies and authorisations in order to fight terrorism in its new manifestations. Only minor amendments had to be enacted.

The repressive and preventive competencies of the Security Forces, which are, at least partly, very broadly framed, are, in general, in conformity with human rights law. Above all, most of the measures require authorisation by the competent judge who grants this authorisation only under very strict conditions. In some cases, the rigorous control by courts has reduced the effectiveness of anti-terrorist measures. Thus, the courts' practice has even provoked public criticism.<sup>163</sup> On the other hand, judicial control is an indispensable balance to the far-reaching extent of anti-terrorist competences

---

<sup>162</sup> EL PAIS of 24 November 2001 p.1 et seq.

<sup>163</sup> *Jaime Jiménez*, see note 36, 257 et seqq.

and, thus, indispensable for a lawful fight against terrorism. Only such a lawful fight will help to attain the aim of ending terrorism in Spain in the long run. However, intensified international co-operation in fighting terrorism with a view to ETA's international isolation will probably be the most important prerequisite for ending terrorism in Spain.