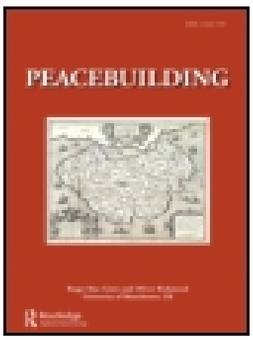

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Criminalizing peace: anti-terrorism law and its impact on peacemaking in the Basque Country and Northern Ireland

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ABSTRACT

This paper investigates anti-terrorism law's impact on peace-making efforts of the nonviolent allies of Basque Homeland and Freedom (ETA) and the Provisional Irish Republican Army (IRA). Drawing on debates concerning 'enemy criminal law', I argue that anti-terrorism law is actor-focused and thus directed at juridically labelled 'terrorist organisations'. Variation in the juridical construction of terrorist organisations is critical to understanding the divergence in the political capacities of non-violent Basque separatists and Irish republicans as peace-makers. In Spain, the judiciary developed a broad definition of the 'terrorist organisation ETA', resulting in the identification of non-violent Basque separatist groups as 'integral components' of ETA and hindering their capacity to engage in peace-making. In contrast, British anti-terrorism law was grounded in a narrow definition of 'proscribed organisations' focused on the IRA's rank-and-file, which facilitated the involvement of the broader republican movement in the successful peace process of the nineties.

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Conflict transformation; enemy criminal law; counterterrorism; Basque Country; Northern Ireland

This paper investigates anti-terrorism law's impact on peace-making efforts in the Basque Country of Spain and in Northern Ireland. I treat anti-terrorism law as a species of 'enemy criminal law' (*feindstrafrecht*), a specialised form of criminal law directed against social 'enemies' not entitled to the civil rights inherent to 'citizen' criminal law. Anti-terrorism law is thus actor-focused, directed against specific social enemies, e.g. 'terrorist organisations' and their collaborators. These enemy organisations – in addition to being actually existing criminal formations – are legal constructs and, as such, legally defined 'enemies' are variable and contested. Such variation shapes the possibilities for conflict transformation by determining the political agency of insurgents, particularly the nonviolent allies of clandestine armed groups.

Anti-terrorism law's impact on insurgent peace-making efforts is demonstrated through a comparative analysis of movement-led attempts to facilitate the disengagement of Basque Homeland and Freedom (ETA) and the Provisional Irish Republican Army (IRA). These cases were selected for analysis in that, despite significant similarities – both being low-level 'terrorist' conflicts within democratic states waged by hierarchical clandestine armed groups embedded in durable political movements – Spanish and British actor-focused anti-terrorism law differ regarding the expansiveness of the 'terrorist organisation' as a legal construct. The

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Spanish judiciary has since the late-nineties broadened the 'terrorist organisation ETA' construct to incorporate nonviolent separatist groups as integral components of ETA. British anti-terrorism law, in contrast, focused on the IRA's military rank-and-file, while associated movement groups remained legal organisations. A second difference concerns 'collaboration' with a terrorist organisation. In the Spanish case, the terrorist organisation's expansive definition allowed for a broad understanding of collaboration encompassing nonviolent political support for ETA. British law, grounded in a narrow understanding of the 'proscribed organisation', did not so broadly criminalise political support for the IRA.

These differences impacted the divergent outcomes of Basque and Irish peace-making. The broad ETA construct constrained all forms of movement activity, including efforts to facilitate ETA's disengagement. The narrower anti-terrorism law of the United Kingdom (and of the Republic of Ireland) provided nonviolent republican leaders space to mobilise supporters and engage with opponents throughout the peace process of the nineties. These differences will be explored following a discussion of actor-focused anti-terrorist law as a form enemy criminal law and consideration of how the definition of the 'enemy', i.e. the terrorist organisation, determines insurgent capacity for peace-making. I conclude this paper by considering 'enemies' in anti-terrorism law through three frames – terrorism-as-crime, terrorism-as-war, and terrorism-as-conflict – suggesting that the conflict frame is the most conducive for peace-making in that it most clearly conceptualizes criminal law as an instrument for conflict transformation.

Defining the terrorist organisation

Scholars have long struggled to define terrorism,[1] though these efforts have been overshadowed by more consequential definitional struggles in international and domestic law. While legislators and judges have largely failed to define terrorism, they have crafted actor-focused anti-terrorist regimes aimed at combatting specific terrorist organisations.[2] As such, identifying terrorist organisations and determining their organisational boundaries are often projects involving juridical construction and strategic labelling rather than objective empirical deduction.[3]

[1]Alex P. Schmid and Albert I. Jongman, *Political Terrorism: A Research Guide to Concepts, Theories, Databases and Literature* (New Brunswick, NJ: Transaction Publishers, 1988); Jack P. Gibbs, 'Conceptualization of Terrorism', *American Sociological Review* 54, no. 3 (1989): 329–340; Charles Tilly, 'Terror, Terrorism, Terrorists', *Sociological Theory* 22, no. 1 (2004): 5–13; Leonard Weinberg, Ami Pedahzur, and Sivan Hirsch-Hoefler, 'The Challenges of Conceptualizing Terrorism', *Terrorism and Political Violence* 16, no. 4 (2004): 777–794; Gilbert Ramsay, 'Why Terrorism Can, but Should not Be Defined', *Critical Studies on Terrorism* 8, no. 2 (2015): 211–228.

[2]Caleb M. Pilgrim, 'Terrorism in National and International Law', *Dickinson Journal of International Law* 8, no. 2 (1990): 147–202; Elisabeth Symeonidou-Kastanidou, 'Defining Terrorism', *European Journal of Crime, Criminal Law and Criminal Justice* 12, no. 1 (2004): 14–35; George P. Fletcher, 'The Indefinable Concept of Terrorism', *Journal of International Criminal Justice* 4, no. 5 (2006): 894–911; Michael P. Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects', *Case Western Reserve Journal International Law* 36 (2006): 359–374; Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation', *Boston College International and Comparative Law Review* 29, no. 1 (2006): 23–105; Eric Reitan, 'Defining Terrorism for Public Policy Purposes: The Group-Target Definition', *Journal of Moral Philosophy* 7, no. 2 (2010): 253–278.

[3]Gibbs, 'Conceptualization of Terrorism'; Manuel Cancio Meliá, '"Derecho Penal" del Enemigo y Delitos de Terrorismo: Algunas Consideraciones sobre la Regulación de las Infracciones en Materia de Terrorismo en el Código Penal Español después de la LO 7/2000', *Jueces para la Democracia* 44 (2002): 19–26; 'War on Terror or Terror Wars? The Problem in Defining Terrorism', *Denver Journal of International Law and Policy* 37, no. 4 (2009): 653–679; Nicholas Appleby, 'Labelling the Innocent: How Government Counter-Terrorism advice Creates Labels that Contribute to the Problem', *Critical Studies on Terrorism* 3, no. 3 (2010): 421–436.

Actor-focused anti-terrorism regimes have been considered in debates over 'enemy criminal law' (*feindstrafrecht*) as described by Jakobs[4] in distinguishing rehabilitative 'citizen' criminal law from pre-emptive criminal law deployed against 'enemies'.[5] Drawing on Fichte and Rousseau, Jakobs argues that the law is grounded in intersubjective cognitive reassurance promising compliance, solidifying citizens' status as juridical 'persons'. 'Enemies', in contrast, fail to provide such reassurance and are therefore 'non-persons' not entitled to protections associated with legal personhood. Moreover, as 'enemies' directly challenge the legal-constitutional order and social peace, the state is justified in derogating civil and human rights to protect these rights, giving rise to the contradictions and paradoxes of enemy criminal law.[6]

Enemy criminal law is actor-focused in that it 'identifies particular types of perpetrators … as "others"',[7] employing such 'judicial othering' to provide cover for illiberal state practices against 'enemies' who exist outside the moral community and thus beyond the legal protections of liberal democracies.[8] Illicit organisations in particular embody the 'supra-individual' focus of enemy criminal law,[9] proscription thus being inherent to its enforcement.[10] Illicit group membership, moreover, signals voluntary and continual willingness to threaten social peace – as such activity is the enemy organisation's raison d'être – justifying pre-emptive punishment for 'future crime'.[11]

Identifying enemies is an act of juridical construction as organisations such as mafias and terrorist groups are nebulous and secret formations.[12] Constructing the

[4]Günther Jakobs, '¿Terroristas como Personas en Derecho?', in *Derecho Penal del Enemigo: El Discurso Penal de la Exclusión*, ed., Manual Cancio Meliá and Carlos Gómez-Jara Díez (Madrid: Edisofer, 2006), 77–92; '¿Derecho Penal del Enemigo? Un Estudio acerca de los Presupuestos de Juridicidad', *Panoptica* 2, no. 7 (2008): 197–213; 'On the Theory of Enemy Criminal Law', in *Foundational Texts in Modern Criminal Law*, ed., Markus D. Dubber (Oxford: Oxford University Press, 2014): 415–424.

[5]Carlos Gómez-Jara Díez, 'Enemy Combatants versus Enemy Criminal Law: An Introduction to the European Debate regarding Enemy Criminal Law and its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants', *New Criminal Law Review* 11, no. 4 (2008): 529–562; Manuel Cancio Meliá, 'Terrorism and Criminal Law: The Dream of Prevention, the Nightmare of the Rule of Law', *New Criminal Law Review* 14, no. 1 (2011): 108–122.

[6]Luigi Ferrajoli, 'El Derecho Penal del Enemigo y la Disolución del Derecho Penal', *Nuevo Foro Penal* 69 (2006): 13–31; Díez, 'Enemy Combatants versus Enemy Criminal Law'; Francisco Muñoz Conde, 'De las Prohibiciones Probatorias al Derecho Procesal Penal del Enemigo', *Revista Penal* 23 (2009): 87–115.

[7]Manuel Cancio Meliá, 2006. 'De Nuevo: ¿"Derecho Penal" del Enemigo?', in *Derecho Penal del Enemigo: El Discurso Penal de la Exclusión* (see note 6), 341–383, 356.

[8]Ruth Jamison and Kieran McEvoy, 'State Crime by Proxy and Judicial Othering', *British Journal of Criminology* 45 (2005): 504–527.

[9]Eduardo Demetrio Crespo, 'Del "Derecho Penal Liberal" al "Derecho Penal del Enemigo"', *Revista Electrónica de Ciencia Penal y Criminología* 14 (2004): 87–115, 110.

[10]Francisco Muñoz Conde, 'De Nuevo sobre el "Derecho Penal del Enemigo"', in *Derecho Penal Liberal y Dignidad Humana: Libro Homenaje al Doctor Hernando Londoño Jiménez*, eds., Kai Ambos and Fernando Velásquez Velásquez (Temis Editorial: Bogotá, 2005), 405–432.

[11]Crespo, 'Del "Derecho Penal Liberal" al "Derecho Penal del Enemigo"'; Jakobs, '¿Derecho Penal del Enemigo?'; Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror"', *The British Journal of Criminology* 49, no. 5 (2009): 628–645.

[12]Alicia Gil Gil, 'La Expansión de los Delitos de Terrorismo en España a Través de la Reinterpretación Jurisrprudencial del Concepto Organización Terrorista', *Anuario de Derecho Penal y Ciencias Penales* 67, no. 1 (2014): 105–154; Cynthia Stohl and Michael Stohl, 'Secret Agencies: The Communicative Constitution of a Clandestine Organisation', *Organisation Studies* 32, no. 9 (2011): 1197–1215; Winston Chou, 'Seen like a State: How Illegitimacy Shapes Terrorism Designation', *Social Forces* 94, no. 3 (2015): 1129–1152; May Darwich, 'Creating the Enemy, Constructing the Threat: The Diffusion of Repression Against the Muslim Brotherhood in the Middle East', *Democratization* 24, no. 7 (2017): 1289–1306.

enemy organisation is thus the task of the state as the 'principle defining agency',[13] requiring cooperation between legislators and law-enforcing agents in projects shaped by institutional norms and ideological commitments.[14] Defining organised challengers as enemy criminal actors depoliticises their struggles,[15] thus states often prefer the 'maximum amount of discretion in interpreting events of political significance',[16] and employ legitimising frames representing counterterrorist struggles as 'war in the Clausewitzean sense … as a continuation of politics'.[17] Enemy criminal law is thus not 'normal' criminal law but rather specialised regimes directed against 'enemies' who are far more societally dangerous than are mere 'criminals'.

Narrowly defined actor-focused anti-terrorist approaches can prevent the infringement of civil liberties by delimiting the constructed scope of terrorist organisations.[18] Direct organisational membership or providing direct material support for violence are more concrete acts than the litany of actions, including nonviolent protest and civil disobedience, that can be subsumed under action-focused definitions of 'terrorism'.[19] But terrorist organisations are clandestine formations without firm boundaries and durable memberships,[20] and their capacity and size are often exaggerated by both militants and states,[21] making defining the 'terrorist organisations' a fundamentally and problematically political act.[22] Thus, legal constructs of terrorist organisations may differ greatly from the actual organisation of these enemy groups as these constructs are shaped by the institutional and ideological commitments of particular states or sectors thereof, allowing for wide variation in the construction of terrorist organisations.

Determining organisational boundaries is further problematised when armed groups are embedded within movements that pose broad challenges to states, which incentivizes expansive definitions of terrorist organisations incorporating nonviolent militants. Such incorporation occurs through criminalising political identities and criminalising political activities.[23] In criminalising political identities, allied groups may be identified

[13]Alex Schmid, 'Terrorism: The Definitional Problem', *Case Western Reserve Journal of International Law* 36 (2004): 375–419, 385.
[14]Ben Golder and George Williams, 'What is "Terrorism"? Problems of Legal Definition', *University of New South Wales Law Journal* 27, no. 4 (2004): 270–295.
[15]Díez, 'Enemy Combatants versus Enemy Criminal Law'; Omar Lizardo, 'Defining and Theorizing Terrorism: A Global Actor-Centered Approach', *Journal of World-Systems Research* 14, no. 2 (2008): 91–118.
[16]Thomas J. Badey, 'Defining International Terrorism: A Pragmatic Approach', *Terrorism and Political Violence* 10, no. 1 (1998): 90–107, 92.
[17]Schmid, 'Terrorism', 401.
[18]Vicki Sentas, 'Terrorist Organisation Proscription as Counterinsurgency in the Kurdish Conflict', *Terrorism and Political Violence* 30, no. 2 (2018): 298–317.
[19]Steve Vanderheiden, 'Eco-Terrorism or Justified Resistance? Radical Environmentalism and the "War on Terror"', *Politics & Society* 33, no. 3 (2005): 425–447; Ben Saul, 'Counter-Terrorism Law and the Shrinking Legal Space for Political Resistance and Violence', in *Security and Human Rights (Second Edition)* eds., Benjamin J Gold and Liora Lazarus (Oxford: Hart Publishing, Forthcoming).
[20]William A. Douglass and Joseba Zulaika, 'On the Interpretation of Terrorist Violence: ETA and the Basque Political Process', *Comparative Studies in Society and History* 32, no. 2 (1990): 238–257; Stohl and Stohl, 'Secret Agencies'.
[21]Sami Zeidan, 'Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World', *Hastings International and Comparative Law Review* 29 (2005): 215–232; Liane Rothenberger, Kathrin Müller, and Ahmed Elmezeny, 'The Discursive Construction of Terrorist Group Identity', *Terrorism and Political Violence* 30, no. 3 (2018): 428–453.
[22]Brian J. Phillips, 'What is a Terrorist Group? Conceptual Issues and Empirical Implications', *Terrorism and Political Violence* 27, no. 2 (2015): 225–242.
[23]Daniel Kirkpatrick, 'Why Negotiate when You Can Criminalize? Lessons for Conflict Transformation from Northern Ireland and South Africa', *Studies in Conflict and Terrorism* 41, no. 8 (2018): 619–637.

as 'fronts' covertly directed by armed groups, or associated movement groups may be defined as 'integral components' of armed groups due to their political activities supporting armed struggle or for general ideological-strategic affinities.[24] Defining 'collaboration' with and 'membership' in terrorist organisations criminalises both political activity and political identity. The definition of collaboration and membership varies in line with the terrorist organisation's construction. Specifying collaboration under narrow definitions of terrorist groups requires evidence of direct contributions to actual violence. Collaboration can also be defined broadly to include political support as 'apologia' or 'glorification of terrorism', whether through justifying violence or support for armed group goals.[25] As broadly criminalising militancy may be problematic and impractical, criminal law may instead focus on movement leaders and their direction of nonviolent political activities in support of armed groups.

Broad definitions can prolong violence and hinder conflict transformation by preventing allies from engaging in the political labour necessary for peace-making.[26] This is critical as movement groups are equipped for peace-making activities such as mobilising supporters, public communication, engagement with opponents, etc., tasks beyond the capacities of clandestine armed groups.[27] Prosecuting movement leaders for collaboration or membership restricts these leaders' capacity for peace-making.[28] States may also hinder conflict transformation by criminalising movement activities and collective action supporting peace-making. Broad actor-focused anti-terrorism law also makes it risky for third-party actors to engage with violent and nonviolent insurgents as even offering advice can be defined as collaboration.[29] But actor-focused anti-terrorist law grounded in narrow definitions of terrorist organisations, restricted to violence-wielding militants and their direct collaborators, can provide space for peace-making efforts and facilitate conflict transformation. Thus, the nature of the 'enemy' as a legal construct can both hinder or facilitate conflict transformation, as demonstrated in the comparative analysis of Basque separatist and Irish republican peace-making efforts.

[24]Gil, 'La Expansión de los Delitos de Terrorismo en España'; Francisco Casel Bértoa and Angela K. Bourne, 'Prescribing Democracy? Party Proscription and Party System Stability in Germany, Spain and Turkey', *European Journal of Political Research* 56, no. 2 (2017): 440–465.

[25]Eugenia Dimitriu, 'The EU's Definition of "Terrorism"', *German Law Journal* 5, no. 5 (2004): 435–617; Iñaki Egaña and Giovanni Giacopuzzi, *La Construcción del Enemigo: ETA a la Vista de España, 2010–2012* (Tafalla, Spain: Txalaparta, 2012).

[26]Carmen Lamarca Pérez, 'Proceso de Paz y Consecuencias Jurídicas', *Revista Icade: Revista de las Facultades de Derecho y Ciencias Económicas y Empresariales* 74 (2008): 27–35; Véronique Dudouet, 'Anti-Terrorism Legislation: Impediments to Conflict Transformation', *Berghof Policy Brief* (November 2011); Angela K. Bourne, 'Democratization and the Illegalization of Political Parties in Europe', *Democratization* 19, no. 6 (2012): 1065–1085; Kirkpatrick, 'Why Negotiate when You Can Criminalise?'.

[27]Peter Neumann, 'Bringing in the Rogues: Political Violence, the British Government and Sinn Fein', *Terrorism and Political Violence* 15, no. 3 (2003): 154–171; Anthony Richards, 'Terrorist Groups and Political Fronts: The IRA, Sinn Fein, the Peace Process and Democracy', *Terrorism and Political Violence* 13, no. 4 (2003): 72–89.

[28]Stacie L. Pettyjohn, 'Engagement: A Path to Disarmament or Disaster?', *International Negotiation* 14, no. 1 (2009): 41–69; Véronique Dudouet, 'Mediating Peace with Proscribed Armed Groups', *USIP Special Report* No. 239 (2010).

[29]David Cole, 'The First Amendment's Borders: The Place of *Holder v. Humanitarian Law Project* in First Amendment Doctrine', *Harvard Law & Policy Review* 6, no. 1 (2012): 147–178; Sophie Haspeslagh, '"Listing Terrorists": The Impact of Proscription on Third-Party efforts to Engage Armed Groups in Peace Processes: A Practitioner's Perspective', *Critical Studies on Terrorism* 6, no. 1 (2013): 189–208.

Spanish anti-terrorism law and peace-making in the Basque Country

ETA formed in the late 1950s amidst the struggle against Francisco Franco's authoritarian regime. Initially conceptualized as a broad-based movement, ETA was involved in clandestine labour organising and cultural activism prior to initiating its armed campaign in 1968. Following Franco's 1975 death, ETA participated in the development of the 'Basque National Liberation Movement', a network of specialised pro-independence groups, including labour unions, cultural associations, and youth organisations, as well as parties such as Herri Batasuna, formed in 1978. The movement's formation provided ETA a durable social base that directly and indirectly supported its escalating armed campaign.

Spain's response to ETA shifted from a militaristic model under the dictatorship towards an increasingly militant 'rule of law' approach after democratisation. Under Franco, military law was wielded against political challengers, an approach formalised in the 1943 Decree-Law for Repression of Banditry and Terrorism, and further expanded by reforms in 1963 and 1968 amidst growing anti-regime collective action,[30] streamlining the detention of nonviolent activists for 'military insurgency'.[31] It was especially effective in repressing ETA's relatively public nonviolent sectors – contributing to the group's increasing militarisation.[32] Following democratisation, a mixed regime was introduced that used extra-legal and illegal methods – talks with ETA and clandestine violence against the group in the French Basque Country – alongside 'emergency' anti-terrorism legislation targeting ETA's cadres and leaders, though terrorism itself remained ambiguously defined.[33] The new regime also targeted political support for ETA. The 1978 Decree-Law on the Protection of Citizen Security criminalized 'apologia' for terrorism and the 1980 Organic Law on Citizen Security suspended rights for those suspected of terrorist offenses, including apologia.[34] A 1984 act authorised the banning of parties led by convicted terrorists, extended sentences for apologia, and prohibited demonstrations supporting terrorism, though these provisions were rarely enforced.[35]

The law-and-order approach hardened beginning in the mid-nineties. In 1995, the Spanish Criminal Code was reformed, and though 'terrorism' remained largely undefined,[36] the 'terrorist organisation' is identified as a criminal entity with 'the purpose or object of committing serious felonies' directed at 'subverting the constitutional order or seriously altering the public peace'.[37] Second-party crimes associated with terrorist organisations range from 'acts that involve discrediting of, disdain for, or humiliation of the victims of terrorist offences or their relatives',[38] to collaboration,

[30]Robert P. Clark, *The Basques: The Franco Years and Beyond* (Reno, USA: University of Nevada Press, 1979), 177–78; Francisco Letamendia, *Historia del Nacionalismo Vasco y ETA: ETA en el Franquismo* (San Sebastian, Spain: R & B Ediciones, 1994), 259.
[31]Michel Wieviorka, *The Making of Terrorism* (Chicago: The University of Chicago Press, 1993), 155–56.
[32]Pedro Ibarra, *La Evolucion Estrategica de ETA (1963–1987)* (San Sebastian, Spain: Kriselu, 1987), 77.
[33]Robert P. Clark, *Negotiating with ETA: Obstacles to Peace in the Basque Country* (Reno, USA: University of Nevada Press, 1990), 38; Omar G. Encarnación, *Spanish Politics: Democracy After Dictatorship* (Cambridge: Polity Press, 2008).
[34]Clark, *Negotiating with ETA*, 41–42.
[35]Ibid., 64–65.
[36]United Nations Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, on his Mission to Spain (7–-14 May 2008)', Tenth Session, Agenda Item 3, 6–11.
[37]Gobierno de España. 'Ley Orgánica 10/1995, de 23 de Noviembre, del Código Penal', Art. 571, Sub. 3.
[38]Ibid., Art. 578.

broadly defined as 'forms of co-operation, aid or mediation, economic or of any other kind whatsoever, with the activities of those terrorist organisations or groups'.[39] These broad statutes would prove critical in criminalising Basque separatism in subsequent years.

Following the 1997 election of José María Aznar's conservative government, counter-terrorism shifted from action to association as manifested in the criminalisation of nonviolent separatist groups,[40] justified through National Court 'super-judge' Baltasar Garzón's 'ETA Complex' thesis which redefined the separatist movement as an ETA-directed organisational totality, a view subsequently upheld by Spanish high courts.[41] The separatist movement was redefined in 2003 by the Supreme Court as 'a single entity, namely, the terrorist organisation ETA, hidden behind an apparent plurality of legal entities created at different times according to an "operational succession" devised in advance by that organisation'.[42] In this reinterpretation, ETA was demoted to being merely the 'armed front',[43] 'armed wing',[44] or 'armed faction'[45] of the movement-encompassing 'structural framework of ETA'.

The inter-organisational coordinating body Patriotic Socialist Coordination (KAS) and its successor Ekin were lynchpins in this redefined ETA construct. KAS, created in 1975 to craft political strategies supporting ETA, had proven largely ineffective by the nineties,[46] but the National Court nevertheless ruled that KAS was ETA's 'mechanism of control' over the separatist movement.[47] In 1998, KAS was provisionally proscribed and 76 individuals associated with it were charged with ETA membership. Ekin, founded in 1999, was proscribed by the National Court in 2001 due to it having, like KAS, 'exercised control over the entire organized collective called the Basque National Liberation Movement according to ETA's designs',[48] and thus 'part of an illicit association, as an arm of the terrorist organization called ETA'.[49]

After 1998, numerous separatist organisations were criminalised, beginning with the movement-linked newspaper *Egin* which the National Court provisionally proscribed that year, determining it to be ETA's 'informational front' tasked with maintaining a 'climate of terror'.[50] In 1999, Basque youth groups – Jarrai and its successors, Haika and Segi – were proscribed due to their use of low-level protest violence, ruled to be 'complementary to the strategy of ETA'.[51] In 2007, the Supreme Court expanded the National Court's ruling, redefining these youth groups as 'terrorist organisations' rather than mere 'illicit associations'. Also criminalized was the network of movement-linked *herriko tabernas*, 'people's bars', which the National Court ruled to be 'another

[39]Ibid., Art. 578, Sub. 2.
[40]Teresa Whitfield, *Endgame for ETA: Elusive Peace in the Basque Country* (London: Hurst & Company, 2014), 103–04.
[41]Giovani Giacoppuzi, *Sin Tregua* (Tafalla, Spain: Txalaparta, 2002): 238–39; Miguel Buesa, *ETA, S.A.: El Dinero que Mueve el Terrorismo y los Costes que Genera* (Barcelona: Editorial Planeta, 2011), 71–72.
[42]European Court of Human Rights, *Herri Batasuna and Batasuna v. Spain* (2009), 9.
[43]Audiencia Nacional de España, Sentencia 73/2007, 95. All translations from Spanish are the authors.
[44]Ibid., 204.
[45]Ibid., 242.
[46]Kepa Aulestia, *HB: Crónica de una Delirio* (Madrid: Temas de Hoy, 1998), 142–43; Florencio Domínguez, *De la Negociación a la Tregua: ¿El Final de ETA?* (Madrid: Taurus, 1998), 108.
[47]Sentencia 73/2007, 202.
[48]Ibid., 218.
[49]Ibid., 546.
[50]Ibid., 113–18.
[51]Audiencia Nacional de España, Sentencia 27/2005, 12.

instrument in the financial system designed by ETA/KAS'.[52] Herri Batasuna and its successor parties were not criminalised as 'integral components' of ETA, but were instead banned under the 2002 Organic Law on Political Parties, which outlawed parties that supported 'terrorism'.[53] In 2003, Herri Batasuna and its successor Batasuna were proscribed by the National Court – a ruling upheld by the European Union Court of Human Rights in 2009.[54]

Criminalisation also entailed nonviolent movement leaders and cadres being prosecuted for 'collaboration' with or 'membership' in ETA. The Court ruled that 'moving within ETA's orbit' was not a crime,[55] and restricted criminal responsibility to 'active collaboration … voluntarily undertaken with the end of facilitating some activities of the organisation, not limited to armed actions'.[56] Collaboration furthermore entailed the 'double requirement of establishing the structure in which [the individual] acts as terrorist, and that the individual contributes to the functioning of this organisation'.[57] Movement 'leaders' were deemed to be 'at the disposal' of ETA 'as demonstrated by the concrete execution of acts of collaboration',[58] and thus bore criminal responsibility for 'planning and executing actions designed for and consistent with providing the group ETA entry into and cover within institutions'.[59]

The 1997 prosecution of Herri Batasuna's leadership for collaboration set a precedent for prosecuting movement leaders.[60] Following the April 1995 release of an ETA peace proposal, the 'Democratic Alternative', Herri Batasuna used in a 1996 campaign advertisement portions of a video ETA provided Basque political groups explaining its proposal. In 1997, Garzón ordered the arrest of 27 HB leaders for 'collaboration with ETA', arguing that as 'it was an impossibility for ETA to occupy electoral spaces freely provided to legal political parties', Herri Batasuna leaders 'ceded' this space to the group,[61] ruled to be 'public manifestation of solidarity with criminal activity'.[62] The National Court found the 27 guilty of collaboration.

A more recent effort targeting movement leaders is the case of the 'Bateragune 5′, veteran movement politicos charged with ETA membership for seeking to form a 'unified political directorate' in the vein of KAS/Ekin, which, according to the National Court, was central to ETA's long-term 'terrorist strategy'. In 2011, the Court found that the five had been 'integrated into an organized structure directed by ETA' as evidenced by the 'cause-effect' relationship between ETA's 'orders' and the subsequent political efforts of the leaders.[63] The National Court ruled that the five were ETA 'leaders', though the Supreme Court found in 2012 that the evidence indicated that they were merely ETA 'members'. That the five leaders were at the time leading an

[52]Audiencia Nacional de España, Sentencia 16/2004, 162.
[53]Bertil Dunér, *The World Community and the 'Other' Terrorism* (Lanham, MD: Lexington Books, 2007), 62–63; Katherine A. Sawyer, 'Rejection of Weimarian Politics or Betrayal of Democracy? Spain's Proscription of Batasuna under the European Convention on Human Rights', *American University Law Review* 52 (2002): 1531–1581.
[54]Bourne, 'Democratization and the Illegalization of Political Parties in Europe'.
[55]Sentencia 16/2014, 242.
[56]Ibid., 244.
[57]Ibid., 24.
[58]Ibid., 246.
[59]Ibid., 251.
[60]Ibid., 248–51.
[61]Gobierno de España, *Boletín del Estado* (August 1999), 27.
[62]Ibid., 30.
[63]Audiencia Nacional de España, Sentencia 22/2011, 42.

intra-movement effort to foster ETA's disengagement did not influence the judiciary's decision.[64]

Criminalisation directly impacted peace-making efforts by limiting non-violent separatists' political agency. The 1997 prosecution of Herri Batasuna leaders centred on the party's promotion of ETA's 'Democratic Alternative', which the defence argued did not entail collaboration with a terrorist group since the Alternative was a peace proposal,[65] of which the Court sought 'to hinder awareness … [through] censorship, coercion, threats, and imprisonment'.[66] Legal efforts initiated during ETA's 1998–99 ceasefire limited the movement's capacity for public communication and inter-organisational coordination vis-à-vis the proscriptions of *Egin* and KAS, though a new newspaper, *Euskadi Información*, was formed within days of *Egin*'s closure, while KAS's capacity had waned and by its 1998 criminalisation was, according to ex-members, 'an organisation belonging to the past'.[67]

During the 2006–07 ETA ceasefire, movement leaders were hindered in their peace-making efforts beginning days after ETA's March ceasefire announcement when separatist leader Arnaldo Otegi was arrested for membership in a terrorist organisation. In subsequent months, movement leaders were charged with collaboration and party demonstrations and press conferences in support of peace-making were prohibited.[68] From the perspective of separatists, these actions undermined José Luis Zapatero's government's credibility as the secret 2005 ETA-Madrid agreement guaranteed Batasuna's right to participate in 'political life under conditions equal to that of other political and social forces'.[69] Zapatero tried to restrain the judiciary – replacing some conservative judges and ordering prosecutors not to pursue charges against nonviolent separatists.[70] Patxi López, head of the Basque wing of the Socialist Party, met publicly with Otegi in May 2006, which Judge Baltazar Garzón refused to prohibit.[71] The Supreme Court also allowed a small separatist party, Basque Nationalist Action, to run in the 2007 parliamentary elections, though nearly half of its candidates were barred from running due to their links to Batasuna.[72]

Despite ETA having over the last decade bowed to intra-movement pressure[73] and disbanded in 2018 after a largely unilateral process, repression has continued, though there have been openings, the most significant being the authorization of the EH Bildu coalition in which Batasuna-linked separatists participated. Additionally, the movement-linked party, Sortu, initially proscribed by the Supreme Court in 2011, was authorized in 2012 by the Constitutional Court, citing the party's rejection of political

[64]Imanol Murua, *Ending ETA's Armed Campaign: How and Why the Basque Armed Group Abandoned Violence* (New York: Routledge, 2017): 82–84.
[65]*Boletín del Estado*, 28–29.
[66]Ibid., 30.
[67]*Euskadi Información*, 18 November 1998.
[68]Antoni Batista, *Adiós a las Armas: Una Crónica del Final de ETA* (Barcelona: Random House, 2011), 90–91; Florencio Domínguez, *La Agonía de ETA* (Madrid: La Esfera de los Libros, 2012), 168–69.
[69]Jesús Eguiguren and Luis Aizpeolea, *ETA, Las Claves de la Paz: Confesiones del Negociador* (Madrid: Aguilar, 2011), 149.
[70]Ibid., 156–57.
[71]Whitfield, *Endgame for ETA*, 173.
[72]*Gara*, September 2007.
[73]Imanol Murua, 'No More Bullets for ETA: The Loss of Internal Support as a Key Factor in the End of the Basque Group's Campaign', *Critical Studies on Terrorism* 10, no. 1 (2017): 93–114.

violence. But repression persists, as evidenced by the 2014 convictions of 35 associated with the *herriko taberna* network. In 2012 the National Court proscribed the prisoners' rights organisation, Herrira, due to its being an 'authentic tentacle of ETA'.[74] Prosecutions of ETA members, furthermore, have continued despite ETA having officially ended its campaign in 2011, decommissioned its weapons in 2017, and disbanded in 2018. Courts have focused on veteran ETA militants who, after decades in prison, stand to be released following the European Court of Human Rights overturning in 2012 of the 'Parot Doctrine', which had been used to circumvent the Spanish Penal Code's 30-year limit on prison sentences. The judiciary responded by opening new charges against imprisoned ETA members, thereby ensuring that these veteran militants remain imprisoned for the foreseeable future. More troublingly, criminal law has been deployed against other political challengers, most notably Catalan separatists, albeit for 'sedition' and 'rebellion' rather than terrorism.[75]

British anti-terrorism law and peace-making in Northern Ireland

The Northern Irish conflict began in 1968 when Protestant unionists violently reacted to the Northern Ireland Civil Rights Association's mobilisations for Catholic civil rights, fuelling sectarian conflict and inter-communal violence in subsequent years. As the Dublin-based 'Official' Irish Republican Army appeared unwilling to 'defend' Northern Catholic communities, a group of republican purists defected in 1969, forming the 'Provisional IRA' (hereafter referred to as the 'IRA') and Provisional Sinn Fein as its political wing. By 1971, the IRA had become the region's most effective clandestine armed group, backed by growing support within Northern Ireland's working-class Catholic communities.

The United Kingdom's counterterrorist response developed in tandem with the conflict. Gormally, McEvoy, and Wall[76] identify three phases. The first, *reactive containment*, represented a quasi-colonialist military approach that included London's direct rule, the British army's deployment, and the widespread internment of suspected insurgents. In 1976, *criminalisation*, a 'fusion of political and military thought',[77] was introduced focused on managing paramilitary violence through jury-less 'Diplock' courts designed to streamline convictions. Beginning in 1981, criminalisation was replaced by *normalisation* that treated political violence as part of a broader conflict that ultimately required political resolution, as well as the normalisation of broad anti-terrorism statutes as permanent features of criminal law.[78] The IRA's rank-and-file remained the target of anti-terrorism law

[74] *El Mundo*, 1 October 2013.
[75] Aitor Jiménez González, 'Enemigos del Estado: Las Guerras Legales de España contra Obreros e Independentistas', *Misión Jurídica* 11, no. 15 (2018): 185–207; Susana Narotzky, 'Evidence Struggles: Legality, Legitimacy, and Social Mobilizations in the Catalan Political Conflict', *Indiana Journal of Global Legal Studies* 26, no. 1 (2019): 31–60.
[76] Brian Gromally, Kieran McEvoy, and David Wall, 'Criminal Justice in a Divided Society: Northern Ireland Prisons', *Crime and Justice* 1, no. 17 (1993): 51–135.
[77] Ibid., 77.
[78] Kieran McEvoy, 'Law, Struggle, and Political Transformation in Northern Ireland', *Journal of Law and Society* 27, no. 4 (2000): 542–571, 552; 'What Did the Lawyers Do during the War: Neutrality, Conflict and the Culture of Quietism', *Modern Law Review* 74 (2011): 350–384, 361.

throughout these phases as proscription was directed only against armed groups.[79] Terrorism itself, however, remained largely undefined until 2000.[80]

Proscribing organisations, a 'British tradition',[81] was an effective instrument in the struggle against the IRA. The 1974 Terrorism Act proscribed the Provisional IRA along with the Ulster Volunteer Force and the Irish National Liberation Army, while also criminalising public support for these organisations subject to three months' imprisonment. The 1989 Prevention of Terrorism Act increased penalties for membership and 'collaboration' such as fundraising and public support, though penalties for these latter crimes remained minimal.[82] The Republic of Ireland has its own tradition or proscription, beginning with the 1939 Offences Against the State Act, which defined 'unlawful organisations' as 'a body of persons purporting to be a government or a legislature but not authorised in that behalf by or under the Constitution,' including 'an armed force or a purported police force not so authorised', and allowed for the possession of 'incriminating documents' as evidence of membership.[83] In 1972, the Act was amended to place further burdens on the accused in disproving membership.

Sinn Fein was not criminalised for its political – and direct – support for the IRA's armed campaign. The party had been previously proscribed in 1956 but was legalised in Northern Ireland in 1974 as part of broader London-led political efforts during the mid-seventies. Sinn Fein and the 'Official' IRA-linked 'Republican Clubs' were legalised in hopes that politically-minded militants would lead their armed comrades down a nonviolent path.[84] Political considerations continued to prevent Sinn Fein's criminalisation into the eighties. Indeed, the Thatcher government believed that proscribing Sinn Fein, would be 'inappropriate and ineffective,' despite acknowledging that 'the membership and command structure of [Sinn Fein and the IRA] is closely related and inter-locked'.[85]

Censorship was widely used against republicans. In the Republic of Ireland, the 1960 Broadcasting Authority Act gave the Minister for Posts and Telegraphs discretion in prohibiting content of 'any particular matter or of any particular class'[86] which was expanded in 1971 to include 'any matter that could be calculated to promote the aims or activities of any organisation which engages in, promotes, encourages or advocates the attaining of any particular objectives by violent means'.[87] In 1974, broadcast interviews with Sinn Fein officials were banned in the Republic, which remained in effect until the IRA's 1994 ceasefire. Censorship was introduced into British law with the 1981 Broadcasting Act and in 1988 censorship was enforced against Sinn Fein, i.e. party spokespeople's voices were subtitled or dubbed.[88] The ban was lifted following the

[79]Kirkpatrick, 'Why Negotiate When You Can Criminalize?'.
[80]Andrew W. Neal, 'Normalization and Legislative Exceptionalism: Counterterrorist Law-Making and the Changing Times of Security Emergencies', *International Political Sociology* 6, no. 3 (2012): 260–276.
[81]Clive Walker, *Terrorism and the Law* (Oxford: Oxford University Press, 2011), 1408.
[82]Christopher Blake, 'Legislative Developments', in *Policing Terrorism*, eds., Christopher Blake, Barrie Sheldon, Rachael Strzelecki and Peter Williams (Thousand Oaks, CA: Sage, 2012), 102–115, 104.
[83]Republic of Ireland, *1939 Offenses Against the State Act*, Art. 26.
[84]Angela K. Bourne, 'Securitisation or Tolerance? The Proscription of Sinn Féin and the Republican Clubs', (paper presented at the annual meeting for the Political Studies Association, Sheffield, UK, March 30–1 April 2015).
[85]*Belfast Telegraph*, 30 December 2015.
[86]Republic of Ireland, *Broadcasting Authority Act of 1960*, Sec. 31.1.
[87]Agnes Maillot, *New Sinn Féin: Irish Republicanism in the Twenty-First Century* (New York: Rutledge, 2005), 74–75.
[88]Rita Lago, 'Interviewing Sinn Fein Under the New Political Environment: A Comparative Analysis of Interviews with Sinn Fein on British television', *Media, Culture & Society* 20, no. 4 (1998): 677–685.

IRA's 1994 ceasefire announcement, thus allowing Sinn Fein leaders to engage in public communication and political debate.

Sinn Fein also faced electoral hurdles. In Northern Ireland, the Local Government Act of 1972 prohibited individuals who had served more than three months in prison from taking municipal seats, while the 1989 Elected Authorities (Northern Ireland) Act disqualified municipal candidates who refused to denounce proscribed organisations.[89] Responding to the 1981 parliamentary election of IRA hunger striker Bobby Sands, Westminster passed the Representation of People Act preventing anyone sentenced to more than twelve months in prison from taking seats in the House of Commons. Sinn Fein's subsequent professionalisation, however, limited these measures' effectiveness. The party's opponents resorted to extra-legal means, 'adjourning meetings before any business could be transacted, shouting, walking out, and blowing whistles when Sinn Fein members attempted to speak and, later, delegating all the lawful business of the council to a committee'.[90] Sinn Fein, however, challenged these tactics in court, and its opponents abandoned these efforts, along with other forms of official and semi-official harassment.[91]

Police and prosecutors sought to directly tie nonviolent republican leaders to IRA violence, as illustrated by the 1990 conviction for kidnapping of Sinn Fein's Director of Publicity Danny Morrison.[92] In the early eighties, police and prosecutors were determined to link through informant testimony Sinn Fein president Gerry Adams and other party leaders to IRA crimes, to no avail.[93] Even IRA leaders were relatively unmolested after the early seventies. In 1983, IRA chief-of-staff Ivor Bell was arrested, but soon released after an informant retracted his testimony.[94] The experience of Thomas 'Slab' Murphy, another reputed IRA chief-of-staff never prosecuted for IRA violence, illustrates the relative freedom IRA commanders enjoyed. In 1987, the Irish *Sunday Times* alleged that Murphy had directed IRA bombings in England, for which Murphy successfully sued for libel, though the verdict was later overturned, and Murphy lost at retrial.[95] The law thus provided republican political and military leaders space to manoeuvre, which was critical to centralised peace-making efforts in the nineties.

In addition to indirect facilitation, the law encouraged peace-making through legislation related to paramilitary prisoners and to unsolved murders. The 1998 Northern Ireland (Sentences) Act established conditions for prisoner release, impacting 447 paramilitary prisoners.[96] Parliament also addressed conflict victims with the 1999 Location of Victims Act, and the creation of the Commission for the Location of Victims to which individuals could provide information to locate the conflict's 'disappeared' without fear of prosecution, as the Act limited forensics in exhumations and

[89]Walker, *Terrorism and the Law*, 378–79.
[90]McEvoy, 'Law, Struggle, and Political Transformation in Northern Ireland', 564.
[91]Ibid.; Robert W. White, 'From State Terrorism to Petty Harassment: A Multi-Method Approach to Understanding Repression of Irish Republicans', *Studi Irlandesi: A Journal of Irish Studies* 7 (2017): 45–64.
[92]Ed Moloney, *A Secret History of the IRA* (New York: W. W. Norton & Company, Inc., 2003), 335–36.
[93]David Bonner, 'Combating Terrorism: Supergrass Trials in Northern Ireland', *The Modern Law Review* 51, no. 1 (1988): 23–53.
[94]Robert W. White, *Out of the Ashes: An Oral History of the Provisional Republican Movement* (Newbridge, Ireland: Merrion Press, 2017), 83.
[95]Toby Harnden, *Bandit Country: The IRA and South Armagh* (London: Hodder & Stoughton, 1999), 441–46.
[96]Walker, *Terrorism and the Law*, 12.

prohibited the use of information provided in criminal proceedings.[97] Demilitarisation and demobilisation, however, occurred largely outside of the law.[98] Without formal amnesty, many former combatants could still face prosecution for their past activities,[99] which would potentially undermine the peace in Northern Ireland.

Legislation against the peace process's 'dissidents', also facilitated peace-making.[100] In response to the 'Real' IRA's 1998 Omagh bombing that killed 27, Westminster passed the Criminal Justice (Terrorism and Conspiracy) Act, streamlining conviction for membership in proscribed organisations based solely on police testimony, while the Irish Republic amended the Offences Against the State Act to allow silence during interrogation to be used as an 'inference' of guilt.[101] Dissidents furthermore did not benefit from the reforms that facilitated disengagement as the 1998 Sentences Act covered only those convicted prior to April 1998. Finally, anti-terrorism legislation since 2000 has expanded policing and prosecutorial powers over the entire United Kingdom,[102] which has decimated republican dissidents while locking Provisional into nonviolent politics by altering the security environment in Northern Ireland and beyond.

Conclusion

The divergence in Spanish and British juridical definitions of the 'terrorist organisation' and the impact of this divergence on conflict transformation reflects a longstanding distinction concerning the framing of terrorism as a problem of crime or of war.[103] A third model, the *conflict frame*, has been indirectly addressed by scholars as well. These three frames have implications for the configuration of anti-terrorism law. A crime frame that defines terrorism as a crime to be combatted by the 'rule of law' is widely advocated by scholars and policymakers as a means for preserving civil liberties and upholding the 'rule of law'. Terrorism, however, is rarely treated as a 'normal' crime and its management requires specialised anti-terrorism law and

[97]Ibid., 522.
[98]Marie Smyth, 'The Process of Demilitarization and the Reversibility of the Peace Process in Northern Ireland', *Terrorism and Political Violence* no. 16, 3: 544–566.
[99]Louise Mallinder, et al., 'The Historical Use of Amnesties, Immunities, and Sentence Reductions in Northern Ireland', *Transitional Justice Institute Research Paper*, no. 16–12 (2015).
[100]Jon Moran, *Policing the Peace in Northern Ireland: Politics, Crime and Security after the Belfast Agreement* (Manchester: Manchester University Press, 2009), 182.
[101]Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford: Oxford University Press, 2012), 192–94.
[102]Neal, 'Normalization and Legislative Exceptionalism'.
[103]Richard E. Rubenstein, *Alchemists of Revolution: Terrorism in the Modern World* (New York: Basic Books Inc, 1987), Ch. 2; Diane F. Orentlicher and Robert Kogod Goldman, 'When Justice Goes to War: Prosecuting Terrorists Before Military Commissions', *Harvard Journal of Law and Public Policy* 25 (2001): 653–664; Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', *European Journal of International Law* 14, no. 2 (2003): 241–264; Sabine von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War Against Terrorism', *European Journal of International Law* 14, no. 2 (2003): 265–282; Alex P. Schmid, 'Frameworks for Conceptualising Terrorism', *Terrorism and Political Violence* 16, no. 2 (2004): 197–221; Jill A. Edy and Patrick C. Meirick, 'Wanted, Dead or Alive: Media Frames, Frame Adoption, and Support for the War in Afghanistan', *Journal of Communication* 57, no. 1 (2007): 119–141; Laurie R. Blank, 'The Consequences of a War Paradigms for Counterterrorism: What Impact on Basic Rights and Values', *Georgia Law Review* 46 (2011): 719–741; Robert H. Wagstaff, *The War Paradigm Versus the Criminal Law in the United States and United Kingdom* (Oxford: Oxford University Press, 2013).

expanded state powers that often undermine rather than uphold constitutional protections and rights.[104] Anti-terrorism law is, after all, enemy criminal law.[105] Crime frames may thus prevent conflict transformation and indeed fuel conflict – particularly when it is wielded broadly against nonviolent as well as violent 'terrorists'.

War frames conceptualise counterterrorism as wars against enemies to be combated through military action. But these frames are not extra-legal. Declaring 'war' against terrorist organisations can have unintended legal consequences, providing 'terrorist' enemies procedural protections and quasi-legal status as combatants under humanitarian law.[106] Indeed, 'under the laws of war, mere membership (even in a criminal organisation) is not a crime'.[107] Thus, much as 'emergency' anti-terrorism criminal law undermines attempts to delegitimize terrorists as 'criminals', war-framed approaches can paradoxically legitimise terrorists as 'soldiers'. In practice, however, wars on terrorism, like other 'war-on-something' frames, are largely metaphorical – and thus critical for the development of enemy criminal law.[108]

The paradoxes and contradictions of these frames suggest a third counterterrorist approach: a *conflict frame* grounded in recognition that political violence exists 'next to a multiple other political acts, some violent, some not, some conventional, some not, some by the terrorists themselves, some by like-minded, but less violent people, who share their goals without approving of their methods'.[109] A conflict frame centres on 'a realisation and acceptance that political violence and division are a "normality" of a given criminal justice system and society – part of a broader range of other "normalities" that should receive equal emphasis such as ordinary crime'.[110] Criminal law, enemy and citizen, remains operative within conflict frames, providing weapons in counterterrorist struggles and instruments for conflict transformation, facilitating the legal transformation of 'enemies' into 'citizens'.

In the struggle against ETA, a crime frame has largely dominated Madrid's approach since the nineties. Previous governments, however, took a more conflict-oriented approach, evident in efforts to negotiate with ETA in the eighties, resulting in the disbandment of one faction, ETA Politico-Military, and the court-driven 'social reinsertion' of hundreds of its prisoners and fugitives.[111] Of course, the conflict approach also engendered a 'dirty war' against ETA in the French Basque Country,[112] as well as the expansion of anti-terrorism law throughout the eighties. The nineties witnessed a shift toward an aggressive 'rule of law' approach grounded in the expansion of the 'terrorist organisation ETA', i.e. the 'enemy' as a legal construct. This practical shift coincided

[104]Findlay, '"Criminalization" and the Detention of "Political Prisoners"', 4.
[105]Meliá, '"Derecho Penal" del Enemigo y Delitos de Terrorismo'.
[106]Fitzpatrick, 'Speaking Law to Power'; Jan Klabbers, 'Rebel with a Cause? Terrorists and Humanitarian Law', *European Journal of International Law*, 14, no. 2 (2003): 299–312; Jack M. Beard, 'The Geneva Boomerang: The Military Commissions Act of 2006 and US Counterterror Operations', *American Journal of International Law* 101, no. 1 (2007): 56–73.
[107]Jordan J. Paust, 'War and Enemy Status After 9/11: Attacks on the Laws of War', *The Yale Journal of International Law* 28 (2003), 325–335.
[108]Gómez-Jara, 'Enemy Combatants versus Enemy Criminal Law', 558.
[109]Schmid, 'Conceptualising Terrorism', 200.
[110]Gormally, McEvoy, and Wall, 'Criminal Justice in a Divided Society', 57.
[111]Clark, *Negotiating with ETA*, 161–62; Gaizka Fernández Soldevilla, 'Agur a las Armas: EIA, Euskadiko Ezkerra y la Disolución de ETA Político-Militar (1976–1985)', *Sancho el Sabio: Revista de Cultura e Investigación Vasca* 33 (2010): 55–96.
[112]Paddy Woodworth, *Dirty War, Clean Hands: ETA, the GAL and Spanish Democracy* (Cork: Cork University Press, 2001).

with a broader discursive transformation centred on the idea that there is no 'Basque conflict', only ETA's terrorism.[113] The 'rule of law' is now being called upon to confront social 'enemies' in Catalonia and within the left,[114] indicating that enemy criminal law has become an effective weapon in struggles against challengers to the state in post-ETA Spain.

The United Kingdom initially approached the Northern Irish conflict through a quasi-colonial war frame, but throughout the seventies a conflict frame emphasising political settlement was developed that combined criminalisation with political resolution efforts.[115] Criminal law's deployment against narrowly-defined enemies – rank-and-file members of armed groups – was critical to 'normalising' the conflict,[116] and facilitated conflict transformation by addressing the concerns of prisoners and victims. Criminal law, however, remains a potential threat to the peace in Northern Ireland, as evidenced by Gerry Adams's brief 2014 detention for questioning concerning a 1972 murder and chronic political controversy over establishing police 'historical enquiries' units to investigate the conflict's crimes.

This conflict frame, though shifting throughout the Northern Irish struggle, mingled elements of the law with language associated with political conflict and civil war. For example, though the term 'terrorist' was commonplace, British officials and media organisations often used 'paramilitary' to describe armed groups, thereby indirectly recognising these organisations as semi-legitimate combatants. Such discursive pragmatism is not evident in Spain: the use by non-Spanish media of terms such as 'violent separatist group' rather than 'terrorist organisation' in reference to ETA has been a source of controversy since the turn of the century.[117] Indeed, 'conflict' itself is for many in the Spanish political establishment a controversial term, whether in reference to the Basque or, increasingly, the Catalan independence struggles, which has been treated in recent years as a matter of criminal rather than constitutional law, as evidenced by police suppression of the prohibited 2017 independence referendum and the ongoing prosecution of nonviolent Catalonian leaders who led the illegal effort. The crime frame, as well as enemy criminal law, has perhaps been normalised in Spain in part due to ETA's apparent 'defeat' by the rule of law.

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[113]Whitfield, *Endgame for ETA*, 16–17.
[114]González, 'Enemigos del Estado'; Narotzky, 'Evidence Struggles'.
[115]Findlay, '"Criminalization" and the Detention of "Political Prisoners"', 5.
[116]Gormally, McEvoy, and Wall, 'Criminal Justice in a Divide Society'.
[117]Batista, *Adiós a las Armas*, 224.