



REPORT ON THE «EGUNKARIA» CASE

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APPENDIX I

APPENDIX II

Origin and creation of *Egunkaria*:

At the end of 1989 a group made up of over 70 figures from the world of Basque culture and language set up the so-called “Egunkaria Sortzen” (Basque expression signifying literally “creating the newspaper”). Its aim was clear: to create a newspaper published exclusively in *Euskara* (the Basque language) and thus address a need that was already being felt from the 1980s onwards.

After the end of the Franco dictatorship (which prohibited the use of Basque for forty years, thus creating a situation in which the language was in danger of disappearing) the idea of producing a Basque newspaper that would make the survival and normalisation of the language possible became very important in Basque society. According to the figures for 1986, only 23% of the 2,800,000 inhabitants throughout the whole of the Basque territory (Araba, Bizkaia, Gipuzkoa and Navarre under Spanish jurisdiction plus Lower Navarre, Zuberoa and Lapurdi under French jurisdiction) mastered Basque, in other words the Basque-speaking population did not even account for a quarter of Basque society. This was undoubtedly a worrying situation for the survival of any language and therefore urgent means were required to bring about the normalisation of the language.

In January 1990 the project to set up the newspaper got its starter’s orders. During the spring of 1990 and in order to make the new project known in Basque society, a full-scale campaign was conducted. It had two objectives: to publicise the birth of a new newspaper; and to raise the funds needed to make the project happen. For this purpose over 180 working committees were set up in 143 towns in the Basque Country; 3,000 people came forward to work as volunteers; share stakes of 30 euros were made available (to provide *Egunkaria Sortzen* with capital), and shares of 3,000 euros were sold to anyone who wanted to be a shareholder. About 90,000 people in all were involved in the project and the sum of 300,000 euros was collected. That is how *Egunkaria*

S.A. was set up and this, in turn, became the commercial-law company responsible for the future newspaper, *Euskaldunon Egunkaria*.

On December 6, 1990, coinciding with the Basque Book and Disc Fair in Durango (Bizkaia), the first edition of *Euskaldunon Egunkaria* was published. In the early days the newspaper reflected a lack of resources. With 32 pages, hardly any advertisements on them and with the added complication of getting the reader used to reading in Basque made getting the paper published again the following day its principal objective in those days.

But as the years went by and after tremendous efforts, the newspaper gradually became consolidated and found a niche for itself in the media market. It succeeded in becoming a professional newspaper with an average of 70 pages a day, a circulation of 15,000 copies which reached 44,000 readers, with a web page and with a quality of journalism comparable with that of any other newspaper.

1.- CHRONICLE OF EVENTS

A.- OPERATION AGAINST EGUNKARIA

On February 20, 2003, the judge of the 6th Central Court of First Instance of the Spanish National Criminal Court, Juan Del Olmo¹, ordered the Spanish Civil Guard to close the newspaper *Egunkaria* and arrest ten people, most of whom were executive directors of *Egunkaria*.

The operation started at one in the morning with the arrests of Xabier Alegria and Luis Goia in Lezo. Joan Mari Torrealdei and Pello Zubiria were arrested at the same time. As reported by the members of their families, both arrests were violent and rough. The Spanish Civil Guard smashed down the door to the house of Joan Mari Torrealdei in Usurbil; they held his wife and children captive in a room while they searched the house.

Eight armed Spanish Civil Guard officers entered Pello Zubiria's house in Hernani. According to his wife, Malores Etxeberria, the arrest was very violent and they refused to let her see her husband, despite the fact that she only wanted to give him some clothes and his medicines. Zubiria is seriously ill and needs medicines and a special diet. That is why his wife was so worried about him right from the very outset.

At the same time Martxelo Otamendi was arrested in Tolosa, Xabier Oleaga in Errenteria, Iñaki Uria in Zarautz and Fermín Lazkano in Eibar. Txema Auzmendi was arrested in Donostia/San Sebastian. The last person arrested was Inma Gomila; as she lives in Urrugne (under French administration), she was arrested in Hondarribia (Fuenterrabia) after crossing the border. Once detained, she was taken to her place of work in Oiartzun.

¹ Arrest and search warrants of February 19, 2003 issued by the Judge, Juan Del Olmo, of the 6th Central Court of First Instance of the Spanish National Criminal Court.

About of 300 Spanish Civil Guard officers participated in the arrests and searches carried out in the provinces of Gipuzkoa, Araba, Bizkaia and Navarra.

Sealing of the headquarters

After the arrests the Spanish Civil Guard entered the main headquarters of *Egunkaria* in the Martin Ugalde Culture Park in Andoain at around 03.30 in the morning. They forced the park's caretaker at gunpoint to open the doors of *Egunkaria*. Riot police checked the rooms one by one to see whether there was anyone on the newspaper's premises and after knocking down the door to the Plazagune Internet services company, they commenced their search.

At around 04.30 in the morning they took one of those arrested to the headquarters with his head bowed and when *Egunkaria*'s lawyer, Iñigo Iruin, arrived at around 05.30, the police refused to let him in, claiming that it was on the express orders of the Judge.

Throughout the morning numerous Spanish Civil Guard vans constantly came and went, removing computers, documents and other material from the headquarters of *Egunkaria*. Around 11.00 they drove one of the detainees away and at around 11.50 the four vans, five four-wheel drive vehicles and five cars that had participated in the search left the Martin Ugalde Culture Park. Martxelo Otamendi, the paper's chief editor, was being taken away in one of the cars. After they had left, the words: "Sealed on the order of the 6th Court of First Instance of the Spanish National Criminal Court" could be read on a notice attached to the door of the building.

Before searching the *Egunkaria* office in Bilbao, Spanish Civil Guard officers rang the doorbells of various neighbours in the nearby houses in order to get people to witness their search. They finally obliged a number of elderly couples to comply. To enter the office they tried to force open the door, but in view of the difficulties they broke it down. They searched the offices from top to bottom. They took away advertising invoices, payrolls and, in general, all kinds of documents relating *Egunkaria*'s finances. At around 08.20, four hours after

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starting their search, Spanish Civil Guard officers sealed the door of the office and left.

Around 03.30 the Spanish Civil Guard turned up at the home of Alberto Barandiarán, Director of *Egunkaria's* Iruñea (Pamplona) office, accompanied by the clerk of the court and armed with a search warrant issued by Judge Del Olmo. They threatened to break down the door to the office if he refused to accompany them. At around 04.00 they entered the *Egunkaria* office and spent four hours there. They went through papers, files and, in general, everything bearing the *Egunkaria* letterhead. They filled seven boxes with material confiscated from the office: computers, CDs, computer disks, advertising invoices, personal diaries... They sealed the doors to the office after completing their search.

The Spanish Civil Guard turned up at the Gasteiz/Vitoria home of Luis Karlos García, head of the local editorial office in the city, at around 04.00 in the morning. The search warrant mentioned the right to request a court-appointed lawyer, which García duly did. However, the lawyer in question arrived four hours after the search had begun. The search was extremely detailed and they took everything away with them. The search of the Gasteiz/Vitoria office took the longest: after sealing the premises, the Spanish Civil Guard left at 13.00.

It is worth pointing out that none of the detainees worked at the paper's offices in Bilbao, Gasteiz/Vitoria or Iruñea/Pamplona.

Searches of the offices of the publications 'Argia' and 'Jakín' and at the Federation of Ikastolas (Basque-medium schools)

They also searched the offices where some of the detainees worked: *Jakín* (a company devoted to the Basque language and culture founded in 1956, whose work involves publishing journals, books and bibliographies); *Argia* (a weekly magazine in Basque founded in 1919); and the Federation of *Ikastolas* (federation of private Basque-medium schools set up during the Franco era).

Having arrested Juan Mari Torrealdai, the Director of *Jakin*, they entered the offices of the journal and searched them until 11.45 in the morning. The same happened after the arrest of Pello Zubiria, a member of *Argia*'s staff, and Xabier Oleaga, the press secretary of the Federation of *Ikastolas*.

Incommunicado arrests and the circumstances surrounding them

According to the Spanish Code of Criminal Procedure the nature of the arrest can vary in the case of people arrested on suspicion of belonging to an armed group, being involved in terrorism or insurgency. Even though detention under normal circumstances cannot exceed a period of 72 hours, in a situation of this kind when a two-day extension has been applied, the detainee can be kept incommunicado for up to five days. This time held incommunicado can even be extended by a further five days after the detainee has been remanded in custody. But even in these cases the decision to keep the detainee incommunicado or extend the period under arrest cannot be applied as a general rule, but only as an exceptional and necessary measure to investigate the case. In this respect, in the cases of the arrests in connection with *Egunkaria*, incommunicado detention for a period of five days was applied automatically and therefore illegally.

According to a detailed study conducted by Human Rights Watch² on counter-terrorism measures in Spain, persons being held incommunicado are, unlike other detainees, deprived of the following rights:

- to notify relatives or a third party of their choice about their detention or whereabouts;
- to receive or send correspondence or any other kind of communications;

² *Setting an Example? Counter-Terrorism Measures in Spain*. Human Rights Watch. January 2005, Vol. 17, No.1. (D).

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- to receive visits from family members, spiritual advisors, a doctor of their own choosing or any other person;
- to designate their own lawyer (they must be assisted by a court-appointed or state-employed attorney).
- to consult privately at any time with the court-appointed or state-employed lawyer assisting them or, of course with any other lawyer.

These were the very characteristics of the arrests endured by the ten detainees while they were being held incommunicado for five days.

Police statement given without a lawyer of their choice

While being held, the ten detainees were not allowed to see the court-appointed lawyer until they made their police statements. In most of the cases this took place three days after they had been arrested.

Moreover, none of the detainees had the chance to speak to the court-appointed lawyer while they were making their statements and some of them did not even know whether the lawyer was present when they were giving their statements. So none of the detainees was allowed to consult privately with the court-appointed lawyer before their statements were taken.

The case of Pello Zubiria

On February 22, two days after the arrests, Pello Zubiria was admitted to the Gregorio Marañón Hospital in Madrid, but news of this did not emerge until two days later. Different media announced that Pello Zubiria had tried to commit suicide and to this day the circumstances surrounding this matter have not been clarified, as he himself remembers nothing about it³.

³ See page 24 of the edition of the newspaper *El Diario Vasco* published on February 25, 2003 and also page 17 of the edition of *El Pais* of February 25, 2003.

On February 26 Mr Zubiria was placed under incommunicado arrest in the Gregorio Marañón Hospital in Madrid and the following day Judge Juan Del Olmo ordered him to be remanded in custody. Pello Zubiria was not allowed to see his own lawyer until the following day, just after he was transferred from the hospital's intensive care unit.

Testifying before the judge without a lawyer of one's choice

On February 24, 2003 the detainees testified incommunicado, and therefore in the absence of a lawyer of their choice, before Judge Juan Del Olmo; all except Txema Auzmendi, who refused to do so without his own lawyer, and Pello Zubiria, whose incommunicado arrest was extended for a further 72 hours. On February 25, after a request made by Olga Sanchez, the prosecutor handling the case, the judge ordered the release on bail (amounting to between 12,000 and 30,000 euros) of Martxelo Otamendi, Inma Gomila, Fermin Lazkano and Luis Goia while Joan Mari Torrealdei, Iñaki Uria, Xabier Oleaga, Txema Auzmendi and Xabier Alegria were remanded in custody⁴.

At last, on March 14, 2003, Txema Auzmendi testified before the Judge in the presence of his own lawyer and left prison after posting bail of 12,000 euros.

Visits by the court-appointed doctor

As far as the visits by the court-appointed doctor during the period incommunicado were concerned, it is worth mentioning that these doctors are court-appointed doctors employed by the State. The detainees were not allowed to be examined by a doctor of their own choice at any time, nor were they entitled to request a second examination by another doctor.

⁴ Remand order of February 25, 2003 issued by the Judge, Juan Del Olmo, of the 6th Central Court of First Instance of the Spanish National Criminal Court.

The controversy surrounding the press statement that the Ministry of the Interior and the Investigating Judge Juan Del Olmo had agreed on

On Thursday February 20, 2003, the Public Prosecutor's Office of the Spanish National Criminal Court sent a press statement to the media present in the Court. It said that the Head Prosecutor of the Spanish National Criminal Court, Eduardo Fungairiño, affirmed that "the Ministry of the Interior and Judge Juan Del Olmo⁵ have agreed on the information contained therein". The Prosecutor himself confirmed the declarations the next day, February 21, 2003. According to the fax numbers appearing at the top of the press statement, the document had been sent from the Ministry of the Interior to the 6th Central Court of First Instance of the Spanish National Criminal Court, before being passed on to the media present.

This created great controversy in the General Council of the Judiciary (the Spanish judiciary's supreme body). Some members even went as far as to request an inquiry to see whether a breach of the principle of the separation of powers had taken place. Joseba Azkarraga, the Justice Minister of the Government of the Basque Autonomous Community, also requested the General Council of the Judiciary to launch an inquiry into the matter⁶.

Subsequently, both the Ministry of the Interior and Judge Juan Del Olmo denied that the statement had been agreed upon between them, and the General Council of the Judiciary did not conduct any inquiry into the matter.

The closure of *Egunkaria* and the lien on all its assets

⁵ This information appeared in the press on February 22, 2003. Specifically, it can be found on pages 14 and 15 of the edition of the newspaper *Deia* of February 22, 2003, and also on page 19 of the February 22, 2003 edition of *El Pais*.

⁶ Page 26 of the February 23, 2003, edition of *El Pais*.

On February 19, 2003 Judge Juan Del Olmo issued another warrant, in addition to the arrest and search warrants, ordering “the provisional, precautionary measure of closure, closing-down and temporary sealing of the company *Egunkaria* S.A., as well as all its headquarters and offices, premises or businesses in Spain”. Likewise, he called a hearing within a period of ten days to notify the temporary closure of the paper and the suspension of its activities.

The hearing was held on February 28, 2003⁷ and Judge Juan Del Olmo issued a writ dated March 10 of the same year ordering the temporary closure of *Egunkaria* for six months and well as the suspension of its activities and the lien on all its assets.

The months and years following saw the successive six-month extensions of the closure of *Egunkaria* and with endless appeals against them lodged by the defence counsel; they were almost automatically rejected.

After the administration of *Egunkaria*'s companies had been put in the hands of its legal representatives⁸, on February 2, 2005, Judge Juan Del Olmo ordered the liquidation of the companies by March 15, 2005. At the same time he laid down that the temporary closure of *Egunkaria* would be lifted on February 20, 2005, because the period of six months since the previous extension had been agreed had expired and because there was no reason whatsoever for having a new six-month extension after the companies assets had been liquidated, since the liquidation would render any kind of activity impossible.

So as a result of the precautionary measures taken during the pre-trial proceedings phase, *Egunkaria* was closed down and liquidated. All its assets were sold off and its debts settled. The money left resulting from the liquidation is in the hands of the judge in a frozen bank account. In other words, *Egunkaria* is dead and buried.

The complaints of torture

⁷ The prosecutor Olga Sanchez requested the temporary closure of *Egunkaria* for six months.

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The moment *Egunkaria*'s Chief Editor Martxelo Otamendi left prison, he denounced the torture he had endured at the hands of the Spanish Civil Guard⁹ before the media who had gathered outside the prison gates. His declarations made a great impact and sparked off much controversy over the days that followed¹⁰. Iñaki Uria, Xabier Alegria, Xabier Oleaga and Txema Auzmendi also denounced that they had been subjected to torture.

The detainees declared that, among other practices, they were tortured with the method known as “the bag”, an unloaded pistol was held to their temples and fired, they were kept naked and on all fours and forced to do press-ups¹¹. While they were being held incommunicado, several of the detainees told the court-appointed doctor about the torture they were being subjected to and these were recorded in the doctors' reports. It is worth mentioning that more than one detainee said that the Spanish Civil Guard officers holding them later found out what the detainees had told the doctor and this was used to intimidate and threaten them¹².

The decision of Judge Juan Del Olmo and the criminal charges brought by the Spanish Ministry of the Interior

On March 8, 2003, Judge Juan Del Olmo did not process the complaint of torture lodged by Martxelo Otamendi and on March 10, 2003, the Spanish Ministry of the Interior, far from investigating the torture complaints, brought criminal charges against Xabier Alegria, Xabier Oleaga, Iñaki Uria and Martxelo for “false” complaints of torture and for “insults and slander” against the Spanish Civil Guard, affirming that apart from complaining about the torture, the

⁸ This decision was communicated in a writ issued by Judge Juan Del Olmo of December 15, 2003.

⁹ Martxelo Otamendi's case was included in the report no. E/CN.4/2004/56/Add.1 of the United Nations Special Rapporteur on Torture, Mr. Theo van Boven on page 297.

¹⁰ On March 3, 2003 the then President of the Catalan Socialist Party (PSC) and the current President of the Government of Catalonia, Pasqual Maragall, said he thought the torture complaint lodged by Martxelo Otamendi was true.

¹¹ The torture testimonies of Iñaki Uria, Martxelo Otamendi, Xabier Alegria and Xabier Oleaga can be found in the first appendix to this document.

¹² See testimonies.

detainees had “collaborated with an armed group”¹³. On December 13, 2003, the criminal charges were dropped provisionally by the 2nd Chamber of the Spanish National Criminal Court, arguing that prior to instituting proceedings, it was necessary to wait for the final resolution on the complaints of torture from the Court of First Instance in Madrid.

The complaints lodged through lawyers representing the Anti-Torture Group

On March 27, 2003, Iñaki Uria, Xabier Oleaga and Xabier Alegria lodged a complaint through the lawyers representing the Anti-Torture Group (TAT)¹⁴ with the Duty Magistrates Court in Donostia/San Sebastian. On October 21, 2003, Txema Auzmendi lodged a complaint with the same court.

In Xabier Alegria’s case the Court of Donostia referred the case to the Court of First Instance of Madrid, which dismissed it the very day it began the proceedings. Only the Prosecutor was notified about the dropping of the proceedings. After the filing of several appeals, the Provincial Court of Madrid requested the 23rd Court of First Instance in Madrid to take a statement from Xabier Alegria and obtain copies of the reports filed by the court-appointed doctors. Xabier Alegria was called to testify on two occasions while he was being remanded in custody. On the first, Xabier Alegria’s lawyers were not notified and the complainant refused to testify. On the second, an attempt was made to make him testify in handcuffs in the presence of three Spanish Civil Guards, in other words, in front of the very same police force he had denounced. He would not testify on this occasion, either. Subsequently, after he had been released, he testified before the Court in Donostia (San Sebastian) as well as before the Court in Madrid.

On July 20, 2005, Iñaki Uria was called to testify before the 1st Court of First Instance of Donostia/San Sebastian. On this occasion this court referred the case to the Spanish National Criminal Court and on another in favour of the 17th

¹³ This is referred to on page 10 of the report no. E/CN.4/2004/56/Add.2. of the United Nations Special Rapporteur on Torture dealing with his visit to Spain.

¹⁴ TAT are the initials of the group’s name in Basque: Tortuaren Aurkako Taldea.

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Court of First Instance in Madrid. Both referrals have been rejected and the case is now being handled by the 1st Court of First Instance in Donostia/San Sebastian. On the very day for testifying the defence counsel found out that the two Spanish Civil Guards involved had testified through rogatory letter in Madrid on July 4, 2005 without the defence counsel able to be present. The judge did not show up when Iñaki Uria testified, so it was the Clerk of the Court who recorded his declaration. The court-appointed doctors have been summonsed to testify but as they refuse to do so in the presence of Iñaki Uria's lawyer, a request has been made for the questions to be made in writing by Uria's defence counsel. Xabier Oleaga was also summonsed to testify as a witness.

In Xabier Oleaga's case the 1st Court of First Instance in Donostia/San Sebastian referred the complaint to the 50th Court of First Instance in Madrid, but the latter decided that it was not competent to deal with the complaint, so it was sent to the Supreme Court for a decision to be taken on the conflict of competencies. The Supreme Court has ruled that the Court of First Instance of Madrid is competent in the case. Yet no proceedings have been instituted.

The complaint filed by Txema Auzmendi was referred, as in the other cases, by the Court of Donostia to the 15th Court of First Instance in Madrid. This Court has only instituted one proceeding (to request copies of the report by the court-appointed doctor) and, following a request made by the Public Prosecutor, it dropped the case on June 10, 2004. An appeal was lodged against the decision before the very same court but it was dismissed, so an appeal was lodged with the Provincial Court but it was not allowed, either. Finally an appeal for legal protection was lodged with the Constitutional Court and a response is currently being awaited.

The complaint lodged by Martxelo Otamendi before the Court of Madrid

As far as Martxelo Otamendi is concerned, on June 2, 2003, the 5th Court of First Instance in Madrid considered his complaint. On January 29, 2004, the doctor who visited Martxelo Otamendi during the time he was being held incommunicado by the Spanish Civil Guard testified as a witness and confirmed

that the complainant had told him that he had been tortured¹⁵. Barely two weeks later, on February 16, Carmen Valcarce, the judge of the 5th Court of First Instance of the Provincial Court in Madrid dismissed the complaint without even asking Martxelo Otamendi to testify, because she regarded it as unsustainable. The complainant lodged an appeal with the same court of first instance and later an appeal with a higher court; it was dismissed by the Second Section of the Provincial Court in Madrid in a ruling dated September 5, 2005. An appeal has been filed against this ruling with the Spanish Constitutional Court.

Malice in Xabier Oleaga's case

In Xabier Oleaga's case, once he had been released on bail, one of the precautionary measures imposed by the judge was that he had to report from time to time to the headquarters of the Spanish Civil Guard in Intxaurreondo (near Donostia/San Sebastian). There is no doubt that this was an unjustified measure, because it was the very police force Xabier Oleaga had lodged a complaint against.

The *sub judice* rule

From the start of the investigation against *Egunkaria*, Judge Juan Del Olmo imposed the *sub judice* rule. Human Rights Watch, on page 43 of its report on counter-terrorism measures in Spain¹⁶, says: "*Under secreto de sumario [the sub judice rule], defence attorneys do not have access to detailed information regarding the charges against their clients. They are not entitled to see any of the evidence or receive any information about the ongoing investigation. In contrast, the prosecutor is entitled to all of this information and to participate in all judicial or police investigations and proceedings.*"

¹⁵ Martxelo Otamendi told the court-appointed doctor the following: "*Listen, doctor, this situation and the treatment I am receiving is unacceptable; I therefore request that you tell the judge of my request for a transfer to the National Criminal Court cells where he can have me held for as long as he considers appropriate until I am called to give evidence. If by tomorrow (Sunday) morning, the judge hasn't taken me out of here, I will smash my head against that column right next to you.*" See Appendix 1.

¹⁶ See note 2.

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Yet at the same time, according to the press statement on February 20, 2003 referred to above¹⁷, the media had already disseminated the contents on the closure order which was under the *sub judice* rule, whereas on February 21, 2003, *Egunkaria's* legal representatives had yet to receive the official notification of it.

The *sub judice* rule was maintained until October 23, 2003, in other words, the decision was prolonged for eight months in which time decisions were taken on the temporary closure of *Egunkaria* as well as on the personal situations of the detainees. This is why the measure was to cause clear defencelessness. By the time the *sub judice* rule was lifted, the case had already run to 25,000 pages.

Remand in custody

In his remand order of February 25, 2003, the examining judge ordered the unconditional remand in custody of Xabier Oleaga, Xabier Alegria, Iñaki Uria, Joan Mari Torrealdai and Txema Auzmendi. The rest of the detainees could avoid custody by posting bail amounting to between 12,000 and 30,000 euros. From the bibliographical section¹⁸ of this report it can be seen that all the detainees are people who as a result of their professional and personal careers have close links with their families and with the places where they live. Most of them are public figures and very well known in Basque society, because of their contribution to Basque culture. This is why the decision to remand them in custody, rather than an exceptional one based on a logical line of reasoning, appears to be an arbitrary one and even a punishment inflicted by Judge Juan Del Olmo.

Five of the detainees were remanded in custody in prisons close to Madrid, like the prison of Soto del Real or Aranjuez, where they remained until they were released. The detainees endured harsh prison conditions and their families had

¹⁷ See section of this report on page 11 entitled: "The controversy surrounding the press statement that the Ministry of the Interior and the Investigating Judge Juan Del Olmo had agreed on".

¹⁸ See page 23 of this report.

to travel about 1,000 km for a visit that, as a general rule, lasted no more than 45 minutes.

A year and a half later Iñaki Uria was the last to secure his release in the *Egunkaria* case. On April 28, 2004, the 1st Chamber of the Spanish National Criminal Court assented to the possibility of releasing him on bail, but it set a figure of 600,000 euros which he was not allowed to pay through a bank guarantee, either. So, unable to pay this figure Iñaki Uria remained in custody. The amount was later reduced to 450,000 euros by Judge Juan Del Olmo and Mr Uria was allowed to use a bank guarantee. Consequently, Iñaki Uria left prison on August 2, 2004. In June 2005, while he was free, the bail amount was reduced to 60,000 euros.

Current judicial situation of the detainees

On November 4, 2004, Judge Juan Del Olmo, published the indictment of Joxemi Zumalaba (who died in January 1993 and who is regarded as the founding father of the *Egunkaria* project), Iñaki Uria, Joan Mari Torrealdai, Txema Auzmendi, Xabier Alegria, Pello Zubiria, Xabier Oleaga and Martxelo Otamendi. The judge did not see fit to indict Inma Gomila, Fermin Lazkano and Luis Goia.

On December 20, 2004 Judge Juan Del Olmo rejected the appeal lodged against the remand order. On December 29, 2004 an appeal was lodged with the 2nd Chamber of the Spanish National Criminal Court, which is scheduled to hear the case; the hearing, which is due to consider the appeal that has been filed, is expected to take place on January 26 and 27, 2006.

It should be pointed out that the current prosecutor in the *Egunkaria* case is Mr. Juan del Moral, who assumed the position in June 2005, replacing the previous prosecutor in the case, Mrs Dolores Delgado.

A brief outline of the investigating judge's line of argument

In the warrant to close down *Egunkaria*, Judge Juan Del Olmo¹⁹ based himself very closely on different reports by the Spanish Civil Guard²⁰ orders the temporary closing down of *Egunkaria* in order to investigate “the alleged connection between a business network and the funding of the terrorist group ETA”. According to the warrant, *Egunkaria* was alleged to be favouring ETA’s strategy in two ways: firstly, from the economico-financial viewpoint, by transferring “funds from the organisation ETA or its network for the purchase of such companies or stakes these companies held in other companies”; secondly, by facilitating “the support and dissemination of the terrorist ideology and the values and interests defended by the said terrorist organisation”.

In the remand order of February 25, 2003, the judge for the first time bases his decision on alleged documents seized from suspected members of ETA at the beginning of the 1990s. In accordance with these documents, the judge considers that there is evidence to believe that ETA ran *Egunkaria* and was involved in its creation. According to the defence lawyers, the characteristics of these documents are as follows:

- There are few of them, despite the fact that almost fourteen years have elapsed since the *Egunkaria* project was born.
- They clearly date back a long time (the beginning of the 1990s).
- They lack any connection between them.
- They constitute a simple juxtaposition of documents.
- There is not one single document from ETA addressed to *Egunkaria* or vice versa.
- They belong to anonymous people or to other people who have nothing to do with the *Egunkaria* project, to which irrelevant references are made.

¹⁹ Four-page warrant of February 19, 2003.

²⁰ Report 9/2001, report 16/02 and report 03/2003 of the Special Central Unit no.1 of the Spanish Civil Guard.

- They are the result of a discriminatory selection; documents in the defence of or favourable towards the accused are excluded.

Between the first warrant of February 19, 2003 and the latest indictment, which charges seven people connected with *Egunkaria*²¹, the judge's investigation changes direction. The judge himself admits²² that after seizing the documents, the reorientation took place when "the initial hypotheses were ruled out and others became consolidated". There is a move from investigating the "alleged involvement of a business network with the terrorist group ETA" to investigating whether "Egunkaria S.A. and the newspaper Euskaldunon Egunkaria are a tool which ETA avails itself of to achieve its aims". In other words, first a newspaper is closed down and then the conclusion is drawn that the initial reasons for doing so are no longer valid.

The lawyers defending *Egunkaria* have maintained that the whole investigation phase has been characterised by the driving force of the police. In other words, the whole investigation has been driven by the Spanish Civil Guard, while it has been left up to the judge simply to make the investigation official. It has been alleged the judge even copied the police reports word for word in many of the paragraphs in his judicial writs. Moreover, it is the police who request the judge for precautionary measures or reports from the Treasury Office, and the judge even goes as far as to include police assessments on the judicial testimonies.

Moreover, in the absence of direct proof linking *Egunkaria* with ETA, the Investigating Judge puts the appraisal of the documents seized through an inference process. This way he resorts to a logic that from a legal point of view is an absurdity. Judge Juan Del Olmo has simply accumulated suspicions using the formula "suspicion plus suspicion equals proof", which is tantamount to a legal outrage.

²¹ Indictment of November 4, 2004.

²² Resolution dismissing the appeal lodged against the indictment of November 4, 2004.

B.- OPERATION AGAINST THE MARTIN UGALDE CULTURE PARK

On October 16, 2003, Judge Juan Del Olmo ordered the arrest of eight people connected with the Martin Ugalde Culture Park, to which *Egunkaria* also belonged.

The Martin Ugalde Culture Park is a complex of buildings inaugurated in June 2002 that bring together the companies, institutions and associations that work in favour of the Basque language and culture. The project was conceived by three companies: Gráficas Lizarra, *Euskaldunon Egunkaria* and Euskalgintza Elkarlanean Fundazioa. The aim was as follows: “to create the opportunity to seek a joint location for the bodies that work in the world of culture in order to combine efforts and achieve efficiency. In other words, to apply the idea of a technology park to the sphere of culture.”

People connected with the above-mentioned companies were arrested in the operation conducted on the Culture Park. Those detained were Joan Mari Larrarte, Joxe Mari Sors, Mikel Arrizabalaga, Angel Ramón Diez, Mikel Sorozabal, Amando Hernández, Mikel Azkune and Xabier Legarra. All the detainees were held incommunicado during the period they were under arrest, which went on for five days. The characteristics of these incommunicado arrests were the same as on the first occasion²³, and the detainees were not allowed to testify before the judge with a lawyer of their choice this time, either.

On October 20, 2003, *Egunkaria's* lawyer and representative, Enekoitz Etxeberria, went to the Spanish National Criminal Court in the capacity of

²³ See section on page 5 of this report entitled “Incommunicado arrests and the circumstances surrounding them”.

defence counsel of two of the detainees. Once inside the National Criminal Court, Judge Juan Del Olmo ordered his arrest and incommunicado detention and he was sent to the cells of the Court.

On October 21, 2003, after testifying before the judge, the detainees were released, four without having to post bail and the rest on bail.

The nine detainees in the second operation plus the detainees in the first operation against *Egunkaria* (a total of nineteen people) are now facing charges. The line of reasoning of Judge Juan Del Olmo is the same, in other words, to investigate “an alleged network of companies or group of companies, formed by, linked to and controlled (directly or indirectly) by the terrorist organisation ETA”.

After conducting an initial investigation of the documents seized in this second operation, Judge Juan Del Olmo²⁴ sent the case to be given a new number and assigned to another Court in view of its complexity. Judge Felix de Gayon-Rojo is now responsible for handling this second indictment.

²⁴ Indictment of November 4, 2003.

2.- THE VIOLATION OF INTERNATIONAL LAW ON HUMAN RIGHTS

In accordance with the chronicle of events in this report we are confronted with a case, which, as we understand it, constitutes a serious breach of the right to freedom of expression and opinion. as recognised in Article 19 of the Universal Declaration of Human Rights²⁵, Article 19 of the International Covenant on Civil and Political Rights²⁶ and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁷. The moment a decision is taken to close down a mass medium, even though it has been at the request of a judge, we find ourselves up against a delicate conflict of rights, in which there is no doubt whatsoever that the right to freedom of expression has been breached. We shall proceed to analyse how a measure that was totally arbitrary and out of proportion has been implemented in this case and which seriously violates the right to freedom of expression.

Yet this case also displays certain peculiarities which, when we consider, lead us to say that we are confronted with a breach of human rights which are enshrined in different international instruments which are applicable. So the rights that may have been abused will be analysed one by one.

²⁵ Universal Declaration of Human Rights, Resolution 217a (III) of the General Assembly, UNO Doc. A/810, 71 (1948) (thereafter Universal Declaration of Human Rights).

²⁶ International Covenant on Civil and Political Rights, Resolution 2200A (XXI) of the General Assembly 21 UNO GAOR (Supp. N° 16), 52, UNO Doc. A/6316 (1966), 999 U.N.T.S. 171, which came into force on March 23, 1976 (thereafter International Covenant on Civil and Political Rights).

²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, (ETS N°5), 213 U.N.T.S. 222, which came into force on September 3, 1953 and amended by Protocols Nos 3, 5, 8 and 11 (thereafter European Convention on Human Rights).

Taking a closer look at the international human rights situation

In the wake of the events of September 11 in New York and taking advantage of the resulting international climate, some countries intensified their struggle against terrorism, and even went as far as abusing the rights and fundamental freedoms skilfully recognised in international human rights instruments. This fact has been recognised by different international authorities²⁸ and even warnings have been issued. What we are faced with is a regression in human rights protection. In other words, there has been a move from the protection of human rights through recognising and inserting them into codes of law to one in which what has already been recognised is denied by means of continual emergency legislation. The practice being adopted right now is the “de facto” removal of these rights from their respective codes of law.

In this situation, faced with the systematic breach of human rights that was taking place and worried about the situation that had arisen as a result, different international and regional organisations began to adopt measures. Thus, the United Nations Commission on Human Rights²⁹ urges States to respect human rights in their fight against terrorism.

The same thing was to happen in the specific case of the right to freedom of expression. Concerned about the persecution that the media and journalists suffer while carrying out their work, the Commission on Human Rights³⁰ issued a warning on the possible use of the fight against terrorism to the detriment of the right to freedom of expression.

²⁸ It has been recognised thus by the Special Rapporteur on Terrorism and Human Rights of the Sub-Commission for the Promotion and Protection of Human Rights, Ms. Kalliopi K. Koufa in document number E/CN.4/Sub.2/2004/40: *“Enhanced attention to terrorism and to the effects of counter-terrorism measures on the enjoyment of human rights is currently driven, of course, by the events of 11 September 2001 and their sequelae - i.e. the ensuing global war against terrorism, the significant unintended consequences to human rights, and the risk of damage to the cause of justice and the rule of law as a result of the adoption or implementation of anti-terrorist legislations and policies – along with the continuing failure to resolve some “hot spots” still fuelling the debate of “terrorists” versus “freedom fighters”, and vice versa.”*

²⁹ Resolution 2005/80 of the Commission on Human Rights on “The Protection of Human Rights and Basic Freedoms in the Fight against Terrorism”.

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“Stressing the need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression,(...)”

Mr. Ambeyi Ligabo³¹, the United Nations Special Rapporteur for the Promotion and Protection of the Right to the Freedom of Opinion and Expression, also expressed concern and said the following:

“many Governments use anti-terrorism and national security legislation to restrict, partially or totally, freedom of opinion and expression and the right of access to information.”

So this is the background of restrictions of rights against which an operation was carried out against the newspaper *Egunkaria*, which right from the start raised concerns even for human rights organisations because of the way it was conducted and its content.

Abolition of human rights in the fight against terrorism

On occasions the practice of abusing human rights by States has been justified by the application of Article 4 of the International Covenant on Civil and Political Rights that allows the suspending of certain rights in a State of Emergency. But it is worth mentioning that even in states of emergency there are certain rights that cannot be suspended or abolished. Thus, Paragraph 2, Article 4 lays down that even if a state of emergency has been declared, the right not to be tortured or the principle of legality, among others, cannot be abolished.

Furthermore, for all the other rights recognised by the International Covenant on Civil and Political Rights to be abolished or suspended, the United Nations

³⁰ Resolution 2004/52 of the Commission on Human Rights.

³¹ Report by the United Nations Special Rapporteur for the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Ambeyi Ligabo, number E/CN.4/2005/64, page 15, paragraph 61.

Commission on Human Rights establishes two fundamental conditions³²: that there has to be an emergency situation which threatens the life of the nation; and that the State has to announce the state of emergency officially.

So as we look at the *Egunkaria* case, we can affirm that as no state of emergency was announced by the Spanish authorities, all the rights recognised by the International Covenant on Civil and Political Rights were in force at the time when the operation was carried out, so the authorities cannot invoke their right to deny certain rights in order to fight against terrorism.

A.- Right to freedom of expression and information

The closure of the newspaper and International Law

According to the chronicle of events, the newspaper *Egunkaria* remained closed for two years. The legal basis used by Judge Juan Del Olmo to support his decision is to be found in Article 129 of Spanish Code of Criminal Law³³, which establishes the following:

“The judge or court, in the cases established in this Code and without prejudice to the terms laid down by Article 31 of the said code, after bringing the matter before the Prosecutor’s Office and before the owners or legal representatives, may impose, with reasons, the following measures:

- a) The closure of the company, its premises or buildings, either temporarily or permanently. Temporary closure may not exceed five years.*
- b) The dissolving of the company, association or foundation.*
- c) Suspension of the activities of the company, business, foundation or association for a period which may not exceed five years. (...)”*

³² General Comment 29 of the United Nations Commission on Human Rights.

³³ Constitutional Law 10/1995 of November 23 of the Spanish Code of Criminal Law.

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In accordance with this article, it is only possible to resort to this article in “*the cases established*” in some type of Code of Criminal Law. However, when one looks at the types of crimes of belonging to or collaboration with an armed group or illegal association, which are precisely the ones on which Judge Juan Del Olmo based the entire operation, no mention is made of this possibility, so that it will not be possible to resort to it. Nevertheless, the Examining Judge does resort to it and closes down the newspaper for two years.

Here we come up against a double violation of international law. On the one hand, there is the breach of the right to the principle of legality, which is enshrined both in Article 15 of the International Covenant on Civil and Political Rights and Article 7.1 of the European Convention for the Protection of Human Rights. Yet on the other hand there is the breach of Article 19.3 of the International Covenant and Article 10.2 of the European Convention, which lay down that the restrictions on the right to freedom of expression have to be “in accordance with the law”.

The European Court of Human Rights in the case of *The Sunday Times vs. The United Kingdom*³⁴, also referred to this question and established that the principle of legality must be abided by with two essential requirements:

- a) **Accessibility:** The citizen must be in a position to have indications that it is adequate in the circumstances of the legal rules applicable in a given case.
- b) **Foreseeability:** The rule must be sufficiently precise so that the citizen can foresee its consequences.

The United Nations Commission on Human Rights³⁵, for its part, mentions that in order for restrictions on the right to freedom of expression to be imposed, they must satisfy the following requirements: they must be “in accordance with

³⁴ Judgment of the European Court of Human Rights. In the case of *The Sunday Times vs. The United Kingdom*, April 26, 1979. Series A, n° 30.

³⁵ General Comment n° 10 of the Commission on Human Rights on freedom of expression.

the law”; they must be “necessary” to “protect national security, public order or health or public morals”.

With respect to the first requirement, we have already pointed out that the circumstances did not exist. With respect to the requirement of “necessity” the jurisprudence of the European Court of Human Rights is broad. So we can find cases like *Engel and others vs. the Netherlands*³⁶, *Chorherr vs. Austria*³⁷, *Handyside vs. The United Kingdom*³⁸, *Incal vs. Turkey*³⁹, and others. In the case of *Handyside vs. The United Kingdom*⁴⁰ the European Court stressed that the proportionality between a restriction and the legitimate aim it serves is inherent in the concept of “necessity”. It thus affirms:

“(...) that every formality, condition, restriction or penalty imposed in this sphere (that of the freedom of expression) must be proportionate to the legitimate aim pursued.”

This is emphasised even further if we bear in mind that the main doctrine establishes that the right to freedom of expression is “a cornerstone upon which the very existence of a democratic society rests”⁴¹. In accordance with this assertion, both the United Nations Commission on Human Rights⁴² and the European Court of Human Rights⁴³ assert that there are two sides to the right to freedom of expression: the right to freedom of thought and ideas and the right to receive them. Therefore, an arbitrary decision that restricts freedom of expression not only affects the right to express information, but also the right of the community to receive all kinds of information. In this context it is worth noting that *Egunkaria* had a circulation of over 15,000 copies and reached about 40,000 readers every day.

³⁶ Judgment of the European Court of Human Rights. In the case of *Engel and others vs. the Netherlands*, November 23, 1976.

³⁷ Judgment of the European Court of Human Rights. In the case of *Chorherr vs. Austria*, August 25, 1993.

³⁸ Judgment of the European Court of Human Rights. In the case of *Handyside vs. The United Kingdom*, December 7, 1976.

³⁹ Judgment of the European Court of Human Rights. In the case of *Incal vs. Turkey*, June 9, 1998.

⁴⁰ See note 38.

⁴¹ Inter-American Court of Human Rights. Advisory Opinion OC-5/85. Para. 70.

⁴² General Comment n° 10 of the United Nations Commission on Human Rights.

⁴³ See note 34, in the case of *Sunday Times vs. The United Kingdom*.

That being the case, it seems clear that the proportionality of the measure to be taken becomes highly relevant. If we bear in mind that judge Juan Del Olmo established from the very beginning Official Receivers for *Egunkaria*, and consider the initial reason for closing down *Egunkaria*⁴⁴, it seems overwhelmingly clear that it would be very unlikely for any allegedly criminal financial transactions to be made, because they would have been under judicial control the whole time. So everything points to the fact that the measure is highly disproportionate to the aim being pursued, and consequently not “necessary” in the light of the jurisprudence of the European Court of Human Rights.

Moreover, if one argues that the newspaper had been used by ETA to “spread its ideology”, the American Convention on Human Rights and Duties of Man expressly prohibits prior censorship and therefore only allows the possibility of subsequent monitoring⁴⁵. Although the American Convention is not applicable in Spain, it is nevertheless relevant for interpreting the right to freedom of expression to the extent that it grants even more protection to it. Thus the Inter-American Court of Human Rights has considered that prior censorship seriously violates the right to freedom of expression⁴⁶.

The raid on the newspaper

We have already described what the raids on the offices and headquarters of *Egunkaria* were like, and we pointed out that they took place on all the newspaper’s premises, irrespective of whether or not they were used by the people arrested. During the raid on the headquarters of *Egunkaria* in Andoain, the Spanish Civil Guard asked Martxelo Otamendi about the offices and desks of the other journalists, against whom no judicial measure had been taken, and their documents were subsequently seized.

⁴⁴ “Alleged connection between a business network and the funding of the terrorist group ETA”.

⁴⁵ Article 13 of the American Convention on Human Rights.

⁴⁶ Inter-American Court of Human Rights. Advisory Opinion OC-5/85. Para. 54.

The confidentiality of journalists' sources has repeatedly been regarded as one of their rights. That is how it has been considered, for example, in the Resolution on Journalistic Freedoms and Human Rights of the European Ministerial Conference on Mass Media Policy⁴⁷ or in the Resolution of the European Parliament on the Confidentiality of Journalists' Sources⁴⁸.

The European Court of Human Rights has considered that *“protection of journalistic sources is one of the basic conditions for press freedom”*⁴⁹. In the same way it has pointed out that *“having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”*⁵⁰

Regardless of the doubtful possible abuse of the right to confidentiality which may have been committed with the people arrested when all their offices were searched, the search conducted in the offices of the other journalists seriously breaches their right to confidentiality, because there were no criminal proceedings against them. So, as confidentiality is an indispensable requisite of freedom of expression, we can affirm that in this case, too, the right to freedom of expression has been abused.

But in this case there has also been a violation of Article 17 of the International Covenant on Civil and Political Rights, which lays down that *“no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...”* Similar protection is granted by Article 8 of the European Convention of Human Rights which protect private life and the inviolability of the home.

⁴⁷ Resolution on Journalistic Freedoms and Human Rights of the European Ministerial Conference on Mass Media Policy (Prague, December 7-8, 1994).

⁴⁸ Resolution of January 18, 1994. Official Journal of the European Communities N° C 44/34.

⁴⁹ Judgment of the European Court of Human Rights. In the case of Goodwin vs. The United Kingdom of March 27, 1996, para. 29.

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The Human Rights Commission says the home has to be regarded as the place “where a person resides or carries out his usual occupation”⁵¹. It also establishes that the expression “arbitrary interference” can also include interference “in accordance with the law”, so the order to search the whole newspaper issued by Judge Juan Del Olmo could be regarded as “arbitrary interference”.

The European Court of Human Rights has established in repeated judgments⁵² that interference in private life must be “in accordance with the law” and be “necessary in a democratic society”. One can hardly think that the search conducted of the documents of the journalists not involved in the criminal proceedings was “necessary” for the investigation into *Egunkaria*, and therefore neither would it be possible to think that it was necessary “in a democratic society”.

B.- Right to personal integrity

Incommunicado detention according to international law

In the question of incommunicado detention Spain has systematically ignored the recommendations made by different bodies, both international and regional.

Article 7 of the International Covenant on Civil and Political Rights establishes that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (...)”

⁵⁰ See note 67, para. 39

⁵¹ General Comment n° 16 of the United Nations Commission on Human Rights.

⁵² Judgments of the European Court of Human Rights. In the cases of Khan vs. The United Kingdom of May 12, 2000; in the case of Haldford vs. The United Kingdom of June 25, 1997; and in the case of Malone vs. The United Kingdom of August 2, 1984.

In 2002 the United Nations Committee against Torture expressed its concern about the period of five days of incommunicado detention in Spain and declared that “it facilitates the committing of acts of torture and ill treatment”⁵³. But in addition to this, the United Nations Special Rapporteur on Torture, Theo van Boven, said in his report on his visit to Spain that “*prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment*”⁵⁴.

Incommunicado detention was extended to five days in the case of all the *Egunkaria* detainees. In accordance with the report and recommendations of the Special Rapporteur Theo van Boven, we can assert that Spain has violated Article 7 of the International Covenant on Civil and Political Rights, because the prolonged period of incommunicado detention is “a form of cruel, inhuman and degrading treatment”.

On the other hand, the European Convention on Human Rights and Fundamental Freedoms establishes that anyone arrested “shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”⁵⁵.

In this respect, the jurisprudence of the European Court of Human Rights does not set a time limit corresponding to the term “promptly”. Nevertheless, the judgment of the European Court in the case of *Brogan and others vs. The United Kingdom*⁵⁶ analyses the period under arrest of four people, which lasted between 4 days, 11 hours and 16 days, 16 and a half hours, and established the following:

“Even the shortest of the four periods of detention, namely, the four days and six hours spent in police custody... falls outside the strict constraints as to time permitted by the first part of Article 5 paragraph 3. ”

⁵³ United Nations Committee Against Torture. Conclusions and recommendations of the Committee Against Torture: Spain. 23/12/2002, CAT/C/CR/29/3.

⁵⁴ Report by the Special Rapporteur on Torture, Theo van Boven. Addendum: Visit to Spain. E/CN.4/2004/56/Add.2, February 6, 2004, para. 34.

⁵⁵ Article 5.3 of the European Convention on Human Rights.

⁵⁶ Judgment of the European Court of Human Rights. In the case of *Brogan and others vs. The United Kingdom*, May 30, 1989.

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We can therefore affirm that, in accordance with the position maintained by the European Court of Human Rights, Spain has violated Article 5.3 of the European Convention of Human Rights when it kept all the detainees in the *Egunkaria* case (those in the first as well as those in the second operation) incommunicado for five days, a period which falls precisely outside the one which the Court already regarded as a breach of Article 5.3.

The prohibition of the use of torture and the obligation of the Spanish State to investigate complaints of torture

Article 13 of the United Nations Convention against Torture establishes the following:

“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities”.

As we have pointed out in the chronicle of events, the case of the complaints of torture is characterised by a lack of interest to investigate what happened on the premises of the Spanish Civil Guard. This lack of interest is supported by the following facts:

- The general approach towards all the complaints lodged with the Court of Donostia/San Sebastian is one of referral both of this Court and of the Court of First Instance in Madrid. So, rather than the intention of investigating what happened on police premises, there seems to have been one of trying to prevent this investigation. In this situation and in accordance with what has been established by the European Court of

Human Rights in the case of Martínez Sala vs Spain⁵⁷, we can at least consider that Article 3 of the Convention has been breached in respect of its “procedural aspect” because of the absence of a clear, unequivocal attempt by the Spanish authorities to investigate the complaints of torture.

- The 5th Court of First Instance of the Provincial Court of Madrid dismissed Martxelo Otamendi’s complaint, without even asking him to testify, even though the court-appointed doctor told the judge that Martxelo Otamendi had complained to him that he had been tortured.
- When Iñaki Uria went to testify, the judge failed to turn up and it was the clerk to the justices of the court who took down the confirmation of his complaint of tortures. Moreover, the police officers who testified in this case did so through a rogatory letter in Madrid without the presence of Iñaki Uria’s lawyers, thus leaving him in a clear situation of defencelessness. The testifying of the court-appointed doctors without the lawyers being present also creates a clear situation of defencelessness.
- It is difficult to understand how Xabier Alegria was expected to testify freely before the Judge, as he did so in the presence of the three members of the police force he was lodging a complaint against.

In his report on his visit to Spain the United Nations Special Rapporteur on Torture expresses concern about the failure of the Spanish authorities to investigate complaints of torture. He says in this respect:

“The Spanish legal system does provide for investigative mechanisms and procedures, but there are a number of reasons why this investigative capacity is underutilized and often ineffective”⁵⁸

⁵⁷ Judgment of the European Court of Human Rights in the case of Martínez Sala vs. Spain, November 2, 2004.

⁵⁸ Report by the UN Special Rapporteur on Torture, Theo van Boven. Addendum: Visit to Spain. E/CN.4/2004/56/Add.2, February 6, 2004, para. 59.

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Therefore, little concern was shown by the Spanish authorities about clearing up and investigating the complaints of torture made in the *Egunkaria* case, either, and this appears to be common practice.

But the fact is even more serious when, far from investigating the torture complaints, the Spanish Government's Interior Ministry brings criminal charges "for collaborating with an armed group" against four *Egunkaria* people for having reported that they had been tortured⁵⁹.

Due Obedience and Command Responsibility

In some torture cases of this type we may find ourselves facing a situation in which both the person who inflicts the torture as well as the Commanding Officers at the Spanish Civil Guard Headquarters where the torture took place resort to evading their criminal responsibility. In an effort to avoid responsibilities, the officer who inflicted the torture may resort to due obedience, justifying his or her action as the carrying out of the orders of his or her superiors in rank, thus trying to relieve him- or herself of any criminal responsibility. International Law has closed the door on any situation of this kind. Article 7.4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia⁶⁰ states:

"The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

But besides this, in the cases of subordinate-commander relationship, there is also a criminal command responsibility which makes the relieving of

⁵⁹ This fact gave Amnesty International cause for concern and it was recorded in the document EUR 41/003/2003 (Public) News Service No: 055, March 11, 2003.

⁶⁰ Statute of the International Tribunal for bringing to justice persons allegedly responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991. Security Council Resolution 827 (1993) of May 25, 1993.

responsibility impossible. In this respect, Article 28.1 of the Statute of the International Criminal Court⁶¹ states:

“A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*
- (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”*

Article 7.3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia also recognises the existence of criminal command responsibility if the commanding officer “had reason to know” that his or her subordinates were violating international law. In this respect, the International Tribunal for the Former Yugoslavia in its judgment in the Blaski’c case⁶², and in connection with the phrase “had reason to know” establishes the limit of responsibility in the negligence that the commanding officer might have been guilty of. In this respect, if the commanding officer fulfilled his or her duties properly, he or she will not be criminally responsible. By contrast, if the commanding officer does not know what happened because he or she was acting negligently, he or she will be criminally responsible.

In the *Egunkaria* case, we are not going to judge whether the acts of torture were a consequence of a decision which could have been taken at higher levels

⁶¹ Rome Statute of the International Criminal Court passed on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

⁶² Case No.IT-95-14-T, The Prosecutor v. Tihomir Blavski’c, Judgment in The Trial Chamber, 3 March 2000.

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or if the commanding officers ordered or encouraged the torture of the detainees. We shall only analyse whether the commanding officers on the Spanish Civil Guard premises where the detainees were tortured “had reason to know” that their subordinates were torturing the detainees in connection with the *Egunkaria* case.

We have already pointed out that the Theo van Boven, the Special Rapporteur on Torture, the United Nations Committee Against Torture as well as the Committee for the Prevention of Torture have on repeated occasions expressed concern that the Spanish Civil Guard carries out torture. These concerns have of course been shared with or at least conveyed to the Spanish authorities and the police authorities are aware of them. Bearing this in mind, it would seem natural that the authorities and the Spanish Civil Guard commanding officers should be aware that torture was being inflicted, yet took no steps to prevent it. In the event that they should claim that they did not know what was going on, we could deduce, in the light of what has already been stated, that this ignorance is the result of negligence in the performance of their duties and that therefore they “had reason to know” that torture was being inflicted and consequently criminal responsibility falls on their shoulders.

Xabier Oleaga’s case

It has been mentioned already that Xabier Oleaga, once he had been released on bail, was required to report to the Spanish Civil Guard Headquarters in Intxaurreondo (Donostia/San Sebastian), as part of the control measures imposed by the judge.

This measure is a clear violation of Article 13 of the United Nations Convention Against Torture, which establishes that “(...) *steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.*” Thinking that a person who has denounced having been tortured will not feel intimidated when reporting from time to time to the very same police force against which he

has lodged a complaint would appear to anyone with an ounce of common sense to amount to malice on the part of the judge.

The right to be examined by a doctor of one's own choice

As has been stated above, none of the detainees throughout the time held incommunicado had an opportunity to be examined by a doctor of their own choice but were examined by forensic doctors or ones employed by the State.

This fact has raised great concerns both for the European Committee for the Prevention of Torture (CPT) and for the United Nations Special Rapporteur on Torture, Theo van Boven. Thus the CPT has the following to say in its report on its visit to Spain in 2001:

*“The European Committee for the Prevention of Torture has never suggested that the right of access to a doctor of one's own choice should replace a medical examination by a forensic doctor or another doctor employed by the State. However, a second medical examination by a doctor freely chosen by the detained person can provide an additional safeguard against ill-treatment.”*⁶³

Theo van Boven, the Special Rapporteur on Torture, for his part, included in the recommendations he made in his report on his visit to Spain “the right to be examined by a doctor of their own choice, it being understood that such examination may take place in the presence of a State-appointed forensic doctor”⁶⁴.

C.- The right to an effective defence

⁶³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT). Report on its visit to Spain between July 22 and 26, 2001. CPT/inf (2003)22.

⁶⁴ Report by the UN Special Rapporteur on Torture, Theo van Boven. Addendum: Visit to Spain. E/CN.4/2004/56/Add.2, February 6, 2004, para. 67.

The right to a lawyer of one's choice

In accordance with the Spanish Code of Criminal Procedure, detainees being held incommunicado are not entitled to a lawyer of their choice and, moreover, are not allowed to speak to their lawyers in private (even if they are state-appointed ones) neither before nor after having a statement taken from them by the police or testifying before a judge.

The right to a lawyer is enshrined in Article 14 of the International Covenant on Civil and Political Rights as well as in Article 6 of the European Convention for the Protection of Human Rights. Both documents recognise the right of everyone to defend themselves through a lawyer of their own choice. This right has been interpreted both by the Human Rights Commission⁶⁵ and the European Court of Human Rights⁶⁶, and both have affirmed that this right is also applicable both in the moments prior to the trial, in other words, it is applicable to the period under arrest.

In the case of *Egunkaria* none of the detainees in the operation were allowed a lawyer of their own choice, nor permitted to see their state-employed lawyers until the very moment they made their police statements, which in most of the cases took place on the third day of their arrests. In this respect, Human Rights Watch, in its report on counter-terrorism measures in Spain, criticises the late presence of the lawyer and affirms that:

“the practice of waiting until the allowable period of incommunicado detention is almost over before requesting the legal aid attorney's presence for the formal police statement seriously undermines the detainee's right to counsel and significantly heightens his or her susceptibility to unlawful pressure”⁶⁷.

Yet as we have already pointed out in the chronicle of events, the detainees were not allowed to see their legal aid attorneys or court-appointed lawyers

⁶⁵ United Nations Human Rights Commission. CCPR/CO/73/UK.

⁶⁶ Judgment of the European Court of Human Rights. In the case of *Imbroscia vs. Switzerland*, November 24, 1993.

before they gave their police statements and that some of them were not even aware that they were in the presence of these court-appointed lawyers at that moment. In this respect, the United Nations Basic Principles on the Role of Lawyers requires that:

“All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials”⁶⁸.

In the same respect, the Special Rapporteur on Torture, Theo van Boven, points out among the recommendations he makes to Spain that it is necessary to guarantee “the right of access to a lawyer including the right to talk to the lawyer in private”⁶⁹.

So, by way of conclusion, we can affirm that Spain has violated Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention for the Protection of Human Rights on the following grounds: denying the right to a lawyer of one’s own choice, not being able to speak to the court-appointed lawyer in private during the period in incommunicado detention and not having been allowed to see the court-appointed lawyer until the third day of arrest.

The *sub judice* rule

In the *Egunkaria* case the *sub judice* rule was maintained for eight months in which time decisions were taken on remands in custody and closure of the newspaper *Egunkaria*. It is worth pointing out that while *sub judice* rule was in

⁶⁷ See note 2.

⁶⁸ Basic Principles on the Role of Lawyers passed by the United Nations 8th Congress on Prevention of Crime and Treatment of Offenders held in Havana (Cuba) from August 27 to September 7, 1990. UN Doc. A/CONF.144/28/Rev. 1 at 118 (1990). No. 8.

⁶⁹ Report by the UN Special Rapporteur on Torture, Theo van Boven. Report on his visit to Spain. E/CN.4/2004/56/Add.2, February 6, 2004, para 67.

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force, the defence lawyers had no access to the court case documents, whereas the Prosecutor did.

This measure enshrined in Spanish law has been questioned by human rights organisations⁷⁰, because it is considered to be in breach of Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention for the Protection of Human Rights, which lays down that everyone charged with a criminal offence has the right “*to have adequate time and the facilities for the preparation of his defence*”. The United Nations Human Rights Commission has affirmed that the word “facilities” should include access to the documents which the person facing charges requests for the preparation of his defence⁷¹.

As we have said in this report⁷², both the Human Rights Commission and the European Court of Human Rights lay down that the rights recognised in Article 14 of the International Covenant and Article 6 of the European Convention are applicable to pre-trial periods. In accordance with that, and at the height of the preliminary investigations it seems clear that when the case was maintained *sub judice*, the defence lawyers lacked the facilities needed for defending their clients.

The European Court of Human Rights has also said that “*the appraisal of the need for a remand in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter case*”⁷³.

Moreover, it is worth pointing out that the European Court of Human Rights has declared that the right to equality of arms is breached when “*counsel is denied*

⁷⁰ See *Setting an Example? Counter-Terrorism Measures in Spain*. Human Rights Watch. January 2005, Volume 17, No.1 (D), page 43.

⁷¹ General Commentary no. 13 of the United Nations Human Rights Commission.

⁷² Section “*The right to a lawyer of one’s choice*” page 40.

⁷³ Judgment of the European Court of Human Rights. In the case of *Lamy vs. Belgium*, March 30, 1989.

access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention"⁷⁴.

D.- The right to an impartial judge

Doubtful independence of the Judge: the press statement

Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention for the Protection of Human Rights lay down that everyone has the rights to have his or her case heard publicly by “*an independent and impartial tribunal.*”

In accordance with the chronicle of events in this report⁷⁵, doubts may be raised about the independence of the judge, Juan Del Olmo, in the *Egunkaria* case. The fact that a press statement was sent from the Ministry of the Interior to the Examining Judge raises suspicions about the proximity of the Judge to the Executive, and even more so when the Head Prosecutor of the Spanish National Criminal Court announced on two occasions that consensus had been reached on the press statement, although this fact was subsequently denied by the Spanish Government and the Judge.

Even bearing in mind this possible breach of the separation of powers, Judge Juan Del Olmo has been kept in charge of the investigations against *Egunkaria* and so the whole investigation conducted by this judge could be tainted. The Spanish National Criminal Court is the very one which will receive the investigation and try the *Egunkaria* case and it is the very one which is responsible for the defenselessness of the defendants in the case.

⁷⁴ Judgment of the European Court of Human Rights. In the case of Nikolova vs. Bulgaria, March 25, 1999.

⁷⁵ See section “*The Controversy surrounding the press statement that the Ministry of the Interior and the Investigating Judge, Juan Del Olmo, had agreed on*”, page 11.

The nature of the Spanish National Criminal Court

The whole operation against Egunkaria is being handled by the judge of a Court (Spanish National Criminal Court) which throughout its history has come in for much criticism by a considerable portion of Spanish doctrine.

The Spanish National Criminal Court was created in 1977 at a time when constitutional guarantees were suspended under the Government of Adolfo Suarez and in which a political transition process was underway between the old Francoist regime and the so-called Spanish democracy. The Spanish National Criminal Court was created by means of an Order of Council and the Court's existence was regarded as transitory from its beginnings, so it would appear to have an expiry date. But it did not happen that way and the court is still in existence today; throughout this time it has been handling questions like terrorism, drug trafficking and other less important matters.

During the Franco era it was the Courts-Martial that tried political dissidence in the Spanish State. Nevertheless, from 1974 onwards this distribution of competencies began to reach a crisis stage, because the Military Courts constantly refused to try political resistance. At the height of the transition this fact forced the Spanish Government to create a civil Court, which, on the one hand, would break with the previous Franco system, but which at the same time would maintain a centralised system that would take action against political dissidence. The current High Commissioner for the Victims of Terrorism, Gregorio Peces-Barba, criticised the Spanish National High Court at the time, because he considered that it breached the right to be tried by the judge that would normally correspond to the person facing charges⁷⁶.

The Commission on Human Rights lays down that the existence of military courts or special courts that try civilians can pose serious problems for the impartiality and independence of the administration of justice, and thus could

⁷⁶ "La Audiencia Nacional: atentado a un derecho fundamental". Cuadernos para el Diálogo, no. 200. February-March, 1977.

violate Article 14 of the International Covenant⁷⁷. For all these reasons and in accordance with a considerable part of the doctrine, the existence of the Spanish National Criminal Court poses serious doubts with respect to the right to an independent, impartial judge, from the point of view of both its origins and the way it operates today.

Driving force of the police in the investigation into the *Egunkaria* case

As has been mentioned already, the investigation against Egunkaria has been characterised by an excessive driving force of the police. Judge Juan Del Olmo has ordered the institutions (Mercantile Register, Provincial Governments, Tax Office, etc.) to hand the documents over to the Spanish Civil Guard directly. All the documents obtained by the Court have been sent to the police information service. Even the judicial statements made by the indictees were sent to the police to be assessed.

If we link this fact with the nature of the Spanish National Criminal Court and the controversy over the press statement, we can at least raise questions about the impartiality and independence of the Judge in the *Egunkaria* case.

E.- Right to a trial without undue delay

In accordance with Article 14 of the International Covenant on Civil and Political Rights, everyone has the right “*to be tried without undue delay*”. Likewise, Article 6 of the European Convention for the Protection of Human Rights lays down that “*everyone is entitled to a fair and public hearing within a reasonable time*”.

In this respect, the European Court of Human Rights has not established a specific period for the expression “a reasonable time” and has laid down that it has to be studied case by case and in accordance with specific circumstances.

⁷⁷ Para 4 of the General Comment no. 13 of the United Nations Commission on Human Rights.

Nevertheless, in the European Court's judgment in the case Ferrantelli and Santangelo vs. Italy, when considering the periods of time that elapsed in the different phases of the case, although the Court considers them to be normal, it does admit that there is an *"inexplicable period of stagnation of nearly two years between the first investigation (arrest) (...) and committal for trial (...)"*⁷⁸. If we look at the *Egunkaria* case, between February 20, 2003 (the day of the arrests) and November 4, 2004 (publication of the indictment) nearly two years elapse, which is almost the same period regarded as "inexplicable" by the European Court. Furthermore, it is worth mentioning that since the appeal against the indictment was lodged, the hearing to rule on it has not yet been decided. This is why the right to be tried within a reasonable time is deemed to have been violated.

F.- The right to one's own language and culture

There is one more abuse of human rights, which is no less serious, despite being left to last. It concerns Article 27 of the International Covenant on Civil and Political Rights:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

As we have pointed out at the beginning of this report, the birth of *Egunkaria* took place in a context in which an attempt was being made to provide a lifeline for the Basque language in the dire circumstances it found itself in. Although the situation has improved slightly in recent years, when *Egunkaria* was closed down, the situation of the Basque language was still giving cause for much concern and that is why a newspaper written exclusively in the language acquired tremendous importance in the development of the language. In this

respect, we can say that the Spanish authorities have violated this article by denying the Basque-speaking minority the right to have its own newspaper. The same thing happened at the Martin Ugalde Culture Park, which was created to support the development of the Basque language.

But alongside this “abstentionist” obligation of the State (“not denying”) there is another “pro-active” obligation of the State in *the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic minorities*⁷⁹, Article 1 of which establishes the following:

“States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”

So, far from protecting the existence of the Basque-speaking minority, the Spanish authorities deny it the right to promote its own language through the creation of a newspaper, and imprison its management, who could be facing sentences amounting to 14 years in prison.

⁷⁸ Judgment of the European Court of Human Rights. In the case of Ferrantelli and Santangelo vs. Italy of August 7, 1996.

⁷⁹ *“Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic minorities.”* Resolution 47/135 of the United Nations General Assembly of December 18, 1992.

APPENDIX I

THE TORTURE TESTIMONIES

Martxelo Otamendi: "I told them just to shoot me and be done with it"

(...) At least three or four policemen participated in the interrogations. The first thing they told me was (...) "This journey lasts for five days, if you give us the information we want you'll only have one bad day and will be able to rest for the other four (...). You should realise that every bugger ends up talking, so that sooner you start doing so the better it'll be for all of us". They also warned me that the interrogations would get harder as the days went by.(...) During the Thursday's interrogations, when I told them I wasn't going to answer their questions, they forced me to repeatedly crouch and stand while keeping my back straight. (...) They also forced me to stand with my arms up for a long time, not allowing me under any circumstances to put them down. They also obliged me to squat for long periods of time. The policemen threatened me constantly with sentences like: "You're going to spend the rest of your life in prison, you're going to be the only one to pay the price... they've grassed on you, don't be stupid and tell us what we want to know... this judge isn't like Garzón who starts a case and doesn't finish it, he's got it in for you...".

(...) That same Friday, at one of the sessions, they forced me to strip from the waist up and to push my trousers and underpants down to my knees. They made the most of this situation to touch my testicles with something soft (like a cushion or something like that), later brushing over my buttocks something plastic that felt as if it was rolled up. (...) During the Friday interrogations I was forced to crouch and stand time and again until I nearly fainted for a second time. (...) They also forced me to answer the question asked by the policemen: "What is the extension of Spain" with "From Irún to Algeciras and from Finisterre to Cabo de Gata" (...).

Xabier Oleaga: "Pressure was so intense, I lost consciousness"

(...) In that moment, I don't know whether was the claustrophobia or the pressure, I lost consciousness and fell. I suppose I was like that for a few minutes. The policemen sounded worried, because they might need to send me

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to hospital. They laid me down in the cell bed (a dirty mattress on top of a cold bed) (...) I was interrogated again, but this time, everything was harder. I was forced to do more flexions, they hit me with some sort of folded newspaper, but it was more like a simulation...It was longer than the previous time.

(...) The time between seeing the coroner on Saturday and Sunday morning was very tense. I was interrogated constantly. One of the last times, I was forced to take all my clothes off and to do all sorts of exercises, until exhaustion. As I was facing down, doing more flexions, they simulated pushing me or hitting me with a paper stick. They loaded a gun and fired at me with no bullet, some times with the gun on my head. I could hear some recorded screams from another cell, and they teased me, saying that they were going to send me to some other interrogators, and telling me I was lucky to be with the goodies. I was shivering of cold and fear, blindfolded, in the darkness, claustrophobic...At about three o'clock in the morning, I was sent to another room in order to testify. They remind me my legal rights and assured me there was a lawyer behind me, which I didn't see. They asked me about 25 questions, but I only answered two of them. They were not happy and threatened me, saying I would have to stay in their hands for another two days. They said they had a paper allowing them to do it so, but it was clear they were lying.

Iñaki Uria: “They put me, nude and freezing, into a kind of cupboard”

(...) They took the hood off and put a bag over my head. First loosely, then tighter. As they tightened it round my neck the plastic started sticking to my face. My breathing made the plastic stick more and more, first to my face and then to my mouth. (...) They threatened me with the rope, with hanging me... but they didn't. They put me for a moment, nude, freezing cold, wet. etc., into a kind of compartment or cupboard in steel sheeting. It was in and out. Then they put me a chair near me, so that I could touch it: temptation within reach of my hand. (...) They've got me in a corner either crouching down or bent over, they say they're going to kill me and hold a gun against my head. I hear the click as they press the trigger. They make me bend over and oblige me to get into a sort of steel cupboard. They tell me to get back out again. Back against the wall. They've taken off the hood. Me with my eyes closed, Open them! It's dark. I can see a little red light from my dark corner: they're pointing at me with a laser or infrared weapon.

(...) They throw me into a kind of steel desk. I'm with the beast. The animal, panting, makes gestures, shouts, makes noises... and throws water over me. Over my head, my neck, my back. It's cold. He takes my trousers down and gives me little slaps with the hand on the buttocks.

Xabier Alegria: "The suffocation sessions with the "plastic bag" broke me down"

(...) I was utterly terrified and as I did not answer their questions they forced me to do physical exercise, and beat me in my genitalia. Afterwards they ordered me to sit down in a chair. They tied me to it, hands and arms fastened with broad plastic tape. They held plastic bags in their hands, and made noise with them near my ear. They threatened me with using "the bag" (placing plastic bags over the head of a detainee, in order to suffocate him), and finally did it. I underwent two sessions. Y suffocated horribly. It broke me down.

After the first interrogation session, they gave me a break, when I promised to talk later. In the second session Y refused to talk and they used "the bag" again.

APPENDIX II

DECLARATIONS ABOUT

«EGUNKARIA»

AMNESTY INTERNATIONAL PRESS RELEASE

AI Index: EUR 41/002/2003 (Public)
News Service No: 043
25 February 2003

Spain : Closure of Basque newspaper must be investigated promptly

Amnesty International today called on the Spanish authorities to act promptly to clarify and substantiate the grounds on which a Basque-language newspaper was shut down, and a number of persons arrested.

On 20 February a National Court judge ordered the precautionary closure of the Basque newspaper *Euskaldunon Egunkaria* - the only newspaper written entirely in the Basque language - and the arrest of 10 persons associated with the newspaper. These included the Jesuit priest, Padre Txema Auzmendi, S.J, and one of the directors, Peio Zubiria, who yesterday reportedly attempted suicide. All were arrested, held incommunicado under the anti-terrorist legislation and taken to the National Court in Madrid.

The judge justified the closure and arrests in a decision in which he stated that the company which published *Egunkaria* was created, financed and directed by the Basque armed group *Euskadi Ta Askatasuna* (ETA). The newspaper, which was founded in 1990, allegedly contributed to a Basque-language information structure which facilitated the dissemination of "terrorist" ideology. As yet, the concrete basis for the decision has not been made clear.

The Basque Government, which has reportedly subsidised *Egunkaria* for a number of years, requested urgent clarification of the basis for the closure and arrests. In a separate statement, the Company of Jesus expressed concern about the arrest of Padre Auzmendi, "publicly recognized for his clear opposition to violence" and defence of the "marginalized" and vulnerable.

The precautionary closure of *Egunkaria* follows the unrelated case of the closure of the Basque newspaper *Egin* by a National Court judge in 1998. *Egin* was suspected of printing coded messages to ETA and of being an instrument of "terrorism". The closure order was lifted a year later but a trial hearing has still not taken place.

Amnesty International, which only 10 days ago, again expressed its unreserved condemnation of the human rights abuses committed by ETA, recognizes the responsibility of the judiciary to take any appropriate measures essential to the protection of life and integrity.

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"However, an action as serious as the closure of a newspaper, and the arrest of those involved in its production - has clearly injurious consequences for the fundamental right to freedom of expression", Amnesty International warned. "It is, therefore, imperative that any judicial investigation is prompt and thorough".



For immediate release

14 November 2005

Closure of Basque newspaper ‘Egunkaria’: ARTICLE 19 calls on court to follow international human rights standards

ARTICLE 19, the Global Campaign for Free Expression, is concerned at the news that Basque-language newspaper *Euskaldunon Egunkaria* remains unable to resume publication following its closure by the Spanish authorities in 2003, due to alleged links with the banned terrorist group ETA.

Euskaldunon Egunkaria, established in 1990 as the first and only Basque-language daily newspaper, reportedly with a readership of 15,000 and widely respected throughout the Basque community, was raided by the authorities on 20 February 2003. On this occasion, documents and computers were seized, and the newspaper’s assets frozen. In addition, ten individuals who were or had been members of staff, including the newspaper’s managing director Iñaki Uria and former editor Pello Zubiria, were arrested in dawn raids and held incommunicado for up to five days.¹ In December 2004, Iñaki Uria, Joan Mari Torrealdai, Txema Auzmendi, Xabier Alegria, Pello Zubiria, Xabier Oleaga and Martxelo Otamendi were for forming an ‘illegal association’ at the time of *Euskaldunon Egunkaria*’s establishment, and for “membership of, or collaboration with, ETA”. Five of the detainees allege that they were subjected to torture while in police custody. The newspaper was also effectively forced into liquidation as its assets were sold off by Court-appointed administrators, meaning that, regardless the outcome of the case, *Euskaldunon Egunkaria* has ceased to exist.

¹ This is permissible under Spanish law.

Defence lawyers acting for the newspaper and for the seven indicted individuals allege that these claims are groundless, and that the evidence presented by the prosecution is circumstantial and inconclusive, and have appealed against the indictment. Their appeal will be heard by the Spanish National Criminal Court on 18 November 2005.

ARTICLE 19 has serious doubts as to whether this action by the Spanish authorities is in conformity with internationally recognised principles relating to freedom of expression and national security.

One of the fundamental principles set out in the ‘Johannesburg Principles’,² which strike a balance between the right to freedom of expression and national security and have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression³ and recommended to States for their consideration by the UN Commission on Human Rights,⁴ is that restrictions on freedom of expression in the name of national security may be imposed only where the speech was intended to incite imminent violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. Principle 6 provides:

[E]xpression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

A similar standard has been embraced by the European Court of Human Rights. In *Karataş v. Turkey*, the applicant had been convicted by the Turkish authorities for publishing poetry that allegedly glorified violence. The Court held that ‘condoning and glorifying terrorism’ as such is a legitimate exercise of the right to freedom of expression; only when glorification constitutes a clear call for violence can it be legitimately proscribed.⁵

According to information available to ARTICLE 19, little evidence has been presented to prove the charges brought by the Prosecution, namely that the newspaper was established in 1990 to facilitate “the support and dissemination of the terrorist ideology and the values and interests” of ETA. More importantly, the definition of this offence fails to satisfy the requirements of the above-mentioned principle, that restrictions on freedom of expression are closely related to the prevention of actual harm to national security, instead of penalising a particular ideology or point of view, however repugnant it may seem.

² *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted October 1995.

³ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

⁴ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

⁵ 8 July 1999, Application No. 23168/94, paras. 52-54.

Report on the Egunkaria case

ARTICLE 19 reminds the Spanish government and judiciary of Spain's responsibility under international law to defend and promote the right of freedom of expression, resulting from its ratification of the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

ARTICLE 19 therefore calls on the Spanish government to provide satisfactory justification for the extreme measures it has taken in respect of *Euskaldunon Egunkaria*. Should it fail to justify the closure in compliance with international standards, the case against the seven individuals indicted should be dismissed, and *Euskaldunon Egunkaria* be allowed to resume publication. Should the indictment be upheld, ARTICLE 19 urges the Spanish authorities to ensure a free and fair trial. Finally, the authorities should fully investigate all allegations of torture made against the police and, if confirmed, bring the responsible to justice.

For more information, please contact Luitgard Hammerer, luitgard@article19.org at +44 20 7278 9292.

IFJ Says Press Freedom is the Victim as Police Close Basque Language Daily

21/02/2003

The closure of the Basque language newspaper Egunkaria because of alleged links to the separatist terror group ETA is a blow to press freedom in the Basque country of Spain said the International Federation of Journalists today.

The newspaper - the only Spanish daily in the Basque language - has vigorously denied tipping off the terrorist group about police movements which the Interior Ministry says are why 300 Civil Guard police arrested 10 people and closed the newspaper's offices in Andoain.

"When the only Basque language paper is closed like this it casts a shadow over press freedom within the Basque language community," said Aidan White, General Secretary of the IFJ, the world's largest journalists' group. "Journalists on all sides of the community are concerned about the implications for free journalism." A witness said the headquarters of the Basque language newspaper in Bilbao were sealed off with police tape. Witnesses at the newspaper office in Andoain said police were taking computers and other confiscated equipment out of the building. The closure is the latest action in a three-day police sweep in the region, which has led to multiple arrests across the northern Basque country. ETA, which has supporters in the area, is responsible for the deaths of more than 800 people in a bombing and shooting campaign since 1968 to back its demands for an independent Basque state.

The group's main media supporter, the newspaper Egin, was closed down in 1998 but a number of other sympathetic and pro-separatist publications have sprung up in its place. "Egunkaria is seen by many as more independent than other journals which are sympathetic to Basque radicals," said Aidan White, "at the same time there are concerns that this is an all-out assault on the Basque language, one of Europe's oldest."



www.rsf.org

Spain | 20.02.2003

Explanation demanded for closure of Basque newspaper

Reporters Without Borders protested against the closure today of the Basque-language daily Euskaldunon Egunkaria and the arrest of 10 of its journalists and contributors on suspicion of "belonging to or working with the ETA terrorist organisation."

"The necessary and legitimate fight against terrorism must respect the principle of press freedom, which is at the core of any democracy," said Reporters Without Borders secretary-general Robert Ménard in a letter to Spanish justice minister José-Maria Michavila.

"It is hardly the moment to close a newspaper when the courts have not yet ruled on the charges against its arrested journalists. We ask you to explain your decision, which seems hasty in the absence of clear evidence to back up what they are accused of."

A national judge ordered the arrest of the paper's senior staff, including publisher Martxelo Otamendi, and members of its board in Lezo, Bilbao, Andoain, Vitoria and Pamplona. Some branch offices were raided and material seized and those in Andoain, Pamplona and Bilbao were placed under seals.

The Basque separatist daily Egin and the radio station Egin-Irratia were temporarily closed in July 1998 on the orders of Judge Baltasar Garzon as part of a crackdown on ETA funding sources.

Reporters Without Borders defends imprisoned journalists and press freedom throughout the world, as well as the right to inform the public and to be informed, in accordance with Article 19 of the Universal Declaration of Human Rights. Reporters Without borders has nine national sections (in Austria, Belgium, France, Germany, Italy, Spain, Sweden, Switzerland, and the United Kingdom), representatives in Abidjan, Bangkok, Buenos Aires, Istanbul, Montreal, Moscow, New York, Tokyo and Washington and more than a hundred correspondents worldwide.



Spain | 23.07.2003

Closure of Basque newspaper Euskaldunon

Egunkaria extended by six months

Reporters Without Borders today called on the Spanish authorities to allow the Basque-language newspaper Euskaldunon Egunkaria to reopen after a national court judge on 21 July ordered a six-month extension to the "preventive measures" that have kept the newspaper closed since February because the group that publishes it is suspected of "belonging to or cooperating with the terrorist organisation ETA."

"We reiterate our opposition to the closure, even provisional, of the newspaper Euskaldunon Egunkaria as long the courts have not yet reached a decision on the substance of this case," Reporters Without Borders secretary-general Robert Ménard said in letter to Spanish justice minister José-Maria Michavila.

"This measure deprives readers of their right to news," Médard said. Voicing concern about the application of "preventive measures" against a newspaper, Médard said Euskaldunon Egunkaria should be allowed to reopen during the entire judicial proceedings.

On the grounds that the Euskaldunon Egunkaria group pursues the same goals as the separatist group ETA and helps to reinforce its terrorist cells by creating dummy companies, judge Juan del Olmo extended the existing preventive measures consisting of freezing its assets, suspending its activities and closing the premises of Egunkaria SA, Egunkaria Sortzen SL and the newspaper's editorial office.

Police on 20 February arrest 10 Euskaldunon Egunkaria journalists and members of its board, while the judge ordered the newspaper's closure. The next day, the Egunkaria team launched Egunero, a new Basque-language newspaper with "Closed but not silent" as its banner. Two members of the Egunkaria board, Iñaki Uria and Xavier Oleaga, are still in prison.

Report on the Egunkaria case

The Basque daily Egin and the radio station Egin-Irratia were provisionally closed in July 1998 on the orders of investigating judge Baltasar Garzón as part of a crackdown on the networks that finance ETA.

Reporters Without Borders defends imprisoned journalists and press freedom throughout the world, as well as the right to inform the public and to be informed, in accordance with Article 19 of the Universal Declaration of Human Rights. Reporters Without borders has nine national sections (in Austria, Belgium, France, Germany, Italy, Spain, Sweden, Switzerland, and the United Kingdom), representatives in Abidjan, Bangkok, Buenos Aires, Istanbul, Montreal, Moscow, New York, Tokyo and Washington and more than a hundred correspondents worldwide.

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SPAIN: Basque daily closed over alleged ETA links

February 23, 2003—*Euskaldunon Egunkaria*, a Basque daily based in the northern Spanish town of Andoain, was closed by government authorities on Thursday, February 20, because of alleged links to the armed separatist group ETA.

The paper reappeared on newsstands the next day under the new name *Egunkaria*.

Hundreds of Civil Guard police officers raided the offices of *Euskaldunon Egunkaria* and the homes of its senior staff throughout the Basque region of northern Spain last Thursday after a court ordered the paper's closure.

Spanish National Radio 1 reported last week that a report from the Civil Guard concluded that ETA finances the newspaper and uses it to launder money obtained from extortion and kidnapping. Authorities also accuse the newspaper of assisting ETA by issuing coded messages in its pages alerting operatives when police had detained one of their commando groups, The Associated Press reported.

Editor-in-chief Marcelo Otamendi and nine executives of the Egunkaria S.A. company, which publishes the daily, were arrested during the raids on charges of supporting ETA. Police also seized documents and computer equipment and shut down the daily's Web site before boarding up the offices.

The remaining staff published a 16-page edition on Friday under the name *Egunkaria* that covered the previous day's raid. The Basque-language headline read "Closed but not silenced."

"Closing a newspaper is a drastic measure, and it is incumbent that the Spanish government justify its actions by making the evidence against *Euskaldunon Egunkaria* public," said CPJ acting director Joel Simon.

On Saturday, February 22, tens of thousands of protestors, including three ministers from the Basque regional government, marched in the northern city of San Sebastian to oppose the newspaper's closure.

Report on the Egunkaria case

The raid on *Euskaldunon Egunkaria* was part of a recent Spanish government effort to broaden its crack down on Basque separatism. In Andoain, where the newspaper is based, members of ETA allegedly shot and killed a local police chief on February 8, The Associated Press reported.

Background

In the past, Spanish authorities have made similar allegations against other pro-ETA media outlets. The government accused the Basque-language newspaper *Egin* of supporting ETA in 1998 and closed the publication without charging any staff.

But ETA, which has been fighting a 30-year-old campaign for an independent Basque homeland, has targeted journalists and the media in the Basque region. In May 2000, a 62-year-old columnist for the Basque edition of the Madrid daily *El Mundo*, Jose Luis Lopez de Lacalle, was shot four times in the head and stomach in Andoain after criticizing ETA in his columns.



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ESPAÑA:

▶ [IMPRIMIR PÁGINA](#) 

▶ PERIÓDICO VASCO CLAUSURADO

El único diario de España que se publicaba en lengua vasca fue cerrado tras ser acusado de apoyar al grupo separatista armado Euskadi Ta Askatasuna (Tierra Vasca y Libertad, ETA), lo que suscitó voces de inquietud del Committee to Protect Journalists (Comité para la Protección de los Periodistas, CPJ), Reporteros sin Fronteras (RSF) y la Federación Internacional de Periodistas (FIP).

El 20 de febrero, cientos de oficiales de policía se presentaron en la redacción de "Euskaldunon Egunkaria" en Andoain, en el norte de España y arrestaron a 10 altos ejecutivos, entre ellos el editor en jefe Marcelo Otamendi, informa el CPJ. Se decomisaron documentos y computadoras y el sitio Web del periódico fue cerrado. El día siguiente, el periódico reapareció con el nuevo nombre "Egunero" llevando un encabezado en la primera plana que leía "Cerrado, pero no silenciado".

El Gobierno español afirma que el editor de "Euskaldunon Egunkaria" auxilia a la ETA al difundir mensajes codificados en sus páginas para informar al grupo armado de las actividades de la policía y la ETA lo está usando para lavar dinero obtenido mediante la extorsión y el secuestro, dice el CPJ. Sin embargo, CPJ, FIP y RSF dicen que el allanamiento del periódico les parece drástico considerando que el Gobierno aún no ha hecho pública su evidencia.

El 24 de febrero, un juez ordenó la congelación de los activos del periódico y sus 10 ejecutivos arrestados, informa Índice de la Censura.

Recientemente las autoridades han estado intensificando su campaña de medidas enérgicas contra las actividades separatistas vascas. El allanamiento de "Euskaldunon Egunkaria" fue parte de un movimiento policiaco amplio de tres días en el País Vasco, en el norte de España, donde la ETA tiene partidarios, dice la FIP.

Desde que comenzó su campaña en 1968 a favor de un estado vasco separado, la ETA ha sido responsable de la muerte de más de 800 personas, agrega la FIP. Varios periodistas han sido asesinados, entre ellos José Luis López de Lacalle, un columnista del periódico madrileño "El Mundo" quien fue baleado y muerto en mayo de 2000 por criticar a la ETA, señala el CPJ.

Visite estos vínculos:

- CPJ: www.cpj.org

- FIP: www.ifj.org

- RSF: www.rsf.org

Resolution on the Basque Country

The Assembly of Delegates of International PEN, meeting
at its 71st International Congress in Bled, Slovenia, 14th – 21st June 2005,

Recalling the resolution on Spain passed by the 70th Congress held in Tromsø, Norway in September 2004,

Deeply concerned by the fact that there have been no new developments in the sense therein called for in the case of the Basque language daily Egunkaria and its editor-in-chief, Martxelo Otamendi as well as other persons working for the newspaper,

Alarmed by the fact that the special public prosecutor requests sentences totalling up to 449 years in jail for the 17 persons accused in the case against the daily newspaper Egin –the editor-in-chief, Jabier Salutregi, the sub-editor in chief, Teresa Toda, and 15 former members of the Administrative Council of the newspaper- on the same imprecise accusations put forward seven years ago when it was also closed down,

Considering that this first trial, for which there is still no date fixed, may open the way for similar requests in the case of Egunkaria,

Further considering that over the last seven years two dailies, Egin and Egunkaria, a radio station, Egin Irratia, and a monthly magazine, Ardi Beltza, have been closed down by the Spanish authorities on still unproved accusations of being controlled or having links with the Basque group Euskadi ta Askatasuna (ETA),

Report on the Egunkaria case

Fearing these proceedings may have harmed freedom of the press and freedom of expression,

Shares the concern that the links between these media and ETA appear to be tenuous and, in the Egin case, seven years after the closure no new evidence has been put forward by the judicial authorities and no trial has been held in Spain;

Refers to international standards that recommend that trials be held at the shortest period of time possible,

Calls upon the Spanish Government to summon an impartial and international board of inquiry to investigate these cases,

Urges the Spanish Government to stay the proceedings, or, at least, to hasten the Egin and Egunkaria cases, guaranteeing a fair trial and the protection of freedom of the press and of expression.

Declaration of 22 members of the European Parliament

MANIFESTO IN FAVOUR OF SUSPENDING THE CLOSURE OF THE NEWSPAPER "EUSKALDUNON EGUNKARIA" AND OF RESPECT FOR THE RIGHTS OF FREEDOM OF EXPRESSION AND INFORMATION OF BASQUE-SPEAKING CITIZENS.

We are in the middle of the ratification process of the "Treaty establishing a Constitution for Europe". This Treaty, in its second chapter, includes the Charter of Fundamental Rights of the European Union, Article 22 of which says:

- 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
- 2. The freedom and pluralism of the media shall be respected.*

On 13 December 2004, the Government of Spain presented a Memorandum to the European Commission requesting recognition in the European Union of all the official languages of Spain, including Euskera (which is, along with Spanish, the co-official language in the Basque Country) and providing a copy of the Constitutional Treaty in Euskera, while at the same time making a proposal for the official recognition in the European Union of the languages other than Spanish.

In the European context, the scrupulous respect for these principles should form part of the Community heritage, and should lead to the restoration of any right infringed in the area of freedom of expression and information. That is why,

through this statement, we want to express our concern to all the European institutions, starting with the European Parliament, about the closing of the newspaper *Euskaldunon Egunkaria*.

On 20 February 2005 two years will have passed since the closing of the Basque-language newspaper "Euskaldunon Egunkaria", the only daily publication published in this official language in the Basque Country. It is worth remembering that the Basque language is recognised as the language of Basques in Article 6 of the law regulating the powers and institutions of the Basques, the Statute of Autonomy of Gernika. Additionally, the Basic Law on the Normalisation of the Use of the Basque Language, Article 22, "*recognises that all citizens have the right to be informed by the media both in Euskera and in Spanish*".

The closing of the newspaper created a great deal of commotion, social concern and reaction, and even the Petition Commission of the European Parliament resolved to make a petition regarding it.

It must be said that *Euskaldunon Egunkaria* was a newspaper that also formed part of the European network **MIDAS (European Organization of Daily Newspapers in Minority and Regional Languages)**, along with 28 other newspapers published in various regional languages, such as *Dolomiten, Tageszeitung, Primorski (Republic of Italy), El Periódico de Catalunya, Avui, El Punt, Diari de Balears, Segre, Regió 7, El 9 Nou, El Correo Galego, Vilaweb (Spain), Nyan Aland, Tidningen (Aland Islands), Flensborg-avis, Serbske Nowiny (Federal Republic of Germany), Hufvudsatdbladet, Jakobstads Tidning, Vasabladet, Osterbottningen (Finland), La Quotidiana–Die Südostsweitz (Switzerland), La Voce del Popolo (Croacia), Nordschleswiger (Denmark), Lá (Republic of Ireland), HHRF (Hungarian minority of Romania, Slovakia, Serbia, Ukrania); Ujszo (Hungarian minority, Slovakia), Szabadság (Romania). **MIDAS** does important work for the reinforcement of the press in the so-called minority and regional languages, forging professional and technological links among the different types of media operating in various European states.*

Without detriment to the judicial steps that must be taken in this or in any other case, it is clearly noteworthy and paradoxical that the newspaper remains closed, even today, as a "precautionary measure". It is easy to see the harm caused, in a general way, to the fundamental public freedoms of expression and communication, that is, to Basque society as a whole and, with special intensity, to speakers of Euskera and, among them, the readers and subscribers of this newspaper. Also negatively affected are the newspaper's employees and collaborators, and the rights of the shareholders, and economic damage has been caused to the suppliers and creditors of the newspaper and associated companies, demonstrating that the closure affects fundamental rights.

Special mention should go to the harm caused to the persons on trial, important personalities in the world of Basque culture, who have received support and solidarity from the widest possible spectrum of political, social and institutional figures in the Basque Country.

Report on the Egunkaria case

In these times in which Europe is attempting to open new spaces for justice, prosperity, freedom and security, and in which the very text of the Treaty establishing a European Constitution emphasises the rights of citizens in a clear way, we believe it necessary to call for the reconsideration of such closure and for the restoration of the rights of the affected Basque speakers.

European Parliament

Strasbourg, 22 February 2005.

Signed:

Alliance of Liberals and Democrats for Europe

Graham Watson -Leader of the ALDE Group- (UK), Josu Ortuondo (Basque Country), Ignasi Guardans (Catalonia), Lapo Pistelli (Italy), Henrik Lax (Finland), Jules Maaten (Netherlands), Sarah Ludford (UK), Cecilia Malmstrom (Sweden), Elspeth Attwooll (UK), Giulietto Chiesa (Italy)

European Free Alliance

Jill Evans (Wales), Ian Hudghton (Scotland), Alyn Smith (Scotland), Tatjana Zdanoka (Latvia), Bernat Joan i Mari (Catalonia)

Green Group

Gerard Onesta -Vice-president of the European Parliament- (France), Monica Frassoni (Italy), Alain Lipietz (France), Raul Romera (Catalonia), Bart Staes (Belgium)

Independence and Democracy Group

Jens-Peter Bonde -Chairman of Independence/Democracy Group- (Denmark)

Without any Group

Karin Resetarits (Austria)