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Abstract

The present article will explore how the terrorist threat is being materially and normatively shaped by national and global institutions of law and order with an emphasis on Spain. In this process security managers are gaining immense powers with limited national or supranational supervision thereby creating a symbiosis that enables them to perpetuate their relevance within national, transnational and international security affairs. This article concludes that this occurrence which is blurring the lines between internal and external aspects of security creates a complex dilemma for civil liberties.

Key Words: Spain, counter-terrorism, intelligence, civil liberties

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Spanish political elites and law enforcement have come to understand, according to Conde and Gonzalez, that ‘terrorism is not a conjunctural phenomenon but a structural one, and as a result, it cannot be confronted militarily (as in the US) or with exceptional and extraordinary norms (as in the UK), but through ordinary legislation in compliance of the rule of law’.¹ As a result, Spain’s law enforcement and security-intelligence services have found in the legal principles that underpin Spanish counter-terrorism practices a successful tool to counter the internal terrorist threat as well as international terrorism. This makes the Spanish experience with terrorism a unique case study in the Western world. Simultaneously, the international homogenization and regularization of norms are shaping not only the terrorist threat and how it is to be countered, but also security in a broader sense. The present article will explore how *the terrorist threat is being materially and normatively shaped by national and global institutions of law and order*. The first part will discuss the evolution of Spanish counter-terrorism practices in an effort to explain Spain’s unique case in shaping terrorism as a threat; the second part will explain how the Spanish counter-terrorism model evolved alongside democratic accountability and civil liberties concerns; and a third part will contextualize global normative and material developments shaping the terrorist threat in Spain and the way Spain enforces not only its counter-terrorism practices, but also its overall security. From a realist perspective it is assumed that ‘laws, simply stated, precede and define criminality’,² but the reality is that it is the material conditions of life that do, for ‘... legal relations as well as forms of state could not be understood by themselves, nor explained by the so called general progress of the human mind ...’.³ Nonetheless, ‘[t]he homogenization [and regularization] of criminal norms throughout international society ... [is] a historical process driven primarily by the criminalizations of dominant states ... and their efforts to export their own criminal justice preferences to other states’.⁴ At the same time, however, it is also a historical process driven by self-interested individuals or corporate actors (public and private) whose interests for political or economic advancement merges with a perceived necessity to securitize national and international society. These views will be further explained in detail. A conclusion will summarize key points from the discussion.

Shaping the terrorist threat: the Spanish counter-terrorism model

Max Weber argued that ‘states lay claim to the legitimate monopoly over the use of violence’. Spanish law enforcement and security-intelligence services argue they are compelled to practice security in a proactive way as Spain has had a long experience with terrorism. In the traditional conceptualization of the term terrorism in Spain falls under two categories; Homegrown since the 1960s; and Islamist terrorism since 2004. For MacKinnon,

¹ Enrique A. Conde & Hortensia Gonzalez, ‘Legislación antiterrorista comparada después de los atentados del 11 de septiembre y su incidencia en el ejercicio de los derechos fundamentales’, *Real Instituto Elcano de Estudios Internacionales y Estratégicos*, ARI No. 7, 2006, p. 2

² Peter Andreas & Ethan Nadelmann, *Policing the Globe: Criminalization & Crime Control in International Relations* (Oxford: Oxford University Press, 2006), p. 11

³ Karl Marx, ‘A Contribution to a Critique on Political Economy’, Stone, N.I., trans. (Chicago: Charles H. Kerr & Co., 1904), p. 11

⁴ Ibid

‘Homegrown’ Spanish terrorism embraces the activities of both ideologues and separatists. Anarchist and fascist terrorists inflicted widespread casualties on the Spanish public during the late 1970s, 1980s, and into the 1990s as they sought to impose their respective visions of government on the Spanish people.⁵

But MacKinnon’s affirmation is inaccurate for Anarchist terrorism has been relevant in Spanish history but certainly not during this period of time where it would seem quite difficult to point out any low intensity terrorist activity based on Anarchist ideology. It seems MacKinnon fundamentally misunderstands the ideological differences between leftist violent groups, for it seems he considers the left-wing GRAPO (*Grupos de Resistencia Antifascista Primero de Octubre*) an Anarchist terrorist organization that operated during this period of time, when in fact, GRAPO had Maoist origins and later Marxist-Leninist leanings.⁶

According to Jaime-Jimenez, four distinct phases may be appreciated with regard to democratic Spain’s fight against terrorism characterized by: (1) Chaotic counter-terrorism guidance and inefficiency between 1976-1980; (2) General coordination of counter-terrorism organizations between 1980-1983; (3) Reorganization of strategic operations under the Interior Ministry between 1983-1988, also characterized by the Antiterrorist Law of 1984; and (4) Dispersal of ETA prisoners between 1989-1996.⁷

The period of most intense terrorist turmoil in Spain occurred throughout the Euskadi Ta Askatasuna (ETA) terrorist organization’s birth and throughout the democratic transition period. On the other hand, although casualties in the 11 March 2004 attacks in Madrid were attributed in first instance to ETA and subsequently to the Moroccan Islamic Combatant Group (MICG) or even to an off-shoot organization of the MICG, Salafiya Jihadiya, the final ruling for the trial of the 11-M attacks concluded in 2007 the initial hypothesis was incorrect. The Court based its ruling on the fact that, although Hassan el-Haski, one of the indicted terrorists, was a leading figure within MICG, this instance did not substantively and necessarily prove a chain-of-command structure existed linking MICG to the 11-M attacks, and thence released him from the charges of inducing to commit terrorist activities while indicting others.⁸ Nonetheless, it was widely conceived that ‘[t]he March bombings were ostensibly part of a global *jihad*

⁵ Ari MacKinnon, ‘Counterterrorism & Checks and Balances: the Spanish & American Examples’, *New York University Law Review*, Vol. 82, No. 602 (May, 2007), p. 610

⁶ Fernando Reinares & Oscar Jaime-Jimenez, ‘Countering Terrorism in a New Democracy: the Case of Spain’ in Fernando Reinares (Ed), *European Democracies Against Terrorism: Governmental policies & intergovernmental cooperation*, The Onati Institute for the Sociology of Law (Aldershot, UK: Ashgate, 2000), p. 121; see, e.g. ‘Los GRAPO, terroristas germinados en los años 60’, *El País* (May 31, 2005) <http://www.elmundo.es/elmundo/2005/05/31/espana/1117527674.html> (accessed October 28, 2008)

⁷ See, Oscar Jaime-Jiménez, *Policía, Terrorismo y cambio político en España, 1976-1996* (Valencia: Tirant Lo Blanch, 2002), pp. 25-34

⁸ ‘El Tribunal del 11-M desbarata la tesis clave de la versión oficial en su sentencia’, *El Mundo* (November 5, 2007), <http://www.elmundo.es/elmundo/2007/11/05/espana/1194233049.html> (accessed November 1, 2008)

and possibly directed at Spanish support for the war in Iraq'.⁹ In spite of this emerging threat, Spain has retained counter-terrorism policies that were designed to combat the homegrown terrorism of the 1970s and 1980s [and also 1990s], even as they wage a new fight against Islamist terrorism.¹⁰ Spanish political elites and law enforcement have come to understand, according to Conde and Gonzalez, that 'terrorism is not a conjunctural phenomenon but a structural one, and as a result, it cannot be confronted militarily (as in the US) or with exceptional and extraordinary norms (as in the UK), but through ordinary legislation in compliance of the rule of law'.¹¹ As a result, Spain's security-intelligence services have found in the criminalization of terrorism a successful tool to counter the homegrown as well as the international terrorist threat.

The democratic Spanish counter-terrorism model originates in January 1977 when, in an attempt to move away from Francoist repressive practices, the National Court *Audiencia Nacional* is created in Madrid to deal with serious crime and terrorist offences. As Alonso and Reinares note, '[t]his implied a fundamental jurisdictional change, since terrorist crimes would be dealt with, from that moment on, by ordinary judges instead of military courts as was previously the case'.¹² This occurred because,

[d]uring the democratic transition and the years of democratic consolidation, the emerging political elites had to remove those practices and reform those agencies, introducing new ones in accordance with the rule of law and the principles of an open society. But due to the intrinsic characteristics of the political change experienced, many of these reforms took place rather slowly, to the extent that indiscriminate repression by police forces when presumably performing operations against terrorism happened while the existing legal framework was being replaced. All this resulted in the counterproductive application of some legislative and coercive measures against terrorism...¹³

This circumstance was duly exploited by the separatist heterogeneous group *Herri Batasuna* (HB: People's Unity). Both Reinares and Jaime-Jimenez concluded '[t]his disloyal opposition [group] based its main collective arguments on the fact that the 1978 Spanish constitution does not recognize the right to national self-determination, thus capitalizing on the difficulties which arose during the implementation of the autonomy arrangements'.¹⁴ While not an insignificant claim, it has to be contextualized at a time

⁹ Ari MacKinnon, 'Counterterrorism & Checks and Balances: the Spanish & American Examples', *New York University Law Review*, Vol. 82, No. 602 (May, 2007), p. 610

¹⁰ Ibid, p. 614, cf: Human Rights Watch, 'Setting an Example? Counter-terrorism measures in Spain' (2005)

¹¹ Enrique A. Conde & Hortensia Gonzalez, 'Legislación antiterrorista comparada después de los atentados del 11 de septiembre y su incidencia en el ejercicio de los derechos fundamentales', *Real Instituto Elcano de Estudios Internacionales y Estratégicos*, ARI No. 7, 2006, p. 2

¹² Rogelio Alonso & Fernando Reinares 'Terrorism, Human Rights and Law Enforcement in Spain', *Terrorism and Political Violence*, Vol. 17, No. 1, (2005), p. 267

¹³ Ibid.

¹⁴ Fernando Reinares & Oscar Jaime-Jimenez, 'Countering Terrorism in a New Democracy: the Case of Spain' in Fernando Reinares (Ed), *European Democracies Against Terrorism: Governmental*

when a segment of Basque Country youth became reactionary towards the democratic institutions being created as a result of the trauma of the Francoist experience, thus empathizing with ETA violence.¹⁵

Between 1978-1980 terrorist violence peaked¹⁶ and the Spanish government decided to reform a dysfunctional internal security structure especially to meet ETA's challenge, though it may be argued this reform originated previously in 1977 with the creation of the Ministry of Defense and the intelligence service *Centro Superior de Información de la Defensa* (CESID) in 1977.¹⁷ As Antonio Díaz explains, 'CESID arose from the fusion of the Central Service of Documentation (SECED), an entity involved in internal espionage, and part of the military High Command, the upper echelons of the armed forces'.¹⁸ CESID was essentially a military intelligence organization organically dependent on the Ministry of Defense but from a functional standpoint dependent on the Presidency, to which the Director of the CESID reported.¹⁹ Nonetheless, in terms of internal security CESID worked in counter-intelligence and counter-terrorism along with the different policing forces: (1) *Policía Nacional* (National Police); (2) *Guardia Civil* (Civil Guard); and (3) *Ertzaintza* (Basque Country Regional Police) each of which developed their own intelligence units.²⁰ In 1979 following the escalation of ETA violence a sizeable number of special security teams from the different internal security apparatuses, including the Special Operations Group (GEOs) from the National Police and the Rural Antiterrorist Groups (RAG) from the Civil Guard (largely cradled under foreign experts' advice) were sent to carry out a terrorist area assessment on ETA capabilities in the Basque Country.²¹ The imprint these 'special' groups left upon early Spanish counter-terrorism efforts and practices was regrettable and counterproductive. In this regard, Reinares and Jaime-Jimenez lamented that pseudo-fascist or antidemocratic tendencies ruled groupthink attitudes not only between commanding officers, but also amongst subordinates, and

policies & intergovernmental cooperation, The Oñati Institute for the Sociology of Law (Aldershot, UK: Ashgate, 2000), p. 124

¹⁵ Ibid, p. 125

¹⁶ Ibid, p. 123

¹⁷ See, e.g., Andrea Giménez-Salinas, 'The Spanish Intelligence Services' in Jean-Paul Brodeur, Peter Gill & Dennis Tollborg, *Democracy, Law & Security: Internal security services in contemporary Europe* (Aldershot, UK: Ashgate, 2003), p. 64; Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial, 2006), p. 189-190

¹⁸ Antonio M. Díaz Fernández, 'Halfway Down the Road to Supervision of the Spanish Intelligence Services', *Intelligence & National Security*, Vol. 21, No. 3 (June 2006), p. 441

¹⁹ Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial), p. 190-192; Andrea Giménez-Salinas, 'The Spanish Intelligence Services' in Jean-Paul Brodeur, Peter Gill & Dennis Tollborg, *Democracy, Law & Security: Internal security services in contemporary Europe* (Aldershot, UK: Ashgate, 2003), p. 67

²⁰ See, e.g. Andrea Jimenez-Salinas, 'The Spanish Intelligence Services' in Jean-Paul Brodeur, Peter Gill & Dennis Tollborg, *Democracy, Law & Security: Internal security services in contemporary Europe* (Aldershot, UK: Ashgate, 2003), p. 70-73

²¹ Oscar Jaime-Jiménez, *Policía, Terrorismo y cambio político en España, 1976-1996* (Valencia: Tirant Lo Blanch, 2002), p. 93

clearly the attitude of the former inhibited or encouraged the actions of the later.²² This in turn caused frequent insubordination cases along with empathy towards terrorist activities perpetrated by fascist leaning groups;²³ hardly the type of people capable of defending the democratic covenant.

Fortunately, ‘the democratic government of Spain was always cautious enough not to involve the armed forces in internal security issues, contrary to the experience in Northern Ireland [NI].²⁴ Yet the memory over Francoist military involvement in internal security was still vivid. It was not until the 1980s that GEOs from the National Police and *Ertzaintza* were deployed in anti-terrorist matters. In this respect, ‘[c]oercion performed by national police and justice was resilient thanks to the adherence to law and order’.²⁵ At the same time the CESID was also involved in the fight placing moles, conducting wire-tapings, etc. Despite the difference with the NI case, it can also be said these groups experienced transformational policing phases akin to those transforming the practices of security services in NI, which included three phases in the cycle of policing—the *militarization* phase, the *normalization* phase and the *counter-insurgency* phase,²⁶ identified by Ni Aolain during the period of the ‘Troubles’. Admittedly, it would certainly be difficult for this scheme to be applied in the Spanish context with the same linear fashion as in the NI case. For example, the *militarization* phase may be of limited consideration since, as mentioned previously, Spain was fortunate not to involve the military in internal security matters and ‘[i]n a sense, [*militarization*] of the police represents the point at which the criminal justice model fades into state terrorism’.²⁷ Nonetheless, the paramilitary connotation of the GARs and the GEOs may still lend some, albeit limited, credence to this categorization within the Spanish context for, after all, *militarization* ‘represents [also] the immediate reaction by the state to the outbreak of civil disturbance’,²⁸ which occasionally occurred within the Basque context, and for a brief period of time in 1979 an Army General was appointed Minister of the Interior. *The normalization* phase applied in the Spanish case is perhaps the most identifiable, since it was conceptualized early on that a military intervention would not be followed by a political solution. Hence, in order to normalize the conditions of life in the Basque Country, restoring or reorganizing the civil institutions of law and order was critical. This may have been achieved by applying the

²² Fernando Reinares & Oscar Jaime-Jimenez, ‘Countering Terrorism in a New Democracy: the Case of Spain’ in Fernando Reinares (Ed), *European Democracies Against Terrorism: Governmental policies & intergovernmental cooperation*, The Oñati Institute for the Sociology of Law (Aldershot, UK: Ashgate, 2000), p. 127-129

²³ Ibid

²⁴ Rogelio Alonso & Fernando Reinares Terrorism, ‘Human Rights and Law Enforcement in Spain’, *Terrorism and Political Violence*, Vol. 17, No. 1, (2005), p. 273

²⁵ Didier Bigo, ‘Internal and External Aspects of Security’, *European Security*, Vol. 15, No. 4, (December, 2006), p. 396

p. 392; see, e.g., Richard Victor Ericson and Kevin D. Haggerty, *Policing the Risk Society* (Toronto: University of Toronto Press, 1997)

²⁶ Mario Mattassa & Tim Newburn, ‘Policing and Terrorism’ in Tim Newburn (ed), ‘Handbook of policing’, (Cullompton: Willan Publishing, 2003), p. 481

²⁷ R.D. Crelinstein, ‘Analysing Terrorism and Counter-terrorism: A Communication Model’, *Terrorism & Political Violence*, Vol. 14, No. 2 (Summer 2002), p. 87

²⁸ Ibid

Audiencia Nacional process and by delegating increasing responsibilities to the *Ertzaintza*. Unfortunately, *normalization* may have coexisted with *counter-insurgency* policing as an institutionalized practice, though not by any measure in a systematically legally sanctioned form as occurred in NI, where even the British Special Air Services (SAS) were deployed. Arguably so, during the early years of the democratic transition period, *counter-insurgency* activities were conducted under the auspices of the Basque-Spanish Battalion *Batallón Vasco Español* (BVE) or the Triple A against ETA, inspired by Israeli and German intelligence services. It appears these practices resurfaced in the following years.²⁹

In 1980 the establishment of the Counter-terrorist Unified Command *Mando Único para la Lucha Contraterrorista* (MULC) attempted to frame the fight against ETA within the rule of law causing the dispersal of right-wing affiliated groups. Simultaneously, the Interior Ministry fomented the reinsertion of ex-activist thereby seeking reintegration and the continuous normalization of the societal order. This policy bore fruits in due course when many activists from ETA(pm), the organization's politico-military wing gradually abandoned armed struggle. In 1983, under Interior Minister Jose Barrionuevo the Special Zone North Plan *Plan Especial Zona Norte* geared towards isolating ETA within Basque society is developed. Unfortunately, that same year the Antiterrorism Liberation Groups *Grupos Antiterroristas de Liberación* (GAL) shamefully emerged as a group composed of security functionaries and [mainly French] mercenaries sanctioning extra-judicial assassinations of alleged ETA terrorists, even within French territory, which resulted in the killing of 27 people between October 1983 and July 1987 before the group was terminated.³⁰ Eventually, the Guardia Civil would be entrusted with the lion's share in the fight against ETA in detriment of the Central Intelligence Brigade *Brigada Central de Información* (BCI), the Police's elite counter-terrorism unit attached to the General Intelligence Commissariat *Comisaria General de la Información* (CGI), by virtue of its successes attributed to its more disciplined command structure. Simultaneously, the need to positively socialize the Guardia Civil perception within society at large may have also geared the ruling government of the *Partido Socialista Obrero Español* (PSOE) towards this decision.

At this juncture, Spain had codified constitutional protections of the rights to freedom from (1) prolonged preventive detention (a maximum of 72 hours with the possibility of extension up to five to thirteen days under the discretion of the Defense Minister and previous judicial review) (2) freedom from warrantless searches and (3) access to defense counsel, among other rights.³¹ Further, in 1988 a land-mark anti-violence accord *Pacto de Ajuarria Enea* is reached. This agreement incorporated the Basque moderate nationalists into a broad consensus on internal security matters and subsequently influenced the

²⁹ Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial, 2006), p. 218-219

³⁰ Fernando Reinares & Oscar Jaime-Jimenez, 'Countering Terrorism in a New Democracy: the Case of Spain' in Fernando Reinares (Ed), *European Democracies Against Terrorism: Governmental policies & intergovernmental cooperation*, The Oñati Institute for the Sociology of Law (Aldershot, UK: Ashgate, 2000), p. 136

³¹ See, for example, a.17(2)-24(2) Spanish Constitution; Ari MacKinnon, 'Counterterrorism & Checks and Balances: the Spanish & American Examples', *New York University Law Review*, Vol. 82, No. 602 (May, 2007), p. 606

central government's policy in a number of measures, such as the definitive abolition of special anti-terrorist legislation that same year (though some provisions were incorporated into the criminal code, or the implementation of new penitentiary initiatives in 1989, also facilitating a progressive but significant increase in police efficiency ...).³²

Later in 1992, then Interior Minister Jose Luis Corcuera pushed through parliament legislation dubbed *ley de la patada en la puerta* (i.e., the kick to the door law). Such law authorized police and security services to search and seize property within a private domicile on suspicion that a crime was being committed, without previous judicial warrant of any type. In 1993 the Constitutional Court *Tribunal Constitucional* ruled against this provision. Further, the *Pactos de la Moncloa*, Chapters IV-V of the Spanish Constitution of 1978 and subsequent legislations leading to the so called Anti-terrorism Law of 1995 underpin these counter-terrorism tools. The 1995 Anti-terrorism Law regulating terrorist crimes particularly, a.571-a.580 within Chapter V of the Spanish Penal Code is of most relevance even when slightly amended in 2001. These articles regulate what constitutes a terrorist crime and how it is to be prosecuted. Article a.571 defines terrorists as,

*those who belong or act on behalf of, or collaborate with armed groups, organizations or terrorist groups, whose objective is the subversion of the constitutional order, or attempt to gravely alter public peace, commit crimes and havoc or burnings typified in a. 346 and a. 351, respectively, will be punished with 15-20 years prison sentence without prejudice of the crime attributed to them should it incur in injury to life, physical integrity or health of people.*³³

In 1998, Interior Minister Jose Barrionuevo and also Secretary of State for Security, Rafael Vera, were indicted as a result of being involved in the dirty war against ETA conducted by the GAL.³⁴ Top official's involvement in extra-judicial activities reflected internecine battles within Spanish security higher-offices, particularly Interior Ministry and Defense Ministry to show success in the fight against Basque terrorism and gain influence within the Spanish security community in an attempt to gain control of the Spanish intelligence apparatus, which would place them in a position of privilege. The counter argument might be that France was highly uncooperative with Spanish authorities in the fight against Basque terrorism, even when the Basque separatist movement also claimed three of France's southeastern provinces as part of a Basque Homeland. France allowed Basque terrorists freedom of movement in the border region following its *Sanctuary Doctrine*.³⁵ As a result, GAL extrajudicial counterterrorist activities 'may have been

³² Fernando Reinares & Oscar Jaime-Jimenez, 'Countering Terrorism in a New Democracy: the Case of Spain' in Fernando Reinares (Ed), *European Democracies Against Terrorism: Governmental policies & intergovernmental cooperation*, The Oñati Institute for the Sociology of Law (Aldershot, UK: Ashgate, 2000), p. 137

³³ Ley Orgánica 10/1995 (November 23, 1995)

³⁴ 'La cúpula de Interior de González, condenada: Sentencia integral del "Caso Segundo Marey"' *El Mundo* (July 29, 1998), <http://www.elmundo.es/nacional/gal/marey/sentencia/sentencia.html> (Accessed March 12, 2008); Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial, 2006), p. 221

³⁵ Oscar Jaime-Jiménez, *Policía, Terrorismo y cambio político en España, 1976-1996* (Valencia: Tirant Lo Blanch, 2002), p. 64; see, e.g., Jeremy Shapiro & Benedict Suzan, 'The French Experience of Counter-terrorism', *Survival*, Vol. 45, No. 1, (Spring 2003), p. 70 where it is stated that the

partly justified as a result of the role Francoist security services performed throughout the 1960s shielding [members of] the OAS [Organisation de l'Armée Secrète],³⁶ associated with right wing politician Jean Jacques Susini, after they had committed terrorist acts in France. The GAL in fact, had adopted exactly the same OAS modus operandi.³⁷ Notwithstanding, as early as 1986 Franco-Spanish cooperation did exist and proved critical in the disarticulation of ETA's leadership in France, which in turn unearthed vital financing information relating to extortions and the so called 'revolutionary tax' by which ETA partly financed itself.³⁸ This instance may call into question whether GAL extrajudicial activities hindered or aided Spanish policing efforts to seek greater French cooperation. But what became evident was that at best, if some state security officials did not aid GAL directly they tacitly approved of its actions.³⁹

What was clear was that developments spelled some of the dangers that arose then as a result of the excessive autonomy irresponsible security managers possessed in the context of slow developing checks and balances to counter their mandates. As a result claims over counterterrorism abuses increased leading Basque families to file numerous claims against the Spanish government. One of the claims presented by the families of those indicted by the *Audiencia Nacional* is that alleged terrorists and their families incur in financial costs as a result of being subpoenaed to Madrid. Prisoners are jailed outside the Basque country since 1989. While families claim human rights violations, Spanish counter-terrorism authorities argue it is a vital tool in both the break-up of command structure and in the reintegration of prisoners into society. But '[t]o some extent the progressive and deep weakening of ETA has made the dispersal of ETA prisoners redundant'.⁴⁰ Nonetheless legislation introduced in 2002 banned the political wing of ETA, HB. In 2004 the European Court of Human Rights (ECHR) ruled against a suit brought forth by the Basque government of the moderate nationalist PNV party of the Basque Country, claiming the Spanish government was violating Basque citizens' human rights under a.6, a.7, and a.11 of the ECHR. The ECHR's unanimous ruling 'concluded that an autonomous government within the state was unable to sue its own state'.⁴¹ The position of Spain's highest courts was that 'the banning of ETA's political wing was the

'Sanctuary Doctrine was based on the belief that international terrorism was ultimately a political and foreign-policy problem distinct from law enforcement and as such had to take into account both the interests and capacities of the French state abroad'.

³⁶ Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial, 2006), p. 219

³⁷ Ibid, p. 220

³⁸ Oscar Jaime-Jiménez, *Policía, Terrorismo y cambio político en España, 1976-1996* (Valencia: Tirant Lo Blanch, 2002), p. 111

³⁹ See, e.g., 'La Policía investigó a los GAL a través de recortes de prensa' *El País* (Octubre 29, 1995) where Antiterrorism Police Chief Commissioner Jesús Martínez Torres acknowledges awareness of GAL activities insisting he had no reason to investigate the group, http://www.elpais.com/articulo/espana/GRUPOS_ANTITERRORISTAS_DE_LIBERACION/GAL/CUERPO_NACIONAL_DE_POLICIA/LUCHA_ANTITERRORISTA-GUERRA_SUCIA/CASO_JUAN_GUERRA_/PSOE/Policia/investigog/GAL/traves/recortes/prensa/elpepiesp/19950129elpepinac_4/Tes (accessed November 9, 2008)

⁴⁰ Rogelio Alonso & Fernando Reinares Terrorism, 'Human Rights and Law Enforcement in Spain', *Terrorism and Political Violence*, Vol. 17, No. 1, (2005), p. 274

⁴¹ Ibid, 269

protection of democracy and the safeguarding of citizens' rights in the Basque Country'.⁴² Judge Baltasar Garzon's review illustrates this position when he accused ETA and HB of pursuing a campaign of ethnic cleansing in a report in which he also argued 'that both organizations had promoted the "deputation of the census" in the Basque Country through the elimination of those citizens who would prevent a nationalist hegemony'.⁴³ It is clear there was a fight between the Government of Spain and the regional government of the Basque Country to frame the policy discourse in a way that would support either the constitutional interest, on the one hand or the regional government agenda on the other, in an attempt to shape the terrorist threat. But to all effects,

[t]he United Nations Special Rapporteur concluded in 2004 that torture or maltreatment of prisoners in Spain is not a systematic practice. He also observed that the system made torture possible, particularly in incommunicado detention, and recommended the recording of the interrogation of detainees [*sic*] to prevent any infringement of their rights. However, police trade unions have frequently rejected such a practice, as the disclosure of their identities would seriously endanger their work, and also put their lives at risk.⁴⁴

Nonetheless, a Human Rights Watch report concurred with the Special Rapporteur with regard to the potential occurrence of torture since under the Spanish Code of Criminal Procedure *Ley de Enjuiciamiento Civil* (LEC)

[t]he right of terrorist suspects to an effective defense, already undermined by the limitations on access to counsel during the incommunicado period, is further impaired by the use of secret legal proceedings. Judges may – and often do – impose secrecy, or *secreto de sumario*, on the investigation and judicial proceedings, either in whole or in part. Under *secreto de sumario*, defense attorneys do not have access to critical information regarding the charges against their clients or the evidence against them, including the full grounds for remand to pre-trial detention. This restricted access may be kept in place until the investigative phase of the legal process is almost concluded.⁴⁵

Over time the ETA organization has been weakened and Spanish counter-terrorism and law enforcement practices have proved to be successful. The idiosyncrasy of the Basque situation is that the ruling party in the Basque government, the PNV, acquiesces to the systematic insecurity of half of the regions' non-nationalist Basque citizens who are compelled to live under constant fear. In fact, [a]lthough new legal measures, increasing police efficiency and growing international cooperation continue to debilitate ETA and its supporting network, around 42,000 Basque citizens live under daily threat from the

⁴² Ibid.

⁴³ Ibid, p. 270

⁴⁴ Ibid, p. 274

⁴⁵ 'Setting an Example? Counter-Terrorist Measures in Spain', *Human Rights Watch* (January 2005) Vol. 17, No. 1(D), p. 2, <http://www.hrw.org/reports/2005/spain0105/spain0105.pdf> (Accessed March 8, 2008)

terrorists and its supporting gangs'.⁴⁶ This is a unique situation in democratic Europe 'where systemic violations of human rights still occur ... [and paradoxically] ... victims are mainly, and almost exclusively, non nationalist Basque citizens'.⁴⁷ These facts point to a deliberate sanctioning of an insecurity state on behalf of the Basque government ruled by the nationalist PNV party. Recent Spanish electoral results reflected a loss of PNV influence. Iñigo Urkullu, recently appointed PNV leader, conceded that the PNV had failed to understand and adapt to the evolution of the Basque society.⁴⁸ The question remains as to how to continue making counter-terrorism successful while eradicating this feeling of insecurity within the Basque region? The Spanish counter-terrorism model is notable insofar as it represents an example of legitimate policing activities conducted by a democratic and sovereign nation state within its internal boundaries under the rule of law as a response to a situation affecting its citizens' material conditions of life. No system is perfect and government overreaching is still not only possible, but feasible constitutionally.⁴⁹ However, '[t]he analysis shows that the Spanish model evinces greater facial respect for checks and balances [than other models], inasmuch as it explicitly provides a role for the three branches of government in the design and execution of counterterrorism policy'.⁵⁰

Counter-terrorism, democratic accountability, and civil liberties

Two new phases in the fight against terrorism may be identifiable in addition to the previous four discussed above: (5) Consolidation of adherence to policing practices within the rule of law between 1996-2002 with greater responsibilities for regional polices *Ertzaintza* and *Mossos d'Esquadra* (in Cataluña); and (6) Reorganization of intelligence gathering structures and capabilities across the State Security Forces *Fuerzas y Cuerpos de Seguridad del Estado* (FCSE) characterized by (a) the creation of an Executive Committee of the Unified Command of the FCSE, *Centro Ejecutivo del Mando Unificado* (CEMU) of the FCSE,⁵¹ and (b) the development of antiterrorist plan *Plan Operativo de Lucha contra el*

⁴⁶ Rogelio Alonso & Fernando Reinares 'Terrorism, Human Rights and Law Enforcement in Spain', *Terrorism and Political Violence*, Vol. 17, No. 1, (2005), p. 276; gangs of young urban mobs wreck havoc on a weekend basis in the streets of the Basque country. This practice is dubbed in Basque *kaleborroka*.

⁴⁷ Ibid, p. 277

⁴⁸ 'Urkullu hace autocrítica y dice que el PNV no ha sabido adaptarse a la sociedad Vasca', *El Mundo* (March, 15, 2008),

<http://www.elmundo.es/elmundo/2008/03/15/espana/1205584756.html?a=3f0bb170e6b52363b0bce0afb92c5346&t=1205611761> (Accessed March 15, 2008), para 1-3

⁴⁹ See, for example, a. 55(2) Spanish Constitution allowing Spanish legislature to suspend constitutional protection of certain fundamental liberties and providing Spanish executive with special counterterrorism police powers.

⁵⁰ Ari MacKinnon, 'Counterterrorism & Checks and Balances: the Spanish & American Examples', *New York University Law Review*, Vol. 82, No. 602 (May, 2007), p. 604

⁵¹ See, Ministerio del Interior, 'Reunión constitutiva del Comité Ejecutivo para el Mando Unificado', *Dirección General de Relaciones Informativas y Sociales: Ministerio del Interior* (May 19, 2004), http://www.mir.es/DGRIS/Notas_Prensa/Ministerio_Interior/2004/np051902.htm (accessed November 11, 2008)

Terrorismo (POLT) between 2001-2006.⁵² Developing events throughout these periods would unearth the legal mechanisms that underpin the Spanish counter-terrorism model while raising some concerns with regard to democratic accountability and civil liberties.

When the *Partido Popular* (PP) party arrived to power in 1996 sound reform of security and counter-terrorism activities was expected to strictly conform to the rule of law. Spanish state security agencies began to accommodate to mechanisms within the rule of law to be applied in their law enforcement practices. But in 1998, even at the outset of supervisory reform,⁵³ the journal *El Mundo* published that the CESID had continued its extrajudicial counter-terrorist practices, eavesdropping this time throughout HB party offices; it became an embarrassment for the PP government. More so after General Galindo, a prominent antiterrorism figure from the *Guardia Civil* was indicted. Yet this hiccup was not followed by a stream of resignations as in 1996. The eavesdropping was labeled a 'mistake' from inherited past practices. While not denying knowledge of the eavesdropping, both ex-President Felipe Gonzalez and ex-Defense Minister Narcis Serra, declared that CESID informs about results, not about means'.⁵⁴ This response was reminiscent of ambivalent responses from informed state security forces with regard to the GAL affair. At the same, time this occurrence postponed reform of the CESID until 2002 when it was rebranded National Intelligence Center *Centro Nacional de Inteligencia* (CNI). The GAL extrajudicial counter-terrorism experience and the political eavesdropping embarrassment revealed critical flaws in supervision and accountability practices not only within the intelligence service at large, but also within the legal due process which inhibited violations of civil liberties. In this regard, should any individual be a party to any judicial proceeding where the intelligence service may be involved, he or she lacks any defense recourse. Not even the Spanish Ombudsman *Defensor del Pueblo*, who in other countries may seek to review an intelligence service's conduct as pertains to a citizen's claim may exercise such supervisory role. To all effects a proceeding labeled as a national security item under the Official Secrets Act will be off-limits for proper democratic review.⁵⁵ Arguably, this may still be a cause for concern today.

⁵² See, Ministerio del Interior, 'Interior destina 1.000 policías a la lucha contra el terrorismo islamista', *Dirección General de Relaciones Informativas y Sociales: Ministerio del Interior* (February 17, 2006), http://www.mir.es/DGRIS/Notas_Prensa/Ministerio_Interior/2006/np021703.htm (accessed November 11, 2008)

⁵³ See, e.g., 'La Sala Tercera del Supremo se mantendra como arbitro en los conflictos sobre secretos', *El Mundo* (March 25, 1998), <http://www.elmundo.es/1997/03/25/espana/25N0019.html> (accessed November 1, 2008); see, e.g., 'Operación Nova El 11-M fue la bofetada que nos enseñó la realidad del terrorismo internacional', *La Vanguardia* (October 8, 2008), <http://www.lavanguardia.es/lv24h/20081008/53556257524.html> (accessed November 11, 2008)

⁵⁴ El Gobierno considera las escuchas a HB como un error que no empana la labor del CESID', *El Mundo* (April 17, 1998), <http://www.elmundo.es/1998/04/17/espana/17N0021.html> (accessed November 9, 2008)

⁵⁵ Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial), pp. 318-319

The actual existence of the pre-Constitution Law of Official Secrets *Ley de Secretos Oficiales* (LSO) of 1968, though subsequently modified in 1978,⁵⁶ is still considered a contentious element within the Spanish democratic system of checks and balances, including freedom of the press. To illustrate this sentiment senator Martin-Retortillo, from the Progressive Independent Socialists, declared that the law of 1968 that is now modified ‘served [then as it would now] to silence the press, and not the professional functionaries, since these already conformed to norms sanctioning release of secrets’.⁵⁷ And yet, paradoxically, it was a breach of the LSO that unearthed the dirty counter-terrorist war the GAL unleashed against ETA members and financed with discretionary *fondos reservados*, reserve funds appropriated for the necessary expenses for the security and the defense of the state assigned to the security, defense and intelligence structures, including the CESID. Once discharged from service in 1991, Coronel Juan Alberto Perote, ex-Chief of the Special Means Operations Group *Agrupación Operativa de Medios Especiales* (AOME) within the CESID, conceals over 1,200 classified documents, some of which find their way to the journal *El Mundo*, which publishes some of these causing public outrage leading to the collapse of the PSOE government in the 1996 elections. The documents ostensibly proved the CESID had been eavesdropping on civil society elites. These events nearly paralyzed the CESID which entered in a deeper operational crisis than that suffered in 1981 when it was acknowledged some of its members participated in the failed 1981 *coup d’état*.⁵⁸

Control of the intelligence services, an important counter-terrorist element, is supposed to be ensured through four different mechanisms (1) Executive Control; (2) Parliamentary Control; (3) Budgetary Control; and (3) Judicial Control.⁵⁹ But in order to meet the objectives of the discussion herein, as far as the Spanish intelligence service is concerned, the focus will be placed on parliamentary and judicial controls since these two supervisory mechanisms would gain preeminence in the attempt to reveal the missing clues within the 11-M Commission investigation that followed the 11 March 2004 terrorist attacks on the Madrid public transport system that wrecked havoc causing over 191 deaths and over 1,400 injured. In the same order of work, it might have caused a conflict of interest with the judicial investigation and final ruling of the 11-M Trial resolved in 2007.

⁵⁶ See, e.g., ‘Así es la ley de Secretos Oficiales’, *El Mundo* (September 3, 1996), <http://www.elmundo.es/papel/hemeroteca/1996/09/03/nacional/236509.html> (accessed March 24, 2008)

⁵⁷ Quoted in ‘Los senadores envían la Ley de Secretos Oficiales a la Comisión de la Cámara’, *El País* (November 5, 1978), http://www.elpais.com/articulo/espana/PODER_LEGISLATIVO/CORTES_CONSTITUENTES/1977/1979/senadores/envian/ley/Secretos/Oficiales/comision/Camara/elpepiesp/19780511elpepinac_29/Tes (accessed November 1, 2008)

⁵⁸ Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial, 2006), pp. 275-277

⁵⁹ Andrea Giménez-Salinas, ‘The Spanish Intelligence Services’ in Jean-Paul Brodeur, Peter Gill & Dennis Tollborg, *Democracy, Law & Security: Internal security services in contemporary Europe* (Aldershot, UK: Ashgate, 2003), p. 74; Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial), pp. 275-277

Past experience, overwhelmingly proved overall poor supervision of the CESID had been a recurring trend, mainly because the CESID lacked a clear defined set of objectives under which a legal case for defining accountability may have been made. Supervision at the parliamentary level was also poor as a result of both legal and bureaucratic obstacles, which led to the creation of the parliamentary Official Secrets Commission *Comision de Secretos Oficiales* (CSO) in 1995, formed by Congress deputies.⁶⁰ Yet to all effects, access to classified information by the CSO remained weak and limited since the LSO was conceived to protect national security interests, and the criminal and military codes impose serious sanctions on the publication of official secrets irrespective of who causes revelations.

As far as judicial control, the criminal prosecution of functionaries and others involved in GAL extrajudicial counter-terrorist activities proved judicial controls may work. Nonetheless, this may only occur once classified information is ready and available, a circumstance subject to governmental scrutiny. In the GAL case, it should not be forgotten that without Coronel Perote's betrayal, perhaps knowledge of the GAL experience may have never been revealed.⁶¹ This circumstance could have allowed for the extended corruption of the CESID and the rule of law in Spain. With regard to the CESID eavesdropping of civil society elites the *Audiencia Nacional* requested necessary documentation to undertake its investigation. But as Diaz Fernandez pointed out, the CESID 'refused to release [documents] on the grounds that it constituted classified information. The request ended up in the council of ministers that also refused to declassify it; yet again, events confirmed how governmental control over such documentation tended to be absolute, thus turning judges into a very necessary counterbalance, although not always with the desired results'.⁶²

Contrary to popular belief the 2002 and the 2006 reforms of the Spanish intelligence service did not arise as a result of the abrupt impact of Islamist militant terrorism in the international stage in 2001, but as a natural evolution in the quest to improve its overall efficiency and its operational capability.⁶³ Thus, the 2002 Reform essentially transformed the CESID into the National Intelligence Center *Centro Nacional de Inteligencia* (CNI) adding some internal structures to foster greater flexibility, efficiency and budgetary transparency. However, terrorism or organized crime information gathered by either the National Police or the Guardia Civil 'fall outside the system of supervision, except for

⁶⁰ Ley 11/1995 de 11 de Mayo Reguladora de la utilización y control de los créditos destinados a gastos reservados, <http://boe.es/boe/dias/1995/05/12/pdfs/A13800-13801.pdf> (accessed March 20, 2008)

⁶¹ See, e.g. Ibid, pp. 74-75;

⁶² Antonio M. Diaz Fernandez, 'Halfway Down the Road to Supervision of the Spanish Intelligence Services', *Intelligence & National Security*, Vol. 21, No. 3 (June 2006), p. 449

⁶³ See, e.g. Ley Organica 2/2002 de 6 de Mayo reguladora del control judicial previo del CNI <http://www.oc.ccn.cni.es/pdf/LeyesdelCNI.pdf> (Accessed November 5, 2008); Real Decreto 612/2006 19 de mayo, de modificación del Real Decreto 436/2002, de 10 de mayo, por el que se establece la estructura orgánica del Centro Nacional de Inteligencia <http://www.boe.es/boe/dias/2006/05/24/pdfs/A19453-19507.pdf> (accessed November 5, 2008)

matters that may be dealt with by the Interior Committee of Congress'.⁶⁴ As far as judicial supervision of its activities the 2002 reform forces the CNI to: (1) seek prior judicial approval of search and seizure activities, including communications, by a magistrate from the Supreme Court *Tribunal Supremo* (TS) appointed for this task; (2) Issuance of such requests must be formalized in writing by the Director of the CNI and must specify:

*(a) the required measures; (b) the circumstances in which the request is grounded; and (c) the objectives that motivate it and the reasons supporting the adoption of such measures; it must also include details of the affected person or persons, if known, and the location at which they are to be put in place; (d) these measures cannot last for longer than 24 hours in cases of entering premises and three months in the case of interception of communications sent by post, telegraph, telephone or by any other medium. Both periods may be extended for times of equal duration whenever necessary. (3) the magistrate shall, within a period of 72 hours that cannot be extended, concede or refuse the requested authorization; this deadline may be reduced to 24 hours whenever justified on the grounds of urgency by the CNI, notwithstanding which the request must contain all of the information mentioned above. The content of these measures adopted by the magistrate shall be classified as secret; and (4) the CNI will destroy immediately all and any communication material pertaining to the aforementioned authorization for search and seizure.*⁶⁵

However, the reforms still enabled the CNI with a great degree of discretion. Both the 11-M Commission investigation and the *Audiencia Nacional* in charge for prosecuting the 11-M attacks acknowledged frustration over their inability to determine (1) which information was pertinent to their efforts and (2) how to access such information. While some documents were declassified by the Council of Ministers, others were made available to the CSO, which subsequently '... turned debates into political slanging matches ...'.⁶⁶ These instances of course are hardly transcendent to an innocent individual who could fall prey to proceedings within the scope of both the LSO as well as the LEC.

The inability on behalf of both the 11-M Commission and especially the judiciary to perform appropriate review is reminiscent once more of questionably democratic, highly politicized, practices of the past that may result in the corruption of the entire democratic apparatus of checks and balances. Such corruptive behaviors sat precedent soon after the 11-M attacks as the PP party declassified CNI documents with the sole objective of proving it had acted responsibly. This instance implied a breach of Government Law *Ley de Gobierno* which sent chills throughout CNI cadres.⁶⁷

As international events unfolded, Spanish security services were reaffirmed in the need to retain the intelligence apparatus within a monocephalic structure, without dividing it

⁶⁴ Ibid, p. 450

⁶⁵ Real Decreto 612/2006 de 19 de Mayo, de modificación del Real Decreto 436/2002, de 10 de mayo, por el que se establece la estructura orgánica del Centro Nacional de Inteligencia <http://www.boe.es/boe/dias/2006/05/24/pdfs/A19453-19507.pdf> (accessed November 5, 2008)

⁶⁶ Antonio M. Diaz Fernandez, 'Halfway Down the Road to Supervision of the Spanish Intelligence Services', *Intelligence & National Security*, Vol. 21, No. 3 (June 2006), p. 452

⁶⁷ Ibid

into internal and external intelligence apparatuses such as the British model. MacKinnon's past categorization between homegrown and foreign-grown terrorism was being reassessed. The 2006 Reform amended previous legislation finally formalizing the organic structure of the CNI. The most important characteristics were (1) the creation of three technical departments with new directors and (2) confirmation that the CNI would remain organically dependent on the Defense Ministry while reporting directly to the Presidency. These final touch ups came as a result of the need to ensure operational effectiveness and put behind supervisory problems of the past with the added supervisory control of the CSO, composed from parliamentarians from each of the different political parties.⁶⁸ Yet, effective supervision of the CNI continues to be questionable particularly after CNI Director, Alberto Saiz, refused to declassify documents revealing a CNI officer had sold classified material to a Russian intelligence service.⁶⁹ In order to better supervise the CNI as well as to maximize its efficiency and that of the *Audiencia Nacional* in counter-terrorism matters, an intensive discovery process, under the guidance of the almost omniscient anti-terrorist magistrates, akin to that in France, may bring positive results, since the 'tight integration with intelligence allows the judicial system to act more effectively'.⁷⁰

Global norms shape the terrorist threat: counter-terrorism beyond Spain

International cooperation has also played a part in supporting Spanish counter-terrorism efforts and therefore in the shaping and countering of the terrorist threat. The conservative Aznar government battled in the EU for the homogenization and regularization of a European Arrest Warrant (EAW). A timid agreement was reached in 1999, though it was not until 2004 that the EAW regime was fully in force and helped bring to justice ETA terrorists as France, particularly, buried the hatchet with ghosts from the past that hindered Franco-Spanish cooperation. Furthermore, the Financial Action Task Force (FATF), first created by the G-7 to curb money laundering from drug-trafficking and later expanded to curb the financing of terrorist activities, enabled Spain to cut the international financing of ETA.⁷¹ This task was furthered by the creation of the Terrorist Activities Supervisory Commission *Comisión de Vigilancia de Actividades de Financiación del Terrorismo* (CVAFT) under the Interior Ministry, in 2003. Evidently, Spanish counter-terrorism efforts would have been fruitless had the US Department of State not included ETA as a terrorist organization for the first time in 1997.⁷²

⁶⁸ Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial, 2006), p. 423

⁶⁹ 'El Gobierno no desclasifica los documentos de Flórez, ex agente del CNI', *El Mundo* (November 5, 2008), <http://www.elmundo.es/papel/2008/11/05/espana/2536660.html> (accessed November 13, 2008)

⁷⁰ Jeremy Shapiro & Benedict Suzan, 'The French Experience of Counter-terrorism', *Survival*, Vol. 45, No. 1, (Spring 2003), p. 83

⁷¹ William Vleck, 'Surveillance to Combat Terrorist Financing in Europe: Whose Liberty, Whose Security?', *European Security*, Vol. 16, No. 1(2007), p. 104; David Brown, 'Defending the Fortress? Assessing the European Union's response to trafficking', *European Security*, Vol. 13, No. 1, (January, 2004), pp. 95-116

⁷² US Department of State, 'Foreign Terrorist Organization List (2004)', <http://www.state.gov/documents/organization/41055.pdf> (Accessed March 18, 2008)

As it may be deduced, before the advent of *hyper-terrorism*, a pattern of international cooperation in criminalizing terrorist activities was embedded in Spanish counter-terrorism practices. Unfortunately, success against ETA terrorism may have caused Spanish counter-terrorism authorities to overlook the evolution of Islamist militancy within Spain proper. While this hypothesis may be true at the policy level, it does not hold much standing within expert circles. In fact, Mariano Rayon, Chief of Central Command for Foreign Intelligence at the National Police *Unidad Central de Información Exterior de la Policía* (UCI) informed Government authorities in November 2003 that Spain was in al-Qaeda's radar.⁷³ In the same line of advice, Reinares also affirmed in 2003 that '*al-Qaeda has used Spain as a base possibly transforming its citizens and leaders in targets of global terrorism*'.⁷⁴ The what 'ifs' may pile up given hindsight reflections with regard to policymakers being in-sync or out-of-sync with the level of perceived threat shared by some security-intelligence officials and field experts. And yet, surprise attacks remain by definition unavoidable.

With a solid understanding of how the terrorist threat has been shaped in Spain and particularly in the Basque Country, both materially and normatively, we can extrapolate why counter-terrorism policies and practices have been facially unaltered within Spain in the wake of the international terrorist threat posed by militant Islamists. There is one major point of concern. While Spanish counter-terrorism was traditionally aimed at preventing and responding to an internal and localized threat making a clear distinction between the roles and functions of internal security-intelligence agencies and the military, the full blown homogenization and regularization of global counter-terrorism policies and practices as mandated by United Nations Security Council Resolutions (UNSCR) and the European Union 2005 Counter-terrorism Strategy (EU CTS), under the guidance of a Counter-terrorism *Czar*, particularly, raises questions over the feasibility and desirability of the application of these within Spain as internal and external aspects of security become blurred. The Lisbon amendments to the Treaty of the EU (TEU) further continued that trend emphasizing the continuous interlocking of Common Foreign and Security Policy (CFSP) and Police and Judicial Cooperation in Criminal Matters (PJCCM) competences. This means an opportunity, as well as a risk, to frame and shape perceptions of security exists at the international level which may come to redefine power relations between and amongst democratic polities so as to serve a particular interest; and measures adopted by the EU Group of Personalities in 2006 point in this direction.⁷⁵

It is assumed that functional integration of peoples, organizations, capitals and goods follows globalization trends. 'As crime problems become more global, so the logic of this

⁷³ 'La policía advirtió al Gobierno antes del 11-M de que España era objetivo del terrorismo islamista', *El Mundo* (July 4, 2004), <http://www.elmundo.es/papel/2004/07/04/espana/1658744.html> (accessed November 10, 2008)

⁷⁴ Fernando Reinares, *Terrorismo Global* (Taurus, Madrid, 2003), p. 131.

⁷⁵ See e.g., Mai'a K. Davis Cross, 'An EU Homeland Security? Sovereignty vs. Supranational Order', *European Security*, Vol. 16, No. 1 (March 1, 2007), pp. 88-95

functional narrative goes, so do the responses to these problems'.⁷⁶ With this premise in mind intelligence and security services world-wide argued appropriate counter-terrorism legislation had to be swiftly passed granting them extraordinary powers to face the challenge of domestic as well as international terrorism that came forth as a result of the radicalization and politicization of Muslims world-wide which vividly materialized in 2001 and the following years. Considering the threat to Western states had been unprecedented in its magnitude in the post-Cold War period, such was the feeling with regard to the need for the tightening up of security. While citizens of many democratic countries debated over the need for new legislation, they also balanced their concerns over the degree of invasiveness associated with provisions in these new legislations in which their civil liberties were being sidelined for the securitization of society. These dynamics have granted political elites and security-intelligence managers' broad powers enabling them to frame and shape not only the terrorist threat, but also security and insecurity at the national, transnational and international levels. How is this connection relevant and what does it actually entail with regard to the maintenance of both security and insecurity?

In 2004 Spain creates the National Antiterrorism Coordination Center *Centro Nacional de Coordinación Antiterrorista* (CNCA) to coordinate intelligence work between the National Police, the Civil Guard and the existing intelligence service CNI, as well as increasing the number of agents in both agencies dedicated to intelligence-gathering on international terrorism. However, information gathered by each service may only be seen and operated by those attaches from each service working within the CNCA.⁷⁷ The CNCA is modeled after the British Joint Terrorism Analysis Centre (JTAC). The CNCA coordinates efforts with JTAC and similar foreign anti-terrorism units such as the *Contra-Terrorism Infobox* (CTI) in the Netherlands; the Common Anti-terror Center *Gemeinsames Terrorismusabwehrzentrum* (GTAZ) in Germany; and the French Anti-terrorism Coordination Center *Unité de Coordination de la Lutte Anti-Terroriste* (UCLAT). However, Ludo Block points out that 'without having direct access to the information of the participating bodies [other counter-terrorism units' intelligence] and largely dependant on face-to-face meetings, UCLAT's coordinating role [for example] remains suboptimal'.⁷⁸ Similarly, the possibility of internal security services vying for turf is a concern that results from these trends. In the UK, for example, the Secret Intelligence Service (MI6) moved competencies into the area of terrorism, 'which was not received with a great deal of enthusiasm by the Metropolitan Police Special Branch; thereafter, MI5, concerned itself with organized crime, again not to the satisfaction of the police services'.⁷⁹ In this regard,

⁷⁶ Peter Andreas & Ethan Nadelmann, *Policing the Globe: Criminalization & Crime Control in International Relations* (Oxford: Oxford University Press, 2006), p. 7

⁷⁷ 'Centro Nacional de Coordinación Antiterrorista', *La Pagina de ASR* (2008), <http://www.intelpage.info/cnca.htm> (Accessed March 19, 2008)

⁷⁸ Ludo Block, 'Evaluating the Effectiveness of French Counter-terrorism', *The Terrorism Monitor*, Vol. 3, No. 15 (July 28, 2005), p. 8, http://www.jamestown.org/terrorism/news/uploads/ter_003_017.pdf (accessed November 11, 2008)

⁷⁹ Malcolm Anderson, et al, *Policing the European Union: Theory Law & Practice* (Oxford: Clarendon Press, 1995), p. 173 in 'Counterterrorism policy in fortress Europe: implications for human rights', in Fernando Reinares (Ed), *European Democracies Against Terrorism: Governmental policies &*

Stewart Baker's warning that '[c]ombining domestic and foreign intelligence functions creates the possibility that domestic law enforcement will be infected by the secrecy, deception and ruthlessness that international espionage requires', should not be taken lightly.⁸⁰ The Spanish FCSE including the CNCA could face similar turf battling constraints. Nevertheless, these instances prove important structural advances have been made to adjust internal as well as external coordination and cooperation between both Spanish FCSE and international security structures to better combat terrorism.

Similarly, some noticeable structural changes have also occurred abroad. In France, for example, two of its intelligence organizations, the Directorate of Territorial Security *Direction de la Surveillance du Territoire* (DST) and the Central Directorate of General Information *Renseignements Généraux* (RG) have merged into one agency, the Central Directorate for Domestic Intelligence *Direction Centrale du Renseignement Interieur* (DCRI) to better fight terrorism.⁸¹ While this may be consistent with the increasing need to avoid the overlapping of functions, maximize resources and ensure efficiency, questions over the possibility of the infringement of civil liberties arise particularly as a result of the revelation that 'a controversial "Big Sister" database in which the intelligence services will store details on millions of citizens, including their health, social life or sexual orientation' [has been created].⁸² The database, called EDVINGE, is mandated by decree to collect information on anyone aged 13 or above who is 'likely to breach public order'. This initiative in France follows on the steps of German counter-terrorism *technologization* methods. In the 1980s,

[l]arge amounts of statistical data were scanned into computers in the effort of identifying overlapping clusters of suspicious traits in particular population segments. For example, the police used the files of utility companies to identify customers who paid their bills in cash or through third parties. This group was narrowed down further by running data checks on lists of residents and

intergovernmental cooperation, The Oñati Institute for the Sociology of Law (Aldershot, UK: Ashgate, 2000), p. 216

⁸⁰ Stewart A. Baker, 'Should Spies Be Cops?', *Foreign Policy*, No. 97 (Winter 1997), p. 37 in Arthur Hulnick, 'Intelligence and law enforcement: The spies are not cops problem', *International Journal of Intelligence & CounterIntelligence*, Vol. 10, No. 3 (September 1, 1997), p. 275

⁸¹ The Law Library of Congress, 'France: Government Organization - Reorganization of Intelligence Services', the Global Legal Monitor (November 2, 2007), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_164_text ; 'L'Elysée coordonnera les services du renseignement', *Le Monde* (august 5, 2008), http://www.lemonde.fr/web/recherche_breve/1,13-0,37-1046079,0.html (accessed November 8, 2008)

⁸² 'French Cabinet row over 'Big Sister' database, the Telegraph (September 8, 2008), <http://www.telegraph.co.uk/news/worldnews/europe/france/2706861/French-cabinet-row-over-Big-Sister-database.html> (accessed November 8, 2008); ENDitorial: 'Massive mobilization against EDVIGE, the new French database', Digital Civil Rights in Europe (July 16, 2008), <http://www.edri.org/edrigram/number6.14/edvige-french-database> (accessed November 8, 2008)

automobile registrations as well as receipts of social security and child care payments. The people that remained in this “drag-net” were potential suspects.⁸³

German counter-terrorism methods have since followed this trend and although early German counter-terrorism practice may be understood in that particular historical context, these practices are called into question in Germany today irrespective of their potential benefit in the fight against terrorism. This has been the security-policy discourse since approval of the invasive 2002 Antiterrorism Law, and since 2006 with the introduction of a new antiterrorism database linking Germany’s law enforcement, intelligence and border agencies.⁸⁴ However, in order to assuage critics, the Act on Joint Databases establishes that,

[t]he order opening a data file shall be approved by the Federal Ministry of the Interior, the Federal Chancellery, the Federal Ministry of Defence, the Federal Ministry of Finance and the supreme Land authorities responsible for the participating Land authorities. The Federal Commissioner for Data Protection and Freedom of Information shall be consulted before the order opening a data file is adopted.⁸⁵

In Italy, by virtue of security intelligence reform, following a string of eavesdropping scandals and collusion with Central Intelligence Agency (CIA) extraordinary renditions involving the Military Intelligence and Security Service *Servizio per le Informazioni e la Sicurezza Militare* (SISMI), Italy produces two internal security agencies and an external agency: (1) the Internal Security Intelligence Agency *Agenzia Informazioni e Sicurezza Interna* (AISI) headed by a General, ex-number two in the *Carabinieri*, the Italian paramilitary police; (2) the Department for Intelligence Security *Dipartimento delle Informazioni per la Sicurezza* (DIS), which supplanted the Executive Committee for Intelligence and Security Services *Comitato Esecutivo per i Servizi di Informazione e Sicurezza* (CESIS) with a mainly coordinating role, now headed by an ex-police chief; and (3) the *Agenzia Informazioni e Sicurezza Esterna* (AISE) replacing SISMI. It was extremely important for Italy to produce appropriate oversight and supervision to avoid its services’ activities to violate civil liberties. Although the Prime Minister is under direct control of the new ‘security information system’, law 03/08/2007, No. 124 includes some checks and balances since ‘[t]he intelligence services are forbidden from employing or commissioning advisory or co-operation services from elected politicians [sic] at the European, national, regional and

⁸³ Peter J. Katzenstein, ‘Same War Different Methods: Germany, Japan & Counterterrorism’, *International Organization*, 57 (Fall 2003), p. 741

⁸⁴ ‘Germany Agrees on Anti-Terror Database’, Spiegel On line (September 5, 2006), <http://www.spiegel.de/international/0,1518,435244,00.html> (accessed November 11, 2008)

⁸⁵ The Bundesdag, ‘Act on Setting up Joint Databases of Police Authorities and Intelligence Services of the Federal Government and the Länder (Act on Joint Databases) of 2006’, http://www.bmi.bund.de/nr_1016300/Internet/Content/Common/Anlagen/Gesetze/Antiterrordateigesetz_en.templateId=raw,property=publicationFile.pdf/Antiterrordateigesetz_en.pdf (accessed November 11, 2008); Elisabeth Book, ‘Germany Tightens Antiterrorism Measures’, *National Defense Magazine* (July 2000), http://www.nationaldefensemagazine.org/archive/2002/July/Pages/Germany_Tightens4042.aspx (accessed November 11, 2008)

local level, members of governing bodies or constitutional bodies, judges, religious ministers and journalists'.⁸⁶ However, no judge may incriminate intelligence officers for providing false evidence or entering an individual's private property. That belonging to political parties, unions, and journals is off-limits. Thus, while some positive security measures protecting civil liberties have been adopted, these remain lax.⁸⁷ In fact, the adequacy of the reform was called into question when Italy moved in 2008 to criminalize illegal immigration but was finally forced to soften its measures after public scrutiny.⁸⁸

As far as balancing counter-terrorism, democratic accountability and civil liberties in Spain, the question is whether these foreign trends have affected Spanish counter-terrorism methods and practices. Has Spain adopted similar *databasing* initiatives thereby conforming to the way the terrorist threat is being shaped? The answer is yes. In 2006, the Antiterrorist Operations Coordination System *Sistema de Coordinación de Operaciones Antiterroristas* (SICOA) is created. SICOA will be used by the General Intelligence Commissariat of the National Police *Comisaría General de Información del Cuerpo Nacional de Policía* (CGI) and by the Guardia Civil Intelligence Service *Servicio de Información de la Guardia Civil* (SIGC) to introduce data related to actual terrorism investigations as well as those related to it for the sake of the state security bodies' efficiency.⁸⁹ At the same time parameters for clear guidance under which government officials in the different diplomatic sites, foreign missions and international organizations are to coordinate between themselves and the Interior Ministry and the CNCA with regard to terrorism related issues are well defined,⁹⁰ though commensurate legal oversight does not necessarily follow under this scheme since CNI *attaches* within the CNCA may consider classifying information subject to democratic oversight.

On the supra-national scene, since EU legal mechanisms have not developed clearly yet in terms of regulating transnational operations on behalf of supra-national state policing bodies it remains to be seen under what discretion they may operate, not only with regard to securitized *databasing*, but also with regard to Joint Investigations Teams (JIT) which may operate trans-nationally as well.⁹¹ Spain has been the only EU country

⁸⁶ 'Law reforms intelligence services', *Statewatch* (September 3, 2008), <http://www.statewatch.org/news/2007/sep/03italy-intell.htm> (accessed November 14, 2008)

⁸⁷ 'Riforma dei servizi, sì unanime della Camera', *Il Corriere della Sera* (February 15, 2007), http://www.corriere.it/Primo_Piano/Politica/2007/02_Febbraio/15/servizi.shtml (accessed November 14, 2008)

⁸⁸ 'When Brussels Trumps Rome', *The Economist* (October 23, 2008), http://www.economist.com/world/europe/displaystory.cfm?story_id=12470625&fsrc=rss (accessed November 14, 2008)

⁸⁹ Fernando Reinares, '¿Estamos más seguros frente a al-Qaeda? Reformas en la seguridad interior española y prevención del terrorismo global, 2004-2008', *Real Instituto El Cano* (Documento de Trabajo No. 40, 2008), p. 9-10 http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Terrorismo+Internacional/DT40-2008 (accessed November 11, 2008)

⁹⁰ *Ibid*

⁹¹ See, Chap. VI, Art. K7.5 of the Treaty of the EU where the European Court of Justice (ECJ) has no bearing's in justice and criminal cooperation oversight; see also, Title V, Chap. I, Art. 72,

that complied fully with the EU JIT Framework Decision thereby protecting itself against others' criminal and civil liabilities if, and when, they do operate within Spanish territory.⁹² Yet, this has to be contextualized within the Spanish LEC mechanisms (i.e., secret proceedings *secreto de sumario*) and the LSO. These integrationist trends and mechanisms may explain recent Franco-Spanish antiterrorist successes.⁹³

As greater cooperation in security–intelligence matters increases so does the integration of these structures. The creation of the Joint Police Chiefs Task Force (JPCTF) in 2000 and the Counter-terrorism Group (CTG) in 2001 are illustrating;⁹⁴ ‘The CTG co-operates closely with the EU, although there are no formal links – most national intelligence services are reluctant to give the EU any formal role’.⁹⁵ Further, in 2006 the launching of the European Gendarmerie Force (EGF), headquartered in Italy and sponsored by France, Italy, The Netherlands, Portugal and Spain aims at improving crisis management capabilities in sensitive areas illustrates this trend. According to its mandate the EGF

responds to the need to rapidly conduct all the spectrum of civil security actions, either on its own or in parallel with the military intervention, by providing a multinational and effective tool. The EGF will facilitate the handling of crisis that require management by police forces, usually in a critical situation, also taking advantage from the experience already gained in the relevant peace-keeping missions.⁹⁶

However, fear over supra-national official's lack of appropriate oversight is a concern. The oft mentioned EUROPOL scandal is a case in point. In 2001 EUROPOL headquarters in the Hague were raided by a special Dutch police team following the arrest

p. 64; and Chap. IV, Art. 82(2), p. 69-70 of Consolidated Texts of the TEU as amended by the Treaty of Lisbon (London: Foreign & Commonwealth Office, 2008)

⁹² ‘Report from the Commission on national measures taken to comply with the Council Framework Decision of 13 June 2002 on Joint Investigation Teams {SEC(2004) 1725}’, *EU Commission* (January 7, 2005), http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&type_doc=COMfinal&an_doc=2004&nu_doc=858&lg=en (accessed November 11, 2008)

⁹³ See, e.g., Ludo Block, ‘European Counter-Terrorism Culture and Methodology’, *Terrorism Monitor*, Vol. 3, No. 8 (April 21, 2005), p. 7, http://www.jamestown.org/terrorism/news/uploads/ter_003_008.pdf (accessed November 11, 2008); Magnus Norell, ‘The Growing Threat of Islamic Militancy in Europe’, *Terrorism Monitor*, Vol. 3, No. 8 (April 21, 2005), p. 8, http://www.jamestown.org/terrorism/news/uploads/ter_003_008.pdf (accessed November 11, 2008)

⁹⁴ The JPCTF aims at enhancing information cooperation through the heads of the different EU member country law-enforcement bodies; the CTG was set up by the EU member country intelligence chiefs to enhance cooperation.

⁹⁵ Daniel Keohane, ‘The EU & Counter-terrorism’, *Centre for European Reform Working Paper* (May 2005), p. 30-31

⁹⁶ European Gendarmerie Force, <http://www.eurogendfor.org/> (accessed November 7, 2008)

of a French official on the accusation of forgery.⁹⁷ As a result EUROPOL's functionality has been much debated.⁹⁸ In fact, the existence and work of many of these supra-national security entities is not well understood by many Europeans, including Spaniards or EU immigrants whose perceptions about one another are being redefined.

When Spain joined the European Community (EC) in 1985 a major requirement for its adhesion was the implementation of an immigration policy that would be grandfathered by EC members. As a result, Spain approved the Alien Law *Ley Organica de Extranjeria* (LOE) on July 1, 1985.⁹⁹ The result of the projection of this law throughout time has been the 'restructuring of identities in the "new" Spain, through a juxtaposition with those who have traditionally been defined as "cultural others."¹⁰⁰ The transformation of the conceptions of citizenship, among Spaniards in Andalusia, Spain's southern tier region, and 'their shifting orientation to their African immigrants with whom they shared not only class solidarity but also a long history of cultural amalgamation.... has created an aura of animosity that contradicts the 'substantial rhetoric about immigrants' rights and integration,¹⁰¹ as related to both the LOE and the EU CTS requirements for border security for the realization of an area of freedom, security and justice. FRONTEX agents will be tasked to approve or deny entry-exit to the EU based on information systems mechanisms within the Schengen area agreement which will be connected to a larger technology of information systems network,¹⁰² potentially connected to EURODAC,¹⁰³ if approved, and to ATLAS and TECS.¹⁰⁴ 'The so called

⁹⁷ Jelle van Buuren, 'More trouble for Europol', *Telepolis* (July 2, 2001), <http://www.heise.de/tp/r4/artikel/3/3615/1.html> (accessed November 7, 2008); 'Europol corruption scandal: French Europol official arrested for alleged fraud and money-laundering', *Statwatch News Online* (June 2001)

⁹⁸ See, e.g., David Brown 'Defending the Fortress? Assessing the European Union's Response to Trafficking', *European Security*, Vol. 13, No. 1, pp. 111-115

⁹⁹ Kitty Calavita & Liliana Suarez-Navaz, 'Spanish Immigration Law & the construction of Difference: Citizens & 'Legals on Europe's Southern Border', in Warren P., Richard & Mauer, Bill, eds., 'Globalization, Governmentality, Law, and Identity' (Minnesota: University of Minnesota Press, 2003), p. 99

¹⁰⁰ Belen Agrela Agrela, Belen (2002), 'Spain as a Recent Country of Immigration: How Immigration Became a Symbolic, Political, and Cultural Problem in the "New Spain"', *Center for Comparative Immigration Studies*, (University of California: San Diego), Working Paper No. 57 (2002), p. 1

¹⁰¹ Kitty Calavita & Liliana Suarez-Navaz, 'Spanish Immigration Law & the construction of Difference: Citizens & 'Legals on Europe's Southern Border', in Warren P., Richard & Mauer, Bill, eds., 'Globalization, Governmentality, Law, and Identity' (Minnesota: University of Minnesota Press, 2003), pp. 100-101

¹⁰² Member States supply information to the system through national networks (N-SIS) connected to a central system (C-SIS), and this IT system is supplemented by a network known as SIRENE (Supplementary Information Request at the National Entry). This network is the human interface of the SIS which will be upgraded by SIS II technology.

¹⁰³ EURODAC consists of a central unit within the Commission equipped with a computerized central database for comparing the fingerprints of asylum applicants and a system for electronic data transmission between Member States and the database.

¹⁰⁴ Atlas Defence Systems is a solution integrator specialized in the resolution of communications, network security and surveillance challenges for governments, defence and security sensitive

Passenger Name Record (PNR) agreement with the US, whereby data on passengers travelling to the US are transferred to that country; and the “Returns Directive”, setting out minimum standards for the expulsion of non-EU citizens from the EU [will also form part of the drive to concentrate *technologization*].¹⁰⁵ These tendencies have also had a negative impact on Spain’s treatment of illegal immigrants which is cause for concern.¹⁰⁶ At the center piece intelligence services are coordinating such efforts. The fact that data exchange is subject to national law ‘afford cooperating authorities a comparatively broad degree of discretion in terms of the data they [, security-intelligence services, decide to] share’.¹⁰⁷ Fears over terrorists blinding immigration officials resulted in Parliament changing direction in Spain. Since 2003, a terrorist suspect may be held incommunicado for a maximum of thirteen days, whereas suspects accused of other crimes now face a maximum of five days of incommunication.¹⁰⁸ In addition while the LEC, under the Spanish Penal Code, ‘establishes that all persons arrested must be brought before a competent judge within seventy-two hours of the arrest, those detained on suspicion of membership or collaboration with an armed group (including terrorist organizations) may be held for an additional forty eight hours. This means that terrorism suspects may be under police custody for five days before being seen by a judge’.¹⁰⁹

These securitization dynamics are relevant as security-intelligence officials across the EU claim the EU CTS will be effective. However, as Parkes suggests,

[t]he logic of ‘effectiveness’ in security cooperation has entailed both an extension of executive power in policy and a reinforcement of executive autonomy in policy-making. The disinclination of those ministers and officials charged with providing security to submit to robust parliamentary input and human rights protection may, therefore, have more to do with their desire to

organizations worldwide; TECS is Europol ‘s Computer System, which helps national law-enforcement agencies across the European Union share information on known and suspected criminals, and on stolen objects. It serves ATLAS: an uninstitutionalized security network currently regrouping more than 30 counter-terrorist special intervention units based in the police, gendarmerie and armed forces of the EU member states and the non-EU member Norway; see, e.g., Ludo Block, ‘Europe’s emerging counter-terrorism elite: the ATLAS Network’, *Terrorism Monitor*, Vol. 5, No. 5 (March 15, 2007)

¹⁰⁵ Marie McGinley, ‘Rights vs. Effectiveness? The autonomy Thesis in EU Internal Security Cooperation’, *European Security*, Vol. 16, Nos. 3-4 (September-December, 2007), p. 246

¹⁰⁶ See, ‘Un informe critica el “régimen de cárcel” para los “sin-papeles”’, *El País* (March 7, 2008), http://www.elpais.com/articulo/espana/informe/critica/regimen/carcel/papeles/elpepiesp/20080307elpepinac_21/Tes (accessed November 12, 2008)

¹⁰⁷ Ibid, p. 252

¹⁰⁸ cf. a. 509(2) Spanish Penal Code in Ari MacKinnon, ‘Counterterrorism & Checks and Balances: the Spanish & American Examples’, *New York University Law Review*, Vol. 82, No. 602 (May, 2007), p. 619

¹⁰⁹ ‘Setting an Example? Counter-Terrorist Measures in Spain’, *Human Rights Watch* (January 2005) Vol. 17, No. 1(D), p. 18-19, <http://www.hrw.org/reports/2005/spain0105/spain0105.pdf> (Accessed March 8, 2008)

extend their autonomy *vis-à-vis* other actors and less with a desire to engage in effective cooperation.¹¹⁰

In Spain these warnings should be reinforced by the acknowledged severe overload of the Spanish justice system (SJS) as a whole. Currently the SJS is underfunded and understaffed, lacking appropriate technology systems akin to those in other modern democracies that impair its functioning efficiently and expediently.¹¹¹ Arguably, these deficiencies may have forced the release of a GRAPO terrorist who was apprehended with French cooperation for the assassination of a Spanish police officer in 2000.¹¹²

As a result of the increased pattern in the international *technologization* of security, it cannot be affirmed that Spain's model has been 'unaltered' in the aftermath of *hyperterrorism*. The terrorist threat is therefore being materially and normatively shaped and framed to suit the interests of actors interested in 'policing at a distance'. This stance is reinforced by the fact that while suffering ETA terrorism for decades, Spanish state security authorities created the CNCA only after 11-M.¹¹³ It is as if Spanish FCSE efficacy in rounding up an al-Qaeda cell in November 2001 is forgotten. The reinforcement of security managers' autonomy will have implications not only for the internal security of Spain and the whole of the EU but also for the internal security of the EU neighborhood countries from which both illegal immigrants and the foreign 'others' arrive since EU security managers will be in a position to manage the security and shape the insecurity of foreign countries as well.¹¹⁴

Ever since the UN responded to the terrorist threat with UNSCR 1373, which created the UN Counter Terrorism Committee (CTC) under Chapter VII of the UN Charter, in the aftermath of 9/11, the international community has been witnessing the international

¹¹⁰ Marie McGinley, 'Rights vs. Effectiveness? The autonomy Thesis in EU Internal Security Cooperation', *European Security*, Vol. 16, Nos. 3-4 (September-December, 2007), p. 246

¹¹¹ 'Los jueces se rebelan en masa contra el Gobierno en internet', *El Mundo* (October 20, 2008), <http://www.elmundo.es/papel/2008/10/20/espana/2524404.html> (accessed November 12, 2008); 'Los juzgados penales acumulan 406.665 sentencias por cumplir', *El País* (March 4, 2008), http://www.elpais.com/articulo/espana/juzgados/penales/acumulan/406665/sentencias/cumplir/elpepiesp/20080404elpepinac_2/Tes (accessed November 12, 2008)

¹¹² 'La desidia judicial obliga a absolver al grapo reconocido como asesino de un policía', *El Mundo* (April 3, 2008), <http://www.elmundo.es/2008/04/03/espana/2359705.html> (accessed November 12, 2008); see, e.g., Ministerio del Interior, 'Francia entrega a España a los miembros del GRAPO Marcos Martín Ponce y Victoria Gómez Méndez', *Dirección General de Relaciones Informativas y Sociales, Ministerio del Interior* (December 22, 2006), http://www.mir.es/DGRIS/Notas_Prensa/Policia/2006/np122203.htm (accessed November 12, 2008)

¹¹³ Fernando Reinares, '¿Estamos más seguros frente a al-Qaeda? Reformas en la seguridad interior española y prevención del terrorismo global, 2004-2008', *Real Instituto El Cano* (Documento de Trabajo No. 40, 2008), p. 9-10
http://www.realinstitutoelcano.org/wps/portal/rielcano/contenido?WCM_GLOBAL_CONTEXT=/Elcano_es/Zonas_es/Terrorismo+Internacional/DT40-2008 (accessed November 11, 2008), p. 9

¹¹⁴ See, e.g., David Brown 'Defending the Fortress? Assessing the European Union's Response to Trafficking', *European Security*, Vol. 13, No. 1, pp. 106-107

homogenization and regularization of norms countering the terrorist threat. The CTC is composed of appointed UNSC members and is ‘mandated to review measures taken by states to prevent and punish acts of terrorism’.¹¹⁵ In 2002 and in 2003 respectively the US and the EU presented their Security Strategies (SS). The EU SS though surprising to many observers, bares much resemblance with the US SS, dubbed ‘Preemptive Security Strategy’. As it may be observed from examples mentioned previously, ‘[a] closer examination of European technologies of counter-terror reveals that Europe or at least the European Union, vigorously appropriates and develops preemptive security practice’.¹¹⁶

The EU CTS aims to ‘combat terrorism globally while respecting human rights and make Europe safer, allowing its citizens to live in an area of freedom, security and justice’.¹¹⁷ However, its strategic commitments to Prevent, Protect, Pursue and Respond have the potential to create a supra-national police state under the surveillance of both public and private actors tasked with *databasing* information of ‘potential’ terrorist threats. ‘Defending the Fortress’ has now become common phraseology referring to the EU. These trends may be seen as undermining the conventional notion of sovereignty of the nation state. As Bigo concludes,

[t]he central question relevant to defining security is thus; WHO is vested with, or who is delegated, the symbolic powers to designate what the threats are? ... It must be qualified by paying attention to who is in the position of enunciation and the positions of authority of the enunciators themselves, keeping in mind their personal, political and institutional interests within the field.¹¹⁸

The reality is that within the EU, actors that advise or enforce securitization practices date as far as the International Criminal Police Commission, better known as Interpol, the Club de Berne or TREVI in 1976, and other organizations founded on international police-intelligence cooperation.¹¹⁹ As McGinley and Parkes have noted the final,

analysis suggests that EU home affairs cooperation was initiated less as a measured response to the emergence of common European problems than is often assumed and more due to a search for autonomy on the part of national security officials. Officials trounced their domestic opponents by shifting policy-

¹¹⁵ Edward J. Flynn, ‘Counter terrorism & Human Rights: the view from the UN’, *European Human Rights Law Review*, Vol. 29 (2005), p. 2

¹¹⁶ Marieke De Goede, ‘The Politics of Preemption and the War on Terror in the EU’, *European Journal of International Relations*, Vol. 14 (2008), p. 168

¹¹⁷ The European Counter-Terrorism Strategy (November 30, 2005), *Council of the European Union* Doc 14469/4/05 REV 4, <http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf> pp. 1-17 (accessed March 18, 2008)

¹¹⁸ Didier Bigo, ‘Internal and External Aspects of Security’, *European Security*, Vol. 15, No. 4, (December, 2006), p. 394

¹¹⁹ See, e.g., Oldrich Bures, ‘EU Counterterrorism Policy: A paper Tiger?’, *Terrorism & Political Violence*, Vol. 18, No. 1 (2006), p. 59

making to the European level and taking advantage of a more amenable institutional environment.¹²⁰

What have occurred indeed, have been the acceleration and the institutionalization of these mechanisms of crime prevention. Considering security-intelligence organizations across the EU have a vested interest in managing coercion and insecurity in order to advance their corporate interests, concern over the necessity of the implementation of such legislation is not completely unfounded as adoption and regularization of this legislation and its practice may be seen as a strategy of power and control that ultimately creates a form of racism which is being deployed spatially.¹²¹ At least this is what is now being perceived recently from the Spanish case as immigrants are increasingly being prevented entrance to and deported from Spain, traditionally an immigrant-friendly country.

So if there were some control mechanisms in place to fight terrorism proactively in Spain, why the drive to *technologize* and police at a distance? Why is this policy and practice necessary? Whatever the response as Bigo points out, '[t]he expansion of a transnational way of policing insecurity through the interlocking of internal security agencies and the subordination of both military and police to "intelligence" services needs to be seriously assessed and cannot be accepted as the only answer to a question framed as global terror'.¹²² National intelligence agencies and the different Europol National Units have legally binding international contractual obligations with regard to the *databasing* of 'critical information sharing'. NATO, for example, imposes on member states the appointment of a competent authority to manage classified information.¹²³ In the case of Spain, this competent authority rests with the Director General of the CNI, whose number two, Elena Sanchez Blanco, affirmed that while there is a need to create and expand a culture of intelligence within Spain to improve society's transparent perception of it, no country has the ability to protect itself on its own in the post 11-S and 11-M world. As a result, new technology to modernize the CNI and enhance its performance is needed.¹²⁴ Here lies the security-civil liberties discourse's current dilemma.

¹²⁰ Marie McGinley, 'Rights vs. Effectiveness? The autonomy Thesis in EU Internal Security Cooperation', *European Security*, Vol. 16, Nos. 3-4 (September-December, 2007), p. 246

¹²¹ See, for example, Mauro Bertani & Alessandro Fontana, Eds., *Society Must be Defended: Lectures at the College de France, Michel Foucault 1975-1976*, David Macey, trans. (New York: Picador, 2003)

¹²² Didier Bigo, 'Internal and External Aspects of Security', *European Security*, Vol. 15, No. 4, (December, 2006), pp. 386

¹²³ Antonio M. Díaz Fernández, *Los Servicios de Inteligencia Españoles desde la Guerra civil hasta el 11-M: Historia de una transición* (Madrid: Alianza Editorial, 2006), p. 203; the CNI, through the Cryptanalytic National Center (CNC) is member to the Security Cooperation Program initiative along with 45 other countries, seeking proactive defense to security breaches.

¹²⁴ 'La nueva jefa de los espías', *El País* (October 25, 2008), http://www.elpais.com/articulo/espana/nueva/jefa/espias/elpepiesp/20081025elpepinac_17/Tes (accessed November 13, 2008)

Conclusion

The EU CTS might break current checks and balances set by the Spanish Parliament, Courts and Executive to control their security organizations, de facto providing security-intelligence manager's excessive leverage to present an agenda potentially inconsistent with real security needs or interests. The fact that shortly after both 11-S and 11-M Spanish state security forces rounded up the alleged suspects very quickly, questions the depth with which this trend should come to pass. The merging of internal and external aspects of security may break the order of work these organizations have come to familiarize with in a democracy, under the *aegis* of the respect for the rule of law, potentially involving the military in internal political affairs and the internal security organizations in external security which traditionally has not been their competence.

Clearly, the global drive for securitization as a result of the homogenization and regularization of international norms has sidelined concerns over their effectiveness and desirability *vis-à-vis* civil liberties. As Dana Eyre and Mark Schumann once put it, '... technology is never just technology ... every machine has a socially constructed meaning and a socially oriented objective ...',¹²⁵ and this must be understood in order to explain how and why the terrorist threat is being shaped.

In Spain, the transition to democracy saw the transformation of law enforcement and security-intelligence practices because of the need to remove excessive autonomy from security managers with self-interested agendas at the same time that it attempted to safeguard civil liberties and the rule of law as they were being created. This might be in jeopardy today. In particular, the EU CTS is placing broad powers on security-intelligence managers who are shaping how national and EU security legislation, and particularly that related to terrorism, should be law enforced, therefore shaping not only the terrorist threat, but also security in broader terms. It is evident from the information presented herein these dynamics will need to be carefully scrutinized in order to guarantee civil liberties both in Spain as well as in the whole of the EU and beyond in the near future.

¹²⁵ Dana Eyre and Mark C. Schumann, 'Status, Norms, and the Proliferation of Conventional Weapons: An Institutional Theory Approach', in *The Culture of National Security: Norms and Identity in World Politics*, ed. Peter Katzenstein (New York: Columbia University Press, 1996), p. 92; Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962) discussed the influence of science upon changing intellectual circumstances. In this regard and considering the drive to adopt high-powered surveillance control mechanisms nationally and trans-nationally, retired British Army General Rupert Smith's reflections on the changing dynamics of conflict are foretelling; General Smith concludes in *The Utility of Force: the Art of War in the Modern World* (London, UK: Penguin, 2005) that 'war amongst the people' is the new paradigm, since force in the traditional sense is no longer useful.



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