SPANISH NATIONAL COURT
CRIMINAL DIVISION
FIRST SECTION
COURT RECORD No. 21/05

CENTRAL COURT OF FIRST INSTANCE No. 6
ORDINARY INDICTMENT No. 44/04

TO THE DIVISION

THE PROSECUTOR, in discharging the transfer conferred by the ruling of 3rd November, 2006, is hereby instructed in the contents of the indictment and is in favour of the dismissal of the proceedings, in accordance with that which is stipulated in Art. 641.1 and 2 of the Criminal Indictment Law, when considering that there is insufficient incriminating evidence to regard the perpetration of the crime of belonging to a terrorist organisation and/or illegal association as proven, and to attribute to any of the defendants his participation in the said crime.

A. DELIMITATION OF THE OBJECT OF THE INVESTIGATION. The present proceedings began with a specific objective of investigation: the alleged implication of the company of the Basque-language newspaper "Egunkaria" in a business network devoted to funding the terrorist group ETA; this was based on a report by the Spanish Civil Guard, the contents of which constituted the action brought by the Attorney General's Office that led to the start of the proceedings. This investigation did not reach a satisfactory conclusion; the Examining Judge himself has expressly recognised this and has accepted that it has not been possible to prove either that the newspaper has been a source of funding of ETA, or that it has been a tool for laundering illegal capital coming from the group. Thereafter, the object of the proceedings was redirected towards verifying whether "Egunkaria S. A." and the newspaper "Egunkaria" constituted a tool that the terrorist group ETA were availing themselves of to achieve their aims. However, this new fact has not been verified in the investigation either, or at least, the result of the proceedings carried out raises serious and reasonable doubts that this is the case.

B. ANALYSIS OF THE PIECES OF EVIDENCE SUBMITTED IN THE INVESTIGATION. It is a well-known fact that the body of evidence on which an accusation has to be based should be sufficient insofar as it provides, in an objective way, the incriminatory elements regarding the existence of the punishable fact and the participation in it of the indictees, upon whom the burden of proving their innocence evidently does not rest.

Having established that there is no clear evidence of the facts, the indictment rests on supposed circumstantial evidence, in which the reasonableness of the link between the supposedly incriminating objective data and the proven fact becomes particularly relevant (SSTC –Rulings of the Constitutional Court– 189/98 and 220/98). So, the Constitutional Court has declared with respect to circumstantial evidence that the connection between the base fact and the consequent fact has of necessity to be:

"coherent, logical and rational, rationality being construed not as something merely mechanical or automatic of course, but as the reasonable understanding of reality that is normally experienced and appreciated in accordance with the collective criteria in force." (SSTC –Rulings of the Constitutional Court– 174/1985, 175/1985, 169/1986, 229/1988, 107/1989, 384/1993 and 206/1994).

In short, as the said Court has stated on other occasions, it is a matter of going beyond mere suspicion that proves nothing. Therefore, if the evidence only leads to fact that is *"inconclusive, because it is excessively open, weak or unspecified"* (SSTC – Rulings of the Constitutional Court– 189/1998), the prosecution cannot be pursued. Well, the Attorney General's Office considers this to be the case in the present Indictment as we shall be going on to analyse below.

B.1. The proceedings were instigated in the summer of 2001 through a brief action brought by the Attorney General's Office in which the information/request of the Spanish Civil Guard was transferred, so that the facts could be investigated.

The first thing that needs to be pointed out is that the proceedings were based on documents dated during the early 1990s –up until 1993–, and therefore coincided with the gestation and first steps of the newspaper. Most of the said documents, if not all, had been published in the national press at the time; they had even sparked off public debate and the bringing of legal action based on the breach of honour of certain persons, without, however, there having been any legal action like the present one brought at that moment.

After the proceedings had been started and the investigation had been going on for a number of years, there is no document of a later date to support the incriminatory conclusions of the prosecution. This alone points to the difficulty in providing evidence to support the hypothesis that throughout the ten years the newspaper Egunkaria was being published, it had been a legal device to fulfil the aims of a terrorist group like ETA and that no document whatsoever that reflected or described an editorial line to support this has however been found.

Moreover, as will be analysed below, the content of the documents not only fails to determine the participation of the accused in criminal acts, but is clearly susceptible to an interpretation that runs counter to the result that one is aiming to obtain from the investigation. This leads us irremissibly to a very reasonable doubt that should favour the defendants, and even more so when the writ of the indictment itself acknowledges, when referring to the accused: *"that an attempt was made before the rest of the general public and the institutions to choose as representatives of the project people, who, without openly distancing themselves from the thesis of the terrorist group ETA and the Basque Nationalist Left, did not have clear links with the said organisation or with the organisations that were arising out of it. This would enable those responsible for developing it to go on maintaining control over the whole project without the newspaper being identified with ETA, which is what happened with the newspaper EGIN."* It is our view that this affirmation, due to the fact that no proof to back it up has been found in the indictment, remains no more than mere presumption of guilt that has not been confirmed and is lacking in evidential support of an incriminatory nature.

B.2. The documents in question have already been used in other legal processes –Indictment 18/98 of Central Magistrates' Court (JCI) No. 5– supposedly having their origin in the ETA terrorist group or in circles close to it, but without specific use being made of them as in the present proceedings. Given that one of them refers to or

mentions specifically the newspaper "Egunkaria", the fact that one of the accused should have a copy of them cannot be so relevant –as the Examining Judge points out–, bearing in mind that they were published and made accessible to anyone at the time.

Even considering that they are documents from which one could draw the conclusion that ETA could have been interested in the Egunkaria project, as a newspaper exclusively in the Basque language and perhaps could have wished to have it under its control; what one is setting out to prove in these proceedings is that the defendants actively participated in the said interest and, therefore, were responsible for its action as tools of the terrorist group. The Public Prosecutor understands, on the contrary, that there are no proceedings in the indictment to prove this and the said documents do not of course prove it, particularly when no document referring to ETA's intervention in the newspaper has been found in the defendants' possession.

At the most it is possible to say that documents were seized from ETA members from which it is possible to infer an interest on the part of the armed group in the newspaper, which is logical, because in recent times ETA has been focussing on socio-political causes to attract followers or, as the writ of the indictment states, to increase the *"reference population"*; but it is one thing for the group to be interested in and informed about the gestation of the newspaper at the dawn of the newspaper, which was a well-known public fact at the time, and quite another that this should imply that its creation, drive or control could be attributed to it, and even less to the people responsible for the newspaper indicted in the present case.

The Public Prosecutor understands that neither resorting to the theory of the "*lifting of the veil*" in accordance with STC –Constitutional Court Ruling– 115/00, 162/02, STS –Supreme Court Ruling– 25-6, 30-7 and 11-10 of 2002 is it possible to gather sufficient elements to bring the accusation, and regard as proven, as true reality, that the terrorist group ETA was hiding under the appearance of a legal newspaper; for this, proof would have been needed showing that the defendants had used their newspaper to lend ideological justification to terrorism by following an editorial line which, for example, had minimised the violence of the said terrorist group, and that is not the case.

These documents seized from members of ETA are ones that could prove an ETA-KAS link, but not an ETA-Egunkaria or KAS-Egunkaria one. They could also prove that ETA was aware of some of the vicissitudes of the newspaper, but in no way that it had control over it.

B.3. In the analysis of the documents on which the prosecution is mainly based we have come across the document "Egunkaria Urriak 26" (Egunkaria October 26) and "10-4 Azaroak 12" (10-4 November 12) which on June 3, 1991 was seized from Jose Domingo Aizpurúa Aizpuru, the alleged member of ETA (m)'s "Reception and Security Set-up". This document makes two references to the Egunkaria project. The first refers to the shareholders: actions undertaken by the newspaper are cited in the said document and refer to 106 commitments to purchase and 40 shares sold; this document is linked to another one seized from one of the defendants –Torrealdai– which also speaks of 106 commitments to purchase and 42 sold; as far as the commitments to purchase are concerned, the document seized from ETA refers to 66 shares, while the one belonging to the defendant refers to 64; this difference is due, according to the Spanish Civil Guard, to a different moment in time. It is not possible to take the isolated coincidence of these documents to extract the consequence established in the indictment that ETA

wielded financial control over the newspaper project as being the most plausible conclusion.

The other coincidence between the two documents would be the date of the newspaper's launch. In the document seized from ETA it is put at December 4, 1990, while in that of Torrealdai the start of the newspaper was set to coincide with the Durango fair, which takes place at the beginning of December. As regards the aspect of the paper's financial control by the terrorist group ETA, the documents cited in the indictment only prove the interest of the group in it, that it is aware of the vicissitudes surrounding the birth of the paper and its needs, and nothing more, but not that it controls the paper. The mere fact that ETA could have approximate knowledge of the shares sold cannot lead to the conclusion, as stated in the indictment, that ETA was in control of the economic running of the paper.

As regards the document "Estrategia política y lucha institucional" (Political Strategy and Institutional Struggle) 12-90, which specifically refers to the Egunkaria Sortzen project, this mention is made within another more generic one on "the decisive role that the media are expected to play in the social projection of the discourse". This document came from the personal computer of Jose Luis Alvarez-Santacristina, aka TXELIS, seized in March 1992 on the occasion of the arrest in Bidart (France) of "ETA's Executive Committee", in which the referred personage was "head of the political apparatus". We cannot, looking at the proceedings as a whole, consider it to have any incriminatory relevance with respect to the defendants; once again ETA's interest in a newspaper in the Basque language is verified, and even though it is referred to expressly, it has to be remembered that ETA has assumed many social struggles, because the same references are to be found in the letters of 8-10-90 of the above-mentioned Santacristina, also forming part of the indictment, in which a revival of the MLNV [Basque National Liberation Movement] is linked to issues like "*the fight against the motorway, drugs, and Egunkaria";* this enumeration does not imply that ETA is in control of the fight against drugs, or against the motorway, nor does it imply that it is in control of the newspaper.

On 14-11-90 the document "10-4- Abuztuak 8" dated August 8, 1990 was seized from Carmen Guisasola, head of the ETA "cells made of up people without criminal records". The document refers to Egunkaria in the following terms: *"Egunkaria: Right now they do not seem to be able to sell it with its own rotary press and premises. This idea has to be abandoned. On the other hand, it seems advisable for the deadlines to be met even though it may prove difficult. The fact that it is a great political move is emphasised."* It could be said that ETA and KAS had information about EGUNKARIA's difficulties, but this only proves their interest and the fact that they knew about the situation of the newspaper when it was born. Even the use of "they" presents the paper or the people running it as somebody or something outside the terrorist group. In the document it is only possible to perceive the political interest that the project aroused in ETA in keeping with the fact that it knew about it.

B.4. On March 29, 1992, the French Authorities arrested ETA's "Executive Committee" in Bidart, France. Among the documents found and seized was one which was dated March 1, 1992 and entitled Meeting of people in charge of "Udaletxe" Projects". According to the police interpretation, the document was supposedly the log of the work sent to ETA leaders to be studied in order to establish a funding model capable of optimising and coordinating the activities carried out in the bosom of organisations forming part of the Basque Nationalist Left.

In actual fact, what we have here is nothing more than a document and one has to bear in mind that some of the companies mentioned in it operate normally even today, which is clearly inconsistent with the position held in the indictment. Specifically, it says in the said document with respect to the group of companies in which Egunkaria is situated that *"contacts with people or companies with influence on boards of directors through capital contributions of people close to the MLNV [Basque National Liberation Movement] are being sought."* In other words, what the terrorist group ETA does appear to be seeking is to win over persons sitting on the Board of Directors, but this would in fact prove that the people running the newspaper were outside the terrorist group and its plans, because ETA was keen to win them over. Neither can it be maintained that the defendants agreed to form part of the group, which is what the Indictment is attempting to prove in with the so-called economic project.

B.5. With respect to the appointment of the newspaper's first chief editor there are references in the above-mentioned document "Egunkaria Urriak 26" which in the indictment are compared with documents seized on the newspaper's premises. The point of coincidence would be that both sets of documents refer to the people who turned down the post offered, but that does not allow one to go beyond the fact that ETA had information about the newspaper. The Examining Judge considers that ETA appointed the newspaper's first chief editor, because the person who was appointed, Pedro Zubiria, emerged as a possible candidate in the ETA document and did not appear in the newspaper's documents, but it cannot simply be deduced from this that they did not accept his appointment in the end or that it was the newspaper itself that appointed him.

In order to lend weight to this theory the indictment includes the declarations of some of the defendants who admitted that they had opposed Pedro Zubiria's appointment as Chief Editor, but the reasons for this opposition cannot be disregarded; thus, Auzmendi does not assert that he appeared to him to be an ETA person, far from it, but rather, as he actually declared: "*I regarded Peio Zubiria as the least suitable of the three as far as image was concerned, because he worked, did not work, but was invited to a programme, a socio-political discussion programme, on Euskal Telebista [television network of the Basque Autonomous Community], the first channel of which is in Basque, and he was the most interfering sort, the biggest pain and I do not think he portrayed a good image.*" Reasons therefore that had nothing to do with any influence of or imposition by ETA.

Moreover, the document seized from ETA cites how the alleged informant tells the group that "*of course they view this proposal better than that of P. Zubiria*." So it does appear that the person appointed was regarded as possible in the bosom of the newspaper –once again it is clear that interpretations as logical as the ones made in the indictment but which also favour the defendant are possible.

It will have to be stressed that in 2003 recourse was made to documents that had already appeared in the press ten years previously –in the newspaper El Mundo of 1993. At that time news had already been published accusing ETA of having participated in the appointment of the newspaper's chief editor, with the defendant himself filing a complaint against the spreading of such information.

B.6. Among the computer documents seized from Jose Maria Dorronsoro-Malaxechevarria is the one entitled "Garikoitz (93-05)" which is referred to in the Indictment and deals with the appointment of the newspaper's Managing Director.

Once again it has to be made clear that there are no documents addressed to the newspaper by ETA or the other way round. These documents are attributed to the defendant Francisco Javier (Xabier) Alegria-Loinaz, who has to answer charges in the prosecution being pursued by the Central Magistrates' Court (JCI) No. 5 of the Spanish National Court (Indictment 18/98 on EKIN), who was to use the pseudonym GARIKOITZ to maintain encrypted communications with ETA leaders. This poses, from the outset, a problem of a breach of the principle *nom bis in idem*, because he cannot be accused of the same activity in two prosecutions, in which he is accused of being the channel of communication with the terrorist organisation in both cases.

In these documents it seems that ETA is being asked for its criteria –there being no record that it is one of the defendants that does so–, and it can even be maintained, therefore, that ETA is informed about and has even let its interlocutor know its opinion concerning its preferences for the appointment. But this cannot imply proof that some of the defendants are, for this reason, immersed in an illegal association, let alone a terrorist organisation. The appointment of the Managing Director leads to the appointment of a third Chief Editor, because recourse is made to the person who was Chief Editor at the time, the defendant Iñaki Uria, about whose appointment documents are cited in the indictment, some of which have already been cited and which present the same characteristics: seized from ETA members with communication alleged to have been sent to the group and in some cases the reply from ETA, but in no case under any kind of imposition. On the other hand, these documents reflect neither communication with Egunkaria nor participation of the defendants in these communications.

The following is stated in one of the paragraphs in the above-mentioned document "Garikoitz (93-05)" ("handik": "from there" Spain, the place where K.A.S. activities are carried out). This document was put together in February 1993 and stored on computer on February 26, 1993:

"Another problem is as follows: that of the managing director. It is not easy to find a replacement who is well-known and highly competent. Naturally, JMTorr is preferred, but he says there is no way he can accept and therefore it seems that IUri would be preferred for a limited period. He will request that a new editor-in-chief be groomed, and, what is more, (perhaps) because those who are inside are too young; [it] could be Imanol Murua but the ideological career of this guy will not ensure that the project, the one until now, is properly consolidated and kept on track. We envisage the possibility of finding a substitute in Xabier Oleaga after some time. What do you think?"

In other words, all that can be construed is that somebody, that is not Egunkaria, but presumably KAS, but none of the defendants apart from the afore-mentioned Javier Alegria, were to consult ETA –according to the Spanish Civil Guard– about whom to appoint as managing director, and as a result of that who to appoint as the paper's chief editor, since the person being proposed for the position of managing director was the chief editor of the paper at that moment, the defendant Iñaki Uria.

A proposal that, at the most, –if one is to accept the interpretation of the Spanish Civil Guard– ETA was to reply to in the document Garikoitz-ari (93-02): *"Two things as far as the Basque language is concerned: the process to replace the previous Managing Director is getting very complicated. On the one hand, it has become clear that the current Managing Director is the only option to become the new managing director. So, the process right now consists of finding a new Chief Editor"*. Regarding the appointment of the third director the reply was to be: *"the proposal of X.O. seems suitable to us"*.

In other words, ETA does not impose anything, nobody from the newspaper requests authorization from ETA, and the defendants do not do so, either, and clearly ETA does not appoint anyone or, at least, there are no documents to prove this.

But there is more, because in the document "Hontza (93-02)", despite ETA's acceptance of the candidate for chief editor, this person is not appointed in the end, and another is put forward: *"a new option has emerged and which is becoming consolidated. Option Marcelo Otamendi."* In other words, the new option clearly does not come from ETA, but ETA is supposedly informed about it. ETA was to respond to this –always according to the interpretation of the Spanish Civil Guard– through the Garikoitz-ari (93-03) document saying: *"the option referred to does not seem that terrible to us, although we don't know the guy that well,"* in other words, ETA cannot be attributed with the appointment or control of the appointment, when it appears that they did not even know the person concerned.

B.7. There is another document included in the indictment relating to the printing premises of the newspaper. This Attorney General's Office understands that the most reasonable interpretation of it in accordance with the rules of logic is in the defendants' favour. The document in question is the one seized when the head of ETA's Military Apparatus, José Javier Arizcuren Ruiz, aka "Kantauri", was arrested in Paris on March 9, 1999, together with other members of ETA, including Miguel Angel Zubimendi-Berastegui, aka "Mikelon", –the latter located at the hub of ETA's Political Apparatus–; attention has been drawn to the following in the section entitled *"Communications Area":*

"Printing premises.- the possibility of the EKHE setting up printing premises: to publish anything, newspapers, books, posters, stickers,… One problem: What about those who have been doing things for us for so many years? (the completely trustworthy printers). We can't tell them to get lost now, because some –a few– will notice it a lot if we drop them. An attempt will be made to look into a solution. We'll get in touch with Egunkaria again to try and persuade them to come in with us. They will want to have their own premises. They viewed coming in with us favourably, but they were afraid (that they might get their fingers burnt…".

The analysis of these documents makes it clear that the interpretation of their contents made by the Spanish Civil Guard lacks solidity and that there are other more reasonable interpretations that are in the defendants' favour, because it is possible to deduce clear reluctance on the part of those running the newspaper with respect to a proposal allegedly coming from ETA in which "they don't want to get their fingers burnt," and this attitude is not compatible with the person who was purportedly controlled by the terrorist group. To this it must be added that as far as the identification of one of the defendants as the author of these documents is concerned, or being aware of them, there is no proof whatsoever in the indictment that it is any more than mere unproven presumption or suspicion.

B.8. The absence of documents after 1993 proving the Egunkaria-ETA link, the inexistence of similar documents that refer to other appointments at the newspaper, like that of deputy chief editor, severely weaken the interpretation given by the Examining Judge to these documents, because one would have to assume that the newspaper "Egunkaria" was being used by ETA as a media power to involve the population ideologically; nevertheless, in the space of the thirteen years of the newspaper's publication there is not one single news item, editorial column or article denoting that they were participating in this political-social dual function, in the desire to unite the

population around ETA; all we have is a letter dated September 2001 from one of the journalists of the newspaper who was resigning because he did not agree with the way the news of the "dead" was being covered. On the other hand, no report has been submitted studying the newspaper's editorial line or the coverage of the news given by the paper. So the question is clear: if Egunkaria is not a tool for financing or for laundering the proceeds from terrorism, if it does not give express or tacit support to ETA terrorism, either, if violence is not encouraged or legitimised, either, how does or did the activity of the newspaper Egunkaria serve the aims of ETA?

B.9. The newspaper is blamed for publishing communiqués of the ETA terrorist group, but this does not take place precisely during the paper's early days, in other words, coinciding with the date of the only documents containing a reference by ETA to the newspaper. Moreover, it is a well-known fact that present-day publications refer to the group's communiqués, and have done so in the past, yet they have not been prosecuted and continue to be published normally today. Furthermore, the Public Prosecutor understands that the fact that for many years, up until 1996, no ETA communiqués were published means that ETA was not in actual fact behind the creation of the newspaper, which is more reasonable, and from a logical interpretation more favourable towards the defendants. And not the way interpreted by the indictment that this was a tactic to disguise the reality. It cannot be regarded as plausible that the newspaper served the group for so many years, if it did not even publish its communiqués as a trustworthy newspaper.

Oddly enough, in this aspect of the accusation the indictment raises an inconsistency, which is easily explained in such an extensive document. It is that the Examining Judge considers that in accordance with documents seized from ETA members, the defendant X. Oleaga, contrary to his statements, was due to join the newspaper in 1993. Nevertheless, when it comes to explaining the reason why the paper should start to publish ETA communiqués in 1996, just as other mass media did and as they do nowadays, the Examining Judge considers that X. Oleaga joining the paper in the said year 1996 is what determined the start of the publication of the said communiqués, which contradicts the assertion that the defendant had joined the paper three years before.

In any case, it is worth recalling that constitutional doctrine on "neutral reporting" leaves no margin for judicial interpretation when considering that the mere publication of communiqués of a terrorist group does not constitute a fact that can be criminally prosecuted. STC–Ruling of the Constitutional Court of 16/12/1986 BOE (Official Gazette of the Spanish State): 19861231 [«BOE» no. 313].

B.10. The Indictment states, literally, that fraudulent subsidies were being sought through the newspaper Egunkaria when, according to ETA, anyone who receives subsidies ends up being "domesticated" by the Government of the Basque Autonomous Community. Indeed, the case refers to the 74th issue of Zutabe of 1995 (ETA's internal medium of communication) seized from the Donosti commando; the said publication cites Egunkaria, and other institutions which the Government of the Basque Autonomous Community was intending to benefit through financial aid (subsidies) when, in actual fact, it is ETA who in that Zutabe criticises the use of subsidies in Egunkaria because that could serve to "*domesticate them*", in other words, it was against them, when , by contrast, this was something that would be attributed to ETA.

B.11. Another of the pieces of evidence used to accuse the defendants of belonging to or collaborating with ETA is the fact that the Zutabes, sometimes more than one copy, were seized from some of them. It is not possible to deduce such serious

incriminatory consequences from this mere fact. But it is fact, however, that a copy of a Zutabe connected with the extortion suffered by a football player (Lizarazu) was seized in the case of one of the defendants, X. Oleaga, a journalist by profession. Being in possession of a copy of a Zutabe cannot be synonymous with committing a crime, as this is virtually what is being intended; on the hand, the fact that he should be in possession of a copy of a Zutabe connected with the footballer Lizarazu, from whom it was publicly known that ETA was extorting money, is perfectly consistent with the version of the defendant that he used the information for his work as a journalist, because he even had work published about it and therefore did not know about the extortion. It is also possible to maintain generally that the group sent the publication to the media whenever it was keen for its contents to be spread.

B.12. Proceedings relating to the investigations have subsequently been added to the indictment, and in the view of this Attorney General's Office, far from increasing criminality, they generate further doubts in favour of the defendants. Thus, copies of some of the documents allegedly from KAS seized from the defendant Torrealdai had "*post-its*" with captions handwritten by him stuck to them. The Spanish Civil Guard interprets the contents of them as having been produced by one of the defendants, by Iñaki Uria in fact. But this assertion is clearly subjective and there is insufficient reason for it. Moreover, in a literal interpretation of these notes, one can deduce the opposite of the involvement of the defendants. For example, on one of the documents the "*post-it*" says how translations into Spanish of some of the documents originally in Basque were obtained, pointing out that they had been obtained through the ETB (Basque Television Network), that Beloki had mentioned them and that a few days later they were passed on to the ETB; if the defendants obtained copies through this channel, it does not appear logical to state that they were in direct contact with KAS-ETA, the alleged authors of the documents.

In another of the handwritten notes, Torrealdai records his reaction at that time to the content of the said documents, saying that ETA could be linked with the newspaper: *"My rules of the game are clear: the autonomy of Egunkaria."* After the publishing at the time of the documents included in the prosecution and on which the prosecution is now based, the Spanish Civil Guard have construed this as the defendants preparing a strategy of apparent autonomy. The more reasonable interpretation and the one that is more favourable towards the defendant would be that the defendant, because he had written a private note not initially intended for publication and discovered by chance, was maintaining and was keen to maintain independence from the terrorist group, and that he was far from accepting or consenting to ETA's control, which would contradict what had been written.

B.13. Another piece of evidence provided by the Examining Judge and which we regard as lacking sufficient evidential effectiveness is the following: on 22 February 1997 a sticker in Basque of the "Democratic Alternative" (part of the adaptive tactics of ETA and the network linked to it directed towards the objectives sought through terrorist strategy and the means for achieving it with respect to the Spanish State) was distributed together with a copy of EUSKALDUNON EGUNKARIA for that day. The said sticker did not have an imprint that would allow the author or printer to be identified. However, no incitement whatsoever to violence is found in it, nor can it constitute an act of collaboration that would favour the carrying out of actions by the armed group. At the time no police or legal action was carried out as a result of these

facts and the defendants justify it as publicity that Herri Batasuna, which was legal at that time, had contracted with the newspaper.

B.14. Another piece of circumstantial evidence against the defendant J. M. Torrealdai noted by the Examining Judge would be a desk diary found on Juan Cruz Gorrotxategi when he was detained on 22 March, 2002. (The latter was arrested along with Miguel Corcuera-Retegui near Valenciennes, France, when the vehicle in which he was travelling with 200,000 euros, which had come from the bank account of a BATASUNA Member of the European Parliament, was intercepted). In it under the section devoted to "Specialised Work Team" there is a mention of "Euskalgintza" (Basque Action) in which it said: "*running of the project: J.M. Torrealdai unable to*". Well, it cannot be deduced from the proposal made to the defendant to lead Euskalgintza's 20th anniversary and from the fact that this should –in fact– be turned down by the defendant, according to these papers, that there is any connection with the original facts of the prosecution, nor does this imply any link with an illegal association or any responsibility of the afore-mentioned Torrealdai.

C. THE LEGAL ASSESSMENT OF THE FACTS. Although in the resolution the Examining Judge weighs up both the possibility that the facts constitute an illegal association and no more, or an illegal association of a terrorist type, it has to be said that, in the end, he appears to opt for the first in the findings section of the prosecution, which, on the other hand, should determine the incompetence of the Spanish National Court in finding out the facts. Nevertheless, given the framework in which the action of the defendants is set, it does not seem to be possible to include them in an illegal association that is not of a terrorist type.

Without taking into account the apparent failure of the initial investigation which lead to the forcing of the legal assessment which is being discussed, it can be deduced that the accusation could be maintained for many of them, after the initial documents on their terrorist involvement, if the prosecution were to continue, only because of the position they were holding and the presumption of knowledge that the said position implied, which is not sufficient in the view of the Prosecutor to open the oral proceedings.

C.1. The crime of illegal association is a crime of status, it requires a certain permanence and continuity. In addition to permanence, the collective will to commit a crime is required for illegal association, which is something that has not been proven in this case.

As regards association of a terrorist nature (Articles 515.2 and 516) it is worth mentioning the judgment of the Supreme Court of 17 June, 2002, no. 1.127/2002 when it specifies that *"the terrorist organisation requires a primary substratum, a plurality of people, the existence of links between them and the establishment of a certain hierarchy and subordination. Moreover, the aim of such an organisation would be to carry out acts of violence against people and property with the aim of perverting the democratic-constitutional order, in short, to act with a political objective in a criminal manner; and as a subjective substratum such permanence or integration requires a more or less permanent character, but never an episodic one."*

All our attention must be focussed on these requisites. The said judgment speaks of:

1) The existence of a plurality of people linked to each other and with relations of hierarchy and subordination, which have to be maintained with a certain permanence.

Neither hierarchy among the defendants nor with respect to KAS or ETA appear to have been deduced from the documents.

2) The aim of this group of people has to be the committing of acts of violence against people and property, although this may not require the use of arms. The existence of the latter cannot be deduced either.

3) The aim of the group has to be directed towards bringing about the perversion of the democratic-constitutional order, through fear, terror, which is the distinctive sign of terrorism. There is no piece of data in the indictment with respect to the said aim, which does arise in ETA but which cannot be shown to emerge in the defendants. So we find ourselves, therefore, far from coming up against a legal argument, but rather an absence of sufficient incriminatory proceedings.

Throughout the years that the newspaper was being published, no sign whatsoever has been pointed out of ambiguity even with respect to any possibility of resorting to violent means to gain access to or remain in a position of power. There is no evidence that the newspaper, in short, that the defendants complemented or politically supported the action of a terrorist organisation in the achieving of its ends to subvert the constitutional order or seriously disturb public peace (echoing the words used in Article 9.2c of the Law of Political Parties).

It has not even been possible to allege that the newspaper run at different moments by the defendants had provided terrorism with ideological justification. In order to open the trial against the defendants, the latter needed to have postulated publicly and actively the message that the terrorist actions were facts that took place as a result of the lack of a democratic resolution of a political conflict for which the Spanish State was to blame through its failure to recognise the self-determination of the Basque Country, but at no time is there any evidence that the defendants, throughout the more than ten years of the newspaper's publication, had provided cover or justification for the actions of the ETA terrorist group by identifying with its methods and aims. Only in this case could it be said that Egunkaria and the people running it had joined the "accumulation of strength", in other words, to increase the reference population that would support the terrorist group, for which there is not the slightest well-founded suspicion all through the length and breadth of the investigation.

C.2. On the other hand, except for the integration of the defendants in the armed group, among the possible legal assessments of the facts, one could put forward the possibility of the crime of collaboration with an armed group, already in force in Art. 174 bis a) of the previous Criminal Code, as appears to be deduced when the bases of the resolutions handed down in other prosecutions (Indictment 18/98 of the J. C. I. Central Magistrates' Court No. 5) are widely used in the indictment.

The crime of collaboration arose out of the need not to absolve any social or individual material support to the terrorist phenomenon (STC –Constitutional Court Ruling– 136/99 of July 20) for which an open clause –declared constitutional– is established in Art. 576 of the CP (Criminal Code) to cover *"any other equivalent form of cooperation (...)"*, thereby preventing a protracted *numerus clausus* from omitting certain types of conduct as effective as those expressly included in the article, but which, so as not to refer to them in the same terms, would not remain outside the crime, given the principle of certainty of Criminal Law.

However, it is not possible to take advantage of this general clause and punish any kind of conduct, since in any case there has to be a correlation with the types of conduct specifically included in the article, in other words, insofar as *"they constitute pieces of information, economic or transport means, infrastructure or services of any*

type that the organisation would have difficulty obtaining or on occasions would not be able to obtain without external help, provided in fact by those who, without belonging to it, give their collaboration on a voluntary basis." (STS-Supreme Court Judgment 16-2-1999). Without a shadow of doubt such acts of the required type do not appear to have been carried out, if one were to go as far as understanding, against the defendants in our opinion, that the defendants took into consideration ETA's view in the appointment to positions of responsibility in the newspaper. It would be necessary to prove that the defendants had been devoting themselves to promoting the violent methods of the terrorist group with such an intensity, awareness and promotional aim of ETA that they warranted a criminal reproach (STS-Supreme Court Judgment no.136 of the Plenary of 20-7-1999). Moreover, in their judicial declarations all the defendants have denied any link or relationship with the ETA terrorist group.

C.3. Finally, it is advisable to evoke the writ of the Court by which the indictment is confirmed by referring to the said resolution as: *"within the indictable period, provisional proceedings of a preparatory and precautionary nature without the said resolution implying a final verdict on the culpability or innocence of the accused-defendants, because not even the evidence collected and taken into account until that moment of the proceedings go beyond the mere character of circumstantial evidence."*

Therefore, it would be inappropriate to open the trial, bearing in mind that it has not been proven that the newspaper Egunkaria had served to fund the terrorist group ETA or to launder capital coming from it; that there is no evidence that the newspaper Egunkaria, or the defendants, had served the aims of the terrorist group ETA; that there is no evidence that the defendants had legitimised terrorist actions or had exonerated or minimized the undemocratic significance and of the abuse of fundamental rights entailed in the action of the said group, which could have been done in a way that was even implicit but with conclusive acts; that there is no evidence that the defendants have provided any specific nor generic assistance aimed at specifically supporting collaboration with terrorism.

Consequently, the Prosecutor concurs with the concluding writ of the indictment and since there are no pieces of circumstantial evidence or elements that are sufficiently solid and univocally incriminatory from the criteria of logic and reasonableness that would allow the provisional upholding of an accusation of belonging to a terrorist organisation –the only accusation in which this judicial body is competent in accordance with the Provisional Stipulations of Organic Law 4/88– and the attributing to the defendants of an illicit criminal act of such a nature, it is appropriate to opt for provisional dismissal in accordance with Art. 641.1 and 2 of the law of penal proceedings, leaving its indictment null and void and whatever personal and real precautionary measures that may have been agreed in these proceedings.

Given in Madrid, this fourteenth day of December of the year two thousand and six.

Signed: Miguel Angel Carballo-Cuervo
Prosecutor of the Spanish National Court.

IT IS FURTHERMORE STATED: as regards possible tax irregularities or possible company offences or ones infringing assets, which the entities Egunkaria, S.A., Egunkaria Sortzen, S.L., and Egunkaria Sortzen Kultur Elkartea may have committed, since everything relating to its commercial reality is pursued in a separate set of

proceedings (Preliminary Proceedings 403/03), the corresponding resolution should be adopted in accordance with the rules of competence laid down in Art. 14 and subsequent ones of the Law of Criminal Indictment for its referral in favour of the competent Courts in the Autonomous Community of the Basque Country.

Given in Madrid, this fourteenth day of December of the year two thousand and six.

Signed: Miguel Angel Carballo-Cuervo
Prosecutor of the Spanish National Court.