



Case Study: Spain

The Ethical Justness of Counter-Terrorism Measures

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1. INTRODUCTION

Spain is one of the few European countries where there has been a real terrorist threat for more than 30 years. The main problem for the Spanish authorities arises from the activities of the ethno-nationalistic group ETA ("Euskadi Ta Askatasuna" in Basque and the "Basque Fatherland and Freedom organization" in English), though other groups such as Galician and Catalan separatists, albeit of lesser impact, also need to be taken into consideration.

The Madrid attacks of 11th March 2004 ("11-M" as they are known) not only marked a turning point in the Spanish case, but also more widely in Europe. Since that year, many Internet-based messages have been sent by the main thinkers and representatives of the Jihadist Salafist movement targeting Spain. According to their ideology, the Spanish state is a continuation of "Al Andalus", the mediaeval Islamic state that occupied the southern part of the Iberian Peninsula; hence one of their fundamental goals is to fight to return this territory to Islamic law.¹

In light of these considerations, it is perfectly understandable that Spanish security forces have included transnational Islamic terrorism alongside ETA as one of the main security threats. This study proposes to analyze Spanish counter-terrorism measures from an ethical point of view, considering their legality and legitimacy according to the parameters established by the TTSRL consortium. Since Spain has suffered the most important terrorist attack in Europe, the Spanish experience and institutional reactions to it offer an interesting case for study. The focus of this paper will be on a selection of measures that represent the core of the legal effort to counter terrorism in Spain after the 11-M attacks.

The focus of our work adheres to what was agreed upon in our consortium: "For the analysis of ethical justness, we will concentrate on the adopted measures that, above all, have an impact on the lives of individuals and challenge fundamental rights". After 11-M, the fight against terrorism in Spain was focused on establishing a comprehensive legal framework that could work not only for ethno-nationalistic terrorism, but also for Islamic-inspired terrorism.

¹ Reinares, Fernando, '¿Cuál es la amenaza que el terrorismo yihadista supone actualmente para España?' (*What threat does Jihadist terrorism currently pose to Spain?*) , ARI Nº 33/2007.

We will analyze some legal measures that, in view of their importance, are relevant to the ethical point of view: firstly, the definition of terrorism; secondly, a controversial law on the liability of minors in relation to terrorist crimes; and, finally, incommunicado detention.

The basis for a legal analysis of all counter-terrorism legislation lies in the legal concept of terrorism, hence we have selected the law defining terrorism (or rather the group of articles in the Criminal Code which do so) in order to determine not only its legality, which is cast into some doubt, but also its legitimacy. The legitimacy of other laws should be examined in the light of the law defining terrorism, since the latter constitutes the most important counter-terrorism concept in the Spanish legal system. It also provides a basis for any further analysis, even in cases where the national definition of terrorism needs to be compared with international treaties (in Spain international treaties become domestic laws once they have been signed and ratified and published in the Official State Bulletin).

The two other laws selected for this study have been criticized by both the press and human rights organizations not on the grounds of their legality, but rather on the grounds of their legitimacy. The first of these is the Organic Act on the Liability of Minors in relation to Terrorist Crimes, and the second, the law governing incommunicado detention. The main human rights concerns regarding the Organic Act on the Liability of Minors stemmed from the fact that it allowed for minors to be judged and condemned as if they were more than 18 years old. However, since "kale borroka" offenses - that is, public disturbances related to ETA terrorist activities - did not lead to numerous detainees, its application was very rare².

The second - and most problematic - of the Organic laws to be analyzed is the one on incommunicado detention. Many human rights organizations have identified an "ethical bottleneck" arising from the application of this law. Incommunicado detention was first applied to ETA detainees, and then also to detainees suspected of Islamic-inspired terrorism after 11-M. An analysis of the legitimacy of such detention takes us to the heart of national and international concerns over this aspect of Spanish counter-terrorism legislation.

² "La «kale borroka» ha disminuido de forma drástica en los tres últimos años", available at: http://www.abc.es/hemeroteca/historico-22-12-2003/abc/Nacional/la-kale-borroka-ha-disminuido-de-forma-drastica-en-los-tres-ultimos-a%C3%B1os_228028.html

With regard to sources, it should be mentioned that there was no open debate about the legitimacy of counter-terrorism legislation in the Parliament when those laws were discussed because the main political parties agreed the basis of Spain's counter-terrorism policy.

The two most important political parties (the "Partido Popular" and the "Partido Socialista Obrero Español") signed an Agreement for Freedom and against Terrorism ("Pacto por las libertades y contra el terrorismo") in December 2000.³ This text emphasizes that both political parties share the same key ideas on fighting terrorism (it was compiled with ETA terrorism in mind) and on respect for basic human rights and freedoms. Even after the 11-M attacks and their influence on the Spanish national election, there was no open debate about counter-terrorism policies and ethical issues.

What the Parliament does discuss are different approaches and varying levels of political commitment (such as the question of whether or not to negotiate with terrorist groups). In this regard, we carried out research on the minutes of the debates in Parliament (the Congress and the Senate) during the last two legislatures (2000-2004 and 2004-2008) when the laws we analyzed were passed. We found that the word "terrorism" is used mainly in reference to victims of terrorism and for requesting information about new counter-terrorism initiatives and policies, but no mention is made of ethical issues involved in this problem. Unfortunately, in the Spanish case, we can quote Theo van Boven, U.N. Special Rapporteur on Torture, who deems the official policy regarding terrorism and human rights to be one of "silence and denial"⁴, which explains the lack of official public debate on those issues.

Both the media and human rights organizations (reports by Human Right Watch, Amnesty International, Statewatch and the Spanish Committee against Torture⁵) have also expressed concern over other terrorism issues analyzed by international commissions in recent years that could lead to "ethical bottlenecks",

³ The complete text is available at <http://www.filosofia.org/his/h2000ac.htm>

⁴ U.N. Special Rapporteur on Torture, Report of the Special Rapporteur on the question of torture, Theo van Boven, Addendum, Visit to Spain, E/CN.4/2004/56/Add.2, 6 February 2004.

⁵ See bibliography

including allegations of torture, ill-treatment of detainees, interrogation practices and the conditions of detention for prisoners suspected of terrorism⁶.

In the Spanish case, further problems arise which do not stem from the essence of national laws that may oppose international treaties, but rather from the practical application of some laws by the security and intelligence forces.

In such cases, and as noted by Mackinnon, "Despite the apparent commitment of the Spanish counterterrorism model to checks and balances, its application has failed to ensure the executive's observance of the limits on its authority".⁷

However, these two dimensions are only mentioned here in passing as they are not the subject of this study.

Finally, it is important to mention that Spain has agreed to cooperate with international and regional monitoring procedures for the protection of human rights. The problematic issues identified here have therefore been studied by different human rights organizations, in particular Human Rights Watch and Amnesty International and also there were some official reaction to those NGO's reports.

For example, after the publication of the Human Rights Watch report 'Setting an example? : Counterterrorism measures in Spain', the Spanish Ministry of Justice reacted by stating that many of the allegations were not completely accurate, and that Human Rights Watch did not clearly differentiate between solitary confinement detention after arrest and solitary confinement imprisonment, and that the technical analysis of Spanish legislation was incomplete.⁸

⁶ Observatory on Violence from the Basta Ya Citizens' Initiative Group, Report on Torture Denuntiations in Spain, available at: <http://www.bastaya.org/actualidad/Violencia/InformeTorturas/InformeTorturasBY.htm>

⁷ Mackinnon, Ari D., Counterterrorism and Check and Balances: The Spanish and American Examples, in New York University Law Review, Vol. 82, May 2007, p. 646.

⁸ Response of the Spanish Ministry of Justice to the Human Rights Watch report "Setting an Example", available at <http://hrw.org/spanish/docs/2005/02/15/spain10360.htm>

2. SPAIN'S COUNTER-TERRORISM MEASURES

After 11-M, Spanish counter-terrorism policy acquired two priorities. The first one, which can be deemed an "organizational priority", was focused on reorganizing the security and intelligence agencies to increase their performance in dealing with the threat of international terrorism. The second priority - a "legal priority" - was concerned with reforming and updating Spanish laws on terrorism.

First organizational priority: reorganizing the security and intelligence agencies

As mentioned above, Spanish counter-terrorism efforts before 11-M were focused on the activities of ETA and ethno-nationalistic terrorism. However, after the Madrid attacks, the question of how to reform the security infrastructure to address international terrorism as well became the main challenge.

A key problem, according to the Spanish expert Fernando Reinares, was "how to improve coordination between the different security agencies, thus a new central organization was established: the National Centre for Anti-Terrorist Coordination ("Centro Nacional de Coordinación Antiterrorista" - CNCA) to ensure an exchange of information between national agencies working on security related issues"⁹. The main task of this new agency is to centralize information obtained by other agencies and guarantee the flow of such information. The CNCA depends on other national agencies and responsibility for counter-terrorism measures remains with the latter rather than the former. However, this paper will not deal with the CNCA and the reorganization of the security and intelligence agencies because those changes affect the level of effectiveness of national agencies and not the ethical aspects of their work. The latter dimension stems, rather, from the legal framework for the activities of the national agencies.

⁹ Reinares, Fernando, '¿Está España mejor dotada frente a Al Qaeda?' (*Is Spain better equipped in the face of Al Qaeda?*), in *El País*, 9th September 2006.

Second organizational priority: updating the legal framework

According to an official document released in 2004 one of the priorities was the creation of a body specialized in terrorism within the judicial system to improve the state capacity's in coordination, prevention and investigation areas.¹⁰

In fact, the process of updating and adapting the Spanish legal framework took two different approaches after 11-M. On the one hand, the goal was to adapt the existing laws, previously established in order to fight ETA terrorism, to the new threat of international terrorism. On the other hand, Spanish laws needed to be updated according to UN resolutions and EU directives to acquire full international legality. Spain has ratified the major United Nations and European Conventions on terrorism, as well as other international legal instruments. This study will analyze the legality and legitimacy of these laws in a bid to identify "ethical bottlenecks".

¹⁰ Spanish Report submitted pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28th September 2001, 29th June 2004, S/2004/523, p. 10.

3. ANALYSIS OF SPAIN'S COUNTER TERRORISM LEGISLATION

Based on the analyses carried out for Deliverable 11 (CT Policies of EU member states), we identified some of the most important legal measures that could generate "ethical bottlenecks". Spain's counter-terrorism approach is based on law enforcement rather than military measures. This approach, which has not changed even after almost 40 years of ethno-nationalistic terrorism, has been maintained by different Spanish governments. The GAL (Antiterrorist Liberation Groups, Grupos Antiterroristas de Liberación in Spanish) case under the government of Felipe González did not comprise a military approach, but rather one of targeted killing, and it was never a legal or official policy.¹¹

When legal measures are implemented by the authorities responsible, their legality and legitimacy need to be examined in order to assess if, for example, civil liberties are really respected in the new legislation. According to the Spanish law, there are specific functions attributed to the Constitutional Court: Review of the constitutionality of rules having the rank of law, Prior review of the constitutionality of international treaties and Individual appeal for constitutional protection.¹²

In the Spanish case, many legal steps were taken to prevent and prosecute ETA terrorism during the last thirty years; in fact Spanish counterterrorism legislation was framed with ETA in mind. After the 11-M attacks, this legislation was then updated and completed in order to fight transnational Islamic-inspired terrorism. As we cannot analyze Spanish counterterrorism policy in its entirety (for example we will not analyze counterterrorism financial laws preventing money laundering), we decided to take some of the most controversial and important measures and analyze them following the method established for this Deliverable by the TTSRL consortium. In any case, the most important measures were established prior to the Madrid

¹¹ Death squads were organized by the Spanish Ministry of Interior between 1983 and 1987 to kill ETA leaders and supporters. An enquiry proved government involvement in these events and many office-holders and high-ranking civil servants were convicted (the Spanish Minister of Interior, the State Security Director and the Chief of Police of the Bilbao Information Brigade).

¹² The powers of the Court are set forth in art. 161 of the Constitution and defined in art. 2.1 of its Organic Law.

attacks in 2004. In some cases, changes were made after those events, but no new legal approach on terrorism was taken.

Firstly, we shall analyze the Spanish legal definition of terrorism as it constitutes the basic foundation of all CT policies (Article 571 of the Criminal Code). Secondly, we shall look at a law which has been subject to some discussion which allows law enforcement agencies to arrest 16/17 year-old boys (Law 7/2000, Organic Act on the Liability of Minors in relation to Terrorist Crimes (22 December 2000)). The third measure to be analyzed is undoubtedly one of the most controversial – namely, the one that governs incommunicado detention and pre-trial detention (the Law on Criminal Prosecution).

3.1. Legal definition of terrorism (Article 571 of the Criminal Code)

Spain does not have a law specific to anti-terrorism. According to Spanish legislation, terrorism is “a type of crime further aggravated by its political intention”.¹³ The Criminal Code (“Código Penal” in Spanish) and the Procedural Criminal Code (“Ley de Enjuiciamiento Criminal” in Spanish) therefore constitute the basic texts. This situation bears a resemblance to the French one before the new Penal Code of 1994 was introduced. The legal definition of terrorism is found in Articles 571 to 579 of the Spanish Criminal Code, “On crimes of terrorism”, and also in the Organic Act on the Reform of the Criminal Code (LO 10/1995 of 23 November 1995). Article 571 of the Criminal Code defines terrorists as those who “belonging, acting in the service of, or collaborating with armed groups, organizations or bodies whose objective is to subvert the constitutional order or seriously alter public peace”, commit the attacks described in Article 346 (attacks on buildings, transportation or communications infrastructure using explosive devices) or Article 351 (arson causing risk of injury or death). According to these articles, a crime of terrorism is “that intended to subvert the constitutional order or seriously alter public peace”, so it is a criminal offence with an aggravating circumstance that affects procedural rules and the gravity of sanctions imposed.

However, the Criminal Code does establish some specific penalties relating to terrorism:

- Promoting or directing armed gangs or terrorist organizations (punished with imprisonment of 8-14 years)
- Membership of an armed gang or terrorist organization (punished with imprisonment of 6-12 years)
- Terrorist murder (punished with imprisonment of 20-30 years).

In any case, the effective maximum prison sentence for a person convicted of two or more terrorist offences is now 40 years.

With regard to judicial procedures (according to the Procedural Criminal Code), there are a number of adaptations of normal procedures used in cases of terrorism and organized crime. “At the first instance level, all cases are heard at

¹³ Alvanou, Maria, Antiterrorism Legislation issues in Spain: Terrorism offences and “Incommunicado” procedures, RIEAS (Research Institute for European and American Studies), Greece, Available at http://rieas.gr/index.php?option=com_content&task=view&id=405&Itemid=41

the National High Court (“Audiencia Nacional”) and the investigating magistrate is an officer of that Court”.¹⁴

3.1.1 Assessing legality

According to the 1987 “Acuerdo de Madrid sobre Terrorismo” (Madrid Agreement on Terrorism) that was signed by the leaders of the main political parties, terrorism is a “State problem”. Item 1.3 sets forth that “continual assassinations, economic extortion, and any other form of violence or intimidation like these counterfeit methods of political activity, threaten to destroy Basque society itself, jeopardizing tolerance, preventing free citizens from exercising their rights, and creating conditions that hinder recovery from the deep economic crisis it is going through”. This agreement reflects the common ground the main political parties share and their common will to work together on the issue.

The Criminal Code and the Procedural Criminal Code (and their respective reforms) are fully legally-binding laws that were created following national legislative procedure with the intervention of the major political parties. Thus, there is no basis to dispute the legality of this law, because it was passed with the cooperation of the two main political parties.

Beyond this internal legality, we could not find any negative reference to their legality in parliamentary debates¹⁵ or court decisions.

One of the main concerns was that the freedom of speech enshrined under article 55.2 of the Spanish Constitution might be threatened, but this right was never discussed in the interpretation of the law in the court’s rulings.

The Spanish definition of terrorism was updated after an amendment made in 1999 (Organic Law on definition of terrorism amending the Criminal Code of 1995). Congress discussed this project in December 1999 after a ruling by the Constitutional Court¹⁶ which created the need for an amendment of this law. According to the ruling, this had become necessary because the seriousness of the offence (terrorist related crimes) and the maximum or minimum sentence applicable meant there was a disproportion in legal remedy. To resolve the issue,

¹⁴ Ibidem.

¹⁵ Boletín Oficial del Estado (Journal of the Official Gazette), Congreso de los Diputados, Comisiones, núm. 516, de 07/06/1995, p. 15083.

¹⁶ Sentence 136/1999 (20 July 1999).

Congress passed the amendment, which calls for prison terms between three and ten years for terrorist offenses, in order to give more flexibility to the courts in such cases.

The upshot of this was that, following the Constitutional Court’s ruling, common ground emerged between the different political parties and the amendment was passed after it had been debated in Congress in November of 1999.¹⁷

3.1.2 Assessing legitimacy

The following indicators were used to gauge the legitimacy of the law defining terrorism:

- The determinacy of its definition
- Its symbolic validation with previous legislation
- its coherence with other policies
- its adherence to international human rights principles

Indicators		
Determinacy	Is the legal measure clearly formulated or does it leave room for discretionary use?	What “terrorism” and related activities encompass is clearly defined in the Spanish judicial system. This definition does not include threats of civil disobedience or political opinions because the law punishes committed offences (not the will to act) with a clear political motivation. Even if the political motivation is not clear, the action itself, once carried out, is considered a crime.
Symbolic validations	Does the legal measure reflect the ‘spirit’ of previous	This definition of terrorism had constituted the basis of Spanish CT legislation for many years before 11-

¹⁷ Boletín Oficial del Estado (Journal of the Official Gazette), Congreso de los Diputados, Comisiones, núm. 516, de 07/06/1995, p. 15083.

	Spanish CT legislation?	M. In fact, the last reform of the Criminal Code regarding terrorism was in 1995 (Organic Law 10/1995, 23 November 1995).
Coherence	Does the legal measure cohere with any principle stated by the Spanish government regarding their CT policy?	There is an overall coherence since this law is the legal basis of the whole counterterrorism framework. All other aspects related to terrorism in the Spanish legal system are based on this law which deals with whether a crime is considered a terrorist offence or not.
Adherence	Does the legal measure adhere to the fundamental aspects of international human rights principles?	Even if the EU definition of terrorism is more detailed than the Spanish one, since the former establishes a catalogue of terrorist acts, the Spanish law meets the criteria established by the European Framework Decision on Combating Terrorism in June 2002 regarding the definition of this offence.

To conclude, the legitimacy of this law is acceptable according to the established criteria. It was passed with the support of the main political parties after parliamentary debate, where it became clear that the addition of this legal definition of terrorism was an absolute necessity at the time. According to the law, the exaltation of armed gangs or terrorist organizations, and the membership of an armed gang or terrorist organization, are considered terrorist offenses.

3.2 Law 7/2000, Organic Act on the Liability of Minors in relation to Terrorist Crimes (22 December 2000)

During the 90s, Spain not only suffered from ETA's terrorism, but also from a high level of street violence that the Spanish authorities called "Urban Terrorism" (Article 577 of the Spanish Criminal Code). Those acts that according to policy makers fell within the definition of terrorism were largely attributable to young people who supported ETA, but were not members of the terrorist organization.¹⁸ As a result, a decision was taken to change the law on the liability of minors to include some offences that, albeit not terrorist acts in themselves, were not merely simple criminal acts because they were politically motivated. The preamble of this Organic Act establishes that "the more a society progresses, the more varied terrorist actions become in seeking to prevent democracy from developing normally, be it by directly terrorizing each citizen, or either the inhabitants of a town or the members of a social, political or professional group on a collective basis".¹⁹

Article 2 of this Organic Law states that terrorist acts (defined in the Criminal Code) committed by persons under 18 years old are punishable subject to some legal modifications: the jurisdictional organ will not be the National High Court (Audiencia Nacional), but rather a Central Minor Court.²⁰

If the detainee is 16-18 years old, he/she will be sentenced to prison for a period of one to eight years and then held under a supervised release program for a period not superior to five years. If the detainee is under 16 years old, he/she will be sentenced to prison for a period of one to four years and then held under a supervised release program for a period not superior to three years. In any case, if the detainees are responsible for more than one terrorist offence, they can be sentenced to prison for up to eight years (if they are 16-18 years

¹⁸ Spanish Ministry of Interior, Urban Terrorism: 2003, available at http://www.mir.es/DGRIS/Balances/Balance_2003/Terrorismo_urbano.html

¹⁹ Organic Act on the Liability of Minors in relation to Terrorist Crimes of 22nd December 2000.

²⁰ Law establishing the Federal Court, Article 65: this determines which criminal offences are to be assigned to the Federal Court, including offences against the state and government, money laundering and others which affect the democratic state and public order. Article 66 specifically states that the Federal Court is to deal with terrorist activities.

old) or up to five years (if they are under 16). This law was very important in view of these changes to the punishable age for terrorist offences. Some human rights organizations declared that the changes affected the basic rights of minors.

3.2.1 Assessing legality

An organic law (*ley orgánica*) is a specific type of statute. According to the Spanish Constitution (Art. 81), such laws differ from ordinary legislation in two fundamental ways. Firstly, the laws which must be organic are “those related to the development of fundamental rights and public liberties, those approved by the Autonomy Statutes and the general electoral regime, as well as the remainder provided for in the Constitution.” (Art. 81.1 Spanish Constitution).²¹ Secondly, organic laws require an absolute majority of the Congress in a final vote on the entire bill (Art. 81.2 Spanish Constitution). This special procedure required by the Spanish Constitution ensures the legality of organic laws, which deal with issues that could affect basic civil rights and fundamental issues of the social system.

This law was debated throughout November 2000. While analyzing these debates²², we saw that three amendments were put forward by smaller political parties, but they were finally rejected. Those amendments were referred to the problems that this new legislation could generate because these parties considered it out of proportion and it could put in danger rights of the minors. Once more we can confirm that the two most important political parties worked together on terrorism issues with only minor discrepancies.

The Ministry of Interior publishes an annual report of its activities. One of the statistics included is the number of people detained for “urban terrorism” (*violencia callejera*, in Spanish). According to this report, from 2004 to 2008 149

²¹ The other matters provided for in the Spanish Constitution include: the ombudsman (‘Defensor del Pueblo’, Art. 54 SC); the Council of State (‘Consejo de Estado’, Art. 107 SC); the Constitutional Court (‘Tribunal Constitucional’, Art. 165 SC) and popular legislative initiative (Art. 87.3 SC).

²² Boletín Oficial del Estado (Journal of the Official Gazette), Congreso de los Diputados, Comisiones, núm. 41, de 16/11/2000, p. 2014.

people were charged,²³ although there is no information on how many of those were minors. From media coverage, it seems clear that minors did not make up the majority. For example, throughout the year 2007, this law was applied to eight minors.²⁴

3.2.2 Assessing legitimacy

The same indicators referred to in 3.1.2 were also used to assess the legitimacy of the Organic Act on the Liability of Minors in relation to Terrorist Crimes. In this case, one of the most important criticisms by five small political parties (‘Grupo Parlamentario Mixto’) was related to concerns regarding its possible inappropriate use in the case that the text was not completely clear. During the parliamentary debates, efforts were concentrated on drafting a law which, while allowing for minors participating in terrorist acts to be punished (the main objective of the new law), could not be applied to other offenses committed by juveniles.²⁵

Indicators		
Determinacy	Is the legal measure clearly formulated or does it leave room for discretionary use?	The law is very clear and establishes a specific punishable act (terrorism offences) without allowing for any extension to other offences.
Symbolic Validation	Does the legal measure reflect the ‘spirit’ of previous Spanish CT legislation?	There is an important change because one of the bases of the penal system (age) is different for terrorism offences.
Coherence	Does the legal	According to the debate held in the

²³ Available at: <http://www.mir.es/DGRIS/Terrorismo de ETA/Operaciones de Lucha Antiterrorista/cuadro7.html>

²⁴ Available at: <http://www.noticiasdegipuzkoa.com/ediciones/2007/01/29/politica/euskadi/ordonez.php>. An interesting article on the personal profile of these “kale borroka” is available at <http://www.paralalibertad.org/modules.php?op=modload&name=News&file=article&sid=4230>

²⁵ Official Bulletin of Congress (Journal of the Official Gazette), The Spanish Congress, Commissions, núm. 41, de 16/11/2000, p. 2014.

	measure cohere with any principle stated by the Spanish government in relation to their CT policy?	Congress, the main concern had to do with the difficulty of separating a “kale borroka” terrorist act from other kinds of urban violence. How this law fits into general CT framework is not clear, beyond the specific need in the ‘90s to stop the sociological phenomenon which arose from ETA members encouraging minors to cause disturbances, based on the assumption they would not be charged because of their age.
Adherence	Does the legal measure adhere to the fundamental aspects of international human rights principles?	There are no references to this issue, the procedural rights and guarantees did not change, what has changed is the judicial instance in charge of those offences when are committed by minors. Anyway, as we said, according to the Ministry of Interior the application of this organic law was almost insignificant in number in any case. According to “El Mundo” there was in 2007 only one minor charged on terrorism in prison ²⁶ and the situation did not changed substantially after this year.

In conclusion, the overall legitimacy of this law is not clear in spite of the debates which have surrounded this initiative. It was a specific need limited to a certain point in time, and this law was drafted to tackle it. Anyway, when circumstances changed, i.e. the involvement of juveniles in these acts decreased in some cities in the Basque Country, the law lost legal (and political) relevance.

²⁶ “Creado el Juzgado Central de Menores que tratará los casos de terrorismo”, El Mundo, 30 December 2000, available at <http://www.elmundo.es/2000/12/30/espana/30N0047.html>

3.3 Incommunicado detention (Procedural Criminal Code, Article 520 bis)

According to Spanish law, detainees suspected of belonging to an armed group may be held in incommunicado detention for up to thirteen days, and pre-trial detention for up to two years.²⁷ In cases of terrorism (or suspicion of terrorism), the judge in charge may order that suspects be detained incommunicado if investigation into the case is ongoing and knowledge of the suspect's detention could hamper investigation procedures. Once the police have solicited incommunicado detention, the prisoner will, in any case, be held incommunicado until the judicial decision is issued – a period which can last up to thirteen days. This means that some judicial guarantees recognized by the constitution are not recognized to this detainee. According to the Spanish Constitution (article 55.2) the regular detainee situation is suspended when this counter-terrorist legislation is in force.

The initial incommunicado order is valid for 72 hours following arrest, but can be prolonged for a further two days at the discretion of the investigating magistrate (in cases of terrorism, the judges of the National High Court ("Audiencia Nacional")). After this period, the magistrate has to decide whether to begin criminal proceedings against the suspect. If he decides to begin criminal proceedings, he may order a preventive (pre-trial) detention, so the suspect is transferred from police custody to judicial custody (in prison facilities). At this point, the magistrate may extend the incommunicado period to five days, followed, in exceptional circumstances, by a final period of three days. Thus, it is possible for a person to be held incommunicado for up to 13 days.

If a detainee is held incommunicado in police custody, "he may be questioned and interrogated in the presence of the duty solicitor (not a lawyer of his own choosing), who is called immediately on arrest. The lawyer may advise the detainee on procedural matters, but may not consult privately with the suspect. A forensic doctor examines the detainee to ensure that there is no torture and mistreatment and sends a report to the judge. But it should be noted that the accused person may only have access to a lawyer of his own choosing once the incommunicado period has ended. The judge must issue a reasoned

²⁷ Procedural Criminal Code, Article 520 bis.

judgment justifying his decision to begin criminal proceedings and any extension of the incommunicado period. Once in judicial custody, the detainee has the right to be seen by a second court-appointed forensic doctor and his legal assistance is continued".²⁸

Spain is still facing the threat of ethno-nationalistic terrorism, and in consequence, incommunicado detention is frequently applied to suspected members of the ETA terrorist organization.

Another important problem in Spain concerns preventative detention and its duration. According to the Spanish Procedural Criminal Code, "when a person has been charged with a terrorism-related offence and held in judicial custody, the period of preventative detention may even last two years if the penalty for the offence is imprisonment of up to three years or more. Where there are circumstances that may prevent a case from being tried within two years, the court may order one extension of up to a further two years".²⁹

In practice, therefore, investigating magistrates can have up to four years to keep a terrorist suspect in detention and prepare the case for trial, although the defendant must be tried within the four-year period. According to Fernando Reinares, in the case of Islamic-inspired terrorism, 285 men suspected of terrorism were detained between 2001 and 2005, 96 of whom (40%) were then released after detention without charge.³⁰ A large majority of the remaining detainees had to wait for almost three years for trial.

3.3.1 Assessing legality

The Criminal Code and the Procedural Criminal Code (and their respective reforms) are fully legally binding laws that were created following the national

²⁸ Alvanou, Maria, 'Antiterrorism Legislation issues in Spain: Terrorism offences and "Incommunicado" procedures', RIEAS (Research Institute for European and American Studies), Greece, Available at http://rieas.gr/index.php?option=com_content&task=view&id=405&Itemid=41

²⁹ Procedural Criminal Code, Article 520 bis.

³⁰ Reinares, Fernando, 'Hacia una caracterización social del terrorismo yihadista en España: implicaciones en seguridad interior y acción exterior' (*Towards a characterisation of jihadist terrorism in Spain: Implications for interior security and external actions*), Real Instituto Elcano, ARI 34/2006.

legislative procedure with the intervention of the major political parties. Thus, there are no grounds to discuss the legality of these national norms.

In spite of this internal standard of legality, some human rights organizations (like Human Rights Watch and Amnesty International³¹) criticized the law governing incommunicado detention and preventative detention based on the grounds that they contradict international human rights legislation, as the International Covenant on Civil and Political Rights.

3.3.2 Assessing legitimacy

The same indicators as those mentioned in 3.1.2 and 3.2.2 were used to assess the legitimacy of the law governing incommunicado detention and preventative detention. According to the Spanish Constitution (article 55.2) in the case of terrorism offences some civil rights and guarantees can be suspended.

It is important to recognize that the prisoner is deprived of certain rights (not habeas corpus even when some human rights reports state that their effective protection is not complete): he cannot choose his own lawyer, but rather is only entitled to an assigned lawyer *ex officio*; his relatives or friends (or, if he is a foreigner, his embassy) do not have to be informed of his arrest; he cannot discuss his case with his assigned lawyer in privacy; and, finally, he can only be examined by a forensic medical examiner assigned by the authorities. Unfortunately, “denial and silence”³² were the main official response to those concerns.

Indicators		
Determinacy	Is the legal measure clearly formulated or does it leave room	Even when the measure is clearly formulated, there is still considerable room for discretionary use, since it is

³¹ See: Amnesty International, ‘Agenda de Derechos Humanos para la Legislatura 2008-2012: Un compromiso más firme, una acción más eficaz’, Spanish Section of Amnesty International, EUR41/009/2008, 2008 and Human Rights Watch, ‘Setting an example? : Counterterrorism measures in Spain’, January 2005 Vol. 17, No. 1(D).

³² U.N. Special Rapporteur on Torture, Report of the Special Rapporteur on the question of torture, Theo van Boven, Addendum, Visit to Spain, E/CN.4/2004/56/Add.2, 6 February 2004

	for discretionary use?	<p>the judge who determines if this law should be used, without any objective basis, because it depends on the proof obtained or the expectation of obtaining new proof.³³</p> <p>In this sense, the formulation of this article is unclear as it merely states that "Detention in police custody should last no longer than the time strictly necessary to carry out investigations aimed at establishing the facts".³⁴ "Strictly necessary" is not an objective parameter.</p>
Symbolic Validation	Does the legal measure reflect the 'spirit' of previous Spanish CT legislation?	Human Rights Watch demonstrated this law is contrary to the rights and guarantees safeguarded in Spanish legislation. ³⁵ Besides that, this law contradict international conventions on human rights which Spain has signed and which also form part of its internal legal regulations.
Coherence	Does the legal measure cohere with any principle stated by the Spanish government in relation to its CT policy?	There is a contradiction between counterterrorism policy in general, which is very respectful of human rights considerations, and this measure since some of the most important guarantees are put to one side in cases of terrorist acts, which

³³ Alvanou, Maria, 'Antiterrorism Legislation issues in Spain: Terrorism offences and "Incommunicado" procedures', RIEAS (Research Institute for European and American Studies), Greece. Available at

http://rieas.gr/index.php?option=com_content&task=view&id=405&Itemid=41

³⁴ Procedural Criminal Code, Article 520 bis.

³⁵ Human Rights Watch, 'Setting an example? : Counterterrorism measures in Spain', January 2005 Vol. 17, No. 1(D).

		effectively means those detained on terrorism charges have a different set of rights.
Adherence	Does the legal measure adhere to the fundamental aspects of international human rights principles?	<p>Besides the limitations imposed by for example the Council of Europe (such as the European Convention for the Protection of Human Rights and Fundamental Principles), Spain is party to other major human rights instruments, including the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments.</p> <p>“While neither the Spanish Constitutional Court (Tribunal Constitucional) nor the European Court of Human Rights have ruled on this issue up to now, non-governmental organizations have urged the Spanish government to repeal the provisions governing incommunicado detention, since this form of detention facilitates torture and prolonged incommunicado detention constitutes cruel, inhuman, or degrading treatment, if not torture”³⁶.</p> <p>“While incommunicado detention is</p>

³⁶ Alvanou, Maria, ‘Antiterrorism Legislation issues in Spain: Terrorism offences and “Incommunicado” procedures’, RIEAS (Research Institute for European and American Studies), Greece, available at: http://rieas.gr/index.php?option=com_content&task=view&id=405&Itemid=41

		not prohibited under international law per se, there is a significant consensus among United Nations Human Rights bodies that it can give rise to serious human rights violations and should thus be prohibited ³⁷ .
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In conclusion, the overall legitimacy of this law is debatable. The Constitutional Court has ruled many times over the last twenty years on these issues³⁸, for example, sentence nº 199/1987 (16/12/1987) - Recursos de inconstitucionalidad³⁹ and sentence nº 196/1987, de 11/12/1987 - Cuestión de inconstitucionalidad⁴⁰. In these cases, the Court said that extending the pre-trial detention period up to 10 days was unconstitutional.

Besides, the Constitutional Court affirmed in those rulings that the law is contrary to the International Pact on Civil and Political Rights and the European Convention for the Protection of Fundamental Rights and Public Liberties.

³⁷ Human Rights Watch, 'Setting an example? : Counterterrorism measures in Spain', January 2005 Vol. 17, No. 1(D), p. 23. After the publication of this study, the Spanish Ministry of Justice wrote a general reply to HRW (<http://hrw.org/spanish/docs/2005/02/15/spain10360.htm>)

³⁸ There were 108 sentences from 1981 to 2008 related to terrorism cases, and many of them were referred to the incommunicado detention. The text of the Sentences is available at the web site of the Constitutional Court (<http://www.tribunalconstitucional.es>)

³⁹ Available at: http://www.boe.es/g/es/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1987-0199

⁴⁰ Available at: http://www.boe.es/g/es/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1987-0196

4. Conclusion: Identification of “ethical bottlenecks”

As mentioned earlier, most post- 11-M antiterrorism legislation is not new since the majority of the laws in question date back to before the terrorist attacks and were framed with ETA in mind during the '80s and '90s. The internal legality of the laws analyzed above is guaranteed since the Penal Code, the Procedural Penal Code and the Organic Law were passed according to Spanish legislative procedures.

Anyway two of these laws were discussed by the Constitutional Court: Sentence 136/1999 (20 July 1999) on Organic Act on the Reform of the Criminal Code (LO 10/1995 of 23 November 1995) and other sentences (nº 199/1987 (16/12/1987) or nº 196/1987, de 11/12/1987 on incommunicado detention.

However, so-called “ethical bottlenecks” can be found when we consider some aspects of the legitimacy of these laws as they are applied in practice, and also some misuses. Among the most controversial issues, we have identified allegations of torture or the ill-treatment of detainees held in prison in connection with terrorism.⁴¹

The Organic Act on the Liability of Minors in relation to Terrorist Crimes (22 December 2000) might at first sight seem to be controversial and to constitute a typical “ethical bottleneck”, but closer analysis defies such an impression. Even if it was problematic to change the minimum age for condemnation in the case of terrorist offences, it must be recognized that the Law and its message are very clear and, in the end, it was seldom used.

Without a doubt, the most problematic case of those analyzed is the law on incommunicado detention. According to studies by human rights organizations, basic human rights are violated: “The right of a citizen to security and proper legal representation and defense is being damaged in a way not fitting to European legal tradition”⁴². The UN Special Rapporteur on Torture stated that “since incommunicado detention creates conditions that facilitate the

⁴¹ U.N. Special Rapporteur on Torture, Report of the Special Rapporteur on the question of torture, Theo van Boven, Addendum, Visit to Spain, E/CN.4/2004/56/Add.2, 6 February 2004.

⁴² Alvanou, Maria, ‘Antiterrorism Legislation issues in Spain: Terrorism offences and “incommunicado” procedures’, RIEAS (Research Institute for European and American Studies), Greece, available at http://rieas.gr/index.php?option=com_content&task=view&id=405&Itemid=41

perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture, the incommunicado regime should be abrogated".⁴³ Two other institutions – the Committee against Torture and the Human Rights Committee – have also expressed their concern about this issue. According to Amnesty International, there is an official project to install video cameras in the cells where incommunicado detainees are held, but it is not clear when this will be completed, or under what circumstances.⁴⁴

It is also important to recognize that after 9-11, the threat of terrorism became a global justification for many human rights limitations in favour of the so-called "War on Terror". This is not only a problem in the U.S., but also in Europe, as we have seen in this case. The Spanish situation bears similarities, but there is also a significant difference: the measures analyzed were implemented before 9-11 and 11-M, and were the consequence of more than 30 years of ETA terrorism.

Finally, it is important to mention that in addition to the above "ethical bottlenecks", other issues of concern regarding the fight on terrorism have also been expressed, including allegations of torture in prisons. In February 2004, the U.N. Special Rapporteur on Torture, Theo van Boven, issued a report⁴⁵ on his visit to Spain in October 2003. The purpose of the visit was to study the various safeguards for the protection of detainees in the context of anti-terrorism measures. Theo van Boven noted "the degree of silence that surrounds the subject" and stated that "denial by the authorities without investigating the allegations of torture has made it particularly difficult to provide the necessary monitoring of protection and guarantees." He concluded that "in the light of the internal consistency of the information received and the precision of factual details these allegations of torture cannot be considered to be fabrications". Although not a regular practice, "their occurrence is more than sporadic and

⁴³ U.N. Special Rapporteur on Torture, Report of the Special Rapporteur on the question of torture, Theo van Boven, Addendum, Visit to Spain, E/CN.4/2004/56/Add.2, 6 February 2004, p.21

⁴⁴ Amnesty International, 'Agenda de Derechos Humanos para la Legislatura 2008-2012: Un compromiso más firme, una acción más eficaz', Spanish Section of Amnesty International, EUR41/009/2008, 2008, p. 13.

⁴⁵ U.N. Special Rapporteur on Torture, Report of the Special Rapporteur on the question of torture, Theo van Boven, Addendum, Visit to Spain, E/CN.4/2004/56/Add.2, 6 February 2004.

incidental". The Government rejected the report, describing it as lacking "objective well-founded analysis".⁴⁶

⁴⁶ US Department of State, Country Reports on Human Rights Practices - 2004, February 28, 2005.

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