

Dear Politics and Protest Folks,

When I subscribed to present at the workshop I had expected to have advanced further in my data analysis and writing. Alas, it didn't go as fast as I thought... This is my very first attempt to organize my empirical data into a coherent framework. Even though or maybe because it is a very early draft, I really do appreciate your feedback on how successful it is, and in what ways I may improve it.

Here I present a first analysis of my Basque case. My other two cases are the Mapuche conflict in Chile and the animal rights conflict in the US. I look at how in these democratic constitutional states the criminal justice system works when it operates in the context of (violent) political conflict. In each case I see similar processes and mechanisms which I want to highlight. In the current outline, the chapters of my case analyses will be preceded by an introduction and a theoretical chapter. After the empirical data follow two chapters in which I compare the cases and draw upon their similarities in the process of criminalization and the impact on the use and interpretation of criminal doctrine.

The current document starts with a 4-page introduction which introduces the research question and the theories underlying my inquiry and then I jump into the analysis of the Basque case. The chapter on the Basque case has been cut off in the middle of the chapter, due to space constraints, and because it hasn't been written yet.

Thank you so much reading and giving comments.

Again... I am truly unsure of this first attempt to integrate my data with the theory and the way to present it, and really appreciate your ideas on how to improve.

Thank you!  
Carolijn

**OUTLINE DISSERTATION (in progress)**

1. Introduction
2. Theories of modes of criminal law and situations of emergency
3. Case animal rights and environmentalist activists in the US
4. Case Mapuche conflict in Chile
5. Case Basque conflict in Spain
6. Criminalization process in violent political conflict
7. Criminal doctrine in violent political conflict
8. Conclusion

## **Prosecution on the Edge of Escalation: Which Story Do You Tell, Mr. Prosecutor?**

Many governments today have to confront the investigation of crimes that have their origin in political conflicts.<sup>1</sup> Consequently they face the prosecution of an accused who often represents a larger group within society voicing their grievances. The stakes in these cases are high. Even the legitimacy of the government itself may be at risk.<sup>2</sup> The choices a government has to make in this situation are difficult. Should the government intervene through the criminal justice system? Or would that only polarize society? Should they give in to demands made by opposing groups? If they choose to intervene through the criminal justice system, should they treat the perpetrators as common criminals, as political activists or as a threat to state security? Which of these paths would reduce chances of escalation of the conflict?

When protesters or 'terrorists' use violence, the solution is often sought in the application of the criminal justice system.<sup>3</sup> The expectancy is that repressive action will reduce the level of violence.<sup>4</sup> An actual risk of the criminal prosecution might be that it does indeed stop the violence in the short run, but radicalizes the conflict in the long run.<sup>5</sup> The dilemma lies in the fact that both intervention and abstention may in fact breed polarization and radicalization of the opposing parties.

The starting point of this research is that one of the factors of escalation and de-escalation is the manner in which the criminal intervention is performed. Rather than assuming that the criminal justice system and its performance are fixed and 'natural', the researcher approaches this institution from the perspective that it may be challenged and can subsequently change its performance.<sup>6</sup> A conflict implies the existence of different discourses opposing each other and struggling to achieve hegemony.<sup>7</sup> In a violent political conflict, these discourses present a threat

---

<sup>1</sup> Miall, H. et. al., *Contemporary Conflict Resolution* Cambridge: Polity Press 2001, p.23

<sup>2</sup> A given power relationship is not legitimate because people believe in its legitimacy, but because it can be justified in terms of their beliefs (Beetham, David. 1991. *The Legitimation of Power*. Edited by P. Jones and A. Weale, *Issues in Political Theory*. London: MacMillan Education Ltd. p.11).

<sup>3</sup> "[...] and the solution is thought to lie in tightening up existing policy, i.e. "more of the same" (even though it does not work): more control, tougher measures, more powers" in: Hart, A.C. 't, "Criminal Law Policy in the Netherlands" in: *Criminal Law in Action. An overview of current issues in Western societies* Kluwer Law and Taxation Publishers Deventer/ Antwerp/ London/ Frankfurt/ Boston/ New York 1988 pp. 93

<sup>4</sup> Dantzker, M.L., *Criminology and Criminal Justice* Boston: Butterworth – Heinemann 1998, p.72

<sup>5</sup> This has been one of the conclusions in my analysis of the Mapuche conflict in Chile. See also Gurr, Ted Robert *Why Men Rebel* Princeton: Princeton University Press 1970

<sup>6</sup> Garland, David *Punishment and Modern Society. A Study in Social Theory* Oxford University Press 1990, p.4. I view the prosecutorial styles analogous to policing styles, as has been researched by della Porta, Donatella, and Herbert Reiter. 1998. *Policing Protest; The Control of Mass Demonstrations in Western Democracies*. Edited by B. Klandermans, *Social Movements, Protest, and Contention* Minneapolis, London: University of Minnesota Press.

<sup>7</sup> Jabri, V. *Discourses of Violence* Manchester and New York: Manchester University Press 1996

to the legitimacy of the state's monopoly of force. The researcher analyzes how the prosecution deals with the double agenda resulting from this threat. In a violent political conflict, the intervention of the criminal justice system also serves the purpose of retrieving legitimacy of that system itself.

Balbus (1973) noted that the criminal justice system always has multiple, and at times competing, interests.<sup>8</sup> The interest of adherence to law and legitimacy can conflict especially with the interest in maintaining order and ending violence. He presents this dilemma of the short term interest of terminating the violence and restoring order, and the longer term interest of minimizing the revolutionary potential of the violence and of maximizing the long-run legitimacy of the elite (Balbus 1973:13). Legitimacy is of central concern also to E.P. Thompson who dealt with the paradoxes of the use of the legal system in political disputes in his analysis of the Black Act in the beginning of the eighteenth century in England (Thompson 1975). This draconian Act criminalized an essentially political conflict between yeoman and oligarchs about customary rights. Thompson indicates the paradoxical way in which even an instrumental use of the rule of law reinforces and gains legitimacy. Lawbreaking and legitimacy has been the focus of various researchers (LaFree 1998; Tyler 2006). Legitimacy has many faces and has been described as a slippery construct (Rosenfeld 2000), and its meaning and importance have been heavily debated (Beetham 1991). Following Beetham I consider a given power relationship not as legitimate because people believe in its legitimacy, but because it can be *justified in terms* of their beliefs (Beetham 1991:11).

Crimes committed in a setting of rising political tensions or violent political conflict, constitute a threat to the legitimacy of the state-monopoly of force.<sup>9</sup> The government may be in a deadlock posed by one or more of the following discursive processes in society<sup>10</sup>: growing perception of impunity, perception of abuse of the monopoly of force, decreasing taboo on the private use of violence, and opposing ideas about democracy, the constitutional state, and sovereignty. The

---

<sup>8</sup> Over the past decades researchers have developed competing perspectives in which they portray the criminal justice system as an institution that develops its own interests, is linked to interests in the larger society, and engages in practices that vary significantly from the ideal of formal legal autonomy (Packer 1964; Feeley 1979; Conley and O'Barr 1990; Lazarus-Black and Hirsch 1994; Ewick and Silbey 1998; Conley and O'Barr 2005). Research in this tradition can be traced back to the legal realists who first disputed the dominance of the formal rationalist approach to law in legal practice. The legal realists were followed by the law and society movement and critical legal theorists who all focused on the relation between processes and (power) relations in society on the one hand and law on the other (Tamanaha 2001).

<sup>9</sup> Elias, Norbert *Het civilisatieproces; Sociogenetische en psychologische onderzoekingen*. Utrecht/Antwerpen: Het Spectrum 1982; Weber, Max *Gezag en bureaucratie* Rotterdam: Universitaire Pers Rotterdam 1972 p.124-128; Reenen, P. van *Overheidsgeweld. Een sociologische studie vn de dynamiek van het geweldsmonopolie* Alphen aan den Rijn: Samsom Uitgeverij 1979, p.17

<sup>10</sup> Terwindt, C.E. *The Challenge of the Monopoly of Force* 2004b, unpublished, 50 pp

monopoly of force of the state is challenged when protesters decide that their political aims justify the use of violence. Legitimacy of the monopoly of force is further eroded when victims start organizing and threaten to take the law in their own hands. These retaliatory discourses have been observed in the case study in Chile on the conflict between indigenous people and land owners where rumors spread of paramilitary activity by private land owners.

It is the responsibility of the government to define the violent challenges to its authority. Paul Brass emphasizes the importance of the analysis of these definitions by focusing his book on “the struggle to interpret violence, the attempts to govern society or a country through gaining not a monopoly on the legitimate use of violence but to gain control over the interpretation of violence”.<sup>11</sup> Obviously, the government has to take action to restore its legitimacy and has to develop a certain “legitimization”-strategy.<sup>12</sup> This strategy is embedded in the interpretation of the events amounting to the violent incident(s). Whereas a legitimization-strategy can very well take place outside of the criminal justice system and for example involve negotiation practices and reconciliation, I focus on criminal policy and the way this plays out in criminal prosecutions. I define criminal policy as the “development and application of classifying concepts with regards to deviant behavior and its social definition, in which the key question is the reach and organization of the criminal law and criminal justice system” (de Roos, 1987:4, translation by author). I thus conceptualize criminal prosecution as a particular way of presenting and institutionalizing a discourse, and therefore certain interpretations about the conflict. This discourse is reproduced in the decisions and choices made in investigations, litigations and punishments of specific crimes.

The discourse of the prosecutor in ordinary criminal cases can usually be characterized by what Nonet and Selznick (1978) called “autonomous law,” or what Balbus following Weber called “formal rationality” (Balbus 1973; Nonet and Selznick 1978).<sup>13</sup> This strategy can change however, when the prosecutor is challenged by a violent political threat and the normal approach no longer seems adequate. What strategy does the prosecutor use to maintain or regain legitimacy? Based on the (policing) strategies described by van Reenen (1979) the expectation was that the prosecutorial system during the course of the escalation of the conflict will abandon the “formal

---

<sup>11</sup> Brass, Paul R. “Introduction: Discourses of Ethnicity, Communalism, and Violence” in: Brass Paul (ed.) *Riots and Pogroms* Washington Square/ New York: New York University Press 1996, p.45

<sup>12</sup> Van Reenen, P. *Loc. Cit.*(1979)

<sup>13</sup> Nonet and Selznick Nonet, P. and P. Selznick (2005). Law and Society in Transition: Towards Responsive Law. New Brunswick, Transaction Publishers give four characteristics of autonomous law: 1. Law is separated from politics; 2. Model of rules; 3. Procedure is at the core of law; 4. Strict obedience to positive law. The idea of formal rationality draws on a distinction between formal procedures and substantive justice Weber, M. (1978). Economy and Society. An Outline of Interpretive Sociology. Berkeley, Los Angeles, University of California Press.

rationality” approach. An important reason for this change is that the police and judicature can become (perceived as) actors in the political conflict. The violent process thus threatens the legitimacy of the government and its institutions. This threat results in a double agenda for the prosecution: intervention by the criminal justice system also serves the purpose of retrieving legitimacy for that system itself. The political tensions will spur the prosecutor to search for a new discourse that is able to counter the feared radicalization of dissidents and escalation of violent conflict. If the prosecutor is forced to abandon formal rationality, when and how does he/she make this choice and how does this choice play out in the criminal proceedings? How the prosecutor reacts to a crisis of legitimacy and the development of a conflict obviously depends on the perception and interpretation of the prosecutor.<sup>14</sup> This issue will be addressed by analyzing the prosecutor’s “threat perception” (Davenport 1995). The threat perception can be seen as the intervening variable in prosecutorial decision-making in cases of political conflict.

My hypothesis thus is that the dynamics of conflict escalation and radicalization in combination with the threat perception of the authorities lead to a shift in the approach to legal repression as the conflict intensifies. Based on the literature I assume that the government has to deal with two increasingly competing interests of order and legitimacy. In this dissertation I will identify the different legitimization strategies that the prosecutor employs in criminal proceedings related to the political conflict. I will analyze the impact these strategies have on the use of criminal law terminology and principles and the way in which the facts of the given case are represented.

A shift in a prosecutorial strategy can be observed as a set of changes such as:

- Prosecution of a group of actors as a collective instead of the individuals of the group as individual defendants
- Discussion of political motive is often taboo or deemed irrelevant in ordinary criminal cases. A shift can occur where this element is considered either necessary to prove the elements of the offense or desirable to address this issue in the courtroom
- Use of a prosecutorial strategy that treats criminal acts as part of a series of incidents (to demonstrate a pattern) instead of isolated acts
- Starting point of investigation suspect-driven or offense-driven

---

<sup>14</sup> Della Porta and Reiter della Porta, D. and H. Reiter (1998). Policing Protest; The Control of Mass Demonstrations in Western Democracies. Minneapolis, London, University of Minnesota Press faced this same problem in their conceptualization of influences on police conduct. They introduced the term ‘police knowledge’ to describe the process in which everything had to pass the interpretation and perception of the police in order to have a certain influence on their behavior.

These changes can be identified as they are displayed in the choices in the construction of the criminal case. Once the prosecutor has chosen the legal approach to a criminal prosecution, this in turn will constitute the boundaries and logic within which the case will be represented (constitutive power of law, Milovanovic 2003). “[L]aw helps constitute *discursive formations* [...] which then function to both place limits of possibility on social action and impose specific forms of discursive possibility” (Hunt 1993 in: Milovanovic 2003). The above-mentioned changes constitute a discursive shift in the political strategy of the prosecutor. I thus focus on the transformation of the political interpretation of ‘facts’ into choices of legal terminology and criminal procedure. This comparative perspective on criminal law corresponds with the notion of a “basic grammar of criminal law” shared across Western legal systems.<sup>15</sup>

The different modalities in which criminal justice can work have been elaborated upon specifically for so-called “states of emergency”. These analyses tend to be both theoretical and normative. In his theory on the “enemy penology” Günther Jakobs (1986, 2003) distinguishes between a ‘normal’ criminal law which is applied to citizens and a ‘special’ criminal law which the state applies to enemies. Whereas he does indicate that these models are ideal-types, it is not clear in his treatment how the process from ‘citizen’ to ‘enemy’ occurs in reality. In addition, although he does give some concrete examples of the differences between these ideal-types, his description is mainly abstract and refers to general principles whereas it leaves open what it actually means for the application of offenses and criminal doctrine in a concrete situation. In this dissertation I will show when and how in concrete cases citizens are converted into enemies and what the criminal doctrine of this ‘enemy penology’ looks like in practice.

---

<sup>15</sup> Fletcher, G. P. (1998). Basic Concepts of Criminal Law. New York, Oxford, Oxford University Press, Fletcher, G. P. (2006). "The Grammar of Criminal Law." Of course, due consideration will be given to the unique political and legal features of countries, examples of which are the jury and an elected prosecutor in the United States.

**Chapter: the contentious process of prosecutorial qualification in the Basque conflict**

1.	Introduction.....	9
2.	Data.....	9
3.	The Conflict – Basque separatism and Spanish unity .....	10
4.	The Transfer – from the political conflict to criminal justice issues.....	11
5.	The Audiencia Nacional .....	13
Conflict Dynamics: the challenges to order and legitimacy .....		13
6.	Activists challenging the law – the armed struggle .....	13
7.	A coup, taking the law in own hands and paramilitary activity.....	15
8.	Victim Mobilization – from victims to victim organizations .....	15
Criminal Policy: what happens to formal rationality?.....		22
9.	What Is ETA?.....	23
10.	Who Is Subject of Prosecutions? From commandos to mayors .....	26
11.	Street Violence: from public disorder to terrorism .....	30
12.	Conclusion.....	35

## **1. Introduction**

This chapter on criminalization in the Basque conflict will show how throughout the conflict the prosecutorial definition of ETA has changed, and how more and more people and actions have become subject to criminal prosecutions. An example shows the discrepancy in understandings about what is ETA. In the trial on the illegalization of a Basque political party the defense lawyer is interrogating one of the police experts. The police expert claims that in a public speech a mayor from that political party had openly called for support for two ETA-members who were detained and allegedly tortured. Defense lawyers: "did she use the word 'ETA'?" Expert: "she said 'Basque political prisoners' which everyone understands as ETA-prisoners." In this chapter we will analyze whether it is true that "everyone" understands Basque political prisoners to be prisoners of ETA.

In this chapter I will first briefly give an overview of the conflict in Spain. Then I will discuss how this political conflict has entered the criminal justice system. I will give a short overview of the most important elements of the Spanish criminal justice system and terrorism legislation. I introduce the Basque activists and their struggle to achieve their political goals. After the activists I will discuss the victims and their efforts to push for application of the criminal justice system. Having thus analyzed the important processes in the Basque conflict and given sufficient information to understand the Spanish criminal justice system, it is time to analyze the criminal policy and its development throughout the conflict. I will start with an analysis of the different images of ETA that circulate. Then I discuss several elements of the course followed by prosecutors: who they target, and the activities that get criminalized, from speech and expressions, to financing ETA, civil disobedience, street violence, social movements and the illegalization of political parties. I combine the analysis of conflict dynamics with doctrinal questions such as the preservation of the presumption of innocence, the logic of causality and the distinction between motive and intention.

## **2. Data**

During the six months I spent so far in the Basque Country I have collected information on the Spanish criminal justice system, the relevant parts of the penal code, and the anti-terrorism legislation. In addition, I have collected data on the escalation and radicalization processes in the conflict, by studying ETA and the state and their respective conflict behaviors as well as the public support for their decisions and actions, drawing upon available data from academic literature, surveys such as for example conducted by the academic team in charge of the

Euskobarometer, public declarations made by ETA and the state, as well as some of their internal documents. I have observed arguments and behavior during one of the major criminal trials ongoing in the Audiencia Nacional specialized in terrorism cases. Further, I have been present at some of the major nationalist mobilization efforts throughout the Basque Country. Finally I have conducted 30 interviews with actors from the different political sides as well as from the criminal justice system, prosecutors, victims, lawyers, and defendants. Through qualitative analysis using Atlas.ti I have analyzed the different interpretations and definitions of protest activity and the use of criminal law terminology by the different actors.

### **3. The Conflict – Basque separatism and Spanish unity**

In this section I describe the political conflict, its actors, their perceived incompatible goals, and the conflict behavior, including protest activity, violence and negotiations. In the analysis of the use of the criminal justice system in the Basque conflict I focus on the period after Franco. I will briefly give an overview of the recent history of Basque separatism and the transition to the current organization of the Spanish state.

The political conflict in a nutshell is about self-determination for the Basque Country.<sup>16</sup> It is not the goal of this inquiry to discuss the different understandings of self-determination in detail. It is important however to keep in mind that some groups advocate nothing short of independence, whereas others are willing to settle for a high level of autonomy. Self-determination is incompatible with the Spanish Constitution which claims Spain as united and undivided (article 2). This means that not only independence is unconstitutional, but also a referendum that takes the Basques as the deciding group is unconstitutional.<sup>17</sup> One left nationalist explained his view as follows: “it is about the equality of political projects. The Constitutionalists have it all, whereas the Independentists have nothing. That is inequality. We don’t even have “the right to loose”.” He thus redefines the “right to decide” which is the right to a referendum to decide on the self-determination of the Basque Country. “They say that we will loose. OK, we’d like to see that. Democracy means that everyone can try to persuade the people.”<sup>18</sup>

---

<sup>16</sup> By talking about the “Basque Country” I avoid the difficult choice between ‘pais vasco’ (Spanish usage), ‘Euskadi’ (associated with the moderate Basque Nationalist Party, PNV) or ‘Euskal Herria’ (associated with the left nationalists and ETA). Euskal Herria does not refer to the Basque Autonomous Community but to the seven provinces which nationalists claim to constitute the desired independent entity. When more specificity is needed, I will make clear exactly to which provinces I refer.

<sup>17</sup> This was recently confirmed in a recent decision by the Constitutional Court which ruled that a referendum planned by the president of the Basque Autonomous Community was unconstitutional and thus illegal.

<sup>18</sup> He expressed this view in a conversation with the author after the trial day on 17 June 2008.

During the Franco dictatorship ETA had evolved as a student group aiming for more radical resistance than they found in the more moderate Basque Nationalist Party (PNV). Whereas ETA was founded in 1959 it was not until 1968 that the first killing happened. In 1973 ETA killed General Carrero Blanco, the supposed successor of Franco. This action gained quite a bit of popular support for ETA (Douglass & Zulaika 1990). In 1975 Franco died and the transition started. Adolfo Suarez has been the architect of this transition. In 1978 the new Constitution was presented for a referendum. The referendum got accepted, although it is important to note that in the four southern provinces constituting the Spanish part of the Basque Country only 35% voted in favor of the Constitution (O'Brien 2003:111). This lack of legitimacy is still often cited by activists.<sup>19</sup>

One important actor in the political conflict is the left independentist movement.<sup>20</sup> Their goal is a free and socialist Basque Country.<sup>21</sup> Political parties in the Basque Country habitually get divided in 'Spanish' parties and 'Basque' parties. 'Madrid' policy is viewed by nationalist Basques as undue "centralization". In the eyes of nationalist Spanish people however it is about equality between the different autonomous communities. "Why would they get more than we do?" is the sentiment. From 1982 onwards the socialist party (PSOE) was in power in the Spanish central government. Only in 1996 did the rightwing party (PP) get into power. The history of interaction between ETA and the state has consisted of violence punctuated by three rounds of negotiations. In 1989 there were negotiations in Algeria. These didn't succeed. In 1998 there was a second failed attempt, followed by failed negotiations in 2006.

#### **4. The Transfer – from the political conflict to criminal justice issues**

In 1978 the Spanish government accepted a broad amnesty law providing amnesty for all political prisoners who were detained under the Franco regime. "The day after the amnesty the prisons were filled again with political prisoners", says Txabi, a lawyer and human rights activist, as a matter-of-fact, apparently not feeling the need to address what exactly prompted their

---

<sup>19</sup> After the Constitution, the specific competencies of the communities got negotiated and in 1979 the Basques could vote in favor or against the Agreement of Gernika in which the division of powers was determined. 53% voted in favor of this agreement, and it is a point of dispute whether this means that through this the Constitution also got accepted or not (O'Brien 2003:112).

<sup>20</sup> A short note on terminology; in reference to the groups most important for my analysis I will refer to 'Spanish nationalist', 'Basque left nationalist', 'Basque moderate nationalist' and 'Spanish rightwing'. I hope this is specific enough to avoid oversimplification, without entering in too much of the internal complex differences that exist within these categories.

<sup>21</sup> Some disagreement exists as to whether the nationalist sentiment or the socialist program is more important. Most of the activists argue that real socialism is not possible within the context of the Spanish and French states, so that even though that may be the ultimate goal, it cannot possibly be achieved without independence first.

detentions. Every conflict has the “chicken-and-egg”-question. Who started the violence? And each actor provides a different, often self-serving, answer. Same story in the Basque conflict: is there legal repression and militarization in the Basque conflict, because of the presence of ETA? Or is ETA there to defend the Basque people against undue legal repression and militarization? Either way, the criminal justice system is brought into the conflict. This means investigations, criminal proceedings, and prisoners. As we have seen in the other cases this transfer can have many consequences for the dynamics of a conflict as it draws in other actors, creates alliances, creates collective enemies, and it adds a different way (logic and terminology) of arguing about the conflict.

The criminal justice system excludes the political conflict from consideration. The question whether or not the Basques have the right to auto-determination is excluded from criminal proceedings. Whereas for Basque nationalists this is the first fundamental violation of their rights, Spanish people do not enter this debate, (only sometimes to emphasize that by the way Basques do not have this right), and argue that that is not relevant to determine the crimes of ETA. Spanish people emphasize that it is not a crime to advocate for independence, and then move on to discuss ETA’s actions in criminal law terms.

Concretely, this transfer means that activists switch part of their time and money from their political goal to issues of criminal justice in reaction to the legal repression they face. One can observe numerous actions of solidarity with what nationalist Basques call “repressed activists”. The prisoner support group “Gestoras pro Amnistia” was created in response to arrests and detentions and prospers in more villages and towns once more people face arrests and detentions. Money is needed for trials and there is a significant increase in rallying around criminal justice issues: demonstrations in front of prisons, honoring ceremonies for prisoners, hunger strikes for better prison conditions. What to do with the prisoners becomes a political issue (amnesty, reintegration, dispersion) and there are websites for political prisoners and issues of torture, how to react in case of arrest and information about ongoing trials.

A number of people identify with repressed activists and *their* repression becomes *our* repression. Many activists identify with the prisoners. In a very real sense they feel that they could have imprisoned as well. I interviewed a lawyer who has been affiliated with a prisoner support group which has been illegalized. He tells that he has no idea why many of his friends were indicted whereas he was not. According to him there is no difference in the kind of work and the kind of involvement that he had and that they had. Similarly, Juan from the illegalized organization Segi tells that many people from his organization face harassment. He has no idea why he hasn’t been

arrested, although it is clear that he expects that this may still come. In addition to this real sense that some other people are facing repression that you might have faced instead, among left nationalists there exists the strong notion that the prisoners are suffering for the same thing every Basque left nationalist is fighting for: a free and socialist Basque Country. So even if you might not share or support their methods, they are suffering for you. Numerous villages are filled with the flags that say “bring the prisoners back to the Basque country.”

## **5. The Audiencia Nacional**

The criminal prosecutions related to the Basque conflict can be divided into the prosecutions that are conducted by the Audiencia Nacional (AN) and those that are done by local prosecutors in the Basque Country. The Audiencia Nacional was founded in 1978. Critics point out that it neatly replaced the Tribunal of Public Order (TOP) which was a heavily criticized instrument used by Franco to detain political opponents. The Audiencia Nacional was founded by an executive decision.<sup>22</sup> Critics claim that this adds to the illegitimacy of the tribunal.<sup>23</sup> After years of legal proceedings on this issue the European Court for Human Rights in Straatsburg ruled that the Audiencia Nacional was a legitimate court.<sup>24</sup> That decision effectively wiped the issue of the table, at least legally. Still, criticism is widespread in the Basque country, also outside of the left nationalist movement. What does the Audiencia Nacional do? In the words of one of the instruction judges, it is not a special court, but a *specialized* court. It specializes in terrorism, but also in money laundering, corruption and drug trade. Most people do not know these other areas also belong to the domain of the AN. The jurisdiction of the Audiencia Nacional is thus restricted to certain areas, one of which is terrorism.

## **Conflict Dynamics: the challenges to order and legitimacy**

What are the processes in the political conflict that challenge the legitimacy of the government? In this section I will discuss the relevant processes of escalation and radicalization.

## **6. Activists challenging the law – the armed struggle**

It is clear that the state monopoly of force is not respected in the Basque struggle. ETA does not consider the state’s monopoly of force legitimate and claims the right to defend the Basque people while using all available means in the struggle for their political project. Not only ETA but also for example Juan explicitly rejects the state monopoly of force. I am talking with Juan, a

---

<sup>22</sup> Check

<sup>23</sup> Manuel Lorenzo Perez, Los pecados de la Audiencia Nacional

<sup>24</sup> *ibid*

member of the youth organization Segi, now an illegal organization as the Supreme Court has ruled that it is a terrorist organization. Despite that judgment, the youth continue organizing and they don't hesitate to present themselves as members of Segi. Juan tells that his generation (he is 28 years old) hasn't lived one year without political and judicial harassment. "They are educating us in violence. If they don't give the youth the necessary instruments, then the reaction will be the only method they leave us, which is violence. It is a reaction to what we receive, and we respond in-kind. The state imposes this on us. It is our right to confront the violence. What we do is politics, and our goal is to overcome the violence." Many left nationalists maintain a state-of-exception-discourse to justify the use of violence: as long as there is neither democracy nor a constitutional state, the armed struggle is justified as a defense against oppression. Given the illegalization of the political party Batasuna, currently activists argue that any political means to fight for their political project has been taken away.

Even though less so now than twenty years ago, ETA still has substantial support for its armed struggle,<sup>25</sup> whereas the state does not have unanimous support for its claim to a monopoly of force. The armed struggle is a sensitive phenomenon, and there exist many positions. Between clear support and clear opposition exists an array of intermediate positions where people may not support it, though also not necessarily oppose it. Some people I spoke with argue that this group is significant. A survey conducted in the Basque country posits the following statement: "today in Euskadi one can defend all ideas without the necessity to recur to violence" and it shows the answers from 1989-2007. A clear majority in agreement with the statement fluctuates around the 80%. Still, a significant and constant minority in disagreement fluctuates around the 10%, sometimes amounting to 20% (Euskobarometro, accessed 7 April 2008). (A third category response is 'don't know').

During the 80s ETA maintained the action-reaction-action doctrine, engaging in actions that would provoke a reaction by the state and then reignite action by angry citizens. Since 1992 the number of battle-related deaths has not surpassed the 25, whereas at its height in 1980 ETA killed 82 people (excluding ETAp and CCAA who killed respectively 5 and 9 people in that same year). Since the 80s however ETA has made several important qualitative leaps in its choice of targets. In the 80s the majority of the killings took place against Civil Guards, in the 90s there were fewer deaths, but those were often more spectacular, aiming at high level politicians, journalists, and judges.

---

<sup>25</sup> I specifically distinguish between support for ETA in its armed struggle, and support for the left nationalist project. Support for the left nationalist project can be measured by looking at the votes of Herri Batasuna and Batasuna (for a reflection on the validity of this measure, see for example Douglass and Zulaika 1990).

## **7. A coup, taking the law in own hands and paramilitary activity**

In this section I will discuss the beginning of the 80s in which a failed military coup and activity by paramilitary groups put violent pressure on the government not to give in too much to Basque nationalists and threats by ETA.

In the 80s military thinking dominated the Spanish approach to ETA (Iñigo Iruin 2001). The foundation for the anti-terrorism policy is the so-called Plan ZEN. Throughout the 80s the threat of a military coup provided a strong incentive for the government to appease the rightwing. In 1981 general Antonio Tejero Molina had attempted a coup and almost succeeded. Between 1983 and 1987 was what has come to be called the "Dirty War". In this period the "GAL" killed 27 persons (Calleja & Sanchez-Cuenca 2006:97). In criminal prosecutions in the 90s some of the truth regarding this Dirty War and its organizers got revealed. Mercenaries got hired by government officials in order to kill ETA-members who had sought refuge in France. One possible motivation was to force France to change its position and cooperate with the Spanish state instead of offering ETA-members safe sanctuary. Several innocent people got killed as a result of mistakes. Also the leader of the left nationalist political party got killed. In the beginning of the 80s there were also rightwing groups active, such as the Batallon Vasco Espanol and Triple A. These groups engaged in the killing of ETA-members. They were labeled "uncontrollable" by the Spanish government. In total about 80 persons were killed between 1979-1987 by these groups (ibid: p.97).

[Further elaboration needed].

## **8. Victim Mobilization – from victims to victim organizations**

I am having a coffee with Angela who is working with the organization "*Dignidad y Justicia*". They advocate for a stringent application of the criminal justice system. She has been involved in some of the big court cases against the left independentist movement. She has been threatened by ETA and has to go everywhere with body guards. Now she has escaped her bodyguards for a second so we are alone. As we sit down, she asks me to change places. She explains that she is not allowed to sit with her back to the door. Personal safety is a constant concern for the people I interview who are opposing ETA and/or Basque independence. They have bodyguards, they park their cars in obscure places, and they check their car for bombs before they start driving

(see for more testimonies for example la Pelota Vasca). ETA's threats and violence have a daily impact on their lives.

I will argue that the current criminal policy in Spain can not be understood without analyzing the dynamic and the growth of these victim organizations and the discursive emphasis on the victim as an important subject for the state.

#### From victims to victim organizations

Until the 90s the victims of ETA were severely neglected by the Spanish society, the Spanish government and the Basque government. They were viewed as "collateral damage" and being forgotten. Judge Garzon writes: "the victims were a mere statistical fact when it came down to terrorist acts" (2005:160-161). In 1981 the first victim association was founded, the Asociacion de Victimas de Terrorismo (AVT). Originally mostly constituted by the widows and parents of Civil Guards they expanded in the 90s. From the start they advocated for a better treatment of victims as they felt "abandoned and marginalization by the state and many sectors of the Spanish society" (website AVT). A complaint was for example that they were not even notified when the trial of a defendant in their case was (interview spokesperson AVT). A further issue was financial compensations for family members. A major effort by the AVT is to create what they call the "civic rebellion" which refers to awareness in Spanish society. The success of this rebellion is claimed for example in huge turn outs in demonstrations in Madrid (Alcaraz 2008). The creation of victim organizations constituted a new player in the conflict dynamic. Important events such as the murder of Miguel Angel Blanco have bolstered the efforts of these organizations to create visibility and support. The AVT currently is one of the best known victim associations, but there are many other associations of victims, organizations working on behalf of victims, and organizations pressing for court actions in terrorism related cases.<sup>26</sup> It is outside the scope of this chapter to deal with all their differences and opposing political affiliations.

#### Victims as a category

Criminal justice logic is about perpetrators and victims. The AVT in Spain employs this language successfully. Whereas a conflict is always more complicated than a simplistic division into victims and perpetrators, guilt and innocence are supposed to be clear-cut in criminal justice (Hulsman 1986). The AVT denies the existence of a conflict, and emphasizes the criminal justice

---

<sup>26</sup> Important other organizations are Manos Limpias, Espana y Libertad, Dignidad y Justicia, Gesto por la Paz, Fundacion Fernando Buesa, Foro de Ermua, Covite, Fundacion de Victimas de Terrorismo and Fundacion de Miguel Angel Blanco. Not only are there a variety of different kinds of organizations, it is important to keep in mind the difference between individual victims and victim organizations. Several victims have indicated their distance to these organizations speaking "on their behalf."

terminology as the only right perspective. Adopting the criminal justice vocabulary Basque leftist nationalists often try to turn the tables and point to the many instances in which they are victims: they emphasize extrajudicial killings, torture, and indiscriminate detentions. More often though than replicating this criminal justice logic of victims and perpetrators, left nationalists bring in their perspective of the conflict in which there are no exclusive victims but opposing political projects and a long history of violence.

#### Who are victims?

The political issues surrounding victimhood (who is entitled to financial benefits and who isn't) create the necessity to delineate who is a victim and who is not. Victim-definitions for example also play a role in the oft-heard term "blood-felonies." The former president of the AVT relates of an incident where he spoke with a high government official during the 2006 truce. In reference to the "process of pacification" the official talked about the possibility to release ETA-prisoners who didn't have "blood-felonies." The mother of an ETA-victim asked the official whether her child, who wasn't killed, but lost two legs, would be counted as a "blood-felony" or not (Alcaraz 2008:107).

#### Are ETA-victims innocent?

"*Algo habra hecho*" – he must have done something. This phrase could commonly be heard by left nationalist Basques when ETA has assassinated someone.<sup>27</sup> The common assumption behind this phrase is that ETA-victims are 'guilty' of something or somehow 'deserve' to die. Many rumors among left nationalist youth after the murder on Isaias Carrasco provided these reasons. One such rumor held that he snitched information to the Spanish police. The belief that victims of ETA somehow could be held responsible for something clashes strongly with the notion upheld by the AVT that there is no conflict. There is no conflict to which they are a party; there is no conflict at all. The AVT maintains that political disputes involving the Basque Country do not supersede the normal politics that in every country is daily business. The assessment of innocence plays a role once we view how different actors define ETA's actions. Innocence is an important ingredient for terrorism (Zulaika and Douglas 1990). The fact that ETA's victims are considered to be innocent is one reason that ETA's actions are prosecuted as terrorism. A young member of the left nationalist youth organization Segi does not accept that attacks by ETA are terrorism, as he argues that ETA does not perpetrate indiscriminate attacks. In his worldview, ETA attacks the state.

---

<sup>27</sup> Calleja & Sanchez-Cuenca (2006) mention how common this attitude was at least in the 80s, I have heard this phrase myself after the murder on Isaias Carrasco from a young man from a little village in the Basque Country.

"Todos Somos Isaiah" - Identification

One of the most recent victims of ETA was Isaiah Carrasco, a local former councilman in a village in the Basque Country for the Socialist Party. The subsequent issue of the magazine of one of the victim organizations titled: "We Are All Isaiah." In great contrast to the early 80s where victims were ignored, now everyone expressly identified with the victim.<sup>28</sup> This corresponds to the interesting paradox that whereas in numbers ETA-killings have ceased enormously since that time (from 96 deaths in 1980 to 3 deaths in 2003) the newspaper Correo announces on 9 June 2008 that "now everyone can be a victim of ETA." This reflects the qualitative leaps that ETA has made in terms of its 'acceptable targets.' The editorial of the Correo backs up its conclusion by referring to ETA's latest attacks: now also murders in France have occurred. Urban attacks previously restricted to areas outside of the Basque Country, now have also occurred in the Basque Country. After the leap that ETA started killing politicians, now ETA also has killed politicians after they have left their position. And after the expansion to politicians, now also the press has been under attack. And finally, whereas the previous opus moderandi of ETA was that they always notified their attacks on civilian buildings, now there had been an attack on a newspaper building without previous notification.

Victims don't feel protected nor that justice is done: impunity and the rule of law

"There is no criminal justice system here" says Pablo when I tell him the subject of my research. "We are the losers, we are the poor bastards". His plain verdict corresponds with the complaints by the spokesperson of the AVT who listed their grievances ranging from the fact that hardly any people are being prosecuted to the way in which victims are treated when they attend the trials.

Impunity is one of the elements which I see as a recurring complaint in each of my cases. Garzon argues that forgetting is a basic aspect of impunity. Impunity has perpetrators. Garzon is explicit when he attributes the blame for the impunity to the "indifferent ones" and their "silence" and "passivity" which enables the continuing aggression and the continuing impunity (2005:170). The history of impunity in all nations is the history of cowardice" (2005:172). This call on the citizens to speak out is shared by many of the victim organizations. Victims in this view are sacrificed in exchange for a flawed peace. Many victims and victim organizations for this reason have opposed the last round negotiations with ETA.

---

<sup>28</sup> See also Judge Garzon (2005, p. 163) where he observes this change.

Victims call on the so-called “estado de derecho” (constitutional state/ rule of law/ rechtsstaat) to claim their right to protection. We have seen this in the case of Chile where landowners call on the estado de derecho, and we see it again in Spain. Whereas traditional constitutionalist interpretations see the concept of the “rechtsstaat” as a protection for citizens against arbitrary state repression, in these cases we see that victims use the term as a toolkit the state is supposed to use to protect them. Further, victims often argue along the same lines as we have seen with Jakobs (2003) where they view rights as a zero-sum game. If the state grants the defendant certain rights, this means the negation of their rights.

#### Victim lobbies on criminal justice

Victim organizations lobby for concrete ways to apply the criminal justice system. For example, until a recent verdict, in Spain sentences were capped at a maximum of 30 years. In addition to this cap prisoners could be released after they had fulfilled two thirds of their sentence. This meant that a convicted ETA-member could be out in the streets after 18 years of prison, even if their sentence could run up to 1,000 years for all the crimes they had committed. For victim organizations this was unacceptable. They advocated therefore for a “full completion” of the sentence. Concretely, they wanted that the two-third-rule was applied not to the 30 years cap, but to the entire sentence. They succeeded in court, and the new interpretation is called the “doctrina Parot”. This sentence is highly controversial among left nationalists who speak about “hidden life sentences.”

Victim organizations also lobby around specific cases of specific individuals. A famous example is the case of Iñaki de Juana. He was a member of the Madrid commando and in that capacity responsible for some of the most deadly attacks by ETA. Representatives of victim organizations call him a serial killer. He was about to be released after 18 years of prison and victim organizations brought all of their weight into the fight to keep him in prison. Their mobilization ranged from demonstrations, petitions, conversations with prosecutors, to press releases. A spokesperson of the AVT vouched that he is confident that it was due to their effective action that Iñaki de Juana was tried for new charges and sentenced again to a prison sentence.<sup>29</sup>

Victims have been active in the criminalization of a whole new area of offenses: those in which victims get humiliated. A change in the Penal Code in 2003 has added a new offense to the terrorism category: actions in which victims of terrorist acts are humiliated are a terrorist offense. Activities brought to the attention of the court under this offense are honoring ceremonies of

---

<sup>29</sup> Iñaki de Juana was released in July 2008 which caused massive mobilizations in Madrid and in the Basque Country. At the moment Iñaki de Juana is in Northern Ireland.

prisoners and street names in which streets are named after (alleged) ETA-members. In order to interpret these offenses it obviously has to be clear who are victims of terrorism, how big this class is allowed to be, what counts as humiliation, and whether humiliation is determined objectively or subjectively. These questions have not yet been answered. It is to be expected that victim organizations will be at the forefront of the struggle for their desired interpretation. In the section below on the criminalization of speech, this will be discussed in more detail.

Other initiatives on behalf of victims include the lobby to think about new statutes and new offenses to use against ETA. For a short while victims talked about “ethnic cleansing” and judge Garzon did one attempt to get this charge accepted by the court, however, he did not succeed. At the moment a new attempt involves the notion of “crimes against humanity” as this is one of the crimes that are recognized under the Rome Statute of the International Criminal Court. Simultaneously, victims advocate for the inclusion of “terrorism” as one of the crimes under the jurisdiction of the Rome Statute. These activities are subject of international organizing in which Spanish victims of terrorism reach out and make alliances with victims of terrorism in other countries such as FARC-victims at an annual conference for victims of terrorism in Madrid.

The effort by victim organizations to have their voice heard coincides with the decision by instruction judge Garzon that “victims had to form part of the antiterrorist actions” (2005:161). It is important to connect the institutional rise of victim organizations with the fact that an important figure such as Garzon at the Audiencia Nacional emphasizes the victim as the reason for judicial investigations.<sup>30</sup>

### Popular Accusation

The main form in which victim organizations have influenced the criminal proceedings related to the Basque Conflict has come through their use of the Popular Accusation. Victims have two ways in which they can represent themselves as a prosecuting force in a criminal trial. They can choose to follow the way of ‘private accusation’ or the way of ‘popular accusation.’ A victim can be a private accuser when the victim is the specific victim in the case. The popular accusation can only be used when the organization represents the class of victims that is relevant in the case at hand. Since the beginning of the 90s the AVT has employed the Popular Accusation in order to promote the interest of the victims. At first, a spokesperson tells me, this was merely a

---

<sup>30</sup> The fact that the AVT criticizes Garzon that he does not enough for victims or compromises the victims in times of truces is only a signal of the divisive nature of the subject. It is clear that Garzon’s emphasis on victims has been an important factor in the leverage victims have today.

way to ensure that the victim would be notified of the date of the trial. Now the surreal situation has emerged that in one trial the state prosecutor has retreated from prosecution after examination of the evidence whereas one of the victim organizations maintains this prosecution against a Basque newspaper. This obviously calls for questions about representation. Who do they represent? Who does the AVT represent? How much support do they have? Which specific victims are represented? Or how is the 'class of victims' defined? Is this Popular Accusation legitimate?

#### Individual victims become "the victims"

Collective action on behalf and by victims thus creates the notion of a shared identity and shared interests, despite possible differences on other counts. This shared identity is maintained and furthered in various honoring ceremonies for the victims of terrorism. Victim organizations have successfully created the notion of "the victims." Individual cases and individual stories are merged in one story of "the victims". All the mobilizing and organizing by victims has had as result that they have become a significant force in electoral politics. As expressed by the son of an assassinated Civil Guard: "first we didn't have a vote, now we can influence the vote." He rejects this extreme politicization of victims. Rumors have it that it is not in the interest of the main political parties to terminate ETA as that would end their electoral trump card.

Why is it important to understand the notion of "victim" and how different actors present and use it? No crime without harm is an important principle in criminal law (Roos 1987:34). The "juridical good" that is harmed and the nature of the harm are important elements I look at in the analysis of the changes in the criminal policy. The identification of victims plays an essential role in the assessment of harm. Judge Garzon writes that "the Spanish society took conscience that we were all victims of terror and the social or professional adscription was not important to feel the attack as an attack on you" (2005:163). The notion that "everyone" or "Spanish society" is a victim is a necessary corollary of offenses in which the "security of citizens" or the "public peace" is considered to be under attack. These concepts have proven important in the development of anti-terrorism laws throughout the past decades. In 2003 the Penal Code introduced "*enaltecimiento*" (glorification) as one of the terrorist offenses. The harm here is the "discrediting or the humiliation of the victim or its family members" (art. 578 CP). The centrality of the persons of the victims and their personal feelings cannot be found in earlier legislation. In the discussion of criminal policy and its development below, we will analyze how the mobilization of victims and their effort to give meaning to notions of victims, victimization, and the identification of the harm play a role in this policy.

### **Criminal Policy: what happens to formal rationality?**

Collateral damage or assassination? On September 22, 2008, a Basque left nationalist newspaper reports the 'death' of a soldier when he was deactivating a bomb that was planted by ETA. The newspaper does not impose explicitly responsibility for the death. The newspaper also does not mention the name of the soldier. A Spanish rightwing newspaper on the contrary titles its article "ETA assassinates Luis de Conde".<sup>31</sup> Whereas the presentation by the rightwing newspaper makes the incident appear on a par with a targeted killing, the presentation by the left nationalist newspaper makes the death appear like collateral damage. These different reports reflect the obvious differences in perspective in any situation of political conflict. How do these differences come to play a role in the prosecutor's take on criminal proceedings? Does it lead the prosecutor to depart from formal rationality in the application of the law? In this section we take a close look at the development and application of classifying concepts.

I am present during the trial against prisoner support group "Gestoras". In his conclusion the lawyer of the Popular Accusation begins by redefining the terminology as used by the defendants. "They talk about fugitives and refugees. That language is misleading. A refugee is someone who as a consequence of a war has had to seek refuge. In Spain there is neither persecution nor war. Here we have a free country, where anyone can participate in the elections". At this remark there is a burst of laughing in the audience present to support the defendants. At the same moment that we are sitting in the Audiencia Nacional in Madrid, in the same city on the same day at the Supreme Court a hearing takes place on the illegalization of two political parties who identify as left nationalist. At trial in the Audiencia Nacional is a prisoner support group that since 1978 has lent support to all "Basque political prisoners." They also support "refugees, exiled, and fugitives". The defendants claim that their work of solidarity is being criminalized. The lawyer of the Popular Accusation is redefining their work of 'solidarity.' He intends to make clear that the people the defendants were supporting were "gunmen" instead of "refugees."

Also judge Garzon is very explicit about his attempts to reinterpret the terminology ETA employs. "The confusion has come to such a point that to avoid it I ordered that they make sort of a dictionary so that the manipulation of language would not interfere negatively with the investigations. For example, the terrorist is a militant, as if we deal with a political organization"

---

<sup>31</sup> Respectively Gara and El Mundo, 22 September 2008

(2005:299). In the following sections I will show the struggle about classifying concepts as it has taken place in criminal proceedings throughout the past three decades.<sup>32</sup>

## 9. What Is ETA?

What is ETA? Is it the vanguard organization or the people's army as ETA itself pretends to be? Is it like a mafia if it's more about money than politics as some people argue? Are they a handful of wacko terrorists who just don't know any other job and thus continue to do their thing as other people claim or are they a highly organized network that permeates the whole fabric of Basque left independentist organizations as the latest judicial verdicts claim it to be? "*ETA es mucho mas*" says the boy who sits in the bus next to me. This phrase – "ETA is much more" sounds like a refutation of something – more than what? It is one of those stock phrases that you hear over and over again when people touch upon the subject. Another stock phrase, but then employed by some left nationalists is "*nos sobreestimar*" – "they overestimate us." Again a refutation: in this view ETA is a handful, absolutely not as highly organized, and definitely not the grand organization able to dictate the behavior of many that is painted in the latest trials.

Most important in the development of criminal policy is the image-transition from the 'environment of ETA' to the 'ETA network.' Those who previously (in the 80s/90s) were situated in the 'environment of ETA' are now prosecuted as 'member of ETA.' In 1989 instruction judge Baltasar Garzon took office and he ordered policemen to collect all available documents whenever they arrested an ETA-member (2005). In 1992 there was an important police operation in Bidart in France. This led to the detention of the leaders of ETA and the confiscation of an enormous amount of documents. Garzon claims that the analysis of this collection of documents revealed a different picture of ETA than they what they had worked with before: "ETA is much more." What is ETA? The answer to that question is the key to the criminal policy with regards to ETA. Without attempting to give a comprehensive or complete overview of all the ETA-images available in the Spanish/Basque society, here I present some of the images that can be

---

<sup>32</sup> In the description of the different images that play a role in the application of concepts I am fully aware of the instrumentalist way in which these images are developed, on each and every side. Vd Broek has pointed this out in his article on the difference between legitimizations used by Basque youth about street violence (2004). He argues that the difference between what he calls 'ex-ante' and 'ex-post' legitimizations may have to do with the fact that youth are currently shielding themselves against prosecutions. On the other hand, activists often maintain that the Spanish state is simply "inventing stories" in order to bust the entire left nationalist movement. Of course, there is no simple way to determine the relation between image and reality. At this point it is sufficient to note that these images, regardless of their strict 'truth' or the sincerity by the person holding the image, clearly play a role in conflict dynamics and criminalization efforts. It is for this value that I analyze the content of these images.

encountered, to show their variety and the differences, and the way in which they relate to the ETA-image prosecutors presented in criminal proceedings throughout the conflict.

#### ETA about ETA

ETA views itself as the vanguard. Initially ETA conceived of the organization as the political and the military vanguard. Initially this also meant that ETA claimed to be in charge of the negotiations with the Spanish government.<sup>33</sup> ETA purports to represent the will of the Basque people. ETA described one of its earlier killings as executing the verdict of the Basque people (Alcedo 1994). The view promulgated by ETA is that it is comparable to the guerrillas that were present in Latin America. Currently, the comparison with the IRA is the favorite.

#### Left nationalists about ETA

"We all wish ETA could disappear, ETA itself wants that!" Iñaki answers me while we are present at the market place of Gernika. He has come to Gernika in order to protest the visit by the rightwing party "La Falange." He strongly refutes the notion that ETA would be a terrorist organization. They are a liberation army, I am also told by a sympathetic lawyer. Most people sympathetic to ETA emphasize that ETA acts in defense. ETA in their view is only a reacting force to the violence the state imposes on the Basque people.

#### Rightwing victims about ETA

"The Basque president also belongs to ETA" is what a family-member of victims tells me. That is the most farfetched and radical opinion on ETA I have heard so far. He retreats a little when I push him on this statement. But his general opinion is clear: First, the Basque president is as dangerous as ETA because he also pursues nationalist ideas and even is proposing a referendum. Second, everyone in the Basque country who has nationalist ideas is in some way connected to the general ETA enterprise and therefore more or less connected to the specific actions ETA is responsible for. Comparisons with Northern Ireland and the IRA are vehemently rejected. That was a political conflict with multiple sides, whereas ETA really is the only side using violence.

#### Garzon about ETA

Garzon attacks the dichotomy that was present in the 80s: the idea dominated that the military wing of ETA was different from the political organization. Garzon sets out to change this conception and show the connections between them, or what's more, that there is no

---

<sup>33</sup> In the negotiations of 2006 ETA has only talked with the government about issues such as the prisoners leaving the political discussion on self-determination and the future of the Basque Country to the negotiation table where Batasuna took seat.

fundamental difference: it's all ETA. His conclusion after analyzing internal ETA-documents is: "before anything this organization was purely politics, even though its methods were violent, it sought political changes, according to its sovereign projections over a part of Spanish territory (2005:290). He redefines the military wing as a political organization and in doing so redefines the political wing as part of the violent strategy of the military wing. "It was about demonstrating that a terrorist organization was something more complex than a mere collection of persons that kills, puts bombs, kidnaps and extortions to achieve its political objectives just as she presented us in her business card" (2005:297).

Garzon is frank and harsh in his assessment of police and judicial activity in the 80s. It is ineffective, uncoordinated and law enforcement has been following the rules of the game as set by ETA: only focusing on the military wing and accepting the strong division between the military wing and the political organization. This has not been effective, and Garzon sets out to design a new strategy.<sup>34</sup>

Until 1998 the concept of the "environment of ETA" was used to refer to the organizations and individuals being close to ETA in terms of the goals for which ETA fights (see Memorias of the General Attorney's Office). It was understood that collaborators were coming out of this 'environment of ETA', that the street violence was committed by youth who were considered to be the 'environment of ETA' in the sense that ETA for example would recruit from this pool. In this section I will analyze what happened to this concept and how it became redefined, or eliminated from the conceptual tools to prosecute, and replaced by a wider concept of the ETA-network.

What is a terrorist organization?<sup>35</sup> Again, prosecutors have to fight against the 'old' image that they themselves helped creating. In the trial against Gestoras it becomes something of a mantra that the prosecutor and Popular Accusation repeat over and over again: "a terrorist organization is not just a group of gunmen." They are fighting against the image of "*pistoleros*" (gunmen)

---

<sup>34</sup> Of course there is a chicken-egg question here: did the prosecutorial strategy change because of a real change in ETA? Or did the prosecutorial strategy change because only at that point they found out what ETA really was? Or is the imaginary just an easy way to persecute as many left nationalist activists as possible? Obviously different sectors in society argue different positions on this issue. In this section I argue that the different imaginaries of ETA are the key to understanding the criminal politics that is pursued.

<sup>35</sup> It was not until the trial of the youth organization Segi that this question became problematic again. In every sentence that the Audiencia Nacional delivered throughout the 80s and 90s ETA is referred to interchangeably as the 'terrorist organization' or 'armed band' without any further definition, explanation or proof. The Audiencia Nacional decided that Segi was not a terrorist organization. On appeal the Supreme Court decided that Segi is a terrorist organization.

which (still) seems to be something inevitably glued to the notion of terrorism. “You don’t need a weapon to be a terrorist,” argues Cristina of Dignity and Justice.<sup>36</sup>

### **10. Who Is Subject of Prosecutions? From commandos to mayors**

One of the most interesting findings of the legal repression in the Basque conflict is the enormous amplification of the “eligible subjects” for criminal prosecution. Cristina is a lawyer for “Dignity and Justice” and she tells me that at the time (1997) it was thought that prosecuting the Board of political party Batasuna (on charges of collaboration with ETA) would be “*la bomba*” (the bomb) – but “nothing happened” as she put it. It was considered to be outside the range of the imaginable to prosecute them. Similarly it was thought that the Law of the Parties (leading to the illegalization of Batasuna), would be impossible, but according to her also that went “well.” Recent prosecutions of high level officials in the moderate nationalist party PNV are other leaps, as this meant a significant expansion from the criminal prosecution of left nationalists to the prosecution of more moderate nationalists.

I am working on a table in which I aim to show that in the 80s the subjects of prosecutions were the commandos, whereas in the 90s it started to change and now it entirely changed. I am using the Annual Memoria of the Attorney General to get these data.

#### Prosecutions of Armed Attacks – ETA Commandos, Murder, Abductions (illegal detention)

Interestingly among left nationalists the prosecution of ETA-commando-members is not an issue at all. Those trials are almost unanimously described as “unproblematic”.<sup>37</sup> In another section I discuss in more detail the ways in which left nationalists challenge the definitions imposed by the state and de-legitimize the criminal justice proceedings in the Audiencia Nacional. Here is it sufficient to note that there is no attempt to challenge the state’s criminal definitions regarding ETA’s armed attacks. There is a general line in which the Audiencia Nacional is not recognized as legitimate. Trials against ETA-members pretty much all follow the same script. ETA-members

---

<sup>36</sup> Another issue that comes up once the definition of terrorism is at stake is the verdict in the case against rightwing uses of violence in the history of the Basque conflict. In the beginning of the 80s there were the so-called “uncontrolled groups.” It is disputed whether these groups were indeed as “uncontrolled” or “uncontrollable” as the administration has argued. In the case of the Dirty War connections with government officials and a certain amount of organization and planning were proven (reference). These organizations have not been judged as terrorist organizations (check verdicts). “What is GAL, what is BVE and what is triple A”? Are these other organizations also terrorist organizations? If not, what is the difference? In another section below I will discuss this issue further in-depth.

<sup>37</sup> This resonates with the remark by an animal rights activist in the US that certain acts are ‘unambiguously illegal.’ This contrasts starkly with his complaints about some other cases where “people hadn’t done anything” and their “legal actions” were criminalized.

declare that they do not consider the court legitimate, that they will not answer any questions, and that they ask their lawyers to refrain from defending them. Even though people may support the armed struggle and maintain and support a war-logic (such as acts in defense, or retaliation, attacks on military targets) to explain ETA's actions, there is no attempt to transfer these definitions to the criminal proceedings.

#### From the underground to the aboveground

After a heavy focus on commandos in the 80s, since the end of the 90s one can observe the criminalization of "above-ground" activists. It is clear that prosecuting members of ETA-commandos maybe did weaken ETA, but not destroy it. ETA seems to have a never-ending cadre of leaders. The government continually announces that now it has decapitated the leadership-cell. This has taken such proportions that one newspaper commented on this by referring to the "myth of the leaders of ETA." It is clear that ETA has had the capacity over the years to renew its leadership with sufficient speed to offset the blow of detentions. Even though the detentions in Bidart in 1992 seem to have given the organization a blow from which it never entirely recovered, the government has not proven to be successful to destroy ETA by detaining its leadership.

If anything, it decreased the number of attacks but fomented the qualitative leap in the kind of targets. One recurrent strategy we have also seen in the US prosecution of animal rights activists if prosecuting the underground activists is not possible or not effective, is that the prosecutors in order to stop violent actions shift their use of the criminal justice system to the "aboveground"-activists, redefine their actions in order to lump them on one pile with the underground-bad-guys, and prosecute.

This requires redefining the phenomenon, redefining the political activity of the aboveground-activists, creating a structural link between aboveground and underground activism (this can be done in various ways, or by proving a real connection, or by showing that as goals are shared, aboveground activists knowingly contribute to underground-activism, especially when justifying or apology-like speech-acts can be found, and therefore share criminal responsibility), re-defining the position, role and identity of the above-ground activists, linking the victims of violent action to the above-ground activists, and there you have your criminal case.

In the analysis below I will address several ways in which the government has expanded the eligible subjects for prosecution. I will start by broadly outlining the so-called "macro-trials." These trials started in 1998 and prosecute a number of Basque organizations.

### Macro-trials – the ETA-network

The previously so-called “environment” of ETA is being prosecuted since 1998 for “membership of a terrorist organization” and many of these proceedings are still on-going. A newspaper, a prisoner support group, café’s, companies, a youth organization, and a language institution, all have been illegalized or activities suspended, and the leadership has been indicted, and in some cases convicted because of “membership of a terrorist organization”. The charge is that a terrorist organization is not only an armed wing, but a complex organization of cultural, political, economic, and armed parts that work together for a common goal in one coordinated structure. Therefore they all belong to ETA. It is at this level that left nationalists complain about the criminalization of a whole sector of society, or a certain idea (independence). The macro-trials are trials with individual defendants, but the defendants are charged in connection to the organization or company in which they are actively involved. According to different interpretations, these trials are either designed to cut off the financial sources of ETA, or to crush the nationalist left.

Defendants in these macro-trials voice the same sentiment: they were working aboveground as they assumed that what they were doing fell squarely within the boundaries of the law. Prosecutors are frank about the challenge these cases pose. The problem with many of the organizations that are being prosecuted is that they do their work legally. This is clearly expressed when you read the accusation against *Egunkaria*, the Basque newspaper which has been charged with terrorism.

From the accusation:

“In the present supposition we don’t encounter the terrorist actuation in its manifestation of direct exercise of violence [...] Within these “mediating” entities, directed at articulating and strengthening the eventual popular backing coming from the denominated “population of reference” [...], but with the appearance of strict legality and with the cover of an absolutely legitimate actuation (including constitutional and legal protection, such as in this case the language – article 3 from the Constitution, and the freedom of information and expression – article 20 of the Constitution), but that would be utilized by the terrorist organization clearly for its goals and objectives, in a mid to long term strategy.”

The prosecutor argues that you will not find directly violent manifestations of the terrorist activity in this document. The author continues to explain that the newspaper is supposed to increase

popular support among the “population of reference”, but with a strictly legal appearance and a cover of absolutely legitimate activity. So, the activity of this newspaper which appears entirely in the Basque language is protected by art 3 of the Constitution which guarantees freedom of language, and art 20 of the Constitution which protects the freedom of information and expression. But... this newspaper is clearly used by the terrorist organizations, to achieve its ends and objectives in a mid to long-term strategy. What do we make of this? The problem is that there is a newspaper that is doing work that is clearly both legal and legitimate. However, the terrorist organization supposedly employs it for its objectives in the mid to long term because the newspaper is gaining support for the organization’s goals among a specific part of the population.<sup>38</sup>

As we observed earlier in the SHAC-case in the US, in the prosecution of aboveground activists we observe a confrontation between perceptions regarding what is legal and what is illegal. Many people in Spain who are in favor of these macro-trials voiced their frustration that the left nationalist activists have “abused” the spaces the law gave them to pursue their activities. In the words of a representative of one of the smaller victim organizations: “the left nationalists and the sympathizers of ETA, they laugh about the legality of the democracy. It is a fraud of law, they make fun of it. In this they are experts and their obsession of their life goes into this; all their energies go into this” (interview with author).

#### Attack on the finances of ETA – from companies to revolutionary tax

A strong belief has taken hold that by squeezing ETA financially it will not be able to continue. Follow the money. That seems to have been one clear device in the prosecutions. In the section below this will be described in more detail. For now it suffices to indicate that many years ago it would seem unthinkable to prosecute someone for giving money to ETA as part of the “revolutionary tax.” Now, that is exactly what is happening. Whereas before it was assumed that these payments are made under huge pressure and at the risk of kidnapping or worse. Now, with or without leaving the assumption of involuntariness, pressure is mounting to resist these payments.

---

<sup>38</sup> Below I will return to this case in order to discuss the issues raised in more detail. For example, what is the ‘goal’ that is referred to? Does the prosecutor refer to the legitimate goal of a free and socialist Basque Country? Or is the reference to the illegitimate goal of creating terror among the population? And what is the theory behind the relevance of this ‘population of reference’? It is important to note moreover that the prosecutor has dropped charges in this case for a lack of evidence. However, the Popular Accusation maintained by organization Dignity and Justice continues its prosecution.

Having discussed in this section the expansion of the 'eligibility' of *subjects* for criminal prosecution, in the following sections I will discuss several forms of *activity* that increasingly have become subject of criminalization. The first section deals with street violence and the switch by the prosecution to deal with this activity as terrorism instead of public disorder. After that I will discuss at large the criminalization of speech, starting by analyzing what 'speech' is and how speech comes to be re-interpreted as 'act'. This often involves a theory on the relation between speech and subsequent action and the interpretation of danger. We will see how the change in the ETA-image along with a changing conception of what speech means for example for victims, leads to the criminalization of shouting slogans in a football stadium, a song by a rock band, street names in villages in the Basque Country, and honoring ceremonies for released ETA-prisoners. I continue by zooming in on what left nationalists have called the "criminalization of the youth." In a variety of measures youth have been the subject of increased criminal prosecutions. The inhabitants of squats and leaders of youth houses that traditionally form a center for cultural activities have been subject to criminal prosecutions. Sentences for street violence have been very high as a consequence of the prosecution of terrorism, and the law on the minors has enabled prosecutors to ask higher sentences despite younger ages. Further sections deal with the criminalization of civil disobedience. And I will discuss more elaborately the issue of torture and the dispersion policy, two of the main charges of illegal repression leveled by left nationalists against the Spanish state.

### **11. Street Violence: from public disorder to terrorism**

Burning an ATM in Cadiz, Andalucía, and burning an ATM in Bilbao, Basque Country... is that the same thing, same offense, same crime? It's the one million dollar question in the criminalization of the *Kale Borroka* or street violence in the Basque Country. During the 80s burning an ATM in the Basque Country was prosecuted as a public disorder, as it is still in these days in Andalucía (check transcripts), and penalties would mostly amount to a fine or a conditional prison sentence. Nowadays some young Basques are serving up to 18 years in prison for this activity. Young nationalist Basques are angry about this overt unequal treatment of the same facts. A lawyer associated to the organization Dignity and Justice rejects this notion of inequality and asserts that the nature of the crime is entirely different. How did this happen? What are the differences between ATM-burning in Bilbao and ATM-burning in Cadiz that are considered to be both relevant and attributable to the individual defendants? How did these differences come to be considered relevant and how did they get translated into legally relevant terminology?

The phenomenon of street violence is hotly debated. Over the years this has been converted from a vandalism-activity that leads to a fine to an action which makes you a member of ETA. It is at this level that different “images” of the phenomenon play their role. Throughout the 90s the so-called “socialization of the suffering” became widespread. Youth got to the streets and targeted a variety of businesses, political party offices, cash machines, telephone cells, and other infrastructure. This phenomenon is widely known as the “*Kale Borroka*”, which is Basque for “street struggle.” The main issue is whether or not the activity is orchestrated or spontaneous. Of course this struggle involves many different kinds of actions (from Molotov cocktails, to confrontation with the police during manifestations, to the burning of cash machines and buses, to spray painting graffiti), by many different actors (youth all over the Basque Country), with many different motivations (political absolutely, and out of frustration for not being heard, but also being drunk, adventure, being cool and participate with friends, anger towards the police, revenge, sheer stupidity, direct response to police violence), at very different places (all over the Basque Country), at different times (during the night, during manifestations in broad daylight). Some of these actions may be coordinated and organized, others are spontaneous. And all of these incidents are connected in different ways in different images into one concept: “*Kale Borroka*”.

In the previous section I discussed the way in which the concept of ETA changed and how this translated into a different strategy of criminal prosecutions. As another case of significant change in the criminal prosecutions in this section I introduce the *Kale Borroka* and describe how in the 80s and the beginning of the 90s this activity was prosecuted as a public disorder by local attorney offices. In 1992 the Audiencia Nacional decided to step in and claimed jurisdiction over a case in which two Basque youth threw a Molotov cocktail into the offices of the national train company. The youth and their lawyers were taken by surprise. What did their case do in the Audiencia Nacional? They were convinced they would not be convicted under the charges of terrorism. They got 10 years in prison. Their case kicked off a battle between lawyers and prosecutors about the jurisdiction the Audiencia Nacional had over these cases. At the end of the 90s all cases of *Kale Borroka* would automatically go to the Audiencia Nacional.

In looking at the nature of the *Kale Borroka* three comparative cases are instructive. What are the differences between acts of vandalism perpetrated by Basque nationalist youth and by youth of rightwing extremist ideology? What are the differences between acts of vandalism perpetrated by Basque youth and other youth in other parts of the country? What are the differences between acts of *Kale Borroka* and ordinary acts of vandalism in the Basque Country? We will see that even though at times defendants may deny their participation in the alleged activity, the

dispute underlying these cases is not so much about the plain facts of who did what and whether a certain person participated in that. To a great extent, the controversy is about meaning and interpretation.

#### The term *Kale Borroka*

Often, "*Kale Borroka*" is used without any translation into Spanish. We see the term in court sentences and used by prosecutors in their arguments. If the term is translated, several translations are popular. Street violence is a common translation (see for example de Calle Robles 2007; vd Broek 2004). Left nationalists oppose this translation. According to the left nationalist political party Herri Batasuna the *Kale Borroka* is not "street violence" but the "People's political struggle" (vd Broek 2004). According to Herri Batasuna the "People's political struggle" is not only sabotage and burning cash-dispensers, but also meetings or sticking up posters in the street ... all this is *kale borroka* as well" (a respondent in an interview with van den Broek 2004). Various other common translations are "street struggle" and "street terrorism."

Various different aspects of the *Kale Borroka* are more or less prominent in these translations. The words chosen by Herri Batasuna emphasize that *Kale Borroka* as such is not a criminal enterprise, even though specific tactics may be criminal as they involve law-breaking and/or violence. *Kale Borroka* is always political in this image. (One lawyer from the left nationalist movement declared in an interview that in the Basque country there simply is no non-political vandalism). *Kale Borroka* is the struggle that takes place outside of the institutions.

The current image of *Kale Borroka* as maintained in the courts is that an organized enterprise of *Kale Borroka* is part of the ETA-strategy to inflict terror in the people and thus it is terrorism. The difference between a public disorder and terrorism is significant, not only because the sentence is higher in case of terrorism, but also because terrorism-cases are judged in a different court in Madrid instead of the Basque Country, which also justifies measures such as a period of five days "incomunicado" which is infamous for denunciations of maltreatment and torture. Furthermore, ETA-prisoners are subject to the dispersion policy which can imply serving a sentence at the Canary Islands far from family and friends.

#### Analysis of a recent case of *Kale Borroka*: the current image at work

From a case on "*Kale Borroka*" October 2007 from the decision made by Judge Baltasar Garzon about preventive detention of eight defendants (translation by author):

FACTS:

FIRST. – From the information we gather that the terrorist organization ETA in the development of its criminal action gives a special relevance to the so-called street struggle or “Kale Borroka” as an element more to its terrorist activity complementing the armed action of ETA. In this dynamic the “Kale Borroka” comes to substitute the inactivity of that organization or the attenuated activity of them in the first respect, designing in this way a strategy with the permanent coercive effects to the citizens, their liberty and property.

The groups (cells “Y”) of the “Kale Borroka” are formed around one or various responsible persons or dynamizers who propose, proportion, and order the execution of the different violent actions per zone.

Within these activities, the zone Uribe-Costa (Vizcaya) and its area of influence is one of the permanent scenes of terrorist action, and it is in this framework that the activity of the group of imputed persons took place, between the years 2004 and 2007.

SECOND. – According the police investigations, the organizers and dynamizers of the “Cell Y” operating in the zone of Uribe-Costa who followed the instructions of the terrorist organizations were: ...

Judge Garzon starts with positioning the actions of the *Kale Borroka* as complementing the “armed action” of the “terrorist organization ETA”. The street struggle is supposed to make up for the inactivity in the armed organization. Then he comments on the organizational structure of the “Y”-groups that are supposed to be responsible or “dynamizing” the Kale Borroka. He continues by declaring that the area “Uribe-Costa” is an area of permanent terrorist action, and it is in this area that the activity of the group of defendants has taken place in the years 2004-2007. Lastly he states that police investigations identified the organizers and dynamizers of this “Y”-group who were following instructions from the terrorist organization ETA. The next paragraph of the decision continues by listing the persons of the group, the leaders responsible for executing the actions, and an overview of the various actions for which these people are responsible.

From the overview of the various actions that are imputed to this “Y”-group it is clear that several actions are supposed to “belong” together and form “*Kale Borroka*” and several people are supposed to “belong” together, even though they acted in various different constellations. At times only the participation of one of them is alleged. In none of the actions did they all eight act together, at least, that is not alleged. According to the decision, the actions are done by one, two, three or four persons each time. As presented, the actions listed are supposed to be the actions of this “Y”-group.

Various offenses are put forward as the possible crimes that were committed: membership of a terrorist organization and the contribution to terrorism without being a member of a terrorist organization. Judge Garzon claims that it is the “public peace” which is breached by the actions of the defendants. Judge Garzon orders for seven of eight of the defendants a preventive detention. He motivates this by saying that despite the fact that none of them has a previous conviction “this activity is notorious for its repetition.” In this explicit way the acts of “*Kale Borroka*” are linked to earlier actions of *Kale Borroka* and experiences with defendants and recidivism. Garzon continues by reasoning that the activity was organized and had a “touch” of terrorism, so there is the risk that defendants might avoid the trial and get outside the reach of justice. In other words: they might flee. Again, judge Garzon extrapolates his anticipation by linking these defendants to previous defendants. In the chapter on criminal doctrine I will use this example to analyze the construction of a ‘pattern of actions’ and a ‘category of defendants’ in the determination of a crime and its relevant features.

What did the prosecutor<sup>39</sup> do in this case and what did he choose not to do?

The prosecutor has chosen to prosecute eight persons at the same time for the same actions. The prosecutor has chosen to classify the actions as “terrorist” actions which is why the case is before the Audiencia Nacional. The prosecutor could have prosecuted the defendants each individually for the isolated acts where they were observed to have participated. The prosecutor could have decided not to allege a relation with ETA. The prosecutor could have decided to charge the participants each with direct responsibility for the actions in which they were involved. Instead, the prosecutor charges the defendants with “membership of a terrorist organization” and indirect responsibility for the actions where they were not present; indeed a responsibility for the whole chain of actions which are “terrorist” actions. Defendants could have been charged with “public disorder” and “property destruction.”

The group “Y” is described to be responsible for a certain area in which throughout 2004-2007 several actions were committed. Implicitly, they are also responsible for many more actions that just were not listed in this decision, were these to be found in later fact-finding. Apart from the impact on the height of the sentence, the story that the prosecutor tells in the current description is substantially different from the one that was not chosen.

---

<sup>39</sup> In a separate paragraph I will explain the Spanish criminal justice system and its division between investigative judges and prosecutors. Some of the choices I describe are made by investigative judges.

Whereas the story that the prosecutor could have told would not clash with the left nationalist narrative of the Kale Borroka, the current narrative is strongly at odds with everything that left nationalists maintain about the Kale Borroka. The existence of “Y”-groups is heavily criticized by the nationalist left. They claim it was an invention in order to link the youth organization Jarrai to ETA.<sup>40</sup> The idea that Kale Borroka actions would fit a strategy of ETA or be instructed by ETA clashes with the notion upheld by left nationalists that the Kale Borroka is the spontaneous expression of frustration by the Basque youth.

In 1992 the first case was brought in which an action of “Kale Borroka” was charged as a terrorism case. A link had to be made to ETA. The court argued that despite the fact that the defendants were not members of ETA, they had “collaborated with the goals and objectives of ETA.” What does that mean? The court argues that it means that as ETA aims to create an “environment of collective fear” by conducting activities of diverse sorts, some of which similar to the one in this case (two brothers had thrown Molotov cocktails in the office of the train station) then we understand that an action like this contributes to that.<sup>41</sup> Interestingly, the court does not elaborate on the “similarities” between the actions by ETA and the action at stake in this case. It is therefore not clear whether similarities have to do with the kind of target, the kind of incendiary device, the inferred political objectives, the location of the crime, or any other aspect that apparently is considered to be relevant. From my interview with the defendant, it was clear that for him there were more differences than similarities.

Harsh punishments for Kale Borroka youth have been a short term disaster in the sense that there was a huge influx of ETA-volunteers in the first years after the high sentences had been delivered. Rumor goes that ETA had to turn people down, as they couldn’t manage the high volume. Reasoning on the part of the youth was strikingly similar to what we have heard from aboveground animal rights activists in reaction to the SHAC-verdict. If we will get such high sentences just for *Kale Borroka*, then we’d rather do the ‘real’ work.

## 12. Conclusion

For the sake of this paper I include some sort of a provisional conclusion.

---

<sup>40</sup> Apparently Basque PNV-politician Atutxa even admitted to this (check source).

<sup>41</sup> Si la organización terrorista ETA, tiene como finalidad el crear un ambiente de temor colectivo a través de actividades de diversa clase, alguna de ellas semejantes a la aquí examinada, entendemos que contribuyen a tal clase de actividades hechos como el presente, aunque su resultado, por razones que no constan, no llegara a alcanzar la importancia que pudiera haber tenido en consideración al medio empleado y al objeto contra el que se dirigió. (Case Julen Larrinaga, Appeal 1994)

In this chapter I have discussed the way in which the Spanish prosecution has been challenged by processes of de-legitimization both by ETA-activists and left nationalist activists who reject the state monopoly of force and assert their right to use violence to defend and advance their political project. I have shown how the Audiencia Nacional as an institution and its criminal proceedings as they are currently conducted, lack legitimacy within this subset of the population. I have further shown that victim organizations who complain about years of neglect put considerable pressure on the criminal prosecutions. Importantly, the continuing threat by ETA's existence and ongoing attacks creating new victims and maintaining a terrorized environment makes for a constant urgency to deal promptly and effectively with this challenge.

I have outlined how the criminal policy of the state has been characterized by a changed interpretation of the organization of ETA. The different understanding of the relation between the military wing and other left nationalist organizations has prompted so-called macro-trials leading to the instant incarceration of dozens of people. I have shown how the eligible subjects for prosecution expanded beyond the previous category of ETA-commando-members to a number of politicians and social movement activists. Further, I discussed the striking change in prosecution of acts of street violence in the Basque country and the transition from defining these acts as public disorders to terrorist activities.

In the next chapters I will, based on the evidence presented here, analyze more in-depth in a comparison with the other cases what characterized the criminalization process and how the logic of the criminal doctrine was applied in the attempt to balance legitimacy and order.

## BIBLIOGRAPHY

- Agirre Aranburu, Xabier. 2004. Large-Scale Victimization and Small-Scale Trials: Selection Criteria and the Use of Sampling Techniques in the Investigation of International Crimes. In *Conference on Large-Scale Victimization and Armed Conflict*. Zagreb.
- Apter, D. 1997. *Legitimization of Violence*. New York: New York University Press.
- Alonso, Rogelio, and Fernando Reinares. 2005. Terrorism, Human Rights and Law Enforcement in Spain. *Terrorism and Political Violence* 17 (1):265-278.
- Antifakomitee. 2003? Das Baskenland. Demokratischer Ausnahmezustand und der Ruf nach Freiheit und Selbstbestimmung Duisburg: Initiativ e.V. Verein für Demokratie und Kultur von unten.
- Aponte, Alejandro. 2002. *Krieg und Feindstrafrecht. Überlegungen zum "effizienten" Feindstrafrecht anhand der Situation in Kolumbien*. Baden-Baden: Nomos Verlagsgesellschaft.
- Azparren, Patxi, Luix Barinagarrementeria, Sabino Ormazabal, Mario Zubiaga, and Mikel Zuloaga. 2003. *Mil coces contra la disidencia*: Auto-edición.
- . 2005. *Mil [y 2] coces contra la disidencia. 18/98+*: Autoedición.
- Balbus, Isaac. 1973. *The Dialectics of Legal Repression. Black Rebels before American Criminal Courts*. New York: Russell Sage Foundation
- Barkan, Steven E. 1985. *Protesters on Trial. Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements*. New Brunswick/ New Jersey: Rutgers University Press.
- Becker, Howard. 1998. *Tricks of the Trade. How to Think About Your Research While You Are Doing It*. Chicago/ London: The University of Chicago Press.
- Beetham, David. 1991. *The Legitimation of Power*. Edited by P. Jones and A. Weale, *Issues in Political Theory*. London: MacMillan Education Ltd.
- Bennett, W. Lance, and Martha S. Feldman. 1981. *Reconstructing Reality in the Courtroom: Justice and Judgement in American Culture*. New Brunswick, New Jersey: Rutgers University Press.
- Brady, Henry E., and David Collier. 2004. *Rethinking Social Inquiry. Diverse Tools, Shared Standards*. Lanham: Rowman & Littlefield Publishers, Inc.
- Brass, Paul. 1997. *Theft of an Idol*. New Jersey: Princeton University Press.
- Brass, Paul R. 1996. Introduction: Discourses of Ethnicity, Communalism, and Violence. In *Riots and Pogroms*, edited by P. Brass. Washington Square/ New York: New York University Press.
- Buijs, Frank J., Froukje Demant, and Atef Hamdy. 2006. *Strijders van eigen bodem. Radicale en democratische moslims in Nederland*. Amsterdam: Amsterdam University Press.
- Baskenland, Informatie Centrum. 2005. Euskal Herria Nieuwsbrief. Utrecht.
- . 2007. Euskal Herria Nieuwsbrief. Utrecht.
- Batasuna, Herri. 1996? Freedom for the Basque Country: Herri Batasuna.
- Behatokia, - Observatory of Human Rights and ESKUBIDEAK - Basque Association of Lawyers. 2002. *Freedom of expression and opinion and right of association in the Basque Country*. Basque Country: Behatokia.
- Behatokia, Observatory of Human Rights. 2003? Medidas antiterroristas: panorama internacional y Euskal Herria. Hernani: Behatokia.
- Berdugo Gómez de la Torre, Ignacio, Luis Arroyo Zapatero, Juan Carlos Ferré Olivé, Nicolás García Rivas, José Ramón Serrano Piedecabras, and Juan Terradillos Basoco. 2004. *Curso de Derecho Penal. Parte General, Manuales Universidad*. Barcelona: Ediciones Experiencia.
- Bestelako, Euskal Herria. 2005? Another Basque Country in another Europe.
- Brien, O. 2003. Matxinada.
- Broek, Hanspeter van den. 2004. Borroka - The Legitimation of Street Violence in the Political Discourse of Radical Basque Nationalists. *Terrorism and Political Violence* 16 (4):714-736.
- Christenson, Ron. 1999. *Political Trials; Gordian Knots in the Law*. Second Edition ed. New Brunswick, New Jersey: Transaction Publishers.

- Cohen, Stanley. 1996. Crime and Politics: Spot the Difference. *The British Journal of Sociology* 47 (1):1-21.
- Conley, John M., and William M. O'Barr. 1990. *Rules versus Relationships; The Ethnography of Legal Discourse*. Chicago/ London: The University of Chicago Press.
- . 2005. *Just Words; Law, Language, and Power*. Edited by J. M. Conley and W. M. O'Barr. Second ed. Vol. 10, *Language and Legal Discourse*. Chicago/ London: The University of Chicago Press.
- Calleja, José , and Ignacio Sanchez-Cuenca. 2006. *La derrota de ETA; de la primera a la última víctima*. Madrid: Adhara Publicaciones.
- CEDRI, Comité de Encuesta sobre las Violaciones de los Derechos Humanos en Europa. 1989. *El Gal o El terrorismo de Estado en la Europa de las democracias. Informe de la encuesta Febrero-Junio 1989*. Tafalla: Txalaparta Editorial.
- DE LA CALLE ROBLES, LUIS. 2007. Fighting for Local Control: Street Violence in the Basque Country *International Studies Quarterly* 51 (2):431-455(25).
- Douglass, William A., and Joseba Zulaika. 1990. On the Interpretation of Terrorist Violence: ETA and the Basque Political Process. *Comparative Studies in Society and History* 32 (2):238-257.
- Davenport, Christian. 1995. Multi-Dimensional Threat Perception and State Repression: An Inquiry into Why States Apply Negative Sanctions. *American Journal of Political Science* 39 (3):683-713.
- Davenport, Christian, Hank Johnston, and Carol Mueller, eds. 2005. *Repression and Mobilization*. Edited by B. Klandermans. Vol. 21, *Social Movements, Protest, and Contention*. Minneapolis, London: University of Minnesota Press.
- della Porta, Donatella, and Herbert Reiter. 1998. *Policing Protest; The Control of Mass Demonstrations in Western Democracies*. Edited by B. Klandermans, *Social Movements, Protest, and Contention* Minneapolis, London: University of Minnesota Press.
- Dijk, Teun Van. 1993. Principles of critical discourse analysis. In *Discourse and Society*. London: Sage.
- Ewick, Patricia, and Susan S. Silbey. 1998. *The Common Place of Law; Stories from Everyday Life*. Chicago/ London: The University of Chicago Press.
- EPPK. 2003? PRES.O.S. Basque Political Prisoners Situation and Prospects.
- Espiau Idoiaga, Gorka. 2006. Special Report: The Basque Conflict. New Ideas and Prospects for Peace. Washington: United States Institute of Peace.
- Euskadi Informacion. 1998. *La Ley del Silencio*. Hernani: Birsortu S.L.
- Ferrer, Mariano, Manuel Cancio Meliá, Jon-Mirena Landa, Félix Cañada, José Ma Elosua, Xabier Ezeizabarrena, Íñigo Lazcano, and Iñaki Lasagabaster. 2005. *Derechos, libertades y razón de Estado (1996-2005)*. Pamplona: Lete argitaletxea.
- Fairclough, Norman. 2002. Critical discourse analysis as a method in social scientific research. In *Methods of Critical Discourse Analysis*. London: Sage Publications.
- Feeley, Malcolm. 1979. *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* New York: Russell Sage Foundation
- Fletcher, George P. 1998. *Basic Concepts of Criminal Law*. New York, Oxford Oxford University Press.
- . 2006. *The Grammar of Criminal Law*.
- Foucault, M. 1975. *Surveiller et punir. Naissance de la prison*. Parijs: Gallimard.
- Gee, James Paul. 2005. *An Introduction to Discourse Analysis: Theory and Method*. New York: Routledge.
- Godoy, Angela Snodgrass. 2005. La Muchacha Respondona: Reflections on the Razor's Edge Between Crime and Human Rights. *Human Rights Quarterly* 27 (2).
- Garzón, Baltasar. 2005. *La lucha contra el terrorismo y sus límites*. Madrid: Adhara Publicaciones.
- . 2006. *Un mundo sin miedo. Segunda edición*. Barcelona: De Bols!llo
- Gestoras pro Amnistia, and Koordinaketa. ?1998? Amnistia tha Askatasuna. Amnistie et liberté. Hernani. Basque Country.
- Gurruchaga, Carmen. 2006. *Los Jefes de ETA*. Madrid: La Esfera de los Libros.
- Heywood, Paul. 1995. *The Government and Politics of Spain*. New York: St. Martin's Press.

- Human Rights Watch, HRW. 2005. Setting an Example? Counter-Terrorism Measures in Spain. 17 (1):1-65.
- Holden Jr., Matthew. 2006. Mechanisms and Processes of Legal Initiation: Working Paper on the Executive-Bureaucratic Role in Law.
- Holden Jr., Matthew. 2005. To get beyond the cult of the robe. *Perspectives on Politics* 3 (2):318-319.
- Jabri, V. 1996. *Discourses of Violence*. Manchester and New York: Manchester University Press.
- Johnston, Hank, and John A. Noakes, eds. 2005. *Frames of Protest*. Lanham/ Boulder: Rowman & Littlefield Publishers, Inc.
- Jakobs, Günther, and Manuel Cancio Meliá. 2006. *Derecho penal del enemigo. Segunda edición, Cuadernos Civitas*. Navarra: Editorial Aranzadi.
- Kalegorria, Equipo de Investigacion de. 2002. *Fondos Reservados. El Negocio de la Guerra*: Kale Gorria.
- Kollektief, Beeldend Protest. 1982? Baskenland. Dordrecht: Kollektief Beeldend Protest.
- Kurlansky, Mark. 2001. The Basque History of the World: The Story of a Nation.
- Kelman, Mark. 1981. Interpretive Construction in the Substantive Criminal Law. *Stanford Law Review* 33:591-673.
- King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing Social Inquiry. Scientific Inference in Qualitative Research*. Princeton: Princeton University Press.
- Kirchheimer, Otto. 1961. *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton, N.J.: Princeton University Press.
- Lurra. 1978. *Burgos: Juicio a un Pueblo*. Donostia: Hordago.
- Lacey, Nicola, and Celia Wells. 1998. *Reconstructing Criminal Law; Text and Materials. Second Edition*. London: Butterworths.
- LaFree, Gary. 1998. *Losing Legitimacy: Street Crime and the Decline of Social Institutions in America*. Boulder, CO: Westview.
- Lazarus-Black, Mindie, and Susan F. Hirsch, eds. 1994. *Contested States; Law, Hegemony and Resistance*. New York, London: Routledge.
- Lichbach, Mark. 2005. How to Organize Your Mechanisms: Research Programs, Stylized Facts, and Historical Narratives. In *Repression and Mobilization* edited by C. Davenport. Minneapolis/ London: University of Minnesota Press.
- Mansell, Wade, Belinda Meteyard, and Alan Thomson. 2004. *A Critical Introduction to Law. 3rd Edition*. London, Sydney: Cavendish Publishing.
- McConville, Mike, Andrew Sanders, and Roger Leng. 1991. *The Case for the Prosecution*. London, New York: Routledge.
- Milovanovic, Dragan. 2003. *An Introduction to the Sociology of Law. 3rd Edition*. Monsey, New York: Criminal Justice Press.
- Martínez-Herrera, Enric. 2002. Nationalist Extremism and Outcomes of State Policies in the Basque Country, 1979-2001. *International Journal on Multicultural Societies* 4 (1).
- Medem, Julio. 2003. *La Pelota Vasca. La piel contra la piedra. Euskal Pilota. Larrua harriaren kontra*. Madrid: Santillana Ediciones Generales.
- Merlos, Alfonso. 2007. *?Rendirse ante ETA? 25 voces contra la negociación*. Barcelona: Áltera.
- Mestre Delgado, Esteban. 1987. *Delincuencia terrorista y Audiencia Nacional*. Madrid: Ministerio de Justicia. Centro de Publicaciones.
- Moral de la Rosa, Juan. 2005. *Aspectos penales y criminológicos del terrorismo*. Madrid: Centro de Estudios Financieros.
- Moreno Campo, Juan Carlos. 1996. *Represion del terrorismo, una vision jurisprudencial*: Editorial General de Derecho, S.L.
- Navarro Estevan, Joaquin. 2002. *Tiempo de ceniza. La libertad acorralada*. Madrid: Foca.
- Navarro, Joaquin. 2001. *Fulgor de Libertad. El Estado Contra Euskal Herria*: Kale Gorria.
- Núñez Astrain, Luis. 1997. *The Basques. Their Struggle for Independence*. Welsh Academic Press.
- Nonet, P., and P. Selznick. 2005. *Law and Society in Transition: Towards Responsive Law*. New Brunswick: Transaction Publishers.

- Nonet, Philippe, and Philip Selznick. 1978. *Law and Society in Transition; Towards Responsive Law*. New York: Octagon Books.
- Oreja, Jaime Mayor. 2007. *Esta gran nación. Conversaciones de Jaime Mayor Oreja con César Alonso de los Ríos*. Madrid: Libros Libres.
- Packer, Herbert L. 1964. Two Models of the Criminal Process. *University of Pennsylvania Law Review* 113 (1).
- Philips, Nelson, and Hardy Cynthia. 2002. *Discourse Analysis. Investigating Processes of Social Construction*. Thousand Oaks: Sage Publications.
- Port, M. van de. 1994. *Het einde van de wereld*. Amsterdam: Babylon-De Geus.
- Quinney, Richard. 1970. *The Social Reality of Crime*. Boston: Little, Brown and Company.
- Rei, Pepe. 1999. *Garzon. La otra cara*. Tafalla: Txalaparta Editorial.
- Reinares, Fernando. Patriotas de la Muerte. Quiénes han militado en ETA y por qué.
- Rodriguez Galindo, Enrique. 2006. *Mi vida contra ETA. La lucha antiterrorista desde el cuartel de Inchaurredo*. Barcelona: Editorial Planeta.
- Ruiz Landáburu, José. 2002. *Provocación y apología: delitos de terrorismo, Biblioteca Jurídica de Bolsillo*. Madrid: Editorial Colex.
- Ragin, C. 1994. *Constructing Social Research*. Thousand Oaks/ London/ New Delhi: Pine Forge Press.
- Rosenfeld, Richard. 2000. Book Review of "Losing Legitimacy" by Gary LaFree. *Contemporary Sociology* 29 (1):253-254.
- Roy, Beth. 1994. *Some Trouble with Cows; Making Sense of Social Conflict*. Berkeley/ Los Angeles/ London: University of California Press.
- Sayyid, Bobby, and Lilian Zac. 1998. Political Analysis in a World without Foundations. In *Research Strategies in the Social Sciences: A Guide to New Approaches*, edited by E. Scarbrough and E. Tananbaum. Oxford University Press: Oxford.
- Schröder, Ingo, and Bettina Schmidt. 2001. Introduction: violent imaginaries and violent practices. In *Anthropology of Violence and Conflict*, edited by Schmidt and Schröder. London & New York Routledge.
- Sanchez-Cuenca, Ignacio. 2001. *ETA contra el estado. Las estrategias del terrorismo*. Barcelona: Kriterion tusQuets Editores
- Terradillos Basoco, Juan. 1988. *Terrorismo y derecho. Comentario a las leyes orgánicas 3 y 4/1988, de reforma del código penal y de la ley de enjuiciamiento criminal*. Madrid: Editorial Tecnos.
- Tamanaha, Brian Z. . 2001. *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press.
- Terwindt, C. E. 2004. The Challenge of the Monopoly of Force. In *Unpublished LLM Thesis*. Utrecht.
- Thompson, E.P. 1975. *Whigs and Hunters; the origin of the Black Act*. New York: Phanteon Books.
- Tilly, Charles, and Sidney Tarrow. 2007. *Contentious Politics*. Boulder/ London: Paradigm Publishers.
- Tyler, Tom R. 2006. *Why People Obey the Law*. Princeton, Oxford: Princeton University Press.
- van Reenen, P. . 1979. *Overheidsgeweld. Een sociologische studie vn de dynamiek van het geweldsmonopolie*. Alphen aan den Rijn: Samsom Uitgeverij.
- Varona, Gema. 2000. Chapter 12: "Spain is Different": Beyond an Invisible Criminal Policy? In *Criminal policy in transition*, edited by P. Green and A. Rutherford. Oxford.
- Vercher Noguera, Antonio. 1991. *Antiterrorismo en el Ulster y en el País Vasco*. Edited by J. Bustos Ramírez and H. Malarée, *El Sistema Penal*. Barcelona: PPU.
- Weber, Max. 1978. *Economy and Society. An Outline of Interpretive Sociology*. Edited by G. Roth and C. Wittich. Berkeley, Los Angeles: University of California Press.
- Wieviorka, Michel. 2003. *The Making of Terrorism*. Chicago, London: The University of Chicago Press.
- Zallo, Ramón. 2001. *El país de los vascos. Desde los sucesos de Ermua al segundo Gobierno Ibarretxe*. Madrid: Editorial Fundamentos.
- Zulaika, and Douglass. 1996. *Terror and Taboo; the follies, fables and faces of terrorism*. New York and London: Routledge.