ETHNOGRAPHIES OF CONTENTIOUS CRIMINALIZATION

Expansion, Ambivalence, Marginalization

Carolijn Terwindt

Submitted in partial fulfillment of the Requirements for the degree of Doctor of the Science of Law at Columbia Law School Columbia University 2012
Copyright 2012
Carolijn Terwindt
All rights reserved
Ethnographies of Contentious Criminalization

Carolijn Terwindt

This dissertation addresses the challenge of liberal democracies to deal with fundamental conflicts in society about, for example, political representation and natural resources, and the subsequent transfer of such conflicts into the criminal justice arena when actors fail to deal with competing demands in the political arena. In an exploration of tensions between law and justice, and the competing conceptions of “crime” and “harm,” this work analyzes criminalization processes in three contentious episodes: the Chilean-Mapuche territorial conflict, the Spanish-Basque separatist conflict, and the eco-conflict in the United States. Although prosecutors invariably asserted their independence and the democratic mandate to “simply” enforce the law, this dissertation describes the gradual politicization of criminal proceedings as opposing actors implicated in the political struggle move into the criminal justice arena and make it subject to and the space of claim-making. This study not only challenges the belief that criminal law can be applied in an independent and neutral manner. Taking a constructivist perspective on the prosecutorial narrative and analyzing how mobilization and discursive action of “victims” and “prisoner supporters” aim to push or challenge criminal prosecutions, it describes in detail the ways in which such conflictive and interpretive processes fundamentally alter the logic and development of criminal prosecutions.
If they apply huinca [pejorative word for Chilean] law, there will be Mapuche justice. This phrase is used frequently by radical Mapuche activists (see, for example, Presxs a la Kalle 2009).
# Table of Contents

**Acknowledgments** ................................................................................................................................................................. vi

**Introduction** ........................................................................................................................................................................ 1

**II. Law, Politics, and Legitimacy in Liberal Democracies** .......................................................... 42

1. Challenge to liberal democracy .......................................................................................................................... 43
2. Criminal prosecutions as social constructions of reality ........................................................................... 53
3. Mobilization and discursive action in the criminal justice arena ......................................................... 73
4. Liberal legalism and beyond ......................................................................................................................... 91
5. Conclusion ..................................................................................................................................................... 108

**II. Basque Separatists Challenge the Spanish State** ............................................................... 110

1. Introduction .......................................................................................................................................................... 111
2. Challenge to the liberal democracy ........................................................................................................... 113
3. Mobilization and discursive action in the criminal justice arena ....................................................... 148
4. Overview ....................................................................................................................................................... 191

**III. Expansive Criminalization in Spain** ................................................................. 193

1. First classification: Conflict or terrorism? ................................................................................................. 198
2. Armed attacks and the interpretive battle about the identity of victims ..................................... 205
3. Changing the image: From “pistoleros” to the ETA network .............................................................. 208
4. The end of ETA: Follow the money and squeeze recruitment ......................................................... 233
5. Street violence: Shift from public disorder to terrorism ................................................................. 238
6. Public support for ETA militants in speech and symbolic expressions ...................... 248
7. Conclusion ....................................................................................................................... 269

V. Mapuche Activists Demand Land Reform in Chile ...................................................... 275

1. Introduction .................................................................................................................... 283
2. Challenge to the liberal democracy ............................................................................. 285
3. Mobilization and discursive action in the criminal justice arena .............................. 339
4. Overview ......................................................................................................................... 388

IV. Ambivalent Criminalization in Chile ........................................................................ 389

1. First classification: Re-contextualization in the “Mapuche conflict” ......................... 400
2. The defendants: “They are not the Mapuche people!” .............................................. 404
3. “The” victims ................................................................................................................ 423
4. Shift from symbolic land occupations to criminal organization ................................ 431
5. What is land for, who owns it, and who is the usurper? ............................................ 439
6. Lumaco: Broadening the legal interest to “state security” ........................................ 456
7. What is a plantation and what is at stake when one is burnt down? ......................... 461
8. From ordinary crimes to terrorism ............................................................................. 477
9. Discursive shift at the Inter-American Commission of Human Rights .................... 502
10. Conclusion: the paradox of simultaneous oppression and impunity ....................... 507

VI. Eco-Radicals Claim Defense of Animals and the Earth in the United States .......... 520

1. Introduction: Who are the real eco-terrorists? ............................................................ 520
2. Challenge to the liberal democracy ............................................................................. 526
3. Mobilization and discursive action in the criminal justice arena ........................................ 588

4. Overview ................................................................................................................................................. 629

VII. Marginalizing Criminalization in the United States ............................................................... 631

1. First classification: Dying earth and animals or eco-terrorism? ........................................ 636

2. Identity politics on trial: The identity of defendants ............................................................. 642

3. Changing the image: From sabotage and vandalism to “eco-terrorism” ....................... 650

4. Future danger instead of past harm: The shift towards proactive prosecution .......... 669

5. Prosecution of “aboveground” activities: Distinguishing the “political” from the “criminal” ............................................................................................................................................ 676

6. Penal response to the SHAC model, or when does the offensive, obnoxious or threatening become terrorism? ........................................................................................................................... 695

7. Conclusion ............................................................................................................................................. 743

Conclusion: A Critical Analysis of the Production of Criminal Justice ................................... 750

Bibliography .............................................................................................................................................. 773

1. General secondary sources .............................................................................................................. 773

2. Spain ................................................................................................................................................ 782

3. Chile ................................................................................................................................................. 796

4. United States .................................................................................................................................... 815

Appendices ............................................................................................................................................... 832

Appendix – Methodology .................................................................................................................. 832

1. Choosing relevant criminal prosecutions .................................................................................... 833
2. The construction of competing narratives ................................................................. 846
3. Data collection in Spain, Chile, and the United States ............................................. 854

Appendix – Abbreviations and acronyms ..................................................................... 880

Appendix – Schematic illustration of indicators of the modalities in the prosecutorial
narrative ............................................................................................................................. 883

Appendix – Visual representation of contentious criminalization ............................. 888

Appendix – Overview of interviews ............................................................................. 889

Appendix – Criminal cases overview ........................................................................... 901

1. Selection of criminal cases in the Spanish-Basque separatist conflict ................. 902
2. Selection of criminal cases in the Chilean-Mapuche territorial conflict ............... 909
3. Selection of criminal cases in the United States eco-conflict ............................... 923
List of figures and tables

Figure 1 Map of the territory of the seven provinces of Euskal Herria in Spain and France ..... 115
Figure 2 Map of Spain ................................................................................................................. 115
Figure 3 Map of Chile .................................................................................................................. 276
Figure 4 Map of Territorio Mapuche, Wallmapu ................................................................. 277

Table 1 Mortal victims of ETA, adapted from data Spanish Ministry of Internal Affairs ........... 120
Table 2 Statistics from a Senate report, restricted to incidents in the summer months January–March, when most actions take place ........................................................................................ 300
Table 3 Brief chronological development of radicalization in the Mapuche movement........... 303
Table 4 Four cases based on the Anti-Terrorism Law before new prosecutions on the basis of the Anti-Terrorism Law started end 2008 .................................................................................. 481
Table 5 Cases brought to the Inter-American Court of Human Rights (IACHR) ......................... 503
Table 6 Total illegal incidents reported by Foundation for Biomedical Research 1981–2005... 600
Table 7 Trials in the case “Lonkos of Traiguén” against Pascual Pichún, Aniceto Norín, and Patricia Troncoso. ................................................................. 915
Acknowledgments

Research involving fieldwork inevitably becomes deeply personal. I did not only spend months in the countries in which the analyzed criminal prosecutions took place, I also spent many hours with the people that were involved in those prosecutions as defendants, victims, prosecutors, lawyers, or supporters for one of the parties. My deepest gratitude, therefore, goes to the people that were willing to answer my questions and share their experiences with me. Those conversations were the most exciting and inspiring part of my doctorate.

Besides my interviewees in each of the countries I have become indebted to many other people who supported my research. I would like to thank the friends that offered me a place to stay on one of my fieldwork related travels to prisons, trials, or interviews. Special thanks go to those who became local sparring partners in my thinking about my research and the related empirical questions and difficulties. For those inspiring and rich discussions I would particularly like to thank Myka, Iñi, and Jaime.

I would not have been able to do this research without a supportive dissertation committee. I thank Professor Jeffrey Fagan for offering me this unique opportunity to conduct research in an independent way. I am grateful for the freedom and unconditional support that he offered me as my research took me not only the West Coast of the United States, but also to Spain, Chile, and eventually Germany. I was lucky enough to find in him a supervisor who was willing to take on a student with a different background and a project that was different from the topics
usually chosen and the research methods generally employed in JSD theses. I would also like to thank Professor Daniel Richman as he was always willing and available to read my work and listen to my doubts and questions. I thank him for creating this warm environment and giving me the feeling that I could indeed always ask him for help. Further appreciation goes to Professor Elizabeth Povinelli whose enthusiasm for my research was motivational and gave me confidence. I also thank her for pointing me into the direction of books and debates that I might never have taken up without her guidance. As she was always a step ahead of me I thank her for her patience and I am happy to have had her open these intellectual doors for me.

I felt at home at the Contentious Politics Workshop led initially by the late Charles Tilly – Chuck for all that came to know him personally – and later by Jim Jasper and John Krinsky at CUNY. Apart from learning how to take a critical look at work of others as well as my own, the workshop allowed me to meet fellow students engaged in qualitative case studies and I benefited a lot from thought-provoking conversations with Christian Davenport and Sun-Chul Kim. Not surprisingly, I am also deeply indebted to Chuck for recommending me some of the books that have become fundamental to my theoretical framework. I learned the most, however, from Chuck’s vision of and dedication to the collective scientific enterprise.

While I was partially able to fund my doctorate through teaching during Summer Programs at the International School for Humanities and Social Sciences in Amsterdam, research assistantships at Columbia Law School, and the research opportunity offered to me by Chris van der Borgh at the Center for Conflict Studies in Utrecht, I would not have been able to do much
of this research without the financial support that I received in the form of scholarships. I am thankful for the faith that the funding committees expressed in me and for their vote of confidence for my proposed investigation. I would like to thank the Dutch Dr. Hendrik Muller Vaderlandsch fonds, Huygens Scholarships Talent Programme and the Prins Bernhard Cultuurfonds for enabling my participation in the JSD program at Columbia Law School in New York. In addition, I thank Columbia Law School for the Finkelstein Fellowship which took care of my tuition. Further, the Marie Curie Fellowship from HUMCRICON permitted my research stay at Deusto University in Bilbao and a fellowship from the International Institute for the Sociology of Law in Oñati enabled a return research visit to the Basque Country. For the last stages of my dissertation, I thank the DAAD for providing the scholarship which brought me to Max Planck Institute for Comparative and International Criminal Law in Freiburg in Germany. This gave me the opportunity to become part of the wonderful International Research School for Retaliation, Mediation, and Punishment. I thank Professor Hans-Jörg Albrecht for allowing me to participate fully in all that the research school has to offer to its doctoral students. Max Planck funding enabled me to devote time to writing up my fieldwork, while providing a warm environment and motivating feedback. I am also indebted to the Max Planck Institute for a proofread of the final manuscript.

Finally I would like to thank all of those that took the time to read parts of my dissertation and provide me with their feedback. I benefited greatly from the comments and criticisms that I received and particularly thank Rubén Cañadas, Suzanne Nievaart, Wouter Veraart, and participants of the Contentious Politics workshop and the REMEP doctoral workshop for
reading several of my draft chapters. Many thanks I owe to Jolle Demmers in the Netherlands, not only for reading and commenting on draft chapters, but especially for supporting me at crucial stages in this project, during my application for doctoral programs in the United States, my search for funding, and during the writing of my dissertation. Her belief in my ability to do this was very important to me.

Carolijn
Dedicated to Erick von Jentschyk †
Introduction

“[Judge] Learned Hand [...] feared a lawsuit more than death or taxes. Criminal cases are the most frightening of all, and they are also the most fascinating for the public” (Dworkin 1986:1).

October 1997, United States: six raids in the Midwest just before the pelting season: between 8,000 and 12,000 minks released, two fur farms out of business. Opposing interpretations either emphasize the tragedy of enormous economic losses for these farming families or joy that many animals escaped death for profit.

October 1999, Chile: a forestry plantation is set on fire in the south of Chile. The plantation belongs to a large forestry company that currently owns 391,000 ha of plantations, while an adjacent indigenous Mapuche community claims historical rights to the land. Opposing interpretations either indicate anger about the economic loss for the forestry company or happiness to see the invasion of imported water-consuming trees turned into ashes.

March 1992, Spain: three Molotov cocktails set the offices of the national train company in Bilbao on fire. Opposing interpretations either claim this was terrorism and related to the

---

2 Learned Hand was a judge in the United States widely admired for his legal writing
armed organization ETA or view it as the angry expression of youths because of police violence
during a demonstration earlier that day.

Each of these incidents formed the material for “frightening” and “fascinating” criminal
prosecutions. Peter Young, who released the minks, spent two years in jail. José Nain, who
always denied responsibility for the arson at the plantation, was convicted to five years and one
day in prison. At the same time, the Mapuche community where he was living ultimately
received the disputed land. Julen Larrinaga, member of a left-nationalist Basque youth group,
was convicted under terrorism laws to ten years in prison. Each of these events was the subject
of a struggle of interpretation, and the criminal proceedings were as much a site for this
struggle as a significant contributor to it. The story that the prosecutor chooses to tell in the
courtroom reinforces one version of the truth about the political contention and
institutionalizes this truth in the form of legal documents if the judges ratify that interpretation.
Further, the story chosen by the prosecutor blames some as “perpetrators,” whereas others are
labeled “victims,” thus enabling the punishment and incarceration of some individuals and not
of others.

Each of the events took place in the context of “streams of contention,” a concept that I borrow
from Tilly (2007:211) which refers to “connected moments of collective claim making that
observers single out for explanation.” Within these streams of contention, I am concerned with
a process that I call contentious criminalization. This name is a playful variation on the
terminology coined by Charles Tilly (in collaboration with Sid Tarrow and Doug McAdam) that is visible in concepts like contentious politics, contentious episodes and contentious performances. Other scholars have adopted and made variations on this theme, such as Auyero in his book *Contentious Lives* (2003). While Tilly and his colleagues have not explicitly entered the terrain of criminal justice and the specific processes and mechanisms pertaining to it, I draw upon some of their concepts and insights to examine this arena.

I have selected three “streams of contention” as the context for my inquiry about processes of criminalization. In the US, eco-activists are challenging the current use of animals and the Earth for human purposes and therefore demand the closure of animal testing companies, the end of experimentation with animals, defense of the earth against infrastructural projects, and restrictions on logging companies. In Chile, Mapuche activists are reclaiming the lands that they lost when they were relocated to reservations in 1881. In Spain, Basque left-nationalists are fighting for an independent and socialist Basque Country. For analytical purposes, these streams of contention can be broken down into separate contentious episodes (Tilly 2007:213). Thus, whereas the Chilean-Mapuche territorial conflict is a “stream of contention” that has been running ever since the Chilean army fought against Mapuche communities and subsequently moved them to reservations, I have chosen to limit my inquiry to the “contentious episode” that began in 1990 when a democratic government was installed after the referendum that rejected the Pinochet regime. In each of these ongoing conflicts many
incidents have occurred that came to the attention of the government with a claim to criminal investigation and prosecution.

In this study, I am concerned with the challenges and difficulties the criminal justice system faces in dealing with these conflicts and any harm they cause. The general inadequacy of criminal justice systems to solve conflicts has been pointed out by many scholars, who point out, for example, the one-sided focus on perpetrators and the frequent exclusion of victims from criminal justice proceedings. Further, crimes often have their origin in social problems like unemployment or psychological disorders. Locking up perpetrators does not address these underlying factors. Some critics go so far as to abolish the notion of punishment (e.g., Hulsman 1986). Without disputing the need to punish or deal coercively with those that use “violence”³ to achieve some moral cause, I want to explore how this fundamental problem of western democracies and their criminal justice systems plays out in the setting of actual conflicts.

³ The concept “violence” is itself wrought with interpretation and the attribution of malicious intent. The dentist that hurts you with the intention to cure you is not generally thought of as violent. Indeed, it is one of my objectives in this book to trace the different definitions of protest activity and the development in which these contentious and often disruptive actions become increasingly defined as illegitimate and violent. Indeed, the very meaning of “violence” is contested, not only in its application but also in theory, as some advocate the position that violence can only be inflicted on human beings (or animals), whereas others include the destruction of property in definitions of violence (I refer interested readers to a discussion on this topic by Morreall, 2002). Violence is often defined as intentionally causing harm to life or property. This presupposes that the definition of “harm” is unproblematic, which however, as we will see in the various cases, is equally contested. In my writing it would be good to use quotation marks every time that I use the concept “violence” to indicate that its use inevitably refers to the labeling as violence by particular actors. I have, however, chosen not to do so, and remain with the explanation in this footnote.
Criticisms of the rule of law

There is a need for new thinking about the nature of criminal prosecutions in relation to political struggles. Political protest can range from harmless social movement activity to deadly attacks. The distinctions between actions on this continuum between these two poles are not only inevitably blurred, but also heavily contested, as is illustrated in the brief examples above. The translation of such actions into “crimes” is thus inherently contentious. The framework of the rule of law claims to be unaffected by this contestation as it sticks to the parameters of due process and the strict application of the letter of the law. A de-contextualized criminal justice approach simply emphasizes obedience to the law and relegates political claims to the political arena.

The rule of law framework is, however, subject to challenges from different sides. Two distinct criticisms of the rule of law were dominant in my country studies and are a reflection of voices from all over the world. A first criticism emphasizes that the rule of law obliges the state to protect victims. This is a demand for security. The 9/11 attacks in New York have led people to question the suitability of criminal prosecutions to deal with such threats. Many countries have enabled stronger incursions on the rights of suspects, leading to longer periods of preventive

---

4 In this book, I will use the terms “rule of law” and “rechtsstaat” interchangeably. While they largely refer to the same concept, they originate in different legal traditions. This has been discussed, for example, by Anne Marie Bos, Geregeld recht. Een rechtspositivistische analyse van de rechtsstaat, Diss. UvA, Nijmegen 2001, pp. 27–28 (cited in: Veraart 2005:22, footnote 59). I use rechtsstaat as the German concept without translation, just like the translator of Habermas chose to do in Between facts and norms (1998:xxxv).

Veraart points out that any conception of the rechtsstaat always comes as not just a description, but also a set of requirements vis-à-vis the government (2005:22, footnote 60). Similarly, Abel asserts that “[l]aw is intrinsically normative; its prescriptions embody societal ideals” (2010:19). In chapter 1 I return more fully to my conceptualization of the rechtsstaat.
detention and broader investigative authorities for police and intelligence agencies. While this perspective addresses the fact that the rule of law is not capable of creating a harm-free society, it ignores the rights of defendants or criticizes such rights as an “obstacle” in the fight against terrorism. Advocates of harsher treatment of terrorist suspects often seem to take for granted that the suspects are factually guilty. The lamentable death of the Brazilian Jean Charles de Menezes in 2005 in the London subway after the police decided to shoot to kill is only one extreme example of the tragedies that can arise when rule of law guarantees are loosened. Further, the focus on preventing supposed terrorist attacks can overshadow or thwart efforts to address and solve underlying societal problems.

A second criticism claims that social protest is “criminalized,” which points to the numerous incidents in which states use the rule of law to repress political opponents (e.g., CIDSE 2009; OCMAL 2009). Mugabe’s labeling of humanitarian food assistance as “terrorism” is just one example of the potential abuses of anti-terrorism laws (Cortright 2008:9). Social and political activists are indeed hampered in their work when they are the target of various prosecutions and investigations, especially when they face long preventive detentions and disproportional charges. Compliance with due process requirements and eventual acquittals may be hailed as “justice” within the logic of the rule of law, but they do not take away this burden on social movements. People accusing the government of “perverse” criminalization, however, often fail

---

to address or recognize the existence or threat of actual harm due to law breaking. In later chapters, we will observe that protesters sometimes ignore or dismiss the grievances of victims of sabotage, vandalism or even murder, which is felt to be especially disparaging when those victims are unrelated to the political demands.

While these criticisms thus do address some of the fundamental flaws or downsides of the rule of law framework of criminal prosecutions, they are problematic in that they tend to simplify what is at stake and fail to take important concerns or complexities into account.

In this research I deal exclusively with episodes where criminal prosecutions are the chosen framework. It is important to note, however, that approaches that dismiss prosecution and opt, for example, for amnesty do not escape the blurring and defining of crime and politics. An example of this is the frustration of South Africans who were robbed or whose relatives were killed, while the Truth and Reconciliation Commission gave the perpetrators amnesty because the crimes were considered part of a political struggle.

Despite these challenges, prosecutors stick to the rule of law framework when they assert their independence and the mandate to “simply” enforce the law. In this dissertation I will focus on these challenges to the rule of law as I describe the gradual politicization of the criminal justice arena that takes place when opposing actors implicated in the political struggle move into the

---

6 For the use of the term “perverse” criminalization, see van der Borgh and Terwindt (forthcoming).
criminal justice arena and make it subject to and a space for claim-making. I understand “ politicization” as bringing issues into the arena of “the political” and making it subject to contestation (Mouffe 1993). Thus, the political is opposed to the “pre-political,” which is assumed and taken for granted. As we will see, the prosecutorial narrative is not immune to contesting claims and discourses, and over time engages with them, for example explicitly rejecting one discourse and adopting (parts of) another discourse, sometimes leading to a radical discursive shift. The fact that I view the choices and representation of the prosecutor as a narrative does not mean that it is not the truth. The point is that one can represent any event in multiple truthful ways by selecting certain elements and ignoring others. Specifically, the prosecutor can be observed to depart from a de-contextualized and de-politicized representation in favor of a re-contextualization of the events subject to criminalization. While the re-contextualization serves to expand criminal liability and thus to respond to victim demands for justice and order, it also propels a new basis for continued contestation.

I have reached this conclusion on the basis of in-depth research into the processes of criminalization in the Chilean-Mapuche territorial conflict, the Spanish-Basque separatist conflict, and the conflict about the use of animals and the earth in the U.S. (henceforth eco-conflict). Each of these episodes represents a liberal democracy afflicted by political struggle where political and legal collective actions are accompanied by illegal and underground activity ostensibly aiming to achieve political demands by extra-legal means. Each of the conflicts

7 I return to the conceptualization of the prosecutorial narrative as a social construction of reality in Chapter 1.
represents a threat to the government that is not existential, but also not insignificant. The
cases tell us how prosecutors respond to that challenge.

The question

What do criminal prosecutions in streams of contention look like? Such contention can become
a problem of national proportions and concern, such as the Basque conflict in Spain or the
Mapuche conflict in Chile. Newspapers frequently or even daily report on events related to the
conflict, and descriptions of the occurrence and the impact of violent or illegal events regularly
fill the pages. While prosecutors prepare the cases against the suspected perpetrators of those
crimes, they are aware of the context within which the crime and the trial take place. As a
Chilean prosecutor put it, he knows that a Mapuche activist burning down a plantation is not
the same as a random pyromaniac. He claims, however, that this does not in any way affect his
job (Interview C-12). Of course, prosecutors are not supposed to get involved in politics.
According to the logic of liberal legalism they are not responsible for solving political conflicts. 8
Their task is just to execute the law and prosecute the crimes as they are defined in the criminal
law. The setting or context of those crimes should not affect their work.

However, setting and context do matter. In three country studies we will learn whether, when,
and how prosecutors take the context of a crime into account as they are investigating and
prosecuting crimes. The results of my research clearly show that context is deemed important

8 “Liberal legalism” is the ideology which places criminal proceedings firmly within the tradition of the rule of law
and cherishes liberal notions such as individual responsibility and formal equality. In chapter 1 I will come back to
this concept.
and is not always ignored and excluded from prosecutorial narratives. We will see, moreover, how the interpretation of the context affects the definition of the crime and the identification and prosecution of perpetrators.

These difficulties are not the exclusive terrain of criminal prosecutions in contentious episodes. One can think of other relevant areas, such as the prosecution of gang violence or the prosecution of politically prominent persons. One could even argue that every criminal case might display some of the dynamics that I outline here. Often prosecutors mentioned in their interviews that the “conflict” cases were not so different from ordinary cases. Indeed, I do not claim that the processes described here are particularly unique. I do argue that they may be more visible and sustained over a longer period of time, creating feedback loops that should be taken into account when trying to understand both the conflict dynamic and the nature of the criminal prosecutions.

This question (How are criminal prosecutions conducted in a situation of conflict?) can be situated in the longstanding academic debate about the relation between law and politics. Put simply, some have argued that law is separate from politics, whereas others have asserted that there is no separation at all, i.e., that law is just another way of doing politics and securing the interests of the powerful. Many academics have tried to reconcile these opposing positions by formulating ways in which law and politics are separate but interdependent (Abel and Marsh 1994). My project should be placed within this tradition of Law and Society research, which
views law as a socially embedded phenomenon and “is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking.” The separation between law and politics, however, is more than just one academic theory among many; it is the foundational fiction and normative ideal upon which lawyers work and have constructed the legal system (this is described, for example, by Nonet and Selznick 1978). The rule of law in this sense is and has to be opposed to the rule by men.

Liberalism advocates a specific way of dealing with conflicts. Western criminal justice systems are based in a liberal ideology. It asserts formal equality of autonomous individuals and a separation between fair proceedings and substantive justice. Political issues are excluded from criminal justice questions as political goals are to be dealt with by dialogue and political lobbying. This system separates ends and means, leaving ends entirely free while prosecuting all illegal means. Thus, a US prosecutor insisted in the courtroom that “this [case] is not about animal rights.” Indeed, he even acknowledged privately that the defendants’ allegations of animal abuse in the animal testing company may be true. “But then they have to go to Congress,” he noted, confirming his commitment to the formal proceedings (Interview US-13).

In each of the episodes, we can observe the prosecutors sticking to this formal rhetoric. This separates the defendants on trial from the larger group that may share their ideology and material grievances. “Real Mapuches are peaceful,” argued the Chilean prosecutor (Interview C-10). “Peaceful animal rights activists have nothing to fear for,” asserted the US prosecutor.

---

Of course, the separation between defendants and the rest of the movement is a slightly bigger challenge once there are 62 defendants, such as in one of the macro-trials in Spain, or when entire organizations in which many Basque volunteers are active are judged to be terrorist organizations.

Prosecutors cannot all be lumped in one category. It is not my concern here, however, to focus on the dynamics within prosecutorial offices or engage with the personal considerations of individual prosecutors. Rather than placing attention on the person of prosecutors, I have studied the act of criminal prosecutions and the decisions and arguments voiced by prosecutors as representatives of the state and the rule of law. The state is not a monolithic enterprise either. Prosecutors may act in contradiction to other state actors, such as judges or politicians. Migdal suggests conceptualizing the state as a “field of power marked by the use and threat of violence” and shaped by a combination of (1) an image of a “coherent, controlling organization in a territory, which is a representation of the people bounded by that territory,” and (2) the “actual practices of its multiple parts” (2001:16). I study the practices of prosecutors as state actors that draw upon, defend or reproduce the image of the state.

Here it is important that while there are personal differences between individual prosecutors and while approaches in prosecutions have changed over time, all prosecutors have publicly maintained their commitment to the basic tenets of the rule of law. This does not mean that prosecutors do not reflect on these cases or are not aware of the fact that political factors or
motives are involved. On the contrary, all prosecutors were fully aware that politics played a role. This is precisely why it is noteworthy that they remained committed to their task to extract the “criminal” from the “political” and engage in this act of boundary drawing. It is this boundary drawing and the multiple and changing ways in which it is done, interpreted, and contested that is the object of this study.

Criminal law is understood to be conceived ideologically for a society in consensus, with shared crime definitions and a clear-cut public interest. In addition, the criminal law assumes an abstract individual as the agent of equal rights and responsibilities. Under those circumstances, the formal rationality of criminal law (separating fair proceedings from substantive justice) would be the fair and legitimate way to deal with “crimes” regardless of the substantive nature of problems. These assumptions of consensus and abstract individualism are challenged during contentious episodes in which a society becomes polarized and actors engage in collective action to contest the status quo.

This dissertation is about the fine line that prosecutors tread as they stay away from politics but take into account the context in which crimes occur. This balancing act will be studied in an analysis of the “battle of interpretation” that is part of any criminal trial, but in situations of conflict the battle of interpretation or “meta-conflict” has a significance and participating voices that go beyond the particular trial at hand. The meta-conflict – the interpretive battle about the

---

10 This does not mean that in any of the countries the criminal codes or the justice system were devised in a society in consensus. It refers to the Enlightenment ideology which inspired the current principles of criminal law. I will come back to this point in Chapter 1.
conflict, its nature and causes and the narrative of the unfolding of its events (Horowitz 1991:2) – can be viewed as an ongoing debate in which different frameworks and definitions of the situation compete for dominance.

One of the central issues in this debate, for example, has to do with the relevant identities of groups and subjects. Prosecutors can choose to emphasize or ignore certain identities or impose others. One US prosecutor effectively ignored the environmentalist credentials and motives of a defendant, while emphasizing his anarchist affiliations, thus setting the criminal case clearly in the center of a dangerous tradition of anarchist extremism and distancing it from mainstream environmentalism. In Chile, Mapuche activists adhering to a nationalist ideology conceive of the conflict in terms of the Chilean state, which rejects the Mapuche people as a nation, instead imposing upon them the forced status of “Chilean” citizen or at best “indigenous” people. “They want us to be their indigenous people,” said a young Mapuche leader, a position which he regards as subordinate instead of equal (Interview C-68). When a Chilean prosecutor announced at the start of the trial that he was prosecuting the defendants “as Chileans” and accused the defendants of “abusing the Mapuche identity,” he was participating in the meta-conflict, responding to certain arguments and definitions while proposing his own (Case Lonkos of Traiguén). Prosecutors are not outside of the meta-conflict. Their interpretations are constructed in the context of this battle, and in turn they contribute to the battle. We can observe this interaction most clearly when prosecutors make a discursive shift.
Contentious criminalization

I present the results of my research into the process of contentious criminalization in three highly distinct contexts of political struggle. Contentious criminalization is the process in which criminal prosecutions in a contentious episode transform into a site of contestation. This contestation may lead to significant discursive shifts in the prosecutorial narrative, with real penal consequences. Despite the differences between the conflicts, their actors, and the political issues at stake, there are striking commonalities that come into view once we focus our attention on the criminal justice system and the contested way it has processed events related to the political struggle while law enforcers claim continued commitment to democracy and the rule of law. In each country study one can observe the following features and mechanisms:

1. Political opponents all perceive the criminal justice system to be unjust or failing in some respect. Critics on both sides argue that the system is failing to provide sufficient protection, is motivated by political considerations, is meting out disproportionally high sentences or sentences that are considered to be too low, or is failing to prosecute crimes.¹¹

¹¹ One can be forgiven for assuming that when both sides of a conflict are dissatisfied with the performance of the criminal justice system and its proceedings, the system is actually doing quite alright. I would argue that the opposite is true. It is failing both sides, which is not the same as seeking a correct middle ground. Demands and images of justice on both sides regarding criminal justice are not necessarily mutually exclusive. For example, heightened protection of potential victims is not necessarily a trade off with correct due process for a defendant. Criminal justice proceedings can very well be both needlessly oppressive and ineffective in satisfying victims.
2. Different actors mobilize support to make claims regarding general criminal policy and specific prosecutions, employing the identifications relevant to the criminal justice logic: “victim” mobilization and “prisoner” support mobilization.

3. Throughout the contentious episode, the prosecutorial narrative moves from a de-contextualized representation of the events towards a re-contextualized representation of those events and the implicated actors.

4. The re-contextualized representation generally serves to expand criminal liability, either by criminalizing more kinds of conduct or by increasing the severity of and thus the sentence for already criminalized conduct.

5. The re-contextualized representation becomes a new basis for continued contestation and mobilization.

These loops of contestation and mobilization may even lead to violent escalation, but that is not necessarily so.\textsuperscript{12} Further inquiry into the relation between these phenomena, however, falls outside the scope of my research, as I am focusing on the events within the criminal justice arena.

I conducted in-depth case studies of a process that I have called \textit{contentious criminalization}. This occurs within the context of contentious episodes when the prosecutorial narrative is

\textsuperscript{12} Indeed, my observation of the Chilean case had led me to speculate that this was a probable outcome. However, the Basque case, for example, shows that violent escalation is not necessarily the consequence of contentious criminalization. While there are multiple connections between these two phenomena, it is impossible to draw any straightforward conclusion about their causal relation.
highly contested. In three distinct episodes, I explored the alternative contesting narratives and traced the development of the prosecutorial narrative. In the analysis of the prosecutorial narrative I asked questions like the following: Which charge has been chosen? Are the defendants prosecuted individually or as a group? What is chosen as the defining element of the group? What motive, if any, is discussed? How is the defendant depicted? How is the criminal act framed? Which legal terminology is chosen to frame the criminal act? Which available interpretations in society does the prosecutor draw on to construct this reality? Which interpretations are ignored? I have documented “discursive shifts” in the development of criminal prosecutions. A discursive shift constitutes and is constituted by legal decisions, for example by changing the affected legal interest from the protection of “property” to the protection of the “democracy.” I draw upon some of the insights developed in the field of discourse analysis and semiotics to study the construction of meaning in the prosecutorial narrative.

In everyday language, criminalization often has a meaning that is almost interchangeable with “demonization” or “stigmatization,” thus referring to a broad process in which actors or actions are labeled and treated as “criminal” in political speech, the media, in confrontations with the police, and in general communication in public places, including the courtroom. In this analysis I take a more technical approach to the process of criminalization, which I view as the legal steps taken by the state to define actions as criminal and prosecute specific actions as crimes. In this process the state draws the boundaries between the political and the criminal justice arena.
This juridical process can of course have demonizing or stigmatizing effects or, as we will see at various points in the country studies, be preceded by conscious efforts to “criminally stigmatize” specific groups, individuals or actions.\textsuperscript{13} This process of boundary-drawing can be fundamentally contested. For analytical purposes, I find it important to distinguish between these very different kinds of criminalization and instead to reserve the term “criminalization” for the judicial trajectory. Indeed, I think that part of the problem in many of the current analyses of “criminalization” is the conflation of various elements of the use of state force, the application of criminal law, and public speech. While these elements are indeed often related, it is unhelpful to lump them together in one term as this impedes our ability to question the exact relations between them and distinguish between the different actors involved at different stages.

I describe three ethnographies of contentious criminalization. I say “ethnographies” as I will emphasize the on-the-ground perspectives of the different actors as they participate in the process of labeling actions, defining crimes, and mobilizing support in favor of or against the government response. My description of the criminalization process is often based on detailed material on specific criminal cases that were in progress at the time of my fieldwork, where I had the opportunity to observe and sit in the courtroom as well as interview each of the people involved in the case from their own position and vantage-point. My research is a “multi-sited ethnography” not only because of my three country studies, but also because of my interest in

\textsuperscript{13} For a similar usage of the term “criminal stigmatization,” see van der Borgh and Terwindt (2012).
various actors and the temporal development over several decades. However, it is based less on participant observation than on “polymorphous engagement,” which Gusterson describes as “interacting with informants across a number of dispersed sites, not just in local communities, and sometimes in virtual form, [...] collecting data eclectically from a disparate array of sources in many different ways” (1997:116). The fieldwork I conducted in Chile, the US, and Spain has consisted of participant observation during various criminal trials, protest actions, and political meetings; more than a hundred interviews with activists, victims on different sides, prosecutors, lawyers, and defendants\(^{14}\); the collection of trial transcripts in numerous criminal cases, such as indictments, opening statements, jury instructions, verdicts, prosecutorial conclusions, trial minutes, motions, documentary evidence, and dossiers from investigative judges; and the collection of written documents, such as public declarations, press releases, legal statutes, websites, and other documents from various political actors, activists, supporters, victim organizations, and government institutions.

I am trained both as a lawyer and an anthropologist and as a consequence have never fully identified myself as one or the other. While I did learn how to do the necessary operations on legal provisions to “solve” cases, I suspect, however, that I failed to properly internalize the legal training to “Think Like A Lawyer” (Mertz 2007). There is a common joke about economists in which a physicist, a chemist, and an economist are on an island in the Pacific with just one can of beans. While the physicist and the chemist attempt to leverage their backgrounds in

\(^{14}\) I have chosen not to interview any judges as I have limited my inquiry to the process of prosecutorial qualification. It is evident, though, that the prosecutorial narrative is influenced by the subsequent rejections or ratifications by judges. Due to the prosecutorial system in Spain I have interviewed an investigative judge there.
order to open the can calculating the heat needed to explode it and the distance at which the individual beans would fall, all the economist can say is: “let’s assume we have a can opener...” I have often felt that lawyers reason in a similar way: “Let’s assume we have a liberal democracy...” While this does not mean that they assume the rule of law always works perfectly, they do assume that the rule of law can work and that by making it work, it can solve everything.

In questioning the very things that lawyers often take for granted, this research is far more anthropological than it is legal. It does, however, engage closely with the very criminal law doctrine and legal documents that are often shunned by anthropologists for being allegedly too impenetrable for outsiders. I have attempted to write in a style that is accessible to all, in order to circumvent that convenient myth that law should be left to the lawyers. Further, I have chosen to study a problem that specifically qualifies as “western,” and my concern with the prosecutorial production of reality reflects an interest in describing powerful elites as much as marginalized “others.” At the same time, the anthropological approach should not make it less relevant to lawyers, legal scholars and particularly prosecutors. I believe that the findings in this study pertain directly to their daily practice and understanding of the way the law works.

**Research design**
The idea for this research emerged when I attended a trial against three Mapuche activists in Chile in April 2003 (Case Lonkos of Traiguén). In his opening statement, the prosecutor did not focus narrowly on the three defendants and the criminal actions that were imputed to them. Instead, he went back to the end of the 19th century to recall the war after which Mapuche indigenous people were put in reservations. His account of the relations between the Chilean state and the Mapuche people was complemented by an analysis of the way in which the defendants allegedly “abused” their Mapuche identity. His emphasis on context surprised me.

In Chapter 5, I will discuss that trial in more detail. This trial and the centrality of criminal justice proceedings within the dynamics of the “Mapuche conflict” sparked my interest in processes of criminalization in conflict situations. Many people, however, dismissed the relevance of my observations as they held Chile to be a third-world country where it would be obvious that criminal proceedings are just an instrument in the hands of the elite. This viewpoint, however, both underestimates the Chilean criminal justice system and overestimates the criminal justice systems in developed western countries. Indeed, far from dismissing contentious criminalization and discursive shifts in the prosecutorial narrative as a Chilean or third-world phenomenon, my assumption was that my observations were related to the inherent dilemmas that a liberal democracy faces when it is challenged by large-scale disruptive mobilizations and political demands. The problem is then understood not as a malfunctioning of the rule of law due to human error or corruption, but as inherent to the rule of law itself. This interest in exploring the universality of shifts in the prosecutorial narrative in
response to discursive mobilization in the criminal justice arena tempted me to go beyond the in-depth study of one case.

**Choice of country studies**

Multiple case studies do not necessarily make a comparative study. The choice of contentious episodes may seem an odd constellation for comparative research. Whereas their differences are glaring, the similarities may not be so obvious. I argue that it is useful to look at these three highly different cases through the same analytical lens. I am not comparing the three conflicts, which admittedly have highly distinct features. Instead, I am comparing the criminalization processes in three liberal democracies that are challenged by major contention. The rule of law in democracies is generally imagined to have universal features. “It is our job to just apply the law,” is what all the prosecutors have told me. This made me decide to look at this “applying the law” in liberal democracies that all strive to solve their political disagreements within the boundaries, framework and promises of the rule of law.

“Research design is always a matter of informed compromise” (Bechhofer and Paterson 2000 in: Ritchie and Lewis 2003:47). The choice of my country studies similarly reflects such compromise, balancing the need for in-depth qualitative research with the aim to portray a process found in many different forms and contexts. On purpose, I have chosen hard cases, as I studied the often unpopular and “violent” marginal parts of social movements in liberal democracies. That makes this analysis very different from analyses of legal repression in outlaw
areas like Guantánamo Bay or Zimbabwe. To explore the mechanisms of criminal proceedings in liberal democracies afflicted by conflict, I limited my population of cases to those countries that receive the highest ratings in political science measures such as Freedom House and Polity IV, which narrows down the possibilities to Western Europe, the US, Canada, Australia, New Zealand, and Chile.¹⁵ In addition, I limited my choice to countries where I would be able to speak the language. Further, whereas the challenge posed by the conflict did not have to be existential, it did have to involve a significant amount of physical or material harm or the fear of violent escalation.

There are thus many cases that I could have included in this research, such as the Corsican nationalist struggle in France, the Northern Ireland troubles, “homegrown” Muslim and immigration contention in Britain or the Netherlands, animal rights activism in Britain, neo-Nazi mobilization in Belgium, or indigenous activism in Canada. Given my choice for in-depth ethnographic research, I decided to limit myself to three in-depth case studies. This research is a qualitative study focusing on in-depth analysis of a small set of cases to generate deep case studies.

¹⁵ In many different judgments the three states that are chosen (US, Spain, Chile) were during the relevant research period considered to be well established democracies. See, for example, http://www.worldaudit.org/democracy.htm [Accessed 1 June 2007] (I only accepted division 1); Polity IV Project, http://www.cidcm.umd.edu/polity/ [Accessed 30 June 2007] (I only accepted level 9/10); http://www.freedomhouse.org/uploads/fiw/FIWAllScores.xls [Accessed 4 November 2009] (I only accepted level 1/2). Various other contentious episodes were excluded, such as autonomous struggles in Bolívia and Mexico, as the states did not fall in the required category of high-capacity democracies. For a critical discussion of such ratings and their relation to processes of democratization see Tilly 2007b:1–11.
The nature of this research has been exploratory and focuses on theory building by “looking for similarities in unexpected places” (Ragin 1994:85). I was therefore interested in choosing cases that would enable me to study the processes of criminalization to the fullest. I followed Becker’s advice to look “for cases that may upset your thinking” (1998:87). I have opted for a “far-out” comparison that aims to explore three highly different instances of the same phenomenon. I was more interested in “finding the full range of cases” (ibid. 1998:87, 112) than zooming in on assumed similarities among cases that are usually pre-conceived as categories, such as the oft-compared cases of the conflicts in the Basque Country and Northern Ireland (a comparison that because of its premise of comparability turns out to be strongly resented by some actors in Spain while favored by others. No comparison is thus politically neutral).

Because of my first observations in Chile and my in-depth knowledge of the “Mapuche conflict,” I decided to keep that case and complement it with useful comparative cases. This led me to include a deadly conflict (the Spanish-Basque conflict), where I expected the process of criminalization to be more visible, severe, or further developed. Indeed, the open defiance of the state monopoly of force turned out to be more present in the Basque country than in Chile, where the use of violence is hardly accepted in public discourse, even among activists. Also, I suspected that the pressure on the government to stop killings in a lethal conflict might be much higher than the pressure that was leveled in the Chilean episode. In addition, the length of the Basque episode made it a good case for studying possible trajectories in the
prosecutorial approach in criminal prosecutions. It turned out to be a fruitful choice, as indeed there have been significant changes in the prosecutorial approach throughout the years.

In addition to the Spanish-Basque case, I chose to include a conflict that was not truncated by a military dictatorship, enabling me to more accurately trace the beginning of the contention and the subsequent criminalization. This led me to include the U.S. eco-conflict. This case provides an additional interesting possibility to study an episode where the activists are not an ethnic minority, and where the political issue is not related to nationalism.\textsuperscript{16}

I wrote that I have chosen conflicts that constitute a significant challenge to the state. Without a doubt the “Basque conflict” has been a major challenge for more than three decades, and the “Mapuche conflict” can also easily be called a huge domestic concern. People may wonder about the challenge that mobilization in the US episode poses to the government. Here I rely on the assessment of the Federal Bureau of Investigation (FBI) itself, which in 2005 publicly called the animal rights movement and “eco-terrorism” the number one domestic terrorism threat (Frieden 2005)\textsuperscript{17} and which continues to list a fugitive animal rights activist on its list of the “most wanted terrorists” (FBI 2011).\textsuperscript{18}

\textsuperscript{16} Christenson (1999) asserts that trials involving nationalists are different from trials involving dissenters because of the different challenge to the state, and also Beetham (1991) describes how rebels attacking the constitution of the state attack the legitimacy of the state in a much more fundamental way than one-issue rebels do.
\textsuperscript{17} This claim was and is contested, also within the government (Department of Homeland Security 2008). This, however, does not take away the fact that the public image of a highly dangerous group was projected in the media. For more information on the various definitions of the situation, see Chapter 6.
\textsuperscript{18} Daniel Andreas San Diego is listed here at number three (FBI 2011). He is wanted for the bombing of two unoccupied office buildings. No one was injured.
I have thus looked at the following contentious episodes: (1) the Chilean-Mapuche land conflict from 1990 to 2010; (2) the Spanish-Basque separatist conflict from 1978 to 2010; and (3) extremist environmental protests in the US from 1980 to 2010. In this study I explore the existence of a pattern, similar mechanisms, comparable processes, or variations on the same process in the course of criminal prosecutions in conflict situations. As such, the goal of my comparison most closely resembles what Tilly calls “process generalization,” in which analysts concentrate on the process itself, “asking in general how it arises and what effects it produces under different conditions” (2007:208).

My emphasis on mechanisms and processes shows that I am indebted to Tilly in this view on social science and specifically theory building in social science (2007). I have been inspired by what Tilly calls the “mechanism-process approach to explaining contentious politics” (2007:206). Tilly defines mechanisms as “events that produce the same immediate effects over a wide range of circumstances.” On a higher level of observation, “processes assemble mechanisms into combinations and sequences that produce larger-scale effects than any particular mechanism causes by itself” (2007:214). As Tilly points out, within mechanisms it will always be possible to identify micro-mechanisms again. Thus, whether we call a specific chain of events a “mechanism” or a “process” depends on our level of observation. While I am committed to understanding events in their particular historical and spatial context, my effort supersedes the single case method in the search for patterns that may give us clues for shared

19 The time frames in the Basque case and the Chilean case were chosen according to the return to democracy in both countries. The starting point of my U.S. research was chosen according to the first documented attack in the name of animal rights.
processes and mechanisms, thus contributing to the development of a theory that can be applicable to similar situations in other liberal democracies. Thus, while my description of the process of contentious criminalization is informed by the three episodes that I have chosen, and while the outcome and specific characteristics of this process will be different in every liberal democracy, I do propose that the broad outline of the process, challenges, dilemmas, and characteristics of contentious criminalization as described here can be found in all liberal democracies afflicted by major contention.

In each of the chosen contentious episodes the challengers of the status quo strongly oppose the economic system. Mapuche activists challenge transnational corporations, infrastructural projects, and the neoliberal conception of “progress.” Basque left-nationalists specifically claim that they are struggling for a free and socialist Basque Country, thus proposing a different economic system. Environmentalists in the United States oppose the profit-driven logic of capitalism that perceives animals and the earth as instrumental to satisfying human needs. Discontent with the economy can indeed lead to a strong challenge to the legitimacy of the government (Beetham 1991:163).²⁰ Whereas the challenge to capitalism has not been one of the variables on which I selected the episodes,²¹ still, that shared feature may not be coincidental. Various scholars have indicated that formal rationality is specific to capitalist

---

²⁰ According to Beetham, often changes or problems in the economy are beyond the control of particular governments. Therefore, discontent with the economy will lead to discontent with the political system, not only discontent with a particular government. He therefore argues that a challenge to the economic system is simultaneously a strong challenge to the political legitimacy of the government.

²¹ Indeed, before starting my research in the Basque Country I was unaware that the struggle is partly a leftist enterprise.
democracies, or even to neoliberal democracies (Weber 1978; Balbus 1973; Mansell et al. 2004; Wacquant 2009). Mansell et al., for example, argue that the rule of law is essential to liberal capitalism, as its focus on individual, formal equality and freedom in the political sense opens the possibility for widespread economic inequality (2004:15). This might mean that the challenges and dilemmas faced by prosecutors who attempt to reconcile contentious prosecutions with the rule of law framework may be specific to these cases where the capitalist model is at stake. While this is a possibility, such speculations fall outside of the scope of my project and my research design is not suitable for answering such questions.

There are of course many differences between the conflicts, contexts and legal systems of my cases, but this is a study about their similarities. The presence of striking features in one episode has opened my eyes to a similar presence or absence of those features in the other cases. I have maximized the possibilities for this feedback-loop by visiting my fieldwork sites twice, enabling the chance to return with renewed questions and concepts based on my observations in the other countries. For example, to explore the phenomenon of prisoner support mobilization in each of the three episodes, I used the differences and similarities between the cases to understand better what prisoner support looks like in each of these countries. Ultimately, the three different expressions of prisoner support enhanced my understanding of what prisoner support mobilization is about and how it relates to the larger process of contentious criminalization.

22 The goal and design of the research was not to explain why prisoner support mobilization is expressed differently in one case or in the other, and why in that form.
The three cases thus exemplify the same phenomenon of contentious criminalization in different forms. Of course, as I mentioned before, these processes are set in highly different institutional and cultural contexts. I will point out some of the most important differences.

First, the political issue is different in each of the episodes, and they therefore involve different actors (such as politicians, companies, scientists, or landowners), regions, political arguments, and relevant circumstances. For example, while poverty and socioeconomic inequality is one of the (important) factors in the Chilean episode, it is not an issue in either the Basque case or the U.S. case. Indeed, the Basque Country area is richer than the rest of Spain. Second, the role of the state differs significantly in the different episodes. The Basque struggle is explicitly against the Spanish state as a direct opponent, whereas in the Mapuche conflict and in the U.S. eco-struggle, the state often plays the role of third actor. Third, the levels of violence vary greatly: the Spanish-Basque conflict has seen more than 800 deaths, the Chilean-Mapuche conflict three killings, and in the U.S. eco-conflict no deaths have been recorded. Fourth, whereas the legal systems of Spain and Chile are highly similar as both are based on German criminal law, the U.S. has a common law system instead of continental law. Other analysts of comparative

---

23 The Spanish-Basque case clearly involves the highest levels of direct violence. In the beginning of the 1980s ETA killed about 100 persons a year. Since 1992 there have consistently been less than twentyfive deaths per year by ETA. In the past few years this number has been less than ten per year. State violence led to a Dirty War in the 1980s involving about 30 deaths and some high-profile cases of torture. The Mapuche struggle escalated in terms of methods and demands throughout the nineties, and the general perception was that things could get severely worse, with politicians fearing a Chilean Chiapas. Actions in the Chilean-Mapuche territorial conflict consist mainly of theft, land takeovers, threats, harassment, and arson. So far there have been three deaths of young Mapuche activists after confrontations with the police. Actions in the animal rights-environmentalist contention in the U.S. consist of harassment, vandalism, threats, and several bombings. Perceptions in the U.S. of eco-violence have been that it easily can become worse, with prosecutors fearing actual deaths as a (intended or unintended) consequence of activists' actions. I have excluded Ted Kaczynski, alias the Unabomber, from this count.
criminal law, however, have emphasized similarities more than differences between common law and continental law (Fletcher 2007; Vercher 1991:14). Although I do not deny the existence of many differences between the legal systems, what is relevant for my conception of contentious criminalization is the shared basis of Enlightenment values and the philosophy of liberal legalism that underlies these criminal justice systems (cf. Vercher 1991:278). For the specific choices I have made in order to deal with these legal differences in terms of data collection and analysis, I refer the reader to the methodological appendix.

**Data collection**

My research question was straightforward: Will a shift in the prosecutorial narrative occur, and if so, when (as a result of which processes and factors?), how (what changes in criminal doctrinal devices constitute that change?), and which narrative does the prosecutor then choose? The focus therefore is on the courtroom as research setting. I have combined ethnographic methods with discourse analysis. As data, I have collected meanings defined as “the linguistic categories that make up the participants’ view of reality and with which they define their own and others’ actions” (Lofland and Lofland 1984:71). Of course, studying three episodes over an extended period of time necessarily means that much could not be covered and that I have had to make many choices about what to select. My country studies do not aim to tell a complete or exhaustive story of either the conflicts or the criminal proceedings. Further, rather than focusing upon what is somehow representative, my interest has mostly been to select the examples that illustrate best how the rule of law is challenged, criticized,
called upon, defended, interpreted, and imagined, and how the prosecutorial narrative is adapted accordingly. In short, I selected the examples that best show that there is a whole process of interpretive battle that goes into “just applying the law” – and what that process looks like in practice.

On the one hand, I have compiled data to construct the prosecutorial narrative as it has developed during the contentious episode in various criminal proceedings. Therefore, I have collected trial transcripts (indictments, press releases, opening statements, closing arguments, and verdicts), information from government websites and official statements, and I have interviewed prosecutors.

On the other hand, I have collected data in order to construct the competing discourses that constitute the meta-conflict and the battle for interpretation in the criminal justice arena. To construe and analyze these competing discourses I have taken both a macro- and a micro-approach. For the macro-approach, I have collected data in order to describe the broad oppositions, competing logics and arguments of the actors challenging and defending the status quo. Therefore, I have attended meetings and events and interviewed various actors from diverse positions (reformist and radical) on the side of both the challengers and the defenders of the status quo. In addition, I have collected books, websites, political declarations and various other materials that express the vision, values and classificatory schemes of the opposing parties.
For the micro-approach, I have made a detailed analysis of several criminal cases and the competing narratives about the background of the specific events that led to the criminal case, the allegations, indictment, argumentation, and the identities of the involved actors. Therefore, I have selected several criminal cases (a maximum of fifteen per country study) and interviewed the defendants and affected parties, complainants and prosecutors, collected the relevant trial transcripts, and (in one or two criminal cases) observed the trial proceedings. The combination of interviews, participant observation, and extensive document analysis has ensured data and method triangulation. Due to the particularities of each country, in each country I have made different decisions regarding the exact data that I have used, the criminal cases that were selected and the people that were interviewed. For a more detailed description of my choices regarding data collection and data analysis in each of the country studies, I refer the reader to the methodology appendix.

I want to mention briefly the special challenges of doing research in these highly sensitive conflict areas. Sociologist Howard Becker has written an article entitled “Whose side are we on?,” in which he argues that neutral positions are not possible for sociologists (1967). He describes that when scholars understand, defend, or explain the position of the underdog, they are less likely to be perceived as credible by the community of scholars and the larger public. This point applies heavily in situations of conflict where both challengers of the status quo and defenders of the status quo can have the position of the underdog, depending on power
relations. In my research I have attempted to faithfully collect the information that reveals the points of view of the different actors in conflicts. I have attempted to be critical towards all sides, making sure to question the information that each shared. This can be personally challenging. How do you balance the feelings of empathy with a person claiming victimhood and on the other hand maintain healthy criticism as you probe into the story they are telling you?

Also, activists and their targets everywhere have a tendency to be paranoid about their security and the identity of people they interact with. This paranoia can be contagious and twice I was sure I had identified an overeager new activist as an undercover FBI informant, though I will never know whether that was indeed the case. Urban Mapuche activists often warned me about militarization in the rural communities. They argued that the state would follow me and that I risked being expelled from the country.

Trials are nerve-racking happenings. The presence of opposing parties, the potential impact of a sentence that can land someone in jail for many years, the lack of certainty about the truth...it all comes together to make a criminal trial as a whole a tense event. The moment in which the verdict is made is the heaviest of all. As I attended these politically charged trials, often I had no neutral place to sit, as the benches on the left were the province of prisoner supporters and those on the right were occupied by victim supporters. The visual orchestration of the courtroom becomes “iconic” of the polarization process and the identification split in the
broader contention enacted in the mutually exclusive roles of victim and defendant.

Maintaining a distance while at the same time approaching people for interviews put me in a constantly difficult position.

More difficult than doing the research, however, was writing everything down. Given the contentious nature of the topic, I am certain that much of what I have written not satisfy everyone. More likely, it may upset one side or the other, or both. I hope people will recognize my work for what it is: less an attempt to describe in depth the different conflicts and their criminal prosecutions than to tease out a common process of social, political, and sometimes violent challenges to the legal system and the way in which criminal law gets interpreted, used, challenged, twisted, and defended. To do so, I have attempted to do justice to the existing different viewpoints. My writing has developed in a continuous internal dialogue with all of my informants, who shared their point of view with me and kept me sharp while developing my sentences. I am aware, however, that my choices of representation and the inevitable selection that I had to make will not do justice to the injustices experienced by the various actors involved.

What is to come

Conflicts tend to be hard to sort out, especially if they are protracted, involving many actors, and if violence has been used. What started out with a relatively straightforward political claim
becomes hidden behind additional claims about past injustices, broken promises, and violence. During my interview in 2003 with Ms. Vidal, the regional prosecutor in the south of Chile, she emphasized that her job was just to “apply the democratic mandate of the law” (Interview C-10). Her references to the law as the basis and final arbiter of her job supposedly closed the discussion about the choices she made and the way she conducted the criminal proceedings. “Just applying the law” can be more complicated than it sounds. This analysis focuses on what that complicated process looks like in situations of conflict and how it contributes to making those conflicts so hard to sort out. This dissertation is a lengthy response to Ms. Vidal arguing that “just applying the law” is where the discussion is just beginning.

I am by no means the first to observe that the rule of law ideology makes promises that it does not always fulfill in practice. It is not my aim to rehearse any of these critical observations, which are by now commonly accepted. My particular objective is to describe how this ideology and its framework of rules and institutions work at the moment in which they are challenged by the discursive action and disruptive mobilization that characterize contentious episodes. In that sense, it goes beyond merely pointing out a “gap” between ideal and practice to show how the ideal itself is interpreted in competing ways or even contested as such. In other words, the gap is not incidental, due to a mistake, open to be repaired in the future. On the contrary, the contentious processes described here are built into the very functioning of the rule of law.
This dissertation presents an in-depth study set in and around the courtrooms of liberal democracies. It is about legitimacy and legitimization, the construction of crimes, and categorization in the criminal law framework. It is about how the state and different non-state actors continue to build and challenge the edifice of liberal democracy and its institutions. We will observe actors as they talk about the rule of law, claim the rule of law, defend the rule of law, and challenge the rule of law. There have been many books that have taken the law and the courtroom as a discursive arena and I am building upon that approach (Silbey and Ewick 1998; Foucault 2001). Discourse analysis is about unpacking all the assumptions that go into criminal justice categories and their application. Specifically, this analysis looks at how these categories are explicitly challenged in the course of contentious episodes. It thus analyzes the drawing of lines between good and bad, which I show to be continuously negotiated products. I explore the consequences of language and show that discursive shifts from de-contextualization to re-contextualization that can be identified in the country-studies have real penal consequences (i.e., who gets in jail for how long). Law is a system of signification, and I am studying the meta-conflict in that process of signification, focusing specifically on the voice of the prosecutor. Law, supposedly authoritative in categorizing, becomes just one of many speakers on the subject and is not regarded anymore as necessarily authoritative by all speakers and listeners.

I thus describe the common process of contentious criminalization in which the political conflict transfers to the criminal justice arena, where people choose sides as victims mobilize and
prisoner supporters challenge the state’s definitions and authority. I will point out the
commonalities in the dilemmas and challenges that prosecutors face and the solutions they
form as they work within the linguistic and logical framework of liberal legalism and try to fit in
the criminal cases while they juggle the challenges of competing discourses that question and
attack the prosecutorial actions, decisions, definitions and arguments. I will describe the
similarities in the ways in which criminal cases become re-contextualized as they are classified,
for example as “Mapuche-conflict” cases, and I will explore the ways in which this shift is
discursively constituted and reinforced in doctrinal moves.

I make two specific claims about the prosecutorial narrative in these country studies that
should be falsifiable:

1. The prosecutor changes the modality of the charging narrative without claiming a
change in the facts of the events “on the ground,” that is, it is a purely interpretive turn.
   For example, the Spanish prosecutorial narrative about Basque street violence has
   changed without claiming that there is a change in the actual events of “street
   violence.”

2. The change in the prosecutorial narrative has consequences outside of the courtroom,
   that is, of course there are penal consequences, such as who gets charged for what, but
   it also changes the way people understand the legal system and what is going on in the
courtroom.
In the next chapter I set out my analytical framework, where I discuss more in depth the contestation of the prosecutorial narrative and the nature of potential discursive shifts and their expression in legal choices. Then I present the country studies, each divided into a chapter in which I outline the competing discourses in the meta-conflict and a chapter with an analysis of the development and discursive shifts in the prosecutorial narrative. I conclude the dissertation with a short comparison of the different episodes and a conclusion in which I discuss the value of the concepts of contentious criminalization, the discursive shift and the distinction between de-contextualization and re-contextualization.

I will hardly address the policy question of what prosecutors should do, i.e., when and how they should take the context of events into account. While obviously an important issue, it is outside the scope of this research. I will only say two things about it: First, when one departs from strict liberal legalist prescription, addressing context is not necessarily “bad” and should not be categorically rejected. For example, the literature on hate crime has abundantly addressed the reasons why context should sometimes be taken into account as well as the specific pitfalls when that is done. Second, as this study attempts to show, “the” context can itself be subject to contestation, making general prescriptions particularly difficult and probably not desirable.

While the meta-conflict transfers into the criminal justice arena in a highly comparable process in each of these episodes, the development of the prosecutorial narrative, the discursive shifts, and the penal consequences are very different. In the case of the Spanish-Basque separatist
conflict, I have found that the prosecutorial narrative makes a strong discursive shift throughout the 1990s as it develops the concept of the “ETA network” and starts macro-trials as a logical consequence of that interpretation of ETA. Similar discursive shifts in relation to street violence and speech and expressions result in an expansion of the people and actions that come under the purview of the criminalization. The criminal justice arena is expanding its reach to cover many of the activities that were previously deemed to belong in the political arena.

In the case of the Chilean-Mapuche territorial conflict, I will argue how the prosecutorial narrative reflects the ambivalence of the state, as it recognizes the political conflict on the one hand, while using anti-terrorism legislation and attempting to criminalize Mapuche organizations on the other hand. The ambivalence is visible in the constant re-drawing of the lines about what exactly belongs in the criminal justice arena and what belongs in the political arena. The prosecutorial narrative creates the contested image of the “true” Mapuche, which is the subject in the political arena, and the image of the “radical activist that abuses the Mapuche identity” as the target of criminal prosecutions.

In the case of the U.S. eco-conflict, we see how the concept of “eco-terrorism” is developed and increasingly applied to a select number of high-profile activists, resulting in severe sentences. The prosecutorial narrative shifts from reacting to past harm to anticipating future crime. The FBI is an important actor in co-creating this narrative. In addition, some important cases mark
an increased attention to aboveground activists allegedly inciting or coordinating underground crimes.

The description of the different kinds of criminalization as expansive, ambivalent, or marginalizing refers to the way in which the prosecutorial narrative proceeds to mark the boundary between the political arena and the criminal justice arena. The expansive discourse in Spain has enabled a criminalization of activities that previously were treated according to the logic of the political arena, thus expanding the criminal justice arena while encroaching upon the political arena. The ambivalent discourse in Chile shows a constant back-and-forth in which that which was considered criminal ten years ago is now firmly treated as political, whereas that which was merely criminal yesterday suddenly turns out to be terrorism today and is subjected to political negotiation tomorrow. The marginalizing discourse in the United States creates a specific pocket of what is considered to be criminal or more specifically “eco-terrorism.” Once you are perceived to have crossed that line you fall deep into the tentacles of criminal justice proceedings. You are turned into a legitimate target of harsh prosecution and it will be difficult to crawl back towards the identity of a subject in the political arena.

Throughout this work I will refer to many different criminal cases, the defendants, and the events that led to the criminal investigation. This can be confusing for the reader. At the end of the text, therefore, the reader can find a brief synopsis of the criminal cases that have the most
relevance throughout the analysis. I hope this solution is more practical than repeating the
details of every case throughout the text.

My conclusion is that these three country cases represent instances of the tragedy of liberal
legalism, where the state is unable to deliver (substantive) justice and the rule of law becomes
the target and sometimes the victim of continued contestation. The goal of this analysis is not
to point out the particular shortcomings of liberal legalism and its constitutive fictions about
society. Many scholars have done that before me. I build upon their insights to describe and
understand how criminal proceedings that take place within the framework of this system play
out in the challenging context of major conflicts. This dissertation thus contributes to the
current literature as it provides new insight into both protracted conflicts that have moved into
the criminal justice arena and the rule of law as it is exposed by the challenges of these
conflicts. Because crime is not a fixed category and because liberal legalism is not necessarily
able to provide substantive justice, the criminal proceedings create conflict dynamics (collective
claim-making, polarization, and escalation) or become the arena in which they are transferred,
sparking a potentially infinite re-framing of events and “innovating” of criminal vocabulary. In
three in depth case-studies, this dissertation describes what that process and the concomitant
criminal proceedings can look like.
II. Law, Politics, and Legitimacy in Liberal Democracies

“We wanted justice and we gained the rule of law.”

Artist Bärbel Bohley on the reunification of Germany (Economist 2010:91)

The rule of law is a wonderful construction that has protected citizens against arbitrary state power and formulated a framework within which disputes can be resolved through fair proceedings. Still, the rule of law is not always capable of delivering justice. Sometimes people are satisfied with having had their chance in court according to proceedings that are recognized as fair and equally accessible for all. At times, however, the rule of law is not enough, or even perceived as part of the problem, leading to protests and challenges to the status quo. If that is the case, it is possible to observe what I have labeled contentious criminalization: criminal prosecutions in a contentious episode transform into a site of contestation. This contestation may lead to significant discursive shifts in the prosecutorial narrative, with real penal consequences. Rather than assuming that the criminal justice system and its performance are fixed and natural, I have approached this institution from the perspective that it may be challenged and can subsequently change its performance (Garland 1990:4). If so, the question is when and how. This dissertation provides three in-depth case studies on this phenomenon.
In this chapter, I present the analytical framework that I have used to analyze this process of contentious criminalization and the prosecutorial discursive shifts that I observed in three distinct case studies: the Spanish-Basque separatist conflict, the Chilean-Mapuche territorial conflict, and the eco-conflict in the United States. First, I elaborate on the way in which challengers to the status quo put prosecutors in a difficult position, facing competing needs for order and legitimacy. Then I discuss what it means to conceive of criminal prosecutions as social constructions of reality. Third, I provide the analytical concepts regarding contestation in the criminal justice arena dominated by victim mobilization and prisoner support mobilization, and finally I present a way to operationalize the discursive shifts that can be observed in the prosecutorial narrative in terms of legal choices and representations.

1. Challenge to liberal democracy

Liberal legalism assumes a social contract, in which citizens give up their right to private violence in exchange for state protection. If the government in turn does not abuse this position to repress the population, the pacification will support the legitimacy of the government (van Reenen 1979:22–23; Tilly 1997:181). The fiction that the social contract benefits the citizens can only be upheld and lead to continuing obedience as long as the government continues to fulfill the obligation to provide security. Facing this obligation to ensure security without repressing the population, authorities in liberal democracies can be
seriously challenged by events that take place in contentious episodes. Challengers of the status quo can engage in disruptive protests that take place outside of the designated legal and political avenues for change. Those negatively affected by these protests often clamor for state protection. A lack of effective state protection can lead targets of protests to engage in proactive self-protection. The state then faces the following dilemma: how to create order (and satisfy the demands of those that claim victimhood) without further stirring up discontent and alienation among protesters and their constituency.

Balancing the competing interests of “order” and “legitimacy” is particularly relevant to liberal democracies, which base their power on popular sovereignty and an ideology of individual liberty. It is within this quandary that I situate the criminal prosecutions that are the subject of this study. The dilemma addresses the complex relationship between law and politics, which I understand to be distinct but interdependent. In this section I briefly discuss the dynamics of how political contestation transfers into the criminal justice arena, where the issues, demands, and actors are co-determined by the logic and language of criminal prosecutions. After having addressed this challenge to liberal democracies, in the next section I analyze the construction of the prosecutorial narrative.

Challengers of the status quo can engage in a wide variety of activities. Most notorious are acts of violence (perceived as intentionally causing harm to life or property), which tend to draw

---

24 Tilly uses the word “challengers” for people who make claims and have no easy access to government agents or resources (1997:29). Throughout this book, I mostly call people mobilizing for change “activists.”
public attention. In this dissertation, however, we will observe many other kinds of activities that have been subjected to criminal prosecution: offering a place to sleep to fugitives, writing press communiqués, organizing honoring ceremonies, making Basque ID cards, spray-painting shops or houses, entering private premises, and shouting offensive texts. In order to justify their collective actions, challengers of the status quo claim the urgency and legitimacy of their grievances and actions, challenge the state’s jurisdiction, dispute the validity of current laws, or point out the deficiencies of political avenues. They often actively construct their own “laws” and rules for engagement, sometimes explicitly defending the use of violence to achieve their goals. Open justifications of private violence, such as the propagation of armed struggle or legitimate self-defense, break the taboo on private violence and strongly challenge the state monopoly on force. Generally, challengers argue that their daily experience with imposed violence does not make their own resort to violent methods so special.

People who feel threatened by these challengers of the status quo often call upon the state for effective protection and the punishment of perpetrators. For example, in the Chilean-Mapuche territorial conflict, a senator made this demand for state intervention explicit:

Facing these types of conflicts, State intervention is logical and demandable, as the State has the legitimate use of force at its disposal and is the guarantor of the rule of law. The absence of the State in the solution of this conflict [...] justifies self-protection, which is the basis of barbarity. (Senator Enrique Silva Cimma in the report of the Comisión de Constitución 2003)
The lack of successful criminal prosecutions can lead to complaints about “impunity.” When victims feel truly unprotected, they may recur to radical means to pressure the state or simply ensure their own protection. Thus, not only challengers but also defenders of the status quo can mobilize and engage in a variety of disruptive actions, including violence. For example, in Spain, in the 1980s, “uncontrolled” right-wing commandos such as the Basque-Spanish Batallón Vasco Español or Triple A engaged in targeted killings of presumed ETA militants. In Chile, a retaliation commando was founded in order to protect private landowners against harassment by Mapuche activists, while private landowner Augustín Figueroa called the south a “Far West” and mentioned his right to take justice into his own hands if the state would not do it. These reprisal actions, in turn, can elicit claims for protection and criminal prosecutions or set off a cycle of violence.

These actions of spray-painting or violence, while practical, can simultaneously be analyzed as statements that challenge, redefine, or defend the meaning of those acts, the law, and the status quo. That is why Cover argued, regarding the struggle against slavery in the United States, that “[r]escuing fugitives, and aiding and abetting them or their rescuers, were at once practical acts and symbolic ones” (Cover 1983:35). In these situations, state control is weakened, alternative rules or authorities are followed, and the legitimacy of the state monopoly on force is not recognized by all anymore. Of course, it matters whether the challenge comes from a minority or a substantial part of the population.
If you are opposed by a minority, it is easy to neutralize them, and your actions need not cause much resentment; but if you are opposed by the vast majority, then you are never going to be safe, and the more blood you shed, the weaker your hold on power becomes. So the best policy you can pursue is to try to win the allegiance of the populace. (Machiavelli 1994:122)

Criminal prosecutions in these situations, therefore, can be highly sensitive. Governments face the prosecution of an accused who possibly represents a larger group within society voicing its grievances. The stakes in these cases are high. An actual risk of criminal prosecutions might be that it does indeed stop violence in the short run but radicalizes the defendant’s supporters in the long run. The lack of intervention, however, can similarly lead to escalation (as victims feel unprotected). This dilemma has been framed as the competition between the “immediate interest in order” and the “long-run interest in maximizing legitimacy” (Balbus 1973:3). The capacity of criminal trials to have a counterproductive effect has been recognized by other scholars, such as Christenson: “A just trial may bring the revenge cycle to a halt, but an unjust trial will encourage the wronged faction to ‘get even’ and ‘right the balance,’ next time in their favor” (Christenson 1999:4). The government runs the risk that groups will identify prosecutors and judges only with particular political interests and no longer see them as representing legitimate authority in upholding law and order (cf. Miall 2001:88). To maintain control, a democratic government therefore has to address different audiences, sending the right messages in order to defend the rule of law, without alienating important sectors in society.
The government thus has to decide which groups can be ignored\textsuperscript{25} or excluded at no risk, and which groups cannot be “barred from the magic circle” (Nieburg 1968:19).\textsuperscript{26} Criminal prosecutions then have a double agenda: they are not only supposed to achieve order but also to recover the legitimacy of the criminal justice system and potentially the government behind it.

The transfer to the criminal justice arena

In liberal democratic regimes, the assumption is that ample political and legal avenues exist to solve political contention. Despite democratic structures, however, it is possible that political negotiation in round tables, constitutional amendments, or legal adjudication in civil lawsuits will fail to deliver a solution that fits everyone’s perceived needs and interests. Adjudication in civil lawsuits only makes sense, for example, if both parties are willing to lose on the issue if the judge decides against their interest. If the stakes are considered too high, or if one simply does not have anything to lose in a further battle (a feeling pervasive among Mapuche activists), there is no incentive to stick with the outcome of civil lawsuits. In each of the case studies in this dissertation, we can observe a shift from the claims that are involved in the political dispute towards questions surrounding the process of criminalization that effectively sideline the political issue. The transfer to the criminal justice arena can take place for a variety of reasons, one of which is the criminal justice response to the use of illegal means, notably violence, by

\textsuperscript{25} Dickson similarly points out that there are “cases and investigations that do not have to be initiated and that could be ignored with little or no serious consequences” (in: Holden Jr. 2006:19).

\textsuperscript{26} “[A]l state systems must integrate into their power structure at least the groups which are self-conscious, organized, interested, and able to exercise private power in the streets if barred from the magic circle” (Nieburg 1968:19).
people who feel disenfranchised from the political or legal avenues or who simply reject the state. The exact reasons for the initiation of criminal prosecutions tend to be highly contested themselves, as challengers often claim that it is not their recourse to illegal methods that prompts state repression but their effective challenge to the status quo.

The transfer to the criminal justice arena implies that a problem or dispute that arose in another arena somehow ended up in this “garbage bag” of last resort. In a way, that is exactly what the criminal justice system is designed for. Criminal law has a crucial function in relation to all other areas of the law, as was expressed already in 1843 by the Criminal Law Commissioners in the UK: “The high and paramount importance of the Criminal Law consists in this consideration, that upon its due operation the enforcement of every other branch of the law ... depends” (in: Norrie, 1993:17). The criminal law is ultimately seen as the guardian of the entire legal system. Therefore, the transfer to the criminal justice arena is often explicitly defended as a means of protecting these other legal and political arenas. The US prosecutor in the case against activists from the campaign Stop Huntingdon Animal Cruelty (SHAC), for example, pointed out that Huntingdon Life Sciences is engaged in “lawful practices,” and that animal testing is “mandated by the Food and Drug Administration.” In Chile, similarly, to justify a penal response to attacks on their lands, landowners consistently point out that they have all the legal land titles and that all lands have been acquired legally for decades already. Those laws from the other arenas are thus presented as the set-in-stone referent to be relied upon and defended in the criminal justice framework.
The switch to the criminal justice arena is in itself generative of issues, actors, and courses of action that are not present in the other arenas (see also Escobar in: della Porta and Reiter 1998:28). The transfer process can be conceptualized as a concrete switch between relevant government buildings including a change in the actors that occupy this arena (Fletcher 2007:4) and a transition in the nature of the logic and language of interaction between actors, such as a shift from persuasion to coercion. Finally, there is a shift in attention from the validity of political claims and interests to the legitimacy of the methods used to pursue the political goal. The transfer can be difficult to reverse when criminal prosecutions lead to the stigmatization of perpetrators and statements like “we don’t negotiate with terrorists,” which subsequently make a shift back to the negotiation table harder to sell (della Porta and Reiter 1998:28; Zulaika & Douglass 1996:x).

As I trace the way in which actions are pushed into the criminal justice arena or defended as belonging in the political arena, it is important to emphasize that actions that are thought to belong in the political arena are not necessarily deemed appropriate, good, or legitimate. Indeed, they can and often are labeled as offensive, unpopular, and unwise. The division between these arenas is not a matter of “good” versus “bad.” The difference between the arenas is that they are guided by different rules, understandings, and criteria, and that the actors populating the arena are constituted by different identities. Indeed, what they are doing is defined in different terms. For example, the claim that specific behavior was an act of self-
defense is saying that in effect the behavior was justified or even “good” while staying within the realm of criminal justice. An argument of “self-defense” does not bring events into the political arena. Similarly, the argument that a public speech was offensive and should not have been given is a political judgment which condemns the speech and can call upon the speaker to be more politically responsible in the future without pushing the event into the criminal justice arena.

The courtroom is a mechanism of the state for creating order while maintaining legitimacy. According to Fletcher, the central question of criminal law “is justifying the use of the state’s coercive power against free and autonomous persons” (Fletcher 2000 [1978]:xix). Law and its social imaginary as being “just” and “neutral” are essential to achieve this legitimization, which is why the criminal process is portrayed as politically neutral, as it “generates ‘objective’ determinations of fact and law” (McBarnet in: Lacey and Wells 1998:16). This imaginary, however, can be contested. Sketching the different viewpoints regarding law and legal repression in a liberal state, Balbus distinguishes between the liberals and the radicals. On the one hand there are the “liberals,” who have a fundamental confidence in the state, emphasizing the crucial role of legality, civil liberties, and due process. Time and again they seem very surprised and upset when they are confronted with arbitrary and violent repression and the violation of these norms. On the other hand there are the “radicals,” who think of the state as a fascist conspiracy characterized only by evil self-interest. They advocate strategies that will reveal this fascist nature of the state and are very disappointed when the state
response is far more benign than they had anticipated (Balbus 1973:1). These caricatures are useful ideal types of the contest that has been going on inside and outside academia regarding the nature of law, its relation to politics, and its capacity to regulate the state’s use of force.

As Balbus suggests, both the liberal view and the radical view are too simplistic to account for the actual relation between law and power and are therefore criticized by various scholars (e.g., EP Thompson 1975; Wiener 1990). The findings of my research similarly reject this dichotomy. On the one hand, the process of criminalization is not adequately viewed as a simple reproduction of the interests of a powerful elite. If that were the case, criminal proceedings in each of the cases would occur more often, lead to more convictions, and yield higher sentences. Criminalization, however, is also not explained by a simple reference to the law and the straightforward application of its provisions. Were that so, profound changes in the interpretation and application of the rules would not be explicable. To analyze the process of criminalization more satisfactorily, I build upon the notion that law and politics should be seen as “distinct but interdependent” (Abel and Marsh 1994). Research in this spirit typically interprets the paradoxical workings of the law as both constraining and legitimizing (EP Thompson 1975; Ron 1997). This tradition can be traced back to the legal realists, who were followed by the law and society movement and critical legal theorists, all of whom focused on the relation between processes and (power) relations in society on the one hand and law on the other (Tamanaha 2001).
Placing my research within this approach, I understand the courtroom as an institution that is continuously socially constructed and reified in interactions between people (cf. Berger and Luckmann 1969). This legitimating mechanism and the claims it makes need to be believed as “true.” Liberal juridical institutions exist only because people give them legitimacy and play the roles that they require. These institutions can also be challenged when people refuse to interact according to the scripts that run them. In the next section, I present prosecutorial narratives as social constructions of reality and discuss how I have analyzed these narratives and the way in which their claims are presented as “natural.” The social mobilization to push for a change in penal action or withdraw compliance with juridical institutions is the topic of the subsequent section.

2. Criminal prosecutions as social constructions of reality

The prosecutor receiving a criminal complaint will have to define the situation to decide whether, how, and against whom to build a criminal case. What information is deemed relevant to define the nature of the event? What information is excluded from consideration? What kinds of questions are asked to determine what happened? In this section, I will discuss how I have approached this process of “building a case.” I propose to study criminal prosecutions as operations of translation from everyday reality into the specific reality of criminal law (cf. Berger and Luckmann 1967). In the next section I discuss mobilization and discursive action in
the criminal justice arena as groups and individuals draw upon the logic and terminology of
criminal law to engage with the prosecutorial narrative.

Existing approaches to the study of criminalization

In this section I compare my approach with several existing approaches to the study of
processes of criminalization. Some scholars have taken a “case flow approach” of several
measurable stages: arrest, prosecution, conviction, imprisonment (see, for example, Balbus
1973:241). These studies are often based on statistical data. Whenever it was easily available, I
have not shied away from collecting quantitative data in order to complement my
interpretation of the criminalization process and put qualitative data in context. Of course, it
does make a difference whether 700 (in Spain, 2009) or 38 people (in Chile, 2010) claim to be
political prisoners. However, instead of attempting to come to “reliable” numbers, I used them
as the starting point for conversations in order to explore how these numbers themselves are
subject to political contestation.

A second common approach to the analysis of criminal cases is a legal analysis or rights-based
analysis. Legal analyses, for example, evaluate or compare selected legislation and judicial
verdicts, providing a factual and informative inquiry or comparison about what the legal limits
and possibilities are as laid down in existing laws and jurisprudence. Though I have studied
legislation and verdicts, my analysis emphasizes contextualization and is not limited to specific
legal instruments in advance but makes the analysis dependent on which laws are used in any
given situation. This makes it possible to observe that in a given situation, the prosecutor changes the kinds of laws that he or she uses for indictments.

A rights-based analysis argues in favor of or against certain measures using, for example, human rights principles and the democratic rule of law as a benchmark. Instead of engaging in these debates (such as whether or not a given terrorism provision infringes on the freedom of expression or whether the illegalization of the Basque political party Batasuna is within the boundaries of a constitutional state), I have taken such expressions and positions by scholars and other actors as the data for my analysis of how the rule of law is demanded, rejected, interpreted, negotiated, and ultimately constructed. It is for this very reason that I will not make any assessment as to whether the prosecutions that I have studied were done according to “the” rule of law or the principles of “due process.” The concept of due process is itself a product of liberal legalism. Violations of due process take place within that framework and as such can only violate the rights of the individual being prosecuted. That very understanding is incommensurable with the grievances of those observing a “criminalization of a social movement.” Such claims of harmful effects of criminal prosecutions go beyond the violations of the rights of individuals. “Rule-of-law thinking” that posits a supposedly external standard against which we can measure criminal proceedings is typical for lawyers. Without disputing the worth of such work, my research aims to investigate this lawyerly discourse and the imagined rule of law as one of the available discourses in society: constructed in context, subject to contestation, and subject to change.
A third type of research has been conducted by sociologists of law, either in micro-analyses of trial proceedings and arguments in the courtroom (e.g., Danelski 1971; Christenson 1999; Becker 1971) or macro-analyses of trajectories of “legal repression” (e.g., Ron 2000; Balbus 1973; Gusfield 1984) or a combination of both (e.g., Barkan 1985; Hajjar 2005). These analyses approach legal institutions as social processes. I build upon this approach, although I pay more attention to legislation, criminal doctrine, legal concepts, and legal reasoning than most sociological studies, thus combining an internal analysis with an external analysis of the law.

A final approach has studied criminal prosecutions as instances of social constructions of reality (e.g., Kelman 1981; Lacey and Wells 1998; McConville, Sanders, and Leng 1991; Bennett and Feldman 1981; Mansell, Meteyard, and Thomson 2004; Ewick and Silbey 1995). Judicial verdicts in this approach are not only decisions that can send someone to prison, they are also discursive products, which is deemed important because of the power of courts to institutionalize these “truths” and “marginalize other ways of looking at the world” (Lacey and Wells 1998:10). Many scholars have emphasized this truth-producing character of criminal proceedings (Abel and Marsh 1994:38; Bennet and Feldman 1981; Brass 1996).

My research draws upon both the third and the fourth strand of research and is based on the idea that crime is a socially constructed category and that the response to crime is “shaped by particular and contingent interpretations of reality” (Wiener 1990:7). Social reaction to an
event or threat is always about what the event or threat represents. Events are placed in an interpretive framework in order to determine the appropriate response (Hulsman 1986). Traffic accidents, for example, are generally perceived as a different threat than that posed by a group of aggressive street-corner youths, a rapist, or an armed organization like Euskadi Ta Askatasuna (ETA). These categorizations can be subject to contestation. For example, some scholars push for a re-conceptualization of the devastation of hurricane Katrina from a mere “natural disaster” to a “state crime,” criticizing the notion “that such disasters are unforeseen, and that humans can do nothing to mitigate the effects of these disasters” (Faust & Carlson 2011:34).

Just two weeks after former councilman Isaías Carrasco was killed by ETA, it was Semana Santa in Spain (the Eastern week during which many people go on holiday), which causes famously big traffic jams with an unfortunately infamous amount of deaths every year. In that year, 2008, the death toll was 63 in the week of Semana Santa, roughly the same number of deaths caused by ETA in the previous ten years. For many reasons, we categorize differently the threat posed by these yearly traffic jams from that posed by the continuing existence of ETA.

Scholars have referred to these different representations as “images” or “definitions of the situation” (Hall 1979; Sudnow 1965). In this study, I trace the development of criminal prosecutions as embedded in specific and changing images and definitions of the situation which are contested in the meta-conflict. I analyze the changes of those images as expressed in
and constitutive of criminal prosecutions. In addition, I describe the contestation of these images as a fundamental part of the conflict dynamics.

Law as a system of signification

The social construction of reality in the criminal justice arena is constituted and constrained by the logic and language of criminal law. I thus understand criminal law as a system of signification, as suggested by James Boyd White (1990), who wrote that “[t]he law, of which legal punishment is a part, is a system of meaning; it is a language and should be evaluated as such” (in: Wiener 1990:9, footnote 26). This system creates classifying concepts and categories of crimes as well as principles and rules, such as the presumption of innocence and rules about proper evidence (cf. De Roos 1987:4). Similarly, the anthropologist Clifford Geertz wrote that law is “not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real” (1983:173, see also p.215 and p.232).

The prosecutorial narrative

In my analysis of criminal cases, I “read” the sequence of criminal prosecutions as a story, a narrative, told by these classifying concepts. The “language” of the prosecutor in the indictments and trial transcripts consists not only of explicit verbal arguments but also of the decisions that he or she makes regarding who gets prosecuted and for what. Every choice a

---

27 De Roos (1987:4) defines criminal policy as the “development and application of classifying concepts with regard to deviant behavior and its social definition, in which the key question is the reach and organization of the criminal law and criminal justice system” (translation mine).
prosecutor makes expresses and reproduces a certain “definition of the situation.” This is a concept from symbolic interactionism developed by W.I. Thomas, indicating the process in which people collectively interact in situations, defining what is going on and acting upon those definitions, thus constructing the situation according to the definition and its expectations. This includes adopting roles and identities that fit the definition, which the counterpart can then accept or reject by treating the other as being a certain person.

I understand definitions of a situation to originate and make sense in discourses that provide us with the logic and terminology to interpret our worlds. The prosecutorial narrative can draw upon discourses in society, reproduce these discourses, institutionalize them, or provide them with new input. Its status as a narration of “facts” has important implications, as can be seen in the following example. An individual mugging story, including an incidental reference to the nonwhite race of the assailant, seems to be simply stating “facts.” It may, however, communicate a message of the inferiority or danger of a certain group, which as a general claim probably would be subjected to empirical evidence. Ewick and Silbey warn that “[t]he causal significance or relevance of the assailant's race is, in such a tale, strongly implied but not subject to challenge or falsifiability” (1995:214). As I focus on the prosecutorial narrative, I thus study criminal law and the criminal justice system as a system of talk, labeling, categorization, and action upon this discursive work.
To understand the important role of the prosecutor in this system of signification, I distinguish between primary criminalization and secondary criminalization (de Roos 1987:4). Primary criminalization is the creation of laws by the lawmaker proscribing abstract behavior. Secondary criminalization is the application of these general laws to concrete instances, thus targeting concrete behavior. The prosecutor is an “agent of secondary criminalization” (Zaffaroni 2006:166). To initiate a criminal case and decide upon the appropriate charge, the prosecutor has to decide whether or not a specific conduct falls within the boundaries of the generally indicated category described by the lawmaker. This means that there has to be a translation from the general to the specific, reducing a complex situation to a specific selection of legally relevant facts which can be more or less contested. Mansell et al. refer to this process as the transformation of “primary reality” into the “secondary reality of the law” (2004:161). These translations have a real impact. Only successful translations can, for example, enable the state to use investigative authorities, limit citizen’s rights, or even use force.

The prosecutorial narrative is thus important for two reasons. First, it creates criminal liability and can thus secure a conviction and land someone in jail. Second, it is a powerful voice in the meta-conflict, in which different parties of the conflict try to impose their version of the truth onto society.
For my conceptualization of criminal prosecutions as a process of translation and communication I rely on scholars who have emphasized this quality of meaning and signification, such as Garland:

[Penality] communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters. Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organize our moral and political understanding and to educate our sentiments and sensibilities. They provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder. Through their judgments, condemnations and classifications, they teach us (and persuade us) how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so. (Garland 1990:252–253)

**Discourse analysis and semiotics**

I will briefly introduce some of the key concepts of discourse theory and semiotics and describe the way in which I approached my data with these analytical tools. Whereas other forms of qualitative analysis tend to accept social reality as a given and explore how actors give meaning to that reality, discourse analysis is a methodology that aims to research this construction, production, and reproduction of social reality (Philips & Hardy 2002:83). It is a good way to study different underlying perceptions of and claims to legitimacy (Brass 1997:59). Discourse analysis, therefore, is an excellent approach for studying criminal prosecutions as representations of reality. Discourse theory is based on anti-foundationalism and anti-essentialism (Sayyid & Zac 1998). Anti-foundationalism holds that we cannot access the truth, but only have access to our descriptions of the truth and our experiences, which are molded by our interpretations. As the Inuit have multiple words for “snow,” they not only expand their vocabulary but are also able to observe distinctions that others would not perceive. Anti-
essentialism is the belief that concepts do not have a meaning prior to the political and social process within which they play a role (Sayyid & Zac 1998:251).

Our descriptions of the world determine how we deal with it. And our descriptions can change. An illustration can show the concrete social impact of these definitions. On its website about police violence, Amnesty International remarked that the beating of suspects in many countries is so normal that even the victims do not recognize it as a form of torture. Calling the treatment torture then does not only describe reality: it can also reveal or construct reality. Words can therefore have very real consequences, which is most evident in law and legal procedures, where rituals constituted by words and references to texts can have material consequences, like imprisonment and the death penalty.

Discourses are constructed and shared in discourse communities in real or virtual interactions in newspapers, rituals, and meetings. On the one hand, individuals are free to construct and influence discourses. On the other hand, in the construction of discourses, individuals are necessarily constrained by the words and meanings that are available in society and shared in communities (Jabri 1996:129; Barthes 1964:14). I focus on the ways in which different discourse communities define and legitimate or condemn social action, specifically in relation to criminalization. For example, our perspective on rape has changed considerably throughout the past century, and it took deliberate mobilization to have non-consensual sex within marriage considered as rape. In a different example of such discursive mobilization leading to criminal
prosecutions, Frailing and Harper Jr. (2010) have shown how midwives in New Orleans in the 1940s became defined as an “abortion racket” in the media and by various (medical) interest groups, which led to their criminal prosecution.

Discourse analysis can identify what causes the institution of courts and the law to be taken for granted. The discourse that is dominant in society is called the “hegemonic discourse,” which can be contested by “counter-discourses.” Struggle about language is therefore a power struggle (Hajer 2000), as those with power are able to produce discourses and have definitional power, and because the knowledge and truths that a discourse entails also produce power. In his perspective on governmentality, Foucault does not propose to view language and discourses as creating realities and identities. Instead, “language and other signifying systems were [...] regarded as one element among many for rendering reality governable” (Rose et al. 2006:89).

Discourses are hegemonic when they are taken for granted (Silbey 1998).28 Hegemony exists when the proposed logic and rules as well as the boundaries of collectives are viewed as “natural,” particular interests are successfully represented as universal interests, and underlying contradictions are negated. Alternative possibilities to the status quo are forgotten, and the fact that the status quo is the product of history and that change is thus possible is denied (Jabri 1996:96; Sayyid & Zac 1998:262; Silbey 1998). “If the minds of the dominated can

---

28 “Here, hegemony is used to refer to those circumstances where representations and social constructions are so embedded as to be almost invisible, so taken for granted that they ‘go without saying, because, being axiomatic, they come without saying’” (Silbey 1998:287).
be influenced in such a way that they accept dominance, and act in the interest of the powerful out of their own free will, we use the term hegemony” (Van Dijk 1993:255).

I analyzed criminal cases as sites of contestation and as a product of that contestation, beyond the adjudication of the specific alleged crimes and defendants on trial, examining what prosecutors communicate in criminal proceedings (materialized in trial transcripts, indictments, and prosecutorial decisions and arguments). Communication involves two sides, and even more than that if one takes into account “bystanders” and other casual listeners (Goffman 1981). Given that communication is about all of these actors, in my analyses of texts I have paid attention not only to what prosecutors said or wrote but also to what several audiences heard and understood. I have thus analyzed indictments as “performative utterances” (Bourdieu 2010:8) and announcements, where the intended and actual audience of the prosecutorial message can vary. Paul Brass emphasizes the importance of the analysis of interpretation by focusing his book on “the struggle to interpret violence, the attempts to govern society or a country through gaining not a monopoly on the legitimate use of violence but to gain control over the interpretation of violence” (1996:45).

I studied the content of the discourses in the meta-conflict at the micro-level by examining what examples are chosen to support arguments, whether the passive or active voice is used, how jokes are made, or what kind of metaphors are used, just as, for example, Van Dijk analyzed subtle forms of racism in parliamentary debates in constructions like “blaming the
victim,” “apparent sympathy” (it is for their own good), or “apparent democracy” (the people do not want more immigration) (Van Dijk 1993:267, see for a larger overview of possible analytical questions: Van Dijk 1993; Fairclough 2003; Gee 2006). In this dissertation, I will describe, for example, how landowners argue that Mapuche activists “take advantage of” their identity.

Apart from analyzing the content of discourses, I also paid attention to the production, distribution, and reception of discourses (Philips and Hardy 2002:86) as well as to which persons have the most influence on a discourse, who has access to specific discourses or gets excluded, and the relation between dominant and non-dominant discourses (Fairclough 2002:128). Access to discourses can depend on access to specific locations (e.g., a business meeting), roles (e.g., a member of parliament), or the differential value that is attached to kinds of information (e.g., statistical or scientific data). These “meta-discursive practices” (Briggs 1996:19) decide who can talk, about what, and for how long. For example, in a courtroom, the discourse of liberal legalism is privileged over other discourses, giving clear cues regarding who can talk, who decides, and what is the allowed subject.

The impact of such meta-discursive practices on the construction of and interaction between discourses was visible, for example, when defendant Cayupe in Chile testified on trial how he had cared for his mother, who suffered from Parkinson’s disease, and was tied to her bed during the last years of her life. Just two months after her death, he was detained and spent
four months in jail awaiting his trial. During his testimony on trial, Cayupe expanded on these obligations towards his mother, when the interrogating prosecutor interrupted and pushed him to come to the point in relation to the crime with which he had been charged. This push to “come to the point” is related to a broader notion of “legally relevant facts.” A defendant who interprets the prosecutor’s intervention according to ordinary conversational practices would certainly consider the interruption as rude. On-trial conversations between the prosecutor and the defendant take place within the specific meta-discursive practices of the courtroom and the playing field offered by liberal rules. The defendant is allowed to be silent, according to the principle of self-incrimination. The prosecutor can ask questions but is held in check by the defense lawyer, who scrutinizes questions and objects when the questions are leading, repetitive, or unrelated to the charges. It is within this strictly orchestrated setting that evidence is presented, a narrative is built, images are evoked or contested, and judges decide about the guilt of the defendants.

Semiotics is the science of signs and the field that studies the creation of meaning. The creation of meaning is called “signification,” which Barthes defines as the act which binds the signifier (e.g., the word *ox*) and the signified (the mental image of an *ox* – not the actual *ox*), an act whose product is the sign (1977:48).²⁹ I will give a concrete illustration of this process of signification in relation to criminalization. The meaning of terrorism, for example, is not only provided by a certain prior (legal) definition of the term, but also by the kinds of cases that

---

²⁹ It should be emphasized here that the signified still is a mental image, and not the real thing itself. “[T]he signified of the word *ox* is not the animal *ox*, but its mental image” (1977:43).
prosecutors choose to charge as terrorism. Changes in the meaning of words (the linkage between signifier and signified) in a language can never be an individualistic enterprise. Even though a specific individual can initiate a change in his or her speech, the real effectuation of a changed meaning depends on its communication and reception and response by others, as well as its use (speech) by others, independent of this first individual.\(^{30}\) The creation of meaning is also dependent on comparison with related signs (Barthes calls this “value”). Thus, to analyze the meaning given to the word terrorism one needs to analyze the process in which the signifier (the word terrorism) is linked to a certain mental image of terrorism. In addition, this mental image has to be compared to and differentiated from the mental image of related concepts, such as “public disorder.” Thus, terrorism obtains a certain value in comparison to public disorder. For example, in the creation of the prosecutorial meaning of “terrorism” in the Spanish-Basque case, this means that by prosecuting street violence\(^{31}\) as terrorism the prosecutor actively influences the meaning of both street violence and of terrorism, as well as the meaning of non-terrorism, such as public disorder.\(^{32}\)

**The construction of a case**

Using the analytical tools described above, I analyzed the construction of a case in the prosecutorial narrative as the translation of events of everyday reality into the appropriate

\(^{30}\) That is, when the meaning of a word is not “arbitrary” as discussed by Barthes (1977:51). That means that the link between the signifier and the signified is “contractual” and thus dependent on another’s consent.

\(^{31}\) Street violence in the Basque Country is generally referred to as *Kale Borroka*, Basque for street struggle, and was previously prosecuted as public disorder. For more on this shift to prosecuting such actions as terrorism, see chapter 4.

\(^{32}\) This is what Barthes means with the “production of meaning” where it is not merely the act of linking one concept (signifier) to something else (signified), but by identifying one sign, the opposite (A versus A’) is articulated in the same act (1977:56).
terminology of criminal law in order to create criminal liability for a defendant. The elements of the story have to be framed, classified, and ordered in such a way that it becomes a convincing criminal case. Criminal liability subsequently forms the justification for the application of a coercive measure against the defendant.\(^{33}\) The interpretation of the prosecutor is guided, that is both constituted and restrained, by criminal law logic and concepts: for example, the prosecutor has to choose a defendant. In the construction of criminal liability, the narrative can make patterns, create organizations, determine leaders, define speech acts, manage identities, de-politicize contentious issues, and redefine political struggles. Other scholars have recognized this tendency of the criminal law framework to guide (and thus influence) the construction of events. McConville et al. (1991) describe how detectives, police officers, and prosecutors create reality in accordance to – often dichotomous – legal categories, like: guilty/not guilty; sane/insane; intentional/not intentional; reckless/not reckless; voluntary/involuntary.

McConville et al. describe the process in which a case is constructed from the moment the suspect becomes an object of police suspicion:

> It must be emphasized that at each point of the criminal justice process “what happened” is the subject of interpretation, addition, subtraction, selection and reformulation. This process is a continuous process, so that the meaning and status of “a case” are to be understood in terms of the particular time and context in which it is viewed, a meaning and status it may not have possessed earlier or continue to possess thereafter. [...] Case construction implicates the actors in a discourse with legal rules and guidelines and involves them in using rules, manipulating rules and interpreting rules. It involves not simply the selection and interpretation of evidence but its creation. Understanding the selections made and the decisions taken requires, therefore, analysis of the motivations of the actors, their value systems and ideologies. (McConville, Sanders, and Leng 1991:12)

\(^{33}\) Criminal liability is the key concept of criminal doctrine: “By legal doctrine we mean the story told (and assumptions made) by judges and legal commentators about both the general structure of, and the rationale for, criminal liability” (Lacey and Wells 1998:31).
Let me briefly tease out what it means to construct a case, examining the selections and interpretations pointed out by McConville et al. Below I illustrate some of the questions that I have posed to my material in order to study this process. For example, it is important to analyze how prosecutors have used their discretion to initiate and drop cases. Further, whom does the prosecutor claim to represent, and what are the competing claims? An important element of my data analysis has been the construction of the identity of the relevant actors and the definition, description, and label given to actors in the indictment and legal arguments. Subjects always have multiple identities, however, and depending on the discourse they can emphasize one or more identities and roles and construct hierarchical relations between them (Sayyid & Zac 1998:263). Subjects identify themselves and are identified in the terms, norms, symbols, and power structures provided by discourses (Jabri 1996:131). In the courtroom, for example, the prosecutor addresses Mapuche activists as “Chilean citizens,” asserting their equality before the law and at the same time negating their claims, which are based on their Mapuche identity. Identification occurs in relation to self-images and enemy images which also play a role in the legitimization of inequality or the use of violence. We will observe how these images and their meanings are contested in the interpretive struggle in the criminal justice arena. For example, as Mapuche activists are prosecuted under anti-terrorism laws, they claim that the state is the “real terrorist.” This is an example of an “inversionary discourse” (Kapferer 1997), in which people strategically adopt images from the opposing discourse and give it new meaning. We will observe that criminal prosecutions reproduce, and possibly institutionalize,
identity images, thus playing a role in processes of identification and polarization. An important feature of identities is that categories such as “Mapuche” and “Chilean” can become interpreted as binary and exclusive, precluding the possibility to be both.

The first important definition and categorization in the construction of a case regards the identity of the defendants as well as their possible representation for a larger group. Given the multiple available labels for the defendant’s identity, which identity does the prosecutor choose or construct? Is the defendant named with others as a group or as an isolated individual? Is the defendant addressed as a leader or as a self-interested agent? When multiple possible perpetrators are involved, it also becomes an issue of who is (not) chosen as a defendant and why. If an organization is involved, then the relation of the defendant to the organization becomes relevant. Of course, the description of the organization can become an item as well, as can the relations between multiple accused, like images of leaders and followers or ideologues and manipulated youth. The collective names that claim-making actors give themselves or that other people give them are what Tilly calls “political identities” (2007:9). These political identities (other examples are “workers,” “citizens,” or “women”) are subject to intense debate, which is reflected in the interpretive struggle in the criminal justice arena. Who do defendants represent? Who do they claim to represent, what does the prosecutor argue about their representativeness? And the same questions can be asked about the victims. Is the victim mentioned, or is it considered a so-called “victimless” crime? Is the victim referred to as an individual or as part of a group? Identity and motive are often
intricately related in the form of an image. The image is relevant as it may influence the perception of whether the criminal conduct is seen as something inherent in and essential to this person, as something inevitable because of a certain ideology, or simply as an incidental mistake, easy to leave behind. This image is thus related to the assessment of dangerousness. These questions lead to potentially contentious choices about identity, membership, representation, and collective guilt.

A second category of inquiry is the legal interest. How is the victim related to the legal interest that is argued to be at stake, threatened or damaged? Was it a specific legal interest such as a specific piece of property or a more abstract interest such as the constitution, the democracy, public peace, or economic stability? If the act allegedly “disturbed public order,” how does the prosecutor define and represent public order? Similar questions can be asked regarding a legal interest like “citizen security” – whose security, whose order?

The conduct that has been identified as criminal conduct is another main element of the construction of the case. Which facts are chosen as the relevant facts? Which facts are excluded? Does the conduct constitute a completed crime or have the prosecutors chosen to criminalize preparatory activities or an unsuccessful attempt? What kinds of actions have been identified as criminal offenses? Speech acts, direct physical harm, preparatory activities, recruitment, or financing of terrorism? Agirre has argued that the key to constructing a series of offenses as a consistent crime is the concept of “pattern,” i.e., the existence of sufficient
elements in common among individual offences to consider them as a whole like a single and greater entity. The common denominators that show the existence of a pattern may refer to the victims, the geographical area of commission, the chronology, or the purpose and modus operandi of the perpetrators (Agirre 2004:18). “The problem is that the ‘pattern’ is a procedural construct, a concept shaped by the process, often of fuzzy boundaries. The prosecution will tend to highlight the most dramatic, the gravest aspects of a purported overall picture, even if they are not central to the pattern” (Agirre 2004:19). What was the time frame that was chosen? Is it a narrow time frame or a broad time frame? This is relevant, for example, because a broad time frame tends to provide more room for excuses (Kelman 1981). It may occur that more than one incident is part of the “criminal conduct.” This opens up the issue of the choice of and interpretation of the relation between specific incidents. One can analyze the justifications for the sampling of incidents and the arguments that establish a pattern between them. Of course, causation is another important part of a charge. All western criminal law systems make a distinction between human causes and natural events. When we attribute damage to a natural event, we are not likely to define it as a crime or punish anyone (Hulsman 1986). Further, it is important to see how actors achieve this construction of facts in a credible way. How are the witnesses, judge, and other participants as well as evidence given credibility? What, for example, is the role of “experts”?

These are some of the questions that I have asked in my analysis of the materials to gauge the construction of prosecutorial narrative and its changes over time. In the next section, I discuss
the meta-conflict in which the images in the prosecutorial narrative are contested. In the last section, I present a typology that enables a systematic analysis of shifts in the prosecutorial narrative as a consequence of this continued contestation and the presentation of alternative narratives.

3. Mobilization and discursive action in the criminal justice arena

Having discussed the role of the state, represented by the prosecutor as the initiator of and spokesperson in criminal prosecutions, I now turn to describing how non-state actors mobilize and bring discursive action into the criminal justice arena. I specifically discuss victim mobilization and prisoner support mobilization as two distinct forms of action competing for dominance, as they are engaged in definition work regarding criminal prosecutions. In this meta-conflict we encounter actors imagining the liberal order, attacking that order, making claims on that order, and defending that order. Criminal law offers a socially validated syntax for condemnation (of perpetrators) and solicitude (for victims). The deployment of such legal vocabulary is a bid for that social validation, or (from the mobilization perspective) at least a rallying cry. In the next section, I discuss the typical logic of criminal prosecutions within the framework of liberal legalism. There, I discuss the features of “liberal legalist” criminalization and also how this liberal legalism can come under pressure in the specific context of a contentious episode, where society is divided and multiple notions of law, violence, politics, and morality are contesting each other.
Whereas the exact nature and form of victim and prisoner support mobilizations differed across
the cases, their main features had striking similarities. While I am not the first to pay attention
to these processes, I developed an original, systematic, and coherent framework to analyze
them. Analyzing my material, I asked questions like: How does a prisoner support group or
victim lobby group come into existence? Who are the active members (e.g., family, friends,
companies, individuals, political sympathizers)? How do they define the event which is the
subject of the prosecution? How do they define the state response? How do they relate to the
actors of the political dispute and define the political dispute? What is their power base? What
kind of political and legal actions do they undertake? What does their work mean for the
lawyers and prosecutors involved in the case? Who decides who is a “political prisoner” or a
“victim” and who is not? How are internal disagreements regarding these labels decided?

**Identification split**

Criminal prosecutions can be analyzed as acts of inclusion and exclusion. Defendants are
excluded from society and a message is sent to people who risk crossing the line as well.

Criminal proceedings can exacerbate or solidify an existing tendency towards polarization when
actors identify either with the defendant or with the victim (the “identification split”) and
identities are framed as mutually exclusive (“you are with us or against us”). Identification –
“the process of identifying with others” (Woodward 1997:14) – is a dual process: actors identify
themselves with a group, but actors are also identified by others. Identities and the process of
identification can be reproduced and institutionalized in criminal proceedings. These identifications can have real consequences. For example, if people identify with the victim in a criminal case, they might fear that they will be the next person to be victimized. Broad societal identification with victims is usually sought and established by emphasizing their innocence. For example, as we will see in Chapter 7, the prosecutor in the SHAC case explicitly argued that the victims had “nothing to do with Huntingdon Life Sciences.” If, however, people identify with the defendant, they might fear that they will be the next in line to suffer (legal) repression. This identification can also be actively sought by prisoner supporters. Given these dynamics, prosecutors can strategically choose to emphasize or ignore certain identities or impose others.

Collective identities give meaning to events. The death of Mapuche activist Alex Lemún, for example, was for the activists in the Mapuche movement not (only) the tragic death of one arbitrary individual. They identified with him as Mapuche, and his death was viewed as the exemplary outcome of the collectivized experience of systematic and continuous police violence against all Mapuches. Identification can thus lead to acts of solidarity (defined as support for someone who suffers on the basis of political identification) intended to share in or alleviate the suffering of other people with whom one identifies. In relation to criminal proceedings, two types of solidarity can be identified: solidarity with the defendant of the criminal prosecution and solidarity with the victim of the criminal offense. The type of solidarity can also determine whether people will cooperate with the criminal justice system or resist it. Solidarity with the victim generally involves support for the criminal prosecution and the use of
state resources to protect and vindicate the victim. Solidarity with the defendant is a challenge to the state and a dissent from the process of criminalization. Other scholars have observed such solidarity as well. For example, DeNardo (1985:191) notes that “[w]hen demonstrators become the victims of brutal repression, their movement often gains sympathy and even material support from people who have not suffered directly from the government's excesses” (in: Opp and Roehl 1990). To garner broad support, it is thus essential for prisoner supporters to portray repression against them as brutal and unjust.

The processes of “prisoner support mobilization” and “victim mobilization” are not confined to specific actors. Mobilization for defendants can be in support of challengers of the status quo as well as defenders of the status quo, depending on the prosecutorial charges. Similarly, both challengers and defenders of the status quo can mobilize as “victims” and claim victimhood. However, in each of the country studies, some actors tend to be more successful in their claims and will be able to appropriate the “victim” label more often than others. In other words, their appropriation of the label is more often “honored” (Scott and Lyman 1968) in the form of criminal cases in which they figure as the officially recognized “victim.” Indeed, while the apparently “equal” presentation of these two processes should not mask the structural asymmetry that often exists between groups, this asymmetry can be reproduced in the criminal justice system. It should thus be clear that in referring to actors as “victims,” I do not mean to qualify them objectively as victims. The actors themselves appropriate this label (quite
effectively) in the public space and act upon that shared identification and the characteristics
that are associated with it.

In the description of the country studies I will describe how victims of ETA in Spain, landowners
in Chile, and animal enterprises in the United States manage to unite and mobilize as victims in
the criminal justice arena. Basque left-nationalists, Mapuche activists, and eco-activists, on the
other hand, mobilize in support of “their” prisoners. In this section, I briefly describe the broad
features of how these groups claim and appropriate roles within criminal justice proceedings or
how they reject roles that are imposed on them. As groups mobilize, they appeal to or de-
legitimize the criminal justice system and its claim to punitive power as they, for example,
contribute payments to police investigations or refuse to testify. The different groups employ
competing discourses and try to access the criminal justice arena and have their concepts and
images accepted as the “truth” and ultimately even taken for granted. In the analysis of the
claims the groups are making, it can be useful to distinguish between competing truth claims
and competing moral claims (Rehg in: Habermas 1998:xv). Sometimes the course of events as
such is disputed (“truth” claims). Competing truth claims may exist when Mapuche activists
deny responsibility for or even the existence of a case of arson, whereas a landowner attributes
responsibility to them. Often, however, there is no disagreement about “what happened,” but
rather the moral valuation of what happened differs. Thus, for example, both eco-activists and
fur farmers can agree upon the basic facts of the case that 2,000 mink were released, but they
offer different moral claims as they either applaud or condemn the action.
Polarization can be observed as an increasing separation and growing inflexibility of discourse communities. Strong mobilization and a strict identification split can then make the criminal justice system incapable of generating a universally shared truth. For example, landowners in Chile interpret the high acquittal rate of defendants as an indication that legal guarantees make it too difficult to provide evidence to convict the guilty. Mapuche activists, on the other hand, read acquittals as a confirmation of the innocence of defendants and the unjust “persecution” by the prosecutors.

In describing victim mobilization and prisoner support mobilization as distinct processes that can be ascribed largely to some major groups and individuals, I attempt to identify the way in which discourses and their key concepts come to play a role in the criminal justice arena. I am not suggesting that these discourses are the sole invention of these groups or that these discourses can be found only within these groups. On the contrary, these groups are connected to the broader society in many ways and it is exactly the resonance with the larger public that can give these groups and their discourses the strength that they may have, which is, for example, shown explicitly when many people show up for the public demonstrations that these specific groups organize.

Of course, the complex conflicts and the relevant multiple actors in society can never be so neatly divided in the dichotomy that I outline here. That, however, is exactly one of the points
that I am making. As actors move into the criminal justice arena, the logic, the available roles, and the very criminal proceedings have this polarizing and dichotomizing effect, simplifying what is often highly blurred and multifaceted. Further, while in some criminal cases the ongoing trials are front-page news and a topic of daily conversation, in many of the other criminal cases only a select number of people care about the trials. My focus on the specific groups that mobilize in the criminal justice arena should not make us forget that often the vast majority of society just carry on with their lives. While absent from active mobilizations, this “silent” majority is often the subject of them as different actors, including the prosecutor, try to reach out to, make claims about, or speak in the name of “society” and the “public.”

Victim mobilization – appealing to state protection

Mobilization in the criminal justice arena is just one of many ways in which people who feel victimized can become engaged. In the country cases, they often engaged in multiple responses at the same time and sometimes did not do anything at all. Frequently, victimized actors attempted to make up for the state’s failure to protect their goods or lives by hiring private security companies or bodyguards or by starting civil lawsuits to ask for protective injunctions or gain restitution or compensation for damages. Whereas victimized actors can recur to extralegal retaliation, and indeed have done so, powerful defenders of the status quo are particularly likely to appeal to the rule of law for their protection (Beetham 1991:67). 34

34 “The much readier access of the powerful to the law, and the fact that it provides both the source and protection of their power, makes appeal to the law as the ground of legitimacy a particularly favored strategy for dominant groups. Indeed, respect for the law is insisted on as the first duty of the subordinate, and legal validity is
Victim mobilization is collective action calling for criminal justice action in the interest of those that claim the status of “victim.” Many scholars mention in their accounts of the dynamics in and around the criminal justice system the relevance of “interest” groups, “pressure” groups, or “moral entrepreneurs” (De Roos 1987; Quinney 1964; Vold 1998; Chambliss & Seidman 1982; Becker in: van Swaaningen 1999:204). Not many, however, have examined how exactly this pressure group activity works. Waddington provides a useful account, suggesting that police officials change their routine behavior when potential victims are “important people” like ambassadors or royalty who can cause significant “in-the-job trouble.” Waddington defines effective “troublemakers” as those who occupy institutionalized positions of power (Waddington 1998:127). In the subsequent case chapters, I will analyze how groups have claimed the victim label and taken steps towards creating these institutionalized positions of power in order not to be ignored. In this process of victim mobilization we can identify several (not necessarily chronological) steps:

1. Self-identification as victim and the forging of alliances
2. Declaration of a common problem
3. Demanding protection from the state
4. Defining actions as criminal: employing criminal law

made to appear not only as the necessary, but as the sufficient, condition of legitimacy: its ultimate, rather than merely its proximate, source” (Beetham 1991:67).
The declaration “I am a victim” is a reference to the logic of criminal law and the institution of a criminal trial in which the victim has a specific place, role, and significance. Whereas the political arena is constituted by political opponents, the criminal justice arena is constituted by perpetrators and victims. It is to this criminal justice “victimhood” that victim mobilization refers. Collective action is then based upon the mutual identification as victims and a shared victimhood, due to a common “perpetrator.” At the same time, “victims” can claim their innocence by denying the political conflict or their role or responsibility in it. Whereas a conflict is always more complicated than a simplistic division into victims and perpetrators can convey, guilt and innocence (“Was it a crime?” and “Did s/he do it?”) are supposed to be clear-cut in criminal justice (Hulsman 1986). Victim mobilization can obtain formal legal effect when the prosecutor or judge is warranted to weigh in the effects of “social alarm,” as, for example, is the case in Spain when a judge decides about preventive detention.

Once unified as a group, “victims” declare their common problem: a lack of protection and continuing impunity. The victims address the state and demand it perform its fundamental duty: to protect citizens adequately from incursions into their rights and freedoms and punish the perpetrators that do. Victims and their advocates generally request “legal security” and a strict obedience to positive law, thus claiming the general tenets of liberal legalism (Nonet & Selznick 2005:54). They point to the state obligations as understood in the social contract and

---

35 Of course, people can claim the term “victim” within the political sphere as well. That does not change the fact that its meaning originates from the logic of criminal justice and merely exemplifies the point that the boundaries between these two distinct areas are in practice often blurred.

36 See, for example, the Spanish Organic Law 7/1983 of 23 of April 1983, Art. 504 sub 2.
the relation between citizens and the state. In this appeal to the law, victims claim the rule of law as a guarantor against crime and the source of their right to protection. At the same time, the law and the rechtsstaat can be viewed as a serious obstacle in the struggle against crime or terrorism, as it is perceived as providing too many guarantees to defendants, making effective police and prosecution work very difficult. Whereas traditional constitutionalist interpretations see the concept of the rechtsstaat as a protection for citizens against arbitrary state repression, in these country studies we see that victims refer to it as if it were a toolkit the state is supposed to use to protect them against other actors. Further, victims often argue along the same lines as Jakobs and Cancio Meliá (2006) in their view of rights as a zero-sum game: if the state grants the defendant certain rights, this means the negation of the rights of victims.

It is useful to think about criminalization from the point of view proposed by Hulsman, who contends that the world is full of potentially “criminalizable events” (1986). Whether or not concrete specific events get criminalized depends on social action, not on a certain innate or essential criminal quality of the event. Human beings can choose to attribute a criminal quality to specific conduct and thus bring it to the attention of the relevant authorities to initiate secondary criminalization. Potentially “punishable facts” happen all the time, but only a certain part of them are translated into the criminal justice system. “Victims” set this process of criminalization in motion when they actively translate their narrative into the criminal law framework. We will see that they often attempt to criminalize actions that were previously not
regarded as criminal, or to change the qualification of actions that were not taken seriously enough.

Why is it important to analyze how different actors present and use the “victim” label? The identification of victims plays an essential role in the assessment of harm and the determination of the legal interest at stake. No crime without harm is an important principle in criminal law (de Roos 1987:34). As victims unite and recognize each other as victims of a similar phenomenon with shared experiences of harm, threat, and fear, they often construct a narrative in which distinct incidents become connected in a pattern. Their narrative can then construe and blame a unified actor, organization, or identity group and hold it responsible for this harm. This narrative can become the basis for a re-contextualized prosecution, which will be discussed in more depth below.

On the basis of their narrative, victims can lobby for the adoption or application of specific laws and engage in debates about the affected legal interests. They draw upon the criminal law language and terminology as they identify harm, define actions as crimes, provide accounts for criminal liability, and demand higher sentences. Victims thus contribute to the criminal qualification of events. Victims traditionally played a small role in classical criminal justice. During the last decades, however, much effort has been made to give the victim a stronger place within the criminal justice system. Once actors have successfully claimed the status of “victims” in the criminal justice arena they have a range of possible actions at their disposal.
Victims can become participants in criminal investigations and trials as private accusers ("private prosecution") or witnesses, they can file complaints, and they can provide assistance in investigative tasks (offer evidence).

As “victims” mobilize and become one united actor, they can thus become effective “troublemakers,” propose an alternative narrative, and transform the way the prosecutor constructs a criminal case.

**Prisoner support mobilization – condemning the state response**

Balbus points out in his study “Black rebels before American Courts” that one of the reasons the courts were able to process the criminal cases after the riots in Detroit, Chicago, and Los Angeles so smoothly was the lack of a consistent challenge to “the very logic of the court authority effort – their very definition of the situation” (Balbus 1973:258–259). In the country studies in this research, we do encounter such organized efforts to provide alternative definitions and challenge those put forward by the state. The process of prisoner support mobilization\(^{37}\) can be divided into four steps or elements.

1. Creation of a prisoner support group: a call for solidarity
2. Criticisms within the framework of liberal legalism: de-legitimization of the state
3. Bringing the “political” back in: identification as a political prisoner

---

\(^{37}\) Whereas in all cases people mobilize under the header of “prisoner” support, it more correctly is “defendant” support, as people who stand on trial while they are not in detention receive similar support.
4. Persuading the public of the political definition: changing the impact of criminal prosecutions

Prisoner support mobilization provides a counter-narrative to the account proposed by the prosecution. The practical aspects of this process – the need for material support – are interwoven with the communicative aspects – the desire to confirm this counter-narrative for internal and external consumption.

As a result of criminal prosecutions, defendants and their supporters switch part of their time and money from their political activities to issues of criminal justice. A clear incentive for the support group to be created is the emergence of practical issues that a criminal prosecution involves, such as the necessary money for the defense lawyer and the practical needs of a prisoner. In the cases that I studied, the prisoner support group also functioned as a coordinator of all the actions that occurred regarding the prosecution. As a case drags on, and of course also during the time of imprisonment, there are infinite moments for outcries and rallies. Prisoner support groups distributed information about the trial dates and the treatment of the prisoner. There were demonstrations in front of prisons, honoring ceremonies for prisoners, and hunger strikes for better prison conditions. This work requires for activists to identify with “fellow activists” who are viewed as sharing the same cause. Activists engaged in prisoner support invariably emphasize that they are acting in solidarity. “Their repression is our repression,” said a Mapuche activist (Interview C-67). Prisoner support activities often become
“a social movement activity in its own right” (Zwerman and Steinhoff 2005:96) and can involve more moderate groups when the state is perceived to be “overreacting” (della Porta and Reiter 1998:18). Criminal justice issues can even come to replace, overshadow, or complement the original political claims (Starr et al. 2008:265). Some challengers of the status quo claimed that this diversion is exactly the aim of those prosecutions.

Not all prisoner support is politically motivated. Prisoner support can be categorized according to its relation to the political claim of the defendants. Family and friends often engage in offering “personal support” intended to alleviate the suffering of the imprisoned person. This is the kind of support that is provided regardless of the definition of the criminal facts, and regardless of the political cause. The prisoner is simply recognized as a human being worthy of humane treatment.

Another form of prisoner support, which I call “liberal” support, is generally provided by human rights organizations and moderate groups which agitate against human rights violations, such as torture, long preventive detention, disproportionate sentences, or the lack of due process. Human rights groups take liberal legalism seriously and maintain the difference between “formal” support (for the legal case) and “substantive” support (for the political cause). Also,

---

38 “When the police are perceived as ‘overreacting,’ a process of ‘solidarization’ is set in motion between those who are the direct target of repression and larger – often more moderate – forces” (della Porta and Reiter 1998:18).

even prisoner supporters who are motivated by reasons that cannot be understood in terms of liberal legalism per se often frame their support as “liberal” support for strategic reasons.

Finally, prisoner support mobilization can step outside of the framework of liberal legalism and criticize the state definition of the criminalized conduct more fundamentally by pushing it back into the political arena. Prisoners can successfully claim and establish their identity as “political” prisoners when they receive support and recognition from a prisoner support group and a broader movement. “Political” prisoners contrast themselves to common prisoners, or what Basque activists call “social” prisoners. Of course, the definition of what counts as a “political” prisoner is fundamentally contested. “Political” prisoners and their political supporters generally defy the state’s legitimacy to condemn their actions. Balbus emphasizes that in challenging the logic of the court, protesters have to sacrifice their short-term interest in the name of the consciousness of a broader, longer-term interest. This requires strong identification with a larger collective and is both a condition for and a goal of prisoner support. Self-identification as a political prisoner may advance the political cause but jeopardize the criminal case, as activists then commit themselves to a “political” solution in the political cause in contrast to “individual” justice in the criminal case. Challengers of the status quo have to decide what kind of defense to give during their trial or whether to reject state jurisdiction entirely, dropping any defense. Defense lawyers can play an important role in supporting a political strategy or choosing an individual juridical defense (cf. Balbus 1973:243). Political
prisoner support is often given by people who are politically active for the same or a similar cause.

Of course, these different kinds of personal, human rights, and political support often overlap. Specifically, supporters tend to switch between a human rights framework and a political challenge depending on the audience to whom they are speaking. For example, political supporters frequently employ the liberal legalist framework in order to de-legitimize the state by pointing out that it “does not apply its own rules.” Prisoner support groups frequently keep detailed track of legal irregularities and publish lists with the number of “political” prisoners to denounce state repression. Political prisoners and their supporters can strategically decide not to step outside of the liberal legalist framework in order to maintain popular support from moderate forces. Regularly, the message is framed such that the larger public is encouraged to identify with the prisoners, claiming that illegitimate repression may also victimize them at some point. Effective de-legitimization of the courts’ decisions and the validity of evidence can lead people to doubt charges and the prosecutorial narrative. This disrupts the belief prevalent in liberal democracies that everyone in prison has a good reason to be there.

In my analysis of the country cases, I will pay quite some attention to the dynamics within the different social movements between moderate and extremist activists. The drawing of boundaries, inclusion and exclusion, and the labeling of groups as extremists, sympathizers, and mainstream is an important aspect of discursive action in the criminal justice arena.
Criminal prosecutions tend to reinforce a distinction between ends and means, as prosecutors claim to focus exclusively on the illegality of means. Whereas “moderates” tend to accept this distinction, “extremists” often reject the very distinction and argue that movements must not be divided over the means of struggle but rather should accept a “diversity of means” (Gelderloos 2007). This division process can lead to a situation in which extremists support extreme protest activity and claim their prisoners are “political” prisoners, whereas moderate activists ignore or condemn them. Criminal prosecutions can thus work as a watershed in activist communities as they can create or strengthen distinctions between the “moderates” and the “extremists.” Moderates often have to decide whether or not they support or even cooperate with the state’s prosecution. We can observe mainstream groups officially and explicitly distancing themselves from more extreme organizations and rejecting illegal means as illegitimate (see also Balbus 1973:259). The Sierra Club in the United States, for example, refers to actions in name of the Earth Liberation Front (ELF) as “extremist.” This active rejection can also be required by the government.

Prisoner support groups are dedicated to promoting their political cause and persuading the public of the political definition of the phenomenon. Successful prisoner solidarity makes prisoners themselves turn into a political issue. Sometimes, political supporters respond to charges by openly disputing the illegitimate tag the state gives the criminalized conduct, claiming responsibility for their actions and widely publicizing, explaining, justifying, and defending them. In many cases, political prisoner supporters simply dismiss the charges as
irrelevant, arguing that the accusation and prosecution are politically motivated because activist tactics were effective in threatening political interests. They then claim that the state is criminalizing their legitimate goal, their legitimate protest, their movement, or their people.

The work of solidarity aims to change the effects that criminal prosecutions are supposed to have: incapacitation, deterrence, rehabilitation, retaliation. Sharp argues that repression can only be effective when the persons against whom repressive measures are taken support the norms that are supposed to be protected by the sanction (1973:14, cf. Mahmood 1996:21).40 True or not, we can observe that supporters actively resist the criminal prosecutions and their effects. In each of the country cases, defendants often decided to evade proceedings and become fugitive. Supporters can then defy law enforcement and offer assistance to fugitives, decline to offer testimony in grand juries, or otherwise refuse to cooperate with law enforcement. Many prisoner support activities challenge the stigmatizing function of criminal proceedings and the distance that is created between the “ordinary citizen” and those imprisoned, a process which led Garfinkel to argue that a criminal procedure can be seen as a “status degradation ceremony” (Vold et al. 2002:213; Van Swaanningen 1999:204). As a consequence of prisoner support, many political prisoners get transformed into heroes, which can turn the cost of repression into a benefit (Opp and Roehl 1990). This is not always the case, however. As a consequence of internal disagreements among “political” prisoners and their

---

40 Sanctions that aim to protect norms that are not shared will not enhance the legitimacy of the government. Cynthia Mahmood observes the same phenomenon in the struggle of Sikhs for a free Khalistan (1996:21). At the same time, many authoritarian regimes have been able to repress dissidents quite effectively, even if the dissidents did not support the protected norms.
solidarity groups (about the means of struggle or negotiation with the government), prisoners can cut ties with the movement as a whole or with their specific support group. Sometimes they are thrown out.

**Contested truths – the problem with evidence**

The interpretation of evidence is one of the stages in criminal proceedings where the impact of the different discourses and belief systems is particularly notable. In the criminal justice system as it is envisioned in the ideology of liberal legalism, the presentation of evidence is the key to truth-finding. Convincing evidence upon which judges can make their verdict “beyond a reasonable doubt” can clear away any assumptions or prejudices that people may have. Evidence is then supposed to give an objective and universal message. In each of the country studies, we can observe that the credibility and meaning of evidence is fundamentally disputed, impeding evidence to provide the basis for a shared truth.

Having discussed the meta-conflict in which “victims” and “prisoner supporters” present alternative images and narratives contesting the discourse of the prosecutor, I will now turn to the discursive shifts that we can observe in the prosecutorial narrative.

**4. Liberal legalism and beyond**
In the previous sections, I have conceptualized the prosecutorial narrative as a construction of reality that is constituted by courtroom arguments and decisions regarding who is prosecuted on which charges. In the process of contentious criminalization, the prosecutorial narrative is constantly contested in the criminal justice arena. Victim mobilization and prisoner support mobilization challenge the prosecutorial narrative and propose alternative narratives regarding punishable events and the proper state response. In interaction with these challenges, the prosecutorial narrative can change. This change can be described as a shift from an ostensibly de-contextualized narrative to a re-contextualized narrative. These are modes of the prosecutorial narrative that are constituted in different applications of criminal doctrine. In contrast to a de-contextualized approach that aims to isolate the facts of a case from the context in which they occurred, the re-contextualized approach situates criminal facts within a particular context while claiming that the context is relevant to understand and label the facts. I have drawn upon the work of various other scholars to identify these potential shifts, which will be discussed in more detail below.

**Criminal law as the practical application of liberalism**

Criminal law can be viewed as the practical application of a liberal political philosophy based on the following values: rationality, legality, formality, and individual justice (Norrie 1993:12–14). This ideology originated in the Enlightenment period when it became the basis for liberal democracies and the rule of law as a means against arbitrary government repression. I follow the conceptualization of Nonet and Selznick, who argue that liberal legalism should be
understood as a system that evolved because a more simplistic “repressive law” was not good at establishing legitimacy. As chief characteristics to legitimize legal outcomes, Nonet and Selznick emphasize the separation between law and politics, the importance of rules and procedure, and strict obedience to positive law (2005:54). If you do not agree with a law, it is allowed to protest through all legal means, but you have to obey the law. Administrators can be held accountable, but citizens have to comply. This is part of the historical bargain according to Nonet and Selznick: “legal institutions purchase procedural autonomy at the price of substantive subordination” (2005:58). Weber similarly stresses this distinction between formal procedures and substantive justice (“formal rationality”) as an important feature, which has been recognized as the best approach for the state to maintain both order and legitimacy (Balbus 1973:13).

Differentiation in society (a distinction between persons and roles) is another important component of the professionalized criminal justice system (Elias 1982; Weber 1972:124–128). Police and judges wear uniforms denying their individuality and are supposed to perform their tasks based on their role and not out of personal motives. These roles are no longer the “property” of a person but are (often temporarily) assigned (Weber 1972: 124–128). Formally, police and prosecutors represent the nation and the public interest. In every prosecutor’s office, courtroom, and prison this is symbolized by the national flag and pictures of the head of state, reflecting the unity of these organs and their role as representatives of the state.

41 They talk about “autonomous law,” which I take to be the kind of law that liberal legalism envisions.
Prosecutors are important “characters” (Fairclough 2003:213) in charge of executing the liberal legalist paradigm in criminal proceedings.

This framework is built, however, on assumptions regarding society and human beings that do not always correspond to reality: “Enlightenment thought was populated with a world of rational individuals living in a society based upon imagined consensus” (Norrie 1993:57). The existence of social and political conflicts was ignored from the beginning in the ideology of liberal legalism, and “[c]rime was the result of individual calculations” (ibid. 1993:58). Liberal legalism produces a framework within which the state is the guarantor of the social peace and abstract legal individuals are assumed to be free and equal. However, this does not correspond to the realities of social life. Critical legal theorists have explored these contradictions between the assumptions underlying liberal legalism and the actual application of law in the real world. In doing so, they have, for example, criticized the notion that law determines legal decisions (Norrie 1993:30–31; McBarnet in: Lacey and Wells 1998:16). Another contradiction is that the prosecutor has to act in the public interest, which is believed to be shared in a society by common consensus, founded in the metaphorical social contract. The public interest is, however, always a contested concept in a divided society. Over the past decades various researchers have developed competing perspectives in which they portray the criminal justice system as an institution that develops its own interests, is linked to interests in the larger society, and engages in practices that vary significantly from the ideal of formal legal autonomy.
In this research, I build upon this insight that there is a discrepancy between the assumptions underlying criminal law and characteristics pertaining to actual events in social reality. In this section, I describe the ideal type of de-contextualization as the standard way in which criminal prosecutions are conducted according to liberal legalism. The fact that it is an ideal type means that it is an analytical device, not a description of factual reality. In contrast to de-contextualization, I describe re-contextualization as an alternative (ideal typical) mode of operation. In this way, I conceptualize the discursive shifts that we can observe in the prosecutorial narrative in response to contestation in the criminal justice arena.

**De-contextualization**

The first ideal type that I describe is based on general descriptions of what criminal proceedings should look like, based on the core values of liberal legalism. Prosecutorial narratives are generally expected to be “de-politicizing” (Nonet and Selznick 2005:58; Balbus 1973; Melossi 2008). De-politicization is a way to legitimate judicial proceedings. It also denies politically motivated defendants exactly what they seek most: political legitimacy (Shapiro 2007:10–15).

How is de-politicization generally achieved? Mertz has analyzed the process by which lawyers learn to translate a story into the relevant legal framework and legal categories. She
emphasizes that lawyers “operate in a world where social context and identity have become invisible” (2008:110). While this approach purports to select legally relevant facts and otherwise exclude the social context, critics have noted that there is no such thing as “no context.” Indeed, the chosen context is a very particular one which is claimed to be politically neutral. De-politicization means that courts move away from the substantive issue at hand and instead focus on formal (understood as neutral) rules, making a strict distinction between ends and means. Instead of dealing with the dispute of political claims, the focus of a criminal prosecution is on the appropriateness and legality of means used by defendants to pursue their ends, make their claims, or defend themselves. Debates about the legitimacy of the underlying political claims are invariably deliberately and silently or explicitly excluded from the trial.

Procedural fairness is a core value. Substantive justice is the “hoped-for-by-product of impeccable method” (Nonet and Selznick 2005:67). Balbus similarly observes sharply that “[f]ormal legal rationality circumscribes the conflict between the state and the accused into a conflict over facts; to have committed a “crime” or to be a “criminal” means only to have been proven to have committed such-and-such act” (Balbus 1973:8). Formal equality before the law is one of the devices that make a criminal prosecution seemingly impartial and unrelated to structural differences in society. Hence the famous quip by Anatole France about “the majestic equality of the French law, which forbids both rich and poor alike from sleeping under the bridges of the Seine” (Balbus 1973:5). De-politicization is further achieved by creating generally

42 Like Elizabeth Mertz, it is not my intention to judge this peculiar aspect of the way the law works. It is both good and bad, as Mertz points out (2008:104).
formulated legal definitions that make a seemingly objective and de-politicized division in behavior, categorizing some as deviant or wrongful (Lacey and Wells 1998:12). Beetham makes the same point as he writes:

[T]here are features inherent in most legal systems that serve not only to encourage respect for the law in general, but to put the particular content of existing law beyond question, and make it difficult to challenge. [...] What are these features? Most deeply embedded are those terms used in everyday language which serve to distinguish the lawful from the unlawful in the achievement and exercise of power, and which demarcate, for example, theft, violence and murder from legally permitted forms of acquisition, compulsion and deprivation of life or livelihood. (Beetham 1991:67)

Criminalization and de-politicization in the spirit of liberal legalism follows the following steps:

1. De-contextualization
2. Individualization
3. Choice legally relevant facts, i.e. selection
4. Choice appropriate legal label, i.e. qualification

A de-contextualized narrative is typical in situations that resemble reality according to the assumptions upon which the criminal law was built: a society in consensus, disrupted by a few criminals who are motivated by self-interest, such as financial gain or an adolescent need for
adventure. This brings us back to the importance of the “definition of the situation.” Liberal legalism is a message from the state to the effect that criminalized activity is fully comprehended within the state. It takes something and treats it as an ordinary part of society. A de-contextualized and de-politicized narrative constitutes a claim by the state that the stakes are not that high. For years, the Chilean government chose to view the Mapuche conflict as isolated cases of private dispute between particular communities on the one hand and specific land owners on the other hand. Criminal incidents were framed within the context of these private disputes. Thus, the political significance of the conflict was downplayed. It is typical that government officials maintained that criminal prosecutions were not only appropriate and necessary but also sufficient to deal with the crimes and disorder related to this private dispute. In 2003, the mayor of Collipulli, a village in the middle of the area that was the center of struggle and “violent” action, commented that with the incarceration of one of the main Mapuche leaders of the zone, “everything was quiet now” (Interview C-19). Thus, he confirmed the image that the problem was caused by a few people and that repressing these individuals was an effective way to maintain or retrieve order and stop the violence. In Chapter 4 I will return to the various other available narratives and the subsequent discursive shifts made by Chilean prosecutors. The de-contextualizing and de-politicizing narrative fits the government that claims to be in control.

While the chosen (non-)“context” in this modality of the prosecutorial narrative is claimed to be politically neutral, in each of the country studies there is a moment in the contentious episodes
in which the prosecutorial narrative in its de-contextualized modality becomes contested. It is important to realize that the doctrinal tools on which the narrative built up (i.e., the choice of a narrow time frame, the focus on individual perpetrators, exclusion of the political motive) co-create the content of this narrative that isolates individuals from their communities and places priority on individualistic motives of actions (see also the table below). The images that are thus produced are specifically typical of this modality. Criticism of these images from actors that feel misrepresented or from actors that call prosecutorial action ineffective thus has a bearing on the form of the narrative as much as on the content. For example, the criticism in the United States that acts of animal-rights-motivated vandalism are organized and coordinated not only changes the image of the crime but also criticizes the ineffective prosecutions of individual perpetrators.

Re-contextualization

The second ideal-type modality of prosecutorial narratives is based on my observations in the country studies and available literature regarding different types of criminal proceedings.

As described earlier in this chapter, contestation in the criminal justice arena can challenge the de-contextualized prosecutorial narrative. Both victim mobilization and prisoner support mobilization can push the prosecutor to take the context into account. “Victims” can perceive the de-contextualized narrative to be highly problematic in fulfilling the promises of the criminal justice system, such as securing convictions, having a deterrent effect, and preventing
criminal acts from happening again. When disruptive action becomes repetitive and involves many people, incarceration of a few is not likely to stop these protests. As we have seen earlier in this chapter, victims can mobilize and complain that many offenses go unpunished as individual material perpetrators do not get caught. In the absence of convincing evidence or a lack of witnesses who are prepared to testify, criminal prosecutions can lead to acquittals. In some other instances, isolated actions of vandalism are not deemed severe enough for serious sentences. As a result, victims can propose a new definition of the situation. In the country studies, I will describe how the state, and in particular prosecutors, can adopt this alternative “definition of the situation,” leading to a discursive shift.

In the new narrative, instead of excluding the context of, for example, the “Mapuche conflict,” this context comes to the foreground. The Mapuche organizations, the Mapuche identity, the political motive, a larger collective of victims, a broad legal interest such as “national security,” the connection between different protest actions, events, and protest targets: all of these elements become necessary parts of the narrative to indict perceived troublemakers, instead of excluding them as they are in the de-contextualized narrative. With this shift, the specific image of perpetrators can vary and change over time while including those that were excluded from decontextualized prosecutions. Prosecutorial attention can focus on powerful leaders, financial supporters, or on outside sympathizers who give support to fugitives. Victims can also construe new images of the perceived perpetrators. Re-contextualizing the prosecutorial narrative in this way serves to expand criminal liability and open up the possibility to address collectives, “nail”
leaders who were not materially involved in the execution of crimes, or prosecute preparatory
activities or activities of logistical support.

Defendants and their supporters also can perceive the de-contextualized narrative as
problematic, because their political grievances and claims are not taken into account. They tend
to challenge the strict distinction between means and ends, which enables prosecutors to
condemn the use of illegal protest tactics and refer activists to the parliamentary route for legal
change while leaving structural inequalities unaddressed. In the country studies, we will
encounter, for example, Mapuche activists who ask in response to allegations of arson in
plantations: “What about the trees, which suck up all the water, making it impossible for the
Mapuche residents on the adjacent lands to get water from their wells?” (Interview C-46). They
perceive such induced erosion to be more “violent” than any of their protest actions which get
prosecuted. Re-contextualizing the prosecutorial narrative in the “context” as Mapuche
activists perceive it would then serve to de-criminalize protest actions that actually enjoy
widespread legitimacy among the population and are, according to the prisoner supporters,
more aptly understood as signals of communication or legitimate self-defense than as “crimes.”

I have pointed out that the doctrinal tools of this modality are an important factor in the
production of images. The shift in modality is therefore simultaneously a shift in both the
doctrinal instruments and in the content of the images. Indeed, a shift in a doctrinal device
towards re-contextualization can inadvertently constitute a change in the projected images.
The prosecutor choosing a doctrinal device for opportunistic purposes (for example drawing on provisions against “criminal organizations” to have more investigative tools and flexibility) can suddenly become immersed in the context of specific criminal acts as the charge forces the prosecutor to produce a credible image of the alleged criminal organization.

As a prosecutor re-contextualizes the narrative in a criminal case, he or she re-draws the boundary between the criminal justice arena and the political arena. Just like the de-contextualized narrative, the new re-contextualized narrative can also have the intention of de-politicizing an event; however, it follows a different path to do so. While the previous de-contextualized narrative ostensibly excluded the context in order to distinguish between the “political” and the “criminal,” the re-contextualized narrative explicitly engages with the context and frames the context in such a way that it affirms the criminal definition of the events.

The discursive shift from de-contextualization to re-contextualization

When the de-contextualized narrative is contested, prosecutors may put criminalized events in a different context. This occurs, for example, when prosecutors classify a case as a “Mapuche conflict case” and thus place a criminal case within a network of assumptions and images that govern the “Mapuche conflict.” I have called this step the “first classification” as this basic categorization is what the further specific re-contextualization of the facts of the case relies on. Competing contextualizing “first” classifications of criminal cases in Spain, for example, are
“ETA terrorism” versus the “Basque conflict.” Beyond the contestation common to criminal cases (“Did s/he do it? “Is there enough evidence?”), the network of assumptions and images that govern the chosen “context” becomes the new basis for continued contestation.

In analyzing the variety of forms of criminal justice proceedings, I step into the footsteps of other scholars who have theorized this issue. Herbert Packer (1964) famously devised two models of criminal process (crime control and due process), and Günther Jakobs (2006) distinguished between Feindstrafrecht (enemy penology) and ordinary citizen penology. Instead of adopting any of these models wholesale, I have drawn from these and other analyses to distinguish between different forms of criminal proceedings. In the appendix is a table in which I have juxtaposed the different ways in which criminal doctrine is interpreted and applied within a de-contextualized narrative and a re-contextualized narrative. For the elaboration of this table I have drawn upon insights and analyses from a wide variety of scholars and studies, including Agirre Aranburu (2004); Agamben (2005); Weber (1978); Packer (1964); Norrie (1993); Kelman (1981); Simpson (2006); Christenson (1999); Barkan (1985); Nonet and Selznick (2005); Damphouse & Shields (2007:71); Jakobs (2006); Smith and Orvis (1993); del Valle (2001); and Turk (1982).

The goal of the table is to provide a descriptive typology for the analysis of data. It does not necessarily have normative implications, even though we can subsequently evaluate its use and legitimacy and the effects in practice. These ideal types will not be found as such in real criminal
cases but can be used as an analytical tool in discerning broader patterns and changes. I use the typology as “a purposive, planned selection, abstraction, combination, and (sometimes) accentuation of a set of criteria with empirical referents that serves as a basis for comparison of empirical cases” (McKinney 1966:3 in: Jacques & Wright 2008:222). Its goal is not to explain a phenomenon, but to provide a useful description of it. Indeed, instead of trying to find these ideal types as such in the country studies, I am more interested in an empirical description of the in-between and what that actually looks like at any given moment. There is no grand shift in which de-contextualization and liberal legalism are entirely abandoned. Rather, we can observe a “back-and-forth” consisting of partial shifts including some elements of re-contextualization.

My focus will thus be less on the dichotomy and more on the process in which prosecutors shift between these ideal types and how these shifts are constituted by and reinforce new images of the criminalized phenomenon. In this way, the prosecutor gets a voice in the meta-conflict and communicates about what is going on, who the relevant actors are, and how the state relates to the situation.

To make the table easier to digest, I have sorted the many different doctrinal choices into three broader shifts that can occur as part of a re-contextualization: (1) a shift from narrowing towards broadening the legal interest; (2) a shift from narrowing towards broadening criminal liability; and (3) a shift from emphasizing towards loosening the separation between law and politics.

43 “A typology does not explain behavior; rather, the role of a typology is to provide concepts that are distinct, observable, quantifiable, and thus explainable by theory” (Jacques & Wright 2008:222).
For the subjects of criminalization, prosecutions in the re-contextualized modus are not necessarily better or worse than those in the de-contextualized modus. The impact on individuals or a movement is not only dependent on the kind of context that is chosen and the way this context is portrayed and translated into legal decisions. More importantly, de-contextualized criminalization can be as damaging to a social movement or individual as any other kind of criminalization. Indeed, without resorting to any context references, governments can easily imprison inconvenient protesters on bogus or pretext charges such as traffic or administrative offenses. While re-contextualized prosecutions may be particularly prone to violations of the liberal legalist rulebook, de-contextualized prosecutions can also lead to the imprisonment of innocent men or women, introduce illegal evidence, or otherwise violate a due process requirement.

The point of this identification of different modalities of prosecution is to understand the interaction between the contextualized images chosen to represent a criminal event and the doctrinal decisions that follow from and at the same time reproduce these images. To speak in plain English: for most people it does not really matter how they get locked up. In liberal democracies, however, the use of the force of criminal law against free individuals needs a justification. This justification is provided in laws and our understanding of the adequate application of these laws. Images of law-breaking can be translated into the corresponding doctrinal devices to narrate that course of events in order to construct a criminal case. A shift in
the images with which prosecutors describe a phenomenon can lead to a shift in the doctrinal tools that are applied, which reproduces and reinforces the discursive shift. The modality shift can even lead to a caricature of the images, as the social construction of reality in the criminal justice arena is constituted and constrained by the logic and language of the criminal law. Thus, prosecutors can be led to portray a loose network as an “organization” simply because the law on criminal organizations requires that the existence of an organization is proven.

The doctrinal shifts described in the table constitute a discursive shift in the narrative of the prosecutor. In each of the three country studies, I analyze the prosecutorial narrative and identify discursive shifts that constitute departures from de-contextualization towards re-contextualization. De-contextualization is one way in which criminal proceedings claim legitimacy. When that claim appears to fail, a new basis for legitimacy can be sought in a particular re-contextualization. The expectation was that de-contextualization is the standard approach which can largely be found in situations of stability where there are no specific pressures on the government or the criminal justice system. Re-contextualization can occur in the face of emergency and escalating violence, but also as a result of victim mobilization or other pressures. My country studies show that when the penal vocabulary is perceived to be unable or inadequate to do what it promises (define, punish and deter crimes), prosecutors will invent new words to indicate new crimes or new types of criminal responsibility.
In the country studies, we will often observe the following dynamic: Prosecutors enter the stage in an attempt to extract “criminal behavior” from a blurry and complicated range of events. Committed to the ideology of liberal legalism, they tend to work in a de-contextualizing manner, selecting specific events and individual perpetrators, charging them with narrowly framed offenses. They often prosecute challengers who have started to assert their rights in extralegal ways. These challengers may criticize the prosecutions and attempt to redefine their protest activity and push it back into the political arena, thus resisting criminalization. As the conflict continues, those who feel victimized by the protest activity may perceive the prosecutor’s response as insufficient. Their victim mobilization can include calls for re-contextualization of the events, while proposing a “context” that competes with the narrative from the prisoner supporters. Thus, the meta-conflict occupies the criminal justice arena as competing accounts of the relevant context and the appropriate definition of the events are translated into criminal law vocabulary. Prosecutors often present their narratives as a natural and inevitable representation of criminal events, while in truth there is not one determinate narrative. Both a de-contextualized prosecutorial narrative and re-contextualization within an alternative context are always an option.

Facing an incriminating re-contextualized narrative, defendants have three options. They can propose a different context and argue for a different definition of the crime (for example, choosing a context that enables the framing of the crime as self-defense or a context in which the role of the particular defendant becomes minor). They can also reject re-contextualization,
emphasize liberal legalist values, and call for a de-contextualized manner of prosecution.

Finally, they can choose to resist criminalization altogether and keep pushing back the boundaries of the criminal justice arena and emphasizing that the proper arena to deal with the criminalized event and its underlying dispute is the political. Often, their response is a mixture of these three options. In this meta-conflict, the prosecutor can – and in the three cases that I studied tends to – adopt the re-contextualized narratives proposed by the victims. While re-contextualization inevitably means that political elements are brought into the criminal proceedings, this does not mean that events are placed and dealt with in the political arena. Re-contextualization still is a form of criminalization, even though there are differences with a de-contextualized approach to criminal prosecution.

At the same time, defendants often also attempt to have their accounts as “victims” honored within the criminal justice arena, presenting a definition of the situation in which their grievances are actually criminal harms. In the cases in my research, these efforts to turn the tables are sometimes successful, but more often ignored.

5. Conclusion

Liberal legalism brings with it a framework that both enables and constrains the state regarding, for example, how it can prove elements of an offense or the kind of conduct it can charge as crimes. When faced with challenges they think are not being satisfactorily addressed
within a decontextualized approach, prosecutors may shift their framing. A discursive shift may bring investigative and charging flexibility, as it enables the prosecutor to punish more severely and to prosecute people and actions together that otherwise would be processed separately. Calling something terrorism, for example, can move incidents up on the list of priorities. At the same time, these constructions can also lead to a loss of the benefits of liberal legalism. While liberal legalism can be a powerful framework for taking complicated events and processing them in a non-contentious manner, re-contextualized prosecutions can turn the prosecutor into a political actor and change the way people think about what is going on in the courtroom. The case studies show that at times prosecutors have decided to switch strategies and have with varying force, depending on time and place, flirted with or moved towards prosecutorial strategies that are not the common ones of liberal legalism. This shift constitutes a recognition that the criminalized events are not ordinary crimes, thus validating to some extent the difference between the defendants and ordinary criminals.

In this chapter, I have sketched the analytical framework that I have used to analyze the different cases. Each country study will be presented in one chapter that sets out the context of the conflict, its actors, competing claims, and the mobilization in the criminal justice arena. A second entire chapter will then be devoted to the analysis of the criminal prosecutions that have occurred, their main themes, and the way in which the prosecutorial narrative, the images it draws upon, and the reliance on context to frame the “crimes” have changed over time.
II. Basque Separatists Challenge the Spanish State

“Somos españoles, aquí también!” [We are Spanish, also here!], shouted the people who had gathered at Plaza Moyúa in Bilbao. After the 2008 European Soccer Championship, youth in Bilbao celebrated the Spanish victory in the finals. Their celebratory shouts indicated a political message as well (Field notes, June 2008). The tensions surrounding the Basque claim for independence are present throughout daily life, also in soccer. Increasingly, the criminal justice arena has been transformed into one of the primary sites where these tensions are played out. Mobilization by and on behalf of victims of ETA dissatisfied with continued neglect and impunity has pushed the government to pay attention to the victims and, more importantly, to adopt new legislation and a different narrative about ETA and its sympathizers that has enabled an expansion of criminal prosecutions. This has drawn a variety of actors into the criminal justice arena, where they engage in a battle of interpretation as they condemn, justify, or redefine the conduct that is charged and place or reject blame. In its struggle to end terrorism and destroy ETA, the prosecutorial narrative has increasingly re-contextualized events within the context of ETA terrorism, defining as criminal what previously had not received that label. As a consequence, the narrative has expanded its reach and brought into the criminal justice arena a range of conduct and people who were previously outside of the tentacles of
prosecution. In this and the next chapter I trace this development in this first case of contentious criminalization as I analyze how the Spanish governments and its law enforcement agents have negotiated a short-term interest in order and a long-term interest in legitimacy in the face of challenges to its claims to democratic decision-making and an adherence to “the” rule of law.

1. Introduction

In June 2008, I met Carlos in the restaurant next to the courthouse in Madrid. As promised, he had brought Iñaki with him, a businessman who had been forced to pay the so-called “revolutionary tax” to Euskadi Ta Askatasuna (ETA) for years now. Carlos introduced me, mentioning that I was a student doing research about the criminal justice system and the struggle against terrorism. He added that I was talking to “everyone” and had also talked with people from the terrorist organization ETA. I wanted to protest and say that I had not interviewed any ETA militants. But before I could say anything, Carlos added that I had attended the trial against Gestoras pro Amnistía and also talked with the defendants. I held back my protest as I realized that Carlos was employing the broader definition of ETA as a network (Field notes, June 2008).

Carlos is not his real name, nor are any of the other first names used throughout these chapters.
The simple question “What is ETA?” proved to be far more complicated than I could imagine before embarking on my fieldwork. Not only is it disputed whether ETA is a terrorist organization or an armed organization. It is also deeply contested who belongs to ETA and who does not. Indeed, even the prosecutor got confused during one of the trials. He charged the defendants with membership in ETA. During his arguments, however, he talked about the relation between one of the defendants and ETA, as if ETA were actually external to the defendants. He corrected himself quickly (Field notes, June 2008, Trial Gestoras, Audiencia Nacional).

A final example can illustrate the discrepancy in understandings about what ETA is. In the trial on the illegalization of a Basque political party, the defense lawyer interrogated one of the police experts. The police expert claimed that in a public speech a mayor of that particular party had openly called for support for two ETA members who were being detained and had allegedly been tortured. Defense lawyer: “Did she use the word ‘ETA’?” Expert: “She said ‘Basque political prisoners,’ which everyone understands as ETA prisoners” (Field notes, June 2008, illegalization ANV/PCTV, Tribunal Supremo).

In this chapter I will analyze and question this assertion that “everyone” views Basque political prisoners as the equivalent of ETA militants. It turns out that different groups imagine ETA in very different ways, and these images have also changed over time. Importantly, the battle
about the representation of ETA has entered the criminal justice arena and changed the choices made in the criminal prosecutions by the Spanish state in its “struggle against terrorism.”

My fieldwork in Spain took place between January and June 2008, and I briefly went back in January 2010. During that time I conducted participant observation at various political events and criminal trials, and I conducted more than thirty interviews with actors from the different political sides as well as those in the criminal justice arena: prosecutors, victims, lawyers, and defendants. In addition, I collected numerous books and articles, surveys, legal transcripts, legislation, public declarations, internal documents from ETA, and government reports. For my analysis of the development of the prosecutorial narrative I have further relied on the yearly publication of the Memoria Anual (MA) by the general attorney’s office. For detailed information regarding my data I refer the reader to the methodological appendix.

2. Challenge to the liberal democracy

Basque nationalists demand independence from Spain. While this conflict goes back a while – at least to ideologue Sabino Arana at the end of the 19th century – the time frame of my

---

45 Part of the envisioned Basque Country lies in France. In these chapters, however, I focus on the conflict with the Spanish state. By talking about the “Basque Country,” I avoid the difficult choice between “Pais Vasco” (Spanish usage, only refers to the Basque Autonomous Community), “Euskadi” (associated with the moderate Basque Nationalist Party, PNV), or “Euskal Herria” (associated with the left nationalists and ETA). Euskal Herria does not refer to the three provinces of the Basque Autonomous Community but to the seven provinces which nationalists
research starts after the death of Franco in 1975. I thus analyze the contentious episode in which the Spanish state transformed into a democratic state and built a rule of law, while at the same time these very processes and the basis upon which they were built continued to be fundamentally contested. More than in the other two country studies, the conflict here directly implicates the state, as the Spanish state and its constitutional requirement for unity are at stake. The state has thus from the start been one of the main actors in this episode. Indeed, agents of the state were deeply involved in the Dirty War during the 1980s and have been among the main targets of ETA. Any brief introduction to the conflict, the actors, their perceived incompatible goals, failed negotiations, and the use of violent methods is bound to be incomplete. It will therefore merely serve as a basis for the reader to show how the actors, demands, and events in this episode challenge the Spanish liberal democracy. Inevitably, the issues and events presented in this introduction form the material for contestation in the criminal justice arena.

claim to constitute the desired independent entity, including Navarra and the three provinces on the French side. When more specificity is needed, I will make clear exactly to which provinces I refer.
The contention: Basque separatism versus Spanish unity

At the core of the contention are the incompatible goals of Basque separatism and Spanish unity. After the death of Franco, the Spanish liberal democratic institutions were built while specific sectors in the Basque Country demanded its independence from Spain, including ETA,

which continued the armed struggle it had started under Franco. During the Franco dictatorship (1939–1975) ETA emerged in 1959 as a student group aiming for more radical resistance than its members found in the moderate Basque Nationalist Party (PNV). Its goal was a free and socialist Basque Country. In 1975 Franco died and the transition started. Prime Minister Adolfo Suárez was the architect of this transition. In 1978, the new Constitution was presented for a referendum, where it was accepted, although in the Basque Country only 35% voted in favor of it (O’Brien 2003:111). This lack of legitimacy is still often cited by nationalist activists. Basque left-nationalist activists dispute that there has been a transition to democracy. Spanish constitutionalists, however, view the subsequently adopted “Statute of Gernika,” which outlines Basque autonomous competencies, as a retro-active legitimization of the Constitution. 53% of the Basque people voted in favor of this agreement, and it is a point of dispute whether this means that through this vote the Constitution also got accepted or not (O’Brien 2003:112). 41% abstained in this vote (Espiau 2006:4).

Left-nationalists spoke out for their demands through party politics until 2003, when the political party Batasuna was banned. ETA’s response was defiant: “Banned? A foreign legal system that we don’t accept is trying to claim that we are banned, but we don’t feel banned! […] We Basques don’t need to find a place within Spanish legality” (interview with a spokesperson of ETA in the newspaper Gara, 8 April 2007). In 2011, a new left-nationalist Basque political party (Bildu) participated in the regional elections, receiving 26% of the votes in the Basque Country.
Demands of Basque nationalists challenge the status quo

Basque nationalists challenge the status quo with their demand for independence of the Basque Country. Self-determination is incompatible with the Spanish Constitution, which claims Spain as united and undivided (Article 2). “No one is allowed to violate the Constitution,” said one of my Spanish right-wing interviewees as he talked about the Basque claim to independence (Interview S-13). Even the proposal for a referendum to decide on the matter is perceived as a strong challenge to Spanish unity, as it would imply that the Basque people alone could decide the matter. Constitutionalists claim that the proper deciding body for such a referendum would be all Spanish citizens. The Constitutional Court ruled in 2008 that a referendum planned by the president of the Basque Autonomous Community was unconstitutional and thus illegal. One left-nationalist activist commented upon this decision: “It is about the equality of political projects. The Constitutionalists have it all, whereas the Independentists have nothing. That is inequality. We don’t even have the right to lose.” He thus redefined the “right to decide” (the right to a referendum) as the right to lose while basing his demand on the liberal value of formal equality. “They say that we will lose. OK, we’d like to see that. Democracy means that everyone can try to persuade the people” (Field notes, June 2008).

In the eyes of nationalist Spanish people, however, equality between the different autonomous communities is at stake. “Why would they get more than we do?” is the sentiment (Interview S-13).
Whereas many “moderate” nationalists currently accept a certain degree of autonomy instead of total independence, left-nationalist activists generally regard the Spanish state and its claim to govern the Basque Country as entirely illegitimate. Indeed, refusing to participate in the collective imagination of the nation state when they talk about the state, they never say “Spain” but always “the Spanish state.”

Some tactics and justifications challenge the law

Unlike the other country studies, in the Spanish-Basque contentious episode the use of violence (including violence against people) has been openly justified, as some nationalist activists have not only rejected the state, but also accepted the use of violence to put pressure behind their demands. Their justifications are often based on fundamental criticisms of the democracy and the rule of law. Indeed, the democracy and the rule of law are perceived as part of the problem. This in turn poses a strong challenge to the state’s claim to a legitimate monopoly on force.

Many left-nationalists maintained a “state-of-exception” discourse to justify the use of violence, reasoning that as long as there is neither democracy nor a constitutional state, the armed struggle is justified as a defense against oppression. For example, after the illegalization of the political party Batasuna, they argued that all political means to fight for their political project had been taken away. Comments justifying the use of violence were expressed openly, as, for example, when a 28-year-old activist claimed that his generation had not lived one year without political and judicial harassment:
They are educating us in violence. If they don’t give the youth the necessary instruments, then our reaction will be the only method they leave us, which is violence. It is a reaction to what we receive, and we respond in kind. The state imposes this on us. It is our right to confront the violence. What we do is politics, and our goal is to overcome the violence. (Interview S-24)

Criticism of the state and its claims to democracy and the rule of law are widespread among left-nationalists. Basque left-nationalist groups such as the prisoner support group Gestoras pro Amnistía and the internationally oriented organization Askapena actively criticize the Spanish state for its perceived injustices and repression.

ETA’s armed attacks profoundly challenged the state’s monopoly on force, especially as ETA claimed the right to defend the Basque people using all available means in the struggle for their political project. During the 1980s, ETA maintained the so-called action-reaction-action doctrine, engaging in actions that would provoke a reaction by the state and then reignite action by angry citizens. ETA waged its most deadly campaign in the early 1980s. At its height in 1980, ETA killed 92 people in one year. While since 1992 the number of battle-related deaths has not surpassed twenty-five per year, during the 1990s ETA made several important qualitative leaps in its choice of targets (Alonso & Reinares 2005:266). During the 1980s, Civil

48 This number excludes ETA-pm and the Comandos Autónomos (CCAA), who killed five and nine people, respectively, in that same year. ETA político-militar (ETA-pm) split off from ETA militar (ETA-m). The ETA we know today is ETA-m. In 2008, this distinction was still frequently made in public spray-painting, where it read not just “Gora ETA” but instead “Gora ETA-m.”
Guards were targeted most frequently. During the 1990s there were fewer deaths, but killings were often more spectacular, costing the lives of high-level politicians, journalists, and judges. These assassinations in combination with actual threats by ETA led many people to hire bodyguards. I display a short table with the mortal victims of ETA from 1975–2010, but only with the emphasis that this numerical overview is necessarily incomplete as it does not adequately indicate the harm caused by ETA. The table does not cover the complexity of the activities that make up ETA’s existence, as it omits the many actions in which people were injured or actions with only material damage.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>16</td>
<td>17</td>
<td>10</td>
<td>66</td>
<td>76</td>
<td>92</td>
<td>30</td>
<td>37</td>
<td>32</td>
<td>32</td>
</tr>
<tr>
<td>1985</td>
<td>37</td>
<td>43</td>
<td>52</td>
<td>21</td>
<td>19</td>
<td>25</td>
<td>46</td>
<td>26</td>
<td>14</td>
<td>12</td>
</tr>
<tr>
<td>1995</td>
<td>15</td>
<td>5</td>
<td>13</td>
<td>6</td>
<td>--</td>
<td>23</td>
<td>15</td>
<td>5</td>
<td>3</td>
<td>--</td>
</tr>
<tr>
<td>2005</td>
<td>--</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Contrary to what is sometimes asserted, civilians were already targeted before the 1990s, for example the assassination of industrial businessman Javier Ybarra Bergé in 1977 (MA 1978:69).
Defending the status quo

Given the violent challenge to its governance, the Spanish state faced the dilemma of maintaining order without further stirring up discontent and alienation among left-nationalists. For decades, it did a poor job as the attempts to maintain “order” were perceived as unjust repression and a continuing violation of the desired autonomy of the Basque people, while at the same time ETA continued its violent campaign. To complicate matters, the challenge to the democratic state did not only come from those demanding independence. During the first decade after the transition, right-wing elements have also threatened the Spanish government and its claim to the monopoly on force. In 1981 general Antonio Tejero Molina attempted a military coup and almost succeeded, providing a strong incentive for the government in those years to appease the right wing and their concern for the unity of Spain. During those years several extremist right-wing groups were active, such as the Batallon Vasco Espanol and Triple A, which engaged in the killing of suspected ETA members. The Spanish government habitually labeled these groups “uncontrollable” (see, for example, MA 1978:70). From 1979 until 1987, an estimated eighty persons were killed by extremist right-wing groups (Calleja & Sanchez-Cuenca 2006:97).

Criminal prosecutions during the 1990s revealed that the Spanish socialist (PSOE) government was deeply involved in the so-called “Dirty War” between 1983 and 1987. In this period, the paramilitary group “GAL” (Grupos Antiterroristas de Liberación or Anti-Terrorist Groups of Liberation) killed 27 persons (Calleja & Sanchez-Cuenca 2006:97). The judicial investigations
revealed that government officials had hired mercenaries in order to kill ETA militants who had sought refuge in France. The paramilitary attacks were not only intended to eliminate ETA militants but also to force France to change its position vis-à-vis ETA and cooperate with the Spanish state instead of offering ETA members safe sanctuary (Woodworth 2002:82). While the lack of effective criminal prosecutions was a major impetus to found GAL and use extra-legal methods to fight ETA, the episode fueled anti-state sentiments in the Basque Country. GAL mistakenly killed several people who were not ETA militants at all as well as the popular leader of the left-nationalist political party Herri Batasuna. The Dirty War thus illustrates the continuing dilemma between the state’s interests in short-term order and long-term legitimacy as well as the balancing of competing demands of different audiences.

**Popular support: Extremism, supporters, and polarization**

Support for calls for independence should be distinguished from the support for ETA and its armed struggle. Surveys among the Basque public, since 1988, show that between 21 and 28% of the population has been in favor of independence, whereas 24–33% has been against it, and 27–37% would decide depending on the circumstances (Euskal Soziometroa/Sociómetro Vasco 2008:41–42). ETA has claimed it would accept the results of a referendum. The Basque challenge to the Spanish state has to be understood in the light of similar calls for independence in other regions, most notably Catalunya. This was, for example, visible when support for the Basque left-nationalist political party Herri Batasuna peaked in 1987, when it
was able to send a representative to the European Parliament. Throughout Spain, especially also in Catalunya and Andalucía, people voted for Herri Batasuna.

The dilemma that the challengers of the status quo pose to the Spanish state can further only be understood in light of the high level of popular support for ETA (especially during the 1970s and 1980s), the threat from right-wing paramilitary groups, and the growing mobilization of anti-ETA groups. Support for the ETA’s armed struggle during the 1970s and 1980s was significant, especially given that many people might not have supported it but also did not necessarily oppose it. Research has shown a constant ten percent of support for ETA (Euskobarómetro 2007; Sánchez-Cuenca 2007:302, Figure 2: Popular support for ETA in the Basque Country). This ten percent is often referred to as the “nucleo duro” or “hard core” of ETA supporters, principally located in small villages in the province of Gipuzkoa in the Basque Country, consequent voters for Herri Batasuna and the political parties that replaced it. On the other hand, right-wing paramilitary activity also received overt support. For example, one member of the Basque business community openly said that if the state would not act against ETA, private individuals would (Woodworth 2002:7). As we will see in subsequent sections, these factors have a direct impact on the practices of criminal justice agents. Popular support, for example, influences the level of citizen cooperation with criminal investigations.

For decades, terrorism has been one of the major topics in every Spanish election, illustrating its assumed importance in public opinion. The Spanish and Basque public have polarized along
exclusionary identities. Such explicit polarization undermines the fiction of a shared public interest. Victim mobilizers and prisoner supporters have engaged in major mobilizations, demonstrations, counter-demonstrations, and public debate, regularly addressing the violence of ETA and the repressive reaction by the state. In the Basque Country, weekly demonstrations called attention to the suffering of “political” prisoners and deaths attributed to the state. Regular demonstrations also took place in honor of victims of ETA. During the 1990s, people participating in these different demonstrations would even come face to face in the streets when public demonstrations were held in favor of the liberation of the hostages held by ETA. Left-nationalist activists (also called members of the MLNV, Movimiento de Liberacion Nacional Vasco) organized “counter-demonstrations”:

The participants in the anti-ETA demonstrations and people wearing blue ribbons often became victims of intimidation (with slogans like “the murderers wear blue ribbons” or “ETA kill them”) and harassment by MLNV members who saw them as enemies of their cause. According to many political comments in those days, the so-called “Basque conflict” had gradually turned into a “conflict among Basques.” (Van den Broek 2004:719)

This is only one expression of the continuous process of identification in which people are categorized as “us” or “them.” Another example of such boundary drawing occurred after the terrorist attack on 11 March 2004 in Madrid (“11-M”). It later turned out that the attack was perpetrated by a group affiliated with Al Qaeda. During the first days after the incident, however, the Aznar government claimed and people thought that ETA had committed the
attack. As a result, female ETA prisoners in Spanish prisons were attacked by other (common) prisoners and had to be protected by the prison guards (testimony of a former prisoner in: Vecin@s de Donibane y Eguzki Bideoak 2007).

The Attorney General wrote in 1990 that “the Spanish society” did not understand why the prison sentences for acts of terrorism were not higher (MA 1990:205). His label of “the” Spanish society excluded the many people in the Basque Country who would disagree. Especially during the early years of its existence, ETA received substantial support for its armed struggle, even though now that support has almost evaporated. For example, when, in 1973, members of ETA killed General Carrero Blanco, the supposed successor of Franco, this action drew quite a bit of popular support for ETA (Douglass & Zulaika 1990). Alonso and Reinares claim that the repressive violence Franco used against ETA led to a loss of state legitimacy and increased public opinion in favor of ETA (2005:267). In 1978 almost half of the Basque citizens viewed ETA members as idealists or patriots; just seven percent called them plain criminals (ibid. 2005:267).

For a long time the common saying among ETA supporters “algo habrá hecho” [s/he must have done something] conveyed the extent of trust people had that ETA would have good reasons for its use of force and choice of targets.\(^5^0\) The common assumption behind this phrase was that

\(^5^0\) Calleja & Sanchez-Cuenca (2006) mention how common this attitude was at least in the 80s; I heard this phrase myself after the murder of Isaías Carrasco by a young man from a little village in the Basque Country. Many rumors among left-nationalist youth after the murder of Isaías Carrasco provided these reasons. I was told, for example, that he provided information to the Spanish police (Field notes March 2008).
ETA victims were “guilty” of something or somehow “deserved” to die. To that extent, the allegiance to ETA took on features of the allegiance to a sovereign. By 2008, left-nationalist interviewees still generally refused to see ETA as a terrorist organization, even if many had come to the conclusion that it should stop killing. Indeed, among a small but significant part of the population, ETA militants were still viewed as heroes. Such support translated into concrete support for ETA militants in the form of offering transportation and lodging, not only in the Basque Country, but also in places like Catalunya and Madrid. A survey conducted annually in the Basque country postulated that “today in Euskadi one can defend all ideas without the necessity to recur to violence” and shows the answers from 1989–2007. A clear majority in agreement with the statement fluctuated at around the 80% mark. Still, a significant and constant minority in disagreement fluctuated at around 10%, sometimes reaching 20% (Euskobarómetro 2007). Of course, it is doubtful how accurate such questions can have been answered. One of my informants told that he had been called for a telephone survey (not necessarily for the Euskobarómetro though) in which one of the questions was whether he supported the armed struggle. He laughed when he told this and said: “they might as well have asked me to come down directly with my hands on my back to be taken to prison” (Interview S-19).

During a large part of the 1980s people who opposed ETA did not dare to speak out. For a long time, moderate nationalists also viewed ETA members as the prodigal lost sons. In a more literal sense, ETA members often were sons of PNV people. Maybe more than explicit
widespread support for ETA, there was a lack of public outrage and opposition. In 1986, the organization Gesto por la Paz was formed as one of the first public platforms opposing the violence of ETA. Throughout the 1990s, the demonstrations against ETA’s abductions and assassinations of civilians enabled people in the Basque villages and cities to speak more liberally about their ideas, even though the majority would still choose not to touch the subject instead of explicitly opposing ETA. Later, the citizen organizations Basta Ya and the Forum of Ermua were also formed and explicitly opposed the violence of ETA.

Prosecutors followed the public support for these developments closely. In 1993, the Attorney General reported that it was “hopeful” that day by day the Basque society was taking a firmer position against the “terrorist phenomenon” (MA 1993:147). He reported a survey by the Basque government that had found that seventy percent of the Gipuzkoans rejected terrorism as a vehicle for the expression of any idea, repudiating it as unjustifiable. At that time, the prosecutor wrote that “only” 7.3 percent were reported to justify ETA’s violence. Further, 16% were reported to believe that the sentences for terrorist crimes should be harsher, and 3.8 % were in favor of the death penalty (1993:148).

Popular support for ETA decreased significantly after the murder of the councilman Miguel Angel Blanco in 1997. A former ETA supporter expressed in early 2010 that he only hoped that ETA would quit with dignity before becoming “some sort of GRAPO,” as he put it (Interview S-35). Despite this decreasing support, for a long time ETA stayed firm: “Today, in the conditions
our country is in, we consider that the reasons for carrying out armed struggle are still applicable, and as long as that is the case we will continue” (interview in: Gara, 8 April 2007).

On 15 June 2009, however, a significant turn was set in motion when the political party Batasuna asked ETA to leave their arms and look for dialogue. In this plea, Batasuna had the support of a part of the ETA prisoners (Diario Clarin, 15 June 2009). Indeed, on 5 September 2010, ETA announced an indefinite cease-fire.

Thus, the Spanish state has faced a persistent challenge to its sovereignty as popular support for independence has been significant and constant. At the same time, during the 1980s few people openly criticized ETA’s armed struggle and paramilitary violence also received some public support. Since the 1990s, however, support for the armed struggle has decreased, and those opposing ETA have increasingly found ways to unite and voice their condemnation.

The Spanish criminal justice system

In this dissertation, the analysis focuses on the part of the interactions in the contentious episode that take place in the criminal justice arena. I specifically explore the way in which actors draw upon the particular logic of that arena to translate complex and contested events into legal facts that are amenable to criminal proceedings. It is necessary, therefore, to provide a brief introduction to the Spanish criminal justice system, some of the relevant laws and penal provisions, and the actors that are assigned with specific roles and tasks in order to create this
edifice of the rule of law. In the subsequent sections I analyze when and how this logic and these actors are mobilized and drawn upon.

The chief prosecutor at the Audiencia Nacional emphasized that it is his “role” within the “system” to apply the law, indicating his adherence to the differentiation of roles in the delivery and production of criminal justice (Interview S-21). What exactly does this system look like in Spain? The Spanish state is a parliamentary monarchy. The king currently is Juan Carlos I de Borbón. He has several competencies that are relevant in relation to the criminal justice system, such as the ability to grant a pardon to convicts. He is also the official commander of the armed forces. In the relation between the Basque Country and the Spanish State, the Statute of Gernika specifies the autonomous competencies, such as the Basque autonomous police, the Ertzaintza. Local Spanish courts (*juzgados de instruccion*) deal with crimes in the first instance. Appeals are lodged at the *Audiencias Provinciales*. The last instance is the *Tribunal Supremo*. Spain also has a Constitutional Court dedicated exclusively to issues regarding the Constitution. Autonomous provinces such as the Basque Country have a *Tribunal Superior de la Justicia*, competent in specific instances, such as cases against high government officials as well as adjudication regarding autonomous competencies. The *Consejo General del Poder Judicial* (CGPJ) is the responsible organ for various high-placed appointments and exercises control over the functioning of the courts. At the highest level, the European Court for Human Rights (ECHR) is the last instance that can adjudicate legal issues, as it has done, for example, in the case of the illegalization of the political party Batasuna.
The Centro Nacional de Inteligencia (CNI) is the Spanish intelligence agency. Spanish policing is distributed to different agencies. The Policía Nacional is the police force present in all of Spain except the autonomous regions (the Basque Country and Catalunya), with specific competencies in the Basque Country, such as on the borders with France. The Guardia Civil is coordinated by the Defense Department and has specific competencies, such as the security in airports and border areas. Spread over the Basque Country are various quarters for the Guardia Civil, which is still a contentious issue. The Ertzaintza is the Basque autonomous police, at first considered a victory for Basque nationalists, now highly criticized by left-nationalists due to perceived repression. Each of these organs plays a role in the process of contentious criminalization.

As the country has a continental legal system, Spanish prosecutors work in cooperation with investigative judges. Especially in Spain, investigative judges occupy an important role in criminal proceedings. As they prepare a case and make crucial decisions regarding who is charged with what, investigative judges play an important role in the creation of what I have called “the prosecutorial narrative.” Only when the investigative phase is closed and the case goes to trial does the prosecutor take over. Therefore, in my research in Spain I have focused as much on investigative judges as on prosecutors. For example, the well-known judge Baltasar Garzón is an investigative judge. He has played a major role in investigations and prosecutions against ETA militants and what he has called the “ETA network.” He has also been one of the
major players in the prosecutions against state officials involved in the Dirty War. The Attorney General of Spain, currently Cándido Conde-Pumpido, supervises the prosecutors and publishes a yearly report (Memoria Anual) indicating the ongoing and terminated criminal proceedings as well as identifying developments in crime rates and the criminal policy.

Until the reform of 1978, terrorism crimes were under the jurisdiction of the military courts. Then, special terrorism laws made terrorist offenses the province of a new court: the Audiencia Nacional. The criminal prosecutions related to the Basque conflict can be divided into the prosecutions that are conducted by the Audiencia Nacional (AN) and those that are done by local prosecutors in the Basque Country. The Audiencia Nacional was founded in 1977 (Decreto Ley 1/1977 of 4 January 1977). Critics point out that it neatly replaced the Tribunal of Public Order (TOP), which was a heavily criticized instrument used by Franco to detain political opponents. The Audiencia Nacional was founded by an executive decision, leading critics to claim that this adds to the illegitimacy of the tribunal (Lorenzo 2005). After years of legal proceedings about the legitimacy of the Audiencia Nacional, the Spanish Constitutional Tribunal ruled in 1987 that the European Commission of Human Rights had declared the Audiencia Nacional to be a normal court. That decision effectively wiped the issue off the table, at least legally. Still, criticism exists, also outside of the left-nationalist movement and outside of the Basque Country. For example, the Spanish lawyer Lorenzo disputes the interpretation of the Constitutional Tribunal (2005:38).
What does the Audiencia Nacional do? The jurisdiction of the Audiencia Nacional is restricted to certain areas, one of which is terrorism. Proponents of the Audiencia Nacional argue, for example, that the distance from the Basque Country is needed to guarantee the safety and neutrality of judges. In the words of one of its instruction judges, it is not a special court, but a specialized court (Interview S-22). It specializes in terrorism, but also in money laundering, tax fraud, corruption, and drug trade. Most people, including those who view the Audiencia Nacional as a special court against separatists, are not aware that these other areas also belong to the domain of the Audiencia Nacional. In 2003, a law was adopted that created an appeals chamber in the Audiencia Nacional. Previously, appeals were only possible in a limited review at the Supreme Court. In 2001, the UN Human Rights Committee ruled that this was not sufficient (HRW 2005:17). In 2010, the appeals chamber was still not operational, making the Tribunal Supremo the instance for appeal and last domestic resort.

The period from 1975 and 1985 was characterized by many legal reforms and attempts to bring the judicial institutions into an adequate position to deal effectively with the threat of continuing terrorist attacks. In 1995 a new Penal Code was written and the special terrorism laws were integrated into the penal code as separate offenses. The Spanish penal code has been reformed again several times, most recently on 26 December 2010. The terrorism provisions authorize, for example, the incommunicado detention, which limits or suspends some constitutional rights according to Article 55(2) of the Constitution, which prescribes that rights can be suspended with respect to length of detention, privacy of the home, and secrecy
of communications “as regards specific persons in connection with investigations of the activities of armed bands of terrorist groups.” Membership in a terrorist organization is criminalized in Article 516 with 515 sub 2 of the Penal Code. Apart from “collaboration,” the Spanish law recognizes a form of authorship called “necessary cooperation” which, for example, is used to prosecute someone who collected information for ETA that is necessary for executing an assassination. In 2000, a law was enacted to deal with the social problem called “Kale Borroka” [street struggle], enabling the prosecution of street violence as a terrorist offense, also when suspects are not a member of a terrorist organization (Law 7/2000). The same law (7/2000) also created a new terrorist offense: the glorification of terrorism or the humiliation of victims of terrorism. In the next chapter, the process towards and the application of these new laws will be discussed in more detail.

After the transition to an electoral democracy, state agents explicitly voiced their desire to build up a liberal democratic criminal justice system. In 1978, the Attorney General described the role of the prosecutor as the “defense of the juridical order and the prevention and punishment of crime,” emphasizing “objectivity,” “impartiality,” and responsibility for the “criminal policy” (Memoria Anual (MA) 1978:87–88). The ideals of liberal legalism are often stressed in the Memoria Anual. For example, in 1993, the Attorney General reflected on the quality of the Spanish rechtsstaat, which according to him should be based not only on a separation of powers but also on the separation between morality and the law. He called the Public Ministry the “grand defender of the society” (1993:25). As values in the criminal investigation, he
mentioned “the dogmas of legality and impartiality” as well as “the professional, scientific, and specialized activity of the Judicial Police” (1993:27).

With regard to the struggle against terrorism, however, in the early years of the transition the tension between respect for human rights and the normal functioning of the criminal justice system was openly acknowledged. In 1979, the Attorney General noted that it should not be the case that while the democratic society was fighting terrorism it “confuses respecting human rights with abandoning the most fundamental of these rights” (MA 1979:65), thus voicing a concern that can still be heard. Indeed, he viewed the terrorist phenomenon as the most horrifying challenge for democratic governments (MA 1979:67). He wrote: “let’s be honest: in the face of the terrorist phenomenon, the normal operation of judging, applying a penalty and taking care of its execution is [like] writing in the sea” (MA 1979:66). Doubts about this tension have vanished over the years, and in 2007 the Attorney General asserted that the judicial activity against terrorism was in “good health” and that the work that had been done was “firm, resounding, and according to strict fulfillment of the principle of legality” (MA 2007:161).

**Defining the situation: From war to criminal justice**

It is clear that the contentious episode has posed a significant challenge to the Spanish state. For decades, engagement in the political arena could not satisfy the demands of the challengers to the status quo. Negotiations failed, and left-nationalists criticized the slow process of implementation of autonomy granted to the Basque Country. The continued justifications for
violence and the armed struggle of ETA in combination with the use of violence by paramilitary
groups as well as torture by state agents turned this episode into a severe challenge for the
young Spanish democracy and its legal institutions. The Spanish state was not passive in the
face of the challenge to its sovereignty and the established order. In this section I trace the
definition of the situation that characterized the state’s priorities in terms of the framework,
set of laws, and state agencies that were put forward to deal with the dispute and the
challenges to the rule of law. Of course, the very definition of the situation is part of the
contention.

From the beginning, state agents have sought for and struggled with the appropriate
framework and means to deal with this challenge. Broadly speaking, while during the 1970s and
1980s the challenge was framed mainly in military terms, throughout the 1990s and 2000s a
criminal justice perspective has gained dominance. It is important to recognize, though, that at
all times the state has employed multiple measures and frameworks. Throughout the years, the
Spanish government has responded with military measures, administrative measures such as
the legalization of organizations and events, police work, political dialogue, and international
cooperation such as the EU terrorism list.

In the 1970s and 1980s, terrorism was viewed as a severe threat to the democracy (Alonso and
Reinares 2005:265). The foundation for the anti-terrorism policy was the so-called Plan ZEN
(Zona Especial Norte) which was heavily criticized (Uriarte 1983; Muñagorri 1996:297). Military
thinking dominated the Spanish approach to ETA (Iruin 2001), and the state viewed ETA as an opponent in a war (MA 1979:65). Illustrative of this war perspective were the confessions by former President Felipe González, who told a reporter from El País that once in 1989 or 1990 he had had the possibility to have the entire leadership of ETA killed at a meeting in France. At the time, he rejected the option, but in 2010 he was still wondering whether that had been the right decision (Millás 2010). During the 1990s and 2000s the definition of the situation changed dramatically and prosecutors emphasized the loss of social support for ETA. By 2008, the government claimed it was about to destroy ETA and prided itself on its capacity to deal effectively with terrorism through criminal prosecutions according to liberal standards and due process.

1970s/1980s: Fear of escalation and obstacles for effective crime-fighting

In the 1970s, the Spanish state struggled with a transition to democracy and the reform of many of the institutions of the old regime. Prosecutors faced dilemmas related to this transition. Several times the Attorney General complained in his Memoria Anual about a lack of funding and good infrastructure to perform well, as well as about an overwhelming number of larger and smaller groups from both the left and right wing that were employing violence and putting pressure on the young emergent democracy. Importantly, in 1979 the “terrorist phenomenon” was discussed without any specific mention of ETA, whereas in later years even the title of the section on “terrorism” converts to “terrorism of ETA.” At the end of the 1970s and throughout the 1980s, other groups active on the violent scene were the Autonomous
Commandos (CCAA, perceived as a more radical split-off from ETA), Terra Lliure (for independence of Catalunya), GRAPO (anti-fascists), MPAIAC (for independence of the Canary Islands), Triple A (right wing), BEV (right wing), and some smaller groups.

The *Memoria Anual* of 1979 makes it clear that criminal prosecutions were not viewed as a significant mode to deal with the terrorism threat. In the face of this threat the Attorney General viewed the administration of criminal justice as marginally useful at best. He contrasted terrorists to ordinary criminals and demanded that specific attention be paid to the specific characteristics of the terrorists. In sharp words, he declared that otherwise the work of the judicial authorities would be in vain.

Any pretension to apply analogous norms to the ordinary delinquent and the terrorist is aberrant. It is not that we would declare him at the margin of the law, but if there is no specific substantive and procedural normative framework to deal with his/her criminal and psychic characteristics, and his/her fanatics and pathological desperation, then the work of the administration of justice will be impossible and will be shipwrecked between disillusion and indifference. (MA 1979:74)

Whether acts of terrorism are different from ordinary crimes and, if so, how that should influence the state response, is a constant theme in the meta-conflict and still debated three decades later (e.g., Unzalu 2008:14). In 1979, the Attorney General viewed the existing terrorist organizations as dangerous and professional, emphasizing their international coordination and
connections, their technical expertise, and their enormous financial possessions (MA 1979:69).

He called the “enemy” (note this war reference) “cruel, difficult, and sophisticated” (MA 1979:70) and claimed that the terrorist activity constituted a grave threat to the state and the security of the citizens. What is more, the prosecutor perceived an escalation of the violence as well as the threat of further escalation. The overview with the number of terrorist attacks in the last decade showed a clear rise, leading the prosecutor to fear for continuing escalation. We will see in the cases of Chile and the United States that prosecutors there similarly perceived mounting escalation. The Attorney General wrote that “we find ourselves before a declared war against the civilization” (1979:65). ETA as an opponent in a war is the image that guided the Spanish state in its policy throughout the 1980s.

At that time, prosecutors were struggling with an ineffective criminal justice system. As obstacles in the effective prosecution of terrorism, the Attorney General listed the lack of international solidarity, the lack of cooperation by the “terrorized citizens,” and the scarce means for the police as obstacles in an effective struggle against terrorism. The Attorney General also berated the media for giving exposure to terrorists. “Terrorism needs publicity for its ends. The terrorist sees his injustice crowned and completed as his name appears on the first page” (MA 1979:72).

Significantly, during the first years after the transition, the category “political crime” was still officially recognized. For example, the Attorney General reported that on 1 January 1977 there
were 8,909 people incarcerated for ordinary crimes and 59 individuals incarcerated for political crimes (MA 1978:114). In those years, prosecutors fought to distinguish terrorism from “political crime,” for example when they called upon other countries to extradite those suspected of terrorist crimes. The Attorney General criticized other countries for the lack of real help and the tendency to interpret terrorist actions as “political crime,” which would lead to their exclusion from extradition (MA 1979:71).

The Attorney General also reported as one of the obstacles in the struggle against terrorism that the fear of the citizens led them to decline cooperation with the administration of justice.

They don’t file complaints, report or communicate crimes or suspicions, they flee away from giving testimony, they hesitate in acts of recognition and identification of aggressors, and, in general, they procure to avoid their intervention, fearing to seek complications. (MA 1979:73)

Therefore, the Attorney General pleaded for a campaign to persuade the population to reject terrorism and cooperate to isolate the terrorists. Also, in 1980 the Attorney General devoted an entire page to this problem of obtaining evidence, noting that in the case of crimes committed by armed groups it was absolutely impossible to find people who would testify at trials, not even the victim. This fear to testify at a trial was reiterated by the Attorney General in the Memoria Anual of 1989, where he stated that witnesses are especially hesitant to recognize perpetrators (1989:214). In Chapter 4, I will explain that this issue is also particularly relevant for the prosecutors in Chile.
1990s/2000s: De-escalation, blows to ETA's capacity, and loss of popular support

While finding witnesses might still have been a problem, by 1989 the definition of the situation and the estimated threat posed by ETA had changed dramatically. Prosecutors observed a downward trend in the number of attacks (MA 1989:122) and a change in attitude among the population and were optimistic about the future trend. Significantly, the criminal justice response was now considered the dominant mode against a phenomenon that had become firmly labeled as “criminal.” In 1989, the prosecutor of San Sebastián explicitly noted that the majority of the Basque people increasingly openly rejected the violence and opted for pacific and democratic solutions to any problem. He observed that the “democratic idea” in which everyone can voice his or her ideas, even extremist ideas, was taking root. He speculated that in the short term the image of a Basque Country tainted by barbaric acts could be nothing more than “a sad and forgotten past” (1989:123) and stated that to achieve this, the goal was to “isolate the terrorist phenomenon and recuperate and re-socialize those that in a recent past took pleasure in or even participated in these criminal activities” (1989:123). What is more, the prosecutor also observed a decline in the activities of public disorder, harm to vehicles and property, and glorification of terrorism. He connected this to the fact that the majority of the people had taken a negative attitude towards the violence.

After the experiences with the GAL and the Dirty War, the discourse changed to a strong determination to deal with ETA through the “rule of law” and criminal prosecutions as well as
other legal instruments, such as the Law on the Political Parties that led to the illegalization of Batasuna. In 2005, Attorney General Cándido Conde-Pumpido announced that “the counter terrorism fight at the international level is at the same stage as the fight against ETA twenty years ago: illegal detentions [and] torture,” claiming that such phenomena no longer existed in Spain as the struggle against terrorism was “based on respect for the rule of law” (HRW 2005:16). Also, the Chief Attorney at the Audiencia Nacional argued that after forty years of experience, Spain now knew that the rule of law and criminal prosecutions were “sufficient to respond effectively to terrorism” (Interview S-21). He advocated fighting the struggle with “all the arms of the law, but also only the arms of the law.” Still, despite such liberal legalist affirmations, the categorization between Us and Them had not disappeared and continued to affect thinking about the proper application of laws. For example, in relation to protests that the closure of the Basque newspaper Egunkaria infringed upon the freedom of expression, former Prime Minister Aznar was reported to have said that the only ones that can seriously talk about being violated in their freedom of expression, up to losing their lives, are the victims of ETA (El Mundo, 26 February 2008).

A crucial step in this commitment to criminal prosecutions as the way to deal with ETA has been the French turn from providing a safe haven to ETA refugees to its cooperation with the Spanish state, arresting and extraditing ETA militants. This safe haven had hampered criminal prosecutions (Garzón 2005). To achieve French cooperation, the necessary shift was to convince the French government that ETA activity was not political crime and that the Spanish
state could be qualified as a democratic *rechtsstaat*. When this succeeded, the French cooperation proved significant in the actuation against ETA, as France could not provide refuge to ETA activists anymore (MA 1993:144).

By 1994, the Catalan terrorist group Terra Lliure had been dismantled and other terrorist groups also disappeared, apart from some minor actions by the terrorist organization GRAPO. This left ETA as the only terrorist organization active in Spain. This contrasts starkly with the situation only ten years earlier, when various groups were still active on this stage. From the early 1990s onwards, ETA lost operational capacity and popular support. By 2008, it was possible for Naty Rodríguez, a family member of ETA victims, to affirm that “ETA is defeated, for how much suffering they still will be able to cause” (Bake hitzak 2008:55).

Thus, during the 1970s and 1980s, ETA and other terrorist organizations were described as “enemies” in a “war” and the criminal justice arena was not viewed as the primary arena to deal with it. To this end, the differences between “terrorism” and “ordinary criminals” were highlighted. Prosecutors expressed their hesitation to take on this challenge in criminal prosecutions alone and feared escalation. This can be contrasted to later decades, in which the “rule of law” was hailed for its effectiveness in dealing with ETA and its terrorist activity, which came to be viewed as just a particular mode of criminality. With the decrease of support for ETA violence and the increased dominance of criminal prosecutions as the site to deal with ETA, collective action in the contentious episode moved increasingly into the criminal justice arena,
translating events and demands into the language of criminal law and setting off the process that I call contentious criminalization.

The transfer: From the political arena to the criminal justice arena

Much of the interaction in the Spanish-Basque contentious episode has increasingly taken place in the criminal justice arena, an arena that is collectively imagined when events are defined as “crime.” This process, which I have labeled the “transfer,” affects the relevant issues, significant actors, and the logic of interaction. This section discusses some of the moments and activities in which that transfer is visible.

After the death of Franco, many of those who had been prosecuted and convicted during his regime were considered “political” prisoners. In 1977, the Spanish government accepted a broad amnesty law (Law 46/1977) providing amnesty for all political prisoners who had been detained under the Franco regime, referring to the “promotion of pacification of spirits, reconciliation and national concordance” (MA 1978:114). ETA prisoners (and others, including, for example, GRAPO prisoners) were recognized as “political” prisoners and released from prison. The amnesty law exemplifies the re-contextualization of criminal events as it conceded amnesty to those who had committed their actions with a political intention. With some crimes, this political intention was assumed, such as with the crimes against the external or internal state security. Amnesty was explicitly conceded to those who had acted in order to re-establish the “public liberties or the demands for the autonomies of the peoples of Spain.” In
order to judge this specific intention, the law dictated that it was important to look at the background and even the personality of the subject. Such an intention was, for example, assumed to exist when the person was a member of a political association that after the transition was legally recognized and was active for the defense of the specific political or social claims (Law 46/1977 sub 2).

This amnesty thus made a reversal from the criminal justice arena to the political arena (a “transfer” in the opposite direction). It did not take long, however, before ETA and its activities were relegated back to the criminal justice arena. “The day after the amnesty the prisons were filled again with political prisoners,” said a Basque lawyer and left-nationalist human rights activist (Interview S-1). He said it as a matter of fact, apparently not feeling the need to address what exactly had prompted their detention. Thus, we can observe a typical difference of interpretation: whereas the Spanish government attributed the increase of the penal population to the fact that released prisoners had returned to criminal activity (MA 1978:114), Basque left-nationalists justified ETA’s continuing presence as a logical response to undue legal repression and militarization.

In the criminal justice arena, the roles, logic, and tools of criminal procedure shape the interactions and the way in which issues are framed. Thus, in interactions in the criminal justice arena, the political dispute is excluded as irrelevant. Basque nationalists consistently have resisted this exclusion, arguing that the lack of self-determination is the first and fundamental
violation of their rights and justifying ETA’s actions from that perspective. Their opponents, however, refuse to enter this debate in the criminal justice arena and argue that the demand for self-determination is not relevant for determining the crimes of ETA. Constitutionalists thus emphasize the liberal legalist distinction between ends and means and argue that it is not a crime to advocate for independence (the end). Having insisted on the strict boundary between the political and the criminal justice arena, they move on to discuss ETA’s actions (the means) in criminal law terms. As evidence that it is really possible to advocate for independence within the political arena, they often point out that the new political party Aralar (founded in 2000, explicitly rejecting ETA’s violence) does not face illegalization. The exclusion of “conflict talk” from criminal proceedings fits neatly with the position of the Association of Victims of Terrorism (AVT), which refuses to label the situation in the Basque Country as a “conflict.” They refuse to speak about it in any other terminology than that of the criminal justice system: there are guilty perpetrators and innocent victims. Talking about a conflict would introduce the notion of some other party to the conflict, whereas they see only one party, which is ETA, and they view themselves as innocent bystanders.

In 1988, an alliance forged by a treaty known as the “Ajuria Enea Pact” reinforced the shift to the criminal justice arena. Emphasizing the logic of legal liberalism, the Ajuria Enea Pact replaced the common framing of the dispute as “Basque nationalists versus Spanish parties” with the alliance of “democrats versus terrorists.” It is this alliance of democrats versus terrorists that reinforced the isolation of the political party Herri Batasuna as long as it refused
to condemn the violence of ETA. Later negotiations in 1998 (Lizarra Pact) revealed that Herri Batasuna had negotiated with other nationalist parties such as the PNV and EA in order to retrieve the previous alliance. It is a typical liberal move to focus on the “means” of a struggle instead of the ends. It aims to isolate extremists from moderates. We will observe similar maneuvering to isolate the extremists in the United States. Again in this spirit of creating a front against the use of terrorist means, in 2000 the political parties PP and PSOE signed an anti-terrorism pact in which they reaffirmed their collaboration in the struggle against terrorism (8 December 2000).

Contrary to this separation of means and ends is the belief held by some right-wing actors that Basque nationalism is directly responsible for the terrorist violence. Sociologist Javier Elzo (himself threatened by ETA) criticized this perspective (in: Medem 2003:175). These right-wing groups put means and ends on the same level again, when, as Elzo writes, they blame the Basque nationalist ideology for terrorist attacks and thus believe that ending that nationalism will also stop terrorism.

In the criminal justice arena, the logic of criminal prosecutions and their focus on the charge is dominant. Judges are careful to police the boundaries of acceptable legal arguments. This was illustrated, for example, when the judge of the Audiencia Nacional told a lawyer to refrain from certain arguments:
Ms. Attorney, [...] you can’t say that there are convictions without evidence. [...] You cannot be gratuitous. For the development of the trial, you can’t offend... [...] I don’t like to intervene in your remarks. Here we are not trying the Audiencia Nacional as a tribunal. That is not the trial.

(Field notes, Trial Gestoras, June 2008)

The attorney had to speak on the topic of the trial, and the judge defined the boundaries of what belonged to that discussion and what did not. At a later point the judge warned: “Don’t talk about torture again; that is not what we are judging here.”

As the contentious episode was transferred into the criminal justice arena and different actors mobilized in this arena, the Spanish state risked a situation in which groups would identify prosecutors and judges only with particular political interests and no longer see them as representing a legitimate authority in upholding law and order (cf. Miall 2001:88). Indeed, this is exactly what has happened. In many of my interviews, people from very different sectors in society expressed their discontent with the Spanish criminal justice system, believing it was deeply politicized and not neutral (Interviews S-1/2/3/5/13/14/16/28/31). It is therefore instructive to be attentive to the ways in which the state addressed different audiences in its prosecutorial narratives, sending messages in order to defend the rule of law without (further) alienating important sectors in society.

Just as we will see in the case of Chile in Chapter 4, the transfer to the criminal justice arena is not complete, and many times actors continued to engage in the political arena. For example,
not only political parties but also ETA participated in negotiations. Scholars have recognized
that “all state systems must integrate into their power structure at least the groups which are
self-conscious, organized, interested, and able to exercise private power in the streets if barred
from the magic circle” (Nieburg 1968:19). While the government defined its actions as
terrorism and prosecuted ETA militants, the social support for ETA was high enough and the
capacity of ETA to create havoc significant enough that there were three formal attempts to
with ETA in Algeria. These negotiations did not succeed. In 1998 there was a second failed
attempt to negotiate by the Aznar government (right-wing Popular Party (PP), 1996–2004),
followed by failed negotiations in 2006 under the Zapatero government (PSOE, 2004–present).

3. Mobilization and discursive action in the criminal justice arena

It is in this context of incompatible goals, the use of violence, and competing views of
democracy and the rule of law that we can observe what I have labeled contentious
criminalization: criminal prosecutions in a contentious episode transform into a site of
contestation. As events unfold and are labeled as “criminal,” and as the state puts its criminal
justice system into motion, groups and individuals in society engage with the state in what I
have called the “criminal justice arena.” In this arena, the liberal legal framework, logic, and
language shape the interactions, demands, and experiences. In my interview with the chief
prosecutor of the Audiencia Nacional, he referred to “the” Spanish society and “the” public
interest (Interview S-21). Contrary to this notion of one unified society with one voice, in this section I discuss the different interest groups that have mobilized to challenge the state’s definition of and response to criminal events.

I specifically analyze two dominant modes of mobilization: victim mobilization by victims of ETA and prisoner support mobilization of the Basque left-nationalist movement. These forms of mobilization draw upon and reproduce an identification split within the Spanish and Basque societies in which people are drawn towards polarized identifications, either with the victim or with the defendant compounding polarized identifications in the political arena.

While I have chosen to focus on the repertoire of victim mobilization by victims of ETA, other groups have mobilized as well in order to claim recognition as “victims.” Basque left-nationalists have frequently tried to turn the tables by adopting the criminal justice vocabulary as they point to the many instances in which they are victims. They emphasize extrajudicial killings, torture, and indiscriminate detentions. Instead of gaining recognition for their victimhood, these claims led some critics to accuse left-nationalists of “victimization.” Sometimes, however, recognition of their victimhood was given. For example, on 24 June 2008, the Human Rights Commission of the Basque government issued a report as the result of concerted effort and mobilization. This report gives explicit recognition to that claim to victimhood, as it focuses on the victims of state violence and paramilitary or radical right-wing groups, explicitly excluding the victims of ETA as these were considered to be already officially listed and having a sufficient
level of recognition (2008:9). While left-nationalists thus have engaged in victim mobilization, they often refuse to replicate the criminal justice logic of victims and perpetrators, emphasizing their perspective of a two-party conflict in which there are no exclusive victims but opposing political projects and a long history of violence on all sides.

I have further chosen to focus on the prisoner support mobilization by left-nationalist activists. Whereas most prisoners are indeed from left-nationalist or nationalist circles, there also have been prosecutions against police and right-wing violators of the law. Accordingly, people have engaged in prisoner support for them, either explicitly defending their actions or supporting their claim to innocence. As an illustration, I will give one significant example of such prisoner support for the former police official Galindo, who in 2000 was convicted to 75 years imprisonment for the illegal detention and murder of two Basque youth supposed to be involved in ETA. In addition, Galindo lost his military status. In 2006, journalist Jesús María Zuloaga wrote the prologue for the memoirs of Enrique Rodríguez Galindo, *My life against ETA: The antiterrorism struggle from the Inchaurreondo quarters*. Zuloaga defined Galindo as a “first line servant of Spain” (p. II). He also described the criminal proceedings against Galindo as a “mediatic process with clear political goals” (p. II), and he believed that time would show that Galindo is indeed innocent, something he has never doubted (p. III). During Galindo’s stay in prison, his family presented a petition for a pardon with 100,000 signatures. Indeed, former president González also recently affirmed his belief in the innocence of Galindo (Millás 2010).
These examples should demonstrate that victim mobilization and prisoner support mobilization are thus forms of action that different groups employ depending upon the specific situation. In this section, however, I focus selectively on victim mobilization by victims of ETA and on prisoner support mobilization by left-nationalist activists.

**Victim mobilization: “Todos somos Isaías”**

One day during my fieldwork, I had a coffee with Angela, who was working with the organization Dignidad y Justicia. This organization advocates for a stringent application of the criminal justice system. She has been involved in some of the big court cases against groups in the left-nationalist movement. Due to this activity she was threatened by ETA and had to go everywhere with bodyguards. On that particularly day she had escaped her bodyguards for a second, so we were alone. As we sat down, she asked me to change places. She explained that she was not allowed to sit with her back to the door (Interview S-17). It was one of those small reminders of constant vigilance, which was a constant concern for those people I interviewed who were opposing ETA or criticizing the demand for Basque independence. They had bodyguards, parked their cars in unexpected places, and checked their car for bombs before they started driving. These are real examples that I observed during my interviews. More in-depth testimonies are, for example, collected in the *Pelota Vasca* (Medem 2003). ETA’s threats and use of violence had a daily impact on their lives. More than 1,000 people had daily bodyguards; they are known as “los amenazados” [the threatened] (Santos 2008:21).
In this section, I analyze the mobilization by victims of ETA and the way in which they have adopted the framework of criminal law to make their claims on the government. I describe how individual victims formed alliances in order to make stronger claims towards the state and how they actively construed a discourse that would increase criminal responsibility. In doing so, the victims effectively established a claim of impunity as well as the continuing danger for everyone. The adoption of that discourse in prosecutorial narrative was visible, for example, when investigative Judge Garzón from the Audiencia Nacional wrote that “the Spanish society took conscience that we were all victims of terror and the social or professional adscription was not important to feel the attack as an attack on you” (2005:163). The notion that “everyone” or “Spanish society” is a victim is a necessary corollary of offenses in which the “security of citizens” or the “public peace” is considered to be under attack. These concepts have proven important in the development of anti-terrorism laws throughout the past decades. For example, in 2000 the Penal Code introduced “enaltecimiento” (glorification) as one of the terrorist offenses. The harm here is the “discrediting or the humiliation of the victim or its family members” (Art. 578 CP). The centrality of the persons of the victims and their personal feelings cannot be found in earlier legislation. The mobilization of victims and their effort to give meaning to the notions of victims, victimization, and the identification of the legal interest played an important role in this development.

I analyze the victim mobilization as one of the voices in the criminal justice arena, specifically in conversation with the prosecutorial narrative. The effort by victim organizations to have their
voice heard coincides with the decision by instruction judge Garzón that “victims had to form part of the antiterrorist actions” (2005:161). It is important to connect the institutional rise of victim organizations with the fact that an important figure such as judge Garzón at the Audiencia Nacional emphasized the victim as the reason for judicial investigations. The fact that the AVT criticized Garzón for not doing enough for victims or compromising the victims in times of truces is only a signal of the divisive nature of the subject. I believe that Garzón’s emphasis on victims has been an important factor in the leverage victims have today. I argue that the course of criminal prosecutions in Spain cannot be understood without analyzing the dynamics and the growth of these victim organizations and the discursive emphasis on the victim as an important subject for the state. I describe the dynamics of Spanish victim mobilization using the four aspects described in Chapter 1.

1. Self-identification as victim and creation of alliances

2. Declaration of a common problem

3. Demanding protection from the state: claiming the rechtsstaat

4. Defining actions as criminal – employing criminal law

1. Self-identification as victim and creation of alliances

Victims of ETA in Spain went from individual cases left to their own devices to the notion that everyone is a potential victim of ETA. This could be observed, for example, in 2008, when a member of ETA killed Isaías Carrasco, a local former councilman for the Socialist Party in a
village in the Basque Country. The subsequent issue of the magazine of one of the victim organizations was titled: “Todos Somos Isaías” [We Are All Isaías]. In great contrast to the early 1980s, when victims were ignored, by 2008 “everyone” expressly identified with the victim. Judge Garzón (2005:163) also observed this change. This creates the interesting paradox that whereas in numbers ETA killings had decreased enormously, the fear of becoming an ETA victim rose. Why was this? One reason is that ETA had made several so-called “qualitative leaps” in its targets. An editorial of the newspaper Correo listed this expansion of acceptable targets looking at ETA’s latest attacks. The newspaper concluded that now murders in France had also occurred. Urban attacks previously restricted to areas outside of the Basque Country now had also occurred inside the Basque Country. After making the leap of starting to kill politicians, now ETA had also killed politicians after they had left their position. And after the expansion to politicians, now the press had also been under attack. And finally, whereas the previous modus operandi of ETA was that they always announced their attacks on civilian buildings, now there had been an attack on a newspaper building without previous notification (9 June 2008, p. 30).

The conclusion is clear, as Correo announced: “[N]ow everyone can be a victim of ETA” (ibid.)

Until the 1990s the victims of ETA were severely neglected by the Spanish society, the Spanish government, and the Basque government. They were viewed as “collateral damage” and forgotten. Judge Garzón wrote: “the victims were a mere statistical fact when it came down to terrorist acts” (2005:160–161). In 1981 the first victim association was founded, the Asociación de Víctimas de Terrorismo (AVT). Originally mostly constituted by the widows and parents of
Guardia Civil, they expanded in the 1990s. The creation of more victim organizations constituted a new player in the contentious episode. Important events such as the murder of Miguel Angel Blanco have bolstered the efforts of these organizations to create visibility and support. Today, many individuals, organizations, and state agents act in solidarity with victims in honoring ceremonies and demonstrations. For example, the organization *Gesto por la Paz* explicitly communicated to the family of a recent victim that the majority of society was with them and that there was solidarity: “We want the family of Uria Mendizábal to know that the majority of this society is with them, shares their pain and rejects the ones who today have swept them into the tragedy” (Press Declaration Gesto por la Paz, 3 December 2008).

Collective action in the name of and by victims thus creates the notion of a shared identity and shared interests, despite possible differences on other counts. This shared identity is maintained and furthered in various honoring ceremonies for the victims of terrorism. Victim organizations have successfully created the notion of “the” victims. Individual cases and individual stories are merged into a single story of “the victims.” All of this mobilizing and organizing has resulted in the victims becoming a significant force in electoral politics. As expressed by the son of an assassinated Civil Guard: “first we didn’t have a vote, now we can influence the vote.” He rejected this extreme politicization of victims (Díaz Lombardo 2007:37).

The AVT currently is one of the best known victim associations, but there are many other associations of victims, organizations working on behalf of victims, and organizations pressing
for court action in terrorism-related cases. Other important organizations are Manos Limpias, España y Libertad, Dignidad y Justicia, Gesto por la Paz, Fundación Fernando Buesa, Foro de Ermua, Covite, Basta Ya, Fundación de Víctimas de Terrorismo, and Fundación de Miguel Angel Blanco. Not only is there a variety of different kinds of organizations, it is important to keep in mind the difference between individual victims and victim organizations. Several victims have indicated their distance to these organizations, speaking “on their behalf.” It is outside the scope of this chapter to deal with all their differences and opposing political affiliations. It is important to note, however, that victims and victim organizations are quite heterogeneous in their political opinions and backgrounds. Many victims, for example, do not wish to be associated with the highly politicized AVT (perceived to be associated with right-wing Spanish politics). To describe the process of victim mobilization and its relevance for criminal justice proceedings, I have spoken with spokespersons of the AVT, Fundación Fernando Buesa, Manos Limpias, and Dignidad y Justicia (D&J). They are by no means representative of the range of victims of ETA and their victim organizations. I have chosen the AVT and D&J not as representatives of all victims, but because they are main players in the criminal justice arena. I added the Fundación Fernando Buesa in order to compare their views. Manos Limpias (as well as España y Libertad) is not a victim organization but is actively involved with the criminal justice system and files complaints defending the assumed interests of victims of ETA.
2. Declaration of a common problem

From the beginning, the AVT advocated for a better treatment of victims, as its members felt “abandoned and marginalized by the state and many sectors of the Spanish society” (AVT 2008). One complaint was, for example, that they were not even notified when the trial of a defendant in their case took place. “Many people don’t know who killed their family member,” a spokesperson of the AVT told me (Interview S-16). Knowing the truth is one of their demands. Another important issue was financial compensation for family members. The first official recognition came in 1988 in a law in which the Spanish government arranged for compensation for victims of terrorist crimes (Real Decreto 1311/1988, MA 1989:214). A major effort by the AVT is to create what they call the “civic rebellion,” which refers to awareness in Spanish society. The success of this rebellion was claimed, for example, with reference to huge turnouts at demonstrations in Madrid (Alcaraz 2008). Being a victim now brings certain rights, especially now that the Basque government has recognized the victims in specific legislation for victims, thus also acknowledging a duty on the part of the government to engage with them.

This recognition of victimhood and related questions, such as who is entitled to financial benefits and who is not, creates the necessity to delineate who is a victim and who is not.\footnote{Victims of ETA is a term that sometimes also refers to the families of those that were killed by ETA.} This necessity to create a clear-cut category can cause contention. This contention was visible, for example, during a conversation between the former president of the AVT, the mother of a victim of ETA, and a high government official during the 2006 truce with ETA. In reference to
the “process of pacification,” the government official mentioned the possibility of releasing ETA prisoners who were not convicted of “blood-felonies.” The mother then asked the government official whether her child, who was not killed, but lost two legs, would be counted as a “blood-felony” or not (Alcaraz 2008:107). This example draws attention to the contested nature of categories of victimhood. Many victim counts focus on the number of deaths, although the number of attacks by ETA is much higher. Victims of ETA, however, emphasize the harm that ETA has done apart from the number of deaths it has caused. Families and friends are victimized, for example, by the harm caused by ETA’s illegal abductions and threats. They also emphasize the harm caused by actions of street violence and the payment of the revolutionary tax. These different ways to count, label, categorize, and assign attacks are highly contested.

3. Demanding protection from the state: Claiming the rechtsstaat

Victims do not feel protected. Nor do they feel that justice is done. They complain of impunity and a lack of the rule of law. “There is no criminal justice system here,” said Pablo when I told him the subject of my research (Interview S-31). He has been forced to pay ETA’s “revolutionary tax” for years. “We are the losers, we are the poor bastards” (los pringados). His plain verdict corresponds to the complaints by the spokesperson of the AVT who listed the victims’ grievances, ranging from the fact that hardly any people are being prosecuted to the way in which victims are treated when they attend the trials.

52 The number of attacks is, for example, visible in a detailed list the government provided in 2001 with all the attacks that had been classified as “terrorist attacks.” The majority is claimed by ETA. There are 49 attacks in total listed that year. Another governmental statistic divides the attacks into those that caused harm to persons and those that caused material harm (Guardia Civil 2008).
The grievance of impunity is one of the elements which I see as a recurring complaint in each of the country studies. Judge Garzón argues that forgetting is a basic aspect of impunity and that impunity therefore has perpetrators. Garzón is explicit when he attributes the blame for the impunity to the “indifferent ones” and their “silence” and “passivity,” which enables the continuing aggression and the continuing impunity (2005:170). “The history of impunity in all nations is the history of cowardice,” he wrote (2005:172). This call on the citizens to speak out is shared by many of the victim organizations. Many victims and victim organizations opposed the last round of negotiations with ETA in 2006 for this reason. Victims in this view are sacrificed in exchange for a flawed peace.

Victims call on the rule of law to claim their right to protection. They mobilize a “toolkit” perspective on the rechtsstaat, interpreting it as the duty of the state to protect its citizens. As discussed in Chapter 1, impunity or the belief in impunity is a problem for a state. Impunity means that the state does not fulfill its part of the social contract as it fails to protect those citizens that have given up their own means of defending themselves to the state. After a period of low law enforcement, confidence has to be re-established in the criminal justice system that the police and the judicial system work for the citizens and are capable of punishing criminals. Apparently recognizing this danger of discourses of impunity, in 2007 the Spanish Attorney General wrote in the Memoria Anual:
The permanent criticism on the actuation of the judicial organs and the prosecutor’s office in the struggle against terrorism, with unfounded accusations of giving up (césion), passivity and/or inactivity, have contributed to creating a climate of social tension and a lack of confidence in the normal functioning of the institutions. (2007:161)

4. Defining actions as criminal – employing criminal law

Criminal justice logic divides people into perpetrators and victims. The AVT in Spain employs this language successfully. There are multiple examples in which victim organizations have influenced the focus and discourse in the criminal justice arena, affecting laws and judicial decisions.

The AVT denies the existence of a conflict and emphasizes the criminal justice terminology as the only right framework. They firmly maintain the absolute innocence of the victims, countering the notion that “algo habrá hecho” – [the victim of ETA] must have done something. The belief that victims of ETA somehow could be held responsible for something clashes strongly with the notion upheld by the AVT that there is no conflict. The assessment of innocence plays a role in the competing ways in which different actors define ETA’s violence. Innocence is an important ingredient for the indiscriminate attacks of terrorism (Zulaika and Douglas 1990; Armborst 2010). In his Memoria Anual, the Attorney General explicitly talked about “innocent” victims (1979:67). A young member of the left-nationalist youth organization Segi, however, did not accept that attacks by ETA are terrorism, as he argues that ETA does not
perpetrate indiscriminate attacks. In his worldview, ETA attacks specific responsible (state) agents (Interview S-24).

Resisting the notion that victims are not innocent, victim organizations explicitly reject possible justifications for ETA’s actions. An illustration of such rejection was visible, for example, when the organization *Gesto por la Paz* expressed its opposition to the violence employed by ETA in a press declaration after the assassination of a businessman dedicated to the construction of the high speed train (TAV). They placed all the responsibility for the killing squarely on the shoulders of ETA. They rejected explicitly any context or circumstances that ETA or left-nationalists might have wanted to include in the considerations.

Desde Gesto por la Paz insistimos e insistiremos cuantas veces haga falta, que no hay ninguna razón, ninguna justificación, ni existe la más endeble argumentación que pueda explicar el asesinato de un ser humano. La responsabilidad está exclusivamente en quienes han decidido y han ejecutado cobardemente a Ignacio Uria. No hay contexto que ampare ese horror. No sirven discursos baratos ni de defensa de un pueblo o de una nación, ni de proyectos ecologistas que beneficiarían a la mayoría, ni de nada.

From *Gesto por la Paz* we insist, and will continue to insist whenever necessary, that there is no reason, no justification, and that there does not exist an argument that can explain the assassination of a human being. The responsibility is exclusively with the ones that have decided and have cowardly executed Ignacio Uria. There is no context that covers this horror. Cheap discourses don’t serve; not about the defense of a people or a nation, not about ecological projects that benefit the majority, nothing. (Declaration for the Press by *Gesto por la Paz*, 3 December 2008)

Victim organizations have successfully lobbied the criminal justice system with concrete demands. For example, until a recent verdict, in Spain sentences were capped at a maximum of thirty years. In addition to this cap, prisoners could be released after they had fulfilled two-thirds of their sentence. This meant that a convicted ETA member could be out on the streets
after eighteen years in prison, even if their formal sentence could run up to 1,000 years for all the crimes they had committed. For victim organizations this was unacceptable. They therefore advocated a “full completion” of the sentence. Concretely, they wanted the two-third rule to be applied not to the thirty year cap but to the entire sentence. They succeeded in court, and the new interpretation is called the “doctrina Parot.” This court decision is highly controversial among left-nationalists, who speak of “hidden life sentences.”

Victim organizations have also lobbied around specific cases of specific individuals. A well-known example is the case of ETA militant Iñaki de Juana. He was a member of the Madrid commando and in that capacity responsible for some of the most deadly attacks by ETA. Representatives of victim organizations call him a serial killer (Interview S-16). He was about to be released after eighteen years of imprisonment, and victim organizations brought all of their weight into the fight to keep him in prison. Their mobilization ranged from demonstrations, petitions, and press releases to personal conversations with prosecutors. A spokesperson of the AVT claimed that he is confident that it was due to their effective action that Iñaki de Juana was tried for new charges and sentenced again to a prison sentence (Interview S-16). 53

Victims have further been active in the creation of the new penal offense prohibiting the humiliation of victims of terrorism as a terrorist crime in the Penal Code. Activities brought to the attention of the court under this offense include ceremonies honoring prisoners and the

---

53 Iñaki de Juana was released in July 2008, which caused massive mobilizations in Madrid and in the Basque Country.
naming of streets after (alleged) ETA members. In order to interpret these offenses, it obviously has to be clear who the victims of terrorism are, how big this class is allowed to be, what counts as humiliation, and whether humiliation is determined objectively or subjectively. These questions have not yet been answered. It is to be expected that victim organizations will be at the forefront of the struggle for their desired interpretation. In the section in the next chapter on the criminalization of speech and expressions, some of the prosecutions that took place under this statute and the meta-conflict about these contested concepts will be discussed in more detail.

Victim mobilization also has drawn more attention to the victims in court sentences. In one case in a small village in the Basque Country, after he came out of prison an ETA member came to live next door to the widow whose husband he had killed. This situation and many other instances where victims or family members had to encounter the perpetrator time and again in their own villages led to new legislation in 1999. In a verdict from 26 December 2005 the Audiencia Nacional for the first time imposed the additional sentence that the defendant cannot reside in the place where the crime was committed or where the victims live or communicate with the victims or their family members (MA 2006:286).

As victims emphasize the fact that crimes of ETA should be seen as common crimes, they reject any notion that there could be negotiation about the punishment of these crimes. It has been suggested that ETA demanded the removal of Attorney General Fungairiño as one of their
requirements in the negotiations of 2006 (San Sebastián 2007). As Fungairiño eventually was
removed, the spokespersons of the AVT claimed that this was in response to ETA’s demand.
Victims portray such negotiations with and concessions to ETA as a breach of the rule of law
and democracy and reject all negotiation efforts that the Spanish government has engaged in.
For them ETA has no credibility, and they refer to the truce of 2006 as the *tregua trampa* [truce trap]. Victim organizations are thus vigilant concerning any departures from the logic of the
criminal justice arena.

Other initiatives on behalf of victims include the lobby to think about new statutes and new
offenses to use against ETA. For a short while victims talked about “ethnic cleansing,” and judge
Garzón made one attempt to get this charge against Batasuna accepted by the court. However,
he did not succeed. A new attempt aims to qualify terrorism as “crimes against humanity.”
Simultaneously, victims advocate for the inclusion of “terrorism” as one of the crimes under the
jurisdiction of the Rome Statute of the International Criminal Court. These activities are the
subject of international organizing in which Spanish victims of terrorism reach out and make
alliances with victims of terrorism in other countries, such as FARC victims at an annual
conference for victims of terrorism in Madrid.

---

54 This debate about the desirability of considering terrorism as a crime against humanity was addressed in issue 68
of the magazine of Gesto por la Paz. One specific reason for this perspective would be the statute of limitation, as
it would not deny victims the possibility of getting to know the answer to the most nagging of their questions: who
did it, and why? Indeed, the resort to the framework of criminal law is not always based in a desire for
punishment. Unzalu (2008:15) asserts that victims “seek more to ‘know’ than to ‘punish’” as he points out that
statutes of limitations impede this knowing. The editorial of that same issue cites the voices of victims: “I will never
know how, or why, or who killed my husband, or my father... Maybe they are already in the streets, or maybe they
never were in prison. I will never know” (2008:3).
The main form in which victim organizations have influenced the criminal proceedings related to the Basque Conflict has come through their use of the Popular Accusation. Victims have two formal ways in which they can represent themselves as a prosecuting force in a criminal trial. They can choose to follow the way of “private accusation” or the way of “popular accusation.” A victim can be a private accuser when he or she is the specific victim in the case. The popular accusation can only be used when the organization represents the class of victims that is relevant in the case at hand. The popular accusation is the only form of victim involvement in those trials in which there are no specific victims. This is the case, for example, in the so-called macro-trials, where defendants are accused of membership in ETA without alleging any specific crime against individual victims. These trials are analyzed in more depth in the next chapter.

Since the beginning of the 1990s, the AVT has employed the Popular Accusation in order to promote the interests of the victims. At first, a spokesperson told me, this was merely a way to ensure that the victim would be notified of the date of the trial. Now the AVT and D&J routinely participate in criminal trials as the Popular Accusation. In one trial the surreal situation emerged that the state prosecutor retreated from prosecution after examining the evidence, whereas the victim organization D&J continued alone as the Popular Accusation in this prosecution against a Basque newspaper.55

Victim mobilization in the criminal justice arena has initiated many new concepts and forced prosecutors to take victims into account. Victim organizations such as the AVT have consistently

55 The legal figure of the popular accusation obviously calls for questions about representation. Who do they represent? Who does the AVT represent? How much support do they have? How is the “class of victims” defined? These questions surprisingly are not subject to strong debate.
pushed for taking a criminal justice perspective on ETA and its activities. By uniting in organizations, pushing for a meaning of *rechtstaat* that focuses on the protection of citizens and the problem of impunity, while at the same time employing the vocabulary of criminal law, victims of ETA have been able to turn themselves into effective “troublemakers” that cannot be overlooked by state agents. As the victim organizations entered this dialogue, the prosecutorial narrative has adopted as well as responded to many of the concepts and ideas introduced by these victim organizations. In the next chapter, I will analyze a more specific discursive development in which victim organizations have been important voices: the redefinition of ETA as gunmen to ETA as a network. This discursive shift subsequently led to the macro-trials, which significantly expanded the reach of criminal prosecutions.

**Prisoner support mobilization by left-nationalists**

There are specific organizations in the Basque Country and also, for example, in Madrid that were founded to care for what they call “Basque political prisoners.” These groups resist the criminalizing effort of the state. While most of these “political” prisoners come from the left-nationalist movement, there are also many criminal cases where defendants can be situated more in a moderate nationalist part of the spectrum. Such cases also lead to efforts and moments of prisoner support, often engaging a larger spectrum of sympathizers. For example, former Basque president Atutxa was prosecuted for disobedience of a judicial decision. His conviction led to a massive demonstration in Bilbao in January 2008 (Personal observation January 2008). In this section, however, I will focus on the more continuous and
institutionalized prisoner support activities organized by left-nationalist activists. Prisoner supporters specifically reject the images and logic enshrined in the prosecutorial narrative. They propose an alternative reading of criminalized events and make an effort to get their narrative publicly accepted as the truth. I will describe the focus and activities of these groups using the four aspects described in Chapter 1.

1. Creation of a prisoner support group: a call for solidarity

2. Criticisms within the framework of liberal legalism: de-legitimization of the state

3. Bringing the “political” back in: identification as a political prisoner

4. Persuading the public of the political definition: changing the impact of criminal prosecutions

**1. Creation of a prisoner support group: A call for solidarity**

Various groups are actively trying to bring the suffering of prisoners to the attention of the general public, and specifically also to visitors from abroad. Within the Basque Country, Gestoras pro Amnistía, Senideak, and Gurasoak are the most important organizations that actively mobilize to support prisoners. Gestoras pro Amnistía (now Askatasuna) was founded in 1977 as a form of solidarity with the political prisoners of the Franco regime (Interview S-1). As the name implies, they mainly advocated for an amnesty. Once the amnesty was granted but people were imprisoned again, Gestoras continued to exist in solidarity with what it calls “presonas represaliadas,” i.e., prisoners, refugees, and deportees. They monitor and report
about repression. Senideak (previously Exterat) is the organization of family members of prisoners and coordinates, for example, visits to far-away prisons. Gurasoak is a more recent organization founded by family members of prisoners of Kale Borroka (Interview S-26). Other organizations relevant to prisoner support are TAT and Behatokia, human rights organizations engaged in the monitoring of human rights violations. TAT focuses specifically on the monitoring of torture and publishes yearly reports with testimonies. There are websites for “political” prisoners and issues of torture, how to react in case of arrest, and information about ongoing trials. In addition, there is a lawyer’s collective for lawyers that defend ETA militants and other Basque “political” prisoners. Askapena, an organization focusing on solidarity with other conflict areas such as Palestine, organizes events for foreign students to make them familiar with the typical Basque culture as well as the injustices they experience. These students are encouraged to become “friends” of the Basque Country.\textsuperscript{56} The cohesion among these groups is enormous, as they are all part of the left-nationalist movement. To learn more about prisoner support mobilization and these groups’ interpretation of events, I interviewed members from Gestoras, Behatokia, Askapena, Gurasoak, and the lawyer’s collective.

Prisoners and trials play an enormous role in the daily lives of left-nationalist activists. I was able to observe this frequently during my fieldwork. One evening, for example, I had a conversation with JL from Gestoras pro Amnistía after he had given a talk in Amurrio, a small Basque village, about his own ongoing trial. Photos of prisoners (and a silhouette symbolizing

\textsuperscript{56} I attended such an event in Elorrio, June 2008
refugees) were hanging in the bar in which we were having a drink with some of the people who had also attended the talk. By coincidence, that same day in Madrid, the mayor of Amurrio, his assistant, and two other people were on trial for their activities and responsibility during an honorary ceremony for an ETA prisoner from Amurrio. When the television in the bar showed images of that trial, the bartender turned on the volume. The mayor could be heard to say that the trial was a “witch hunt.” At the same time a boy entered the bar with a large backpack. He had just returned from Madrid, where he had attended the trial against his mayor. He apologized for not having been able to attend the talk by JL and shared a little bit about what had happened in the trial that day. When we continued our conversation, JL said that not only had he and his older brother been convicted for terrorism; his younger brother was also convicted for having spray-painted “Gora ETA” in the street. The continued experience of repression against their children had turned his parents from voting PNV to voting Batasuna (Field notes June 2008). This evening thus exemplified the shared experience of repression, criminal prosecution and prisoner support activities.

Prisoner support is about solidarity and an act of identification between the supporter and the defendant or prisoner. In his last word in his trial, defendant Madariaga said that “any injustice creates an antidote which is solidarity. Solidarity is real” (Audiencia Nacional, trial Gestoras, 18 June 2008). Throughout the Basque Country one can observe the many symbols of solidarity with prisoners, such as pictures of prisoners in bars. Numerous balconies in Basque villages carry the flags that say “bring the prisoners back to the Basque Country.” Demonstrations in
relation to some of the contentious trials or alleged cases of torture bring large numbers of
people to the streets. Prisoners who return home can often expect an official honoring
ceremony in their village. There have been demonstrations in front of prisons and hunger
strikes for better prison conditions. Solidarity is not limited to the Basque Country. During the
trial against Gestoras pro Amnistía, a dinner was organized by activists in Madrid. A girl gave a
speech affirming their solidarity: “We want to show that Madrid is not only the Audiencia
Nacional and prisons, but that you know that there are people here who are with you – against
the capitalist and anti-fascist state” (Field notes June 2008). She thus explicitly redefined
“criminalizing Madrid” as “political support Madrid.”

2. Criticisms within the framework of liberal legalism: De-legitimization of the state
Several human rights organizations criticize the state for its repressive actions against ETA
members or left-nationalist activists. Behatokia, TAT, and the Coordinator for the Prevention of
Torture tirelessly point out where the state is violating its own laws in its struggle against
terrorism. The rule of law forms the basis for such criticisms. Activists question the legitimacy of
the Audiencia Nacional, asking what makes it a “court” engaged in “law” instead of a political
institution doing politics. They rely on liberal legalist principles like formal equality and
proportionality when they ask why an ETA prisoner should deserve higher sentences than
rapists or serial killers. As an example of such criticism of trial proceedings, Euskal Herria Watch
claimed that the judge’s requirement that the defendants in the 18/98 trial all had to be
present made it into a “punishment without a conviction” as the trial took 16 months (2008).
A major question in the conversation within the criminal justice arena is whether or not ETA prisoners should be considered “equal” to other prisoners or not. Already in 1979, the Attorney General wrote: “Justice is not to treat all equally, but to treat unequally those who are unequal” (1979:74). In 1989, the Attorney General advocated for a different penitentiary treatment for terrorist delinquents, writing that it seemed “absurd” to treat terrorist delinquents similarly to ordinary criminals. After the suspicion was raised that in the prisons ETA continued to organize meetings and attacks, in 1989 the Spanish state started the “dispersion policy.” This policy entails distributing ETA prisoners in jails throughout Spain (and France). In addition, ETA prisoners have to change prisons after several years. This policy has been claimed as necessary for splitting up “hard-liners” and “soft-liners.”

While the Spanish state thus makes a distinction between ETA prisoners and common prisoners, prisoner supporters refer to the equality principle and emphasize that they demand that Basque “political” prisoners have the same rights as other prisoners. This controversial issue is a topic of much debate among victim groups, prisoner support groups, and state actors. Prisoner supporters stress the suffering they and their families go through and call it illegal extra punishment of family members.57 A mother with a child in prison said: “They say that only one side suffers, but we are suffering too” (Field notes, June 2008). Note here the strong dichotomous thinking in terms of Us and Them. Organization Etxerat also criticized the policy

57 The travels are an extra punishment, writes a prisoner in his petition (1997) dated 1 October 1997 to the “Juzgado de Vigilancia Penitenciaria” in order to be transferred to a prison in the Basque Country.
and called it a “penitentiary policy of pressure,” pointing out the bad conditions in which prisoners were placed (2010). In their demand to “bring the prisoners home,” supporters refer to legal instruments such as principle 20 of Resolution 43/173 of the General Assembly of the United Nations from 9 December 1988, which prescribes that prisoners can be close to their habitual residences if the prisoner so requests.\(^{58}\) Whereas the Basque prisoner support groups complain about the dispersion policy, causing families to travel many kilometers to visit their family member in prison, the AVT had posters saying that they have to travel so many kilometers to see the graves of their loved ones. Anti-ETA organization Basta Ya pointed out that it could not make much of a difference whether families visited ETA prisoners in a far-away prison or in clandestinity in France (2011). And while prisoner support groups also claim that deadly accidents on the roads on the way to visiting prisoners should be attributed to the state,\(^{59}\) such claims are viewed as “victimismo” by groups like Dignidad Y Justicia (Interview S-17).

Another controversial topic is the continuing stream of allegations of torture. Prisoners suspected of militancy with ETA or involvement with Kale Borroka frequently accuse the state of torturing them during the incommunicado detention (Terwindt 2011). These allegations of torture have led to deep suspicion of state law enforcement within the left-nationalist

\(^{58}\) This reference was made in a legal petition dated 1 October 1997 to the “Juzgado de Vigilancia Penitenciaria” in order to be transferred to a prison in the Basque Country. Resolution 43/173 of the General Assembly of the UN stipulates: “If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.” (Principle 20)

\(^{59}\) A family member told that there have been so many accidents, and when the date of the visit comes close, the prisoner describes himself to be both happy and nervous, because of the fear that his family might get in an accident (Interview S-28).
movement. Instead of having a basic trust in the state’s evidence and convictions by judges, they assume that evidence is fabricated and convictions are based upon declarations extracted through torture. Many of my interviewees assumed that quite a few of “their” people had been imprisoned innocently. It is significant that in these criticisms, prisoner support groups draw upon the very logic of liberal legalism to demonstrate the ways in which the Spanish state presumably violates its own principles. These Criticisms have severely damaged the state’s credibility and legitimacy among a substantial part of the population.

This de-legitimating effect led the newspaper *El País* to accuse these prisoner support and human rights organizations of being “ambassadors of ETA.” It criticized the “cover” organizations for ETA, whose only real goal was allegedly to discredit the Spanish state. The newspaper specifically included international organizations such as Amnesty International and former Special Rapporteur for the United Nations Theo van Boven in its criticism, claiming that their one-sided commitment to human rights is naïve and counterproductive when their informants are ETA militants. The article ended with the advice that Spain should not only be respectful to human rights, but also *seem* that way. Therefore, the article suggested that the state would have to step up its efforts to counter the “propaganda” initiatives “ETA/Batasuna” was undertaking to improve its profile in the international arena (1 June 2008).

In the contentious conversation about prisoners, the meaning of “social reinsertion” is disputed. Again, we can observe competing claims of “difference” or “equality” with regard to
other prisoners. As used by state agents, the term refers to insertion into a life without ETA. Families of these prisoners, however, claim that it is contradictory to the aim of reinsertion that their visits are being made more difficult. They refer to the Spanish Constitution and international treaties, in which reinsertion is supposed to be an objective of the prison sentence. Critics, however, dispute the very objective of “reinsertion,” asserting that there is a real difference between ordinary criminals and terrorist delinquents in this respect (Unzalu 2008). For example, in order to facilitate reinsertion, prisoners in Spain are allowed to attend university studies while they are in prison. Unzalu points out that the image of ordinary criminals is that they are outside of social structures and that reinserting them into society involves giving them access to these structures. Terrorist delinquents, on the other hand, already belong to precisely these structures and will not need reinsertion in this sense. What should reinsertion be for terrorist delinquents? For Andoni Unzalu it would mean a “de-legitimization of violence” and “recognition of the harm caused to victims” (2008:16). “A terrorist, who has done three degrees in prison and at leaving receives an honorary ceremony for his anterior actions, is not a reinserted terrorist” (2008:16).

3. Bringing the “political” back in: Identification as a “political” prisoner

While human rights organizations stick with the framework of liberal legalism and demand equal treatment of all defendants and prisoners, denouncing treatment of prisoners and demanding fair trial proceedings from within the rule of law, political supporters of prisoners

---

60 For example, in the petition for transfer (1997) a “political” prisoner refers to the conclusions of the United Nations in a meeting in Tokyo in December 1990. This prisoner claims this right in order to contribute to his “re-socialization.”
reject the existing rule of law and claim that the prisoners are “political” prisoners. Thus, left-nationalist interviewees consistently made a distinction between “social” prisoners and “political” prisoners, emphasizing the differences. Indeed, they identify strongly with the “political” prisoners because of their shared political beliefs. The category of “political” prisoners obtains a reality in the Basque Country through their ways of organizing and the rules to which they adhere (more on this below). This claim of the “political” nature of these prisoners is vehemently rejected both in the prosecutorial narrative and by victim organizations. The mutual recognition of their political identity between those prisoners and their supporters reproduces a rejection of the state’s claim to jurisdiction or the state’s ability to classify their actions as merely “crimes.”

Basque “political” prisoners are all part of the prisoner collective, the Collective of Basque Political Prisoners (EPPK). As a collective they have often organized coordinated protests, such as in January 2010, when the 742 prisoners in both Spanish and French prisons protested by refusing to leave their cells (this form of protest is called “chapeos”). Being part of the collective brings obligations. The Collective of Basque Political Prisoners is a very tight collective. Everyone is supposed to accept the rules of the collective. Whereas supporters of the prisoner collective claim that its goal is to maintain cohesion, the prosecutorial narrative argues that prisoners are strongly “controlled” (Field notes trial Gestoras April 2008). Basque political prisoners are not supposed to negotiate with the state. Thus, they are always in the 3rd grade,

---

61 Only few prisoners have left this collective. Such departures have usually generated media attention.
62 This incident was reported on 12 January 2010 in the newspaper *Gara* (2010).
the worst conditions in the prison, whereas they could be transferred to the 2nd grade if they accepted to cooperate with the state. Basque “political” prisoners are also obliged to take a lawyer from the lawyer’s collective and commit themselves to a “political solution” instead of justice in their individual case. This commitment can be strictly enforced by ETA with social and even physical pressure, and individual ways out are not accepted.

Inspired by a similar program in Italy, the Spanish government launched a project in 1980 to motivate ETA prisoners to accept the rules for a “repenting prisoner” (arrepentido). Even though in the beginning various prisoners did accept the proposal, this policy has resulted in a failure. ETA reacted harshly against some of the people that accepted the deal with the state. For example, ETA assassinated the very well-known former ETA member “Yoyes” in broad daylight in her own village while she was tending her daughter (Douglass and Zulaika 1990). The anti-ETA organization Basta Ya pointed out that between 1989 and 1995, the dispersion policy led 112 ETA prisoners to take advantage of the reinsertion policy (Basta Ya 2011:2). Since 2008, the tight collective of Basque prisoners has been showing dissent. Important old ETA members have left the collective over a dispute with the current ETA leaders. These dissenting members lost the support provided by Gestoras pro Amnistía, the prisoner support group related to the left-nationalist movement.63

63 See, for more about disputes within ETA about the use of violence, Zirakzadeh (2002).
As ETA rejects the state’s jurisdiction, ETA-commando members never defend themselves in court. Prosecution and sentencing are not recognized as legitimate, but accepted as a matter of fact. Indeed, among left-nationalists the prosecution of ETA-commando members is not controversial. The trials are generally described as “unproblematic” (Interview S-3). Even though people may support the armed struggle and maintain and support a war logic (such as acts in defense or retaliation, attacks on military targets) to explain ETA’s actions, there is no attempt to transfer these definitions to the criminal justice arena and its criminal proceedings. The war discourse of the armed struggle is not acted out in the courtroom. ETA militants simply refuse to accept the courts as legitimate and thus refuse to engage in the court proceedings.

As prisoner supporters try to bring back the “political,” they systematically deny the state’s capacity to confer a criminal status to the actions and authors of “crimes.” While ETA militants routinely rejected a juridical defense in the courtroom, ETA did, however, publicly claim its actions, provide its reading, and explain and defend them in public declarations and interviews. In this way, ETA defended the political nature of its actions. Also, actions of Kale Borroka were sometimes claimed in communiqués (Van den Broek 2004:719). These communiqués became subject to the scrutiny of prosecutors. At various moments, prosecutors have discussed the meaning, goal, and impact of these communiqués as well as the responsibility of those fabricating and distributing them. There have been several attempts to bring such

---

64 I observed a trial against two ETA militants from the Barcelona commando, Madrid, June 2008.
65 This resonates with the remark by an animal rights activist in the U.S. that certain acts are “unambiguously illegal.” This contrasts starkly with his complaints about some other cases where “people hadn’t done anything” and their “legal actions” were criminalized (Interview US-5, he was talking about the SHAC-case which will be discussed in more depth in Chapter 7).
communiqués, its authors, and distributors into the criminal justice arena. However, only few of such attempts have succeeded. In the 1980s there were attempts to use the crime of apology in order to prosecute people who published ETA communiqués. On 9 January 1980, the Audiencia Nacional convicted Luis Felipe for a “crime against citizen security” for having rewritten and corrected ETA communiqués and information about ETA actions given to him by members of ETA (military) in order to spread the information.66 Most attempts to obtain a conviction for publishing such communiqués, however, fell flat and for many years I could not find any records of more attempts until the theme was taken up again in the macro-trials. In the accusation against the newspaper Egunkaria, the investigative judge argued that ETA communiqués are not only claims regarding violent actions but also “the expression of a specific partial evaluation of situations” (Audiencia Nacional, 4 November 2004:70). Twenty-seven years after the conviction of Luis Felipe, the Audiencia Nacional considered the prosecutorial argument proven that the Basque newspaper EGIN was the “mediatic front” of ETA as it

maintained the internal cohesion and oriented the activity of the “National Movement of Basque Liberation,” magnifying the acts of the terrorist organization and justifying them as conforming to the ideology imposed by ETA, in the form that it marked the guide of the orthodoxy that fixed the “vanguard” of the criminal organization, represented by its armed wing. (Audiencia Nacional, 19 December 2007:178)

66 The Supreme Court rejects his cassation arguments (3 March 1981). According to Vercher, on 12 December 1980, the Constitutional Tribunal decided that publishing ETA communiqués was not a crime of apology, referring to the right to inform and be informed (1991:425). The Supreme Court, however, does not refer to this decision by the Constitutional Tribunal in its verdict.
As the state pushes for the acceptance of its classification and determination of crimes, a highly contentious issue has become the refusal to “condemn” ETA and ETA’s use of violence by the political party Herri Batasuna and its successors. This refusal to condemn led to the 2002 Law on Political Parties and the subsequent illegalization of Batasuna. Article 9.3 of this law legislates that a party will be illegalized when it gives “express or tacit political support to terrorism.” Basque human rights organization Behatokia has argued that “tacit political support” is unacceptably vague and could potentially include many kinds of behavior that in their opinion should not be reasons for illegalization (2003). They argued that the law fails to provide a clear test for what “political support” entails, claiming that what is meant with this law is to illegalize a party that does not condemn acts of terrorism. Behatokia wrote that it may be reproachable ethically or morally to not condemn violence, but they argued that it cannot be reproachable punitively (ibid.).

This issue has also been brought up during criminal trials. For example, during the trial of Arnaldo Otegi, spokesperson of the political party Batasuna, the judge of the Audiencia Nacional, Ángela Murillo, asked him whether he condemned the violence of ETA. Upon his refusal to answer, the prosecutor said: “Quien calla, otorga,” implying that the silence signifies agreement with ETA’s violence (Manso 2010). Left-nationalist activists often reject the word “condemn” and its specific moral signification (Frabetti 2008). One interviewee pointed out that left-nationalists have often publicly expressed that they “lament” violent actions, which should be sufficient (Interview S-7).
These supporters of “political” prisoners do not deny the fact that militants of ETA-commandos have used violence or committed crimes. However, they situate those crimes within the context of a political conflict. It is because of this political context, they argue, that once the conflict is solved, these “political” prisoners should be released (Interview S-23). In other cases, especially in the macro-trials, supporters do argue that defendants are on trial for purely legitimate political activities. As we will also see in the cases of Chile and the United States, the reasoning of activists is that the more effective the tactics the political movement employs are the more repression the state will use. In the Basque Country, a leader from the illegalized youth organization Segi argued that “we reach so many youths. We are actually effective in negotiating housing for students. That is why they are targeting us” (Interview S-24). Even seemingly just decisions can be interpreted by activists as manipulation by the state. For example, in the trial against Gestoras pro Amnistía, the prosecutor dropped the charges against two of the defendants. The lawyer in that case argued that this was only done to demonstrate that the state keeps the guarantees of the law, but that underneath the verdict was already decided even before the trial had started (Field notes, trial Gestoras, June 2008).

In these cases, political supporters challenge not only the jurisdiction of the Spanish state but also the very classification of activity as “criminal.” This challenge is most visible in the trials against left-nationalist social and political organizations whose members have been accused of belonging to the network of ETA (because of the large number of defendants involved also
known as the “macro-trials”). These prosecutions will be analyzed in depth in the next chapter.

Here it is important to point out that while the definition of the crime as such is not disputed in the trials against militants of ETA commandos, it is at the core of the contention in these trials against the “ETA network.” The Basque human rights organization Behatokia, for example, asserted that social and political activities were the subject of criminal investigation in these trials. They argued that previously these facts had been “penally irrelevant” as they belonged to “political criticism and the combat of ideas. Thus they are criminalizing goals. They are giving an extreme interpretation to the facts in order to include them in the offense of collaboration, when it doesn’t belong there” (2003). Behatokia thus argued that not the violent methods of ETA but its objective had become the justification for criminal prosecutions and warned that this could convert any citizen immediately into a member of an armed organization. In Chile and in the United States we can also observe these generalizing claims, such as “any citizen can become subject to repression,” which contribute to the identification split and the polarized generalized perceptions that anyone can become subject to suspicion and state repression (or, alternatively, as we have seen above, the belief that everyone can become a victim of ETA).

Thus, supporters of Basque “political” prisoners hold that the Spanish state is criminalizing the left-nationalist movement.
4. Persuading the public of the political definition: Changing the impact of criminal prosecutions

The left-nationalist movement is engaged in a concerted effort to convince the public of the legitimacy of left-nationalist social and political activities and the illegitimacy of the state response. The counting of “political” prisoners is a recurring phenomenon in each of the countries under study here. The Basques, however, have professionalized this act with yearly posters with pictures of all of the “political” prisoners, which are distributed throughout the Basque country in bars and other places. In 2008, this poster contained 700 pictures, one for each of the “political” prisoners, and in addition some empty spaces for the people that remain fugitive. Similarly, in reports and websites the message is spread that the Basque prisoners are political prisoners. The spreading of the message of repression is also done in person. For example, during the trial of Gestoras pro Amnistía, the defendants were traveling throughout the Basque Country to give speeches and inform people about their case.

As already mentioned above, often defendants and their supporters argued that the population should be concerned about this repression, not only because it is unjust, but also because it might victimize them at some point. Basque left-nationalists, for example, maintained that the Basque Country is a laboratory of repression techniques that would later be exported to the rest of the world. Two Catalan lawyers wrote along similar lines in an opinion piece in which
they commented specifically on the general reactions regarding the sentence in one of the macro-trials. They referred to a poem attributed to Brecht:  

[F]irst there were a few, and then followed others, but when it was my turn, it was already too late. Hopefully this warning will reach those who applaud today or simply look the other way. (Asens and Pisarello 2007)  

As supporters identify with “political” prisoners, they can decide to engage directly in the criminal justice arena by obstructing judicial proceedings or making their voice heard in the ongoing conversation about the legitimacy of criminal prosecutions. People defy the state’s definition of criminal acts most radically, however, when they collaborate with ETA commandos and, for example, provide housing for fugitives. Such efforts aim to thwart the state’s attempt to take control and defy its assertion that the criminal justice response is legitimate. ETA explicitly expressed its voice in the criminal justice arena when it warned the state to stop repressive criminal justice measures:  

Don’t attack Euskal Herria. Don’t pass measures such as the Parot doctrine to target Basque political prisoners. Don’t prosecute and imprison Basques like Iñaki De Juana. The trials of large numbers of Basque youths, and so on and so forth, are all further examples of the exceptional state of affairs in our country. Let all this stop, and ETA will have no need to react. (Interview with ETA in the newspaper Gara, 8 April 2007)  

---

67 This poem is actually wrongly attributed to Brecht, as the original poem was written by Martin Niemöller.
This “conversation” about criminal justice issues can also take place in the streets, for example when street violence is motivated by outrage about criminal justice issues (Van den Broek 2004:719). This was also understood by a prosecutor of Navarra who explained that such street actions “intend to call attention to” a variety of things, such as the ETA prisoners, the disarticulation of commandos, their opposition to the trials against conscientious objectors or draft evaders, and militarism, etcetera (MA 1994:474). In 1994, the Attorney General explicitly framed the actions of ETA sympathizers as an “answer” to detentions of ETA’s extortion-network and the death of an ETA member (MA 1994).68

The most common forms of solidarization with “political” prisoners are attending trials in Madrid and participating in public demonstrations in relation to prisoner issues. While the prisoners are by no means generally recognized as “political” prisoners, left-nationalists have successfully turned the prisoners into a political issue. For a long time the public debate in Spain regarding the Basque struggle has been engaged with demands about the amnesty, reintegration, and dispersion of their prisoners. Many left-nationalists indeed identify with the prisoners and feel that the prisoners are suffering for the same thing every Basque left-nationalist is fighting for: a free and socialist Basque Country. More specifically, many left-nationalist activists feel that they could easily have been imprisoned as well. A leader from the

---

68 The Attorney General similarly states that there exists a “close relation” between the increase in attacks by the groups from the environment of ETA and the events related to ETA. As an example, he points to the fact that the rise in attacks in August of 1993 was due to the detentions of the extortion network of ETA, and in September the attacks were an answer to the death of an ETA member.
illegalized organization Segi said that many people from his organization faced criminal investigations. He had no idea why he had not been arrested, although it was clear that he expected that this could still occur (Interview S-24).

By persuading the public of the “political” nature of the prisoners, supporters aim to achieve material and symbolic support as the prisoners continue to defy the state and its attempts to confer a “criminal” status to the defendants and prisoners.

Contested truths: The problem with evidence

A major role of the prosecutorial narrative in criminal proceedings is to convey the credibility and meaning of evidence. As truths are deeply contested in the contentious episode, this means that the interpretation of evidence is also at stake. There are many ways in which prisoner supporters challenge the credibility of the evidence presented at trials. Most important is the allegation that confessions and declarations are obtained through torture. This creates uncertainty about the value of these declarations, which often form the main body of evidence upon which convictions are based. Already in 1984 the Attorney General spoke up on the issue of torture and the “Kafkaesque” situation which this produces (MA 1984:138). He wrote that on the one hand there will be a criminal proceeding in the Audiencia Nacional investigating a crime based on a declaration made at a police station. This same declaration, however, would at the same time be subject to a criminal investigation at one of the local courts (with jurisdiction in the case of a crime of torture) which might end up disqualifying the
declarations and thus the main procedure. The Attorney General called it “dysfunctional” (1984:138).

The prosecutorial narrative has systematically condemned incidents of torture while representing them as “exceptional.” The Attorney General rejected voices that according to him actively portray such incidents as generalized (MA 1993:406). In the description of the torture incidents during the Dirty War, the prosecutorial narrative explicitly placed these events in the context of the “terrorist phenomenon” and portrayed them as “excesses” of the security forces in their activities of “prevention and repression of the terrorist phenomenon and its environments” (1993:406).

I have seen several documentaries and read many testimonies in which Basque people, young and old, testify to the abuse and torture they have suffered at the hands of the Spanish Guardia Civil while detained “incommunicado” in Spanish police stations. For example, Iker reported in 2005 that

[t]he worst part was hearing the other detainees’ screams. At one point, while I was in the cell, I heard another detainee, who, when they opened his cell door, shouted at the Guardia Civil officers, “leave me alone, leave me alone!” [dejame en paz] I could also hear screams when I was under interrogation. [...] They suffocated me with a plastic bag many times, always when I was on my feet. At times they also made me do stand-ups while the bag was over my head, which made me retch and feel like throwing up. (TAT 2005:13)
His testimony was followed by 46 other lengthy testimonies recounting similar or worse experiences in 2005.

The front page of the TAT yearly report in 2002 showed a picture of Unai Romano. The photo was horrible to see, as his face is swollen, his eyes are bruised black, and he is wearing a brace around his neck. On the web you can find the bruised picture next to a picture of Unai Romano from before the alleged torture occurred (Koldomikel 2008). He is unrecognizable. If that would seem undisputable evidence of torture, the reaction of the judge may seem cynical. The judge in Madrid claimed that Unai had inflicted the injuries himself (Gara 2005). A lawyer representing a victim organization was equally unmoved by the picture. When I discussed the torture allegations with her, she claimed that without any doubt the picture had been photoshopped (Interview S-17). The organization Basta Ya published a document titled “The false torture of Unai Romano” claiming how Unai and his supporters went to great lengths to falsify documents so they could allege the torture (2006). On the other hand, an elderly man present at a demonstration in Iruñea-Pamplona for another alleged case of torture said: “here no one believes that Romano would have injured himself like that” (Personal conversation, January 2008).

These voices contesting the truth claims of evidence presented in criminal trials not only bring contention into the criminal justice arena but also deeply challenge the state’s claim of proving
guilt objectively and beyond a reasonable doubt. Indeed, these challenges fuel the existing distrust towards the Spanish state among left-nationalist sectors of society (Terwindt 2011). The Spanish state rejects all allegations. This debate also takes place at the highest levels. The 2004 report by the UN Special Rapporteur on Torture Theo van Boven about his visit to Spain created a controversy. He concluded that whereas accusations of torture may be trumped up, he did not believe that they are all fabricated, and moreover he believed that the abusive incidents are “more than sporadic and incidental” (2004). Spain’s reaction to this conclusion was swift and condemnatory. To give an indication of the tone of this debate, I will cite from the response from the Permanent Mission of Spain to the United Nations Office at Geneva, where it addressed the Office of the United Nations High Commissioner for Human Rights. Spain claimed that

the Special Rapporteur has collected alleged statements from sources identified only as “former detainees,” whose anonymity the Government believes is completely unjustified. The Special Rapporteur considers these sources to be credible precisely because “a certain pattern had emerged” from their statements. From this Mr. Van Boven goes on to conclude that these statements cannot be considered to be “fabrications.” It is outrageous that the Special Rapporteur should have failed to consider that the versions of these “former detainees” might agree precisely because they were acting on the basis of instructions from the organization to which they belonged. (Permanent Mission of Spain 2004:2)

Individuals and organizations actively participate in this debate about torture allegations and present arguments of all sorts. For example, an investigative judge maintained that any incident of police abuse or torture is not a sign of systematic abuse but simply a rogue police officer who

---

69 When the Mission writes “the organization” it can be assumed they are referring to ETA.
can and will be prosecuted and, if proven guilty, punished (Interview S-22). He has frequently given his fiat to a period of incommunicado detention. The organization Basta Ya argued that supporters of ETA have to assert that ETA militants were tortured to maintain the hero image of a militant who would only confess to the police under the highest pressure (2011). On the other hand, a Basque human rights lawyer questions why ETA prisoners who are detained in France never file torture allegations, which would be expected if it were the ETA policy to do so (Interview S-5). I could go on listing the arguments that I have heard on both sides. It is not my objective here, however, to go into detail and examine the various arguments supporting one or the other position. Rather, I want to indicate the intensity of the debate to illustrate how difficult it becomes to achieve a shared truth in the courtroom. A family member of an ETA prisoner had no doubts that torture exists: “You have seen the pictures; do you think they do that themselves? And why else would they confess?” He thought that the Spanish trials were just theater. He was by no means the only one who believed that many Basque youth are innocently imprisoned (Interview S-28).

Many criminal cases are built upon confessions whose authors allege coercion in its drafting. When that allegation is not considered credible, the confession can still be used as evidence. For example, during a trial of the Audiencia Nacional in which the defendant claimed that his declarations had been taken after torture, a police officer declared that “the accused responded spontaneously, relating some fifteen actions of ‘kale borroka’ in which he had

---

70 Defense lawyers of accused police officers have invoked the “syndrome of the north,” a condition of constant fear, as an excuse for harsh police treatment. This excuse was rejected by courts (Vercher 1991:426).
participated” (Audiencia Nacional 51/2005). The Audiencia Nacional decided that the declarations were credible considering that the torture complaint that the defendant had filed in the Audiencia Provincial from Alava was rejected. That court in Alava decided on 30 March 2004: “Relevant is that (the complaint) does not deserve any credibility, given that it reports the existence of some grave physical aggressions, of which the forensic doctor did not see any; therefore, one can reasonably doubt his entire report.” This was cited in the verdict Audiencia Nacional in the case 51/2005. While the Audiencia Nacional reproduces this decision, believers in the existence of torture, however, easily dismiss the role of forensic doctors, pointing to various deficiencies in their documentation, such as the lack of supervision or protocol (TAT 2005:124). Such doubts about the confession thus question the validity of the conviction in the verdict of the Audiencia Nacional in case 51/2005. This illustrates that doubts about one part of the criminal justice edifice can “infect” the entire building.

Detainees have often filed complaints about torture during their incommunicado detention. This torture-claim discredits any declarations that are signed by detainees and devalues its evidentiary value. These complaints are de-legitimized, however, by the prosecutorial argument that ETA orders its militants in its manual to denounce torture upon arrest in order to delegitimize the Spanish state. Cases dealing with torture allegations are seldom resolved to the satisfaction of claimants. Instead, like in the case of Romano, these cases often lead to further contention.71 In order to counter the continuing stream of what the state thinks to be

---

71 In 2008, out of the 21 complaints against Ertzaintza, nine were acquitted, and one was convicted. Out of the 425 complaints against the National Police, 129 were acquitted, and 28 were convicted for charges of injury,
false denunciations, charges were made in some cases for the crime of “false complaint” against several of the lawyers who had filed such a complaint. An example of such a charge was the case against Begoña Lalana in 1992, which was dropped later on (Instruction Court Madrid).\textsuperscript{72} When the mayor of Hernani accused members of the security forces of the systematic use of torture in 2008, she was prosecuted for the crime of defamation and slander.\textsuperscript{73} Such criminal cases thus send de-legitimating messages to various audiences, discrediting state agents or challengers of the state. Thus, the contention about torture allegations sets off a spiral of criminal cases, which all become the subject of renewed contention.

4. Overview

Since the transition, the young Spanish democracy has been challenged by continued demands for independence and criticism of its institutions and its rule of law. ETA’s violent campaign, failed negotiations, and a Dirty War in which the government was involved with paramilitary activity put continued pressure on the state to deliver upon its part of the imagined “social contract,” in which citizens give up their arms in exchange for state protection. Indeed, the maltreatment, or torture (CPT 2008:23). Human rights lawyers complain that the sentences in cases of conviction are very low. They also refer to specific instances where officials convicted for torture received a pardon or early release, such as Enrique Galindo, or the decoration for Melito Manzanas. See also Amnesty International (2004).\textsuperscript{72} The complaint dated 22 May 1992 relates, among other things, that José Angel Iniciarte was received in the Carabanchel Hospital after recommendation by the forensic doctor. Another of the detainees told that they had put electrodes and hit him on the head and testicles.\textsuperscript{73} The words of the mayor were: “In Euskal Herria everyone knows: here they torture, all police corpses and repressive organs utilize torture systematically against the Basque independentists” (Sumario 19/2008). On 5 June 2009 she was acquitted of this charge (Yoldi 2009).
erosion of legitimacy of state institutions and particularly the criminal justice system has been such that interviewees on all sides perceived the criminal justice system to be partial and failing. This perceived gap between law and justice is a key characteristic of the process of contentious criminalization.

The chief prosecutor at the Audiencia Nacional recognized this “double criticism,” where victims of ETA claimed that the state was not doing enough to destroy terrorism, and left-nationalist defendants argued that they were being persecuted for their ideas. He defended his role as prosecutor of “applying the law,” which in a “rechtsstaat,” as he pointed out, “also includes respecting the rights of and guarantees to citizens [...] including the rights of the worst terrorists” (Interview S-21). In his commitment to the rule of law, the chief prosecutor emphasized that the law applies to everyone. He rejected any notions of “enemy penology” or the practices in Guantánamo Bay, which to him has turned into a symbol for lawlessness for this prosecutor, indeed, for the “negation of the rule of law: You cannot defend the rule of law while violating the rule of law.” Voicing the core value of liberal legalism, he said that “la justicia se basa en la aplicación de la ley,” [Justice is based in the application of the law]. In the next chapter, I analyze the prosecutorial narrative and the way it has responded to the ongoing battle of interpretation in the criminal justice arena. The scrutiny of several prosecutions over the course of the past three decades shows that the “application of the law” is not independent of, but at least partially a product of these interpretive battles.
III. Expansive Criminalization in Spain

Collateral damage or targeted assassination? On 22 September 2008, the Basque left-nationalist newspaper *Gara* reported the “death” of a Guardia Civil who had been deactivating a bomb planted by ETA. The newspaper did not explicitly attribute responsibility for the death. The newspaper also did not mention the name of the Guardia Civil. The Spanish right-wing newspaper *El Mundo*, on the contrary, titled its article “ETA assassinates Luis de Conde.” Whereas the presentation by the right-wing newspaper makes the incident appear on a par with a targeted killing, the presentation by the left-nationalist newspaper makes the death appear like unfortunate collateral damage. These different reports reflect the obvious differences in perspective in any situation of violent political conflict. But how do these differences come to play a role in the prosecutor’s narrative in criminal proceedings? In this chapter we will take a close look at the prosecutorial discourse in several criminal trials.

How would the prosecutorial narrative translate the event that occurred on 22 September when it presents a case in the courtroom? How would the prosecutor describe the different actors that are (allegedly) involved? Will the identity of the Guardia Civil as a member of the state security forces be emphasized or ignored? How will the prosecutor describe ETA? Will the prosecutor focus narrowly on the events on 22 September or take into account a broader time frame? How will the prosecutor incorporate or reject, ignore or respond to the different representations of reality produced in the different newspapers?
The previous chapter described the meta-conflict as voices speak up in the criminal justice arena, actively producing narratives that place or reject blame. In this chapter we will see how the prosecutorial narrative develops in the many criminal cases that come before the Audiencia Nacional as a product of continued contention in the Basque Country. The prosecutorial narrative is far from a static or isolated voice. Instead, we can observe how it actively engages in the meta-conflict, adapting to new interpretations of reality and changing its communicative strategy as it proceeds to claim authority over the definition of events. This struggle for interpretation is visible in the courtroom. For example, from April to June 2008, I was present during the trial against Basque prisoner support group Gestoras pro Amnistía, which since 1978 has lent support to all “Basque political prisoners” as well as “refugees, exiled, and fugitives.” The defendants claimed that their work of “solidarity” was being criminalized. In his concluding arguments, the lawyer of the Popular Accusation began by redefining the terminology as used by the defendants:

They talk about fugitives and refugees. That language is misleading. A refugee is someone who as a consequence of a war has had to seek refuge. In Spain there is neither persecution nor war. Here we have a free country, where anyone can participate in the elections. (Madrid, June 2008)

---

74 At this final remark about elections there was a burst of laughing in the audience among the left-nationalist supporters of the defendants, as at the same moment in which we were sitting in the Audiencia Nacional in Madrid, in the same city on the same day, a hearing took place at the Supreme Court on the illegalization of two left-nationalist political parties, supposedly successors of the illegalized party Batasuna.
In his statement, the lawyer of the Popular Accusation was redefining the work of “solidarity,” making it clear that the people the defendants of Gestoras were supporting were “gunmen” instead of “refugees.” In this chapter, we will analyze various instances where concepts, ideas, and history are redefined. Instruction Judge Garzón is very explicit about his attempts to reinterpret the terminology ETA employs:

The confusion has come to such a point that to avoid it, I ordered that they [the police] make sort of a dictionary so that the manipulation of language would not interfere negatively with the investigations. For example, the terrorist is called a militant, as if we are dealing with a political organization. (Garzón 2005:299)

Thus, Garzón explicitly recognizes the importance of language in the construction of reality. He consciously takes on that battle, refusing, for example, to call ETA members “militants.” In the following sections I will show the struggle about classifying concepts as it has taken place in criminal proceedings throughout the past three decades.

As the prosecutorial narrative translates events into the categories of criminal law, its interpretations derive from a specific understanding of the relevant context in which these events are situated. In Chapter 1 I distinguished between two ideal-typical modalities of prosecution, contrasting de-contextualization with re-contextualization. We can observe that throughout the 1990s the prosecutorial narrative increasingly re-contextualizes events. Thus, as we will see in this chapter, incidents of street violence were initially prosecuted as single events
that took place at a specific time and place, involving a specific set of actors, and excluding all considerations of a broader context that could have changed the interpretation of the facts. Throughout the 1990s, the prosecutorial narrative re-contextualized single events, connecting different events and different actors across time and place in order to construct a different narrative that does not frame single incidents as public disorder but instead links these incidents to ETA and to terrorism.

Re-contextualization occurred as discontent with the result of prosecutions under the de-contextualized narratives mounted. As victims and victim supporters mobilized in the criminal justice arena and proposed new narratives, the prosecutorial narrative incorporated elements of these new narratives. Thus, political contention moved into the criminal justice arena, because the context that is chosen or constructed as the relevant background is itself deeply contested. The translation of the new narrative into the criminal law framework constituted this re-contextualization. The discursive shifts in the prosecutorial narrative, such as the new conceptualization of the ETA network and new interpretations of events like honoring ceremonies produced a broadening of the legal interest, a broadening of the criminal liability, and a loosening of the separation between law and politics.

The business of the prosecutorial narrative is declaring events to be “crimes” and assigning responsibility for these crimes to individuals. In Spain, the development of the prosecutorial narrative has expanded its reach from a narrow definition of crimes to include a wide range of
actions and forms of organizing in its conception of criminal activity. This expansion can involve a re-drawing of the boundary between the political and the criminal justice arena, where behavior that was previously understood to be “political” becomes redefined as “criminal.” The expansion can, however, also involve a redefinition within the criminal justice arena, where activity that was “merely” criminal becomes defined as “terrorism.” In this chapter I will address the expansive development of the prosecutorial narrative in four distinct areas. First, I analyze the expansion as a consequence of a redefinition of the organization ETA as a “network.” Second, I trace an increased focus on stopping ETA at its perceived “basis”: funding and recruitment. Third, I analyze how the prosecutorial narrative has redefined street violence, which was formerly prosecuted as a public disorder and throughout the 1990s became prosecuted as a terrorist offense. Fourth, the prosecutorial narrative branches out into the area of speech acts, prosecuting conduct that had not been defined as criminal before, such as the waving of a flag with ETA symbols on it.

Since the beginning of the 1990s, the prosecutorial narrative has amplified the range of “eligible subjects” for criminal prosecution. After a heavy focus on the criminal prosecution of ETA militants in commandos in the 1980s, towards the end of the 1990s one can observe the criminal prosecution of “aboveground” activists. This had not been attempted before. A lawyer for the victim association Dignidad y Justicia told me that, back in 1997, it was thought that prosecuting the board of the political party Batasuna (on charges of collaboration with ETA)
would be “la bomba” (the bomb)\textsuperscript{75} – but “nothing happened,” as she put it (Interview S-27).

Until then, it was considered to be outside the range of the imaginable to prosecute them.

Similarly, it was thought that the Law of the Parties (leading to the illegalization of Batasuna) would be impossible, but according to her that also “went well.” Some interviewees have interpreted recent prosecutions of high-level officials in the moderate nationalist party PNV as other leaps, as this meant a significant expansion from the criminal prosecution of left-nationalists to the prosecution of more moderate nationalists (Interviewee S-3). Significant is that these prosecutions are not a response to a sudden engagement with criminal conduct by these defendants. Instead, these leaps are enabled by novel understandings and interpretations of key concepts and images in the prosecutorial narrative, sometimes enabled by new laws. The new narrative thus redefines long existing forms of conduct as criminal.

I should say beforehand that the overview of criminal prosecutions is necessarily an incomplete discussion and selection out of many cases. Indeed, even from the cases that I touch upon, it is impossible to give all the details about the various proceedings, defendants, appeals, and legal issues that are involved. I have selected certain criminal prosecutions that I regard to be illustrative of a trend.

1. First classification: Conflict or terrorism?

\textsuperscript{75} A Spanish expression to indicate that she thought it would have enormous impact.
Just as in the other country studies, we can observe the phenomenon of “first classification,” where actors in the conflict as well as state agents interpret a criminal event as part of a broader context. We have already seen that victims generally deny all references to a “conflict.” They prefer the relevant context to be viewed exclusively as a matter of “ETA terrorism.” Whether described as conflict or terrorism, these classifications-in-context elevate the specific criminal event above its particular features, time, and location and places it within a larger phenomenon. Significantly, the classification matters in criminal prosecutions as it colors the construction of the narrative that determines crimes and criminal liability. The further specific re-contextualization of the facts of criminal cases relies upon this basic categorization.

One of the recurring themes in the meta-conflict in the criminal justice arena is the question whether acts of terrorism are ordinary crimes or not and whether (the perpetrators of) acts of terrorism should be treated differently from (those of) ordinary crimes. The kinds of differences and equalities asserted or demanded depend strongly on the context that is chosen. Taking terrorism as the relevant context, for example, the dispersion policy is based on assumed differences between ETA prisoners and ordinary prisoners. On the other hand, prisoner supporters claim a relevant difference when they demand amnesty for their prisoners as they place their criminal responsibility within the broader context of conflict.

The classification of events as “ETA terrorism” has as its logical counterpart the “struggle against terrorism” (*lucha contra el terrorismo*). This image is strengthened with references to
war metaphors like the “arms of the law.” This struggle is conceptualized as an overarching battle, potentially subordinating single prosecutions to this broader goal. Indeed, a strategy can consist of different “tracks,” such as the policy described by the attorney general to combine a focus on armed commandos, the arrest of “historical” members of ETA who reside in Latin America, prosecutions of the political organizations of the ETA network, prosecution of Kale Borroka, action against the glorification of terrorism, and the pursuit of a prison policy that dissociates prisoners from ETA (MA, 2010:262).

This first classification is thus a continuous battle, pitching those who claim the conflict as the context and those who claim terrorism as the relevant context. The claim to a context is a claim that there is a significant difference between a de-contextualized interpretation and a re-contextualized interpretation. The claimed difference is then supposed to alter the criminal prosecution as it would alter the definition of the crime or the claim to criminal liability. A continual question of debate is therefore whether the asserted differences are legally relevant or not.

Let me illustrate this debate with an example in which the relevance of the political context is denied by state authorities. This happened in the trial against a defendant who was accused of killing a baker. The killing happened on 13 March 2004, just two days after the mass attacks on the trains in Madrid, later attributed to Al Qaeda. President Aznar and his government initially accused ETA of these attacks, causing a debate about whether or not ETA was responsible. Even
the UN Security Council adopted a Resolution condemning the attacks and attributing them to ETA (Resolution 1530, 11 March 2004). Batasuna leader Arnaldo Otegi, however, appeared on television explicitly denying any involvement of ETA in the attacks. For many left-nationalists this was a definitive sign that ETA was not responsible. The issue became a national debate in the first days after the attack. Sentiments also ran high locally. In Iruña/Pamplona, in Navarra, a baker was asked by his neighbor to put a sign speaking out against ETA in his window. This baker, Ángel Berrueta, refused to put up a sign with the text “ETA No” because he believed that ETA was not involved in the attacks. His neighbor, an officer at the National Police, was outraged about his refusal and shot him. Significantly, what contributed to this incident was Ángel’s identity as founder and member of the organization Gurasoak, which provides support to families whose children are imprisoned for Kale Borroka. Due to this affiliation, the neighbors believed him to be an ETA militant. This “ideological discrimination” was later taken into account as an aggravating circumstance (Audiencia Nacional, 8 July 2005).

During the trial, the prosecutor, however, framed the case as “una riña de vecinos” [a fight between neighbors.] Ángel’s family members, however, emphasize the political climate within which the killing occurred. They point out that Ángel dared to say “no” against an imposed ideology and reality and blame Aznar for having made the references to ETA and the climate of “impunity” within which the National Police officer felt justified in his action. Ángel’s daughter laments the lack of support for her family. She said: “two months later they kill two Guardias

76 The widow of Angel testified during the trial against Gestoras, Madrid (field notes, June 2008).
*Civiles* and the whole world is on the streets. What is the difference with my father? I don’t see it” (Vecin@s de Donibane y Eguzki Bideoak 2007). In this case, some voices indicated that the case should be placed within a broader context; however, this classification is expressly denied in the prosecutorial narrative. This contestation does not only take place in the courtroom but also in the streets and, for example, online newspaper forums (e.g., Deia 2010).

The chosen context or the de-contextualization of events can itself thus be a matter of intense contestation. This is not surprising, because the chosen context can have a great impact on criminal proceedings. This becomes especially clear when the chosen context is changed along the way as occurred in a case of protest against the High Speed Train (TAV/AHT). During a protest on 3 November 2006, two protesters from Beasain were arrested and charged for “public disorder” (Alonso, Lago, and Bárcena 2008). On 15 January 2008, their case was scheduled to take place at the courthouse in Tolosa (“Los acusados” 2008). However, at the last moment, the crimes were redefined as acts of terrorism and the Audiencia Nacional intervened, transferring the case from the local courthouse to Madrid.

What had happened? On 5 January 2008, the newspaper *Gara* had published an interview with ETA in which the organization pronounced itself against the High Speed Train. Now, with this information, the protests in 2006 were viewed in a new light and the prosecutions were undertaken within the framework of terrorism. ETA decided to oppose the High Speed Train, which led the Audiencia Nacional to re-contextualize the protest of the Beasain activists as
“terrorism.” This redefinition sparked contestation and questions about what constitutes terrorism and whether the activists should have known in 2006 that a year later ETA would voice its opposition to the project. Anti-High-Speed-Train activists were further put under pressure when on 3 December 2008 ETA killed the businessman Ignacio Uria Mendizabal, who was responsible for the company involved in the construction of the train. Activists were called upon to actively distance themselves from the assassination and condemn the killing, something which various left-nationalist activists refused to do.

Placing events in context can thus significantly alter the crime definitions. This is actually one of the main grievances of victim organizations. They have criticized prosecutors for being less repressive during the truce with ETA. The chief prosecutor of the Audiencia Nacional confirmed and justified this trend as he pointed out that some conduct is simply evaluated differently during a truce (Interview S-21). “The application of the law depends a lot on the context and circumstances of each case. That is a legal criterion and within the rule of law.” He admitted that during the truce the prosecutors had been more flexible regarding actions of the environment of ETA. However, he defended this as only logical. He argued that meetings and demonstrations during a truce, when ETA has stopped violence, have a legal goal when the goal is to support the peace process. However, when ETA has broken the truce and returned to killing and extortion, then such meetings and demonstrations, when they support the methods and strategies of ETA, have an illegal goal.
Therefore, the application of the law cannot be the same in one circumstance or the other. [...] 

The laws are applied according to the social reality and the context in which they are applied. You cannot claim a rigorous application of the law when the circumstances do not warrant that rigor, but a more flexible application. (Interview S-21)

The chief prosecutor thus defended a different interpretation of conduct given a change in the context because of the truce. Victims of ETA, however, dispute this belief on behalf of government officials in the truce. Indeed, they do not see a truce in the sense of a “peace process.” They disagree with the notion that ETA would be working towards peace during that period. Instead, they argue that ETA just uses the time to recover strength. Victims of extortion by ETA have emphasized that the letters demanding the “revolutionary tax” have continued despite the truce. Indeed, a businessman reported that when he denounced the continuation of extortion letters to the government (at risk of repercussion from ETA), he was told that he was being an obstacle in the peace process (Delgado 2007). The meaning of the truce of ETA is one of the topics that is heavily contested in the meta-conflict, with important consequences for the interpretation of conduct and the construction of crimes.

While indicating that the interpretation of some actions thus changes with a change in the context, the chief prosecutor emphasized that all criminal proceedings for “clear” crimes of terrorism continued. In cases of attacks, destruction, arson, actions of Kale Borroka, and collaboration, indictments continued to be formulated and people were convicted. “Clear crimes don’t change,” he said (Interview S-21).
2. Armed attacks and the interpretive battle about the identity of victims

Context is brought into the narratives competing for dominance in the criminal justice arena, for example through the identities of victims or perpetrators. The exclusion of context upholds the fiction of abstract individuals who are all equally subjected to the prohibitions and protection of the rule of law. Such a position denies individuals any particularistic political identities which could be relevant within the criminal justice arena.

Not all identities are considered irrelevant, however, in the various narratives justifying or condemning behavior. ETA, for example, has long legitimized its attacks by indicating that it targeted “military goals” and that victims were members of the Spanish security forces. It thus draws upon the strict distinction between civilian and military targets, which is a cornerstone of international humanitarian law regulating the use of violence in war. This distinction is, however, rejected by prosecutors, who refuse the rules of war as the relevant framework. Indeed, not only do prosecutors reject “war” as a valid context, they often emphasize that identities do not matter. For example, in 1994, the attorney general responded to such claims of ETA as he mentioned that victims of ETA attacks were both civilians and public functionaries or members of the security forces. At the same time he emphasized that the identity or the background of the victims does not add any significant meaning to the horrible actions (MA
1994:155), thus explicitly denying the relevance of this distinction between civilians and military actors in the liberal legalist ideology of criminal justice.

This prosecutorial emphasis on the notion that the identity of victims does not influence the definition of the crime should be seen in light of the fact that for many in the Basque Country the Guardia Civil are responsible for a long history of repression and are the symbol of the military oppression of Franco. A left-nationalist youth told me that no one used to go to their funerals. Indeed, when he was younger he used to celebrate when a Guardia Civil died, just like many other youth in Basque villages (Interview S-35). Many Basque left-nationalist youth still view the Guardia Civil as the enemy and support the left-nationalist campaign “Alde Hemendik” to have them leave the Basque Country. The Guardia Civil has been the institution most affected by ETA attacks.

Outside the security forces, ETA has killed people from Spanish political parties, the PP, and the PSOE, and it has killed journalists, businessmen, engineers in infrastructural projects, judges, and prosecutors. These killings send forceful messages to the people that share the same profession or the same opinion. While denied relevance in the criminal justice arena, the identity of victims thus does play a role in many of the narratives that describe violent events. For example, the assassination of a journalist is interpreted as a message to other journalists. The interpretation of the relevant identity of the victim thus has practical importance for the threat assessment of those who listen to the message encapsulated in these murders.
Andoni Unzalu argued that this is one of the features that differentiates terrorism from ordinary crimes. The assassination of an individual does not have as its primary objective the assassination of that person but the threatening of a part of the population (2008:14). One consequence of these killings is that many people have full-time bodyguards, which severely impacts their daily lives and their political liberty to do what they choose to do. It is the impact of this specific message tied to the identity of the victim that gives these actions the potential to create terror, but not because these targets are indiscriminate. On the contrary, these actions create terror exactly because the targets are chosen for a reason, whether it be the refusal to pay the “revolutionary tax” or the writing of journalistic articles that are contrary to the ideals or practice of ETA. For example, Judge Lidón was shot as he was driving his car out of his garage on 7 November 2001. ETA claimed the action on 15 November 2001, calling it “an action directed against the Spanish judicial apparatus” (Audiencia Nacional 51/2005). The interpretation of the identity of victims in these targeted assassinations is therefore deemed to be important in order to take adequate security measures.

The interpretation of the identity of victims is thus inevitably connected to an assessment of the intention of ETA. Targeted assassinations are distinguished from ETA victims who were killed because they happened to be the bodyguard of these people or happened to be nearby when a car bomb was detonated. Sometimes, however, the intention of ETA is contested. This was the case with the attack on Hipercor in 1987, which killed 21 people. This event generated
a public debate about the question whether the victims were collateral victims (that is, unintended but accepted) or whether it was an indiscriminate attack (that is, intended victims but regardless of their identity).

The interpretation of the relevant identity of the victims and the difference that is made between security forces or bodyguards on the one hand and judges or journalists on the other hand alter the message that is sent and understood. The debate about the identity of victims is thus constitutive of the message that is understood and thus ultimately relevant in the labeling of the crime. While some attacks are interpreted as specific harm against a specific individual, other events become labeled as an attack on society. Therefore, identity interpretations cannot be excluded from the criminal justice arena.

3. Changing the image: From “pistoleros” to the ETA network

“If the environment didn’t exist, terrorism would be much more marginal; it is the breeding ground,” said the chief prosecutor of the Audiencia Nacional (Interview S-21). The image of ETA, and specifically its relation to this “environment,” has changed significantly throughout the past decades, leading to a very different kind of criminal prosecution. In the 1980s and the beginning of the 1990s the prosecutorial focus was on the ETA commandos, their direct support

77 Douglass and Zulaika (1990) distinguished between ETA as a concept and ETA as a structure; here I refer to both.
structure, and the armed attacks they committed. For example, in 1993 the attorney general wrote that the so-called “traveling commando” was the “desperation” of the Ministry of Interior (MA 1993:250). The annual reports from the Office of the Attorney General in those years described the dismantling of ETA commandos in the various parts of Spain. An essential part of the dismantling of the commandos is the dismantling of the support “infrastructure” in each city (MA 1993:250). People who arranged transport and provided housing to members of ETA were prosecuted for “collaboration” with the organization.

Since 1998, the focus of criminal justice efforts has shifted from the ETA commandos and their direct support structure to what was previously called the “environment” of ETA. Since then, members of the left-nationalist movement are being prosecuted for “membership in a terrorist organization,” and in 2008 many of these proceedings were still ongoing. In these so-called macro-trials, the defendants are not suspected of being a member of an ETA commando or otherwise suspected of being directly engaged in armed attacks. The defendants are related to ETA because of their activities for other organizations that are alleged to be part of the “ETA network” (entramado de ETA). In this section I argue that although little had changed in the

---

78 The list of crimes committed by ETA in 1992 in the Memoria Anual contains only armed attacks (1993:252). The chief prosecutor confirmed that in the 1980s the “vision regarding terrorism was much more limited” (Interview S-21).

79 ETA had commandos located in different cities. One commando, however, was not fixed in a city, but “traveled.”

80 It is remarkable that these descriptions are very detailed. Every detainee is mentioned by name. Many times the exact circumstances of the ETA attacks and assassinations are described.

81 The attorney general added that these people knew that they were giving housing to ETA members, indicating a commitment to actual mens rea instead of strict liability. The number of people prosecuted for collaboration with an ETA commando was high during the 1980s. In 1983 a total of 131 of the criminal proceedings at the Audiencia Nacional were for collaboration. In comparison, for example, 22 proceedings were for assassinations (MA 1984:table B6). In 1989, there were 825 charges of collaboration with terrorism at the Audiencia Nacional versus 10 charges of membership in an armed band (MA 1989:213).
relationship of these actors to ETA since the early 1980s, the prosecutorial narrative had changed. During the 1990s, the prosecutorial narrative construed a different image of ETA and changed its prosecutorial decisions accordingly.

What is ETA? Is it the vanguard organization or the people’s army, as ETA itself claims to be? Is it like a mafia and more about money than politics, as some opponents argue? Are they a handful of lunatic terrorists who just do not know any other job and thus continue to do their thing, as other people claim? Or is it a highly organized network that permeates the whole fabric of Basque left-nationalist organizations, as the latest judicial verdicts claim it to be? “ETA es mucho más,” said a young man who was sitting on the bus next to me as I traveled from Madrid to Bilbao. This phrase – “ETA is much more” – sounds like a refutation of something: more than what? It is one of those stock phrases that you hear over and over again when people touch upon the subject. Another stock phrase, but then employed by left-nationalists, is “nos sobreestiman” – [they overestimate us] (Interview S-3). Again a refutation: In this view ETA is a handful, absolutely not as highly organized, and definitely not the grand organization able to dictate the behavior of many that has been painted in the latest trials.

**Competing images of ETA**

I will not go into detail on the different images that exist regarding ETA. It suffices to show the vast variety and differences in the images that currently exist. The competing images of ETA give different answers to a host of different questions. What kind of people join ETA? How
much money does ETA need in order to cause trouble? What motivates the members of ETA? Are ETA’s leaders motivated by politics or money? Who can be blamed for the fact that ETA still exists?

ETA views itself as the political and the military vanguard. ETA’s proclaimed goal is self-determination and a free and socialist Euskal Herria. ETA purports to represent the will of “the” Basque people. This perspective was expressed, for example, after an early ETA attack in 1968 on a member of the Guardia Civil known for the torture of Basques was framed as the “execution of the verdict from the Basque people” (Alcedo 1994). ETA thus positioned itself as the bringer of justice in name of the Basque people. The view promulgated by ETA is that its struggle is comparable to the guerrillas that were present in Latin America. Currently, the comparison with the IRA in Northern Ireland is the favorite.

“We all wish ETA could disappear, ETA itself wants that!” Iñaki told me while we were at the market place of Gernika (Interview S-4). He is a self-identified left-nationalist and had come to Gernika in order to protest the planned visit by the far-right-wing party “La Falange.” He strongly refuted the notion that ETA was a terrorist organization. “They are a liberation army,” I was also told by a lawyer sympathetic to the left-nationalist struggle. Most people

---

82 Initially this also meant that ETA claimed to be in charge of the negotiations with the Spanish government. In the negotiations of 2006, however, ETA only talked with the government about issues such as the prisoners leaving the political discussion on self-determination and the future of the Basque Country to the negotiation table, where political party Batasuna took seat.

83 She was present during the trial against Gestoras pro Amnistía, where she told me her views (field notes Madrid, June 2008).
sympathetic to ETA emphasize that it acts in defense. ETA in their view is only a reacting force to the violence the state imposes on the Basque people. Many left-nationalists deny that ETA represents them. ETA is talked about as a necessary consequence of the political situation, but not because anyone actually wants it to be there. In doing so, they position themselves entirely outside of ETA and talk about it as a fact of nature you cannot really influence, like the rain.⁸⁴

In other conversations based upon a radically different ETA image, the assumption is that ETA starts the violence, and the state reacts to it. Opponents of ETA assume that it is ETA’s goal to create terror. Comparisons with Northern Ireland and the IRA are therefore vehemently rejected. While in Northern Ireland there was a political conflict with multiple sides, opponents argue, ETA really is the only side using violence. Talking about the “environment of ETA,” one right-wing interviewee maintained that anyone who does not condemn ETA attacks belongs to the environment of ETA (Interview S-13).

Some people conflate nationalism with terrorism in their image of ETA. “The Basque president also belongs to ETA,” a family member of victims told me (Interview S-16). He was referring to President Ibarretxe and pushing the notion that “ETA es mucho más” to the extreme. He argued that the Basque president was as dangerous as ETA because he also pursued nationalist ideas and even was proposing a referendum on the issue of independence. According to this spokesperson of the Association of Victims of Terrorism, everyone in the Basque Country who

⁸⁴ One of my interviewees actually made this comparison between ETA and the rain (Interview S-2).
has nationalist ideas is in some way connected to the general ETA enterprise and therefore
more or less connected to the specific actions ETA is responsible for.

What is ETA? The answer to that question is the key to the criminal prosecutions. The question
“What is ETA?” is important because ETA is considered a terrorist organization.\textsuperscript{85} As
membership in a terrorist organization is a crime, the prosecutor has to determine who belongs
to ETA in order to indict the members. The image of ETA affects the determination of
membership. Assertions about membership are often disputed. For example, during the trial
against Gestoras I spoke with a defendant who was an ex-ETA member (armed wing). He
complained that the prosecutor argued that people who were once a member of ETA will
always be a member. “What would ETA do with an old man like me?,” he said. “They cannot
use me” (Field notes, June 2008). His understanding of ETA could not incorporate this notion of
lifelong membership assumed by the prosecutor.

\textit{Shift from the “environment of ETA” to “membership in ETA”}

The image of ETA in the prosecutorial narrative changed radically during the 1990s. Those who
previously (in the 1980s/1990s) were situated in the “environment of ETA,“ loosely described as
those “political sectors with goals similar to the terrorist organization ETA” (MA 1991:197),
were prosecuted as “members of ETA” in the 2000s. In order to understand this development, I
will start with the concept “environment of ETA” \textit{[entorno de ETA]}. In 1991, this concept

\textsuperscript{85} That ETA is a terrorist organization is now taken for granted as a (legal) fact. In 1981, the Tribunal Supremo (3
March 1981) still explicitly argued this in a case of apology of ETA and reaffirmed that ETA is a terrorist
organization with a reference to the specific article in the Penal Code. That affirmation is omitted in later years.
appeared for the first time in the *Memoria Anual* of the attorney general when the prosecutor of the Basque Country described under the heading of “terrorist delinquency” that a great part of the “street violence” was the responsibility of “what is generally called the environment of ETA” (1991:297). It was, for example, understood that collaborators of ETA who provided housing to fugitives were coming out of this “environment of ETA.” Also, youths committing street violence were considered to be the “environment of ETA” in the sense that ETA would recruit from this pool. During the 1990s, this concept of the “environment” became redefined, or (more accurately) eliminated from the conceptual tools for prosecution, and replaced by the broader concept of the “ETA network.”

Instruction Judge Garzón played an important role in this conceptual development. In 1989, Baltasar Garzón took office in the Audiencia Nacional, and one of the things he did is to order policemen to collect all available documents whenever they arrested an ETA member (2005). In 1992 there was an important police operation in Bidart in France. This led to the detention of the leaders of ETA and the confiscation of an enormous amount of documents. Garzón now claims that the analysis of this collection of documents revealed a different picture of ETA than what prosecutors had worked with before: “ETA is much more.” Investigative judge Garzón attacked the dichotomy that was present in the image of law enforcement the 1980s. The idea that the military wing of ETA was separate from the political organization dominated, and as a consequence law enforcement limited its efforts to prosecutions of the military wing. Garzón

---

86 Of course, Garzón is not the only actor responsible for the prosecutorial narrative at the Audiencia Nacional. He has, however, been instrumental in many of the prosecutions of alleged ETA members.
set out to change this conception and showed the connections between them, or what is more, that there is no fundamental difference between the wings: it is all ETA.

I argue that the criminal prosecutions changed because the shift in the image of the prosecutorial narrative warranted and enabled such a different approach. This does not say anything about whether or not the new prosecutorial image is more accurate than the previous one. ETA itself has changed, of course, over the course of those years. However, Garzón’s claim is not so much that ETA has changed but that its true nature has always been misrepresented. Often, it is remarked that the current prosecutions of the ETA network are long overdue, partially because it was difficult to obtain evidence on the alleged nature of the relations between the different wings or fronts of ETA (a narrative does not account for much when the prosecutor cannot prove it).

Garzón’s conclusion about ETA after analyzing internal ETA documents was that “before anything this organization was purely politics; even though its methods were violent, it sought political changes, according to its sovereign projections over a part of Spanish territory” (2005:290). He redefined the military wing as a political organization and in doing so redefined the political wing as part of the violent strategy of the military wing, “demonstrating that a terrorist organization was something more complex than a mere collection of persons that kills, lays bombs, kidnaps, and extorts to achieve its political objectives” (2005:297). Garzón is frank and harsh in his assessment of police and judicial activity in the 1980s. According to him it was
ineffective and uncoordinated as law enforcement had been following the rules of the game as set by ETA by only focusing on the military wing and accepting the strong division between the military wing and the political organization. This had not been effective, and Garzón set out to design a new strategy.

In this concept of the ETA network, many people previously situated outside of ETA became viewed as “members” of ETA. For example, early ETA refugees in Cuba were suddenly called “reserves” of ETA. Further, sociopolitical organizations in the ETA network were linked to ETA by way of “functions” they fulfilled within the strategy of ETA towards the goal of ETA, understood as subverting the Constitution. Members of these sociopolitical organizations thus became perceived as members of ETA. This notion of the ETA network received support among many victim organizations. For example, the director of Dignidad y Justicia wrote about the ETA network (Portero 2007).

The simultaneous articulation of the meaning of “ETA” and “terrorist organization”

The switch to viewing ETA as a network paradoxically lies in the recognition of ETA as a political organization. It is important to recognize that this conceptualization of the ETA network, introduced by Garzón, therefore also has an impact on the understanding of what terrorism and a terrorist organization are. Prosecutors had to fight against the “old” image of “terrorism” that they themselves helped to create. In the trial against Gestoras it became a mantra that the prosecutor and Popular Accusation repeated over and over again: “A terrorist organization is
not just a group of gunmen.” They were fighting against the image of “pistoleros” [gunmen], which (still) seemed to be something inevitably glued to the notion of terrorism. “You don’t need a weapon to be a terrorist,” argued a lawyer with Dignity and Justice against the “old” terrorism image (Interview S-27). “Terrorists are not only those who commit attacks, but also those that share the strategy and the methods of the terrorist organization, and in addition contribute materially to the development of that strategy and those methods, even if they don’t use weapons,” said the chief prosecutor of the Audiencia Nacional. Thus, the meaning of one concept is always co-created in relation to other concepts. The image of ETA is determined in interaction with the image of “terrorism.” If one changes, so does the other.

What constitutes a terrorist organization became a topic of contention when the Tribunal Supremo decided in 1998 that GAL did not constitute an armed or terrorist organization. The decision was made in the criminal prosecution of the abduction of Segundo Marey. The considerations for the decision that GAL was not an armed or terrorist organization reflect a de-contextualization of the incident. At the moment of the Marey abduction, it was the first time that the letters GAL were used. This led the judges to conclude that there was not a “stable” group of persons. It was furthermore not clear that during the entire abduction the type of arms that is necessary for the definition of an armed organization was used. Lastly, the judges argued that the “isolated incident” of the abduction did not “perturb the civic coexistence for producing alarm or fear proper to terrorism” (Verdict No 2/1998, consideration 15). By 2008,  

87 In the early 1990s, instruction judge Garzón had made an enormous effort to prosecute the state officials behind the GAL crimes (Woodworth 2002).
many left-nationalists still talked about this decision and regarded it as evidence of the partiality of the justice system.

Contestation about the meaning of a terrorist organization re-emerged during the prosecution of members of the Basque youth organization Jarrai/Haika/Segi. Jarrai was the original name of the Basque left-nationalist youth organization, which was founded in 1979. After a process denominated “national construction,” in which Basque organizations on the Spanish and French sides of Euskal Herria cooperated, Jarrai merged with a youth organization on the French side to form a new “national” organization. That is how Haika emerged. On 1 May 2001, Garzón declared Haika-Jarrai to be illegal. In response to the illegalization, Basque left-nationalist youths founded Segi, which was soon declared illegal as well. The prosecution of members of Jarrai/Haika/Segi was one of the proceedings against sociopolitical organizations allegedly belonging to the ETA network. The prosecutors argued that there was an actual organization with hierarchies, the use of weapons, such as manually fabricated explosives, and the intention to put pressure on citizens as a complement to the struggle of ETA. Lastly, they argued that the organization was subordinated to ETA and obeyed its directives.

In 2005 the Audiencia Nacional declared that the Basque left-nationalist youth organization Jarrai/Haika/Segi was an illegal organization but not a terrorist organization. This decision sparked renewed contestation about the nature of a terrorist organization, as it was criticized, for example, by many victim organizations. On 19 January 2007, the Tribunal Supremo reversed
the verdict and declared Jarrai/Haika/Segi a terrorist organization. Unlike the recurred verdict of the Audiencia Nacional, the Tribunal Supremo strongly distinguished between an *armed* organization and a *terrorist* organization and decided that most important is the “nature” of the action and the goal that is pursued (46th consideration, #8). The conceptualization of a terrorist organization (and its conceptual relations to an “illegal” organization and an “armed” organization) has thus developed throughout the past decades with much debate in as well as outside the courtroom. Significantly, the concept is not developed in the abstract but is given its meaning through the application of that concept to certain groups and the refusal to apply it to other groups.

The conceptualization of ETA as a network significantly altered not only the conceptualization of a “terrorist” organization but also the range of people being considered “members” of that organization. As the image of the ETA network changed the view of membership in ETA, it also changed the meaning of “collaboration” with ETA. If everyone gets charged as a “member” of ETA, collaboration becomes a moot concept that does not cover any actual conduct anymore. The network image thus also has an impact on the relation between criminal law concepts. For example, the ETA network image raises questions about the applicability of crimes that in their definition refer to terrorism, such as glorification of terrorism, threatening with a terrorist action, or recruitment for a terrorist organization. What, for example, does “recruitment” mean now that the definition of ETA has expanded? Originally, obviously, recruitment for ETA meant

---

recruitment for the military wing. Now, if someone “recruits” a new member for Gestoras pro Amnistía (the illegalized prisoner support group), will that be prosecuted as “recruitment for ETA”? These questions have not (yet) been addressed in the prosecutorial narrative. An absence of criminal prosecutions of, for example, such “recruitment” would indicate that the distinction between the military wing and socio-political organizations has not been entirely dissolved.

**Criminal prosecutions based on the concept of the ETA network**

A newspaper, a prisoner support group, cafés, companies, a youth organization, and a language institution have all been illegalized or their activities suspended, and the leadership and various members have been indicted and in some cases convicted because of “membership of a terrorist organization.” The charge in all of these cases is based upon the idea that a terrorist organization consists not only of an armed group, but also includes a complex organization of cultural, political, economic, and armed parts that work together for a common goal in one coordinated structure. Therefore, the argument goes, all these organizations belong to and constitute ETA. A characteristic of the ETA network according to the prosecutorial narrative is the “complementarity” of these different organizations and their “functions,” which together make up the ETA network, such as the complementarity between the armed struggle and the street struggle. Unlike standard reactive criminal prosecutions, these macro-trials were therefore not triggered because of a specific violent event. The prosecutions were proactive decisions, enabled by a combination of a new narrative and the emergence of evidence. The
left-nationalist human rights organization Behatokia therefore complained that the new interpretation means that what was considered to be legal political activity before is suddenly converted into a penal offense, without a legislative reform, creating juridical insecurity (2003).

The argument in several of the macro-trials that what defendants did was “legal” did not impress the supporters of these macro-trials. They voiced their frustration that the left-nationalist activists had previously “abused” the spaces the law gave them to pursue their activities. In the words of a representative of the victim organization Fundación Fernando Buesa: “the left-nationalists and the sympathizers of ETA, they laugh about the legality of the democracy. It is a fraud of law, they make fun of it. In this they are experts and their obsession of their life goes into this; all their energies go into this” (Interview S-15). Similarly, Judge del Olmo in his accusation of the Basque newspaper Egunkaria clarified that the ETA network takes advantage of the democratic framework and the establishment in Spain of a democratic rechtsstaat, with a foundation in a Constitution and a rights-based legal order and protector of the fundamental rights and liberties, and that thus this terrorist organization has generated a plural structure, legal and alegal, in which it has embedded the necessary and useful instruments for the strengthening and the support of its terrorist strategy. (del Olmo 2004:3)

The president of Dignidad y Justicia has argued that various left-nationalist organizations simply changed their name after they were illegalized, making fun of the law. For example, he argued that the youth organization Segi has continued its work under the name “Gazte
Independentistak” (Asociación Dignidad y Justicia 2009:1). These suspicions of one organization simply replacing the other led to arrests of 34 youths in November 2009 and another ten in October 2010 charged with the intention to recompose the “terrorist” youth organization.

In May 2002, 202 people had already been indicted in the macro-trials, many of whom spent time in pre-trial detention. The trial called “18/98” involved the most people, as it affected businesses that were alleged to finance ETA, an Euskara language institute (AEK), a cultural association (XAKI), a journalist (Pepe Rei), and various other organizations (EKIN, Fundación Joxemi Zumalabe, and others). After a trial against 62 defendants that lasted 16 months, 47 of the defendants were convicted by the Audiencia Nacional on 19 December 2007. The Tribunal Supremo acquitted nine of the defendants on appeal in 2009. The case already mentioned against youth organization Jarrai/Haika/Segi had 42 defendants, 24 of whom were convicted by the Audiencia Nacional in 2005. On 19 January 2007, the Tribunal Supremo acquitted one of them. Other macro-trials were initiated against the political party Batasuna, left-nationalist cafés and companies, an association of Basque municipal mayors and councilors, the prisoner support organization Gestoras pro Amnistía, and the newspaper Egunkaria.

History in the courtroom

The prosecutorial narrative in all of the macro-trials involved a description of the history of ETA since the end of the Franco regime, when ETA decided to enforce a process called “desdoblamiento.” Prosecutors thus describe in the courtroom how with the emerging
democratic structures, many of the cultural and political organizations which were prohibited under the dictatorship could start to work above ground, and only the military wing of ETA would stay underground. In order to maintain cohesion between the various organizations, ETA decided that members of ETA would perform their (illegal) tasks within the underground armed organization and simultaneously sit on the (aboveground) board of the various sociopolitical organizations. For example, Judge del Olmo alleged that there were persons active in the newspaper Egunkaria who were also members of ETA. He emphasized that this was not a membership “in the restrictive sense in the direct execution of violence” (2004:2). Thus, the judge emphasized that membership in a terrorist organization can include more than engagement in direct violence. Further, ETA developed a theory of different “fronts.” The armed struggle was just one of these fronts; other fronts were the political front and the “front of the masses.” Prisoner support organization Gestoras, as a popular grassroots organization, belonged to the front of the masses.

The inclusion of this history within the ambit of the criminal justice arena as relevant legal information exemplifies a broadening of the time frame of the prosecutorial narrative. In addition, it brought into the courtroom a debate about what the exact nature of cooperation was and is between the ETA military wing and the social and political organizations, as well as about the relation between the armed struggle and the other “fronts.” Apart from reconstructing what was, the very reference to this history raised the legal question of exactly what kind of (historic or current) relations between (members of) the military wing and political
organizations constituted a criminal offense. As we will see, this has become a widely disputed issue, both inside and outside the courtroom.

The trials against the organizations alleged to constitute the “ETA network” have raised the important question in the Basque society of the conditions under which contact with a member of ETA turns criminal. This question is on the minds of friends and family members of ETA members, but also of people who are not so intimately connected to ETA but who are concerned that they may get prosecuted because of “whom they happen to talk with in a bar,” as one interviewee put it (Interview S-25). Activists in Barcelona and Madrid complained about criminal investigations against activist networks in their cities such as the *izquierda castellana* [Castilian left], which were facing prosecutions due to alleged connections with ETA.

Prosecutors argue that their evidence presented in the courtroom demonstrates the narrow cooperation between ETA (military wing) and certain sociopolitical organizations. Left-nationalists argued, however, that cooperation has not been as narrow as the prosecutors are alleging and that the cooperation that *did* exist should not be criminalized. They maintain that this would effectively lead to the simple criminalization of political activity, only because this activity has the objective of creating a free and socialist Euskal Herria, which happens to be the same goal that ETA has. Arguing that simply criminalizing contact with ETA is absurd, left-nationalists pointed out that the Spanish government has also entered into contact with ETA
militants for its negotiations, indicating that the mere evidence of contact cannot be sufficient for proving a “criminal” cooperation.

Supporters of the prosecutorial narrative in these macro-trials point out that what is missing in these left-nationalist arguments is genuine outrage about a possible connection to ETA. After one of the trial sessions against Gestoras pro Amnistía, I talked with one of the staunchest activists trying to put the ETA network on trial. She was a lawyer and involved in many of the macro-trials. “Why don’t they defend themselves?,” she asked me rhetorically. “Why aren’t they outraged? If someone accuses me of being a murderer, I would argue that I didn’t do it, that I wasn’t there at the time, that it is a horrible thing to accuse me of such a crime. Why don’t they argue with us? Why don’t they respond to our allegations?” (Interview S-17). A foreign sympathizer of the left-nationalist movement voiced a similar notion: “The problem is that they accept the prison. That makes people think that they are from ETA” (Interview S-33).

The organizations fulfill “functions” within the ETA network

Below I will analyze in more depth the prosecutorial narrative in the case against the newspaper *Egunkaria* and the case against Gestoras pro Amnistía to illustrate some of the key concepts and arguments that are the fundament of the basic narrative in each of the cases. The case against *Egunkaria* is in some ways a special case, because after the initial proceedings, the prosecutor dropped charges against Egunkaria due to a lack of evidence. It is the only case the state prosecution has retreated from, and victim organization *Dignidad y Justicia* has decided to
pursue the case on its own as the Popular Accusation. This is quite extraordinary, and the right to continue the Popular Accusation without the backing of a state prosecutor was questioned by left-nationalists. While most of the macro-trials ended in convictions, all the defendants in the Egunkaria trial were acquitted by the Audiencia Nacional on 15 April 2010. Despite these unique features, the prosecutorial narrative in this case relied on the same themes and assumptions as in the other prosecutions of the “ETA network.”

Just as different images regarding ETA are circulating, different images compete for dominance to describe Egunkaria. Is it a legitimate newspaper that aims to inform people? Or does it aim to convince people of the legitimacy of ETA’s struggle? Or is it a profitable company that is one of the sources of funding of ETA? For Basque left-nationalists it is their newspaper entirely in Euskara, founded by the communal effort of left-nationalists, which meant a huge step forward after the Franco regime, under which Euskara was forbidden. Many Basque nationalists believe that Egunkaria was closed because it divulged opinions regarding a free and socialist Euskal Herria, published ETA communiqués, and was written entirely in Euskara. Judge del Olmo instead described Egunkaria as a newspaper that was founded to provide ETA with continuity and stability by having the “mediatic-informative-social-economic-financial life” of the newspaper (2004:11). Victim organizations support the prosecutorial narrative and explicitly defend its liberal credentials as they emphasize that they support freedom of expression and reject the notion that Egunkaria was founded with a journalistic purpose (Asociación Dignidad y Justicia 2007).
Defendants in each of the macro-trials argued that they were working above ground and assumed that what they were doing fell squarely within the boundaries of the law, that is within the political arena. Prosecutors and instruction judges were frank about the challenge these cases posed, as indeed these organizations did their work legally. For example, in the criminal case against the newspaper Egunkaria, the instruction judge explicitly argued that one would not find directly violent manifestations of the terrorist activity in the dossier and continued to explain that the purpose of the newspaper was to increase popular support among the “population of reference,” but with a strictly legal appearance and a cover of absolutely legitimate activity (del Olmo 2004:1). So, he wrote, the activity of this newspaper, which appeared entirely in the Basque language, was protected by Art. 3 of the Constitution, which guarantees freedom of language, and Art. 20 of the Constitution, which protects the freedom of information and expression. But, the argument went, this newspaper was clearly used by the terrorist organization ETA to achieve its ends and objectives in a mid- to long-term strategy.

The problem was thus explicitly that the newspaper was doing work that was clearly both legal and legitimate. However, the terrorist organization supposedly employed the newspaper for its objectives in the mid to long term because the newspaper was gaining support for the organization’s goals among a specific segment of the population (the “population of reference”). Judge del Olmo argued that the content of the newspaper was clearly guided by
the political decision to project a certain image in its articles. As evidence of this alleged partiality, he cited a letter written by someone who refused to sit on the board of Egunkaria and argued that in Egunkaria the death of an ETA member was described very differently from the death of an Ertzaina (a Basque policeman) or, for example, that Egunkaria failed to mention that in one of ETA’s attacks the victims were children (2004:34).

The prosecutorial narrative describes the function of Egunkaria as follows: “to facilitate the protection and diffusion (with the help of Eusquera\textsuperscript{89} or Basque language as cultural cover for that) of the terrorist idea and the values and interests defended by that terrorist organization (that project called the ‘national construction’)” (2004:2). “Function” is a complicated concept in terms of criminal law, as it draws on motive and (indirect) causality, only constituting criminal conduct in relation to some other crime. Left-nationalists have been quick to monopolize the struggle for interpretation in the Basque Country and spread the now widely accepted notion that Egunkaria has been subjected to prosecution only because it is published entirely in Euskara. It is clear that the references to Euskara as a “cultural cover” and the widely supported project of national construction as an ETA project have provided the necessary ammunition for this image. There have been no consistent efforts on the part of the Spanish judiciary to effectively counter this interpretation.

\textsuperscript{89} Often, like here the word “Eusquera” instead of Euskara, prosecutors explicitly spell words in a “Spanish” spelling instead of a Basque spelling. The same happened with the spelling of the name of Julen Larrinaga, whose trial transcripts are listed as Yulen Larrinaga.
The investigative judge thus argued that Egunkaria fulfilled a “function” for the ETA network. This concept returns in other macro-trials. In the Gestoras trial, for example, the prosecutor argued that the “functions” of Gestoras are gaining control over the collective of ETA prisoners; facilitating the contact between ETA prisoners and the leaders of ETA; collecting information important for the security of ETA; indicating and legitimating targets in society for ETA to kill; publishing pamphlets; and recruiting militants. For example, Gestoras launched a campaign called “Alde Hemendik” – “Get out of here” – which called upon the Guardia Civil to leave the Basque Country. The prosecutorial narrative interpreted this campaign as one of the functions that Gestoras performed within the ETA network.

Members of Gestoras explained that one of their activities to monitor and call attention to the repression of prisoners and human rights violations against them (Interview S-23). They have criticized the Spanish state for a “judicialization of the repression” and have reproached, for example, Judge Lidón for one of his rulings. In 2001, ETA killed Judge Lidón. During the Gestoras trial, using this incident as an example, the prosecutor argued that the criticism voiced by Gestoras constituted “señalamiento” [signaling], one of the “functions” that Gestoras was alleged to have for ETA. According to the prosecutorial narrative, the human rights violations denounced by Gestoras are supposed to prepare the population for an attack by ETA as well as signal to ETA whom to attack. The prosecutor thus claimed that Gestoras had “signaled” to ETA to kill Judge José Lidón. In the trial against the journalist Pepe Rei this phenomenon of “signaling” was also discussed (Sumario 18/98). There, the judge ruled that “signaling is not a
juridical-penal entity” and “alone it is not penally relevant.”90 Señalamiento thus is not a criminal offense in itself. However, it played a role in describing the so-called “organic relations” between Gestoras and ETA. Defendants of Gestoras criticized this interpretation and claimed that this legal-discursive construction is effectively a criminalization of human rights work and prisoner support.

Financial contributions

For many people (outside of left-nationalist circles) I spoke to during my fieldwork, the financial contributions from and to ETA would have been decisive in their assessment of the actual criminal responsibilities of organizations like Egunkaria and Gestoras. For example, the AVT held that Egunkaria was closed because it was founded in 1990 with money from ETA and that Egunkaria (like various other organizations) formed a source of money for ETA (Popular Accusation, 26 June 2007). In this light, it is surprising that the prosecutor in many cases has paid so much attention to other aspects, like propaganda and justificatory remarks. If there were actual transfers of money from sociopolitical organizations into ETA pockets, then why was the detour into history and justificatory speech necessary in order to allege that all these people are “members of ETA”?

In the indictment against Gestoras, the prosecutor described the historical relation between ETA and Gestoras and stated that Gestoras was directly financed by ETA at least until 1991. In

---

90 “[E]l señalamiento no es una entidad jurídica-penal” [...] “por sí sólo no es penalmente relevante” (Euskal Herria Watch 2008:2–3).
1991, the so-called “project Udaletxe” was started, allegedly a financial plan in which left-nationalist organizations (the ETA network) would finance ETA. However, in the verdict against Gestoras, there was nothing left of the allegations and evidence of financial transactions between Gestoras and ETA, and the court did not refer to these money trails (Audiencia Nacional, 15 September 2008; Tribunal Supremo 2009). The only reference to finances regarded financial assistance to “refugees” in other countries, which was conceptualized as “economic support to the collective of ETA militants located in various Latin American countries” (Tribunal Supremo, 13 October 2009:33).

In this section I have analyzed the conceptual shift from a distinction between ETA as the armed organization and the environment of ETA to the view that they both belong to a single ETA network. I discussed some of the elements of the prosecutorial narrative as this concept of the ETA network was translated into criminal law vocabulary. The resulting macro-trials meant an important change in comparison to the prosecutorial focus on ETA’s armed commandos during the 1980s. The trials expanded the scope of defendants beyond the armed ETA commandos.

Most of the defendants belonged to what is understood to be the left-nationalist movement. However, according to human rights organization EH Watch, the macro-trials also affect organizations that are “peripheral or outside of the proper left nationalists,” referring, for example, to Fundación Joxemi Zumalabe (EH Watch 2008). Thus, there are very different perceptions regarding who and what stands close to ETA. Even a Basque activist for Gesto por
La Paz (explicitly mobilizing against ETA) criticized the macro-trials: “from Madrid it may seem as if Elkarri\textsuperscript{91} belongs to ETA. However, seen from a perspective from Bilbao, Elkarri is not at all within that bloc. Who decides that? In the prosecutions it seems as if ETA is a Big Brother” (Interview S-32). Left-nationalists often joked about the seeming arbitrariness of the choice of defendants. “You only know that you are a member of ETA at the moment of the indictment” said one Gestoras defendant. Another one joked that as Garzón is deciding who is a member of ETA, he is technically recruiting people for a terrorist organization, and should be charged as such (field notes, Trial Gestoras, May 2008).

The macro-trials and their charges for “membership” in a terrorist organization have put the defendants of these sociopolitical organizations in the same position as the ETA militants from armed commandos. Indeed, victim organizations have advocated this equalization. For example, when Martxelo Otamendi, the indicted former director of Egunkaria, wanted to travel to the United States to cover a story there and petitioned to leave the country,\textsuperscript{92} the AVT advocated that he should not be allowed to travel. They argued that “ETA militants” had fled from justice “in similar situations,” such as a precedent involving Josu Ternera, a high level ETA member alleged to have been involved in multiple deadly attacks (military wing). They emphasized the situation of “indefensión” [lack of defense] that the victims would be in if Otamendi would not stand trial (Asociación de Víctimas del Terrorismo 2003). This analogy, however, was not accepted by Martxelo Otamendi, who claimed that he had nothing to do with

\textsuperscript{91} Elkarri describes itself as a “social movement for dialogue and agreement” (Elkarri 2011).

\textsuperscript{92} One of the security measures as he was awaiting trial was that he was not allowed to travel outside the country.
ETA and that he did not intend at all to flee from a trial, as he viewed himself as an innocent man (Interview S-2).

4. The end of ETA: Follow the money and squeeze recruitment

The image of ETA and assumptions about its modus operandi thus guide the criminal prosecutions in the choice of defendants, the kinds of charges that are leveled, and the argumentation for criminal liability. The image and underlying assumptions are deeply contested, however, in the meta-conflict and as a result can change over time, changing the prosecutorial choices of defendants and charges. We have seen this in the previous section about the ETA network and the broadened scope of defendants that are charged as members of ETA. But that is not the only area in which the prosecutorial narrative has been contested and as a result changes over time. For example, it might be that those being extorted for the payment of revolutionary tax will not be treated as victims anymore, but be prosecuted for financing terrorism in the future.

Different images compete for dominance in relation to ETA’s finances and its recruitment of new members, as victim organizations or prisoner supporters are pushing or criticizing criminal prosecutions. Significantly, again we can observe that the prosecutorial narrative changes as a result of the adoption of new images. The alternative construction of reality then leads to significant alterations in the choices of defendants, the charges, or the kind of liability that is
alleged. The prosecution of the financing of terrorism and recruitment of terrorists always requires establishing a link between the conduct of the defendant and the terrorist activity of ETA. In this sense, these crimes are what I have called “dependent” crimes (Chapter 1, Table 1) as they require other crimes in order for the prosecuted conduct to be criminal. In the establishment of this link the prosecutorial narrative necessarily invokes a broader time frame and the implication of multiple actors.

For years the Spanish state has approached the “struggle against terrorism” with the aim to destroy ETA. Two premises have emerged as guides in this struggle to end ETA: without money ETA will not be able to pursue its deadly attacks, and without new members it will not be able to fill its cadres after detentions. Various victim organizations have emphasized that if ETA is squeezed financially it will not be able to continue. “Follow the money,” stressed the director of the victim organization Dignidad y Justicia (Interview S-14). He suggested, for example, that law enforcement focus its attention on those that facilitate the payment of the so-called “revolutionary tax.” Businessmen who decide to respond to the coercive letters of ETA were often asked to go to individuals or sites of the left-nationalist movement in order to make their payment. Portero suggested that law enforcement arrest the intermediaries of these transactions (2007b:19). Such prosecutions have indeed been initiated (e.g., case against lawyer Arantza Zulueta, 2011). Also, the macro-trials were at least partially founded on the assumption that the various companies and sociopolitical organizations that constitute the ETA network are

---

93 The term “revolutionary tax” is also referred to as such (with commas) by a prosecutor in the Memoria Anual (1993:144).
indispensable for ETA’s finances. And the illegalization of Batasuna was partially inspired by the notion that public money for political parties should not end up in the pockets of ETA.

The emphasis on cutting the financial means of ETA has also affected prosecutions regarding those believed to pay the “revolutionary tax.” During the 1980s and 1990s, the payment of these taxes had been framed as “extortion,” given the pressure exerted on those that refused to pay. Recently, however, voices have advocated for prosecuting the payment as the “financing of terrorism.” Manos Limpias is one of the organizations that put pressure on criminal justice agents by filing official complaints regarding payments to ETA. The spokesperson of Manos Limpias argued that “when the money is finished, ETA is finished” (Interview S-20). While during the 1980s and 1990s the payment of revolutionary tax was always the consequence of extortion, Portero reported that since 2000 ETA has initiated a new form of collecting money in which it asks businessmen in circles of the left-nationalist movement to contribute voluntarily, without any threats (2007b:14).

During the 1980s it would seem unthinkable to prosecute someone for giving money to ETA as part of the “revolutionary tax.” Now, that is exactly what is happening. Whereas before it was assumed that these payments were made under huge pressure and at the risk of kidnapping or worse, now, with or without leaving the assumption of involuntariness, pressure is mounting to resist these payments, effectively leading to a standard of strict liability. Thus, in the new image, people who pay the revolutionary tax are converted from victims into perpetrators,
leading to renewed contestation in and outside the courtroom. In 2006, a prosecution was initiated for such payment, and it was reported that an instruction judge believed the two businessmen to have paid voluntarily (Colli 2006). In June 2011, the Audiencia Nacional for the first time convicted two people for paying the “revolutionary tax” and imposed a sentence of one year and three months (Case Bruño). Their active participation in illegalized left-nationalist political parties was identified by the prosecutors as an indication of their voluntary payment. Instead of perpetrators, the convicted sisters self-identified as “victims of ETA” (EFE 2011).

Apart from squeezing the funds of ETA, there has been an attempt to squeeze ETA’s recruitment of young new members, as this would ultimately mean the end of ETA. Basque youth, and specifically youth involved in organizing left-nationalist events, are viewed as the “cantera de ETA” [the pool of ETA]: the source of future ETA fighters. “The majority of etarras [ETA militants] come from the Kale Borroka,” said the chief prosecutor of the Audiencia Nacional. “It is their prelude” (Interview S-21). This assumption characterizes the prosecutorial narrative. For example, the prosecution against youth organization Jarrai/Haika/Segi was partially premised on the notion that its illegalization would make recruitment to ETA more difficult.

Left-nationalists perceive that during the past two decades, Basque left-nationalist youth have increasingly been targeted with harsh measures. Young inhabitants of squats and leaders of youth houses, which traditionally form a center for cultural activities (“gaztetxe”), have been
subject to criminal prosecutions. Sentences for street violence have increased as a consequence of the prosecution of street violence as terrorism, and the law on the minors has enabled prosecutors to ask higher sentences despite younger ages. The interpretive battle surrounding these prosecutions is characterized by competing images regarding gaztetxes, the organization Jarrai/Haika/Segi, and their relations to ETA or Kale Borroka, as well as the way in which these images form the basis for the prosecutorial narrative. For example, a left-nationalist lawyer disputed the links that prosecutors asserted between gaztetxes and the Kale Borroka (Interview S-26). A leader of Segi told about the arrest of six members of his youth organization. They were accused of participating in actions of Kale Borroka, but he thought that this was just a pretext, suspecting that the real reason of their detention was their activism in gaztetxes (Interview S-24). While some thus defend gaztetxes as cultural centers, others argue that they are centers of recruitment for ETA (Iturriaga 2002). The various criminal prosecutions involving youths thus inevitably come to play a role in this ongoing conversation, as competing voices interpret and resist or confirm the images produced in the prosecutorial narrative.

In its criminal prosecutions, the prosecutorial narrative put flesh on the government’s aim to destroy ETA by expanding its efforts to eliminate the financing of ETA and its recruitment. The assumptions and images that guide these criminal prosecutions are contested in the meta-conflict.
5. Street violence: Shift from public disorder to terrorism

Burning an ATM in Cadiz, Andalucía, and burning an ATM in Bilbao, Basque Country... is that the same thing, same offense, same crime? It is one of the debated questions in the criminal prosecutions of the Kale Borroka or street violence in the Basque Country. Left-nationalist activists invariably argued that during the 1980s burning an ATM in the Basque Country was prosecuted as public disorder, as it still is these days in Andalucía, and penalties would mostly amount to a fine or a conditional prison sentence. Nowadays some young Basques are serving up to 18 years in prison for this kind of violence, as the prosecutorial narrative has changed significantly and prosecutors decided that it does matter whether you burn an ATM in Bilbao or in Andalucía. Left-nationalist Basques are angry about what they view as overt unequal treatment of the same facts (Interviews S-3/7/9/12/23/24/25). A lawyer associated with the organization Dignidad y Justicia, however, rejected this notion of inequality and asserted that the very nature of street violence in Andalucía would be entirely different (Interview S-27).

In this section I review the change in the prosecutorial discourse, the way in which the new image is reproduced in actual criminal cases and how the image is informed and contested by the different images put forward by opposing groups in society. What are the differences between ATM-burning in Bilbao and ATM-burning in Cadiz that are considered to be both relevant and attributable to the individual defendants? How did these differences come to be considered relevant and how did they get translated into legally relevant terminology?
Throughout the 1990s the so-called “socialization of the suffering” became widespread (van den Broek 2004:721). Youths took to the streets and targeted a variety of businesses, political party offices, cash machines, telephone cells, and other infrastructure. This phenomenon is widely known as the “*Kale Borroka,*” which is Basque for “street struggle.” This street struggle involves many different kinds of actions (from Molotov cocktails to confrontation with the police during demonstrations to the burning of cash machines and buses to spray painting graffiti), by many different actors (youth all over the Basque Country), against different targets (banking offices, public transport, property of the Security forces, and offices of political parties), with many different motivations (political absolutely, and out of frustration for not being heard, but also being drunk, adventure, being cool and participating with friends, anger towards the police, revenge, sheer stupidity, direct response to police violence), at very different places (all over the Basque Country), and at different times (during the night, during demonstrations in broad daylight). All of these incidents are connected to a single concept: “*Kale Borroka.*”

Although the concept comes from the streets and from the Basque language, it has been incorporated into the official courtroom discourse. The concept is referred to in quotation marks, but its meaning is taken for granted as it is not translated or explained. For example, in 2005 the Audiencia Nacional described that a defendant had declared before the police that he had participated in “kale borroka” in Vitoria regarding some autobuses and ATMs. At a later
point in the same verdict, the court described that the defendant knew an ETA member as they were both “in the sphere of the ‘kale borroka’” (e.g., Audiencia Nacional, 12 December 2005).

In the meta-conflict different images compete for dominance of the correct portrayal of this phenomenon of Kale Borroka, its actors, the targets, and the motivations. Some actors emphasize the political context, such as when the attorney general described the targets of Kale Borroka and noted that the attacks were directed against “French interests,” thus locating the events in a broader analysis of the demands of the left nationalists (1993:146). Other actors downplay the political motives and, for example, portray the radical youths as “victims of indoctrination and manipulation by ETA” (Elzo 1996 in: Van den Broek, 2004:717). Left-nationalists often portray Kale Borroka as political activity. According to Herri Batasuna, the “People's political struggle is not only sabotage and burning cash-dispensers, but also meetings or sticking up posters in the street ... all this is kale borroka as well” (a respondent in an interview with Van den Broek 2004:720). Kale Borroka is always political in this image and is viewed as the struggle that takes place outside of the institutions. The words chosen by Herri Batasuna emphasize that Kale Borroka as such is not a criminal enterprise, even though specific tactics may be criminal as they involve law-breaking or violence.

During the 1980s, events of Kale Borroka were adjudicated in local courts in the Basque Country. In 1992, however, the Audiencia Nacional decided to step in and claimed jurisdiction over a case in which two Basque youths threw a Molotov cocktail into the offices of the
national train company. The youths and their lawyers were taken by surprise. Why would their case go to the Audiencia Nacional? Based on past jurisprudence, they were convinced they would not be convicted under the charges of terrorism. They were mistaken and they were convicted to ten years in prison (Case Julen Larrinaga, Tribunal Supremo 1994). Their case kicked off a battle between lawyers and prosecutors about the jurisdiction of the Audiencia Nacional in these cases.

In the transfer of actions labeled “Kale Borroka” to the Audiencia Nacional, we can observe a re-contextualization of the events which enables this shift. Increasingly, acts of Kale Borroka were no longer described as separate and isolated events. Instead, the actors were linked to ETA, for example as “groups of support to ETA” (MA 1994:156), and the actions were understood to contribute to the goals of ETA. Thus, we can observe several legal-discursive shifts, such as a broadening of the legal interest, a broader time frame, the prosecution of individuals as part of a group, the creation of a pattern, and the broadening of criminal liability. At the end of the 1990s, the prosecutorial narrative arguing that Kale Borroka is a matter of terrorism had become dominant, and all cases classified as Kale Borroka would automatically go to the Audiencia Nacional. The classification of incidents as Kale Borroka and the shift of these cases from local Basque courts to the Audiencia Nacional is materially significant not only because of the higher sentences that can be given, but also because of the possibility of incommunicado detentions and the fact that convicts will be dispersed across Spain. Not surprisingly, the re-contextualization of events led to intense contestation of the new
prosecutorial narrative. In this process of re-defining Kale Borroka as terrorism, the narratives simultaneously re-articulated the meaning of public disorder.

In 1992, in the first case where an action of “Kale Borroka” was charged as terrorism, a link had to be made to ETA in order for the terrorism charges to stick. The court argued that despite the fact that the defendants were not members of ETA, they had “collaborated with the goals and objectives of ETA” (Case Larrinaga, Tribunal Supremo 1994). The court argued that as ETA aims to create an “environment of collective fear” by conducting activities of diverse sorts, some of which are similar to the one in this case (two brothers had thrown Molotov cocktails in the office of the train station), then the court understands that an action like this contributes to ETA’s goals. Interestingly, the Tribunal Supremo did not elaborate on the “similarities” between the actions by ETA and the action at stake in this case. It is therefore not clear whether the alleged similarities have to do with the kind of target, the kind of incendiary device, the inferred political objectives, the location of the crime, or any other aspect that apparently is considered to be relevant. From my interview with the defendant, it was clear that for him there were more differences than similarities between his action and ETA’s attacks (Interview S-23).

\[94 \text{ Si la organización terrorista ETA, tiene como finalidad el crear un ambiente de temor colectivo a través de actividades de diversa clase, alguna de ellas semejantes a la aquí examinada, entendemos que contribuyen a tal clase de actividades hechos como el presente, aunque su resultado, por razones que no constan, no llegaría a alcanzar la importancia que pudiera haber tenido en consideración al medio empleado y al objeto contra el que se dirigió (Case Julen Larrinaga, Tribunal Supremo 1994).}\]
Orchestrated by ETA or spontaneous? Merely economic losses or terror?

One of the controversial issues in the meta-conflict surrounding these criminal proceedings is whether or not Kale Borroka is orchestrated or spontaneous. Already in 1989, the annual report of the attorney general asserted that Kale Borroka is not spontaneous but organized by left-nationalists and possibly by ETA (MA 1989:123). Similarly, in 1993 the attorney general pointed out that often demonstrations organized by Gestoras Pro-Amnistía or Jarrai for detentions of ETA activists or hunger strikes led to disturbances of public order, causing damage to official buildings, banks, telephone cabins, and urban buses. Indeed, at this point it is already made clear that the actions of Kale Borroka are “directly linked to the terrorist phenomenon;” however, no mention is made of the nature of the link to terrorism or ETA (1993:147).

Still, at that time, most of the cases were not taken to the Audiencia Nacional. Instead, in the majority of detentions of these cases the charge was public disorder, sometimes leading to trials of misdemeanors or abbreviated proceedings (MA 1993:416). Also, in 1993, the actions were still called “public disorders” and “acts of vandalism” and were attributed to the “environment of ETA” (MA 1993:146–147). The harm inflicted by the actions of Kale Borroka was mainly described in economic terms. For example, the claim was made that between 1986 and 1991 the total costs were 200 million pesetas (1993:147). The attorney general noted that whereas each single action of street violence did not produce high economic costs, because of their frequency they did lead to important losses (1993:416). A shift in the legal interest
became visible in the assertion that actions of Kale Borroka affected the “sense of insecurity” (1993:147).

As efforts were ongoing to transfer cases of Kale Borroka to the Audiencia Nacional, the legislator implemented changes in the Penal Code that facilitated the prosecution of actions of Kale Borroka as terrorism. In 2000, a new law (LO 7/2000) was introduced that specifically turned various acts into a terrorist crime, such as homicide, illegal detention, and material destruction as well as carrying arms or components of incendiary devices, also if the perpetrator does not belong to an armed organization but has the goal of subverting the constitution, changing the public peace, or creating terror in a specific subset of the population. This law affirmed and legalized the change that had already been effectuated in the criminal proceedings in the Audiencia Nacional. Also relevant for the punishment of actions of Kale Borroka was the change in the Law on the Minors. This law enabled harsher punishment for minors, specifically for terrorism offenses (LO 5/2000).

The prosecutorial narrative during the trial against Jarrai/Haika/Segi was also based on this assertion that actions of Kale Borroka were orchestrated. In 2005, the prosecutor argued that Jarrai/Haika/Segi coordinated the Kale Borroka (Concluding statements, 11 April 2005). In his argumentation, the prosecutor drew upon the difference between the so-called x, y, and z-struggle. This is a theory on the interaction between different kinds of struggle allegedly elaborated by ETA leader “Txelis.” The first (x) are engaged in political agitation, the second (y)
in sabotage, and the third (z) are the ETA commandos (Gurruchaga 2006:301; 2001). “Cells” engaged in Kale Borroka were thus understood as “grupos y” (Terra/Efe 2000). Journalist Carmen Gurruchaga wrote that Txelis’ reason for promoting the Kale Borroka was that it would be a pity if etarras were detained for such low-level actions. Therefore, minors were to be stimulated to engage in such actions, especially also because they were suspected to be prosecuted only for misdemeanors (2006:300–301). The concept of “Y” groups was heavily criticized by the nationalist left. They claimed it was a prosecutorial invention in order to link the youth organization Jarrai to ETA (Interview S-23). The idea that Kale Borroka actions fit a strategy of ETA or were instructed by ETA clashed with the notion upheld by left nationalists that the Kale Borroka was the spontaneous expression of frustration by the Basque youth.

The image of Kale Borroka as organized and coordinated broadens the time frame and the criminal liability of defendants. When youth organization Jarrai/Haika/Segi was prosecuted as a terrorist organization involved in the coordination of the Kale Borroka, the broader time frame and (indirect) criminal liability were visible as the prosecutor argued that the organization was responsible for 6,263 acts of Kale Borroka between 6 January 1992 and 5 March 1999, charging the 42 defendants with “membership in a terrorist organization” (Tribunal Supremo, 19 January 2007, 46th consideration).
By 2007, it had become common practice to classify cases of Kale Borroka as terrorism. The prosecutorial narrative was firmly based in the image of organized cells, determining the chosen time frame, defendants, legal interest, and kind of criminal liability. For example, in October 2007, Judge Baltasar Garzón decided on the preventive detention of eight defendants (translation by author):

FACTS:
FIRST. – From the information we gather that the terrorist organization ETA in the development of its criminal action gives special relevance to the so-called street struggle or “Kale Borroka” as an element more to its terrorist activity complementing the armed action of ETA. In this dynamic the “Kale Borroka” comes to substitute the inactivity of that organization or its attenuated activity in the first respect, designing in this way a strategy with the permanent coercive effects to the citizens, their liberty and property.

The groups (“Y” cells) of the “Kale Borroka” are formed around one or various responsible persons or dynamizers who propose, proportion, and order the execution of the different violent actions per zone.

Within these activities, the zone Uribe-Costa (Vizcaya) and its area of influence is one of the permanent scenes of terrorist action, and it is in this framework that the activity of the group of imputed persons took place, between the years 2004 and 2007.

SECOND. – According the police investigations, the organizers and dynamizers of the “Cell Y” operating in the zone of Uribe-Costa who followed the instructions of the terrorist organizations were: ... . (Auto de procedimiento, 19 October 2007)

In this decision, Judge Garzón starts by positioning the actions of the Kale Borroka as a complement to the “armed action” of the “terrorist organization ETA.” The purpose of the street struggle is supposedly to make up for the inactivity of the armed organization. Then he comments on the organizational structure of the “Y” groups, claiming that they are responsible for “dynamizing” the Kale Borroka. He continues by declaring that “Uribe-Costa” is an area of permanent terrorist action, and that it is in this area that the activity of the group of defendants took place in the years 2004–2007. Lastly, he states that police investigations identified the
organizers and mobilizers of this “Y” group, who were following instructions from the terrorist organization ETA. The next paragraph of the decision continues by listing the persons of the group, the leaders responsible for executing the actions, and an overview of the various actions for which these people are held responsible.

The prosecutorial narrative is thus characterized by several typical legal-discursive shifts of re-contextualization: the construction of a pattern and a group, the broadening of the time frame and geographical area, as well as the broadening of the legal interest. From the overview of the various actions that are imputed to this “Y” group it is clear that several actions are assumed to “belong” together and form “Kale Borroka,” and that several people are assumed to “belong” together even though they acted in different constellations. At times only the actual participation of one of them is alleged. In none of the actions did all eight of them act together (at least, that is not alleged). According to the decision, the actions are done by one, two, three, or four persons each time. As presented, the actions listed are assumed to be the actions of this “Y” group, making it look like everyone is connected to these actions, if not indirectly criminally liable. The “Y” group is described as being responsible for a certain area in which several actions were committed between 2004 and 2007. The time frame and geographical area are thus broadened and based upon a constructed pattern instead of a single criminal event. Various offenses are put forward as the possible crimes that were committed: membership in a terrorist organization and contributing to terrorism without being a member of a terrorist organization. Judge Garzón claims that it is the “public peace” which is breached by the actions
of the defendants, thus broadening the legal interest from property to public peace. Judge Garzón orders for seven of the eight defendants to be placed in preventive detention. He motivates this by saying that despite the fact that none of them has a previous conviction, “this activity is notorious for its repetition.” In this explicit way, these acts of “Kale Borroka” are linked to earlier actions of Kale Borroka and judicial experiences with defendants and recidivism. Thus, Garzón construes a “category of defendants” based on the concept of Kale Borroka.

During the 1990s, the prosecutorial narrative regarding acts of Kale Borroka thus changed significantly, adopting an image of Kale Borroka that postulates the existence of “cells” which are coordinated by ETA and fit a broader strategy. The prosecutorial narrative in the case detailed above construes a group of defendants who are collectively held responsible for a pattern of actions that occurred during an extended time period. The protected legal interest shifts from the property of a business or individual to the “public peace.” Single events of Kale Borroka are thus re-contextualized, which alters the crime from an offense of public disorder to the charge of terrorism.

6. Public support for ETA militants in speech and symbolic expressions

Throughout this chapter I have demonstrated that the development of the prosecutorial narrative in Spain is expansive. It pushes the boundaries of the criminal justice arena to include
conduct that was previously not understood in criminal terms. The narrative pushes the boundaries of criminal liability in order to hold responsible people that were previously not connected to criminal activity. Lastly, the narrative pushes understandings regarding the gravity of the conduct and the harm that it inflicts, thus legitimating higher sentences.

So far, I have addressed the expansion of the prosecutorial narrative to include the sociopolitical organizations of the ETA network, the payment of revolutionary taxes, areas of recruitment, and the Kale Borroka. In this section I address a last area into which the prosecutorial narrative moves to translate events into criminal conduct: public support for ETA. Such support can be drawn into the criminal justice arena indirectly as part of a broader charge, such as when Judge Garzón accused members of Batasuna of membership in the ETA network and asserted that Batasuna was involved in justifying ETA’s actions because members of Batasuna made remarks such as: “when there are no dead people, they forget the case” (Auto de procedimiento, 16 October 2002). In this section, however, I analyze the development of narrative devices that directly translate speech and symbolic expressions into crimes, such as the “endorsement” and “glorification” of terrorism. By 2010, the prosecution of activities that glorify terrorism, specifically prohibiting the exhibition of symbolic images in public spaces, had become an important and explicit prosecutorial focus in the struggle against ETA (MA 2010:262).
This explicit emphasis is remarkable, as it signifies a radical change from the silence that characterized the prosecutorial narrative during the 1980s. The change can only be understood in the light of active mobilization on behalf of the victims of ETA terrorism, who have tirelessly tried to put these issues on the agenda. It has taken years for their voices to be recognized and the crime definitions that they proposed to be adopted in the prosecutorial narrative.

Times have changed. What was “normal” twenty years ago has now effectively been translated into criminal conduct today. During a conversation in 2010 with Iñaki, a Basque man around thirty, he recalled a funeral ceremony that he had attended at some point in the early nineties when he was a young boy. The coffin was covered in the ikurriña, the Basque flag. An ETA member had died in prison, and during the ritual someone with his face masked handed a memorial object with the symbol of ETA to the mother of the deceased. She lifted it above her head and shouted “Gora ETA militarra!” [Long live ETA-m] Thinking back to this event during our conversation, Iñaki shook his head and said that would be unthinkable nowadays (Interview S-35). Just as it would be unthinkable now for youths, like himself ten years ago, to stand in the streets in a “counter-demonstration” and yell “ETA, kill them, ETA kill them” to the so-called “blue-ribbon” people demonstrating for the liberty of a businessman that ETA had abducted. I pushed him on his participation in these counter-demonstrations, questioning the meaning of such slogans. He shrugged and could only say “that was normal.” He also remembered how they cherished specific ETA members who seemed really cool or sympathetic.
Iñaki was a young teenager at the time. This attitude, however, was embedded in a broader social environment. His parents, for example, (moderate PNV voters) would comment indifferently, or even with a smirk, on the results of Kale Borroka actions in his village the previous day, when they would see the banks with the windows smashed, as was often the case. He recalled that the office for temporary jobs had to close because it got its windows smashed every three months. No general outrage; it was normal. Now, that would be far from normal. When he was young, he used to celebrate when a Guardia Civil died. What is more, that was actually normal, he said. Every three days someone died at the hands of ETA. Now, that has changed. Iñaki also changed. When I spoke with him in 2010, he was not in favor of ETA anymore, although he had not changed his view that ETA had been very important to the Basque people. But now things are different, he said, and he thought ETA should lay down its arms and the political dialogue should resolve the political situation.

Things changed from being normal to being socially rejected, and now to being subjected to penalization. Social support has always been viewed as indispensable for ETA and its militants.

As Maria J. Funes correctly observed, the fact that ETA still exists, even after more than two decades of democratic rule in Spain, should be attributed mainly to “its social support from a qualitatively significant sector of Basque society”; there is a network that actively supports those who commit violent activities, and there is another sector which does not provide direct support, but does not look unfavourably upon the activists and their actions either. Both sectors legitimize the violence used by ETA and the radical youth movement. (Van den Broek 2004:716)
The social support for ETA and the legitimization of violence have been the subject of public campaigns to de-legitimate violence. The grassroots anti-ETA organization Gesto por la Paz, for example, organized a colloquium on this theme (Gesto por la Paz 2006), and recently the Basque government has launched a “Plan de Convivencia Democrática y Deslegitimación de la Violencia” [Plan for the Democratic Coexistence and De-legitimation of Violence] (31 May 2010).

The increasing public rejection of violence has also led to louder calls for the criminalization of public support for terrorist actions and their perpetrators. The prosecutorial narrative has changed significantly as a consequence. In the early 1990s there still was hesitance to draw public expressions into the criminal justice arena. Warning against counterproductive effects, the attorney general expressed restraint in 1993 regarding the criminalization of “verbal manifestations.” He wrote that prosecutors have to act with

> great prudence and flexibility [...] having to react penally only against conduct whose results are especially grave and intolerable, because experience has indicated that a “hyper-criminalization” in this terrain usually produces effects contrary to those intended. (MA 1993:406)

Fifteen years later, many criminal prosecutions were ongoing in which the prosecutorial narrative defined “verbal manifestations” as crimes. In this section, I analyze several of these
prosecutions and explore the meta-conflict about these alleged criminal expressions of support for ETA and its militants. Competing narratives dispute the relation between verbal or symbolic expressions and ETA and whether or under what circumstances that relation creates criminal liability. These questions address the boundary between the political arena and the criminal justice arena. Importantly, this boundary has moved during the past decades. The meaning of the controversial verbal and symbolic expressions continues to be deeply contested.

In this discussion of the legislation and criminal prosecutions regarding endorsement and glorification, my intention is not to give an up-to-date, detailed analysis of current jurisprudence and judicial interpretation. Instead, I draw on selected cases and legislation to illustrate the changes in the prosecutorial narrative and how it now addresses practices that were previously thought to be outside of its proper terrain. This involves the legislative creation of new offenses, competing doctrinal interpretations by judges and prosecutors, interpretive changes in the boundaries of existing offenses, and new representations of controversial practices. I thus conceptualize the prosecutorial narrative as moving within a certain space of what is within its reach and what is outside of its reach. The voices in the meta-conflict push and pull the prosecutorial narrative, disputing what was taken for granted and proposing alternative narratives, thus shifting the space that is deemed to be within the appropriate reach of the prosecutorial narrative. Importantly, the voice of victims has gained far more leverage.
It is the liberal dichotomy between ideas and conduct and the fiction of their strict separation that is at stake in this expansion of the prosecutorial narrative that translates such verbal and symbolic expressions into crimes. They are speech, but they are speech *acts*. What exactly they *do* is a subject of contention. The prosecutorial narrative comes to emphasize that they should be understood as acts of endorsement, glorification, justification, or provocation. As is to be expected in a deeply polarized society, what people hear and see varies, and this is expressed in the meta-conflict that accompanies these criminal prosecutions.

**Pushing the boundaries to prosecute verbal support for ETA during the 1990s**

The prosecutorial narrative attempted to broaden the applicability of endorsement in various criminal prosecutions during the 1990s. Two doctrinal issues were raised as the prosecutorial narrative attempted to draw verbal support for ETA militants into the criminal justice arena. First, does the endorsement of the *author* of an illicit act constitute the crime of endorsement? Opponents argued that criminalization should be limited to the endorsement of a specific crime, not its author. Second, the prosecutorial narrative posited that endorsement of a past criminal act is sufficient for criminalization. Courts argued, however, that the mere approval of ETA actions was not sufficient. Judges maintained that endorsement required the direct incitation to commit a crime, which means that there is a real intention to commit a future crime (see also Laranburu 2002; Belloch 2000; and Biurrun 2000). Prosecutors (as well as several victim spokespersons), however, wanted to penalize any act of endorsement, regardless the inductive character. For a long time, however, judges did not accept this interpretation.
I will analyze one such prosecution in more depth. It demonstrates the commitment of the prosecutors to push the boundaries of “endorsement” to include verbal approval of ETA and its militants. In 1992, a prosecutor initiated criminal proceedings against five council members of San Sebastián and charged them with endorsement. After the detentions of ETA leaders in Bidart in 1992, the San Sebastian council members had issued a statement including the following: “Thus, we extend our most firm solidarity to all militants of our sister organization... at the same time we express our profound admiration for their patriotic consistency, their heroism and human fortitude.” Doubtlessly, the council members expressed solidarity with the ETA militants. The question was whether this was a criminal act. On 17 November 1993, the Tribunal Superior de Justicia de Bilbao acquitted the defendants. The court reasoned that mere approbation of an act is not punishable. Pure notoriety was not enough; the verbal expression had to be able to negatively influence the social community, clearly stimulating the commission of crimes (MA 1994:147). This defeat resulted in a lengthy discussion of “endorsement” as a crime by the attorney general. Acknowledging the somewhat contested place of endorsement within criminal law in an exceptionally long discussion of over six pages, the attorney general described the history of “endorsement” and the various court decisions that had interpreted the various meanings of words like “approbation” and “solidarity.” He expressed a clear commitment to continue the appeal in the San Sebastián case and possibly other cases, in an attempt to receive a judgment favorable to his interpretation of endorsement. He made it clear

95 “Asimismo, hacemos extensiva nuestra más firme solidaridad a todas y todos los militantes de esa misma organización hermana... al mismo tiempo que les expresamos nuestra profunda admiración por su coherencia abertzale, su heroísmo y entereza humanos” (MA 1994:147).
that especially in the case of “terrorism,” endorsement cannot be taken lightly. Thus, after the acquittal by the court in Bilbao, the prosecutors appealed to the Tribunal Supremo.

The debate is framed in the typical liberal legalist terms of the freedom of speech and the separation between (political) ends and (criminal) means. In his discussion, the attorney general adhered firmly to this separation and argued that the verbal expression was not endorsing the political ideology of the prisoners but the persons as militants of the terrorist organization ETA, which is recognized as an illegal organization. He asked rhetorically: “Is it necessary to emphasize that the terrorist band ETA is known not primarily for its political ideology, but for the ways its members use to realize, or better, impose it?” The attorney general held that it was clearly “praise” and “exaltation” of the conduct of the prisoners when the council members called it a “brave struggle” against the “foreign imperialism,” which is, as the prosecutor views it, “nothing more than the integration of Euskadi in the Spanish State” (1994:149). The attorney general acknowledged that some jurists opined that endorsement is a matter of moral judgment and therefore should not be punished. He disagreed however, arguing that it was not necessary for a concrete harmful result to be shown (1994:154).

On 4 July 2001, the Tribunal Supremo rejected the cassation arguments of the prosecutor, thus closing the possibility to bring such verbal support into the criminal justice arena based on the available legislation. However, by this time, the new law on glorification of terrorism (LO 7/2000) had effectively given the prosecutor the tool to prosecute actions of glorification
without having to argue that there was an inductive intention to the verbal expression. The law also enabled the prosecution of expressions that glorify the author of a crime, and not just glorifications of the conduct. In a different case, the Tribunal Supremo decided on 26 February 2007 that “glorification” can be done in words or in actions, and it can be to glorify or justify. The object of glorification can be the conduct as described in one of the terrorism offenses (Art. 571–577 PC) or the persons that have participated in these actions. The law also created a new offense called “humiliation of the victims,” which introduced for the first time strong recognition of victims of terrorism and their humiliation as a new relevant legal interest. The chief prosecutor of the Audiencia Nacional called this legal interest the “dignity, tranquility and memory” of the victims (Interview S-21). This law gives victims a strong role in bringing cases to the attention of the authorities and in defining what exactly “humiliation” means. Victim associations have grabbed this opportunity. For example, the organization Dignidad y Justicia actively filed petitions regarding photos of ETA militants displayed in bars in the Basque Country, honoring ceremonies, and street names commemorating former ETA militants in order to generate prosecutions under the new law.

References to ETA or symbols of ETA can be found in many places in the Basque Country: in graffiti in the streets, in public speech with references to ETA, or in songs. I will discuss several expressions of support for ETA or for “Basque political prisoners” that for a long time were habitual practice in the Basque Country and that are slowly are disappearing or changing now that they are subject to criminal prosecution. The interpretive battle centers on the question of
what exactly a reference to ETA is and what makes that reference criminal. I analyze the developing discourse around three controversial practices: the usage of ETA symbols, honoring ceremonies for “political” prisoners, and the public display of pictures of “political” prisoners. These prosecutions took place before ETA announced its ceasefire and cessation of armed activity. At the time of writing, it is not clear yet how this might affect such prosecutions in the future.

**Criminal liability and the “notorious and public” meaning of ETA symbols**

The first case I want to discuss concerns the waving of a flag with the ETA anagram during a soccer match. In 2006, two young Basques (25 and 27 years old) were taken to the Audiencia Nacional in Madrid because of the following:

> The afternoon of the day 5th of February of 2006, the defendants Ander XXX and Jagoba XXX are together in the soccer stadium of Anoeta to be present at the soccer match between the teams Real Sociedad of San Sebastián and Real Mallorca C. de F, occupying spaces of the amphitheater of the southern part, carrying a flag on which is painted the word E.T.A. and the anagram of the same consisting of an ax and a snake coiled to it, in addition to the words “Bietan Jarrai,” and also a star with five points that coincides with the anagram of the juvenile terrorist group of ETA, Jarrai, inside of which is painted an emblem of the soccer team Real Sociedad, of which they have eliminated the crown which it officially carries. (Audiencia Nacional, 15 November 2007)

These facts were confirmed by the defendants. They were accused of glorification (*enaltecimiento*) of terrorism.

The Audiencia Nacional argued that the intention of the defendants could have been no other than to glorify terrorism, as it is “notorious and public” what the exhibited symbols mean: the
terrorist activity of the *banda* ETA. “The knowledge of what the letters ETA mean and the symbol of the coiled snake and the ax are public and notorious” (15 November 2007, 2\textsuperscript{nd} consideration). The intention of the defendants was understood to have been to glorify terrorist actions, because it was obvious what symbols were shown on the flag. As evidence of the criminal conduct, a video of the soccer match was shown. The court noted that the video did not show that the defendants displayed any gestures of rejection with regard to the flag. “There is no other logical conclusion than that of full knowledge regarding what it means to wave the anagram and the name of the terrorist group and reiterate this act in public” (third consideration). The two young men were convicted to one year imprisonment.

It is illuminating to read the dissenting opinion by Judge Ramón Sáez Valcárcel in this case. The judge started his dissent by pointing out several facts that were not mentioned in the court decision. Reading it changed my image of the defendants completely. My impression after reading the court decision was that of two active ETA supporters who had intentionally fabricated, brought, and waved the flag with the ETA symbols to emphasize their support for the armed struggle and Basque independence. In the dissenting opinion, on the other hand, the perpetrators became fervent and aggressive supporters (like hooligans) of their club Real Sociedad who had randomly picked up a flag that was lying on the floor of what could be viewed as the hooligans’ stand of the stadium, while they did not notice or did not care that it had the ETA symbols among several others, such as a piracy skull. They cheered on their team,
never uttering any political phrases, not caring about politics, and left the flag after the game was over.

Now we have two radically different images of the perpetrators and what they did. Does it change the crime? Judge Ramón Sáez Valcárcel concluded that the flag-waving did not constitute glorification of any concrete criminal offense or its authors; “in addition, it is doubtful that it represents, without more, an exaltation of the band and its methods [...] even though it expresses in a confused manner a pseudo-ideological position that may seem aberrant” (dissenting opinion 4/2007). Judge Sáez Valcárcel thus disputed that the perpetrators had the required intention ("dolo") needed for the crime of glorification, arguing for their acquittal. His dissenting opinion put the actions that had been selected for incrimination in a very different context, providing a different interpretation to the meaning of the flag with ETA symbols, which his colleagues of the bench assumed to be “obvious.”

Legal scholars distinguish between objective and subjective intention. If subjective intention is required, the prosecutor has to prove that the specific defendants actually had the required criminal intention. If objective intention is required, the prosecutor only has to prove that under the circumstances it is reasonable to assume that such intention was present. The Audiencia Nacional in this case took “objective” intention as its starting point. Their assertion that the meaning of the ETA symbols was “public and notorious” thus created a form of strict liability, where the criminal intention was simply inferred from “objective” facts. With this
criminal prosecution, the prosecutorial narrative sent a clear message about the public use of symbols of ETA.

Honoring and remembering prisoners versus the humiliation of victims

It has been common practice among nationalist Basques to organize honoring ceremonies for “Basque political prisoners” who were released from prison and returned to their villages. This practice has become increasingly controversial. Victim organizations have petitioned for the prosecution of the organizers of such ceremonies for glorification of terrorism. For example, on 29 January 2008, the organization España y Libertad wrote a petition to the prosecutor’s office of the Tribunal Superior de Justicia in the Basque Country. In reference to Article 264 of the criminal procedure (L.E.Crim.), the organization approached the authorities because of the general obligation of citizens to report crimes and called their attention to an upcoming honoring ceremony in Santurce for alleged ETA militant Endika Iztueta, who had passed away in Cabo Verde. During the 2000s the prosecutorial narrative has increasingly brought such ceremonies into the meta-conflict in the criminal justice arena. Honoring ceremonies were mentioned, for example, when leaders of Gestoras pro Amnistía were accused of membership in ETA, and the prosecutor described how their function was to organize honoring ceremonies in memory of ETA members that had passed away in which “they endorse a crime, to the mocking of the victims and the juridical order” (Indictment Gestoras #12). It was not entirely clear, however, whether the honoring ceremonies in themselves were considered to be crimes, or whether they were merely proof for the “function” of Gestoras within the larger ETA
network. Even if the ceremonies were only a part of the “evidence” of a criminal link to ETA, this would come close to a de-facto criminalization of the organization of such ceremonies. This confusion between the evidence for a crime and the crime itself is typical of the concept of “functions” within the ETA network.

In other cases, prosecutors framed honoring ceremonies as the circumstance that can lead to the crimes of endorsement and glorification. For example, in 2006 Batasuna leader Arnaldo Otegi was convicted to 15 months imprisonment for glorification of terrorism for a speech he held during an honoring ceremony commemorating the 25th anniversary of the death of ETA militant “Argala” (Reuters 2006). By 2008, honoring ceremonies had become subject to prosecution as self-standing crimes. In that year, the mayor of the Basque village Amurrio was prosecuted because he allowed an honoring ceremony to take place in his village. Whereas honoring ceremonies have thus been pushed deep into the criminal justice arena, it is not the case, however, that honoring ceremonies have been turned into illegal gatherings, something which would open up the possibility to arrest and prosecute everyone present. Only specific persons have been prosecuted for specific responsibilities in relation to honoring ceremonies.

Does an honoring ceremony constitute solidarity with prisoners or humiliation of victims? What part of the identity of the prisoner is honored in such ceremonies? “We are honoring my uncle. He has suffered so much,” said Txomin, the young nephew of a well-known ETA militant who has spent seventeen years in prison now (Interview S-28). I asked him whether he would agree
with victims who argued that these honoring ceremonies are humiliating for them. He looked at me, seemingly surprised by the suggestion. “Humiliation…? We wouldn’t do it if it were humiliating,” he uttered. Honoring ceremonies are a difficult knot to untie. What is it exactly that people are doing when they engage in such a ceremony? And is that a criminal offense? Put simply: What are honoring ceremonies? Txomin told me that they were honoring the person, not what that person has done or not done. It is a suffering for the whole family, because that person is far away due to the dispersion policy, and so they honor a person who has suffered, and who has fulfilled the punishment. He thinks these things should not be illegalized because it is freedom of expression, and every individual is there with his or her own motivations.

I confronted him with the fact that for victims these kinds of ceremonies, as well as the pictures of ETA prisoners during fiestas or in bars, are experienced by some victims as very insulting and humiliating. He was shocked:

We are not protecting or justifying, but it is our family. I can’t put myself into their skin, but I don’t think it is humiliating. [...] I don’t want to offend anyone, but it is my uncle. I have to support him; not only because he is in prison, but also because it is a continuing extortion with blackmailing and threats. For example, he puts pictures of his family and an “Arrano Beltza” [Black Eagle, symbolizing Euskal Herria] on the wall of his cell. And they tell him to take that away; otherwise he won’t get dinner. That is why he has done several hunger strikes and has been put in isolation. (Interview S-28)
The emphasis on suffering and the need for support and solidarity are constant elements in the
discourse of the left-nationalist movement. These competing interpretations of honoring
ceremonies form the background against which the prosecutorial narrative is constructed.

Another contested practice in which Basque “political” prisoners are commemorated is the
display of pictures in bars throughout the Basque country and during the yearly “fiestas del
pueblo.” Recently, the practice of naming streets after ETA militants has also become
contested. Do these pictures signify support for the armed struggle? Do they glorify ETA and its
militants? Are they a humiliation for victims? Several criminal prosecutions have been launched
in which these questions were at stake. For example, on 17 September 2009, Dignidad y Justicia
presented a complaint about a photo displayed during the “fiesta del pueblo” of Durango. The
instruction judge considered the photo to be a “clear homage” to etarras Harriet Iragui and Igor
Solana. One of the municipal councilors of the festivities, Natxo Martínez, from the moderate
nationalist PNV, disputed this interpretation and claimed that in his understanding “the photo
of a prisoner who fulfills a sentence is only a record that the inmate cannot be present during
the fiestas of his natal village” (Europa Press 2009).

In each of these cases the competing narratives disagree about the chosen context, and
particularly about the identity of those involved. This then leads to the juxtaposing
interpretations of expressions as support for Basque political prisoners versus the humiliation
of victims. A final case illustrates this meta-conflict. In 2008, the mayor of the Basque village Hernani was prosecuted for a public speech after the arrest of two suspected ETA militants:

Before anything, this encouragement, this hug and this shower of applause that you have offered us, as warmly as possible, to Igor Portu and Mattin Sarasola and to all Basque political prisoners who are dispersed in the prisons of France and Spain. We love you!!

The prosecutor claimed this constituted the crime of glorification of terrorism. The judge, however, dropped the case because he did not consider the acts to be “constitutive of a crime.” The judge had made an analysis of the exact words of the mayor and concluded that the mayor had shown her support for Portu and Sarasola because of the fact that they had denounced having been tortured during their detention, adding that that it had not been proven yet that Portu and Sarasola are members of ETA (Audiencia Nacional, 25 January 2008). The judge concluded that there was no concrete support to specific terrorist actions. To support his conclusion, he referred to a verdict by the Tribunal Supremo (STS 21/1997) which ruled that the defense of ideas – even if they question the constitutional framework – should be allowed, because otherwise the figure of glorification could be converted into an instrument to control political dissidence (Audiencia Nacional, 25 January 2008). The judge also referred to a similar decision in 2006 in which the Audiencia Nacional acquitted a person who had publicly said: “Our warm applause to all Basque soldiers who have fallen in this long struggle for self-determination. He left us, with 22 years, as so many soldiers of ETA, with silent dignity and a solitary death” (Sumario 12/2006, decided on 23 March 2007).
The prosecutor was not satisfied and appealed this decision to drop the case. He described the facts as follows: “expressions in favor of the members of ETA Igor Portu and Mattin Sarasola, receiving as answer applause and screams from the public in favor of those members of the terrorist band as well as in favor of the activities realized by the armed band ETA” (Audiencia Nacional, 3 April 2008). It is clear that the overt facts of the case are undisputed. What is contested, however, is which of Portu and Sarasola’s identities are dominant and which events should be taken as the relevant context of the speech act. Contrary to the assertions of the prosecutor, the mayor of Hernani expressed before the judge that she had made her remarks because of the individuals as persons, not as ETA militants. Indeed, she argued that the solidarity shown was not with their activities. Instead of interpreting the speech in the context of ETA terrorism, she located the speech in the context of the alleged torture by state agents. According to her, the expressions were not in support of ETA or of the detainees as members of ETA. On 3 April 2008, the Audiencia Nacional ordered that the case be reopened. On 5 June 2009, the Audiencia Nacional convicted the mayor and she was sentenced to one year in prison (Yoldi 2009). On 19 March 2010, she was finally acquitted by the Tribunal Supremo (Sáiz-Pardo 2010).

This debate about the identity of Basque “political” prisoners or ETA militants and the relevant context of verbal support is a recurring theme in the prosecutions. Left-nationalists emphasize state repression as the relevant context for their symbolic expressions. Victims of ETA and the
prosecutors emphasize ETA’s terror campaign. Were the ETA militants referred to by the council members of San Sebastián, “Patxi” and “Txelis,” only ETA militants? Alternatively, can the Durango militants be seen as only inhabitants of Durango? Victims point out that not every inhabitant who happens to not be able to attend the fiestas is memorialized with a photo. Indeed, not all prisoners who happen to be (former) inhabitants of Durango are memorialized with a photo. Again, the meta-conflict is about the relevant context and whether that context should be a basis for criminal liability.

In the past few years there have been many other criminal prosecutions for the use of ETA symbols or verbal support for ETA, its militants, or its prisoners. For example, in March 2008, after the ETA murder of Isaías Carrasco, the board of soccer club Athletic Bilbao decided to hold a minute of silence to commemorate his death before the Sunday match. Someone in the stadium decided not to respect this and shouted “Gora ETA” during this minute of silence. After a criminal complaint by victim organization Dignidad y Justicia, the person was prosecuted for the glorification of terrorism. Another example is the prosecution of the musical group Soziedad Alcoholika after a criminal complaint filed by the Association of Victims of Terrorism. The AVT argued that several of their songs were offensive to victims of ETA. The group, however, argued that they do not support ETA and that the AVT had interpreted their songs incorrectly. In November 2006, the members of Soziedad Alcoholika were acquitted of the charge of glorification of terrorism.
Even though not all of these prosecutions have ended in convictions, the prosecutorial narrative is increasingly defining verbal and symbolic expressions as criminal. Also, regardless of their outcome, the prosecutions have a real impact on daily life, as people start to assess and anticipate the possible reactions by the authorities. For example, Martxelo Otamendi, the director of the closed newspaper Egunkaria, voiced protest against his trial for “membership in a terrorist organization” and spoke at various public events to spread information about his case. In one instance, however, the dean of the University of Gran Canaria refused his presence in a forum, because it could constitute the crime of “endorsement of terrorism” (Martín 2003). The dean of the University of Gran Canaria had thus listened to the prosecutorial narrative and drawn his own conclusion.

Many left-nationalist activists expressed their feeling of juridical insecurity as it was not clear to them which actions could potentially be qualified as endorsement or glorification. For example, in June 2008 I interviewed the municipal assistant to a left-nationalist mayor of a Basque village. He was preparing the yearly fiestas and was not sure how to describe some of the activities in the official program. It is a tradition that there is a yearly honoring ceremony for the prisoners and refugees of that specific village in the public square. But he was afraid that putting that in the municipal program might lead to a prohibition of the ceremony. So he changed the title to: “honoring ceremony in favor of the rights of the prisoners and refugees of the village.” He remarked: “no one knows anymore what ‘an honoring ceremony in favor of the rights’ means, but at least they cannot be against it.” Similarly, the yearly “Amnesty Day” had
been renamed “Day in Favor of the Rights of the Repressed.” He added that on the public billboards people still used the widely known term “Amnesty Day,” but those were not made by the municipality, and his concern was to prevent criminal prosecutions against his mayor (Interview S-3).

The new 7/2000 law on glorification has thus opened a Pandora’s box of criminal prosecutions. After years of neglect, victims have now received an important role in the criminal justice arena, a chance some have grabbed at with both hands. The battle about symbols, identities, and meanings that these prosecutions have initiated is far from settled. Victims argue for placing honoring ceremonies and references to prisoners within the context of ETA terrorism. Defendants, however, emphasize a de-contextualized interpretation or recognition of the context of state repression. Whereas prosecutors have attempted to create openings for the narrative set in the context of ETA-terrorism, judges have often defended de-contextualization and the strict separation between ideas and actions. It is clear, however, that the prosecutorial narrative has expanded its reach to translate public support for ETA and its militants into the condemnatory language of criminal law.

7. Conclusion

The process of contentious criminalization in Spain and particularly the Basque Country is thus characterized by constant mobilization inside and outside the courtroom about charges,
sentences, the use of anti-terrorism legislation, and the narratives that claim harm suffered and place blame on specific individuals or organizations. Key debates in the meta-conflict address the questions “What is ETA?” and the question whether terrorism should be treated as an ordinary crime or not. After years of neglect and a continued campaign of attacks by ETA, victims of ETA organized in professional victim organizations and started to call attention to their experiences and claimed “impunity.” Throughout the 1990s, prosecutors and investigative judges at the Audiencia Nacional have radically changed their narrative in various ways. These changes paved the way for an expansion of the criminal justice arena to cover conduct that had previously not been translated into the language of criminal law.

Instead of accepting the separation between ETA as a military organization and the left-nationalist movement as a collection of sociopolitical organizations, the prosecutorial narrative created the concept “ETA network,” around which it started various macro-trials. As part of its focus on “ending ETA,” the prosecutorial narrative further put emphasis on the criminalization of paying a “revolutionary tax” to ETA and those that facilitate “recruitment.” Street violence was redefined as a terrorist offense, and various speech acts were interpreted as a “humiliation of victims” and the “glorification of terrorism.” The new narratives enable the criminal prosecution of a broader circle of people than were currently being prosecuted.

The broadened scope of the prosecutorial narrative created such a large pool of potential defendants that many times it was not clear to defendants why they had been selected, or why
others had not been selected. For example, a lawyer from Gestoras pro Amnistía was not sure why he had not been indicted along with the other Gestoras-defendants with whom he had worked for so many years (Interview S-3). A young Segi activist similarly did not know why he was still able to advocate and organize, whereas his organization had been declared a terrorist organization (Interview S-24). In the next chapter, this theme of “ambivalent” criminalization will be explored in depth in the case of Chile, where it has been the dominant feature of the prosecutorial narrative during the past twenty years.

In the meta-conflict, the competing narratives of victims and prisoner supporters proposed radically different contexts in order to interpret events. Supporters of Basque “political” prisoners read what happens against a context of continued state repression, a lack of political opportunities to defend their political project, and a state of exception in which the rule of law does not apply. Essentially, they understand all events as part of a political conflict in which violence comes from two sides. Victim organizations reject all references to a conflict and propose the terrorism of ETA as the relevant context in which events should be interpreted. The prosecutorial narrative thus has operated in the face of a continuous battle about the relevant context within which the prosecutors should interpret events. After years of de-contextualization, Judge Garzón criticized the Audiencia Nacional for having played ETA’s game. His prosecutions initiated a new narrative. The prosecutorial narrative increasingly re-contextualized events adopting the context of ETA terrorism, in which terrorism was re-interpreted as more than the use of weapons. During truces, however, prosecutors argued that
the context of ETA terrorism no longer applied and that a “peace process” had started in its place. Victim organizations have criticized law enforcement for this move and refused to re-interpret events within the context of this peace process.

Prosecutors re-contextualized events by adopting different images of the perpetrator(s) and the crime, which often led to specific discursive shifts, such as a broadening of the legal interest from harm to an individual or the property of an individual to broader entities such as “citizen security” and “public peace.” Single incidents were perceived as part of a pattern against the backdrop of the relevant context. Individuals were prosecuted as member of an organization, such as the ETA network or grupos Y in the Kale Borroka. Political motives as well as the identity of victims or perpetrators have been drawn into the courtroom as elements of the crime. These discursive shifts are a consequence of a different image of the crime or perpetrators, while at the same time they reproduce that image.

The images produced in the prosecutorial narrative are contested in the meta-conflict, where actors may push for different images. I am fully aware of the possibly instrumentalist motives behind these images. Van den Broek has pointed this out in his article on legitimizations of street violence used by Basque youths (2004). He identifies differences between what he calls “ex-ante” and “ex-post” legitimizations and argues that the discrepancies may be due to the fact that youths employ the “ex-post” legitimizations to shield themselves against prosecutions, whereas “ex-ante” legitimizations are intended for a different audience. Left-nationalists are
similarly skeptical of the prosecutorial images. They often maintain that the Spanish state is simply “inventing stories” in order to bust the entire left-nationalist movement. Self-serving or not, the battle around such images forms a core part of the mobilization and discursive action in the criminal justice arena. This is understandable, as this chapter has demonstrated that the adoption of images in the prosecutorial narrative has real consequences on the penal decisions, such as who gets prosecuted, for what and with what kind of sentence.

The analysis of the criminal prosecutions during the 2000s has shown a changing interpretation of ETA and the symbols and speech acts in support of ETA militants. This has led to the prosecution of many people and kinds of conduct that were not (successfully) prosecuted during the 1980s. Without the image of the ETA network there would have been no macro-trials, and without the change in the definition of Kale Borroka toward terrorism, youths would not be sentenced to ten years imprisonment for a Molotov cocktail. This illustrates the significance of the hegemonic meaning of events and their translation into the logic and vocabulary of criminal law. The changes in the prosecutorial narrative have been produced amidst a continuing strong battle between critics and proponents of those images and their logical and legal implications, which form the basis of the prosecutorial claims of criminal liability. In this process, political contention is drawn into the criminal justice arena as the history of ETA has become central to the courtroom debate, the meaning of terrorism has come to include activity that was previously categorized as “political,” and, most importantly, the
agents of law enforcement have come to be seen (by prisoner supporters and also by some of
the victim organizations) as partial actors in this conflict.

In the next chapter I turn to the case of contentious criminalization in Chile. The process is
remarkably similar in that changes in the prosecutorial narrative can be explained by an
emerging mobilization of landowners successfully appropriating the label of “victims” and the
development of a counter-narrative by supporters of the defendants in criminal trials. The
prosecutorial narrative is quick to re-contextualize events in the context of the “Mapuche
conflict,” adopting wholesale many of the contentious assumptions that construct that context.
The particular dynamics in that episode, however, are far more ambivalent. In Chile the
prosecutorial narrative does not systematically extend the reach of the criminal law vocabulary
like in the Spanish-Basque case. Instead, the narrative goes back and forth between leaving
contentious action to the political arena and subsequently applying the label of terrorism to
that same action. Navigating these criminal prosecutions is a challenge for the Chilean
prosecutors, who, like the prosecutors and instruction judges at the Audiencia Nacional, are
perceived as partial as they are criticized nationally and even internationally by all actors
implicated in the conflict.
V. Mapuche Activists Demand Land Reform in Chile

After the analysis of the contentious criminalization process in the Spanish-Basque conflict, in this chapter we move to the far south in Latin America to a conflict that is generally little known in Europe or the United States. Indeed, not everyone is aware that there are indigenous people in Chile. The Mapuche people are the largest indigenous group in Chile and live in the south of the country, predominantly in the 8th, 9th, and 10th region. Tourists travel to the south of Chile because of its beautiful lakes and volcanoes. The 9th region is also known as the Araucanía Region after the large Araucaria tree which grows there and Temuco is its regional capital and informally understood as the main urban Mapuche center. While the Mapuche territory also covers part of Argentina (Figure 4), in this research I focus exclusively on the conflict in Chile and the criminal justice response of the Chilean state.

Since the early 1990s, this region in the south has witnessed mobilizations, demands, and protests which the press has labeled the “Mapuche conflict.” The conflict has been most intense in the Arauco province in the 8th region and in the Malleco and Cautín provinces in the 9th region. Forestry companies have a strong presence in the valley between the Andes and the coastal mountains in the 8th and the 9th region and have recently also expanded into the 10th
region, partially because of the tensions in the other regions. The controversial hydroelectric dam Ralco was constructed deep in the Andes, where the Bío Bío river has its origin.

Prosecutors have become deeply involved in the dynamics of this conflict, and criminal cases have turned into important battlegrounds, where landowners and Mapuche activists play out the claimed or imposed roles of victims and defendants. In this and the following chapter I explore these criminal cases and the competing narratives that these actors present about the events that led to criminal prosecution. How is criminal justice produced or co-produced here? How is the rule of law claimed or rejected? How did the prosecutorial narrative develop as a consequence of the voices in the meta-conflict? What impact do the narrative’s discursive shifts have on criminal justice decisions? What are the images that the prosecutorial narrative creates or reproduces? How do these images legitimize the state and its intervention?

Figure 3 Map of Chile
During my second stint of fieldwork in Chile in May 2009, I visited a Mapuche community for an interview with four men who had been convicted under the Law on State Security. In 1997, they had been charged for their alleged involvement in the burning of three trucks in the plantation of the forestry company Bosques Arauco. The case is known as the “Lumaco” case, after the area in which the incident occurred. The Mapuche community to which these men belonged had a claim on the land, which was at the time in the hands of forestry company Bosques Arauco. During the interview we sat at a wooden table in their community. Outside it was raining cats and dogs. Under the table the charcoal from the stove was burning, which I used to warm and dry my wet feet. The men were living in the same community, and as I had arrived at the house of our host, the others also came in, one in his poncho, all in their working clothes. They introduced themselves with few words. Their faces were marked by the life outside in *el campo*. I came to talk with them about their experiences with the Chilean criminal justice system and particularly their view on the events that led to their conviction.

When we started the interview, I read parts of the initial criminal complaint that had been filed in this case to them out loud:

This action put at grave risk the life and physical integrity of the drivers of the referenced trucks, provoked serious economic damage both to the company Forestal Bosques Arauco and to the different truck owners, and caused a grave disruption to the normal development of economic activities involved in the transport of goods. (Official request by the provincial governor of the use of the Law on State Security in the Case Lumaco, 2 December 1997)

I also read parts of the verdict in which the court decided that they were guilty of the alleged facts. The verdict asserted that the arson caused a disturbance in the economic activities of the forestry company. Their reaction to the verdict surprised me. One of them exclaimed: “No dice nada en favor de nosotros!” [It doesn’t say anything in favor of us!]. I later commented on this remark to a defense lawyer and he voiced the same obvious surprise as I had felt. “Of course not, it is a trial against them!” (Interview C-64). It took me a long time to get to an interpretation of the defendant’s words. It was easy to just shove it away along with so many other remarks that showed the incomprehension of the rules and procedures of the Chilean criminal law and justice system that I often encountered among older members of Mapuche communities. “It doesn’t say anything in favor of us.” It was almost funny. But he was not joking.
Even if the remark does indeed demonstrate their lack of understanding of the rules in criminal proceedings, it also underlines something that may have become too obvious for those that work in the system: the criminal case is a case against a specific person about a specific conduct that is circumscribed by the penal law. Everything else is not relevant to the case, and thus out of the discussion. Another Mapuche activist criticized precisely this point when he said: “they never talk about the presence of the forestry company, about the planes with fumigation, the pollution that comes with the wind. That is terrorism” (Interview C-46).

“They don’t say anything in favor of us!” said the four convicted community members. The criminal proceedings indeed systematically marginalized their perspective, excluding everything that they would have emphasized, as it was not “legally relevant” to the facts of the case. The narrative proposed by these four men had a different starting point, different actors, a different timeline, and a different plot. The resulting competing narratives about harm, grievances and the placing of blame are thus fundamentally incommensurable. Sharing their view of the situation, the community members told me that during the Agrarian Reform in 1970 their fathers had actually possessed the disputed land but were removed during the Contra Reform (I will return to these reforms below). One of the community members summarized their point of view: “If I had 1800 hectares and now I have only 800, and I have never sold anything, then there is usurpation” (Interview C-60). For them, it was as simple as that. Unlike some other activists defending land claims, they made no references to indigenous spirits, shamans, or religious traditions. Neither did they argue that they wanted to live “in harmony with nature.”
They needed few words to make their case. The land was ours. We are poor, they are rich. We have nothing, they have it all. That’s it.

These chapters explore the competing and often incommensurable narratives that have contested each other in and around the criminal prosecutions in the contentious episode of the “Mapuche conflict” in Chile since the return to democracy in 1989. The Mapuche demand for autonomy and land redistribution has strengthened quickly since then, following disappointment of ongoing discrimination, continuing poverty, and the slow return of ancestral lands. Mobilizations in relation to the land dispute have led to criminal complaints and prosecutions. Just as we have seen in the criminal proceedings in Spain, these criminal cases have also become part of a process of an intense struggle for interpretative domination in Chile. Competing claims of victimhood, impunity, and illegitimate repression and rival notions of democracy and the rule of law have become part and parcel of the dynamics in and around the courtrooms.

While the prosecutorial narrative did not say anything in favor of them, after the trial the Chilean government negotiated with the Mapuche community of Lumaco. Their land claims were recognized, and the community relocated to a larger piece of land elsewhere in the 9th region. Indeed, despite the seemingly strong vocabulary of “State Security,” they were allowed to serve their sentences in liberty, by regularly reporting to the nearest police station. It is this combination of harsh rhetoric and de facto leniency, the combination of swift criminal
procedures and simultaneous political negotiations that characterizes the contentious
criminalization process in relation to the “Mapuche conflict.”

The Chilean state intervenes in the “Mapuche conflict” in many ways, with poverty programs, a
land redistribution scheme, and criminal prosecutions. While the Spanish criminalization
process resulted in an expansion of the criminal justice arena, at the expense of actors and
conduct that were previously understood to “belong in” the political arena, the role of the
Chilean criminal justice system can be characterized by a thorough ambivalence, switching
between general lenience and sudden harsh intervention. The boundary between the criminal
justice arena and the political arena is not only deeply contested but also regularly removed or
blurred on some occasions and strongly asserted on others. The state recognizes the legitimacy
and validity of the Mapuche land claims while at the same time condemning any extralegal
actions undertaken in the name of those demands. This strict separation of ends and means is
typical of liberal legalism and liberal democracies. The emphasis on political and legal
procedures for solving the land claims sits uncomfortably, however, with the state’s failure to
effectively address longstanding structural inequalities, poverty, and a lack of indigenous access
to decision-making, while promoting a continuing expansion of the logging industry and other
infrastructural projects in the areas where Mapuche communities live.

In our 2003 interview, chief regional prosecutor Esmirna Vidal claimed the primacy of “the
victims” and the prosecutorial independence from political considerations (Interview C-10).
Despite this rhetorical attachment to the rule of law, both landowners and Mapuche activists accuse the criminal justice system of partiality and politically influenced decisions. Their engagement with the criminal proceedings related to the land disputes brings the meta-conflict into the criminal justice arena, as their narratives challenge, criticize, support, and push the prosecutorial narrative.

This chapter presents an overview of the contentious episode and its actors, while zooming in on the mobilization and discursive action in the criminal justice arena. In the next chapter I explore the development of the prosecutorial narrative as it engages with the competing voices in the meta-conflict. During the past two decades, the prosecutorial narrative has re-contextualized many of the alleged crimes within the context of the “Mapuche conflict.” Criminal prosecutions have developed from using ordinary criminal laws to laws on state security (between 1997 and 2001) and anti-terrorism laws (many indictments since 2002). The changes in the choice of these laws coincide with a changing discourse on the national political level. The Mapuche conflict transformed discursively from a conflict between private parties into a national problem affecting national security. Thus, prosecutors re-contextualized the protests of Mapuche activists and placed them squarely within the context of the “conflict.”

With this re-contextualization, the specific interpretation of the conflict chosen by the prosecutors and the underlying assumptions about the actors, the issues, and the potential solutions become an inevitable part of the prosecutorial narrative. The re-contextualized
prosecutorial narrative often focuses on “radical” Mapuches as the perpetrators responsible for the “violence,” “crimes,” and “terrorist actions” that disturb the Chilean economy and national security. This particular perspective on the conflict has been promoted by landowners from the 1990s onwards as they claimed victimhood and impunity. The narrative is contested by many Mapuche activists, who blame the state for the continuing dispossession of their lands and call attention to the detrimental effects plantations have, for example in terms of erosion and decreasing biodiversity.

Prosecutors have become major actors within the dynamics of the Mapuche conflict and the prosecutions one of the primary sites where the actors face and interact with each other. Mapuche activists distrust the criminal justice authorities, their evidence and decisions. Many landowners equally have lost their faith in the authorities. Within this potentially explosive situation, prosecutors continue their job of “simply” applying the law. Let’s see how.

1. Introduction

The “Mapuche conflict” is visible in a large number of concrete disputes about the building of an airport, landfills, viaducts, hydroelectric dams, a coastal highway, the salmon industry, a paper factory, and the expansion of forestry plantations. Instead of one conflict, there are many
specific conflicts between Mapuche communities, landowners, and the state. Many different issues are at stake, including recognition for the Mapuche culture and language, socio-economic inequality, demands for more autonomy, and the claims for lands that were taken from the Mapuches in the so-called Pacification of the Araucanía at the end of the 19th century.

The larger label (and misnomer) “Mapuche conflict” lumps together a host of different disputes and incidents under this name, involving different actors, targets, and motivations, and thereby assumes instead of questions the idea that they constitute a single phenomenon with a single explanation. Mapuche activists often criticize the term as it seems to imply that Mapuches are causing the conflict. They propose alternative names such as “forestry conflict.” Still, most actors refer to the “Mapuche conflict,” and this is, as we will see, also the label adopted in the prosecutorial narrative.

I have limited the study of criminal prosecutions to the period 1990–2009, corresponding to the time since the official turn to democracy of the Chilean government in 1990. My analysis is based on two periods of fieldwork of six and three months in 2002/2003 and 2009, respectively. In total I have conducted more than seventy interviews or lengthy informal conversations with defendants, complainants, landowners, Mapuche activists, lawyers, prosecutors, and government officials. I conducted observation at prisons, political meetings, criminal trials, Mapuche communities, forestry sites, and demonstrations. In addition, I

---

97 A police report counted 189 conflicts in 1999 and 410 conflicts in the period between January 2000 and October 2001 (CORMA no date c). There are various other publications by Mapuche organizations and academics that list these conflicts as well (Aukiñ Wallmapu Ngulum 1997, CAM 1999, CAM 2000, Foerster & Lavanchy 1999, and Seguel 2002).
collected numerous written documents, such as trial transcripts, public declarations of different actors, newspaper articles, and police records. For more detail about my data collection I refer the reader to the methodological appendix.

2. Challenge to the liberal democracy

For the purpose of this analysis, I must briefly introduce the “Mapuche conflict,” although any short summary is bound to be partial and incomplete. The goal here, therefore, is not to give a final representation of the issues, the actors, and the relevant events. On the contrary, my aim here is to give a quick overview in order to indicate the various issues that can be and have been contested.

The contention: Competing claims of land rights

The “Mapuche conflict” has turned into a major national concern during the past two decades, often making the headlines of national newspapers. While the conflict encompasses multiple disputes, my analysis of this contentious episode focuses on the competing land claims, where current non-Mapuche landowners face demands from Mapuche communities. While I use the broad term “landowners,” which may evoke the image of a homogeneous group, there are landowners of many kinds. They vary from international companies like the Spanish energy company Endesa to Chilean owned transnational companies such as the forestry companies Arauco and Mininco, smaller Chilean forestry companies like Magasa, private landowners with
significant political power like the former state secretary of agriculture Juan Agustín Figueroa, and smaller landowners. Despite these differences, all of them claim the legal ownership of the lands that they have acquired and state protection of their rights and property. They express their interests both individually and through coordinating bodies and alliances, such as the National Agricultural Society (SNA) and the Timber Corporation (CORMA).

While landowners want to protect their properties, Mapuche activists challenge the status quo. Their demands range from moderate demands for land redistribution and political inclusion to more radical challenges to the Chilean state’s imposition, resistance against all forestry plantations, and demands for higher levels of autonomy for the Mapuche “nation.” These different strands of activism are all part of the “Mapuche movement” which is a collective reference to all groups, individuals, and communities that make claims in the name of the Mapuche identity. I speak about “Mapuche activists” as a general category to refer to anyone who is active in the Mapuche movement without going into much detail about the ethnic categorizations and their problems, as I have done that elsewhere (Terwindt 2009). Just like the landowners, however, the category of “Mapuche activists” is far from homogeneous, as it includes urban and rural activists, radicals and moderates, and highly-educated people and people without much formal education. Importantly, the category “Mapuche activists” also includes Chilean or foreign supporters who sympathize with the Mapuche claims.
Between 5 and 10% of the Chilean population currently self-identifies as Mapuche. According to the most recent population census taken in 2002, 604,349 people self-identified as Mapuches (the total Chilean population at the time consisted of 15,116,435 inhabitants) (INE-CHILE 2002a; 2002b). In the 9th region, the ancestral Mapuche territory, the Mapuche population makes up 30.6 percent of the inhabitants (INE 2002b:14). 37.6 percent of the Mapuches continue to live in rural areas. Mapuches traditionally lived in communities, and most Mapuches in rural areas continue to live in this way. Communities consist of several families and can be small with less than fifty persons, or bigger with several hundred persons. Mapuche communities often maintain traditional structures with a lonko [chief], a werken [spokesperson], and a machi [health specialist and leader of religious ceremonies.] While most Mapuches do speak Spanish, a significant number (also) speaks Mapuzugun, the Mapuche language (about 24%, Naguil 2010).

In order to understand the current situation and the competing land claims, it is necessary to give some historical background of the Mapuche people and the Chilean state. In contrast to the indigenous people in other parts of Latin America, the Mapuche people were never conquered by the Spaniards. Instead, in 1641 the Mapuches signed a peace treaty with the Spanish Crown which recognized their territory. As a signal of official relations, four Mapuche ambassadors took a seat in Santiago on 4 April 1774 (Aukiñ 1991:5). After the independence struggle of Chile against the Spanish Crown in 1810, the Mapuche territory beneath the Bío Bío

---

98 Due to a different way of formulating the question in the census of 1992, however, 928,060 people identified as Mapuche (INE-CHILE 1992).
river remained in the hands of the Mapuches for another 71 years. Only in 1866 the Chilean state considered this unacceptable, and after fifteen years of fighting, in 1881, the Chilean army defeated the Mapuches (Bengoa 2002:45) in what has come to be known as the “Pacificación de la Araucanía” [Pacification of the Araucanía].

The Chilean state took the Mapuche lands away, and the Mapuches were transferred to smaller properties called “reducciones” [reservations]. The land title for these reservations was called a título de merced, which was a land title specifically designated to Mapuche communities. It was prohibited to sell these land titles (Bengoa 2002:164), although this has happened quite often, in exchange for alcohol or even with threats (Bengoa 2002; Barrera 1999). The newly reduced territory constituted only 6.4 percent of their original territory (Richards 2010:62). The lands that had become available after the “pacification” were sold to immigrants from Europe, the so-called colonos, mostly Italians and Germans, who still have a significant presence in the south. These immigrants worked the lands and created intensive agriculture. Often Mapuches labored these lands for a patrón [landlord]. Land disputes emerged easily as the descriptions of the exact boundaries of the pieces of land given to Mapuche communities were quite vague. An employee of the national forestry agency (CONAF) explained: “imagine that the title said ‘from that tree to that fence.’ And now the tree is gone, the fence moved and there is disagreement about the property title” (Interview C-3).
Since their “reduction” to reservations, some Mapuches have organized themselves in order to
defend their interests. In 1910 the *Sociedad Caupolican Defensora de la Araucania* [Caupolicán
Society in Defense of the Araucanía] was founded, demanding better education, for example.
The *Federacion Araucana* [Araucanian Federation] advocated against assimilation, for the
recovery of the “stolen” lands, and in favor of an independent republic (Singer Swords

Throughout the twentieth century there have been a few attempts to redistribute lands. In
1962, under the governments of President Alessandri and later President Eduardo Frei, the Law
on Agrarian Reform was enacted (Correa et al. 2005:71), a policy that was continued by the
socialist government of President Salvador Allende (1970–1973). These agrarian reforms
expropriated landowners and redistributed the lands.

These reforms have always been contentious. The reforms in the 1960s and 1970s occurred
under the pressure of land occupations and were not welcomed by all. Some landowners
mobilized after the occupation of the estates Alaska and Pidenco, which led to the declaration
of a state of emergency in the province of Malleco in July 1970 (Correa et al. 2005:119). Direct
action for land reform in 1970 became known as “corridas de cerco” [moving of the fences]
(Correa et al. 2005:126). During the Allende regime, many landowners fled the country because
they were threatened with expropriation and feared the bloody events in countries like Cuba
and Nicaragua. The son of a German landowner who was expropriated told me how Mapuche
peasants were standing outside the house of his grandfather yelling “damned gringo, we’ll get your land” (Interview C-49). As I will discuss at more length in the next chapter, when in 1992 the Mapuche organization Consejo de Todas las Tierras (CTT) decided to do symbolic land takeovers, this was perceived as threatening partly because of this history of the corridas de cerco and the land occupations in the early 1970s.

Many of the land redistributions were reversed after the Pinochet coup in 1973 in what was called the Contra Agrarian Reform, leaving only 16% of the recovered lands in the hands of the Mapuches (Correa et al. 2005:243; Richards 2010:64). The experience of expropriated landowners significantly influenced their view on the subsequent dictatorship and the Mapuche demands:

My grandmother is Pinochetista, because she saw how my grandfather got humiliated and Pinochet restored order. And then the Mapuches came and asked for work again. They had been infiltrated by other people. That is why they acted like that. (Interview C-49)

The Chilean population is still deeply divided regarding the Pinochet regime. During my fieldwork I still encountered positive evaluations of the Pinochet regime, despite the many human rights violations that were perpetrated by his regime, including killings, torture, and disappearances.
General Pinochet led an extreme neoliberal economic policy based on the theory of the Chicago Boys led by Milton Friedman to improve the economic situation in Chile, which had deteriorated under the Allende regime. Important for understanding the later conflicts is Pinochet’s decision to stimulate forestry plantations. In the first half of the 20th century, intensive agriculture in the 8th, 9th, and 10th region in the south of Chile shrank the native forest and eroded the land. This led Pinochet to enact a law that was beneficial for forestry plantations, which were expected to perform better than agriculture despite the erosion. This law, the Decreto Ley 701, provided subsidies for forestry. Various companies and individuals made use of these benefits and bought lands to plant eucalyptus and pine trees. The reforestation of formerly agricultural lands that were suffering from erosion ended up benefiting large companies over smallholders like Mapuche communities. Mapuche communities lost their jobs with the landowners who had previously neighbored their communities. Instead, they became surrounded by anonymous forestry companies. Fences impeded them from having their cattle graze on neighboring lands. In addition, the monoculture that was thus promoted and subsidized further eroded the land, causing draught to surrounding lands. Over the years, many Mapuches have migrated to urban areas in order to find jobs. By 2002, as many as 30.3 percent of the Mapuches had moved to Santiago in their search for work (INE 2002b:14).

In 1989, Pinochet lost a referendum, and a democratic government led by President Patricio Aylwin was installed. Well aware of the Mapuche demands and the claims for recognition by
the indigenous people in general, President Aylwin negotiated extensively with Mapuche leaders and other indigenous peoples in Chile, a process that became known as the “Parliament of Nueva Imperial” (Bengoa 2002:183). The result was the Ley Indígena [Indigenous Act], which was enacted in 1993 and included rules about land property and an arrangement in which indigenous communities could apply for land restitution. A new government organ, the Corporación Nacional de Desarrollo Indígena [National Corporation for Indigenous Development] (CONADI), was made responsible for the land reforms envisioned in the Indigenous Act. CONADI received access to the Fondo de Tierras y Aguas Indígenas [Fund of Indigenous Lands and Waters] in order to buy the properties that were demanded by indigenous communities. According to the Indigenous Act, the fund can buy lands for communities or individuals that do not own sufficient land (Art. 20a) or for communities that have a claim on land which is based on a título de merced or another state (judicial) decision that grants a land title to the indigenous community (Art. 20b).

This official mechanism for land reform created high expectations and the hope that it would finally solve the protracted land conflicts. CONADI has received many requests for lands, and between 1994 and 2009 a total of 90,000 hectares were transferred into the hands of Mapuche communities under Art. 20b (CONADI 2009a). The number of hectares per transfer has varied considerably. At times only twenty hectares were transferred to four families. In other instances 2,300 hectares were transferred to a Mapuche community of eighty families. In comparison, in 1992, forestry plantations in the 9th region encompassed 251,140 hectares (Ruiz...
2000: appendix 1). By 2010, one of the larger Chilean forestry companies, Forestal Mininco, alone owned more than 391,000 hectares of plantations in the south of Chile (321,000 of pine trees and 70,000 with eucalyptus, mainly in the 8th, 9th, and 10th region, Mininco 2010).

Despite the new Indigenous Act and the efforts by CONADI, land disputes are not over. This has various reasons. For starters, the whole CONADI process is at odds with the perspective of some Mapuche activists: “Buying lands?! That is ridiculous. The lands were ours to begin with!” (Interview C-61). Furthermore, CONADI can only buy a piece of land if the owner is willing to sell voluntarily. As we will see, this has created significant contention and an incentive for Mapuche communities to “make” a landowner want to sell. In addition, the CONADI redistribution focuses on communities that have a claim to land based on the land title, the título de merced, that they received when they were relocated to reservations. This is not satisfactory for Mapuche communities that demand the lands that they owned before the Pacification of the Araucanía. The redistribution program is also criticized by non-Mapuche landowners. In its commitment to land redistribution, the Chilean government regularly affirms that the Mapuche land claim is legitimate. Non-Mapuche landowners are concerned, as to them this translates into the notion that their land title is worth less than a título de merced. They interpret the government as saying: You are not the legitimate owner of your land (Interview C-54). As we will see in what follows, another criticism of the CONADI procedures is that it actually fomented the use of violence.
Since 1990, governments have made explicit efforts focused on the indigenous populations. For example, various developmental programs were initiated to stimulate bilingual education, intercultural health, and livelihood projects. In 2001, the government installed a Comisión de Verdad Histórica y Nuevo Trato [Historical Truth and New Deal Commission], which was expected to write a historical report and recommendations for the relations between the indigenous populations and the Chilean state. At the same time, however, the neoliberal policies of Pinochet, such as free trade agreements, privatization, and large infrastructural projects, the target of heavy criticism by Mapuche activists, have been acclaimed widely as the reason for the Chilean “economic wonder” and were continued by the succeeding Concertación (center-left) coalition governments of President Aylwin (1990–1994), President Frei Ruiz-Tagle (1994–2000), President Lagos (2000–2006), and President Bachelet (2006–2010).

During the 2000s indigenous people in Chile advocated strongly for their constitutional recognition as “indigenous people.” This was resisted vehemently by groups that feared that constitutional recognition would ignite demands for self-determination based on international human rights instruments that grant this right to “peoples.” Therefore, the constitutional legislator had defined indigenous groups as “indigenous populations” and explicitly rejected the terminology of indigenous “peoples.” After the project for recognition had stalled under the various regimes of Presidents Aylwin, Frei, and Lagos, President Bachelet finally made a proposal for recognition. Similar fears of demands for self-determination explain the fact that the Bachelet government did not ratify Convention 169 of the International Labor Organization.
(ILO) until 2008, significantly later than many other Latin American countries, which had ratified the convention during the 1990s. This convention is one of the major international human rights instruments for indigenous peoples.

Thus, just as the government was rebuilding the democratic state, procedures, and institutions in the early 1990s, it was challenged in this collective enterprise by Mapuche activists who criticized its fundamentals and the direction it was taking. Even today, some Mapuche activists call the Chilean state a “dictatorship in disguise.” Not everyone feels bound by the fragile social contract. Meanwhile, Chilean governments have struggled to develop inclusive policies that reconcile all Mapuches with their citizenship in the Chilean nation state, while at the same time providing sufficient protection to the landowners, who feel victimized by continued incursions on their private property.

**Demands of Mapuche activists challenge the status quo**

Mapuches expected real change from the new democratic governments. They were soon disappointed. In addition to the continuing expansion of the timber industry, governments since 1990 have stimulated several new infrastructural projects, such as the building of hydroelectric dams in the Alto Bío Bío, a highway on the coast, and a highway around the main city in the 9th region, Temuco. Mapuche activists claim that each of these projects has severe impact on the territory of Mapuche communities, their cemeteries, the fertility of the ground, and the availability of plants for their traditional medicines. They point to the particularly
detrimental effects of forestry exploitation, which leads to erosion, water pollution through pesticides, the disappearance of medicinal plants, a decrease of groundwater, and the reduction of biodiversity (Seguel 2002). In summers, the government has to ship water into some communities due to the extreme drought caused by plantations (Richards 2010:68).

Further, activists complain that the government does not do enough to protect their rights. In various court verdicts, laws on private property or electricity have been privileged over the rights in the Indigenous Act. For example, in the decision to build the hydroelectric dam Ralco in the Bío Bío River, an indigenous community had to leave its land in the interest of electricity for the country, despite the provisions in the Indigenous Act that protect indigenous communities against such incursions on their property (Orellana 2005).

Mapuche activists base their demands on a collective Mapuche identity and ground their territorial claims in the history of the Chilean state and its relation to the Mapuche people. For radical Mapuche activists their ethnicity is not just a reason to reclaim lost lands as the descendants of those that were confined to reservations. Instead, the ethnic identity forms the basis for their claim as a Mapuche “nation” and thus the right to self-determination. The importance of ethnicity is downplayed, however, by landowners and the government, who often define the Mapuche problem as a poverty issue. It is true that poverty is widespread among Mapuches. The Gini index, for example, indicates that Chile is one of the most unequal

99 A 1998 report from the Chilean private think tank Libertad y Desarrollo stated that the percentage of the population living in poverty in the regions where the Mapuches had their original territory, and where at the moment (apart from Santiago) the majority of the Mapuches live (8th, 9th and 10th region), is 33.9 %, 36.5%, and 32.2%, respectively, whereas countrywide 23.2% of Chileans live in poverty (de la Luz & de los Angeles 1998:5).
societies in South America. Mapuche activists, however, though they also denounce the structural inequality, claim that they “are not poor Chileans” (Barrera 1999:72, footnote 14). Instead, they emphasize their right to the lands on the basis of their history as well as their identity as a *pueblo*, while they claim a different worldview and a special relation between them and the land (see also Terwindt 2009).

*Some tactics and justifications challenge the law*

Mapuche activists have pressured for land reforms in various ways. Apart from applications to CONADI, Mapuche communities have filed civil lawsuits based on their *título de merced*. These lawsuits, however, used to take many years and often ended in a negative decision for the Mapuche community. Also, recovery procedures through CONADI were perceived as slow and inefficient. Thus, Mapuche activists became frustrated with the official procedures available to them. With the first disappointments, mobilization efforts returned. During the past twenty years, Mapuche protests have ranged from symbolic land occupations to the use of arson as a pressure tool.

There have been different attempts to create organizations that unite Mapuches across communities and urban centers. After the return to democracy in 1989, the Mapuche organization Consejo de Todas las Tierras (CTT, or *Aukiñ Wallmapu Ngulam in Mapuzugun*) was

---

100 Analphabetism among the national rural indigenous population is 19%. The national mean is 4.4%, whereas the national rural mean is 12.2% (ibid.1998:6). A 2003 paper from the same institute reports similar findings of inequality (Camhi & de la Luz 2003).

100 Chile rates 54.9. In South America, only Brazil, Colombia, and Bolivia have a higher Gini index. The Netherlands, in comparison, rates 30.9 (CIA 2010).
founded in 1990 in a first effort to rebuild the Mapuche movement. Later in 1998, a new Mapuche organization, the Coordinadora de Comunidades Mapuche en Conflicto Arauco Malleco (CAM), was founded in the 8th region in Arauco during a meeting in an old school building. The explicit intent of the CAM was to further radicalize the movement because of dissatisfaction with other Mapuche organizations, notably also the CTT (Interview C-46). For many (former) CAM members, the CAM was an inspiring force leading communities to stand up for their rights. Their particular emphasis was on the rural communities and their coordination. “The same people from Lumaco went to Traiguén, and then to Collipulli. We came and we went, and that work of organization … that is how the CAM started,” said a former CAM member (Interview C-59). Since that time, many early members left the CAM and others joined, transforming the organization. Over time the CAM has become notorious as the most radical Mapuche organization. This organization has also become a major focus in criminal prosecutions and will therefore be discussed at more length in the next chapter. While the CTT and the CAM are most relevant for my analysis because of their role in criminal prosecutions, there are certainly not the only Mapuche organizations that are part of the Mapuche movement. For example, in 2006, the first Mapuche political party, Wallmapuwen, was founded, and in 2009 a new organization, the Alianza Territorial Mapuche, was founded to place renewed emphasis on the leadership by rural Mapuche communities.

Mapuche activists challenge the status quo as they demand land reforms, constitutional recognition, a halt to forestry expansion, and more political autonomy. Their mobilization takes
all sorts of forms: public demonstrations, official negotiations, and also extra-legal action. Some actions are symbolic, overt, and mainly or merely communicative; others are direct or coercive and covert. Covert actions have included arson in plantations, trucks, and machinery and some of these actions have been publicly claimed in declarations by an organization or Mapuche community. For example, the CAM claimed an action in July 2009, stating that it demanded the “purchase and transmission of the terrains seized by señor Jorge Luchsinger to the Lof [Mapuche community] Yeupeko-Filkun. Without any quick response to our demands we will radicalize our actions” (Neira 2009). Without such public claiming, however, the attribution of most incidents of arson is disputed.

Frequently Mapuche protest actions have led to the desired change. Protests have, for example, affected decisions of forestry companies, who have left areas that were too conflictive. The arsons also made it more difficult for landowners to obtain insurance, as the risk that a plantation could be set on fire became too high in certain areas. Mobilizing communities have obtained land as government officials paid attention to the areas where the conflict erupted most dramatically. In such areas, the government and landowners have engaged in negotiations with Mapuche communities and Mapuche leaders. As a result, landowners are eager to point out that in this process the state has made violence effective, as it handed out lands to those communities that have used “violent” tactics.
A partial overview of some statistics collected by the Chilean government shows the number and kind of incidents that took place between 2000 and 2003 (Comisión de Constitución 2003:78). I present this table not as an objective or final list of the actions, but as an indication of the way in which reality is categorized, counted, and presented by the government. It also serves to give at least an indication of the scale of the disruptive events.

Table 2 Statistics from a Senate report, restricted to incidents in the summer months January–March, when most actions take place

<table>
<thead>
<tr>
<th>Actions</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land occupation</td>
<td>5</td>
<td>11</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Occupation of public building</td>
<td>3</td>
<td>0</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>Road blockade</td>
<td>2</td>
<td>2</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Arson</td>
<td>9</td>
<td>8</td>
<td>16</td>
<td>19</td>
</tr>
<tr>
<td>Detentions</td>
<td>15</td>
<td>33</td>
<td>90</td>
<td>55</td>
</tr>
<tr>
<td>Demonstrations</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Attacks</td>
<td>9</td>
<td>9</td>
<td>5</td>
<td>11</td>
</tr>
</tbody>
</table>

As Mapuche activists challenge the status quo and engage in extralegal actions, they also challenge the Chilean constitution and its laws; they criticize the democratic system and their exclusion from it, and they often draw upon legal reasoning and concepts from criminal law to justify their actions. For example, sometimes activists implicitly claimed what could be called
customary rights: “Our animals have always grazed on that land,” or “We have always sought our medicinal plants there.” They frequently explicitly invoked international human rights law, for example the treaty from the International Labor Organization on indigenous people (ILO 169). Other activists referred to the concept of necessity, arguing that they need land to survive, or otherwise they will die, physically or, as a pueblo, culturally. They often displayed a sense of urgency, sacrifice, and obligation: “If we don’t act now, we will be dead,” a student leader from Chol Chol expressed during a conversation in 2003.

Similar accounts appear in a research study by students from the Catholic University in Temuco which listed the personal motivations of youth who participated in “actions committed in the context of the ‘Mapuche conflict’” (Santander et al. 2004). Important motivations for Mapuche youth to participate in the struggle were their conviction of being entitled to the lands, their fear of losing the Mapuche culture, and the necessity due to poverty (2004:132). The students noted that the family, the peer group, and the Mapuche community played an important role as they tended to stimulate the youth in their actions and convictions (2004:131–132). The students further noted that for the Mapuche adolescents the actions were legitimate and just, and in their justifications they appealed to the democratic system and freedom of expression.

In their justification for the use of violence, Mapuche activists have often claimed self-defense: “Our violence is legitimate. The raids in communities are much worse. They come in with their military clothes and weapons of war. It is a hidden war. The media don’t show it that way. They
only see that there was a criminal and that they are looking for that criminal” (Interview C-63).

The radical Mapuche organization CAM similarly publicly defends its use of violence as “defensive” (Weftun 2011). The government is viewed as the enemy, not as a source of protection. The state is perceived as violent. Activists often criticized the asserted rule of law: “The Chilean state is the real terrorist. They are always the first to use violence in favor of the so-called rechtsstaat, but what rechtsstaat? There is no way that a Mapuche can respond to that violence, such as raids in communities and constant harassment” (Interview C-57).

Disputing that the laws are protecting the public interests, activists argued that the laws are just there for the privileged: “They [Mapuches] are fighting for food. The other is just fighting for more money, not for survival,” said a young anthropology student (Interview C-39).

Criticisms of specific laws and the rule of law in general frequently go in tandem with criticisms of the lack of democracy: “We have not made those laws; we did not participate in that” (Interview C-22). Radical Mapuches who demand more autonomy often ground the justification for their tactics in nationalism: “The Chilean laws should only be applicable from Concepción and above” (Interview C-61). They also emphasize that they have exhausted all political possibilities to be heard; “How many years have we been demonstrating? That would be a very long term project. It has already been 150 years. For some the violence doesn’t do anything, but I think that is because we are with too few” (Interview C-63); and the fact that dialogue can simply be perceived to be impossible: “The forestry company is a Goliath. A lonko cannot go
and talk with them. That never happens” (Interview C-72). The discourse justifying extralegal protest activity thus fundamentally challenges the Chilean democracy and its laws.

**Table 3 Brief chronological development of radicalization in the Mapuche movement**

<table>
<thead>
<tr>
<th>Year Range</th>
<th>Phase</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992 – 1997</td>
<td>Civil disobedience</td>
<td>CTT rejects the institutional framework and engages in open defiance of the Chilean laws through symbolic land occupations and a Mapuche tribunal.</td>
</tr>
<tr>
<td>1997 – 2002</td>
<td>Radicalization</td>
<td>The CAM emerges and replaces the CTT as the “radical” actor as it introduces productive land occupations and covert actions of arson.</td>
</tr>
<tr>
<td>2008 – 2010</td>
<td>Radicalization</td>
<td>The CAM is “back.” Actions become more violent and affect a wider range of targets, such as trucks on the highway. Covert illegal actions are publicly claimed, while at the same time there is more explicit opposition within the Mapuche movement.</td>
</tr>
</tbody>
</table>

**Defending the status quo**

The landowners’ response to Mapuche claims and actions has been diverse, ranging from political negotiations and round tables to demands for police intervention and criminal
prosecutions. In the face of land claims by Mapuche communities, landowners generally asserted their legal right to the lands that they claim to have bought and acquired legally. In addition, they often presented themselves as working hard and contributing to the Chilean economy and welfare, arguing that Mapuche activists are only interested in profiting from their hard work. They refuse to accept the argument that they are rich and can therefore easily give away part of their property or proceeds. Landowners commonly emphasize the formal and legal equality between Mapuches and Chileans, like one landowner argued that “it does not correspond that this indigenous group wants something else than the rest of the Chileans” (Interview C-33).

Even though landowners loudly protest that they will not negotiate with “violentistas” [users of violence], many of the land disputes have been negotiated *after* land occupations or arson put pressure on the government and the landowners. Many Mapuche communities have obtained demanded lands after having drawn attention to the dispute by means of a land occupation. For example, this happened in the Mapuche community “Temulemu,” where CONADI bought 58.4 hectares of a piece of land called *Fundo* [Estate] Santa Rosa de Colpi after the community had already assumed control of it in a productive takeover. The public relations official from Forestal Mininco, the official owner of the estate, said in an interview that Santa Rosa de Colpi had become worthless to them as they could not enter the land. Therefore, Forestal Mininco was willing to sell, even though they formally refused to do so without a valid *título de merced*
or court order as they did not want to set a precedent by selling the land just on the basis of the ideology of “ancestral rights” (Interview C-17).

Some forestry companies seem to have accepted the trade-off to let Mapuche communities enter the plantations to find firewood in order to avoid arson as the cheapest way of prevention: a “short-term solution” to “calm down the situation” and “avoid confrontations,” even though they are aware that this is not a “real solution” to the problem (Interview C-34). Other landowners have paid attention to “being a good neighbor” for Mapuche communities and set up programs that, for example, offer scholarships and other perks (Mininco 1999a; 1999b; 2002; Tierra Nueva 1998–2002; SOFOFA 2002). Most forestry companies have engaged in the process to receive certification such as FSC (Forest Stewardship Council). Such efforts of corporate social responsibility are criticized by radical Mapuche activists, who view them as mere window dressing.

Since the end of the 1990s, countermobilization by landowners has resulted in the threat of escalation. While complaining about the lack of effective state protection, forestry companies have employed private security companies to protect their estates, and private landowners have similarly provided for the private protection of their properties. In 1999, the forestry council CORMA warned the government that private landowners living on their threatened property “can find themselves obliged to employ the means that they esteem convenient” (CORMA 1999b). Indeed, in 2001, the major daily Chilean newspaper El Mercurio reported that
private landowners had shot at Mapuches, warning the authorities who were considered to be too passive that “it’s a miracle that no indigenous has died yet.” These private landowners claimed to be ready to defend their estates with all means. With references to the Agrarian Reform in the early seventies, a landowner was reported to have said that “they know that we defend ourselves well. If they [the Mapuches] want to verify, then they will find out” (Barria 2001). A perceived lack of state protection led these anonymous landowners to reclaim their right to private violence in defiance of the state monopoly of force. On 11 June 2005, the reactivation of the “Hernán Trizano Commando” was announced in an anonymous phone call to the local newspaper of Temuco. A note was left:

Estamos dispuestos a empezar una represalia contra los señores indígenas, en defensa de los agricultores, las forestales y las empresas hidroeléctricas... En vista que el Gobierno no ha hecho absolutamente nada para detener a los comuneros violentistas ni ha garantizado la seguridad de los agricultores [...] En virtud de esto, ya comunicamos nuestra constitución, para ir en apoyo de los que son atropellados, tenemos los medios y la gente en la Octava y Novena Regiones y no trepidaremos en efectuar ajustes de cuentas contra los terroristas mapuche, chilenos y extranjeros, que apoyan esta subversión.

[We are ready to start a reprisal against the indigenous gentlemen, in defense of the farmers, the forestry companies and the hydroelectric companies... Given that the Government has done absolutely nothing to stop the violent community members nor guaranteed the security of the farmers [...] Because of this, we communicate our constitution, to go in support of those that are trampled upon, we have the means and the people in the 8th and 9th region and won’t hesitate to set bills against the Mapuche terrorists and Chileans and foreigners who support this subversion.] (Anonymous caller cited in: Cayuqueo 2005a:7)

While the state may not have intervened enough to satisfy landowners, police have frequently confronted Mapuche activists. In 1999, the chief of Police of the 9th region sent a letter to the prefecture of Cautín stating that police operations were conducted too aggressively, especially in relation to Mapuches (Toledo 2007:278). Such police intervention has occasionally led to
police violence, for example when the removal of land occupations and road blockades were followed by violent confrontations (Observatorio Ciudadano 2008). On 17 January 2001, for example, it was reported that during such a removal a twelve-year-old girl was hurt by a police shot (Toledo 2007:278). On three occasions, despite the official warning against aggressive police operations, police bullets killed young Mapuche activists (in 2002, 2008, and 2009).

As both Mapuche activists and landowners increasingly legitimized the use of violent and illegal means in order to challenge or defend the status quo, the contention posed a strong challenge to the young Chilean democracy and its claim to governance based on the rule of law as well as its claim to a legitimate monopoly of force. Indeed, the competing discourses criticized state action as well as state inaction, ultimately claiming that the state failed to deliver on its part of the imagined social contract on multiple counts. According to landowners, it failed to deliver the promised pacification, while according to Mapuche activists it used its monopoly of force to arbitrarily repress Mapuches.

**Popular support: Extremism, supporters, and polarization**

Both Mapuche activists and landowners thus challenge the Chilean claims to the liberal democracy. The exact nature and impact of this dual erosion of legitimacy depends on the popular support for both discourses. As described in Chapter 1, Machiavelli (1994) pointed out that it matters whether it is a minority or a majority that opposes the government. To understand the maneuvering of the Chilean government, it is important to understand that the
Mapuche land claims enjoy widespread support among the Chilean population. In addition, since the early 1990s, internationally indigenous people have increasingly been recognized in treaties and UN resolutions. This explains, for example, the fact that landowners (and especially private landowners) feel abandoned in Chile. Equally important, however, (and in strong contrast to the Spanish-Basque case) is that the use of violent tactics is strongly rejected, not only by the mainstream Chilean society but also within the Mapuche movement, creating a strong tension between moderates and a small group of extremists.

The legitimacy of indigenous claims is widely accepted among Mapuches and also among non-Mapuches. The term “la deuda histórica” [historic debt] to the Mapuche people has firmly entered official discourse. In 2006, the Centro de Estudios Públicos [Center for Public Studies] (CEP), a private foundation, inquired about the legitimacy of Mapuche demands in a national survey: “Si miramos la historia, ¿Ud. cree que el país debe reparar a los mapuche?” [If we look at the history, do you think that the country should offer compensations to the Mapuche?] 91% of the Mapuches and 79% of the non-Mapuches answered “yes” (CEP 2006:48). This general recognition of a debt towards the Mapuche people does not, however, cover more radical demands. Specifically, Mapuches have little support for their claims to so-called “ancestral lands.” Those are the lands for which communities do not have a Título de Merced, but which they claim to have owned before the “Pacification of the Araucanía” in 1881.
While Mapuche demands are thus generally considered legitimate, not everyone supports violent protests for such demands. Indeed, Mapuches are themselves highly divided on this issue. In the same survey executed by CEP, 20% of the Mapuches responded that reclaiming lands by the use of force was always justified, while another 40% responded that the use of force was justified in some circumstances, and 37% responded that it was not justified. These different views about tactics often divide the Mapuche movement and Mapuche communities. For example, a man from a sector south of Temuco told me that in the beginning of the 1990s there was a break in his Mapuche community. He said about other people in his community that “they think we are communists, terrorists, arsonists, conflictivos” (Field notes, April 2009).

Unlike what was described in Chapter 2 about Spain, in Chile there is a strong public taboo on violence, and hardly a publicly accepted discourse to claim it as a legitimate tactic. Significantly, more extreme actions have recently been accompanied by public condemnations from within the Mapuche movement. For example, the organization Alianza Territorial Mapuche publicly condemned an attack on a small farmer in the subprovince Ercilla in the 9th region, adding explicitly that they would not have said anything if the actions had only damaged material, but clearly condemned actions that hurt persons, even if those persons were police officers:

*Mientras haya actuaciones de la CAM que no causen daño a personas civiles, nosotros claramente no vamos a decir nada. Pero estamos en contra de que se dañe a las personas o que se atente contra la vida, incluso de carabineros...*
[When actions by the CAM do not damage persons, clearly we will not say anything. But we are against injuring persons or attacking life, including that of police officers...] (in: Cayuqueo 2009)

In the Spanish-Basque case it already became clear that popular support is relevant among other things because the state depends on citizen cooperation with law enforcement agencies in its criminal prosecutions. Indeed, the rejection of violent methods leads some Mapuche community members to cooperate with landowners and law enforcement. For example, a private landowner reported to the police that members of a Mapuche community had warned his family of arsons that were about to be committed. He specifically mentioned that his family had been protected on several occasions by people close to the community (Case Lonkos of Traiguén, declaration 3 August 2002).

Not all Mapuche people reject such violence for the same reason. For some, the memory of the dictatorship is an important factor, especially in the countryside. Some are therefore afraid that leaders who speak up will be the targets of violent persecution if the government happens to change again, leading them to reject any form of activism (Interview C-52). Some activists criticize the use of violence as it has the effect that “all are put in the same sack” and suspected of violence and terrorism (Interview C-70). This would lead some to hesitate to undertake even an action such as pacifically occupying the CONADI building out of a fear of being viewed as “violent” (Interview C-40). More extreme activists argued that these opinions come from “mainstream” Mapuches who have adopted the “definitions of the state” (Interviews C-68/72).
Another divisive issue within the Mapuche movement concerns negotiation and cooperation with the government. Radical Mapuche activists have often accused those who decided to negotiate or cooperate with the government of “cooptation” and “treason.” Such activists view any kind of cooperation with the government, also in matters unrelated to criminal prosecutions, as cooptation. When these activists talk about CONADI or other government programs for Mapuches, it is generally in derogatory terms about the Mapuches that work there and believe in these programs. They viewed them as undermining the Mapuche struggle and unity instead of contributing to fulfilling their demands. Radical activists and radical Mapuche organizations adopt a non-compromising stance in which no negotiation with the state is possible. The CAM, for example, was intended to be radical from the start. Being radical was viewed as positive. Law-breaking was the intention, anti-systemic the label. Thus, they positioned their own methods in juxtaposition to those “within” the system. For example, about the new Mapuche political party, Wallmapuwen, a young activist said: “They participate in the same institutional game as that which is imposed. They are not there,” (Interview C-39). I asked him what exactly he meant with “there.” “They are in an intellectual struggle, not in the real struggle. They are not in the recuperation, in the land takeovers; they are not there in the confrontations with the police,” he answered.

In the face of these internal divisions, both within and among Mapuche communities, activists often argued that there is a specific state policy intent on dividing communities. “We are [considered] the violent ones,” said a young leader of Mapuche community Temucuicui in the
9th region. “They are trying to divide us. They love it when we fight between each other; that
de-legitimizes us” (Interview C-68). In his analysis the state thus engages in a conscious strategy
to stigmatize “bad” communities. Similarly, other activists claimed that the state privileges
communities that are agreeable to the state, whereas it penalizes those that oppose state
projects: a strategy of sticks and carrots. In the next chapter, we will see that the prosecutorial
narrative draws upon and reproduces this distinction between “good” and “bad” Mapuches.

The Chilean criminal justice system

As from now on I zoom in on the interaction between actors in and around criminal
prosecutions, it is necessary to provide a brief description of the Chilean criminal justice system.
On 16 December 2000, Chile embarked on a Penal Reform. This reform radically changed
criminal proceedings, from an antiquated inquisitorial system – where one judge both
investigated and judged the case, often in secret proceedings – to a more transparent
adversarial system, with public trials, a prosecutor to lead the investigations, and the possibility
for victims to be involved in the case to make a private accusation. Before implementing this
new system in the whole country, the Penal Reform was first piloted in two regions, one of
which was the 9th region Araucanía, and the government directed national attention and
financial resources to these pilot regions in order to make the Penal Reform a success. In
addition, a public defense system was set up, and in the 9th region a special Defensoría Penal
Mapuche [Public Defenders Office for Mapuches] was founded to assist the Mapuche
population in recognition of the large Mapuche presence in the region, potentially cultural
elements in the cases, and the usage of the language Mapuzugun (Defensoría Penal 2011). The Penal Reform itself has turned into a major topic of contention in the meta-conflict as Mapuche activists have accused the government of using the experiment to mete out harsh sentences to Mapuches engaged in the land struggle.

In the new system, prosecutors are members of the “Ministerio Público” [Public Ministry], which is coordinated by the national office in Santiago, but every region has a separate regional office. Art. 1 of the Law on the Public Ministry stipulates that it is an “autonomous and hierarchical” organ. Article 3 orders prosecutors to only focus on the “correct application of the law.” In doing so, they have to collect information that can prove the criminal responsibility of defendants as well as information that would exempt or attenuate such responsibility. The Fiscal Nacional [Attorney General] is appointed for ten years after an open application period and subsequent selection by the Supreme Court and the Senate. Chief regional prosecutors are appointed for ten years by the Attorney General after having been proposed by the regional Court of Appeals. The hierarchical structure is expressed in the fact that regional prosecutors have to obey the instructions of the Attorney General and under the office of the regional prosecutor are local prosecutor offices. By 2010, none of the prosecutors in the 9th region had been a Mapuche. To understand the case flow, it is important to know that not all criminal cases end in a trial and a judicial verdict. Indeed, that is generally only true in less than 20% of the cases. The vast majority is shelved (Ministerio Público 2004:15–17).
Soon enough prosecutors explicitly expressed the burden of the Mapuche-conflict cases. An evaluation of the Penal Reform in 2002 reported that what the Public Ministry referred to as the “Mapuche problem” was one of the factors that had increased the daily burden for prosecutors, which had not been foreseen when the reform was designed. The Attorney General therefore pleaded for an increase in the number of prosecutors (Ministerio Público 2002:158). Since January 2008, the 8th and the 9th regions have even had specific prosecutors charged with the prosecution of offenses that arise in the “Mapuche conflict” (Leiva 2008). The Public Ministry justified this arrangement with the need for specific expertise. Not surprisingly, many Mapuche activists call them the “anti-Mapuche prosecutors.” To give an indication of the number of cases that are classified as “Mapuche-conflict cases,” in the year 2008 seven new cases prosecuted by the special prosecutor of the 9th region were entered into the database of the judicial authorities. In 2009, a total of 32 cases were still listed under his name as “in process,” the oldest dating back to 2004 (Poder Judicial 2009).101

From the start, the prosecutors have been proud of the Penal Reform and have defended the system as a great step forward in comparison with the old, more inquisitorial, system (Interviews in 2003 C-10/11/12/13). As some emphasized, they specifically valued the Chilean liberal democracy because they had been part of the struggle against Pinochet (Interview C-12/13). The rhetoric of liberal legalism had an explicit presence in the prosecutorial narrative, especially in response to allegations of partiality by Mapuche activists. In audio files of oral

101 In April 2009, the Defensoría Pública Penal had eighteen cases related to the “Mapuche conflict” (DPP 2009), in addition to an unknown number that was in the hands of the Defensoría Penal Mapuche.
proceedings in 2008 and 2009, the prosecutor frequently started his opening statement with an emphasis on the objectivity of and adherence to the rule of law, for example by stating explicitly that he did not want to create a “farce,” a common accusation by Mapuche defendants (Case Cayupe, minute 32:07). In another trial the prosecutor warned that “we will hear discourses of ‘set-ups,’ ‘state terrorism’ and a ‘racist and militarized state,’ but here are crimes […] which the Public Ministry tries to prove” (Case Chequenco, minute 8:45). One of the private accusers underscored liberal principles by saying that “we do not seek an exemplifying punishment, but a just punishment” (Lawyer for transportation company Lasker in Case Chequenco). These are clear examples of how prosecutors directly addressed arguments and criticisms in the meta-conflict.

Other important features of the Chilean criminal justice system in relation to the contentious episode under analysis are the continuing presence of military courts and the anti-terrorism law. For offenses related to the military or carabineros [the police], the military courts still have exclusive competence. Many Mapuche activists have faced prosecution before military tribunals because of crimes involving the police (ibid. 2007:278). This practice is severely criticized not only by activists. In 2005, even the Inter-American Court for Human Rights reprimanded Chile because of its prosecution of civilians before military tribunals. The court argued that military jurisdiction should be restricted to crimes committed by military in active service (Toledo 2007:288). Another deeply controversial issue is the use of anti-terrorism legislation in cases against Mapuche activists. Chile has an anti-terrorism law, the “Law on
Terrorist Conduct,” that dates back to the Pinochet era but has since been modified multiple times. This anti-terrorism law can work as an “add-on” to many existing crimes. Thus, the crime of arson can be charged as a “terrorist” arson attack in conjunction with the anti-terrorism law. This law provides for longer pre-trial detention, higher penalties, and the possibility to use anonymous witnesses. This law and its usage will be addressed in more depth in the next chapter.

Finally, the involvement of the executive government with criminal proceedings is very controversial. The Chilean government is highly centralized. Many decisions are made in Santiago. This is specifically so in criminal justice issues related to the Mapuche conflict. For example, we will see that in some cases, government officials requested the use of the Law on State Security because before the Penal Reform, such a request was necessary for the investigative judge to apply the law. Another way in which the executive government has directly engaged with criminal proceedings is in the role of private accuser (yes, in addition to the prosecutor). In addition to landowners that have acted as private accusers, intendentes [regional governors] and sometimes the Department of Internal Affairs have also chosen to file a private accusation. Between 2001 and 2003, there were more than eighty criminal complaints from these governmental actors in relation to cases resulting from the Mapuche conflict, many for arson, but also for theft, damages, injuries, public disorder, and usurpation (Comisión de Constitución 2003:78). Participating as a private accuser means that the government can have its own lawyer present during the trial and can be involved in the gathering of evidence. Thus,
governmental lawyers work on such cases in addition to state prosecutors on behalf of the population of the region in cases of “public commotion.” The lawyer filing these complaints for the governor of Malleco said that, for example, in cases in which a truck had been ambushed on the highway, it was impossible for the governor not to file such a complaint, due to this presumed “public commotion.” Acknowledging that pressure from corporations in these cases is a reality, he said that otherwise the criticism in the media would be obvious: “the government does not take responsibility!” (Interview C-56).

This decision of the government to actively take part in these “Mapuche conflict” cases is a point of contention in the meta-conflict. Mapuche activists interpret this involvement as a clear violation of the supposed neutrality of the government in criminal cases. They see it as evidence of the specific persecution of the Mapuche people. Here we already clearly see how prosecutors and judges become easily identified only with particular political interests as they are no longer viewed as representing legitimate authority in upholding law and order (cf. Miall 2001:88).

**Defining the situation: ambivalence**

Mapuche mobilizations and (the threat of) countermobilization thus challenge the Chilean state and its young democracy as Mapuche activists challenge the status quo, demand fundamental changes in land tenure, the constitutional position of the Mapuche people, and contest the hegemonic definition of progress. The credibility of Chile’s institutions and the confidence that
the Mapuche people have in democratic procedures delivering their promises are at stake. Despite round tables, the Historical Truth and New Deal Commission, and the CONADI Fund of Indigenous Lands and Waters, as well as many civil law suits concerning the validity of legal titles, the land disputes have not yet been resolved. Indeed, ongoing projects like the building of hydroelectric dams in the Bío Bío River and the coastal highway continue to create new conflicts. At the same time, landowners are losing their patience and their confidence in effective state protection of their interests and properties.

Actors on both sides have decided that a lack of government protection or a perceived democratic deficit legitimize the turn to coercive measures and disruptive protest. As Mapuche activists and landowners criticize the state’s failure to keep the promises of the social contract and threaten to withdraw their compliance, the state’s legitimacy and its claim to a legitimate monopoly on force are at stake. The decision of landowners to carry weapons to defend their property thus not only emphasizes their conviction that they are the legitimate owners, but also challenges the Chilean legal order as the protector of private property. Similarly, the decision of some Mapuche activists to burn plantations not only expresses their opposition to forestry expansion, but also challenges the democratic system that would promise to solve such disagreements through parliamentary debate. In addition, as they claim ownership over the entire former Mapuche territory below the Bío Bío River, they challenge not only the current Chilean land titles in the hands of the current land owners but also the legal system in which these titles are embedded and the just and neutral image it claims as representing the “public
interest.” Significantly, Mapuche demands enjoy the support of a significant part of the population, and even some of the extralegal tactics receive public sympathy.

As Nieburg said, in order to maintain control the government has to decide which groups can be ignored or excluded at no risk, and which groups cannot be “barred from the magic circle” (1968:19). To maintain its control, the democratic government has to address different audiences, sending the right messages in order to defend the rule of law, without alienating important sectors in society. Who are the relevant actors, who are their stakeholders, can they be ignored, or should they be taken into account? How much harm can the different actors cause? Are the grievances legitimate, what is the cause of the problem, what is the solution? These questions are the topic of debate and disagreement, and the answers change over time. One of these debated questions is the role of leaders and outside activists; whether or not entire indigenous communities are involved in the controversial actions and whether or not those actions have widespread support or not within those communities. Another topic of debate is the nature of the threat or harm posed by protest actions, as government actors sometimes highlight the physical threat to the lives and bodily integrity of people and at other times emphasize the danger to economic development of the region, the importance of the forestry sector, and the harmful decrease in investments (Barria 2001).

Thus, in giving answers to such questions, the state “defines” the situation as it puts labels on actions and actors and relies on certain assumptions about what is going on and what is at
stake. The state’s “definition of the situation” then determines, fits, and legitimizes the state response. This is important, because publicly claiming the need to protect “victims” or to defend “national security” not only indicates but also legitimizes a certain response. Indeed, if the definition of the situation is accepted by the public, the resulting response will be perceived as natural and taken for granted. I argue that in defining the situation, the Chilean government has set itself up for pervasive ambivalence.

**Downplaying the problem versus the fear of escalation**

The definition of the “security” problem, which has been relegated to the criminal justice arena, is far from stable. Government officials have alternately emphasized the potential for grave escalation with references to “national security” and “terrorism” on the one hand and downplayed the security problem on the other, reducing it to several specific incidents and private disputes. The next chapter demonstrates that this ambivalence is reflected in the prosecutorial narrative in a constant back and forth between de-contextualization and re-contextualization of events.

At various points during the past two decades, state officials have downplayed the problem, localized it in some leaders, asserted control, and expressed confidence that the criminal justice system was the right place to deal with the issue. For example, in 1999 the sub-secretary of the Ministry of Internal Affairs affirmed that “there is no Chiapas, no revolution or Mapuche uprising” (Barrera 1999:68). Similarly, in 2001 Berta Belmar, regional governor of the 9th region,
declared that of the 2200 Mapuche communities in the region only 40 or 50 were organized by the Mapuche organizations CAM or the CTT (Barria 2001). Again, in 2009 Viera Gallo, the state secretary and coordinator of indigenous politics, claimed that “we are not talking about an Al Qaeda in the Araucanía region” and “there is no civil war.” “We have to accept that this problem exists and treat it seriously, but we must never exaggerate it” (EFE 2009). Indeed, despite the tensions and the fear of economic stagnation, the index of Regional Economic Activity of the 9th region grew by 19.3 percent from 2000 to 2005 (Invierta en Araucanía 2009).

These arguments also enter the Chilean courtrooms and even the courtroom of the Inter-American Court of Human Rights (IACHR). Thus in 2006, the Chilean state argued that there were more than 3,500 Mapuche communities with 203,950 persons in the 9th region, whereas only 60 persons were involved in the criminal activity – some of whom did not belong to the Mapuche people, as the state emphasized. They therefore “represent a percentage that is considerably small in relation to the universe of members of that [Mapuche] people” (Case Lonkos of Traiguén, IACHR, consideration 35). The next chapter analyzes in more depth how these images and assertions are reproduced in the prosecutorial narratives.

The words chosen to demonstrate government control show the images that dictate the conversation, as officials declare what it is not: it is no Chiapas, there is no civil war, and there is no Al Qaeda. These negative formulations indicate the ongoing conversation between those who fear escalation and those who emphasize that the problem is not that big. Indeed,
landowners often criticized this tendency of the government to downplay the issue. Since the early 1990s, landowners urged “Santiago” to take the problem seriously and perceive it as a national problem instead of a regional problem. For example, in 1999 the CORMA clearly wrote: “It is not, as we see, a conflict between private parties” (CORMA 1999a:2). In October 2008 a coalition of professional associations reiterated in a public declaration that “this is a theme of the country, not only of one region” (CPC 2008). Sometimes, government officials have adopted this alternative definition of the situation. For example, when the state secretary for internal affairs, Sergio Correa Sutil, was asked in a newspaper interview in 2002 whether they were facing a security problem for the country, his answer was a clear “yes” (El Mercurio 2002).

Similarly, prosecutors have adopted such notions in the courtroom. In 2003, a prosecutor referred to the “dignity of Chile,” the “soul and spirit of Chile,” and the “nation” that were at stake (Case Lonkos of Traiguén, Field notes, April 2003).

Lawlessness and the prospect of a “state within a state” are recurring themes in accounts that stress the severity of the situation. It is true that some Mapuche communities have become or claim to be de-facto no-go areas for official authorities. Newspaper accounts from 1997 often mentioned “little Chiapas” as a specter. Sometimes, the prosecutorial narrative appropriated these images. For example, one prosecutor argued in his opening statement that “[Mapuche community] Temulemu apparently is a territorial space that does not obey the Chilean laws.” And later he said: “From Temulemu onwards it is another world, that’s another Chile” (Case
Lonkos of Traiguén). These expressions affirmed and reproduced an image of lawlessness and places where the Chilean state does not rule.

Indeed, some actors have used a war metaphor to describe the situation. Judge Karen Atala, who was stopped at a road blockade and subsequently threatened with a gun, said:

La guerra de Arauco no ha terminado. Los mapuches están en pie de guerra aún. [...] actuaron como un batallón disciplinado, con mucha sangre fría, perfectamente coordinados. Si hubieran querido matar a alguien, lo habrían hecho. Estábamos en completa indefensión.

[The war of Arauco has not ended. The Mapuches are still on a war footing. [...] They acted as a disciplined battalion, with a lot of cold blood, perfectly coordinated. If they had wanted to kill someone, they would have done it. We were completely defenseless.] (Fredes 2007)

Judge Atala confessed that her first thought was: “Are we in Chile?” (Fredes 2007).

Various actors during the past decade have emphasized that escalation was inevitable. The newspaper *El Mercurio* wrote in 2001: “The Mapuche Intifada. The Indigenous Uprising Worsens” (Barria 2001). In 2003, a prosecutor expressed fear of further escalation, pointing out that “it” started with crimes against forestry companies and that now small and midsize farmers were the victims (Case Lonkos of Traiguén, Field notes, April 2003). In 2006, the burning down of the house of private farmer Luchsinger was a turning point in the perception
of landowners. For them it meant that there was a real danger for their life. Attacks on trucks on the highway in early 2008 were similarly interpreted as a signal of escalation. Truck drivers started to demand bodyguards. On 29 July 2009, the CAM claimed an attack on a passenger bus. The local newspaper “Austral Temuco” reported anxiously about this shift of attacks from cargo transport to the transport of “human lives.” Just as in Spain, actors thus identify “leaps” in the chosen targets and the willingness to inflict harm. Not only landowners feared escalation and the possibility of deaths. Some Mapuche activists also expressed that already early on they were convinced that violence against them would lead to the death of Mapuche activists (Interview C-57). And also a private security guard I spoke with in 2003 claimed that the Chilean government should attack the problem at the root and send in the military. “25 or 100 Mapuche deaths and it is over. Yes, that may be cruel, but there will inevitably be deaths” (Interview C-18). Such fear and expectation of escalation has also been adopted in the prosecutorial narrative. For example, in one case, the prosecutor argued that when a conflict starts with damages, threats, and robberies, it may end with violence against persons (Oral proceedings, CAM 2005).

Thus, while the government often publicly downplayed the problem, emphasizing the small number of people involved in criminal activity, the alternative definition of the situation emphasized that the conflict threatened the whole country, created a situation of lawlessness and potentially a state within a state, while the violence was escalating and could possibly lead to deaths. Just like the government, the landowners have also sent ambivalent messages about
the actual threat posed by radical Mapuche activists. While affected landowners often called for more attention from the government and argued forcefully that the matter was grave and should be treated as terrorism, at the same time they tried to maintain a low profile to prevent the conflict from getting out of proportion and receiving too much negative media attention, and therefore negatively affecting their reputation. Just like the government, landowners frequently emphasized the individual criminal responsibility of a few perpetrators and the fact that the problem was limited to specific regions where the radicals were active.

In framing the problem, government officials have further introduced ambivalence as they adamantly distinguish between the “poverty” problem of the authentic and rural Mapuche people (political arena) on the one hand and the “security” problem posed by radicals that “abuse” the Mapuche identity (criminal justice arena) on the other hand. This distinction is also visible in public opinion, as surveys demonstrate simultaneous support for the Mapuche claims and for harsher measures against “activists” (Richards 2010:77). The location of the problem in a specific set of identifiable individuals and communities has guided the Chilean response. The distinction between “good” peaceful communities and “bad” radicals also returns in a concept like “conflictive communities,” which served to guide policy on land transfers. To prevent the so-called “export of the conflict,” forestry companies and the Ministry of Planning deemed it important that “conflict communities” were not transferred to an otherwise peaceful area (Mideplan 2002; CORMA 2002b). In the next chapter, I will show how this separation between the “radical” activists on the one hand and the legitimate Mapuche people on the other hand
returns in and is reinforced by the prosecutorial narrative in various criminal cases, and how the recognition of legitimacy of the demands in combination with the push towards the criminal justice system has created a thorough ambivalence.

Ambiguity thus exists in the debate whether the security issue is a big national problem or rather consists only of isolated and local events. At the same time, the security aspect of the Mapuche conflict has become the dominant government concern, while Mapuche grievances concerning, for example, erosion and a decrease in groundwater and biodiversity are ignored. Thus, while the “poverty” problem is dealt with by livelihood support programs, scholarships, and other attempts to make rural Mapuches part of the Chilean economic wonder, the “security” problem is defined as the likelihood that crimes will be committed, and this causes the issue to be transferred to the criminal justice arena. The relevant actors are then identified as “perpetrators” and “victims.”

The transfer: From civil lawsuits on land rights to criminal prosecutions of arsons

The transfer to the criminal justice arena very simply means that actions are defined and treated as crimes. This transfer can be a deliberate policy. For example, an engineer from a big forestry company told me that “it is policy to treat these actions as ordinary thefts and crimes” (Interview C-34). As such, it is a de-politicizing move. However, as I will show, the transfer does not mean that it is possible to keep political issues outside of the criminal proceedings.
To facilitate the de-contextualization of events, the “Mapuche conflict” is often put in strictly juridical terms. That is, the land claims are forced within the framework of land titles and civil lawsuits. The relations between Mapuches and Chileans are reduced to a merely constitutional issue of formal recognition of indigenous peoples. These legal conceptualizations become the contested framework for the debate in the criminal justice arena.

In line with the liberal separation of ends and means, Chilean prosecutors firmly emphasize the separation of political objectives and criminal means. “The demands may be just, but they [Mapuche activists] have to claim them through political channels. Violence is against the democracy,” said one of the prosecutors in 2003 (Interview C-11). Indeed, during a trial in 2003, both the prosecutor and the private accusers referred to the “legitimate aspirations” of the Mapuches but emphasized that they have to follow the “legal path” (Case Lonkos of Traiguén, field notes, April 2003). A legal assistant to the chief prosecutor of the 9th region said: “I can’t commit crimes the whole day, thinking I am fighting for something, whatever that may be!” (Interview C-13). Typical for the liberal understanding of the relation between crime and politics, landowners also stress the distinction between means and ends. “Many of them are right in their claims,” said the SOFO lawyer, who works for several farmers, “but that does not justify the means they use. If you open that Pandora’s box, then even Bin Laden could become justified in sending those planes” (Interview C-42).
The transfer of political contestation to the criminal justice arena implies that the relevant issues change. It is the process in which (a part of) the political struggle is redefined in the logic and language of criminal justice, and actors of the criminal justice system become involved. Instead of arguing whether and how a pine tree affects the soil, the question under debate becomes whether or not the Chilean state can use anti-terrorism laws in cases of material destruction such as arson. Instead of questioning the lack of representation of Mapuches in the national parliament, actors debate whether or not prisoners should have the right to hold a religious ceremony in the prison. The shift from lawsuits between private parties to criminal prosecutions is accompanied by a discourse that frames the problem in public terms: the interests of the entire society are at stake. The transfer to the criminal justice system is also enacted by refusals by landowners to negotiate with “violentistas” (Interview C-17). The shift to the criminal justice arena is the shift from persuasion and negotiation to the language of condemnation and individualized blame. The problem becomes a criminal problem, even if the crimes are sometimes recognized to be “politically motivated” crimes. More often, however, the prosecutorial narrative downplays political motives and routinely emphasizes self-interest as the “real” motivation of perpetrators.

Very concretely, the transfer also means that much of the news reporting in relation to the “conflict” is based on police and prosecutorial accounts, thus adopting the state’s viewpoint and other dominant voices while marginalizing others. Interestingly, in an analysis of the sources of newspaper articles in relation to the “Mapuche conflict,” it turned out that
prosecutors had been the most important source for newspapers, as they figured in 26.7% of the articles as a source. In comparison, “victims” were only relied upon in 3.3% of the articles and “indigenous people” in none of the articles (del Valle 2005:88). Del Valle further points to the dominance of police reports and their hierarchical superiority in the construction and establishment of “facts” in comparison to other sources of evidence.

“We fulfill a duty,” said the chief prosecutor of the regional attorney’s office of the 9th region in Chile, sticking firmly to the ideology of liberal legalism, when I interviewed her in 2003 about the criminal prosecutions that took place in the context of the Mapuche conflict (Interview C-10). When I asked her about the consequences of the criminal prosecutions on the conflict dynamics, she maintained that potentially radicalizing effects or the motives of a perpetrator were not the terrain of the prosecutor; that belonged to politicians. “We just do our work. It is not up to us to think about the consequences. The ideal of equality and the democratic construction of the system forbid us to think about the consequences. We follow the rules; the rules that have been decided democratically,” declared a lawyer at the regional prosecutor’s office in Temuco (Interview C-13). The spokesperson of the regional office similarly declared, “we do technical work” (Interview C-11). He wrote:

*Siendo entonces el Ministerio Público un organismo técnico, cuya función es investigar delitos, en la ejecución de su cometido no puede tener en consideración circunstancias generales que motiven o fundamenten la comisión de un ilícito determinado, si eso fuera así, cuán peligroso resultaría la persecución de delitos, la que estaría sujeta a consideraciones subjetivas cuyo alcance nadie está en condiciones de prever.*

[The Public Ministry is a technical organism, whose function is to investigate crimes, in the execution of which one cannot take into consideration general circumstances that motivate or account for the committing of a given illegal action; if that were the case, how dangerous would the persecution of
This reasoning places the police and the prosecutors as law enforcers outside of politics and thus outside any of the substantive issues that constitute the “Mapuche conflict.” They view themselves as outsiders and as not responsible for solving the conflict. Crime control mandated by the law is the narrow duty that they fulfill. For the political issues, the law enforcers point to the political arena, in which dialogue, negotiation, persuasion, political parties, political policies, elections, the parliament, and law-making activities are located.

Mapuche activists attempt to open up space for alternative viewpoints as they work hard for the recognition of what they perceive to be the “real” crimes: their removal from their lands and confinement in reservations, followed by years of discrimination against their parents and grandparents. For many Mapuche activists it is pure cynicism that they are charged with “usurpation” when their history tells the story of constant usurpation of their lands. Whereas Mapuche activists often place contentious actions against landowners within the context of their legitimate demand for land, many landowners avoid the question of legitimacy of the land claims entirely and conveniently stick with the narrow focus of criminal justice. Instead of engaging with such claims of legitimacy, landowners frequently assert that many of the criminal actions are not done by Mapuches or on behalf of the Mapuches. Indeed, a common argument is that Mapuche leaders or even outsiders are only engaged in mobilizations and disruptive
activities because they are interested in media attention, adventure, or financial gain. Landowners thus disconnect the criminal incidents from the political demand for land reform.

These diverging perspectives are reflected in the different voices that obtain official status in the course of criminal proceedings, in witness testimonies or interrogations with defendants. In testimonies before police officials or on trial, the testimony of Mapuche activists generally includes the long history of the specific land and the details of the land dispute. While landowners sometimes mention their perspective on the land dispute and generally confirm their legal landownership, they mostly focus on a very narrow timeframe of specific incidents. This narrower timeframe is reflected in police expert investigations of the crime scene and the specific locations of every event. Similarly, Del Valle (2001) points out that prosecutors and private accusers tend to emphasize that a case has to be judged on the basis of the “facts,” whereas the defense lawyers generally try to put the “facts” in their historical context. While that certainly is the pattern in some trials, it is definitely not always the case that the prosecutor keeps to the facts and the defendants aim to put things in context. Indeed, in some trials it was the other way around (e.g., Case Lonkos of Traiguén, Field notes, 2003). In the next chapter I will argue that it is more appropriate to describe the interaction not as a competition between de-contextualization versus re-contextualization but as a competition between different interpretations of context.
A case study of ambivalent state intervention: Fundo Ginebra

The role and intervention of subsequent Chilean governments in land disputes has been full of contradictions. Before discussing more systematically some of the contradictions that can be found, I will present a case study which illustrates the dynamic of land conflicts and the way in which criminal prosecutions and the relevant state agents play a role in this. The following account is based on an analysis of police files with witness declarations at the police station, interviews by the author, and newspaper articles. Despite its particularities, it demonstrates many of the recurring features in such disputes.

At the end of the 1990s, a Mapuche community in the sector of Collipulli demanded forty hectares from Fundo [estate] Ginebra, which was in the hands of a private landowner. The community claimed that this land had actually belonged to them since 1813; however, in 1918 they lost it due to the fact that a new landowner refused to give it back after what would have been a five-year lease. There were two organizations active in the Mapuche community. Both were demanding the forty hectares, but while one organization chose to stick with dialogue, the other organization engaged in land occupations. Part of the community was actually working on the forty hectares that were disputed, sowing grain. There had been negotiations about a purchase through CONADI, but nothing had worked out. In the beginning of January 2001, leaders from the land-occupying organization of the Mapuche community told the landowners they would harvest the current plants. In addition, the leaders requested the landowners to drop the criminal complaints that the landowners had filed because of the
occupation of their land. In reaction to this warning, the landowners hired a guard, who would give notice when a land occupation or arson was to take place.

In the night of 20 January 2001, the guard was attacked while keeping watch on the terrain. His arm got broken and his head severely injured. “They left me for dead” was his comment to the police after the attack. The landowners were shot at during the same night while driving by the estate. One of the landowners was severely injured in his hand, leaving it paralyzed. In reaction to the shooting, the landowners shot back with their shotgun and pistol. An activist who generally rejected the use of violence mentioned that in that specific case he understood the perpetrator because of the nasty relation between the landowner and the community (Interview C-28). Estate Ginebra was occupied, the house that was built on it destroyed, and everything taken away from the house. For the landowners, who have their permanent residence in Temuco, it was their house for summer holidays.

The state filed charges for attempted homicide and started secret negotiations with CONADI. The police investigated the crimes, but no one disclosed the identity of the attackers even though in testimonies with the police, members of the community clearly showed their internal differences about the legitimacy of extralegal activity. While earlier pacific occupations were openly recognized by the participants, everyone in the Mapuche community denied any involvement in the violent attacks. Finally, one of the community members was convicted to 818 days in prison. The landowners continue to live in Temuco. In March 2002, estate Ginebra
was purchased by CONADI and given to the Mapuche community. Thirty-five families received 403.2 hectares. CONADI paid 2,371,652 Chilean pesos per hectare (CONADI 2009b).

This vignette illustrates some of the typical elements in these land disputes between Mapuche communities and Chilean landowners. It shows that personal contacts and also personal grievances often play a role in the events. Negotiation, tactics of civil disobedience, and violence interact in complex ways. Typical is also that the Mapuche community was divided over the use of extralegal tactics, but that everyone still refused to cooperate with criminal investigations. Different government agencies played a role: law enforcement agents prosecuted a single individual for very a specific event that actually occurred within a larger context in which many more people played a role. At the same time, CONADI purchased the property and transferred it to the Mapuche community. This illustrates how specific events can be transferred to the criminal justice arena, while other parts of the dispute remain in the political arena.

Criminal prosecutions thus do not occur in a vacuum. The events at the estate Ginebra exemplify the complex situation within which crimes occur and the many governmental agents that get involved. The different agents and organs that make up the Chilean state all get involved in line with their specific mandates and perceived duties. For a full grasp of the state’s role in the “Mapuche conflict,” I would thus have to discuss state interventions ranging from police operations, detentions without subsequent charges, political negotiations and dialogue,
and the role of military courts to socioeconomic programs for development and specific assistance to Mapuche people. That is, however, outside the scope of this research. Rather, my focus will be on the criminal justice arena and specifically the ambivalence pervasive in the prosecutorial narrative and criminal justice decisions regarding the “Mapuche conflict.”

Mapuche activists routinely accuse the state of criminalizing the Mapuche protests. Landowners often argue the opposite: their concern is that Mapuches can actually get away a lot easier with certain crimes because they are Mapuche. My data support both propositions, at least in part. There are many instances where the state does indeed react with a heavy hand, supporting the perspective of Mapuche activists. For example, the state applies anti-terrorism laws, arrests activists on a large scale,\textsuperscript{102} trumps up charges and employs unjustified police violence in Mapuche communities (Observatorio Ciudadano 2008). Many activists have suffered long pre-trial detention, and newspaper headlines brand Mapuches as terrorists. Also, some activists are tried twice for the same offense in military courts and civilian courts.

However, while the state’s approach can clearly be heavy-handed, at the same time the state (and landowners) has actually often been very permissive. There are indications that the state occasionally has attempted to avoid criminal prosecutions and convictions of Mapuche activists. For example, Mapuche protest actions, such as land occupations and road blockades, have generally been removed by the police, but are usually not followed up with criminal

\textsuperscript{102} Reliable statistics do not exist, but one source estimated that in 1998 there were 285 people arrested and in 1999 at least 400 (Comunicaciones Mapuche Xeg-Xeg 1999).
prosecutions as the overriding concern in such situations is to dampen the conflict (Interview C-56). Many Mapuche activists who were briefly arrested were never subsequently indicted or tried. The number of Mapuche activists imprisoned at any given point in time – awaiting trial or serving a sentence – has hardly ever been more than fifty people and generally less. Further, it was not until 2000 that the first Mapuche activist actually had to spend time in jail for a conviction. Sometimes, to avoid an escalation of events or out of a fear of reprisals, landowners themselves have decided not to pursue any prosecutions. Indeed, landowners often prefer activists to receive an “alternative solution” instead of a conviction, as they want to avoid accusations of “unjust repression” and “political prisoners” (Interview C-42). It is also incredible how many Mapuche activists manage to remain fugitive in quite a small territory. A public defender said: “I was drinking mate with the fugitives in their own community: so much for being ‘fugitive’ [clandestino]; they just hide in their communities” (Interview C-48). And an activist told me: “We used to bring in clandestinos for speeches at the university” (Interview C-72). It is hard to believe that was possible if the Chilean state actually put a lot of effort into their tracing.

This leniency in prosecutorial decisions is also reflected in the recollections of Mapuche activists. For example, in urban areas the occupation of buildings, such as the CONADI offices, was a common pressure tactic. A former Mapuche student leader told me that he had never been indicted or prosecuted for such occupations in their struggle for cheap housing for rural

---

103 Mapuche activists count their prisoners and, for example, eleven persons were imprisoned in January 2007 (Memoria Indígena 2007), whereas in May 2003, 29 people were in prison (Mapuche.info 2003), and in June 2010 the number reached fifty (Agrupación Mapuche Kilapan 2010).
Mapuches coming to study in the city of Temuco. “It seemed legitimate to us. The legal framework did not take the reality into account. It was a necessity. We had to take care of a budget and food for Mapuche students.” It was highly effective indeed:

When we mobilized, within a month we would have the money. [...] It was a way to make the conflict visible. The occupation of a public building creates a conflict with the citizens, as it is an obstacle for the functioning of the institutions. We would send letters to CONADI or to the Regional Governor, but all the doors would be closed and everyone would say that there is no money. Then the next day when we occupied the building of CONADI there would be money. That has been our experience. (Interview C-59)

Reflecting upon an action in Arauco at the end of the 1990s, the former student leader agreed that they were probably able to get away with it without much trouble because they were Mapuches. He recalled telling his co-defendants, who were sentenced for usurpation and theft: “we got off with minor sentences! If we were Chileans, we would still be in prison” (Interview C-59).

Such examples do not reflect a government or landowners using every opportunity to prosecute and punish Mapuche activists as harshly as possible, which would be the “radical” perspective on law and politics, in which the law is nothing more than an instrument in the hands of the elite. Instead of a straightforward harsh application of the law favoring the elite, a more complex interplay emerges and real or apparent contradictions are visible in the
simultaneous negotiation with and criminal prosecution of Mapuche leaders; in the use of police violence in interactions with Mapuche communities, whereas judges continue to acquit defendants on trial; and in the combination of harsh anti-terrorism legislation with restraint in the use of penal laws in other instances. I understand the Chilean case, therefore, as a paradox of simultaneous oppression and impunity. In my exploration of the development of the prosecutorial narrative in these chapters I aim to uncover the dynamics underlying this apparent paradox.

A lack of coordination between the different state organs (the legislator, police, military, prosecutors, judges, minister of internal affairs) or even outright disagreement can explain some of the contradictions. For example, in his inaugural speech, the new head of the Court of Appeals in Temuco had commented on the criminal cases that arose in the context of the Mapuche conflict and said that those cases should not be sent to them as the criminal justice system cannot solve them. It was a frank statement, and several people with whom I spoke in 2009 referred to those words (e.g., Interview C-64). In September 2010 there was even an open confrontation between the executive government and the Attorney General. In the last elections in February 2010, Piñera, leader of the right-wing party Renovación Nacional [National Renewal], became president of Chile. President Piñera had made promises to Mapuche hunger strikers to change their charges of terrorism into ordinary crimes. The Attorney General, however, refused to do this, arguing that it would be illegal and unconstitutional and that it could actually be a crime to change the charges (Cooperativa 2010). In October 2010, the
Attorney General said: “No pretendamos que la Fiscalía arregle un problema de 200 años, de 180 años.” [We don’t claim that the Public Ministry can solve a problem of 200 years, 180 years] (Cooperativa 2010). This was one of the few moments in which government authorities overtly recognized that the criminal justice system is not the right arena to deal with these cases, and as such quite a breakthrough.

Even though the criminal justice arena might not solve the problem, and state agents acknowledge this, many events are understood and categorized as “crimes” and thus translated into the vocabulary of criminal law and passed on to prosecutors to act upon it. In the next section, I analyze how different actors claim victimhood or solidarity with “political” prisoners as criminal proceedings create these identities of victims and defendants in indictments and oral proceedings. In the meta-conflict that ensues in the criminal justice arena, the competing voices propose their own definitions of the situation, challenging or demanding the state’s imposition of labels.

3. Mobilization and discursive action in the criminal justice arena

As discussed in Chapter 1, the processes of victim mobilization and prisoner support mobilization are not reserved ex ante for specific political actors. Mapuche activists engage in both prisoner support mobilization and victim mobilization. Their claims as victims have, however, hardly received official recognition in criminal proceedings.
Mapuche activists generally claim victimhood for having been thrown off their lands after the Pacification of the Araucanía and use criminal law vocabulary when they accuse the current landowners of “usurpation.” Such attempts have never been accepted in the courtroom. There are no criminal prosecutions to adjudicate the grievance of Mapuches that eucalyptus trees are sucking up all their groundwater. These grievances are not successfully defined as “crimes” and are therefore not even considered to be within the criminal justice arena. In other cases, the understanding of events as crimes may be acknowledged, but prosecutions have been minimal. This is the case in claims of police violence, such as raids in Mapuche communities, violent searches, disproportional violence in confrontations with activists, and alleged torture by police officers to extract confessions.

While their account has not often been honored, Mapuche activists have mobilized as victims and pushed for criminal proceedings in some cases. I will briefly provide a short overview of such mobilization and the adoption of their narrative in the courtroom. For example, Mapuche activists have claimed that the declarations by paramilitary group “Hernán Trizano” constituted “criminal threats.” In 2002, Member of Parliament Alejandro Navarro asked the regional governor to investigate “Comando Hernán Trizano,” particularly requesting preventive instead of “a posteriori” action against these “real anti-Mapuche terrorist groups” and also asking the governor specifically to contemplate the use of the Law on State Security (El Mercurio 2010). That same year, Mapuche leaders filed criminal complaints of death threats by the commando
(Toledo 2007:283), and a prosecutor was reported to investigate the commando (Palma 2002; Austral 2002c). No indictment followed, however. In 2009, Mapuche activists filed complaints about “genocide” and “ethnic cleansing” after communications had been issued in the name of this same commando. A spokesperson of the commando was reported to have said that “the main Mapuche leaders will disappear from the world, due to two cartridges of dynamite which we will place in their belts if they continue with the demands for lands” (Chavez 2009; P.A.S. 2009).

Mapuche activists also engaged in active victim mobilization when they argued that the deaths of young Mapuche activists Alex Lemún, Matías Catrileo, and Jaime Mendoza were not the “accidental deaths” in “confrontations” with the police that the Chilean government portrayed them to be. Instead, the activists offered an alternative narrative and claimed that the deaths were deliberate assassinations. This narrative fits with the beliefs of many activists, who experienced such confrontations with the police and expressed that “The police are out there to kill” (Interview C-57). As the cases involved police officers supervised by the Ministry of Defense, the trials did not take place in ordinary courts but in military tribunals. In the case of Alex Lemún, these proceedings ended in the dismissal of charges, leaving the family and the entire Mapuche movement disillusioned. The resulting lack of confidence in fair proceedings later led activists to keep Matías’ body hidden for the government during the first few days after his death. Activists wanted to protect the body against feared tampering with the evidence that the police bullet had come from behind. The activists thus deeply distrusted the state’s forensic employees. Such incidents transform into major junctures for Mapuche activists
to mobilize to be recognized as victims in criminal procedures. The death of Matías Catrileo garnered immediate solidarity from a wide variety of people, who all came to Temuco to attend his funeral. Demonstrations were organized to condemn his death and call for an investigation and punishment of the responsible policeman. Spray-painting in the streets of Temuco called the policeman a “murderer” [*asesino*] and decried “state terrorism” (Field notes, April 2009).

For a long time, the police argued that they had killed Matías while defending themselves against an attack in which activists were burning haystacks on the land of a private landowner. In June 2009, the trial took place against the police officer whose bullet was responsible for the death of Matías Catrileo. Evidence confirmed that the bullet had hit Matías in the back, and the prosecutors charged the police officer with “unnecessary violence resulting in death” and asked for 10 years imprisonment. The judges of the military tribunal in Valdivia convicted the carabinero responsible for the death of Matías Catrileo, but sentenced him to two years, a sentence he could serve by reporting regularly to the police (La Tercera 2010). The tribunal argued that the police officer had acted in “legitimate defense.” The sentence was a disappointment for the friends and family of Matías, and a radio host declared:

*Acá hay un mensaje a la policía: asesinen tranquilamente por la espalda, porque les van a poder aplicar estas atenuantes e irse a la casa tranquilamente a dormir mientras una familia tiene a su hijo asesinado.*
[Here is a message for the police: kill tranquilly in the back, because they will apply mitigations and you will be able to go home and sleep tranquilly while a family has their child assassinated.]
(Radio Cooperativa in: La Tercera 2010)

These are the rare instances in which Mapuche activists have officially taken on the role of victims in criminal proceedings. Otherwise, however, their claims of victimhood have not been “honored.” For example, violence during raids in communities is hardly subjected to the scrutiny of courts. The most frequent constellation in criminal cases in relation to the “Mapuche conflict” is that Mapuche activists are defendants and landowners occupy the institutionally recognized role as “victims.” In the rest of this section I therefore focus upon an analysis of landowners who mobilize as victims and Mapuche activists who mobilize as prisoner supporters.

Just as in Spain, in Chile the criminal proceedings in relation to the Mapuche conflict have been the subject of criticisms by all parties involved. An example is the all-round dissatisfaction regarding the frequent acquittal or partial acquittal of many Mapuche activists, sometimes after having spent more than a year in pre-trial detention. Such cases naturally upset the defendants. In addition, an acquittal implies that no one has been convicted for a presumably serious crime, which inevitably dissatisfies the victims. While it is quite common in Chile for cases to be shelved, when they are taken to trial there is a conviction in ninety percent of the cases (Ministerio Público 2004:19). According to one of the defense lawyers, however, in cases against Mapuche activists, the acquittal rate has been higher (Interview C-48). Particularly
relevant also, are the partial acquittals. As LeBonniec (2008:2) points out, often Mapuche activists were acquitted of the heavier charges that had provoked the main stigmatizing headlines after their arrests and then got convicted on smaller charges, such as arms possession or threats, instead of the bigger charges like arson and terrorist organization. For example, the lonkos of Traiguén were initially charged with terrorist arson and later only convicted for terrorist threats. Also Victor Ancalaf was initially accused of three arsons. After the appeal, he was only found guilty of one of them (these criminal cases will be discussed in more depth in the next chapter). While such (partial) acquittals may be interpreted as an indication of a well-functioning and independent judiciary scrutinizing cases, their frequency also throws in doubt the legitimacy of the initiation of such criminal investigations. Such acquittals have therefore also raised questions about the validity of the criminal proceedings (HRW 2004; Guerra 2010; Sepúlveda 2011).

In the meta-conflict in the criminal justice arena, those mobilizing as “victims” and “prisoner supporters” propose alternative narratives as they push the state to adopt or reject certain representations of reality and the narrative that condemns and places blame. This battle of interpretation addresses the boundary between the political arena and the criminal justice arena and the meaning of the different actions and identities of the actors involved in the “Mapuche conflict.” For example, while indicted Mapuche activists claim to be political prisoners, landowners vehemently reject this notion. “Not one Mapuche is in prison for having
done a demonstration or for having sent a letter. They have all used violence, not just expressed ideas,” claimed the general manager of the CORMA in the 9th region (Interview C-35).

The dichotomous understanding (victim advocates versus prisoner supporters) of mobilization and discursive action in the criminal justice arena corresponds to the fixed roles allotted to defendants and victims in the structure and logic of criminal law. Criminal trials can thus induce an “identification split” in which actors align themselves according to these roles, fomenting existing processes of polarization.

**Landowners mobilize as victims: “This is the Far West”**

Private landowner Juan Agustín Figueroa spoke these words in 2003 when he referred to the rural Araucanía as the “Far West” and threatened to take the law in his own hands, making explicit reference to the social contract, in which citizens give up their right to self-defense and hand it over to the state. Spoken by a prestigious lawyer, a member of the Constitutional Court, these words carry weight:

*En una sociedad los ciudadanos renuncian a su derecho de la autodefensa, porque se la entregan al Estado… Sin embargo, cuando éste en el hecho no me la brinda y me deja en una situación de indefensión, indirectamente me está invitando a la justicia por mano propia.*
Collective mobilization of forestry companies and private landowners as the “victims” in the Mapuche conflict gained force throughout the 1990s. Since the early 2000s they have become more effective in getting their definition of the situation (“this is terrorism”) accepted in criminal prosecutions, in which they often actively participated as private complainants.

In this section, I focus specifically on the way in which landowners tried to engage the criminal justice system. Landowners are, however, not only concerned with punishment and have responded to the challenges posed by Mapuche protests in many different ways. In order to protect their property, they have hired private security companies, bought guns, and arranged for surveillance on their lands, sometimes in coordination with neighbors. They have asked for police protection and on occasion have founded what they call “defense” committees (and Mapuche activists call “paramilitaries”). In addition to concerns about proper protection, landowners have expressed worries about negative publicity (in the case of companies) or their good name (in the case of private landowners). Forestry companies have worked hard to maintain good public relations and keep the region interesting for investments as they faced the difficult task of countering the public image of corporations and landowners as greedy and powerful entities facing the “poor and oppressed indigenous people.” Companies have set up so-called “good neighbors” programs designed to create good relations with adjacent Mapuche
communities, for example by providing them with work, scholarships, and other services. Finally, landowners have negotiated with Mapuche communities about land transfers, either officially and in dialogue with CONADI or more informally. Landowner mobilization as “victims” in the criminal justice arena should thus always be understood within the context of this broader range of interactions between landowners, the state, and Mapuche communities.

For this description of landowner mobilization, I relied on interviews with representatives of almost all forestry companies in the region, large and small. I also interviewed one private farmer and lawyers representing private farmers and forestry companies. In addition, I used information provided in witness testimonies during trials as well as documentation from business associations such as the forestry council CORMA. I describe the dynamics of victim mobilization by Chilean landowners using the four aspects described in Chapter 1.

1. Self-identification as victim and creation of alliances
2. Declaration of a common problem
3. Demanding protection from the state: claiming the rechtsstaat
4. Defining actions as criminal – employing criminal law

1. Self-identification as victim and creation of alliances

Landowners claim victimhood and actively create alliances with other landowners to construct a specific image of the “landowner as victim.” Unlike the outright denial of a political conflict in
Spain, Chilean landowners generally recognize the “Mapuche conflict” as a political conflict, and some also acknowledge that the demands have some legitimacy. However, they sweep away any notion that the current landowners could be (partially) blamed and portray themselves exclusively as victims of the situation. “It is a historical problem, and the forestry companies have nothing to do with it,” said the regional manager of the CORMA in 2003 (Interview C-35).

Typical is also the following declaration issued by Forestal Mininco in reaction to the land takeover and subsequent confrontations in the estate Santa Rosa de Colpi:

*Hacemos un llamado a la opinión pública a no dejarse confundir por versiones e imágenes falsas y tendenciosas acerca de lo ocurrido, que pretenden legitimar acciones de violencia y terrorismo. Los graves problemas sociales que aquejan a los habitantes de estas zonas, son muy anteriores a la presencia en ellas de empresas forestales. Las reivindicaciones históricas de tierras o los problemas sociales, por serios que éstos sean, no pueden justificar el uso de medios de presión ilegales y violentos, si queremos vivir en una sociedad civilizada y democrática.*

We call for the public opinion to not be confused by false and tendentious versions and images about what has happened which have the intention of legitimizing actions of violence and terrorism. The grave social problems that exist among the inhabitants of this region date very much from before the presence of the forestry companies in the region. The historical claims of lands or the social problems, however serious they are, cannot justify the use of illegal and violent means of pressure if we want to live in a civilized and democratic society. (Mininco 1999c)

In their representation as victims, companies reject their image as powerful actors that Mapuche activists paint. The general manager of the CORMA in the 9th region said: “we are weak! If we had power, we would not have been forced to sell things. Then there would not have been arsons” (Interview C-35). The chief of public relations from Forestal Mininco agreed that they are weak: “they are threatening us with a match” (Interview C-17). He lamented that Mininco did not have much room to maneuver, as he indicated they have to compete on the market. Whereas Mapuche activists argue that landowners have consciously bought lands they
knew belonged to the Mapuches, the chief of public relations talked about “the process” in which Mininco acquired almost 400,000 hectares as an automatic development that was simply the (natural) “consequence” of Decreto Ley 701, the law enacted in 1974 to promote forestry (Interview C-17). In his account, he almost made Forestal Mininco disappear as an actor, explaining that it was all a “sociological phenomenon” because of the reforestation from 1975 onwards. He empathized with the Mapuches when he said: “their lives were changed without asking.” As a forestry company, however, he did not see any responsibility: “What does a forestry company have to do with a phenomenon from 1880?” He pointed out that Mapuches do not want to change. “They want the fruits of development, but without working for it. Nobody will admit it, but if you look, that is the truth.” In contrast to the small-scale and subsistence Mapuche agriculture, landowners project themselves as entrepreneurs and important forces in the economic development of Chile.

During the 1990s forestry companies undertook collective action in order to bring their problems with Mapuche mobilizations to the attention of the government and the larger public. Still, coordination does not mean that there is a single policy. The president of the CORMA in the 8th region, Jorge Cerón [sic], emphasized that “every company applies their own rules, according to what the shareholders of the company estimate as being convenient, who are the ones that decide how to administer their patrimony and how to resolve their problems” (Comisión Especial 2000:24).
While corporate landowners faced Mapuche mobilizations during the 1990s and united in response to their protests, during the 2000s, as the attacks on private landowners became more frequent, there were also collective actions on their behalf. In 2001, the SOFO [Sociedad de Fomento Agrícola de Temuco, Society in Promotion of Agriculture in Temuco, founded in 1918] distributed a manual among farmers giving instructions about how to act in the event of a land occupation or another threat. It included information about how to file a criminal complaint, listing names and directions of prosecutors and providing information about the rights of victims and the possibility to ask for police protection (Barria 2001). In response to the attack on the house of private landowner Luchsinger, the “Consorcio Agrícola del Sur” [Agricultural Consortium of the South] even offered compensation to the person that found the perpetrators (Terra.cl 2005). The arson of Luchsinger’s house in 2006 also triggered several members of the farmer’s organization SOFO to support each other by setting up a solidarity fund for legal assistance. The director of the SOFO explained this sign of support, indicating that there was a fear among landowners that “I could be next” (Interview C-55). Identification with the “victim” thus created the basis for fear of victimization and solidarity. Still, according to the SOFO director, the number of people supporting the legal fund for victims of attacks was not very high, even though there were people that made donations although they did not personally experience problems with Mapuche demands. The SOFO lawyer similarly told me that by 2009 only 65 farmers were member of the fund, whereas the SOFO had 700 members (Interview C-42).
The SOFO, CORMA, and other industry associations frequently cooperated in their preparation of common declarations, calling upon the government to intervene in the conflict (CORMA 1999c; CORMA 2002a; CORMA, no date a; Public Declaration 2001; Public Declaration 2002). Indeed, having united as one collective actor facing one enemy, landowners were able to communicate as “victims” and set up a coordinated media strategy, develop position papers about the best communication strategy in response to attacks, and critically analyze past practices which might have harmed the sector’s image more than necessary (CORMA, no date b).

Apart from public declarations and media work, there has been an active lobby to congressmen and local governors. For example, the manager of the CORMA had meetings with the governors of Cautín and Malleco as well as with the sub-secretary of Mideplan to express their concern and press them for actions. Affected landowners or their lawyers have further met with senators and the Minister of Internal Affairs (El Mercurio 2008) and cooperated with reports for Senate investigative committees. In addition, a coalition of corporate associations initiated a scientific investigation about the different “perspectives on peace” from actors involved in the conflict (Casas 2009).

104 Apart from the CORMA and the SOFO, other regular subscribers of common declarations are the Cámara Chilena de Construcción, the Cámara de Comercio, Servicios y Turismo, the Asociación Gremial de Dueños de Camiones de Cautín, and the Corporación de Energía y Desarrollo, Confederación de la Producción y el Comercio and the Asociación de Industriales de Malleco y Cautín.
Despite these efforts to unite in a common victimhood, collective mobilization alternates with efforts to emphasize the differences between the different kinds of landowners. Private landowners have emphasized that they have always had good relations with adjacent Mapuche communities, in contrast to the forestry companies. Smaller forestry companies have underscored that they are not the big transnational companies which were the focal point of Mapuche protests during the 1990s. A forestry engineer from a big forestry company, however, traced the problem back to agriculture: “This is a problem of the last fifty years with agriculture. It is not a problem of forestry” (Interview C-34). An example of such boundary-drawing by landowners was visible in a session of a special parliamentary committee on citizen security. The daughter of one of the often-attacked private farmers said: “We are not terratenientes [landowners]. We are not latifundistas [owners of large estates]. That is a lie. [...] We work hard for what we have; no one has ever just given anything to us.” (Comisión Seguridad Ciudadana 2009). She attempted to counter the Mapuche legitimizations of the attacks leveled against her family and their property, rejecting their ascribed identity as rich and powerful landowners and instead emphasizing their hard work. Solidarity thus has clear limits. Indeed, a private landowner told me that it was like a disease, because when he experienced problems with surrounding Mapuche communities, other private farmers did not want to associate with him anymore as they were scared to be next (Interview C-37).

Landowners thus claim to be victims. And while they are not homogeneous, and keep emphasizing differences between them, they also do recognize each other in a common
victimhood, forming alliances, cooperating in lobby work and public declarations and interpreting separate experiences as part of a meaningful whole in the context of the “Mapuche conflict.”

2. Declaration of a common problem

Landowners claim that the Mapuche conflict constitutes the following threats: forced land transfers, economic stagnation, insurance troubles, loss of investments, and a threat to lives. A collective declaration in October 2008, for example, focused its attention on the decrease in investments in the region.

*Sin embargo cualquier emprendimiento se ve afectado por el clima de incertidumbre y desconfianza. Ante los hechos de violencia reiterados no se ha podido emprender por falta de seguridad y acoso permanente. Todo ello ha redundado en desempleo y bajo crecimiento. Sabemos que la Región de La Araucanía ha visto mermada considerablemente la inversión. La inversión extranjera es nula y la inversión nacional ha disminuido en los últimos años.*

Any entrepreneurship is affected by the climate of uncertainty and lack of confidence. Facing the facts of reiterated violence, it has not been possible to undertake investments because of a lack of security and permanent hassle. All this has led to unemployment and low growth. We know that the region of the Araucania has seen a considerable decrease in investments. Foreign investment is zero and the national investment has decreased in the last years. (CPC 2008)

Landowners have strategically drawn on the human rights discourse, claiming that they too have human rights (see also Richards 2010:80). They criticize the way in which Mapuche activists seem to have appropriated human rights as a concept exclusively applicable to Mapuches and Mapuche prisoners. For example, when the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, visited Chile in 2009, a coalition of
landowners sent him a report in which they listed the violations of their human rights as they perceived his focus on the Mapuches to be one-sided (Interview C-43).

Thus, landowners claim that they want to live in peace and tranquility to be able to continue their “entrepreneurship” (CPC October 2008). While landowners have sometimes united under one umbrella, there are clear distinctions in the kind of harm that private landowners and forestry companies suffer. Arson can be a nuisance for forestry companies, but for private landowners it can mean that 100% of their property is wiped out (Interview C-35). The lawyer for SOFO, representing several of the private landowners, further emphasized that the negative portrayal of troubled landowners in national media is what often hurts them the most. He called it the “murder of their image” as fellow farmers tend to think that the ones that get into trouble are treating Mapuches badly and are only interested in profit (Interview C-42).

Another important difference is that while forestry companies simply hire private security employees in order to guard their plantations, private landowners are often living on their property and some have claimed to suffer from daily harassment. One farmer family, for example, has been living with constant protection by police, who bring the children to school and pick them up again. The children have been threatened and harassed and their father and grandfather were called “murderers” in graffiti in the village. At one point, they found animals cut open on the road. During a session in a parliamentary commission, the family members expressed that they felt this was purely to cause fear and destroy them as persons. Their car
was set on fire when the landowner was still in it. They felt that they have not deserved such treatment. “We haven’t damaged anyone, not nature, not anyone. [...] What have we done to the people that are attacking us?” (Comisión Seguridad Ciudadana 2009).

Thus, landowners lift their own personal experiences out of the individual sphere when they declare that they suffer a common problem due to the “Mapuche conflict,” emphasizing the economic losses, the lack of investment, and the difficulty to find insurance. In addition to claiming such collective problems, private landowners call attention to the daily harassment they suffer in which they tend to portray themselves as scapegoats of a larger problem.

3. Demanding protection from the state: Claiming the rechtsstaat

Landowners have demanded state intervention in order to deal effectively with the common problem they are experiencing. They claim that not enough has been done to protect them and punish the perpetrators of the crimes. Landowners refer to the rechtsstaat in order to demand respect for their property and argue that the state has to deliver order. The president of the CORMA in the 8th region explained that forestry companies need a stable and secure environment: “forestry activity is long term and requires basic components such as equilibrium and maximal tranquility that guarantee the strong investment that they are making” (in: Comisión Especial 2000:24).
In a remarkable similarity with the complaints in Spain, landowners have criticized the lack of attention from government officials as well as the low conviction rate. Farmers report that they feel unprotected. Even farmers who have 24/7 protection have suffered attacks; it was even reported that some pay the police for fuel for their cars to come to protect them (Interview C-55). Facing the lack of protection by the state, farmers have warned the government. Manuel Riesco, president of the Consorcio Agrícola del Sur, said after the attack on Jorge Luchsinger’s house on 9 June 2005: “Si el Gobierno no actúa, vamos a tener que actuar nosotros para defendernos.” [If the government doesn’t act, we will have to act to defend ourselves] (Cayuqueo 2005b). A private landowner complained that when he visited the local governors they played down the problem, saying that it concerned ordinary criminals and isolated cases and that they could only offer him police protection. He experienced twenty-five attacks of theft and arson, but there had not been one arrest in his case (Comisión Seguridad Ciudadana 2009).

Indeed, many landowners signaled that there had been too few convictions. The lawyer for SOFO said that there had been more than fifty criminal complaints filed by landowners between 2005 and 2009 and only four convictions and a couple of “alternative solutions” (extrajudicial settlements) (Interview C-42). After internal deliberation, a Forestal Mininco representative was not even allowed to give me the number of criminal complaints they had filed during the past years, because the results were “so bad” (telephone conversation May 2009). Many criminal cases thus have gone unresolved, a situation that was recognized in 2003
in government statistics in relation to “Mapuche conflict” cases (Comisión de Constitución 2003:76). Frustrated with the inaction of the government, a forestry company in Galvarino even took the initiative to identify the perpetrators of arsons, felling of trees, road blockades, and occupations, claiming to be able to prove the participation of the alleged suspects with documents that were registered with the carabineros of Galvarino (CORMA 2001).

According to landowners, the lack of convictions is partially due to the fact that actions are done during the night, executed by highly prepared criminals, and because they have their face covered [encapuchados] and threaten potential witnesses. At the same time, landowners criticize criminal procedure, claiming that the standards for sufficient proof are too high and that the system gives too many rights to defendants. They also said that too little resources were dedicated to solving these crimes, arguing that there was not enough political will from “Santiago” to deal with these issues (Interviews C-42/44/54/55).

Landowners thus explicitly call upon the state’s obligations as a quid pro quo in the social contract. Private landowner Juan Agustín Figueroa argued that landowners lack the necessary protection which they deserve as citizens of Chile (Cayuqueo 2003). The rule of law is thus interpreted as an obligation of the state to protect citizens, corporations, and their property. “We comply with all the labor and environmental laws. The state has to guarantee us the right to private property,” claimed the manager of one of the bigger forestry companies (Interview C-34). Landowners continually emphasized the importance of the law, placing the criminal law
clearly within the larger framework of the entire legal system and its protection of private property. “We want the law to work,” said the manager of one of the smaller Chilean forestry companies. “In [sub-province] Ercilla there was a claim without foundation. We bought the land legally. They [a Mapuche community] demanded the lands, but they didn’t show any Título de Merced. It doesn’t work that way. As a company we want the law to work” (Interview C-33).

4. Defining actions as criminal – employing criminal law

Landowners have taken up the vocabulary of criminal law and moved into the criminal justice arena. They define events as crimes, file criminal complaints, cooperate with law enforcement, and propose an alternative narrative about the nature and the perpetrators of the crimes. While many landowners have done so, some private landowners as well as bigger forestry companies have made the conscious decision not to denounce crimes or file complaints. They have decided to maintain a low profile, not to gain any unwanted (negative) publicity, to either accept the crimes as a given by-product of the situation or respond in a non-penalized way.

Since 1997, landowners have become an important voice in the criminal justice arena. They have criticized the state when it advances a de-contextualized narrative and emphasize that attacks on their properties should not be viewed as isolated incidents. Instead, they argue, the “Mapuche conflict” should be in the foreground as the relevant context. One landowner, for example, expressed his frustration that the government continued to treat the attacks as isolated events, each perpetrated by simple criminals. He wished the government would
acknowledge his proposed image of an organized commando that perpetrates each of the attacks. He asked the government to acknowledge the bigger problem that he was facing: a continued series of attacks that was not likely to stop (Comisión Seguridad Ciudadana 2009).

Landowners have brought such a re-contextualized perspective into the courtroom, for example, when the executive vice-president of the CORMA, Juan Correa Bulnes, was a witness for the prosecutor and testified as follows:

There was the idea that [the crimes] were separate facts. Now, we cause public alarm by saying that there were 600 of those crimes. And now we have described them in detail, so that the government can see how many crimes there are. We want attention for the truth, to enable unified action. (Trial Lonkos of Traiguén, Field notes, April 2003)

While landowners generally recognized the Mapuche conflict as a political conflict, they stressed that this does not mean that the protest actions are somehow legitimate or actually represent the legitimate Mapuche demands. For example, one private landowner said the name “Mapuche conflict” is a misnomer. “It is pure terrorist delinquency” (Interview C-37). Therefore, they emphasized that specific individuals were responsible for the criminal activity. For example, the chief of public relations of Forestal Mininco said that they “never had problems in [estate] San Jorge until the Ancalaf family moved there. There are people who are experts in creating chaos” (Interview C-17). Thus, while recognizing the “Mapuche conflict” as the relevant context for interpreting and connecting criminal events, as true “victims”
landowners routinely claim their innocence and rejected any justification for the attacks against them. They point to the state as the actor that is responsible for the conflict situation.

The re-contextualization of single events as part of an organization and coordination of attacks led landowners to define the pattern of actions as terrorism.

Los actos de violencia no son “situaciones aisladas”, la ciudadanía ha sido testigo del nivel de complejidad, de organización y de aumento en la escalada de violencia que ha recrudecido en los últimos tiempos. Esto corresponde a un plan de largo plazo con connotaciones ideológicas de índole terrorista.

[The acts of violence are not “isolated situations”; the citizens have been witnesses to the level of complexity, of organization and the recent escalation of violence. This corresponds to a long term plan with ideological connotations of terrorist nature.] (CPC 2008, emphasis added by author)

Landowners therefore lobbied for the use of the Anti-Terrorism Law. For example, on 14 December 2001, the president of the CORMA in the 9th region wrote a letter to the provincial governor of the province Cautín asking him to apply the Law on State Security or the Anti-Terrorism Law regarding the violent acts in Mapuche conflict. On 10 March 2002, the corporate associations published a two-page advertisement in the newspaper El Mercurio in which they claimed that “terrorism is expanding in the sectors in the Araucanía region” and demanded state intervention using the Law on State Security and the Anti-Terrorism Law (Toledo 2007:282). Indeed, after this advertisement the Anti-Terrorism Law was used for the first time. Provincial governors and regional governors in the 8th and 9th region requested the Anti-Terrorism Law on twelve occasions between 2002 and 2003 (Comisión de Constitución 2003:76). In order to defend the use of the terrorism label, landowners advocated the point of
view that not only threats to human beings but also material destruction should be subject to terrorism laws (Interview C-55).

Landowners have thus actively pushed for the definition of events as “crimes.” They moved into the criminal justice arena to deal with the harm that they experienced. Some believed that criminal prosecutions would be effective in reducing violence. For example, in 2003 several landowners expressed their conviction that the detention of Mapuche activist Victor Ancalaf was the reason why mobilizations in the Collipulli area (in the 9th region) had decreased significantly. Also, in an interview in 2003 the manager from the CORMA in the 9th region was convinced that the penal approach had the desired effect as he observed less arsons and attributed this to the use of harsher laws (Interview C-35). Thus, “detentions work!” was the motto. Landowners therefore actively assisted prosecutors and the police in the investigation of events and also participated as “private accusers” during trials. Forestal Mininco is one of the forestry companies that consistently participate as a private accuser during all trials in which Mininco is an affected party. They have provided maximum assistance to the process of fact-finding and judicial investigation. One of the duties of their private security personnel, for example, was to make pictures and videos during occupations or incidents and provide witness testimony (Interview C-18).

While some thus may have been confident (for a while) that criminal prosecutions would effectively solve their problems, many landowners continued to complain about a lack of effort
and cooperation from authorities. Indeed, it seemed that at the time of my fieldwork in 2009, landowners were less confident that the state would engage in criminal prosecutions and secure convictions than in 2003. Interviewees in 2009 expressed a perception of continued impunity of illegal actions by Mapuche activists. The discontent with the results of the criminal justice system even led to an official complaint filed in 2006 by the senator of a right-wing political party to remove the regional prosecutor of La Araucanía because of a lack of results. “I am tired of filing criminal complaints” said the owner of several plantations in 2009 (Interview C-54). The only reason that kept him filing complaints was that the insurance company required him to do so. Indeed, some farmers decided to retreat from the criminal justice arena and withdrew from cooperation with law enforcers. The director of the SOFO told me that the criminal complaints that farmers had filed had had brought so few results that many of them had decided not to file complaints anymore (Interview C-55).

While some landowners thus retreated from the criminal justice arena, others emphasized the importance of continuing to file complaints. A senior lawyer who represented Forestal Mininco in its trials estimated that at least eighty percent of the complaints that he filed were being archived without any results (Interview C-44). He did not, however, see this as a huge failure. For him, the most important thing was to keep the “system functioning.” Thus, the company continued to file complaints: it was not so much the punishment that was important; it was the process of labeling that had to continue. Finally, there were landowners who did not have confidence in the authorities or the penal solution but continued their engagement in the
criminal justice arena as a default option. For example, the lawyer for SOFO, filing criminal complaints on behalf of farmers, acknowledged that the real solution cannot and will not be found in criminal prosecutions. “The solution is not in the courtrooms. The Mapuche problem is a sociopolitical problem. But while the state is not solving it, we have to continue reacting” (Interview C-42). So litigation continued.

In response to attacks on their property, landowners thus have mobilized as “victims” and effectively taken up and received the role of victims in criminal proceedings. On various occasions, they united and declared their separate experiences as part of a common problem. They firmly defined the attacks on their property as crimes and demanded prosecution. Landowners thus moved into the criminal justice arena and formed a strong voice in the meta-conflict. They have strongly criticized the state for the low conviction rate, for not taking the issue seriously, and for failing to offer adequate protection. Frustrated with the state’s tendency to downplay the problem and deal with separate events in isolation, landowners have further pushed the prosecutors to adopt a re-contextualized narrative in which separate events are connected and understood as “terrorism.” Despite an increase in criminal prosecutions during the 2000s, however, landowners have continued to criticize the state for the meager results of prosecutions, and by 2009 some landowners had retreated from the criminal justice arena due to this frustration. Others have emphasized either the autonomous importance of labeling and condemning criminal events or the lack of alternative ways to respond.
Prisoner support mobilization in the Mapuche movement

The voice of “victim” landowners thus pushes the state to take their experiences seriously and respond with a “mano dura” [strong hand or iron fist] to attacks on their property. This is, however, not the only voice in the criminal justice arena as it is countered by the voice of prisoner supporters who propose an alternative reading of events. In response to the criminal prosecutions of Mapuche activists, prisoner supporters have rushed into the criminal justice arena to challenge the state’s definition of the situation, assist defendants in the practicalities of standing trial, and raise awareness in the larger public about the claimed political nature of the criminal proceedings. Mapuche activists stand out in their disorganized though widespread support for their prisoners, as well as in their hesitancy to fundamentally challenge the Chilean state, as most criticism stays within the liberal legalist framework.

This description of prisoner support mobilization is based on in-depth interviews and conversations with more than twenty defendants and many supporters and activists in the Mapuche movement. I have selected defendants from some of the major prosecutions as well as some smaller criminal cases. I have made the pool of interviewees as diverse as possible, selecting defendants belonging to the Mapuche organizations CAM and CTT as well as non-affiliated defendants. I have included rural older community members and young urban Chilean sympathizers and everything in between. In addition, I have relied upon the information disseminated on websites and e-mail lists.
I will describe the focus and activities of the prisoner support groups using the four aspects described in Chapter 1.

1. Creation of a prisoner support group: a call for solidarity

2. Criticisms within the framework of liberal legalism: de-legitimization of the state

3. Bringing the “political” back in: identification as a political prisoner

4. Persuading the public of the political definition: changing the impact of criminal prosecutions

1. Creation of a prisoner support group: A call for solidarity

There are a variety of prisoner support groups within and outside of the Mapuche movement, and their names and specific stances have changed over time. Some groups specifically chose to support only CAM members; others have provided broader support to all defendants related to the Mapuche movement. Regardless such differences, prisoner supporters generally attempt to reduce the financial and psychological cost of repression. The vicious effects of the hassle with an investigation, a trial, and prison can lead to expenses for a lawyer and such banal issues as marital problems. Support work varies from visiting prisoners, attending trials, and assisting the family with the harvest to organizing demonstrations. During the 2010 hunger strike, some activists worked full time as “spokespersons” of the prisoners. Some Mapuche students set up regular visits to prisoners in order to learn from them. It is their way of educating themselves about the conflict, about the leaders, from the people who have experienced it. They view the
prisoners as experts, as people who know, as people who have intimate knowledge of what is going on. In many instances, activists and also fellow community members try to attend trials in which a Mapuche activist is prosecuted and honoring ceremonies are held yearly in the memory of young Mapuche activists that have been killed in police confrontations.

The solidarity is based on the claimed common, reified, and generalized Mapuche identity. “It is a familiar fight, when a Mapuche struggles for his people,” said one activist (Interview C-68). Those inside prison are perceived to suffer for those outside. Identification with the defendant reproduces the notion that you could be in his or her place. “They apply the law to us,” said an activist who herself had not been prosecuted (Field notes, April 2009). This shifts the emphasis from an alleged crime to the shared identity. Compassion and sacrifice are important to activists, for example to a young student who told me about his visits to prisoners: “At times I get up at five in the morning to walk two hours and catch the bus to Angol to visit my brothers.” It is a sacrifice, but for me it is enriching. I am supporting my brothers,” he said with tears in his eyes (Interview C-67). Mapuche activists thus strongly identify with experiences of repression affecting other Mapuches. A single confrontation involving police violence against one Mapuche in the Temucuicui community (a Mapuche community in the 9th region) is thus interpreted as police violence against the Mapuche “people.” Similarly, they interpret a specific fight for land in the area Los Laureles as a struggle about the Mapuche “territory.” Events are

105 Hermanos [brothers] is a common way to indicate fellow Mapuches. Similar to African Americans in the United States, Mapuches often refer to each other as brothers, or peñi in Mapuzugun, alternatively sisters or lamngen.
interpreted in the context of the Mapuche struggle and the historical and continuous
dispossession of and violence against the Mapuche people.

Mapuche activists tend to have little confidence in the criminal justice system. They perceive a lack of access to the legal system, distrust the public defenders, and believe that the legal system does not work in favor of Mapuches. Confidence in the state is so low that Mapuche activists generally do not believe any of the allegations made against fellow Mapuche activists during criminal investigations. As I will discuss in more depth below, this means that the authority of the state to yield credible evidence is at stake. A survey conducted in 1999 reported that only 18% of Mapuches supported the government and only 25% had confidence in the government. The support for and confidence in the national parliament were even lower, both hardly reaching 10%. In addition, only 13% of Mapuches had confidence in the judicial powers (CERC in: Lavanchy 2003:13). Historian Lavanchy concluded that the state had lost its legitimacy in the eyes of the Mapuches in general (not just the activists) (2003:13).

This lack of confidence makes it impossible for the rule of law to perform its legitimizing function in court. Activists refer to an unfavorable court decision against a Mapuche land claim as proof of the way in which the system works against Mapuches, providing grounds for acts of civil disobedience. Similarly, whereas an acquittal of a Mapuche activist is understood as proof of “unjustified persecution” by prosecutors, a conviction is interpreted merely as the affirmation that the trial was rigged and that Mapuches are not granted equal rights in courts.
2. Criticisms within the framework of liberal legalism: De-legitimization of the state

Much of the prisoner support work in the Mapuche movement sticks within the framework of liberal legalism and aims to delegitimize the state by pointing out the ways in which it does not adhere to the rule of law. Liberal supporters are concerned about human rights violations, such as the violation of the presumption of innocence, a lack of due process, and incidents of torture. While the previous chapters described that lawyers for ETA militants refused to engage in criminal defense, in Chile most criminal cases of Mapuche activists are defended within the framework of liberal legalism, which emphasizes the presumption of innocence and the fact that the prosecutor has to prove beyond reasonable doubt the participation of the defendant.

Just as in Spain, most human rights organizations also adhere to the liberal legalist framework. For example, I asked one of the lawyers at the Observatorio Ciudadano about criminal cases against Mapuche activists. He referred me to the most famous cases, on which I already had information, and I continued to ask him if he could help me to get access to other criminal cases that had taken place. He told me that “those are not relevant, because there are no issues of human rights involved there” (Field notes, April 2009). I had a hard time getting him to at least listen to my project. For him it was really off his radar once there were no “human rights violations” at stake in the strict sense of violation of (international) human rights law and the narrow legalistic definitions of a “fair trial” and “due process.”
The demands in the 2010 hunger strike similarly reflected this “rule of law” basis of grievances, when the activists argued that the anti-terrorism law was disproportionate and criticized that some Mapuche activists faced charges in both military courts and civilian courts (violating the ne bis in idem principle, which prohibits a person from being tried twice for the same offense). In this strike, activists reached out to official organs. For example, CAM leader Hector Llaitul wrote a letter from prison to Secretary General of the UN Ban Ki Moon asking for his intervention (Radio UChile 2010).  

Many international human rights organizations have spoken out about criminal prosecutions in the Mapuche conflict and the use of anti-terrorism laws in particular, such as Amnesty International, Human Rights Watch, the International Federation for Human Rights, and the UN Special Rapporteur on the Rights of Indigenous Peoples. Their reports and recommendations have had important leverage in the public debate in Chile as they were widely discussed and cited.

### 3. Bringing the “political” back in: Becoming a “political” prisoner

“Have you heard the radio? This morning there was a search in Tirúa, and they detained eleven people!” In April 2009, I accompanied Juan to one of the Mapuche communities. The whole day the events in Tirúa (city in the 8th region) were the topic of conversation. Everyone in that particular Mapuche community was involved with the news and felt for their “brothers” who

---

106 After almost three months they stopped the strike, arguing that “the struggle needed them to be alive” (ConceTV 2010).
had “fallen.” There was no mention of what the charges against them might be or whether the
detainees might have been guilty of these charges. As in the usual conversations between
activists, that was virtually irrelevant. The detentions were simply viewed as one more
repressive action against their struggle and their people.

Mapuche activists claim their prisoners to be “political” prisoners. Some organizations provide
specific descriptions of what that means:

Para nuestra Organización, Preso Político Mapuche es todo aquel Mapuche privado de libertad y/o
en proceso, producto de su participación en acciones que apunten a la reconstrucción del Pueblo-
Nación Mapuche, entendiendo por tal los procesos de recuperación de tierras y/o ejerciendo Control
Territorial sobre predios recuperados, acciones de resistencia ante la represión policial, así como las
movilizaciones que apunten a la reivindicación de los Derechos Políticos del Pueblo Mapuche.[...] Con
los anteriores criterios, claramente nuestros hermanos no son presos comunes o delincuentes como
el estado opresor los ha tratado.

[For our organization, a Mapuche Political Prisoner is any Mapuche whose liberty is taken away, or is
in that process, as a product of his/her participation in actions that lead to the reconstruction of the
Pueblo-Nación Mapuche [People-Nation Mapuche], understanding as such the processes of
recuperation of lands and/or execution of Territorial Control over recuperated lands, actions of
resistance against police repression, as well as mobilizations that lead to the recuperation of
Political Rights of the Mapuche People. [...] With the aforementioned criteria, clearly our brothers
are not common prisoners or criminals, as the oppressive state has treated them.] (Meli Witran
Mapu 2011)

Contrary to such claims by activists, the Chilean state categorically rejects all suggestions about
“political” prisoners. In her visit to the Netherlands, President Michelle Bachelet officially
declared that in Chile there are no Mapuche political prisoners. “No one is imprisoned [in Chile]
because of a specific ideology or because of belonging to an original ethnic group [etnia]” (cited
in: Silva 2009). She thus specifically engaged in the meta-conflict in the criminal justice arena
about the labels used to define events, victims, and perpetrators in the criminal cases in the Mapuche conflict.

In their identification of Mapuche activists as “political” prisoners, supporters seldom directly challenge the criminal definitions imposed by the state. Instead, they focus their attention on the trajectory of state repression. For a long time, Mapuche activists denied responsibility for their covert actions. This meant that they made competing truth claims, not competing moral claims regarding the prosecutor’s charges. A former CAM activist explained this choice as a consequence of the fact that the Mapuche people were not yet “ready” for such covert “violent” actions and would not have accepted them (Interview C-28). Often, Mapuche activists entirely ignored the underlying accusation and focused on what they viewed as illegitimate repression. For example, in our conversation about an incident in which a security guard got burned (Case of attempted homicide 2001), the defendant told me that “no one ever asked me whether I did it or not.” He was not sure whether people assumed that he did it and did not care or whether they thought he was innocent. He thinks people just did not care about why he was in prison. “No, once I was asked,” he added after a while. “A lamngen [sister] asked me whether I did it or not. When I said I did, she disapprovingly said ‘oooh’” (Interview C-57).

Mapuche activists thus shift the focus from the criminalized event to the state prosecution. While the state and “victims” argue that prosecutions are the natural response to a “crime,” political supporters of Mapuche defendants challenge the notion that prosecutions are simply
and “naturally” a reaction to “crimes.” Contrary to liberal prisoner supporters who focus on separate criminal prosecutions and criticize violations within the framework of the rule of law, political supporters interpret single prosecutions within the broader context of repression of the Mapuche people. Political prisoner supporters argue that the criminal prosecutions of Mapuche activists constitute the criminalization of a social movement, criminalization of social protest, criminalization of legitimate demands, and the criminalization of a pueblo. They criticize this push of political demands and activism into the criminal justice arena. The term “criminalization” does not necessarily refer to any specific event, but to the general translation of Mapuche activism into the language and logic of the criminal law, guilt, and punishment.

“They should not punish the Mapuche struggle, but solve it,” said a former CAM member (Interview C-46). Even some human rights organizations have moved beyond the liberal legalist framework and adopted this contextualized reading of the criminal prosecutions. For example, human rights organization FIDH claimed in 2006 that there is “criminalization” because of the many defendants, human rights violations, disproportional sentences, the influence of prosecutions on social and political life, and the legitimacy of social and political demands (FIDH 2006:52).

The term “criminalization” is often used loosely in activist discourse, referring not only to an alleged political use of trials but also to exaggerating and stigmatizing media headlines as well as supposed violations of due process and excessive police violence. The seizure of potential evidentiary material by the police, for example, is often perceived by activists as deliberate
“theft” in order to weaken the movement. Indeed, many Mapuche activists claimed that searches and arrests are meant more to disturb and intimidate than to come to any conviction. Activists further routinely argued that criminal prosecutions are the result of fabricated charges and fabricated evidence against them. They say that the state and corporations are setting them up, either by orchestrating the crime itself and then imputing them, or by tampering with the evidence and making them seem guilty. Indeed, there have been reports about private security employees who claimed to have staged attacks ordered by a forestry company in order to frame Mapuche activists for those attacks or in order to justify and maintain their jobs (Navarro 2001; Villegas 2007, footnote 67). Activists often drew on these incidents in order to back up their claim that Mapuches do not commit arsons.

Activists thus expect the repression. Some defendants described that they had just been waiting for the blow. For long-time activists, prison converts almost literally into the expected “cost” of activism. “I came out pretty cheaply, given my [long] trajectory,” reflected a CAM member, employing the metaphor of money and the market to illustrate the “bargain” that he got (Interview C-72). Prison or conviction is thus interpreted cynically and calmly as the simple, almost inevitable, price one finally will have to pay. They just hope it will not be a high price. In the words of another activist: “I accepted the consequences and the risks. The work that I did, it is not a hobby; it is about beliefs” (Interview C-39).

---

107 In 1999, a worker asked for police protection after he had been pressured by his superiors to commit arson and blame it on Ancalaf, a well-known Mapuche leader. In 2000, a previous private security guard committed suicide and left a suicide note. He wrote that he started arsons in order to maintain their work and incriminate Mapuches (Langelle 2006).
By placing criminal prosecutions in this broader context of expected repression, political supporters thus redefine what the trials are “actually about.” They interpret the detention of their leaders, for example, as a deliberate strategy to incapacitate the important political spokespersons and community chiefs in that struggle. Also, on various occasions it has been suggested that a specific indictment or investigation was the “political punishment” for having denounced human rights violations (e.g., FIDH 2006:58). Former CAM activist Pedro Cayuqueo, for example, was arrested upon his return from a speech at the UN in Geneva in 1999 and activist Juan Pichún was similarly investigated after a tour through Europe in which he had given public talks about the prosecutions against his family. Also lonko Juana Calfunao was prosecuted after having visited Europe and given speeches at various places (FIDH 2006:58). And lawyer Myriam García Reyes was charged with contempt of court after she made public classified information about payments regarding protected witnesses in cases related to so-called “territorial conflicts” (CODEPU 2005).

While most criminal defense lawyers stick with the liberal legalist framework and defend their clients without invoking a larger political context of “legitimate demands” and the relations between the Chilean state and the Mapuches, one criminal defense lawyer, José Lincoqueo, is known to have consistently challenged Chilean jurisdiction in the courtroom in defense of Mapuche activists (Toloza 2009). In one case, for example, he described his Mapuche defendants as “three foreigners who live outside of the borders of Chile” (Supreme Court, 4 September 2002, Rol No 2378-02). In his defense in the case of Lumaco he based his argument
on the Mapuche treaties with the Spanish Crown and argued that the Chilean court therefore lacked jurisdiction over the Mapuche territory:

El Estado de Chile jamás ha tenido soberanía ni jurisdicción sobre el espacie territorial señalada en el sub título, pues esos territorios están y han estado siempre bajo el imperio del Parlamento de Negrete de los días 3, 4, 5 de marzo de 1803, respaldado por incontables disposiciones del C. Civil y pertinentes de la Constitución Política del año 1833 [...].

[The Chilean State never has had sovereignty nor jurisdiction over the territorial space signaled in the subtitle, as these territories are and have always been under the rule of the Parliament of Negrete of the days 3, 4, and 5 March 1803, backed by countless dispositions of the Civil Code and the relevant passages of the Political Constitution of the year 1833 [...].] (Court of Appeals Temuco, 5 January 1998, underlining in original)

His legal arguments have, however, never been recognized by the Chilean courts.

Prisoner supporters claiming defendants as “political” prisoners thus hardly publicly claim responsibility for covert actions, hereby cutting off the possibility to defend or redefine those actions in the meta-conflict in the criminal justice arena. Instead, in the public battle for interpretation they shift attention to the initiation of prosecutions and define criminal trials as part of a broader process of criminalization of the Mapuche struggle.

4. Persuading the public of the political definition: Changing the impact of criminal prosecutions

Prisoner supporters challenge the labels of the state and the stigmatizing effect of criminal convictions. In doing so, they turn to the larger public in order to persuade more people of the alternative narrative, in which prisoners are not criminals, but “political” prisoners. One form of communicating with the public is visible in the lists counting the number of “political” prisoners
that are frequently published on websites. At various moments Mapuche activists have succeeded in turning the issue of “political” prisoners into a nationwide debate. For example, the 2008 and 2010 hunger strikes and the appeals to the Inter American Court of Human Rights have drawn many actors into the meta-conflict in which the criminal justice labels are disputed. A specific focus of supporters has been to counter the stigma that comes with the “terrorism” label.

Prisoner supporters also aim to turn the negative experiences of repression into a positive and essential part of their Mapuche identity. They counter the state’s claim to effectively control and eliminate the problem with criminal prosecutions. Instead, prisoner supporters often argue that repression will only increase the willingness of Mapuches to become activists and stand up against the government or go underground (Interview C-28; Chile Information Project 1999). Constant struggle and the battle against repression has become a pervasive part of the identity of Mapuche activists, and it is the continuation of this battle that is firmly established as a valuable and essential characteristic. Many Mapuche activists see themselves as continuing the struggle of their ancestors Lautaro and Caupolicán against the Spaniards. As such, the battle itself is worthwhile, and repression is only part of the game. The individual cost of repression is thus mitigated in the value of the myth of martyrdom and heroism and the knowledge of being a part of the pueblo and its struggle against oppression. In this regard, psychologist Festinger said that “[r]ats and people come to love the things for which they have suffered...” (in: Mitchell 1981:65). A former member said that within the CAM the prison had transformed into
an essential part of the “education” of the true nationalist Mapuche (Interview C-28). Instead of the simple criminal justice premise that imprisonment of “rot apples” will stop mobilizations, Mapuches believe in Marrichiweu! – the old Mapuzugun battle cry meaning that for every person who falls, ten others will arise.

Prisoner supporters fit repressive events into their narrative of continuous state repression against the Mapuche people and bring this narrative to outside organizations, such as Amnesty International, Human Rights Watch, and the United Nations Special Rapporteur for Indigenous Rights. Often, supporters have been effective in their efforts to draw outside support for their prisoners. For example, in reaction to the detentions in the 1997 Lumaco case, the Spanish non-governmental organization WATU Acción Indígena sent a letter to Antonio Castro Gutiérrez, the investigative judge of the appeals court in Temuco, asking to withdraw the charges against the members of Mapuche organization CTT and instead start a process of negotiation and dialogue (29 December 1997). Thus, WATU specifically asked to reverse the transfer of the events into the criminal justice arena and return to the political arena.

Sometimes, prisoner support work also effectively managed to impede the stigmatization of the prisoners. For example, despite or indeed even because of his conviction and serving five years in prison, Pascual Pichún, lonko of Mapuche community Temulemu, gained widespread respect within the Mapuche movement. In meetings, people addressed him admiringly as “lonko” and were eager to listen to his opinion (Field notes, April/May 2009). He was offered a podium on
various occasions in order to share his experiences in the struggle for land and his experiences
during his trial and imprisonment (for example during the visit of the UN Special Rapporteur in
April 2009).

At other times, however, prisoner support work has not been enough, simply lacking, or
unconvincing. When given the choice between solidarity or condemnation, many Mapuche
community members choose to condemn violence and extremism, thus accepting the
normative framework of the state. Criminal prosecutions have therefore often divided the
Mapuche movement and communities into “moderates” and “extremists.” Research on
Mapuche adolescents, for example, revealed that many Mapuche families respect the authority
of the state and reprimand their children when they get involved with the criminal justice
system (Colombre et al. 2004:132). One activist complained about this attitude he found among
his community after returning from prison: “They have all adopted the governmental discourse
against violence. They have all accepted the image portrayed by the government that any act of
resistance is terrorism” (Interview C-62). In this way, “extremists” are sometimes isolated
within their communities. “It was as if I had a contagious disease,” said a defendant as he
described how former fellow activists and friends started to avoid him and ignored his appeals
for financial support to pay his lawyer fees. He thought that people were afraid of guilt by
association (Interview C-72).
Prisoner supporters and the state thus engage in a continuous conversation in the criminal justice arena about the legitimacy of Mapuche protest activity and the meaning of criminal prosecutions. In several cases, activists reported that criminal justice officials encouraged them to change their opinions about the use of violence and the appropriateness of illegal methods in the struggle. A former CAM member, for example, told me that in 2008, at the end of his parole, he had to pass some tests to prove that he had distanced himself from his former opinions on the use of violence as a viable method in the struggle (Interview C-57). Another former CAM member told me that during the hunger strike in 2005 the prisoners were pressured to stop the strike and sign a paper that would confirm that they repented having caused harm. All the prisoners rejected (Interview C-46). Activists thus reject the meanings that the state tries to impose on them in and around criminal procedures. This was also visible in the letter written by two Mapuche activists to the president of the Court of Appeals in Temuco asking for “libertad condicional” [parole].

Finally we manifest that for us it is not valid to consider parole as a way to prove that we have been corrected and are rehabilitated to rejoin social life, that it instead would be a small political signal to recognize on behalf of the state the Political-Judicial error that was made in our imprisonment, and that it is your obligation to take responsibility for the violation of our rights. (Signed by Juan Patricio and Jaime Marileo Saravia, “Mapuche Political Prisoners,” 9 April 2009)
Here these prisoners refused the “common” meaning of parole as a signal of “correction” and “rehabilitation.” Instead, they asked the state to adopt an alternative reading of the parole and treat it as a signal of a “Political-Judicial error” that was made in their imprisonment.

“Political” prisoners and their supporters are thus defiant of criminal proceedings and authorities in the criminal justice system. As the ultimate demonstration of such defiance, many activists have become fugitives instead of facing trial, or have at least considered the option (Interview C-72). Some Mapuche activists are even very openly defiant of the criminal justice proceedings to which they are subjected. “I have a trial in Collipulli today at twelve o’clock,” said a young werken of a Mapuche community while he was in Temuco for a meeting with various other representatives of Mapuche communities (Interview C-68; Field notes, June 2009). In the end, however, he ended up not going to his own trial. “The meeting was still going on,” he explained, and laughed a little, when I asked him about this decision and what would then happen to his case. “I don’t know,” he said while he maintained his smile. He was indifferent. “At some point they may get me, I don’t know.” He had stopped caring about courts and trials.

Some activists have been prosecuted for open defiance during detention or during trials. There are various criminal cases against Mapuche activists that are the result of alleged disrespect for judges or prosecutors, or alleged intimidation of witnesses. All such prosecutions can be considered “second-order” prosecutions in which the state communicates norms about the
proper process of criminal investigation and prosecution, and in which it demands respect for the state’s authority and legitimacy in carrying out such prosecutions. Some activists have therefore been convicted for *desacatos* [contempt of court]. For example, in 2009 Waikilaf Calfunao was charged with contempt of court after standing with his back to the judge during his trial. And in 2002 José Nain and Manuel Santander were convicted for contempt of court: after a judge decided to maintain their pre-trial detention, they did not react as the state expected them to. Instead, the judge described their reaction as follows:

> [L]os acusados manifestaron su rechazo, y causaron tumultos y desórdenes, negándose a hacer abandono de la sala de audiencias, por lo que el Juzgado de Garantía no pudo continuar con sus labores en forma habitual.

[The defendants demonstrated their rejection and caused tumult and disorder, refusing to abandon the courtroom, such that the Lower Court could not continue its work in the habitual form.] (Angol, 2 October 2002, Tribunal Oral)

Defendant Juana Calfunao even made international headlines when she hit a prosecutor in his face after she was convicted of public disorder. She and her family members were afterwards convicted for attacking an “authority.” Her husband later told me about the incident that they had wanted to send a signal to other communities that you can fight for your rights. He wanted to show that you should not have fear; that you can strike back (Interview C-66). Juana herself told me that she was not going to let herself get silently imprisoned by the government: the
world would at least hear about it (Field notes, April 2009, women’s prison in Temuco). These second-order prosecutions are a clear example of how contentious criminalization and the battle of interpretation about labels and crime definitions can lead to a cycle of criminal prosecutions and continued contestation.

Thus, “victims” and prisoner supporters compete with each other for dominance in the meta-conflict in the criminal justice arena. The identities in the political arena of landowners and Mapuche activists transfer into the criminal justice arena where they transform, as landowners automatically identify with other landowners as “victims” and Mapuche activists identify with fellow activists as they are “persecuted,” strengthening the process of polarization between landowners and activists. This strict division is also visible in the courtroom. Not only do landowners and Mapuche activists strictly separate the left and the right of the courtroom benches. Often, landowners have cooperated as witnesses for the prosecution. Mapuche activists on the contrary have frequently acted as defense witnesses. The few Mapuches who have testified for the prosecution are considered traitors by Mapuche activists.

Landowners have quite successfully gained recognition as the major “victims” in the Mapuche conflict and converted themselves into quite successful “troublemakers” for criminal justice agents. They have construed a narrative that changes the qualification of actions such as arson from ordinary crimes into terrorism. In this narrative they emphasize that single events should not be understood in isolation but viewed as part of a pattern, coordination, and organization.
As landowners united they proposed that the legal interest at stake is not just their private property but the security of the entire nation. Mapuche activists, conversely, emphasize a very different context as the relevant interpretive framework for understanding the criminal prosecutions against them: the history of dispossession and continuous discrimination against the Mapuche people.

The constant mobilization and discursive action in the criminal justice arena thus creates a challenging environment for prosecutors. They receive letters from international organizations demanding that indictments be dropped, while at the same time an advertisement in the newspaper *El Mercurio* calls for the application of anti-terrorism legislation. As a practical matter, prosecutors experience difficulty finding anyone willing to testify and in terms of the effects of their prosecutions they know that even if they manage to imprison one person, this will not stop the mobilizations. The conviction rate is low and subject to harsh criticism, while at the same time defendants claim their status as “political prisoners.” Landowners claim the rule of law as the state obligation to protect them and their property, while criticizing the rule of law for providing defendants with too many rights that ultimately hamper convictions. Mapuche activists, in turn, challenge the rule of law not only with their references to Spanish treaties and a rejection of Chilean jurisdiction but also in their active support for prisoners and fugitives, refusing to adopt the condemnatory attitude that the state and its criminal prosecutions prescribe. Before turning in the next chapter to the development of the prosecutorial narrative...
in the midst of this constant criticism, in the next section I explore in more depth the challenges that prosecutors face as they build the evidence for their cases.

**Contested truths: The problem with evidence**

I have sketched how the criminal justice arena becomes populated with competing actors, mobilization, and meaning-making practices concerning criminal proceedings. In this section, I analyze a specific part of criminal prosecutions which is deeply contested: the credibility and legitimacy of anonymous witnesses. This illustrates how the process of contentious criminalization, the identification split, and the competing narratives from “victims” and “prisoner supporters” deeply challenge the criminal proceedings in their capacity to provide a shared truth. Of course, disagreement about evidence happens in any criminal case. Here, however, people systematically divide along the same lines, discrediting the evidence put forward by the opponent and by default believing the evidence presented by their own identity group. Thus, many Mapuche activists firmly believe that several of their prisoners were innocentely imprisoned due to a farce trial and bogus testimonies and landowners are suspicious of any evidence claiming the innocence of Mapuche activists.

“And then,” the director of the SOFO told me, “when someone [a witness] recognizes them [the defendants], they obtain false documents showing that on the day of the crime they were far north working as subcontractors in the fruit industry” (Interview C-55). He had no doubt that those documents were false and believed the farmer-businessman who claimed to recognize
the defendants. This example illustrates the fundamental problem with the credibility of witnesses in the Mapuche conflict. This story that the SOFO director told me and many similar stories are passed on among actors. Indeed, I often heard such stories more than once from different individuals. The lawyer for SOFO told me the same story as he said that “they [defendants] have, for example, managed to obtain false contracts for short-term work to pick tomatoes in the Central Region. In that way they proved that they were not here on the day of the crime” (Interview C-42). In this process of (re-)telling such stories, their cumulative message corrupts the possibility of the criminal proceedings to settle the matter. About this power of discourses, Apter remarked that “[i]ndividuals convey their individual stories to reinforce a collective one and draw down in interpretative power more than they put in” (1997:12). Farmers have thus become convinced that Mapuche activists prepare their alibis.

Evidence is the basis for truth claims in criminal trials. In the process of contentious criminalization in the Mapuche conflict, however, the interpretation of the evidence, the authenticity of the evidence, and, in the end, the truth claims that are based on the evidence are disputed by the competing groups mobilizing in the criminal justice arena.

As discussed above, landowners often complained that it is so difficult to collect evidence that will be accepted in court, blaming the high standards that are required because too many rights are allotted to defendants. They feel that without a video of events, nothing gets proven (Interview C-18). A lawyer who represented Mininco in trials explained that “the people [in
Mapuche communities do not collaborate. They do not accuse each other” (Interview C-44). In the face of these difficulties to secure evidence, prosecutors have argued that they need to work with “protected” witnesses because potential witnesses often had fear of violent reprisals. These witnesses usually lived in or near the Mapuche communities of the defendants and claimed to receive threats. Indeed, there have been news reports of former protected witnesses whose house was set on fire (Tauran 2012). Prosecutors have therefore argued that strong identity protection is the only way in which they could get these witnesses to testify, and claimed that the fact that the defense lawyer can interrogate the witness during the trial sufficiently guarantees the rights of the defendants. In 2003, anonymous witnesses testified for the first time in the trial against the lonkos of Traiguén. Since then, such witnesses have often given their testimony from behind a screen, while their voice is made unrecognizable.

Some of the testimonies given by these anonymous witnesses seem to reveal divisions within the communities, where some community members reject violence, whereas others argue that there is no other way forward.

*En el sector donde vivo siempre estuvo tranquilo hasta el año 1994 [...] En la actualidad existen problemas en el sector donde vivo debido a que un sujeto de nombre José Osvaldo CARIQUEO SARAVIA ha comenzado a revolucionar a las personas invitándolos a movilizarse para recuperar tierras [...].*

[The sector where I live was always tranquil until the year 1994 [...] At the moment there are problems in the sector where I live due to a subject by the name of Jose Osvaldo CARIQUEO SARAVIA who has started to revolutionize the persons inviting them to mobilize to recuperate the lands [...].] (Case Poluco Pidenco, Witness Annex No. 19, 25 June 2002)

And another testimony:
En algunas reuniones la directiva antes mencionada, planteaba como forma de presionar y obtener tierras en forma rápida, la realización de tomas de tierra específicamente en el fundo Poluco Pidenco. Esta idea nunca fue bien recibida por la gran mayoría de la comunidad, pero ellos nos decían que no importaba que no fuéramos pero que ayudáramos con dinero y alimentos a los comuneros que ejecutan esta acción pero al final nunca supe que se planificara esta toma [...].

[In several meetings the direction mentioned before proposed the realization of takeovers, specifically in the estate Poluco Pidenco, as a form of exerting pressure and obtaining lands in a quick form. This idea was never well received by the great majority of the community, but they said that it was not important if we didn’t go, but that we could help with money and food for the community members that execute this action; but in the end I never knew that they planned this takeover [...] (Case Poluco Pidenco, Witness Annex No. 20, 25 June 2002)

While landowners are convinced that anonymous witnesses are their only chance to secure convictions, Mapuche activists firmly believe that anonymous witnesses are bribed and lie, confirming their idea that Mapuches are prosecuted without having committed a crime. On 18 August 2004, the Newspaper El Gong published evidence that the Public Ministry had spent twenty million Chilean pesos (more than 30,000 dollars) for the protection of ten protected witnesses in the case Poluco Pidenco (Toledo 2007:286; HRW 2004). In addition to such reports suggesting a financial motive behind testimonies, Mapuche activists have no lack of stories and speculations about the identity of the various anonymous witnesses that have appeared in the trials against them. One witness in the case Poluco Pidenco, for example, was argued to be a well-known thief of the community who was relocated after having testified several times against his former fellow community members (Field notes, April 2009). Another report suggested that “protected witnesses” were actually tortured by the police for their testimonies (País Mapuche 2011). Needless to say, Mapuche activists have zero confidence in the value of these testimonies from anonymous witnesses.
This meta-conflict about the value of these witness testimonies has even led prosecutors to address the issue in the courtroom. For example, in February 2009, the prosecutor addressed the motivation of the protected witnesses that would testify, asking openly why a witness would make the effort to come to the trial, attempting to preempt any of such criticisms (Oral proceedings, Case Chekenko, min. 10:00). Polarization between the interpretative communities has thus reduced the ability of evidence to fulfill the function of creating a shared truth in the courtroom.

4. Overview

In this chapter, I have analyzed the different processes that challenge the rule of law and the status quo in relation to land use and ownership in the south of Chile and the position of the Mapuche people within Chilean society. The governmental response to contentious events has transferred the battle for interpretation into the criminal justice arena. In the meta-conflict surrounding criminal prosecutions, landowners and Mapuche activists dispute the main concepts that should be used to interpret, on the one hand, the actions and demands in the struggle for the recuperation of lands by Mapuche activists and, on the other hand, the claims for defense and protection by the current landowners who call upon the Chilean state to enforce the rule of law.
As “victims” and “prisoner supporters” engage in the battle of interpretation, it is clear that they interpret the “rule of law” differently. Landowners and Mapuche activists are not only divided over fundamental questions about land ownership and the relation between the Chilean state and the Mapuche people, they are equally divided over the criminal trials, the assessment of harm, and the legitimacy of protest activity. In the next chapter, I will analyze the prosecutorial discourse as it emerges in interaction with the competing discourses. While the political nature of the Mapuche conflict is recognized by most actors, landowners have mobilized to define incursions on their property as crimes or even terrorism. The exact boundary between the political arena and the criminal justice arena is intensely disputed. In the next chapter, I will show that this boundary is continually changing and that the prosecutorial narrative drawing and producing that boundary is highly ambivalent.
IV. Ambivalent Criminalization in Chile

Since January 2008, the state has dedicated two prosecutors exclusively to the “Mapuche conflict.” They prosecute the crimes that occur within that context. One would therefore assume that it is easy to distinguish Mapuche-conflict cases from ordinary cases. However, when I asked how they know whether a case is related to the Mapuche conflict, an honest prosecutor answered: “Often we don’t know” (personal conversation, April 2009). Such confusion about the “correct” classification was obvious, when, for example, during my fieldwork in March 2009, a farmer in Ercilla was murdered. Mapuche activists, landowners, prosecutors, and government officials all commented on the nature of this murder, the motive, and the identity of the perpetrator. People wondered whether this was a Mapuche-conflict case and speculated about the potentially disastrous escalatory consequences if it was.

Mapuche activists complained that the immediate naming of Mapuches destroys the presumption of innocence to which they are entitled. The final consensus in the Ercilla case was that this was an “ordinary” murder. The very concern with the classification of the case, however, raises the question whether it would have made a difference for the criminal proceedings, and if so, how.

In this chapter I even go a step further beyond this practice of classification and ask what is actually meant with the “Mapuche conflict” in these categorizations. Clearly, landowners and
Mapuche activists attach very different meanings to the concept. Criminal prosecutions and their production of images that speak about the Mapuche people, land ownership, and plantations are therefore the subject of intense contestation. The questions I address are the following: How has the prosecutorial narrative represented the conflict? How was it contested and how did it change over time? To explore these questions, I delve deeper into the meta-conflict that is raging in the criminal justice arena, about the identity of the relevant actors, the issues at stake, and the desired solutions. Which ways of looking at the world are reinforced and which are marginalized? I describe how crimes are re-contextualized in the “Mapuche conflict” and how that conflict is defined as the prosecutor constructs reality. How do prosecutors contribute to the meta-conflict as they speak with the voice of the law?

Prosecutors claim they are “just” applying the law. The images of criminal events and perpetrators upon which they rely therefore seem to lead self-evidently to the indictment that the prosecutors present. For example, when prosecutors assert the presence of an organization that is behind a pattern of terrorist actions, it becomes natural that this organization and its members are charged as a terrorist organization. The question is, however, how the image of an organization came to be construed.

In the introduction of this dissertation, I already mentioned that the origins of this research project can be found in my experience attending a trial that became known as the trial against the “Lonkos of Traiguén.” Contrary to my expectations, the prosecutor brought the Mapuche
conflict explicitly into the courtroom in constructing the identity of the defendants and the “victims,” in his choice of evidence, and in his connection of different events. His narrative is exemplary of what I now call a re-contextualization of the criminal event. The trial also became one of the best known trials in the context of the Mapuche conflict. It even was the subject of a documentary film (Larraín 2007).

In this chapter, I present an analysis of the development of the prosecutorial narrative in the context of the Chilean-Mapuche territorial conflict. I aim to show how this narrative has changed over time since the 1990s and how the narrative has been the subject of constant contestation. I therefore trace the different images that different actors put forward and that were or were not be adopted in the prosecutorial terminology and decisions. Further, I will describe how the narrative is expressed and translated in the actual decisions and criminal legal terminology in criminal proceedings.

I am not going to tell about how big corporations abuse the criminal justice system to systematically oppress “poor Indians.” They do, but that would be an unjustifiably simplified and partial account of the actual story. Neither will I tell about how “cells” of Mapuche activists engage in terrorism and pose a real threat to national security. That is an equally partial and simplified take on the situation. Rather than adjudicating between these two partial perspectives, my concern lies with the tragically insufficient liberal legalistic response to this disagreement about what is going on. That response fails not only the vast majority of Mapuche
communities that have been dispossessed, discriminated against, and disposed of during most of the existence of the Chilean state. It also fails the majority of the hardworking landowners and their employees who are threatened in their businesses. While the state is ostensibly hanging on to the rules, vocabulary, and principles of liberal legalism out of routine and to preserve its legitimacy, prosecutors enter the stage facing what I would call a catch-22, where they are set up to fail one side or the other, or often both.

My account of the process of criminalization in the Mapuche conflict will therefore develop without dividing actors into the good guys versus the bad guys, victims versus aggressors. Rather than aiming to determine which side is right, my interest is in teasing out the role of the prosecutorial narrative. How did it develop? Why did it develop in that way? What are the consequences of that? What can we learn about the possibilities and limits of the rule of law?

The fact that the “Mapuche conflict” is a sociopolitical conflict is acknowledged in the Chilean courtroom. Prosecutors recognize this conflict and explicitly take a stance it, while positioning themselves in line with the principles of liberal legalism. Doing so, they respond to the allegations voiced by Mapuche activists in the meta-conflict that the trials constitute the criminalization of social protest. Thus, during one trial, the prosecutor argued that “the Public Ministry does not persecute ideologies or convictions, and certainly does not attempt to adjudicate social conflicts.” Instead, he called upon the “estado de derecho” [rechtsstaat, rule of law] and argued that the “legal and constitutional mandate” of the prosecutors was to
“investigate facts that constitute crimes” (Oral proceedings, Trial CAM, July 2005). Here the prosecutor reproduced the legalistic image of simple “facts that constitute crimes” which presumably can be found, observed, investigated, and adjudicated. He accordingly denied the significance of the multitude of voices engaged in constructing narratives about those “facts.” He ignored the various actors involved in socially constructing those events, the actors that disputed the relevant identities, definitions, and relations that would determine the legally relevant meaning of what happened.

So what have prosecutors done? How did they translate events into criminal conduct, and what were their charges? It is hard, if not impossible, to find an actual thread or pattern in the prosecutions, arguments, and decisions of Chilean prosecutors in relation to the Mapuche conflict. It is more accurate to describe their intervention as a complex mixture of ad hoc and pre-meditated investigations, drawing upon different available discourses, switching between different images, and changing course at various moments in time. Prosecutors in Chile switch back and forth between and sometimes mix a de-contextualized approach and a re-contextualized narrative. I understand the resulting ambivalence as the product of the continuous contention and the variable and changing strength of the different actors involved.

I call the criminalization in Chile ambivalent because it hovers between the criminal justice arena and the political arena. Sometimes the prosecutorial narrative pushes conduct far into the criminal justice arena, labeling it terrorism, and employing the full force of the criminal law.
Often, though, that push towards the criminal justice arena is accompanied by the acknowledgement that the events and demands actually belong in the political arena, resulting in negotiation, political promises, and an open involvement of political actors in the government. In this chapter I analyze the effort of prosecutors to tease out exactly what and who belongs squarely in the criminal justice arena and what and who does not. This means that the prosecutorial narrative is actively engaged in the construction of the criminal justice arena, defining what is politics and what is criminal. This goes beyond identifying single crimes. It is the entire category of “crime” that is up for negotiation. It is this “teasing out” that leads to such distinctions as that between “Mapuche radicals” and “the Mapuche people,” where the first is created to become the main target of prosecutions in the criminal justice arena and the second is reified as the supposed actor in negotiations and the recipient of development and bilingual programs in the political arena. These images and the lines drawn are nevertheless constantly changing, not in one clear direction of expansive criminalization such as in Spain or in the direction of a marginalizing narrow focus on particular subjects like in the United States, but in a constant back and forth between the criminal justice arena and the political arena.

I have had to make many difficult choices in writing this chapter as it is simply impossible to pay attention to the wide variety of events that occur within the ambit of the criminal justice arena. The state is not a monolithic entity, and many different actors (police, military, prosecutors, Minister of Internal Affairs, Minister for Development and Planning) are involved. As I have chosen to focus on the prosecutorial narrative, I will hardly pay any attention to the role police
forces, special forces, investigative police, or the military play, even though, for example, actions such as house searches and detentions constitute a large part of the grievances expressed by Mapuche activists. Further, it is impossible to discuss in detail the many criminal trials that have taken place since the beginning of the 1990s in relation to the Chilean-Mapuche conflict. It is even less possible to give detailed accounts of all the truncated criminal investigations and criminal cases that were started but dropped along the way, even though these cases have an impact on the investigated suspect, the affected Mapuche community, and sometimes even the entire Mapuche movement. Lastly, because prosecutorial activity has largely focused on activities of Mapuche activists, this is reflected in my description of the prosecutorial narratives. I do not analyze in depth the few criminal prosecutions against carabineros in relation to the conflict.

I analyze the prosecutorial narrative in the criminal cases that have taken place in the context of the Mapuche conflict. During the past twenty years, Mapuche activists have been accused of hurto [petty theft] (of wood), robo [theft] (of wood), usurpation (of land), (terrorist) arson (of plantations, houses, machines and trucks), illicit association (terrorist or not), (terrorist) threat, injury and attempted homicide (of forestry guards from private security companies). As I analyze the prosecutions that have taken place regarding such charges, it should be kept in mind that the prosecutorial narrative does not only speak in its accusations, but also in its silences. The lack of initiation of criminal prosecutions regarding some types of conduct became visible to me in the comparison with prosecutions in Spain and the United States. Contrary to
the Spanish prosecutions, for example, in Chile support for fugitives and speech acts have hardly been subjected to criminal prosecutions. Indeed, there has been little public debate about these issues and only few calls for their criminalization. Support for fugitives has been a governmental concern, but was never conceptualized as a crime. In June 2005, a prosecutor expressed this concern and complained in an opening statement that “twelve of the defendants are fugitive. That means there is an organization that supports them and protects them. They are mocking the justice system” (Oral proceedings, Trial CAM). Despite such statements, there has been no criminal case, however, in which a prosecutor actually charged someone with this fugitive support as a crime.

Another example illustrates the particular way in which the Chilean state construes the support for fugitives positioning in in relation to the criminal justice arena and the political arena. When on 20 October 2009 the radical organization CAM declared “war” on the Chilean state, the State Secretary of Internal Affairs, Edmundo Pérez Yoma, threatened people and communities that intended to provide support for the people behind attacks. If there were any evidence that they were “protegiendo a este tipo de delincuentes, esas comunidades no tendrán ninguna posibilidad de tener conversaciones con la autoridad para posibles entregas de tierras“ [protecting this type of criminals, those communities will not have any possibility to engage in conversations with the authorities about the possible transfer of lands] (cited in: Lichtenegger 2009). Importantly, this statement expresses that the sanction for such support is not sought in the criminal justice system but in the land transfers that were promised.
Just as the concern about fugitive support has not translated into actual criminal prosecutions, the Chilean prosecutorial narrative has been relatively silent in relation to speech acts glorifying or justifying illegal protest activity. A parliamentary commission has, for example, suggested to investigate Mapuche internet pages and their relation to “violence” in the “Mapuche conflict” more closely (Comisión de Constitución 2003:67), yet no prosecutions have followed. On 5 December 2003, the newspaper *El Mercurio* reported that several senators had taken the initiative to call for a prosecution of the leaders behind land takeovers because of their vocal support for such actions. They specifically called for the detention of Aucán Huilcamán who

*justifica y promueve esas acciones emprendidas por indígenas, a través de entrevistas, conferencias y comunicados. […] Huilcamán respalda públicamente las medidas de presión de las comunidades mapuches. […] [D]icho apoyo constituiría una inducción a la comisión del delito de usurpación, contemplado en el artículo 457 y siguientes del Código Penal.*

Despite this call for his prosecution, Aucán Huilcamán was not prosecuted for incitement. In one instance, lawyer José Lincoqueo was charged and convicted for inciting people to commit a crime as he had convinced some Mapuche community members that entering the land of the forestry company was legal according to the old Spanish treaties (Case Temulemu 1999). “Some of the people thought that what they did was legal,” said one of the participants in this takeover (Interview C-59). “The lawyer had said so, and they believed him.” He smiled and added: “No, I understood that his argument would not hold up in court, but not everyone did.”
Apart from this conviction, the prosecutorial narrative has been silent on the topic of speech acts, despite calls for such prosecutions. This is one of the instances where the prosecutorial narrative is surprisingly more reserved, than might be expected from the overreach such as the use of terrorism laws in other cases.

The prosecutorial narrative is constructed with the logic and vocabulary of criminal doctrine and legislation. The lack of prosecution of people engaged in the support for fugitives or speech acts is therefore reflected in the prosecutor’s use of doctrinal concepts to define the perpetrator. Unlike the many constructions used in Spain, where various activities of “support,” “incitement,” or “collaboration” are criminalized, in Chile defendants were generally accused as direct authors of a crime. Even though Chilean law allows for the possibility to be accused as a “complice” [accomplice] or helper to a crime, these forms of authorship were not used in the actual indictments in the cases that I reviewed. I also did not observe constructions like “conspiracy,” where a string of “preparatory activities” is penalized, regardless of the outcome, which is a prosecutor’s favorite in the United States as I will show in the next chapters. In a few cases, the prosecutor used the modality of “encubrimiento,” which is best translated as “obstruction of justice,” meaning that someone either benefits from the crime, knows about the crime but failed to report it to the authorities, or has covered up the crime. In a few cases, the prosecutors accused activists of membership of a criminal organization. These cases will be explored in more depth below.
Ambivalence is not only expressed in a decision to prosecute or not, but also in the penalties that are asked and imposed. In one serious case, for example, a defendant was charged with attempted homicide and the violation of the Law on State Security after a private security guard of Forestal Mininco suffered burn injuries because his car was set on fire during an ambush at a Mininco plantation in 1999 (Case attempted homicide). In that case, the prison sentence was remarkably low. Marileo was sentenced to 541 days for the Law on State Security and three years and one day for attempted homicide, but only served three months in prison. As discussed in the previous chapter, such incidents involving injured persons are often invoked by landowners and prosecutors to emphasize the danger of the situation and the potential threat to human lives. A low prison sentence in such a case has been one of the reasons for landowners to engage in victim mobilization and demand for harsher state intervention. This was, however, one of the few incidents in which physical injury inflicted by Mapuche activists was severe. Therefore, the following analysis centers on prosecutions regarding land occupations and arson of machinery and plantations.

1. First classification: Re-contextualization in the “Mapuche conflict”

Agents throughout the criminal justice system have started to use the “Mapuche conflict” as a relevant category to classify criminal cases. For example, to conduct their criminal investigations, the police have photo collections with the label “Mapuche conflict” in which they keep pictures of people who participated in demonstrations or were detained previously.
in relation to Mapuche mobilizations (Field notes, trial Chamichaco, May 2009). Also, in January 2008 two special prosecutors were appointed “with exclusive dedication to cases of the Mapuche conflict” (Leiva 2008). During one trial, the lawyer representing the Ministerio del Interior [Department of Internal Affairs] as private accuser explicitly explained that the department had decided to participate in the trial because the illicit facts had been executed “in relation to the so-called Mapuche conflict” (Oral proceedings, Trial CAM 2005). Judges also use the “Mapuche conflict” as a relevant category. In many of the court verdicts one can read references to the conflict (variously labeled as “territorial conflict” or “Mapuche problem”) as the context in which the facts took place or should be interpreted.

The category is relevant because Mapuche-conflict cases are assumed to be different from common crimes. A lawyer at the Public Ministry said: “when you put a pyromaniac behind bars, the problem is solved. Imprisoning a Mapuche activist doesn’t solve the problem” (Interview C-13). “It is complicated,” he said. “It is more than a juridical problem. It is not about individuals. The whole country is involved.” And his colleague said: “It is a social problem, of the whole society. That is the same with drug criminals. We know that there is another motivation behind their crimes than is the case with common crimes” (Interview C-12). Thus, to discuss how to deal with these different kinds of cases, the regional head of the prosecutor’s office consulted with the State Secretaries of Internal Affairs and Development and Planning (La Tercera 2002). Such meetings with political actors clearly show that the events in the “Mapuche conflict” are not narrowly dealt with in the criminal justice arena.
In order to determine the population of criminal cases relevant for my inquiry and select the criminal cases to analyze in more depth, I had to determine what exactly counts as a criminal case in relation to the Mapuche conflict. As one of the defense lawyers said (Interview C-48), there are some short-cut ways to “recognize” a criminal case that is related to the Mapuche conflict:

- because of the charges: usurpation and terrorism are generally related to the Mapuche conflict

- because of the region where the facts take place: for example, Temucuicui is a well-known conflictive area

- because of the defendants: when Héctor Llaitul is one of the defendants it is likely that the case is related to the Mapuche conflict as he is seen as the unofficial commander of the CAM

Now, all of this may seem simple for anyone who is a little familiar with the region and its history. The seeming clarity of these features, however, belies the process behind the very phenomenon that I have placed at the center of my research: How is it that these apparent “facts” have come to be related to that which we call the “Mapuche conflict”? Of course, anyone can see that the above rules of thumb do not constitute a watertight system. It may well be (and does occur, although very little) that other people are charged with usurpation or terrorism. And of course, there are criminal cases that relate to facts in Temucuicui without
having anything to do with the Mapuche conflict, such as intra-familial violence. Finally, even if Héctor Llaitul is indeed the commander of the CAM, he may well become involved in a criminal case that is unrelated to his CAM activities, such as speeding on the highway.

Indeed, as already briefly indicated above with the example of the farmer murdered in Ercilla, the classification of events is not necessarily obvious. For example, contrary to public image, throughout my conversations with landowners, it turned out that “wood theft” is not necessarily or only a Mapuche-conflict case. Wood theft actually constitutes a problem far beyond the “Mapuche conflict.” One landowner, for example, used the word “mafia” to describe the organized practices of professional thieves unrelated to Mapuche demands (Interview C-55). Another landowner complained about the ineffectiveness of the criminal justice system in relation to such thefts in a way similar to landowners’ criticisms related to Mapuche-conflict cases. “They were Chileans and there was no land claim involved,” he said. Still, there were never any prosecutions for the arsons and wood theft he experienced, and the one prosecution there was ended in an acquittal (Interview C-54).

The proper classification of events is an important dispute in the meta-conflict in the criminal justice arena, for example in cases of plantation fires. While companies attribute many fires to Mapuche activism, activists blame the summer heat, touristic accidents, or malicious attacks by companies themselves for insurance purposes or to give Mapuches a bad name. Mapuche activists reject the tendency to attribute arsons to Mapuches and the conflict.
The classification of criminal events as part of the Mapuche conflict has concrete consequences for the prosecutorial narrative. The notion that such a category of cases exists has not only led to the appointment of special prosecutors. The re-contextualization of events in the Mapuche conflict can also lead to the prosecution of defendants as members of an allegedly illegal or terrorist organization, a shift towards a broader legal interest, and the allegation of indirect responsibility instead direct responsibility for a crime. Re-contextualization of an event can induce a scale-shift in time and space. For example, if events are understood to have happened in the context of the Mapuche conflict, the relevant space in the prosecutorial narrative can shift from a specific house or property to the whole of the 9th region or even to the entire country. Similarly, in Mapuche-conflict cases the relevant victims of a specific case can shift in the prosecutorial narrative from the direct victims who live on or own a particular property to all landowners with properties that are adjacent to Mapuche communities or to all “Chileans.”

2. The defendants: “They are not the Mapuche people!”

In 2008, landowner Luchsinger’s lawyer visited the Minister of Internal Affairs and urged him not to view the recent arson attack at Luchsinger’s house as a matter of the Mapuche people. In his opinion, “there is a specific group that commits these terrorist acts, absolutely oblivious to the origin, ethnicity, race or condition of any species” (cited in: El Mercurio 2008). Why did this lawyer specifically urge the Minister not to view the attack as a Mapuche case? In this section, I
discuss the image of the defendants that is constructed in the prosecutorial narrative. This image is in continuous construction as it develops in the context of a continuous “conversation” between the actors in the criminal justice arena. In this conversation – that resembles more a series of reciprocal allegations than a constructive dialogue – the image is constantly evolving and different elements are emphasized at different times. Some elements, however, stand out and have become part of a more stable template which will be highlighted here.

The “ingredients” of this conversation are the asserted differences and relations between “Chileans” and “Mapuches” as well as the differences and relations between the Mapuche activists and the whole of the Mapuche people. This exchange between different voices in the meta-conflict takes place in and around specific criminal prosecutions. Mapuche activists have spread the message that Mapuches can be persecuted only because of their Mapuche identity. This claim was provided credibility in 1994 through the prosecution of 144 Mapuche leaders and members of the Mapuche organization Consejo de Todas las Tierras (CTT) (more on this case below in section 4). Their standing within their communities and the widespread participation of elderly people, women, and children in the symbolic land occupations made this prosecution a symbol of “the Mapuche people.” That message caught on and has become a shared belief among at least a part of the Mapuche youth. Prosecutors attempt to counter that message. In 2009, special prosecutor Velasquez, for example, repeated at the start of his opening statement that “this trial is not about repression, as they [the defendants] like to say” (Field notes, Trial Chamichaco, May 2009).
While prosecutors thus deny that Mapuches are persecuted because of their identity, criminal justice agents do use the Mapuche label all the time as a relevant category to describe and give meaning to events in transcripts and verdicts. For example, in one case, the judges considered that it was not logical that someone outside Mapuche communities should have perpetrated the crimes, as the incident fitted the goal of creating harassment and fear, and no “property of Mapuches” was damaged (Verdict, Case Lonkos of Traiguén, September 2003, consideration 15). This reference to “property of Mapuches” not only invoked the Mapuche identity as a relevant category. It also expressed a clear Us versus Them logic.

The Mapuche identity is a political identity (Tilly 2007:9) and the subject of an interpretive struggle and questions in the criminal justice arena. Are the defendants Mapuche? Do they represent the Mapuches? Do “the Mapuches” really want to engage in mobilizations, or are they manipulated by external infiltrators, Chileans, or foreigners? Are the defendants really motivated by their claims based on the Mapuche identity, or do they take advantage of the Mapuche identity for personal profit? This debate about the identity of defendants is embedded in a broader debate within Chilean society about the relations between Mapuches and Chileans, the characteristics of Mapuche ethnicity, rules about who are Mapuche and who are not, as well as the obligations of the Chilean state towards the Mapuches and the rights Mapuches have as a people.
The liberal legalist imperative is to ignore any identity claims. While prosecutors claim to do exactly that, at the same time their statements about identity construct an image of “the” defendants in Mapuche-conflict cases. The prosecutorial narrative emphasizes that defendants do not represent the Mapuche people and that they are a minority without much support. Landowners purposefully contribute to this image, for example when the lawyer of landowner Luchsinger visited the Minister of Internal Affairs. Mapuche activists, however, contest the image of isolated radicals. The courtroom thus has become an important space in which the relation between Mapuches and Chileans and the meaning of the Mapuche identity is constructed and contested.

**Mapuche or Chilean**

In contrast to other Latin American countries, the Chilean identity is not perceived to be a mix with indigenous identities, as, for example, is the case in Mexico (Jung 2008). The Chilean is not perceived to be “mestizo” and according to a commentator in a newspaper Chileans always viewed themselves to be the Englishmen of the continent (Jaramillo 2005). As mentioned briefly in the previous chapter, Mapuche activists have claimed recognition for their unique identity and recognition of the Mapuche people as a “people” in the constitution. Whereas the current “constitutional recognition” does refer to a “multicultural” Chile, Mapuche activists, other indigenous activists and critical lawyers like José Aylwin argued that this does not provide the real recognition that offers indigenous people the possibility to assert their rights (Marin 2009). On 15 June 2010, various indigenous organizations signed a letter to President Piñera in
which they rejected what they called the “false constitutional recognition” (Mapuche Noticias 2010). Mapuche activists challenge multicultural or intercultural initiatives as they argue that this only means that they have to learn or adopt the Chilean perspective, whereas Chileans will not accommodate the Mapuche perspective. Thus, outside of the criminal justice arena there is an ongoing debate about the relations between Chileans and Mapuches and the kind of adaptation or recognition that is required from and between these identity groups. The meta-conflict in the criminal justice arena, however, inevitably draws on and feeds into this debate.

The Mapuche label is more than a simple descriptive device. Claims about the Mapuche identity are at the heart of the whole conflict, as Mapuche activists ground their claims in their Mapuche identity, arguing that they are heirs of the Mapuches that were thrown off their lands (during the Pacification of the Araucanía) and that the Mapuches are a people with the right to self-determination. While acknowledging some legitimacy, landowners refuse to accept these arguments wholesale. For example, the general manager of the CORMA expressed his view that Mapuches “take advantage” of their identity and demand more than they deserve (Interview C-35). “The Mapuches are poor Chileans with a lot of social problems, who take advantage of their being Mapuche to produce this kind of conflict,” said another forestry representative (Interview C-34). “They claim to be more Chilean than we are,” thus perpetuating the Us versus Them dichotomy. Therefore, in the narratives of landowners, the Mapuche label is often understood in opposition to the Chilean identity and simultaneously invoked and rejected. Manuel Riesco, president of the Consorcio Agrícola del Sur, for example, commented about the
arson of Luchsinger’s house that the perpetrators were not Mapuces but “simply Chilean terrorists” (Terra.cl 2005).

Mapuche activists also refer to their Mapuche identity when they claim that, contrary to Chilean landowners, Mapuces do not want to exploit nature, but live in harmony with it. Landowners dispute this ideal. Instead of “harmony” they see laziness:

It is not possible to transfer lands to the Mapuches... that will be an absolute misery, because they do not work. That won’t resolve the problem. That won’t end their miserable state. Have you seen how their lands are that the state has purchased for them? Nothing remains, not one tree, they don’t produce anything! ... Indians never work. The Mapuche is predatory, doesn’t have intellectual capacity, no will, no economic means, no equipment, nothing... The Mapuche is sly, twisted, disloyal and abusive. (A landowner cited in: Cayuqueo 2005b)

Other landowners argue that this envisioned “living in harmony with nature” is not what “the” Mapuches really want. “They only want their kids to study and have another life” (Interview C-17). Dismissing the sincerity of the defendant’s references to the Mapuche label entirely, some landowners claim that it is not about the land, but just about economic profit. Many landowners attribute personal motivations like financial gain and the desire for power and media attention to Mapuche leaders. Theft of wood, for example, is primarily seen as a profit-driven business, where ideology just comes in handy as an excuse but is not the primary motivation (Interview C-34).
Just like the landowners, prosecutors often explicitly ignore or even deny these identity claims. “They are ordinary Chilean citizens. We don’t make a distinction between Mapuches and Chileans,” said the spokesperson for the regional Public Ministry in the Araucanía (Interview C-11). The regional prosecutor, for example, explicitly denied that the Coordinadora Arauco Malleco (CAM) was an indigenous organization. At the same time as the perpetrators are thus denied to be Mapuche, prosecutors highlight their respect for the Mapuche people. For example, the regional prosecutor emphasized her respect for “la etnia” [the ethnic group] and told me: “I grew up in the countryside and know the people; I have a lot of respect for them” (Interview C-10). Note that she said “them” and thus simultaneously located her own person outside that group. “This is not a trial against the Mapuche people,” said another prosecutor at the start of the trial against two lonkos (Field notes, Trial Lonkos of Traiguén, March 2003). The explicit negation of the Mapuche identity reveals the significance of the categorization as well as the contested meaning of what it means to be Mapuche, and what the criteria for that would be. In 2002, after the detention of alleged CAM-members, even the Minister of Interior declared that

this is not a detention of Mapuches. This is a detention of persons on whom criminal information has been collected. Among these persons are Mapuches, persons who judged by their last names are mestizos, and Nordic persons who can hardly link themselves to the Mapuche people. If one looks at persons with double Mapuche last names, there are only three. (Del Valle 2005:91)
In stark contrast to these assertions that activists are prosecuted “as Chileans,” in trial transcripts defendants are often identified as “Mapuches” or as belonging to the “Mapuche ethnic group.” Thus, in the prosecutorial narrative the Mapuche identity is often recognized as a descriptive marker. The identity is denied, however, as relevant in the relation between the defendant and the Chilean state.

The prosecutors that emphasized to prosecute Mapuche activists “as Chileans,” did so in explicit reference to the core values of liberal legalism, emphasizing the formal equality between defendants and all Chilean citizens. At the core of this debate, thus, we find competing claims about difference and equality and their relation to the rule of law. The regional prosecutor claimed that

> it is about objectivity. When we let that go, it becomes dangerous. It is about juridical security. That gives citizens confidence in the justice system. It would create uncertainty if we distinguished between races, colors, political parties or religion. We believe in the transparency of the justice system. We investigate crimes independent of the motivation that lies behind it. (Interview C-10)

Both the emphasis and the explicit denial of the ethnic identity reproduce the identity of the activists as a relevant factor in the conflict. The ethno-nationalist label for the Mapuche conflict has conveniently worked to downplay the landowners’ economic interests. While Mapuche activists claim their identity as Mapuches and in some cases claim to act for the Mapuche
people, at the same time they have often resisted the term “Mapuche conflict” as it perpetuates the notion that Mapuches are the problem and that they are to blame. Instead, they prefer to call the conflict the “forestry conflict” or “territorial conflict.”

**True Mapuches or criminals**

The identity dichotomy Chilean or Mapuche is thus one level at which the identity of defendants in the courtroom is constructed, where the prosecutorial narrative demonstratively denies that defendants are Mapuches and claims to prosecute defendants as Chileans. At the same time, the prosecutorial narrative construes the identity of defendants in relation to an imagined “good” or “true” Mapuche. The construction of the identity of the defendant is closely related to the construction of the boundary between the criminal justice arena and the political arena. Asserting that boundary implies a strict distinction between political and social problems on the one hand and criminal matters on the other. Parallel to this dichotomy, in the prosecutorial narrative we can find the distinction between the “true” Mapuches and the “criminals,” a distinction that is also made by landowners. For example, a forestry manager said that “it is only a small group that makes trouble. With the rest of the indigenous people we have a good relationship, we give them work” (Interview C-7). This distinction has also been identified by scholars, who have contrasted the “*indio permitido*” or “authorized Indian” (Richards 2010:72) with the “insurrectionary” Indian (Hale in: Richards 2010:72). I agree with Richards when she claims that the authorized/insurrectionary dichotomy has governed the Concertación’s response to the conflicts (2010:72). The distinction serves to legitimate the
criminal prosecutions, for example, when prosecutors claim that it is a minority that is on trial and subjected to anti-terrorism legislation, not all of the Mapuches. The emphasis on the “minority” fits the government’s assertions that the conflict is a focalized problem, “territorially concentrated.” Thus, in prosecutorial opening statements the notion is repeated that “there are a total of 1,500 Mapuche communities, of which not more than three hundred demand lands and not more than sixty have been involved in illicit facts” (Oral proceedings, Trial CAM 2005).

In this narrative, “true” Mapuches are considered to be a people who want to live in peace but have a poverty problem (e.g., Berdichewsky 2002). One prosecutor reproduced this image in the courtroom when he argued that the “true” Mapuches have calluses on their hands because of their work on the land (Field notes, Trial Lonkos of Traiguén, April 2003). As he said this, the Mapuche supporters that were present looked at their hands, making jokes about their authenticity as Mapuches. Later on, they repeated the jokes among themselves: “Show me your hands; let me see if you are a Mapuche according to Mister Bustos [the prosecutor]?!?” (Field notes, April 2003).

Activists reject the distinction and the nice words about the “true” Mapuches. “They only say that in order to keep the Mapuche bowing for the domination,” asserted a Mapuche activist (Field notes, April 2009). As Le Bonniec (2008:2) points out, the construct of the “bad” Mapuche in the trial is the counterpart of the “good” Mapuche that opposes violence and is the recipient
of the assistance offered by the state in its various social programs directed at eradicating poverty and supporting education. Indeed, the construction of the “good” Mapuche fits in well with the multiculturalist discourse that has been hegemonic in the Chilean public sphere since the early 1990s (Richards 2010). While this discourse does recognize the indigenous populations of Chile at a cultural level, at the same time it is hesitant to confer any rights, as was visible in the opposition to constitutional recognition and the ratification of the ILO Convention 169. The multiculturalist discourse does not question power structures that benefit some ethnic groups more than others.

In order to substantiate the distinction between the “good” and the “bad” Mapuches, prosecutors are keen to point out that Mapuche communities are highly divided on the issue of recuperation of lands and the legitimate ways to achieve this. “[Not only landowners, but] also the Mapuches are afraid of the radicals,” asserted the regional prosecutor in a conversation shortly after the detention of a majority of the CAM members (Interview C-10). Another prosecutor juxtaposed violent activists with “the peaceful families, which are the majority, the people that want the institutional ways, with CONADI, with the government” (Oral proceedings, Trial CAM 2005). Prosecutors frequently argued that community members ask for police protection and are afraid to testify during trials. Police reports equally draw upon and reproduce this dichotomy as in one report where they described that “minorities” were “agitating” and “dividing” the community as they “introduce violent formulas” in the struggle for land (Police report, Estate Rucañanco 2001). The image of “radicals” as dangerous is also
reinforced in newspapers publishing stigmatizing allegations of “paramilitary training” and possession of “weapons” (e.g., Notimex 2009). Chilean anthropologist Saavedra has pointed out that the frequent use of “los encapuchados” [the masked persons] as a reference to activists further dehumanizes this minority (Saavedra 2002:5). This image of a radical and dangerous minority is contested by activists, who emphasize the central importance and participation of ordinary community members in actions like land occupations and the slingshot as their main “weapon.”

The trial against the lonkos of Traiguén was a strong example of the identity politics in the courtroom. The defendants ostensibly presented themselves as Mapuches, as they appeared in their traditional clothing and addressed the audience in Mapuzugun. As prosecutors have aimed to set defendants apart from the larger Mapuche people, they often argued that the defendants do not represent the Mapuche population. “They use the name of the Mapuche people,” said the prosecutor about the defendants during the trial against the lonkos of Traiguén (Field notes, March 2003). He emphasized that the majority of persons even within their own communities did not share the violent ideas that the defendants allegedly promoted. This is only one example where the prosecutor responds explicitly to the identity claims of defendants. In turning the alleged absence of reciprocal identification and support of fellow activists and community members into an important element of the identity of the defendants, however, the prosecutor actually moves away from the abstract rational individual in liberal ideology. When prosecutors explicitly attack the notion that the defendants would represent
their community – as they have done in several trials – the question comes up whether that would actually be relevant for the determination of the criminal offense. Why would prosecutors make the effort to demonstrate that defendants do not represent their communities? Anthropologist Le Bonniec (2008:6, footnote 13) reported that in the trial against the lonkos of Traiguén in September 2003 the prosecutors even used anthropologist Faron to point out that the lonkos were not the real traditional authorities of the Mapuche community that they claimed to represent. In the trial against members of the CAM the prosecutor relied on the principles of democracy (and the alleged absence of such mechanisms within Mapuche communities) in order to dispute the claims of representation: “The defendants will try to demonstrate their representativeness of the Mapuche people, but without democratic elements of national or popular representation, they only represent themselves” (lawyer representing the Department of Internal Affairs in oral proceedings, Trial CAM, 27 July 2005; this case will be analyzed in more depth below). In this courtroom conversation about the Mapuche people and who would legitimately represented them, “the” Mapuche people become a reified notion, recognized in the abstract, but with no clarity as to how to perceive, define, or represent them in reality.

Prisoner supporters try to publicly counter these arguments made by the prosecutor that the defendants do not carry their support. For example, many people from the Mapuche communities were present during the week-long trial to support their lonkos. The logistical effort to show their presence was enormous, as supporters arranged for the elderly, children,
men, and women to all travel from their community, arranging lodging with sympathizers in a different city for at least forty people. The battle for interpretation about the Mapuche identity and the relation between defendants and “the” Mapuche people was thus taken to the space outside of the courtroom, where the supporters played on their musical instruments and performed ceremonial acts (Field notes, April 2003).

The media, some political parties, and landowners have often argued that the mobilization of Mapuches is caused by outside “manipulation” and “infiltration” and “indoctrination” (e.g., Barrera, 1999:72; Interview C-37). Many different groups of people have been suspected of direct outside involvement in Mapuche mobilization: foreigners (in particular American and European students), radical leftists (who belong to the Communist Party, or (former) guerilla groups such as the Movimiento de Izquierda Revolucionario or the Frente Patriótico Manuel Rodríguez), ecologists (who are struggling against the hydroelectric dams in the Alto Bío Bío), international terrorist groups (particularly links with the FARC and ETA have been suggested), or “academics from the seventies” (in particular anthropologists, Interview C-42). “They are used. They don’t invent it themselves,” said the former owner of Fundo Ginebra (Interview C-37). “Many foreigners come here and put things in the head of the Mapuches,” was another illustrative comment (Field notes, April 2003). Such allegations have hardly been substantiated by or led to any criminal prosecutions of foreigners or other “outsiders.” Rather, small incidents have seemed to take on mythical proportions in the meta-conflict. For example, in 1999 there was a French student who wrote his master’s thesis about the Mapuches. He had been invited
to spend a few nights in Mapuche community Temulemu while they were engaged in a land occupation. He was subsequently accused of involvement in the occupation and deported from Chile (Case Arnaud Fuentes, Appeals Court Temuco 1999). His case fomented speculations about the involvement of foreigners, and I heard repeated references to his person in interviews.

The image of “foreign linkages” is drawn upon and reproduced in prosecutorial decisions, as is illustrated in the following example. In 2001, an independent Mapuche media collective made fun of the constant allegations of links to foreign terrorist groups and wrote the words “Bin Laden Corporation” on their website with a fake address in Saudi Arabia. Immediately a complaint was filed in Santiago, and a judicial investigation followed (Ansa 2001; Fredes & Gómez 2002). The website editor commented: “We just wanted to laugh about all the paranoia, such as that people thought that there could be suicide attacks here. [...] We had black humor; this was typical of our media collective. But the other part did not identify this as humor” (Interview C-28). The failure to understand such a reference as a joke indicates the existence of radically exclusionary interpretative communities that lack a shared code to interpret such an utterance meaningfully or a lack of willingness to adopt that interpretation. The Mapuche media website was subsequently analyzed in a report on “cybernetic terrorism” published in the newspaper El Mercurio, referencing various academic, advocacy, and human rights websites allegedly involved in promoting Mapuche “violence” (Richards 2010:75). Thus, a narrative is constructed in which Mapuche websites are linked to “terrorism.” The prosecutorial
narrative subsequently draws upon the identity images that are thus produced. For example, during one trial, the website of this independent media collective was used as evidence in order to prove that an arson incident had been a “terrorist” arson (Field notes, Trial Lonkos of Traiguén, April 2003). The prosecutor argued that the website had reported about the defendants in that case, and at the same time the website provided links to other “terrorist groups” such as the FARC. This mere fact of simultaneous mentioning on a website was relied upon as evidence during the trial, in order to demonstrate the “terrorist” nature of the alleged arson, and simultaneously reproducing the image of foreign linkages with terrorist groups.

Another aspect of the identity image of the defendant that is construed in the prosecutorial narrative regards the number of defendants on trial, and the kind of role that they are alleged to have had in the alleged crime. In this regard, the prosecutorial narrative has moved towards a focus on the “leaders” or “instigators” of actions and mobilizations. The prosecution of members of the organization CTT in 1994 involved 144 defendants. Since then, prosecutors have focused on a more limited number of people. While many activists have faced arrest and investigation, the actual criminal prosecutions have concentrated on specific individuals, communities, and families. For example, in several trials, only the official lonkos or spokespersons of a Mapuche community were prosecuted for actions (such as land occupations), in which many people from their communities had participated. This practice has reproduced the image of a “violent minority.” This practice also fits the belief of prosecutors, government actors, and landowners that the detention of these leaders and infiltrators would
stop the crimes. For example, the detention of leader Victor Ancalaf was believed to have
decreased crimes significantly (Interview C-19). Data of criminal investigations shows that
prosecutors specifically looked for external “radicals,” such as in the following request from a
prosecutor in a case of violent usurpation, theft, and arson:

> It is equally solicited to investigate whether members of some organization *unconnected* to the
sector have brought about, planned or participated in these events, and whether there are persons
who participate as *activists* in illegal takeovers. (Case Nueva Imperial 2002, Emphasis added by
author)

The search for “leaders” is also visible in many of the transcripts of interrogations by the police
and prosecutors, in which frequent questions are: Who gave orders? Who directed the rest?
Who was the spokesperson? This purposive selection of defendants from a larger group of
participants reproduced the image of a radical minority of “activists.” The construction of
criminal cases thus provided a perfect feedback loop with the general hegemonic narrative on
the causes of the problems in the region.

In several prosecutions, leaders, activists, and external manipulators were held to be
specifically criminally liable for actions – indeed, more liable than the “manipulated” Mapuche
communities. In the prosecutorial narrative, the organizations CAM and CTT are specifically
construed as troublemakers, because of their activities in Mapuche communities. When
Mapuche communities send out public declarations to claim actions such as land occupations,
they sometimes refer to the CAM or CTT. For example, in 2003, Mapuche community “José Millacheo Levío” announced a land occupation and claimed that it was done “with the help of the neighboring communities in conflict and the Coordinadora Mapuche Arauco Malleco” (Public Declaration 2003). Instead of “help,” prosecutors interpret the relations between Mapuche communities and outside activists as “infiltration.” One prosecutor, for example, argued that the CAM is “infiltrating the communities, creating fractures in the communities” (Opening statement, oral proceedings, Trial CAM, June 2005). Similarly, a CTT activist told me that while he was convicted for usurpation when he was “supporting” a community to reclaim land, the community members that had participated in the land occupation were acquitted. “They accused us of being activists. The others were acquitted. […] The community had more legitimacy,” he said (Interview C-53).

During the trial against another activist for the Mapuche cause, her “Chilean” identity was explicitly emphasized by the prosecutor (Field notes, Trial Lonkos of Traiguén, April 2003).

Mapuche activists resist this defendant image that is constructed in criminal prosecutions. They emphasize their Mapuche identity and claim the participation and support of the Mapuche people, specifically the Mapuche communities, rejecting all notions of outside infiltration and manipulation. Mapuche activists work hard to project their self-image as representatives of a larger Mapuche people. Landowners in turn project their enemy image into the public arena of Mapuche activists as marginal outcasts without public support in order to locate their actions.

---

108 This shows the negative connotation that “activist” has in the Chilean context. Lacking a better word, I continue to use the term Mapuche activist to refer to those who are involved in the Mapuche movement.
squarely within the criminal justice arena. The identity boundary that the landowner’s narrative
draws up between “manipulating activists” and “the Mapuche people” thus reinforces the
boundary between the political and the criminal justice arena, legitimizing the criminal
prosecutions and the definition of the conduct of activists as “crime.” Both constructions of
reality aim to influence the prosecutorial narrative, which is the focus of this meta-conflict, and
during trials and in prosecutorial decisions it can be observed that the prosecutor adopts or
specifically rejects concepts and claims from the competing discourses.

Thus, in criminal investigations and indictments, the prosecutor selects defendants and in doing
so constructs their identity. The identity images construed and reproduced in this prosecutorial
narrative isolate “radical” Mapuche activists and reify “the” Mapuche people as an authentic
and unified voice. Mapuche activists criticize the notion that these authentic Mapuches are
“manipulated” by external elements and foreigners as a continuation of the subordinate
position that Mapuches have occupied within Chilean society and their assumed lack of
capacity for autonomous decision-making and purposive action. At the same time as
prosecutors emphasize the authentic “Mapuche” identity, they ostensibly treat defendants as
“Chileans.” In the process of the creation of these identity images, separate and isolated
incidents involving different actors are understood to form a unified and coherent whole for
which Mapuche “radicals” are responsible. The individual and highly personal circumstances of
each case are thus put in the background, whereas the “common” features are foregrounded.
In the construction of this category of cases, the “victims” are similarly stripped of their highly
particular and personal relations to the alleged “perpetrators.” The specific identity construction of those victims is explored in more depth in the next section.

3. “The” victims

Not only the defendant, but also the victim is constructed in the prosecutorial narrative. This victim image is in many ways a counterpart of the image of the defendants in the previous section. Victims are a key concept in the discourse of prosecutors. “We feel responsible for protecting the victims,” explained the head regional prosecutor (Interview C-10). “We care about the victims,” she said, pointing out that victims were demanding relief and asking her how long they had to wait for the state to act. While prosecutors refer to “the” victims as the obvious legitimation for their prosecutions, it is not obvious to all who the victims are. Despite the liberal imagination of a society in consensus regarding what counts as a crime (and thus who as a victim), there is a lack of consensus about the identification of the victims in the “Mapuche conflict” which becomes visible in the competing mobilizations of “victims” in the criminal justice arena as was described in the previous chapter.

In several trials, the prosecutor shifted the focus from individual victims in particular cases to the asserted collective victimhood of “the” victims in the “Mapuche conflict.” In this shift, prosecutors re-contextualize events, and the prosecutorial narrative shifts from direct victimization after a concrete harmful event to indirect victimization due to a generalized state
of fear that is asserted to exist. This is specifically so in cases in which actions are framed as “terrorism,” because that legislation introduces “fear” as a basis for victimhood. The prosecutorial narrative understands those with fear to be a specific group or sector in society, for example the landowners that live adjacent to Mapuche communities or Mapuche community members who disagree with the “violent minority.”

The prosecutorial narrative explicitly engages with the self-images and enemy images of victimhood that compete in the meta-conflict. “In this trial, people were given a voice who normally don’t have a voice: the victims,” stated the prosecutor in closing his arguments, claiming that “the victims” don’t have a voice, don’t appear on television, and don’t give press conferences (Field notes, Trial Lonkos of Traiguén, April 2003). Thus, not only did he refer to the ways in which prisoner supporters had strategically used the media, he also incidentally inverted the slogan that Mapuche activists often use when they claim to “give a voice to those without a voice” in the marginalized Mapuche communities. The prosecutor explicitly addressed this inversion of discourses when he warned the tribunal that the defendants would present themselves as the weaker part. “We are the racists, the violators of human rights,” he stated, echoing what he expected the defendants to say. He emphasized that (in the arson attack) smallholder Juan Sagredo Marin lost “the only patrimony that he had.” Thus, the prosecutor explicitly responded to the enemy images that Mapuche activists have constructed, such as David versus Goliath, poor versus rich, oppressed versus aggressor. He clearly countered those images when he said about the affected landowners that “they are not
millionaires, magistrate, they are not tall blonds with green eyes. They are Chileans, and as Chileans they need their rights to be respected.”

In some of the terrorism trials, various landowners, from smallholders to big forestry companies, have been called upon to testify about arson attacks and land occupations that they suffered. By calling these witnesses, the prosecutor created a category of victims to demonstrate the fear in a sector of the population (as prescribed in the anti-terrorism legislation). At the same time, while emphasizing their commonalities, differences between these landowners were ignored. For example, in the trial against the lonkos of Traiguén, landowner Agustín Figueroa was framed as being part of a bigger group, aligned with a poor farmer (Juan Sagredo Marin), thus providing an alternative image to the allegations of him as a rich and powerful man: “We are not talking about forestry companies,” said the prosecutor, “we are talking about middle and small-scale landowners” (Oral proceedings, April 2003).

In this meta-conflict about the identification of victims, Mapuche activists, the prosecutors, government and landowners make competing claims about the “ordinary” Mapuches in rural communities. While Mapuche activists claim to represent the Mapuches living in rural communities, prosecutors claim that those peaceful Mapuches are actually the victims of the violent radicals. The prosecutor in the trial against the lonkos of Traiguén argued that those within the communities who disagreed with the violent means were ostracized and had their own pieces of land burnt. He asserted that the fear is “inter-ethnic and intra-ethnic” (Oral
proceedings, March 2003). Similarly, in 2001 the regional governor had expressed his view that “El resto de las comunidades vive en paz y no quieren esto. ¡No lo quieren!” [The rest of the communities live in peace and don’t want this. They don’t want it!] (Barria 2001). Landowners co-construct this narrative every time that they emphasize that the majority of Mapuche community members reject violence. For example, a manager of Forestal Mininco claimed that 90% of the workers in Mininco are Mapuches, that they are peaceful, and that the majority does not agree with the methods of the CAM (witness statement, Trial CAM, 27 July 2005).

Who speaks for “the” Mapuche? All actors (activists, landowners, prosecutors, and other government actors) claim that they know what “the” Mapuches want and use this in the criminal justice arena to support their claims and labels. My own interviews have mostly focused on those that have received the role of defendants and victims as direct participants in the meta-conflict in the criminal justice arena. However, in this arena the actors frequently claim to be speaking for other actors. Significantly, the prosecutors claim to speak in the name of “the” victims, whether landowners or victimized or “manipulated” Mapuche communities. Defying the defendant’s claim to speak for the Mapuche people, the prosecutorial narrative sometimes presents the anonymous protected witnesses from Mapuche communities as the representative voice of the “real” Mapuche people. These claims to speak for the victimized Mapuches or to know what they want inevitably represent only a limited and partial view of the more diverse and complex reality. I have spent quite some time in several Mapuche communities, more active and radical communities, but also in lesser active communities.
While it has given me an insight in the existing range of viewpoints and dynamics among and between communities, that is not enough to make any claims about who “the” Mapuche people are, what they want, how their views are best represented, and whether or to what extent they are victims or not. Instead of acknowledging this variety and complexity, different claims of representation are thus competing in the criminal justice arena and in the process objectifying the Mapuche ethnicity, the communities, and the “people.”

Not only the victimhood of “the” Mapuches (as victims of a radical minority) is contested, but also the victimhood claimed by private landowners and transnational companies. Mapuche activists resist the victim label that landowners claim and receive in the courtroom. They accuse them of racism and hold them at least partially responsible for their dispossession. A community member in Temulemu argued, for example, that seventy percent of the current big landowners are children of those that were involved in fraud in the past (Field notes, April 2003). Landowners publicly and explicitly resist these images of them as guilty of former dispossession. For example, after arson on two estates, Forestal Mininco issued a press release emphasizing that there were no official demands for the two estates in any court, and that there had not been Mapuche owners of the estates since at least the year 1907 (Mininco 1999d). Thus, they rejected any wrongdoing, while referring back to the Chilean legal framework. In the end, however, what matters most to activists is that the landowners are rich, and “maybe they are not guilty, but they do have the land,” as a former CAM member put it (Interview C-46).
While Mapuche activists blame current landowners for their role and knowledge in the former usurpation of the Mapuche lands, the prosecutorial narrative portrays victimized landowners as having done everything to prevent hostilities but just having “bad luck.” During the trial against the CAM for example, the lawyer in the role of private accuser argued that he was representing a concrete victim, who was “just one of the thousand anonymous victims who are affected in their daily lives because they had the bad luck, the misfortune, to be the owner of a property in a specific place at a specific time” (Opening statement, oral proceedings, Trial CAM, June 2005).

The prosecutor in that trial exclaimed in his opening statement that the landowners “have done everything possible, everything humanly possible, to live in peace. What can one say, as the landowner of a property, when your neighbor after decades and decades suddenly says: ‘this [property] is declared to be in conflict’”? While the prosecutorial narrative thus refers to Mapuche communities as “neighbors,” Mella and Le Bonniec (2004) point out that this leaves out the history of the creation of private property and how those landowners and Mapuche communities came to be neighbors. Contrary to the Mapuche activists who demand change and accuse landowners and forestry companies of taking their lands and resources away, the prosecutor described the status quo as a situation of “peace,” thus marginalizing the perspective of Mapuche activists.

The prosecutor in the case against the CAM echoed the views of landowners when he argued that landowners had followed strategies of good “neighborship,” offering work and firewood to
Mapuche community members, specifically to avoid trouble (Opening statement, oral proceedings, Trial CAM, June 2005). Landowners feed this narrative in which they are already doing “everything possible” to live in peace. Around criminal proceedings and during trials, landowners often emphasize their good relations with the adjacent Mapuche communities and their efforts to help them. For example, a private accuser stated during a trial that “days earlier he had taken [the defendant] a part of the way in the truck and offered him clothes for his children, as he had told him that he had seven children...” (Del Valle 2001). Another landowner reported to the police that

[H]asta que comenzaron los conflictos entre propietarios chilenos y comuneros mapuches, el trato con las comunidades aledañas al predio, fue muy bueno. Se les daba trabajo a los comuneros mapuches y se les trataba de incorporar a un número importante de ellos a las labores agroforestales del campo.

[Until the conflicts between Chilean landowners and Mapuche community members started, the relations with the adjacent communities were very good. One gave work to the Mapuche community members and attempted to incorporate an important number of them into agro-forestry jobs on the land.] (Case Lonkos of Traiguén, Declaration 3 August 2002, Traiguén)

Richards also observed references to paternalistic “generosity” in her interviews with the Araucanía elite, and she concluded that “the Mapuche provide convenient evidence for the European farmers’ benevolence and superiority” (2010:82). That narrative is also presented in the courtroom. One private landowner, for example, claimed that his grandfather had built a public school and a health clinic for the communities after acquiring the property around 1942 (testimony, Trial CAM, verdict 2005). Richards (2010) points out that landowners often selectively remember a good relation with the Mapuche communities and place the contention and mobilization in a very short time frame. Indeed, landowners often even ignore any previous
land occupations that may have occurred during the Agrarian Reform in the early 1970s. This selective focus on good relationships contrasts with the discourse of activists, which tends to go back to the relations that Mapuches had with the Spanish Crown. Adopting a broader time frame, activists perceive the status quo as a continuation of the violence inflicted during the Pacification of the Araucanía.

The image of “the” victims is a key component of the prosecutorial narrative that seeks to accuse Mapuche activists of specific crimes. In this brief description of the image of the victims in the prosecutorial narrative, I have focused on the portrayal of landowners and “the” Mapuche people as victims of a violent minority. Prosecutors de-emphasize characteristics of landowners that Mapuche activists attribute to them, such as that they would be rich and powerful. Instead, they emphasize that small-scale farmers are also negatively affected and that private landowners are not “blond and tall.” The discursive positioning of landowners and “the” Mapuche people as victims is reproduced and institutionalized in criminal proceedings. Mapuche community members who testify, sometimes anonymously, against the “radical minority” are portrayed as the representative voice of the “real” Mapuche people. A variety of private landowners and company representatives are invited to testify in various trials, where their particular experiences are linked together into the common experience of victimization as landowners. In the creation of this image of “the” victims, the prosecutorial narrative is at the center of the meta-conflict in the criminal justice arena, challenged by Mapuche activists and supported by landowners.
4. Shift from symbolic land occupations to criminal organization

In the previous sections, I have analyzed the construction of the main actors of the prosecutorial narrative: the defendants and the victims. What follows traces the construction of the alleged crimes and the interpretation of Mapuche protest activities as crimes. I will argue that caught up in the meta-conflict and the general ambivalence in defining the situation, the prosecutorial narrative is going back and forth between de-contextualization and re-contextualization of the allegedly criminal events. In this section, I turn to an important criminal case that is the first instance of re-contextualization in this contentious episode since the transition to a democratically elected government after Pinochet. I will demonstrate the significance of re-contextualization by describing how this move influences the choice of defendants, the selected criminal offense, and the arguments for criminal liability.

The transition and the dialogues between the new government and Mapuche representatives triggered high expectations for land reforms. Already in 1992, however, there was dissatisfaction among Mapuche activists regarding the political promises and the possibilities of the Indigenous Act. The activists from Mapuche organization CTT did not feel bound by the Agreement of Nueva Imperial, in which other Mapuche organizations had negotiated with President Aylwin and had promised to stick with the institutional paths. Instead, activists from
CTT decided to carry out what Chilean anthropologist Bengoa described as “the much-feared and remembered land occupations” (Bengoa 1999:196).

Founded in 1990, the CTT presented itself as an organization of traditional authorities from different Mapuche communities (Mariman 1995). It started a process of recuperations, entering lands near the communities in symbolic rituals in which elderly people, traditional authorities, and children participated. It also started a “Mapuche newspaper,” Aukiñ, the “Mapuche Voice.” In March 1992, the first Mapuche Tribunal was inaugurated in order to strengthen the Mapuche “institutionality” (Aukiñ 1993a). In light of later events, these activities are all pretty innocent. Indeed, looking back, one defense lawyer described the activities in the early 1990s organized by CTT as a “joke” compared to the nature of the protest actions in 2009 (Interview C-47). Still, in 1992, landowners and the Chilean government considered the CTT activities to be threatening. For example, in an internal analysis of the situation in 1989, the new government had explicitly warned of possible land occupations and “corridas de cerco” (Toledo 2007:254). José Mariman wrote that the recuperations created “terror” in the minds of the landowners (1995). Not only were the land occupations perceived as a threat, so was the Mapuche Tribunal’s challenging of Chilean laws and jurisdiction. Therefore, Sr. Joaquín Chuecas Muñoz, the regional governor of the 9th region, filed a petition for a criminal investigation.

On 23 June 1992, special Judge Antonio Castro Gutiérrez initiated proceedings against leader Aucán Huilcamán Paillama for the usurpation of lands and the theft of two animals as a
member of the criminal organization Consejo de Todas las Tierras (CTT). In addition, the other 143 defendants of “Mapuche origin” were accused of usurpation, criminal organization, contempt of court, theft, and damages (CIDH 2002). To build this case against the members of the organization CTT, Judge Castro pulled together different incidents of land occupations, for which complaints were sitting at the police offices without successful prosecution, to construct a pattern which, together with an alleged common objective, became the basis for the charge of a criminal organization. Thus, the investigative judge interpreted the symbolic land occupations organized by members and communities of the CTT as actions of a *criminal* organization. A public defender recalled that

> it was election time and the government didn’t want to seem soft. The trial meant the end of the harmony that had existed between the Concertación [government coalition] and the indigenous organizations. The investigative judge aggregated the various open cases that existed against the different actions undertaken by CTT, arguing that they were related. (Interview C-47)

In 2009, I interviewed José, CTT activist and one of the defendants in the case, about their activities and the subsequent prosecution. He recalled their hopes and expectations when the CTT started mobilizing in the early 1990s:

> Those who participated were elderly, traditional authorities, *machi, werkenes*, and children. [...] There was a lot of hope. The idea at the return of democracy was that we were going to be listened to, that there would be an opening in the attitude towards the Mapuche. At that

---

109 There have been assertions that the CTT members were charged on the basis of the Law on State Security, for example on Wikipedia (2011), in personal conversations (Interview C-53), and in newspaper accounts (Jaramillo (2005) in the newspaper *La Nación*). I have not been able to see this confirmed in court documents. Indeed, a lawyer as assured me that the Law on State Security was not applied in this case (Interview C-47).
moment, Patricio Aylwin was president and had adopted a dialogue with the Mapuches. We never imagined that they would apply the same laws as the military regime. They said that we were against the state. We were not at all against the state. We were just demanding compensation for the historical debt. It was an opportunity. Our position was entirely legitimate. We thought it would be received positively. (Interview C-53)

His testimony lays bare the striking discrepancy in the way in which he defines what they were doing and how it was received. Faced with the criminalization, José kept pushing their actions back into the political arena.

The indictment sparked strong resistance and attempts to counter the criminal labeling and redefine the events. “We demand acquittals” was the front page of their newspaper Aukiñ in November 1992, accompanied by pictures of a grand demonstration showing an assembly of older men and women wearing symbols of their Mapuche identity, such as clothing and musical instruments. The Aukiñ editorial defined their actions as “the crime of reclaiming historical rights,” (1992a) and that language continues today. The accusation was interpreted as an accusation of “the” Mapuches. “Los mapuche no hemos cometido ningún delito solo hemos reclamado nuestros derechos como es la tierra [...] los winka son los usurpadores no los mapuche.” [We Mapuches have not committed any crime; we have only demanded our rights to the lands. [...] The winka are the usurpers, not the Mapuches], said lonko Juan Coliqueo at a public demonstration (Aukiñ 1992c). Leader Aucán Huilcamán defended CTT as a legitimate organization: “no nos hemos organizado para cometer delito, sino para promover nuestros derechos” [we haven’t organized ourselves to commit a crime, but to promote our rights]
(Aukiñ 1992c). The CTT activists emphasized the context of dispossession as the proper framework to judge their actions.

Acusar de usurpación de tierras a las comunidades Mapuche, es lo más aberrante que existe en la historia Mapuche y chilena. Con esto se pretende desconocer que los mapuche son los verdaderos dueños y originarios de estas tierras, es pretender revertir la historia [...].

[Accusing Mapuche communities of usurpation of lands is the most erroneous thing that exists in Chilean and Mapuche history. It is an attempt to deny that the Mapuche are the real owners of the land, an attempt to reverse history [...].] (Aukiñ 1992b)

The 144 defendants were selected because they had signed a letter that explained the demands for land and the related actions of recuperation. According to José not everyone who had signed the letter had actually participated in the recuperations. It is true, though, that they were all members of the CTT, and that is what they got charged with, the letter being the evidence of their membership. As such, the land occupations were the crimes that were attributed to the organization, and the members were held responsible even if they had not personally participated. The move towards re-contextualization of the single events of land occupations thus was constituted by a broadening of the relevant time frame and criminal liability on the basis of membership in an organization.
The re-contextualization of the separate land occupations was justified in the indictment which expressed that, for the Chilean state, far more was at stake than the harm inflicted by single acts of land occupation. The underlying fear was that of a state within a state. The investigative judge argued that CTT posed a threat not only because of the land occupations but because of its defiance of Chilean authority in general:

*El caracter [sic] ilegal de esta asociación se encuentra suficientemente acreditado con el desconocimiento de la autoridad, la creación y funcionamiento de un tribunal Mapuche, creación de bandera y emblema, el tener un periodico [sic] clandestino denominado AUKIÑ, hacer presiones contra las autoridades. - La existencia de una asociación de personas denominadas Consejo de Todas Las Tierras, que se autodefine como Organización estructural Histórica Mapuche, constituida [sic] por lo que ellos llaman sus autoridades originarias. - Que esta entidad postula la existencia de una Nación con toda la significación que este termino [sic] da al Derecho político.*

[The illegal character of this association is sufficiently attested in its disregard for authority, the creation and functioning of a Mapuche tribunal, the creation of a flag and an emblem, the clandestine newspaper called *Aukiñ*, and its pressuring of authorities. The existence of an association of persons called Consejo de Todas las Tierras that defines itself as the structural Historical Mapuche Organization, constituted by what they call their original authorities; that this entity postulates the existence of a Nation with all the significance that this term gives to the political Law] (Accusation cited in *Aukiñ* 1993b).

The defense took the battle of interpretation about the Mapuche identity and representation into the trial as it aimed to explain what the *real* nature of CTT was. The defense lawyers discussed the concepts of *Lonko*, *Machi*, *Weupife*, and *Werkenes*, arguing that these are true roles in Mapuche tradition, not an invention of an illicit organization. That same battle of interpretation was subsequently fed back into the public sphere when the defense statement was reprinted in a shortened version in the “Mapuche voice” *Aukiñ* (1993c). Referring to the customs as they have been throughout known Mapuche history, so long ignored by the Chilean state, the lawyers argued that the organization CTT was “*un esfuerzo de volver a reunir a las*
autoridades del Pueblo Mapuche a fin que este se manifieste y se relacione con el resto de los chilenos mediante la organización que es propia y natural” [an effort to assemble the authorities of the Mapuche People once again so that they can manifest and relate to the rest of the Chileans through an organization that is its own and is natural] (Reprint of part of the defense statement in: Aukiñ 1993c).

After the conviction of 141 defendants on 11 March 1993, the CTT appealed and lost the case and was later rejected at the Supreme Court. The case went on to the Inter-American Commission of Human Rights, where it is still under consideration. Despite the labeling of the CTT as a criminal organization, however, none of the 141 convicted defendants has spent time in prison. Defendants did lose political rights, though, and were impeded, for example, from running for president. Thus, while the state has symbolically dragged the CTT and its activities into the criminal justice arena, de facto the organization CTT still exists today and has not ceased to be active in the mobilization of communities and other happenings in name of the Mapuche people. Their basis of support has decreased over the years, but a survey in 2006 demonstrated that at least 10% of (self-identified) Mapuches claimed that the CTT represented them “a lot” (CEP 2006).\textsuperscript{110}

\textsuperscript{110}In 2006, a CEP survey asked whether (self-identified) Mapuches knew the CTT and whether or not they felt this organization represented them. The decision to include a person as Mapuche was on self-identification. 42% reported that they knew the CTT, and of these 42% there were 36% who responded that the CTT represented them a little, and 10% who responded that the CTT represented them a lot.
The prosecution of the Mapuche organization CTT did something that had not happened before. Until then, prosecutors had investigated and prosecuted acts of land occupations separately. For example, in 1991 thirteen Mapuches were prosecuted for “usurpation” after they had occupied the estate “Santa Clara” in the 9th region (Barria 2001). Instead of continuing that route, in 1992 the investigative judge made a discursive shift. In this prosecution against the CTT, the prosecutorial attention shifted from the particular occupation of specific land estates on specific dates and particular damages done to the fences or produce to a broader time frame and a broader geographical scope. The narrative re-contextualized separate incidents of land occupation in order to create a pattern and a meaning above and beyond the individual land occupations. The prosecution against Consejo de Todas las Tierras thus displays several of the elements that I have listed as re-contextualization in Chapter 1. The narrative shifted attention from individuals to a collective, stipulated a pattern, and invoked a broader legal interest.

Not only were the specific “criminal” events of land occupations drawn into the criminal justice arena. Instead, an entire Mapuche organization was defined as “criminal,” and even those members that did not personally participate in the occupations were captured by the logic of criminal liability. This was only possible because the prosecutorial narrative shifted from a de-contextualized modality to a re-contextualized interpretation of events, which then enabled the expansion of the criminal justice arena to incorporate acts and persons that were previously thought to be in the political arena. Indeed, the case ignited a battle for interpretation as
Mapuche activists presented a counter-narrative defining their actions as primarily political and symbolic instead of criminal. The trial became a battle about the identity and legitimacy of the Consejo de Todas las Tierras and their representation of the Mapuche people as well as the legitimacy of the Mapuche land demand. Interestingly, after this criminal case land occupations à la the CTT model have hardly been prosecuted. The contention about the criminalization of land occupations is explored in more depth in the next section.

5. **What is land for, who owns it, and who is the usurper?**

In this section, I analyze the way in which land occupations have been defined in the prosecutorial narrative since the prosecution of the CTT. Prosecutions of land occupations, or, more to the point, the lack of such criminal prosecutions, should be understood against the background of the legitimacy of the Mapuche demands for land restitution and the recognition of these demands among the larger Chilean population. A survey conducted at the end of the 1990s showed that land occupations as a protest action enjoyed widespread legitimacy among Chileans, stating that 80% of Chileans thought that “the Mapuches are right in the conflict between forestry companies and Mapuche communities” (CERC 1999:1).

---

111 From the conclusions of the CERC report: “The immense majority of the Chileans consider that the Mapuches are right in the conflict between forestry companies and Mapuche communities in the 8th and 9th region. That is what 80% of the population thinks, whereas 10% considers that the companies are right” (CERC 1999:1). The specific question was: “in the last weeks there has been information about incidents between groups of Mapuches and forestry companies in the 8th and 9th region. According to what you know or have heard, who is right, the Mapuches or the forestry companies?” (1999:7).
In its attempts to allocate land occupations to the arena in which it “belongs,” the prosecutorial narrative is deeply ambivalent. In the previous section I noted that despite the determination of the CTT as a criminal organization and the conviction of 141 of its members, none of the defendants spent time in prison and CTT has continued to exist. Indeed, CTT has continued to engage in land occupations and only on a few occasions have activists been prosecuted for this conduct. Since 1994 symbolic land occupations have hardly been prosecuted at all, de facto giving activists the space to claim such occupations as political actions that should be situated in the political arena and responded to within the logic of persuasion and negotiation, even though landowners continue to claim that it is a crime and should be prosecuted as such.

Indeed, between 2001 and 2005, it was routine practice not to prosecute such occupations, described Jorge Correa Sutil, former sub-secretary of the Department of Internal Affairs:

[El Gobierno de la época se abstenia de actuar en los casos conocidos como “tomas virtuales de terreno”, donde grupos concertados ingresaban pacíficamente a los predios, convocaban a la prensa y luego se retiraban sin necesidad de intervención policial masiva y sin dejar tras ellos daños importantes a la propiedad.]

[The government of that period abstained from action in cases known as “virtual land occupations,” in which coordinated groups peacefully entered the lands, called the press, and then left without the necessity of massive police intervention and without leaving behind significant damages to the property.] (Comisión de Constitución 2003:32)

Whether intended as official policy or not, this permissiveness added to a publicly recognized legitimacy of Mapuche land demands.

Perceiving this lack of law enforcement, landowners have been pushing the meta-conflict about land occupations back into the criminal justice arena, demanding that the government protect
and defend private property. For example, in a public speech in 2002, the president of the CORMA defended the importance of private property, economic progress, and the strict application of the “rule of law.” He explicitly condemned any tendency to take extra-legal factors such as “popularity, the ethnic origin, friendship, economic, social or political position” into account when judging actions. And he specifically criticized the permissiveness towards Mapuche land occupations and argued that the social order would weaken when the application of the law was made dependent on “the popularity of a cause, the socioeconomic situation of the criminals or their capacity to voice their demands in the media.” He emphasized the liberal legalist value that the law be applied “with rigorous equality to all [...] members [of society].” (2002a).

While so-called “virtual” or “symbolic” occupations have thus de facto been excluded from the criminal justice arena, “productive” occupations have been the subject of several criminal prosecutions. Contrary to merely symbolic occupations, productive occupations, which started in 1998, go beyond the simple entering of a piece of land. Instead, communities proceed to work on the land and extract trees or wheat for sale or consumption. While some transgression of property lines has actually been customarily allowed in the relations between business farmers and their workers and adjacent communities, productive occupations go far beyond such incidental incursions. Over time, landowners and the state have therefore come to re-contextualize such occupations as the start of lawlessness and a loss of control.
With the criminal prosecutions, the sociopolitical dispute about land ownership, land value, and land use transferred to the criminal justice arena. The competing discourses give radically different answers to the questions: What is land for, who owns it, and who is the usurper? Landowners argue that property is sacred and legally in the hands of the current landowners. Mapuche activists in turn claim that the Chilean state owes a historic debt to the Mapuche people.

While the fundamental dispute is about legal ownership of properties, productive land occupations also feed ongoing disagreement between Mapuche activists and landowners about the meaning of land and proper land use. In addition to claims about national self-determination and the significance of the Mapuche territory, Mapuche activists reject the exploitation of the land and demand instead a respect for native forests and a desire to live in harmony with nature. They also emphasize that communities need the land because otherwise they do not have enough resources for their children and they will continue to live in poverty. This need is aggravated by the fact that much of the lands are severely degraded due to erosion. Landowners emphasize, however, that Mapuches traditionally never were farmers and that they do not have the knowledge and techniques to fruitfully work the land. Landowners therefore argue that giving land would never solve the poverty problem as more children will be born and Mapuches will need more land every time they divide the land among their children. Indeed, the president of the CORMA argued that those living on land acquired by CONADI are “poorer than ever” (2002a).
In this meta-conflict in and around the courtroom, actors attempt to reclaim vocabulary and assert their specific interpretation and values. While Mapuche activists are accused of the criminal offense “usurpation of land,” they systematically refer to the state as the “usurper” and to landowners as “usurpers.” Activists resist the label “land occupation” and assert that what they are doing is “recuperation.” They reject the notion that they could be guilty of the crime of usurpation. One activist asked me: “How can the owner be guilty of this crime? And the thief arrests the owner?” (Interview C-61). They thus juggle and invert the hegemonic vocabulary. And when landowners in hegemonic discourse are systematically referred to as the “dueños de la tierra” [landowners], CTT leader Aucán Huilcamán proclaims that the Mapuches are the “real” dueños de la tierra.

Landowners also employ this strategy of inverting arguments that are thought to be firmly within the domain of the opponent. For example, when Mapuche activists emphasize ecological affinity to affirm their superiority, forestry companies specifically detail how their plantations contribute to ecological equilibrium and the conservation of native forests. Landowners also criticize the “myth” that only indigenous people could have a strong connection with nature (Interview C-54). Thus, we can observe how actors appropriate terms and arguments that initially “belonged” to the opponent. And of course, these arguments are also reproduced in the courtroom. During trials, private landowners specifically dispute the accusation that they look at land only as a profit-making asset. For example, the Figueroa family asserted that the
land did not only mean financial gain for them, but also had emotional value (Field notes, Trial Lonkos of Traiguén, April 2003). They pointed out that *their* ancestors were also buried on their land (Larrain 2007), thus inverting the common claim made by Mapuches that the land is special to them because their ancestors are buried there. In this way, keywords and key arguments are re-appropriated by the opposing discourse and given a different meaning. The words and arguments chosen in the prosecutorial narrative are of great significance in this linguistic battle. The prosecutorial narrative participates in this meta-conflict about land occupations and the meaning of land as it emphasizes that the value of land should be measured in money.

A fundamental issue in the meta-conflict is the question of legal and legitimate land ownership. Mapuche activists criticize the idea that because of the war in 1881 the current landowners have acquired “legal property” and reject this as a form of unacceptable victor’s justice. Thus, apart from making demands based on titles that they received when they were brought to reductions – the reduced pieces of lands reserved for them after the war – they also refer to Spanish treaties to make their claim to “ancestral lands” consisting of ten million hectares below the Bío Bío River. “Our Mapuche nation has not taken distance from those treaties nor has it violated them, having to affirm their complete validity and recognition from our part” (Aukiñ 1991:5). This claim is based on the notion of land as “territory” (the land that belongs to a nation and people) as opposed to land as “*tierra*” (land which can be divided into individual property). Among Mapuche activists and in many Mapuche communities, the validity of these
treaties is undisputed, and therefore activists claim that land occupations are not crimes but political events. A lonko described it as a “shout of protest to the state and the rich” (Interview C-27). Contrary to the landowner’s perspective, they rhetorically ask “Why do we need titles if all the land was ours”? (Interview C-62).

Mapuche activists have attempted to frame their demands with an explicit reference to Chilean laws. On 16 January 1999 a founder of the Center for the Study of Indian Law sent a letter to the CORMA declaring that the rights claimed by the forestry companies are “imaginary rights” which “are violently unconstitutional” with reference to the laws of 2 July 1852 and 4 December 1866 (on file with author). Thus, the letter demanded that “in faithful and integral compliance with the Chilean laws, constitutions, codes and serious laws, return the usurped lands to the real owners and otherwise the indigenous communities will take care of it.”

Landowners, however, refused to accept this logic. While recognizing the legitimacy of *títulos de merced* as a valid title within the current legal system, landowners specifically resist the notion of “ancestral rights,” which challenges the basis of the Chilean legal framework. They reject the notion that “anyone who can claim to have been there first would be able to exercise an eternal right to the land,” said the representative of Forestal Mininco. “Then the Chinese might be able to claim land here! That is not valid, and that damaging discourse could sow an extremely dangerous conflict” (Interview C-17). One landowner rejected the Mapuche claims because “in the end, they were never the owners of these lands; rather, they only lived in an isolated way” (citation from interview by Richards 2010:80). Ridiculing this logic of ancestral
rights, the representative of forestry company Bosques Cautín laughed (Interview C-33): “The hospital in Temuco, the indigenous say that it is theirs!”

Landowners thus dismiss the reading of history in which treaties with the Spanish Crown and the Pacification of the Araucanía lead to current obligations for the Chilean state. Their position is supported in the current Chilean legal framework, as Mapuche assertions of land ownership are not recognized without titles that have been recognized in a civil court. In 1999, the “ancestral lands” were explicitly excluded from CONADI’s Fund of Land and Water, which purchases land for Mapuche communities (Toledo 2007:260). In the Indigenous Act, only lands which were granted to the Mapuches after the Pacification of the Araucanía were considered to be “indigenous” (Richards 2010:68).

These competing narratives about landownership and land use traveled into the criminal justice arena and also popped up in the prosecutorial narrative. Sometimes, the prosecutor explicitly dismissed the claims to ancestral lands. For example, in his opening statement in the trial against the Lonkos of Traiguén, the prosecutor argued that since 1992, various intellectuals, like Chilean anthropologist José Bengoa, have spread “theories” about the history of Chile and the Mapuches which have resulted in the land claims. Mella and Le Bonniec (2004) point out that the prosecutor thus reduced land claims to theories and to something that is recent, ignoring a long history of claims and mobilizations in which Mapuche communities have gone to Chilean courts and staged occupations, long before 1992.
The emergence of productive occupations

In 1998, the Mapuche community Temulemu did for the first time what came to be called a “productive” land occupation, as they not only entered but also exploited the forestry plantations on the estates Santa Rosa de Colpi and Chorrillos. They based their claim of landownership on a judicial decision from 1930 by the Tribunal de Indios [Court for Indians] (Barrera 1999:69). One participating activist told me the story:

We entered and started a little company. People from the community simply came to work. Instead of occupying the field as a symbolic action, we did a “productive” recuperation. That meant that instead of asking attention for our demand and hoping that it would get solved, we just put the land to our use. We started cutting the trees and transporting them. People from the community who came to work would get their pay at the end of the day. […] With a hundred people we occupied it for three months. We made a camp and installed a wooden campground. We had an industrial saw machine and a modern production. We paid a daily wage to anyone that came to work. It was a highly unusual system. There was no such thing as reclaiming “sacred” trees. It was all about the higher quality of life for the people. The wood was used firstly to build houses for the people, and secondly for sale. (Interview C-59)

The productive land occupation came to be connected to the concept of “territorial control.” This idea was coined by José Huenchunao, an early leader of the Mapuche organization CAM. In “productive” land takeovers, communities would simply start working the land during the day and patrolling at night. This practice still existed in 2009, when a community member from the coastal area told me that “we are guarding the territory in order to prevent the company from entering. We get up early and work in shifts,” (Field notes, April 2009). These occupied estates would transform into a no-go area for the landowner and Chilean authorities.
Such occupations are not clandestine operations, but often publicly announced. For example, on 13 January 2003 a Mapuche community sent out a public declaration stating that they had occupied *Fundo* Nupangue:

This occupation develops with productive activities inside the estate and will be done for an undefined time. [...] This action expresses our rejection of the usurpation of the ancestral Mapuche lands that both individuals and transnational companies, especially forestry investors, had done previously. (Public Declaration 2003)

Contrasting these occupations to the “peaceful” symbolic land occupations, landowners portray the productive land occupations as a different phenomenon, with different actors and different motives. The complementary images of the symbolic land occupation and the productive land occupation display a dichotomy similar to the distiction between the “good” Mapuche and the “bad” Mapuche. In the landowner’s narrative, the symbolic land occupation transformed into the peaceful action of a “good” Mapuche, turning those involved in productive occupations into the criminals. “Before there were women, children, and lonkos,” said the lawyer of one of the biggest forestry companies. He attributed a different motive for participation to these “women, children, and lonkos”: “For them it was really about the land.” About the later land takeovers he said: “they do not care so much about the land as about something more, such as autonomy” (Interview C-16).
Transfer into the criminal justice arena

The lack of a systematic criminalization of symbolic land occupations (or the symbolic occupation of urban buildings) provided space for Mapuche activists to claim these tactics as political protests instead of plain crimes. Landowners, however, fear for the potential legitimization of occupations and other actions which they want to be clearly labeled as crimes. In a public speech, the director of the CORMA referred specifically to past experiences with productive occupations, such as the sawmill that the Temulemu community built:

Can one occupy with force the property of a neighbor when one has been waiting several years for a solution of housing? Can a group of Mapuches attack with an ax a patrol of Carabineros in Lumaco, or with bullets a farmer in Victoria and others in Collipulli? Can someone systematically steal wood from his neighbors because he believes that the lands belonged to him at some point? Can one burn woods and houses, attack and intimidate workers, assault trucks and build clandestine sawmills when one is dissatisfied with the current situation, established in the Chilean laws? (CORMA 2002a)

Productive land occupations have been transferred into the criminal justice arena and the logging of trees and harvesting of grain during such occupations have been defined as crimes. In these prosecutions, the historical context of the relation between “neighbors” and the Mapuche land claims were generally ignored. Instead, the prosecutorial narrative tended to focus narrowly on the specific damage done to trees and produce on a specific property, affirming their economic value and financial vocabulary as the main language. In the Temulemu
case, for example, there was considerable debate about what the costs of a tree are, whether one cubic meter is $10,000, and whether 400 trees then come to $3,200,000 or not. In another case, eleven members of Mapuche community “José Millacheo Levio” from Chequenco were accused of the theft of between 30 and 800 sacks of wheat. Also in that case, the focus was on the specific costs and the judges decided that about 10,000 kg of wheat were taken. The value of the wheat was estimated at 945,500 pesos, as every 100 kg was estimated to be 9,455 pesos (Case Chequenco).

Mapuche activists often resist this “capitalist” way of defining and valuing land, which focuses on financial “profit” only. Instead, they claim to wish to live in harmony with nature. Landowners in turn claim the importance of protecting private property and securing investments as public and national interests. A representative from a forestry company said that a plantation is indeed a “productive unit,” and the function of a pine tree is to be converted into timber (Interview C-34). In the meta-conflict alternative claims about the value of land, territory, productivity, and wealth thus compete for hegemony, which would mean that particular interests are successfully represented as universal interests and the fact that the status quo is a product of history is denied. For example, in such a move to represent and work for the common good (instead of particular interests), the CORMA director claimed that “the private sector continues to be the principal motor of development of the country” (2002a).
While the prosecutorial narrative thus emphasizes financial damages in order to construct the case, at the same time, private landowners often highlight their emotional attachment to their land. The fact that more was at stake than financial profit was indeed recognized during the Chequenco trial. In that case landowner María Magdalena Silva Correa had abandoned her property after she got tired of the constant attacks. In recognition of the way in which this had affected her, the convicted community members of “José Millacheo Levio” not only had to pay the damages to the produce, but also emotional damages (Case Chequenco). Still, the land itself was evaluated in financial terms.

Criminal prosecutions of those engaged in productive land occupations thus define such actions clearly as crimes, specifically because of the economic damage that is incurred to the private or corporate landowners. At the same time, however, there are numerous cases where such criminal prosecutions are followed by political negotiations. This was, for example, the case after the Temulemu productive occupation. Fifteen participants were convicted of usurpation and theft of wood. Afterwards, however, negotiations with CONADI resulted in the land being transferred to the Mapuche communities that had engaged in the productive occupation. This transfer fueled the meta-conflict about land use. Forestal Mininco declared publicly that it did not believe that the handing over of lands was the solution to the grave situation of poverty that affects the rural sector in the 8th and 9th regions (Public Declaration, Mininco 1999e). This declaration was issued a few months after Mininco sold the estate Santa Rosa de Colpi to CONADI, after which it was transferred to the Mapuche community. In this back and forth
between the criminal justice arena and the political arena, questions about the legality and legitimacy of land occupations become intricately connected to the issues of land ownership and land use.

The prosecution of defendants for their actions in a productive occupation required a re-contextualization of separate actions and incidents as a part of that enterprise. For example, in the indictment of the Temulemu case, the prosecutorial narrative connected a collection of separate incidents, as these were construed into a pattern. Various actions on different dates with different participants were listed: some actions were qualified as “usurpation” and “theft” between 20 September and 16 October 1998, and there were also actions of usurpation and theft on 16 November 1998. Separate events were thus re-contextualized as being part of a larger whole: the productive occupation. Lonko Pascual Pichún, the chief of the community Temulemu, was accused of the facts in both instances. The other defendants were different for each set of facts. Apart from the fact that all of the actions were related to the estate Santa Rosa de Colpi, it is not entirely clear why they were prosecuted and sentenced together. It is clear, however, that there was a move beyond single incidents. This is also reflected in the fact that the investigative judge, Archibaldo Loyola, was investigating the existence of an “underground organization composed of Mapuches and non-Mapuches who take advantage of the situation for their own benefit in order to transport and commercialize stolen wood” (Barrera 1999:77). The specific mention of “non-Mapuches” clearly reflects the image of the “external influences” regarding alleged perpetrators of such actions, discussed in section two of
this chapter. The search for an “underground organization” indicates a move from the investigation of particular individuals towards an investigation of (members of) a collective.

Landowners were dissatisfied with the result of the criminal prosecutions of such occupations. In the Temulemu-case, for example, prosecution took place and fifteen people were convicted. But none of them actually spent time in prison, regularly reporting to the police station instead (similar to probation). After the community members were removed from the estates, Forestal Mininco exploited the plantations cutting the trees. After various attempts to replant, they abandoned the ground in 2001. “What is Fundo Santa Rosa worth?” the representative of Forestal Mininco asked me. “Zero. We cannot enter it,” he said, answering his own question (Interview C-17). Any future plantation there cannot be adequately protected. He added: “in theory it would be one million pesos because of the value of the ground, and then added to that the planted trees having a value dependent on their age.” Also, many of such occupations have not led to prosecutions or convictions. The lawyer for the governor of sub-region Malleco confirmed that when there is a land takeover, the government is more concerned with removing the occupants than with engaging in the procedures necessary for effective prosecution (Interview C-56). Therefore, landowners continued to call for more attention to the grave effect of these occupations. In 2002, the CORMA director was clear about their frustration: “Without a doubt, sirs, parliamentarians of the region, we are very tired, worse, discouraged. We have knocked on many doors and we haven’t been listened to” (2002a).
Productive occupations as lawlessness and a loss of control

According to one of the public defenders, smaller transgressions of the law such as theft and usurpation are only prosecuted if they are perceived to be the overture to worse actions (Interview C-47). Indeed, small transgressions of the law are perceived as a customary practice, characterizing the relations between rural neighbors, and more specifically the relations between business farmers and their workers, who often come from Mapuche communities. The already ambivalent border between the political arena and the criminal justice arena is thus further blurred by the fact that many instances of small theft are viewed within the framework of what one landowner called the “laws of the countryside” (Interview C-55). As long as farmers have the feeling of being in control of the situation, they do not mobilize the criminal justice system. Productive land occupations, however, clearly indicate to them the start of lawlessness and escalation.

When one talks to members of Mapuche communities as well as landowners, it is clear that “coexistence” in the countryside is characterized by an absence of state agents and the laws of the state. Customary practices and solving things among each other is the rule, state intervention the exception. Hulsman (1986) pointed out that state intervention is the exception everywhere, but it seems to be even more so in the rural areas of the south of Chile. It used to be common for Mapuches from rural communities to enter other properties to look for firewood or have their animals graze on the land. This was not always permitted, as a young member of a Mapuche community reported that when he was caught, he had to pay one of
their animals as a fine in a private settlement (Interview C-58). The boundaries between the legal, customary, the accepted, and the illegal are vague in the countryside. The SOFO director said that workers commonly take some grain or fertilizers from the private landowner who employs them for use in their small farm practices, comparable to the practice in some companies that employees sometimes use copy machines for their own purposes or take small office materials, such as pens, home. He emphasized that the rural areas are always far from authorities. “It is difficult to protect property.” So farmers were used to “thieving” and to a certain level that was part of an unspoken agreement. “But then,” the SOFO director said, “forty or sixty animals in two months; that is not like a single pen anymore.” He contrasted “thieving out of necessity” to “organized thieving” and added that this second type also contains an “ideological component” (Interview C-55). Landowners came to perceive references to poverty and a history of violence and exclusion as a carte blanche to take from them and that some community members simply were taking advantage of their work.

Over time, these productive land occupations have therefore obtained a meaning within the prosecutorial narrative that goes beyond the specific occupation of a property or the specific damage to trees. This is specifically visible in trials in which the prosecutor has charged defendants under terrorism laws. In the trial against the Lonkos of Traiguén, the prosecutor commented that after pieces of land had been “unilaterally” declared to be in conflict, “those terrains left the sphere of Chilean legality. They became a no man’s land” (Oral proceedings, April 2003). In the trial against the CAM, private complainant Forestal Mininco argued that the
“unilateral” declaration of a property to be “in conflict” is a “euphemism” that is “utilized to announce that any kind of crimes will be committed in the property.” According to him, the negative economic impact of such a declaration is obvious, as the “commercial value” of the property “practically disappears” the moment that “it cannot be exploited, the moment that anything that is planted can be destroyed, that it won’t be possible to harvest without a police contingent.” He concluded that “no one is interested in buying conflicts” (Opening statement, oral proceedings, June 2005). These productive land occupations have thus come to be perceived as the start of a series of crimes, potentially ending in arson.

Thus, while symbolic land occupations were de facto transferred back into the political arena, the prosecutorial narrative interpreted the damage done by productive land occupations as crimes, and thus confirmed a conceptualization of the value of land in terms of financial losses. Most importantly, however, such productive occupations obtained the meaning of an overture to lawlessness and escalation within the prosecutorial narrative. At the same time, such occupations have sometimes led to negotiations with CONADI, signalling the ambivalence in the definition of the situation. Furthermore, not all of such occupations were consistently prosecuted, leaving landowners dissatisfied with what they perceived as a lack of protection.

6. **Lumaco: Broadening the legal interest to “state security”**
On 1 December 1997, for the first time activists set three trucks on fire. A former CAM activist explained this as follows:

The arson in Lumaco was the response to the limits of the Indigenous Act. A lot of people had confidence in that law, they thought it would create a better place for their community, but it wasn’t what they had expected. The discrimination, racism, the misery, and the prepotency lived by the community people in Lumaco; that led to the burning of those trucks. (Interview C-57)

This incident led forestry companies and the state to speculate about an underground organization and a “Chilean Chiapas.” The newspaper El Mercurio reported with the heading “Nuestro Pequeño Chiapas” [Our Little Chiapas] on 28 February 1999 (cited in: Barrera 1999:74). Contrary to such suspicions of an underground organization, activists that participated in the event emphasized that the arson had not been planned but occurred spontaneously in the heat of the moment because of their anger (Interview C-23).

Immediately the day after, Regional Governor Oscar Eltit wrote a request to demand for the application of the Law on State Security. Twelve people were indeed indicted under this law and it was argued that the action counted as the destruction of means or elements that are used in public service or for industrial activities, such as the mines, agriculture, or transport, as described in the Law on State Security. The trucks were the property of private owners who were giving their service to one of the biggest forestry companies in Chile, Forestal Bosques
Arauco and whereas the truck owners were the most direct victims, it was understood that the target of this action was the forestry company. “Their goal is to paralyze the productive activities of the company Forestal Bosques Arauco in Fundo Pidenco,” the regional governor wrote (Request, 2 December 1997).

This first time use of the Law on State Security in the Mapuche conflict instead of ordinary criminal laws implied a shift in the legal interest that was at stake. It means that not only the property right of a private party was threatened, but also the security of the state, shifting from a narrowly defined legal interest to a broad and generally vaguely defined legal interest (see also Mariman 1998; Valle 2001).

Often, Lumaco is viewed as the incident that really ignited the conflict. It is easy to see why the conflict emerged forcefully in 1997. Forestry plantations take about twenty years to grow. The legal instrument that enabled forestry companies to invest and plant (DL 701) was enacted in 1977. Thus, in 1997 the forestry companies started to exploit many of the plantations that were planted after the enactment of DL 701. Mapuche communities wanted a fair share instead of watching all the wealth of their lands go abroad. As actions of protest, the estate Pidenco was occupied and a road blockaded. Participating in the land occupation and the road blockade, the Lumaco community members perceived themselves as pioneers in the struggle after a long period of silence (Interview C-60).
After the arson, they were detained and charged with the Law on State Security. The governor’s request for the application of this law is a typical example of a re-contextualization of events. The regional governor emphasized that the relevant context for this petition was the fact that it was not the first time that the forestry company had been affected and that there was a pattern of actions against it. He mentioned that on 13 October 1997 there was a land occupation, the occupation of a road in Fundo Pidenco, and an incident of arson in that estate. In the search for the perpetrators of the arson, Regional Governor Oscar Eltit gave orders to look for those who were involved in an earlier occupation of the offices of CONADI by Mapuche organizations, thus making a clear connection with Mapuche land demands. He also presumed that members of the Mapuche community Pichi Loncoyán were involved. The regional governor specifically also called for punishment of the “intellectual authors” of the crime. “They have become progressively more violent, and they are instigated by leaders who maybe do not participate in the material action, but they are the intellectual authors, whose responsibilities should be determined in the investigation” (Request, 2 December 1997). Thus all the elements of re-contextualization are present, as the regional governor explicitly called for a deliberate search for leaders, intellectual authors, and aboveground supporters and claimed that organizations were involved and separate incidents were connected in a pattern.

A recurring issue in the meta-conflict about arsons in the Mapuche conflict is the question whether it damages property or poses a threat to lives. In the Lumaco case, the regional governor wrote in his complaint that the life and physical integrity of the truck drivers was put
at “grave risk” (Request 2 December 1997). Mapuche activists, however, denied any risk to human lives and emphasized that care was taken that the truck drivers stepped out of the trucks and were brought to safety before the trucks were set on fire (Interview C-23). They dispute that the real worries have anything to do with physical injuries. Instead, activists argue that the threat to economic interests and land ownership are the real underlying concerns.

While the use of the Law on State Security indicates that the government responded harshly, and the broadening of the legal interest seems to communicate recognition of the threat posed by such arsons, there are signals that – despite ostensibly harsher rhetoric and laws – prosecutors have actually sought to minimize the impact of criminal proceedings on Mapuche communities. In this case, after spending two months in prison awaiting trial the defendants were convicted but could serve their time by presenting themselves monthly at the court. A defense lawyer told me that the choice for the Law on State Security was informed not only by the broadening of the legal interest but also by the fact that the penalties under that law were actually lower than they would have been if the defendants had been prosecuted for ordinary arson (Interview C-47). This indicates attempts to dampen the conflict that is recognized as political, in which the defendants are not marginal criminals, but represent a larger constituency. The Lumaco community members who were convicted, however, continue to deny their involvement in the burning of the trucks and argue that they were merely prosecuted because of their participation in earlier land occupations (Interview C-60). Reproducing the strict boundary between the political arena and the criminal justice arena – while at the same time
symptomatic of the government’s ambivalence in these situations – the government on the one hand prosecuted what it had defined as crimes, and on the other hand recognized the land demands as legitimate. Thus, after their trial the Lumaco communities negotiated with CONADI, received 634 hectares, and were relocated.

After the Lumaco case, the state initiated four other prosecutions on the basis of the Law on State Security against Mapuche activists in relation to land disputes (Valle 2001). With the Penal Reform in 2001, however, the executive government was prohibited from recurring to the Law on State Security, as the prosecutors obtained the exclusive power over charging defendants. Instead of the Law on State Security, from 2002 onwards, the Anti-Terrorism Law was used multiple times. Just as in the Lumaco case, the prosecutor in these terrorism cases argued for a broadening of the relevant legal interest from individual property to the public order and public security. This will be discussed in more depth in Section 8.

7. What is a plantation and what is at stake when one is burnt down?

One of the actions most feared by landowners is arson in plantations. Landowners have actively pushed for more attention to this issue, firmly placing it in the criminal justice arena and attributing responsibility to Mapuche activists. Mapuche activists in turn consistently deny any responsibility and provide competing accounts of the causes of forest fires. Underlying the debate about criminal attribution and responsibility is a more fundamental debate about the
value and impact of plantations and the forestry industry. While the forestry industry claims to be essential for Chile’s economy and progress, forestry plantations and their harmful effects are among the primary grievances of Mapuche activists and rural Mapuche communities.

Many of the criminal complaints filed by forestry companies did not lead to criminal prosecutions or convictions, leading them to decry the situation of “lawlessness” they are experiencing. Throughout the years, they have increasingly labeled forest fires as “terrorist acts.” Even more important than the direct economic loss, they point to the threat of a loss of confidence in investments, which is highly important in the case of produce that needs seventeen years to grow. In addition, they emphasize the threat to persons that forest fires pose.

Landowners have been successful in having this definition of the situation accepted by the government. In March 1999, a parliamentary commission was installed to assess the threat due to the growing number of arsons in the 6th, 7th, 8th, and 9th regions, with a special focus on the influence of the “property conflict between indigenous communities and private parties” on arsons. The report emphasized the importance of the forestry sector for the country and the economy, as the sector provided 120,000 jobs and represented an export of 2 billion USD per year (Comisión Especial 2000). Intentional arsons were called a grave threat given the national identity as a “forestry country” (ibid. 2000:2) thus affirming the slogan of the forestry
companies: Chile, *pais forestal*. The report further argued that the forest fires add CO₂, threaten the ecosystem, and can aggravate climate change.

The report was framed in the logic and language of criminal law as it described the kinds of forest fires that occurred and the kind of liability that could be alleged, making a distinction between “malicious” and “negligent” arsons. It reported that in general about 38% of the forest fires were intentional, due to playing youth or negligent tourists, implying that the other 62% of the forest fires (for example due to summer heat) indeed could not be located in the criminal justice arena. In the 9th region, however, about 90% of the arsons were deemed intentional, often assumed to damage forestry companies. One of the consulted experts made a difference between the arson as an end in itself (pyromaniac) or a means (Mapuche activist).

The report also confirmed the lack of prosecutions that landowners criticized. In 95% of the cases, the perpetrators were not found, and in less than 1% there was an actual legal sanction (Comisión Especial 2000:25). A lawyer from a forestry company indicated that the lack of convictions was due to a lack of evidence (Interview C-9). The small percentage of solved forestry arsons led to outrage among forestry companies. Landowners called for criminal prosecutions and the rigorous application of the rule of law to bring back confidence and the possibility of investment. “As growers of plantations we need a stable economy and confidence in our investments” (CORMA 2002a).
What are plantations? Competing images in the meta-conflict

The underlying debate in the meta-conflict surrounding arson is about the meaning, value, and impact of plantations. Not surprisingly, forestry companies emphasize the importance and beneficial role of plantations, while Mapuche activists point to the detrimental effects.

Plantation owners argue that forestry activity is in the “public interest” and beneficial to Chile, to the native forests, and for job creation. Chile was, after Brazil, the country with the most forestry exploitation in Latin America (Lira 2001), and lumber products are the second largest export product of Chile after mining (Invierta en Araucanía 2009). Indeed, forestry companies claim to provide jobs and wealth for the region. A forestry company in Galvarino (affected by various arsons) wrote that “we make an effort to generate riches and jobs in a region which is immersed in the most extreme poverty” (CORMA 2001). Forestry companies emphasize that pine and eucalyptus were planted on eroded soil that was qualified as not being suitable for agriculture. Farmers sold their lands eagerly to forestry entrepreneurs as the land had become eroded and bad for agriculture. This was the rationale behind the law DL 701, enacted by Pinochet, which initiated the expansion of forestry in the south of Chile. These trees need between 18 and 22 years of growth before the felling starts. Therefore, a representative from Bosques Cautín argued that “a plantation is an activity that permits the degraded zone to recuperate” (Interview C-33). These arguments are also brought into the courtroom, for example during the trial against the CAM, when a private forestry businessman expressed that
“he thought that what he did was a good for the country, as he reforested lands that stood idle (testimony 27 July 2005, Trial CAM).

Mapuche activists, however, present a very different story and particularly criticize the notion that these plantations serve the public interest. The turn from agriculture to plantations changed the daily lives of Mapuche communities as it often became prohibited to look for firewood in adjacent terrain or have their animals graze in a larger territory. Mapuche activists also dispute the notion that the plantations create jobs, as manual labor is only needed in the planting and felling seasons. They further criticize plantations for their monocultures, lack of biodiversity, and the erosion they create in adjacent communities as these imported trees use more water than the land can offer. They dispute that plantations are good for the recovery of the land. Nearby streams dry up, and communities can no longer get water from their wells.

When I put these allegations in front of the manager of one of the forestry companies, he agreed that especially eucalyptus sucks a lot of water. “But,” he defended his company, “there is nothing within the law that says that one cannot have eucalyptus for reasons of water” (Interview C-34). It is important to note that he was not cynical, and I do not cite him as an instance of particular carelessness. He simply portrayed the perspective that makes sense not just for his company, but for all the forestry companies in the region. It is an indication of the importance of legalism and market competition for these companies.
Competing images of forest fires: Criminal events versus natural causes

Besides this fundamental and essentially political debate about the value and impact of plantations, the meta-conflict addresses the question about the causes of such arsons, which comes down to the allocation of such events inside or outside the criminal justice arena. The prosecutorial narrative firmly argues that Mapuche activists are responsible for the arsons. For example, in the trial against the Lonkos of Traiguén, the prosecutor argued in his opening statement that “it is not logical that in the province of Malleco there are 500 arsons. Curiously, 80–90% take place in the property of farmers, medium and small, and forestry companies. That doesn’t happen in any part in Chile” (Oral proceedings, April 2003). Landowners equally tend to attribute the arsons to Mapuche activists. Forest fires, however, occur often and can have many causes. Since 1982, the 9th region has seen between 1500 and 2500 arsons every year (CONAF 2011). In criminal cases, the prosecutor therefore has to prove that an alleged arson was intentional. To do so, the prosecutor generally points to the fact that there are multiple “foci” where the fire started, which makes it highly unlikely that the fire was natural or accidental.

While both symbolic and productive land occupations are overt activities, Mapuche activists generally have denied any responsibility for the arsons. That denial brings a very different dynamic of narratives in the courtroom because it changes the debate from a question of the legitimacy of an action to the issue of attribution. For a long time, there was no public claiming of arsons in court or even in anonymous communiqués. A former CAM member told me in 2003
that his strategic assessment was that the “Mapuche people were not ready for this yet” (Interview C-28). Indeed, the general attitude among Mapuche activists still is that a “Mapuche” would not do this. Thus while activists engaged in productive land occupations are defiant of the criminal label and claim their action as legitimate, regarding allegations of arson they reproduce the image of a Mapuche who is peaceful and law abiding. “Mapuches don’t do arsons,” activists told me over and over again. Mapuche activists therefore provide alternative accounts of competing truth claims (instead of competing moral claims) of the cause and responsibility for the arsons. They claim that other factors than deliberate arson could cause the forest fires, such as the hot summer weather and draught, which would deny the existence of a crime and remove the entire event from the criminal justice arena as the logic of individual guilt would not apply. Their attribution to natural factors such as the heat takes away the need to blame anyone and turns the event into a natural consequence instead of a crime.

Activists also often attribute fires to staged attacks by the forestry companies or private security companies to receive insurance money, maintain jobs, or to blame it on Mapuches. This would not remove the event from the criminal justice arena but allocates guilt and criminal responsibility elsewhere. In interviews, they frequently pointed to the evidence that emerged after the suicide of a forestry employee to prove that such incidents have happened (see for more information about this case Navarro 2001; Langelle 2006; Villegas 2007, footnote 67). When arson attacks occurred during major trials against Mapuche activists, activists argued
that these were staged as well, for example by forestry companies, to induce judges to come
down hard on the Mapuche activists who were on trial (Field notes, March 2003).

The accounts that Mapuche activists provide for the arsons thus focus on alternative truth
claims, which either frame the event as a natural disaster, or attribute responsibility to other
actors. They do, however, also provide alternative moral claims, providing legitimacy to an act
of arson, if it were done by Mapuche activists. Activists argue, for example, that arsons are
negligible in comparison to the structural violence caused by plantations. This means that – in
the hypothetical case that Mapuches were responsible for it, they deny that it was a crime, but
see it as a legitimate form of struggle. An activist who formerly belonged to the Mapuche
organization Ad Mapu expressed it in this way: “If it were Mapuches who are doing this, then it
would be legitimate” (Interview C-24). A few activists simply acknowledge arson as one of the
tactics in the repertoire of resistance, but redefine the act and dispute that it is a crime. “It is a
form so that they listen,” said a werken of a community in the 9th region:

Before, the state never listened to the Mapuches. [...] For me it is not a crime. I support it,
because the state is guilty, not the Mapuches. Because the state would not listen before, and
would not return the lands before, I agree with the Mapuches. There are also a lot of Chileans
who support it. It has been successful as well; they have achieved the attention of the
politicians, and the ratification of the ILO Treaty 169. (Interview C-61)
A former CAM member similarly explained that in some communities it is a very accepted form of struggle:

It is well looked upon as it attacks the direct enemy; it is a slap for capitalism. It can make you respected. It is a way to not be practically trampled upon. Finally you are lifting your head to meet the enemy head on. That is also when there are confrontations and you face the most direct enemy in the eyes: the Carabineros or the PDI (Policía de Investigaciones). (Interview C-57)

A final issue in the meta-conflict about the criminality of arsons is the question of harm. What is at stake when a plantation is burnt down? Landowners criticize arsons for three reasons. First, they argue that arsons pose a threat to the lives of employees of the forestry company, the private landowner, or firemen.

Second, landowners argue that plantation arsons impede economic growth by stalling investments in the region, decreasing profits. There are fears that investments will go to Argentina, Uruguay, and Brazil. For example, a newspaper article reported about investments of Chilean forestry companies going to Argentina (El Diario 2001). In a public declaration, the CORMA claimed that forestry companies lost more than 80 million USD due to arsons, including the costs to combat those fires (CORMA, no date c). Elsewhere the CORMA argued that the conflict had led to a decrease in the percentage of forestation, a decrease in the value of land, and a decrease in the value of the plantations. It was mentioned that such an effect on the
value of land is only observed in countries “in a state of war.” This was due to a decrease in investments in the zone claimed to have the effect of a loss of 1.2 to 2.4 million USD (CORMA, no date a). By 2008, the CORMA and other business associations argued that foreign investment had gone to zero whereas national investment had decreased (CPC 2008). Already in 2002, payments for insurance had increased by approximately 40%, further depriving landowners of profits. The CORMA pointed out that these higher insurance fees affects all forestry holders, regardless of their relation to the conflict (2002c), thus making a move towards generalizing victimhood. Last but not least, the fear for arsons led some companies to start felling their plantations before they were fully grown, fearing that otherwise they may not have any profits at all (Barria 2001). Activists have sometimes expressed their doubts about the decrease of profits as a result of arsons (Interview C-59). Also Chilean historian Toledo (2007:262) argued that forestry companies and the government exaggerated the economic impact of Mapuche mobilizations as well as the number of arsons.112

Third, plantation owners argue that arsons represent the destruction of an ecosystem and a conversion of the land into “deserts.” Thus, adopting the ecological concern from the narrative of Mapuche activists, landowners claim that arsons actually cause not only economic damage but also considerable ecological harm. In contrast, activists often argue that arsons are actually beneficial for the soil. Activists argue that the plantation fires bring the land back to its original

112 He cites a thesis from the Faculty of Physical Sciences and Mathematics of the University of Chile, which demonstrates that there was not much negative impact on the economic situation of forestry companies: Pharo Hakon, (2004) “Evaluación de las Perdidas Económicas Generadas Por El Conflicto Mapuche en la Novena Región,” Tesis Facultad De Ciencias Físicas y Matemáticas, Universidad de Chile.
state, and they expect that after a few years nature will restore its harmony again. Mapuche activists see a plantation as a harmful anomaly in the region and the return to soil as a good thing: giving space to real nature: “Why should it be permitted to cut an oak tree that may be protecting the water, but the eucalyptus plantation of a forestry company cannot be touched?” A community member in Temulemu explicitly rejected the notion that Santa Rosa de Colpi was now a desert: “What is a desert? A plantation! There are now birds and foxes again in Santa Rosa de Colpi” (Field notes, April 2003).

While community members of Temulemu thus praised the possibility of the estate to return to a “state of nature,” the value assessment by Forestal Mininco was based on the market value of the land and its produce. Just as in the criminal prosecutions of land occupations, in criminal prosecutions regarding arson the prosecutorial narrative often reproduces the hegemonic financial perspective as the right (and only) way to judge the value of a plantation. One prosecutor complained during his opening statement that if you go to the sectors of Didaiko and Temulemu, you will see “deserted terrains,” and “in this region, nobody wants to invest, nobody wants to give insurance” (Oral proceedings, Trial Lonkos of Traiguén, April 2003).

Case Fundo Alaska

After this overview of the different voices competing for hegemony in the meta-conflict that surrounds the criminal proceedings in cases of arson, I will now turn to such a case in which events were defined as “arson.” In this case, the forestry company, Mapuche activists, and the
prosecutors offered different narratives to translate the events into the language and logic of criminal law and interpret the harm done, the motives for the arson, and the value of forestry plantations. On 2 December 1999, a part of Fundo Alaska was set on fire. On 6 April 2001, the case was brought before the Tribunal de Letras [Court of Justice] in the village Collipulli. The court’s summary of the events was very specific, maintaining a narrow time frame.

Los hechos que dieron origen a esta causa ocurrieron el día 02 de diciembre de 1999, en horas, de la tarde, en el interior del fundo Alaska, Comuna de Ercilla de propiedad de Forestal Mininco, cuando un grupo de 60 mapuches de la Comunidad Temucuicui, provocaron diferentes incendios de bosques ubicados alrededor de la casa del fundo mencionado, debiendo intervenir Carabineros para que las brigadas de incendio pudieran extinguir los 16 focos de incendio, siendo atacados con boleadoras y hondas, lográndose la extinción del incendio a las 20,15 horas.

[The events that gave rise to this case occurred on 2 December 1999, in the afternoon, at the estate Alaska, Comuna Ercilla, on Forestal Mininco property, when a group of 60 Mapuches of the Community Temucuicui set fires in plantations located around the house of the mentioned Fundo, requiring the intervention of the police so that the fire brigades could extinguish 16 foci of arson, while being attacked with slingshots and catapults, managing the extinction of the arson at 20:15h.]
(Verdict Tribunal de Letras Collipulli, 6 April 2001)

While the aforementioned description of the events simply asserts that there were different arsons, the defense offered a competing definition of the events. The defense lawyers argued that what had been claimed to be arson was in reality the “barricades” that the Temucuicui community raised and set on fire (bonfires) in order to defend themselves against the shootings by the police, as a confrontation between the police and the community had arisen in which the community threw stones and used slingshots while the police shot “chemical deterrents” (tear gas) (Verdict, Appeals Court Temuco 2002). Those bonfires were then interpreted to be intentional arson of the plantation. The court dismissed this version and pointed out that three or four hectares of the plantation were destroyed, that human intervention was needed to stop
the fire, and that the fire had gained a character of non-governability (ibid.). Thus, the events were qualified as arson.

The narrow definition of this event into the secondary reality of criminal law was disputed by community members of Temucuicui. Years after this case had been decided, they still resented the verdict, as became clear in my conversation with them in April 2009. During a visit to Temucuicui, some community members asked me how I could explain how the person that burned down many hectares in the famous national park of Torres del Paine got away with a fine, whereas they were imprisoned (Field notes, April 2009). (Actually, the persons with whom I spoke were not imprisoned, but two of their leaders were, and they strongly identified with them). They referred to an incident that had occurred a few years before and quickly became front page news in Chile and was even reported internationally. On 17 February 2005, a Czech tourist caused a fire that destroyed about 5,500 hectares of Chile’s best known National Park, Torres del Paine (Torres del Paine 2011; Cooperativa 2005, La Nación 2006). He had been cooking in an area that was not designated for camping. He was indicted by the Public Ministry based on a law (Ley de Bosques [Forestry Law]) that penalizes arson when it is the result of negligent behavior. In the end, he was sanctioned with a fine of 121,000 Chilean pesos (the maximum fine for this offense, which at the time was not more than 250 USD) and set free by the Tribunal de Garantía [Warranty Court] of Puerto Natales in the far south of Chile.
For the members of the Mapuche community asking this question, the disastrous result consisting of the destruction of the natural forest in Torres del Paine was highly upsetting. Their concern highlights the value they attach to natural forests versus monoculture plantations, as the case juxtaposes the non-monetary value of nature in Torres del Paine versus the financial value of a pine plantation. For the members of Temucuicui, the damage done was much more important than the difference of intentionality versus negligence that played a crucial role in the decision of the judge in Puerto Natales. This case reflects the importance that the criminal justice ideology attaches to the intention with which an act is committed, as opposed to the factual damage that has been done. Accidents generally fall outside of the ambit of criminal law. Negligence often leads to a lesser charge or punishment. Deliberate intention and premeditation, however, can yield severe charges and punishments, specifically when this is combined with political demands, legitimate or not. Indeed, the legitimacy of the demands does not (and, according to strictly liberal values should not) alter the criminal qualification. The Temuicui members resisted this prioritization of intent over the kind of damage that is done.

The hegemonic discourse thus assumes the monetary value of plantations and the importance of those plantations for the “progress” of Chile, and the prosecutorial narrative reproduces these values. In the Alaska case, the prosecutor emphasized the forest fires as a severe problem. The economic and ecological damage were asserted and presented as a public problem, affecting Chile’s economic potential and identity as país forestal. Particular interests are thus successfully represented as a public interest, even though not everyone is represented
in this public interest, as Mapuche activists do not express any concern about the fires. Indeed, they do not claim to be affected by the forest fires and minimize or reject the notion that it can be ecologically damaging. Thus, their lived experience and their reality of forest fires are radically different from the experience of forestry companies. Despite the prosecutor’s claim to investigate these fires in the public interest, Mapuche activists and many Mapuche community members do not feel that the prosecutor represents their interests.

As has been typical in these cases, the prosecutor had chosen to charge the leaders of the community with these arsons, even though many people of the Temucuicui community had participated in the mobilizations and the confrontation with the police on 2 December 1999. However, it turned out not to be so easy to prove their criminal liability. Because their direct involvement in setting the plantation on fire could not be proven, there was a shift from direct to indirect liability. The judges of the Appeals Court agreed with the arguments of the defense that the testimonies that framed the defendants as the direct authors of setting fire to the centers of the arson were not credible or reliable. In order to still hold them criminally liable, the court argued that “authors of the crime” are not only those who directly take part in the execution of setting something on fire, but also those who hinder a third person from intervening to combat the arson, as they are facilitating the conditions necessary to realize the arson. The court thus broadened the liability of the defendants. The court considered it proven that defendant José Nain had participated in the group that was throwing stones and branches, hindering the plantation personnel from putting out the fire, so that they had to call for the
help of carabineros, who also faced confrontation. The judges therefore convicted him as “indirect author” according to the Chilean Penal Code, Art. 15 No. 1, which penalizes hindering the prevention of a crime. This creation of criminal responsibility for the leaders of the Mapuche community was criticized by the defense lawyers and Mapuche activists interpreted it as a signal that the Chilean state was deliberately imprisoning its leaders.

The prosecutorial narrative thus reproduces the financial value of plantations, emphasizing the decreasing investments as a result of the arsons, marginalizing the perspective of Mapuche activists that the land is better off without such monocultures and excluding from the courtroom arguments about the detrimental effects of plantations on the surrounding lands of Mapuche communities. Further, in order to hold individuals accountable, the prosecutorial narrative focuses on the deliberate intention with which plantations are set on fire, whereas Mapuche activists would rather talk about the actual harm that is inflicted or the legitimacy of the underlying demands. While the prosecutorial narrative thus ostensibly reproduces the hegemonic discourse and the perspective of landowners, until 2003 only few cases of arson were brought into the courtroom. And, in the few cases that were tried, the results were characterized by typical Chilean ambivalence. In the Alaska case, defendant José Nain spent five years in prison, whereas by 2010 defendant Marcelo Catrillanca was still a fugitive – even though this had not impeded him once in a while to give interviews to Mapuche journalists. Further, the disputed estate Alaska was negotiated and transferred to the Temucuicui
community. Landowners responded to what they perceived as widespread “impunity” with stronger demands to prosecute such arsons as “terrorism.”

8. From ordinary crimes to terrorism

In the previous sections I have argued that since the case against the Consejo de Todas las Tierras symbolic land occupations were hardly prosecuted. Productive occupations have been prosecuted for the damages that were caused, but landowners claimed that this did nothing to secure their property, especially as most sanctions did not lead to actual imprisonment. Prosecutions in cases of arsons led to sanctions in only 1% of the cases. And the Law on State Security did also not yield very high sentences. Landowners, therefore, continued to plead for the use of anti-terrorism legislation and to define these arsons as “terrorism.” This means a significant shift in the protected legal interest from private property to public security and the presence of a motive to create fear.

Landowners have been very dissatisfied with the prosecution of isolated crimes, which often resulted in conditional sentences (probation) while they would still lose their property, as in the case of Santa Rosa de Colpi. As described in the previous chapter, landowners mobilized collectively and offered a re-contextualized account, emphasizing that there is a connection between different incidents that constitutes a pattern of terrorism. They argued that it is not just private property that is at stake, but the national economy and security. Already in 1999
the CORMA wrote a letter to the investigative judge Archibaldo Loyola to request the use of the anti-terrorism law for the actions by Mapuche activists in Traiguén and Lumaco (Barrera 1999:100). After 2001, proponents of the terrorism discourse located their claims within the international climate, within which anti-terrorism legislation has become the dominant mode of response, which enables higher penalties and broader investigative authorities. Thus, to justify the use of the anti-terrorism legislation, the CORMA referred to UN Resolution 56–88 of 24 January 2002, in which “ethnic terrorism” is condemned (CORMA 2002a). The Anti-Terrorism Law has practical advantages for the investigation of a crime, as it permits longer pre-trial detention, secret investigations for six months (instead of the normal sixty days), the protection of witnesses through anonymity, and the interception of telephones (Vargas 2010; Univisión 2009). A lawyer representing one of the biggest forestry companies asserted, however, that the qualification of events as terrorism is not just about the practical advantages, but also about giving the actions the appropriate name (Interview C-44).

While landowners thus pressure the government to adopt their terrorism narrative, government officials throughout the years have taken changing positions regarding the demand to use the Anti-Terrorism Law. Some have refused to seek the application of that law. For example, former Regional Governor Belmar claimed she never filed complaints using the qualification of terrorism. According to her, prosecutors autonomously sought the qualification of terrorism in some of the cases (Comisión de Constitución 2006:11). Indeed, in 2001 Berta Belmar was reported to have claimed that the government was not overreacting. “If that were
the case,” she said, “the Law on Internal State Security and the Anti-Terrorism Law would be used” (Barria 2001). While regional authorities thus often counseled against the use of that law, the Ministry of Internal Affairs in Santiago was an important actor behind the shift towards terrorism qualifications due to pressure from the parliament and the senate (Comisión de Constitución 2006). While the Anti-Terrorism Law has been applied on many occasions now, there has not been a clear discursive shift towards a consequent representation of Mapuche protest actions as terrorism. Instead, the interpretive struggle about these terrorism qualifications is still ongoing, reflecting a deep-seated controversy in Chilean society.

The re-qualification of facts as terrorism instead of ordinary crimes in the prosecutorial narrative invariably involves doctrinal shifts that are embedded in a re-contextualization of events. In anti-terrorism charges single incidents are interpreted beyond the local confines of specific events involving isolated actors. Instead, local events are understood as threats to state security, democracy, and the rule of law and are considered to be of national importance, claiming a broader legal interest. Thus, in the trial against the CAM, the lawyer representing the Ministry of Interior described the threatened legal interest as “the very power of the state and its supremacy” (oral proceedings, June 2005). Instead of selecting single events and prosecuting individuals for narrowly defined acts, in order to make the case for terrorism the prosecutorial narrative interprets several events as part of a larger whole and constructs patterns, organizations, a broader legal interest, a larger group of victims, broader time frames, and a broader criminal responsibility. In this way, events that previously did not lead to a criminal
case, or for which no perpetrator could be found, were given a higher priority because they were understood as part of a pattern of “terrorism.” Re-contextualization can thus make legally relevant what was thus far excluded from criminal proceedings in de-contextualized modalities of the prosecutorial narrative. In what follows I will look in-depth at some of the key prosecutions that were the result of this re-contextualized prosecutorial narrative.

The contested use of the Anti-Terrorism Law

The first case in which anti-terrorism legislation was used in relation to Mapuche protests was against leader Víctor Ancalaf. He was accused of burning trucks in the Alto Bío Bío. This is the mountainous Andes region where the construction of the hydroelectric plant Ralco and the dam in the Bío Bío river by the Spanish company Endesa caused considerable controversy (Orellana 2005). On three separate occasions in 2001 and in 2002, three trucks and a bulldozer used for the construction of Ralco were set on fire. Pressure mounted in March 2002 after the third incident. The farmers’ association SNA qualified the incident as “terrorism,” and members of parliament were reported to request a harsh response (Austral 2002a; 2002b). On 19 March 2002, the governor of the Bío Bío Province presented a request to use the anti-

---

113 The head of CONADI, a government organ for indigenous development, opposed the project publicly. The Frei administration removed him (Orellana 2005:521). The environmental impact assessment (EIA) was first rejected by all 22 public agencies that evaluated it (ibid 2005:520). Only direct intervention of the Frei government led CONAMA, Chile’s environmental agency, to accept the EIA. In 1998, Endesa started the construction of Ralco. The 1993 Indigenous Act provided indigenous people with the decision-making authority over their lands. The Mapuche-Pehuenche people living in the Alto Bío Bío were offered relocation by Endesa. Many families signed these agreements, according to Orellana because “grandiose promises, pervasive poverty, large amounts of alcohol, threats and lack of legal support all conspired to induce many families to sign exchange agreements” (ibid. 2005:521). Seven families, however, refused to sell their lands. Their insistence threatened the construction of the whole plant. In 2000, Eduardo Frei used a law on electric services and granted Endesa energy concessions, superseding rights granted in the Indigenous Act. This enabled the company to construct the plant despite the indigenous opposition, threatening the seven Mapuche-Pehuenche families with forced evictions.
terrorism laws in the prosecution of the three incidents. In November 2002 Ancalaf was
arrested and accused of the three arsons. In the trial against Ancalaf, the court explicitly put the
arson in the context of the “Pehuenche conflict” and the “opposition to the construction of
the Hydroelectric Plant Ralco.” Re-contextualizing the separate incidents of arson, the court
literally argued that “[i]n this context, the facts have occurred as a way to demand the
authorities for solutions or impose demands to revert the existing situation of the construction
of the plant” (Appeals Court Concepción 2004, Consideration 19). The court made clear that the
arson put in danger the “physical integrity” of persons and “public or private property” as the
“directly attacked goods.” At the same time, moving towards a broader legal interest, the court
explicitly considered that the more significantly affected legal interests in this case were the
“public order” and “public security” (ibid. Consideration 23).

Since the conviction of Victor Ancalaf, many more Mapuche leaders and activists have been
charged under the Chilean anti-terrorism legislation. In this analysis I focus on the four
terrorism cases that were tried between 2003 and 2007 and led to the conviction of nine
people under the Anti-Terrorism Law.

Table 4 Four cases based on the Anti-Terrorism Law before new prosecutions on the basis of the Anti-
Terrorism Law started end 2008

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Decision</th>
</tr>
</thead>
</table>

---

114 The Mapuches in the mountainous region are called Pehuenche
<table>
<thead>
<tr>
<th>Defendant</th>
<th>Date</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victor Ancalaf</td>
<td>30 November 2003</td>
<td>Conviction</td>
</tr>
<tr>
<td>Victor Ancalaf Appeal</td>
<td>4 June 2004</td>
<td>Partial acquittal</td>
</tr>
<tr>
<td>Lonkos of Traiguén</td>
<td>14 April 2003</td>
<td>Acquittal</td>
</tr>
<tr>
<td>Lonkos of Traiguén re-trial</td>
<td>27 September 2003</td>
<td>Conviction</td>
</tr>
<tr>
<td>Poluco Pidenco 1</td>
<td>22 August 2004</td>
<td>Conviction</td>
</tr>
<tr>
<td>Poluco Pidenco 2</td>
<td>3 May 2005</td>
<td>Conviction</td>
</tr>
<tr>
<td>Poluco Pidenco 3</td>
<td>7 April 2006</td>
<td>Acquittal</td>
</tr>
<tr>
<td>Poluco Pidenco 4</td>
<td>8 February 2007</td>
<td>Conviction</td>
</tr>
<tr>
<td>CAM 1</td>
<td>9 November 2004</td>
<td>Acquittal</td>
</tr>
<tr>
<td>CAM re-trial</td>
<td>27 July 2005</td>
<td>Acquittal</td>
</tr>
</tbody>
</table>

In each of these cases, multiple defendants were charged, several of whom chose to escape the proceedings in clandestinity. The cases illustrate how re-contextualization works through doctrinal choices and the construction of the prosecutorial narrative: a broader time frame, a broader geographical frame, inclusion of the motive, a focus on a collective, an expansion of the kind of involvement that is deemed criminal, a larger group or category of victims, and a broader legal interest. Just as in the case against Ancalaf, each of the other terrorism prosecutions also reflects the involvement of the executive government in the request for the anti-terrorism law and as a private accuser during the trial.
Re-contextualization: The contested choice for the context

In these four terrorism prosecutions the prosecutorial narrative re-contextualized events in order to arrive at the interpretation of facts as “terrorism.” The narrative justifies the terrorism charges with reference to the context, a pattern, and the motive of pressure. For example, in the case against the Lonkos of Traiguén, the prosecutor argued: “If four hundred arsons in this region, if burning houses within a predio, if burning eighty hectares of a plantation ... if that is not terrorism, I don’t know what is.” He described that the situation was such that farmers were in fact threatened as they could choose between “you give me half of your house, or we burn it.” The pressure had an effect, acknowledged the prosecutor, and that was the problem:

The most preoccupying are the sales under pressure. What the defendants seek is for those lands to be bought. They demand for the authorities to buy. And sadly, we have seen that the strategy has worked. (Oral proceedings, Trial Lonkos of Traiguén, April 2003)

Similarly in the Poluco Pidenco case the prosecutor emphasized that the event fit in with a larger premeditated plan to create a climate of insecurity, instability, and fear to become the victims of “similar attacks” among this sector of the population, which was the case in “all crimes committed in the region during the last years” (summary of the allegations of the prosecutor in the verdict Tribunal Penal Angol, 22 August 2004). The prosecutor pointed out that the fundo Poluco Pidenco had frequently been the object of intentional arsons, theft, and damages. Thus, the prosecutorial narrative creates a category of crimes.
Mapuche activists contest this representation of the context of the Mapuche conflict as terrorism. The prosecutorial narrative is based on a re-contextualization of specific events as part of the “Mapuche conflict,” which according to the prosecutors refers to “numerous grave crimes committed in distinct places in the 9th Region, including arson of plantations, farm fields and patronal houses” (Chilean state in: IACHR, Case Lonkos of Traiguén, 21 October 2006, consideration 35). For Mapuche activists, however, legitimate land claims provide the context for properly understanding the protest events. For example, in the case of Poluco Pidenco, the Mapuche community Tricauco has a claim on the lands, as they regained part of them during the Unidad Popular government in 1971. After the coup, the army removed the Mapuches in 1977 and subsequently transferred the land to CONAF to be bought by Mininco S.A. in 1978–79. The Tricauco community has, however, continued to demand the land back (Mella and Le Bonniec 2004). Similarly, in the case of the Lonkos of Traiguén, the Temulemu community has a claim on land that is currently in the hands of the Figueroa family.

Thus, there are two competing versions of the relevant context that attempt to interpret events. Within the prosecutorial narrative, only rarely is “conflict” meant to refer to the larger context of Chilean-Mapuche relations throughout the entire twentieth century. Instead, it usually refers to the “category of crimes” that the narrative created. For example, in the 2005 trial against the CAM, the Department of Internal Affairs claimed that it had been demonstrated that “the conflicts [had] diminished by 70 percent” since the judicial actions (Oral proceedings, June 2005). It is clear that this use of “conflict” does not correspond to its usage
by Mapuche activists, who would hardly claim that conflicts have diminished since the judicial actions. Similarly, while a private accuser representing Forestal Mininco argued that the CAM prosecution sought “the origin” of all the crimes (Oral proceedings, June 2005), Mapuche activists see the Chilean state and the dispossession of their lands as the “origin” of all their problems, thus giving a different definition to “all the crimes.”

Making the terrorism charges stick – the battle about the “terrorism” label

The use of the Ant-Terrorism Law has been controversial from the very beginning. The trials in each of the four terrorism prosecutions discussed above drew national and international attention. During the trial against the Lonkos of Traiguén, for example, in addition to direct supporters many prominent persons visited the trial, such as the leader of the Communist Party, representatives of Amnesty International, and Jorge Andrade, secretary of the Ministry of Planning and Development. The cases ignited a battle about the terrorism label, and significantly, in each of these cases, the judges rejected terrorism charges at some point only to be corrected by the Supreme Court later on. The prosecutors thus had a hard time making the terrorism charges “stick.” Their battle took them to various re-trials as they faced judges who refused to accept the terrorism qualification.

In an early hearing in the case Poluco-Pidenco, the first judge (Nancy Germany) rejected the qualification as terrorism. The Court of Appeals in Temuco even confirmed her judgment. The prosecutors then filed a complaint against her at the Supreme Court. In January 2004, the
Supreme Court rejected the complaint but decided that the judge had exceeded her competencies in her dismissal of the terrorism qualification, and she was removed from her position. The defense lawyers in the case perceived this as a “very strong message to judges” (HRW 2004). In the (first) trial in this case in August 2004, the judges confirmed the terrorism charges and convicted the defendants to ten years and one day: the longest sentences that by then had been handed out in relation to the Mapuche conflict. Many of the defendants in this criminal prosecution, however, had decided not to wait for the trial and the resulting conviction, but chosen to go fugitive. Therefore, there have been multiple trials for this arson, as over time people were caught by the police or decided to turn themselves in, tired of the fugitive life (Interview C-58). While the second Poluco Pidenco trial confirmed the terrorism qualification, in the third trial, on 7 April 2006, the judges decided that the facts did not constitute a “terrorist” arson. According to them, the prosecutors failed to prove a premeditated plan or the intention to cause fear.\textsuperscript{115} The defendant was even acquitted. In a subsequent trial in 2007 against another defendant in this case, the judges confirmed that the arson was not a “terrorist” arson, resulting in a five-year sentence for common arson.

In the prosecution against the CAM, the prosecutors really tried hard to have the defendants convicted as members in a terrorist organization but had to give up after two trials. In November 2004, the members of the CAM were acquitted for the first time. The prosecutors

\textsuperscript{115} In addition, in the third trial, the judges decided that the participation of the two defendants was not conclusively proven, as the witness statements did not corroborate each other. The witness statements that were dismissed as evidence in the third trial for a lack of credibility are the same witness statements that were used as evidence in the earlier Poluco Pidenco trials.
petitioned for nullification at the Supreme Court. They succeeded; the trial was nullified, and they gave it another try. They returned in the second trial with a different “story” about the “terrorist organization,” based on a different image of the CAM and the illegal activities attributed to the CAM. During the second trial in July 2005, the prosecutors proposed a kind of Babushka model, as they did not claim that the CAM itself was a terrorist organization (as they had in the earlier trial), but that under the wings of the CAM some people were engaged in a terrorist organization. The lawyer representing Forestal Mininco argued that the defendants “took advantage” of the structure of the CAM “to constitute a parallel illicit association.” Thus “in the same structure two organizations coexist,” one licit and one illicit, “with some overlapping members in the same space” (Oral proceedings, July 2005). The court, however, refused to convict the defendants. The prosecutors thus failed to establish the CAM as a terrorist organization.

_Fear: A contested key element of “terrorism”_

Mapuche activists strongly dispute that their actions could constitute terrorism. For example, during a cultural happening in Temuco, several young female Mapuche activists emphasized that in their public actions, such as collecting food for prisoners, they wanted to make clear that they are not terrorists (Field notes, February 2003). Landowners, however, interpret the arsons as intimidating. For example, one landowner declared that he understood the arson as an “act

---

116 In the second trial, the prosecutors additionally charged the defendants for membership in a “criminal” (i.e., not terrorist) organization, thus giving the court the opportunity to convict the defendants without using the terrorism label. The court, however, rejected the prosecutorial narrative entirely.
of intimidation against the landowners [...] to effectuate the ceding in the face of pressures and
give up the land for good” (Case Lonkos of Traiguén, Declaration 3 August 2002, Traiguén).

According to the Anti-Terrorism Law, in order to prove that a specific action or organization is
“terrorist” or “terroristic,” the prosecutors have to prove that the actions were premeditated in
order to create fear among the population. Indeed, a “terrorist” charge puts the burden upon
the prosecutor to prove that the arson was something other than the act of a pyromaniac.
Instead, it has to be proven that the objective was to instill fear. In each of the trials, therefore,
the prosecutor called upon various landowners as well as, for example the director of the
CORMA to provide testimony during the trials about such fear.

Mapuche activists and other critics of the terrorism charges dispute the notion that widespread
fear exists. One elderly man from the Temulemu community said: “according to a survey we
have the support of 85% of the Chilean population. How is it possible that there is fear then?”
(Field notes, April 2003). Activists often reverse the fear claim. A Mapuche from the community
Pantano in the 9th region said: “they argue that we scare them, but they make us live in fear.
The idea that you can be detained arbitrarily because I am Mapuche!” (Field notes, April 2003).
Others argue that the actions would only be terrorism if it caused indiscriminate fear in the
entire Chilean population, not just in a limited geographical area (for example Claudio Pavlic
Véliz, the regional public defender, in: Comisión de Constitución 2006:14). Prosecutors,
however, reject the notion that fear was only limited to a few private landowners. In the CAM
trial, for example, they drew upon the distinction between good and bad Mapuches to argue that the trial was specifically also in the interest of the “real” Mapuche people:

   In this case, we aren’t persecuting an ethnic group or a specific community. In fact, several of our witnesses are Mapuche community members. To them, they have only ended up impoverished because of the destruction of sources of labor, their own goods; they have gotten fear, including physically, for not adhering to the violent method of this association, or because they improved their economic situation through institutional avenues, with CONADI, or through the state. They are the primary parties interested in seeing this rural terror end. (Verdict, Case CAM, 27 July 2005)

While the prosecutors thus claimed that the CAM was disconnected from the Mapuche communities, in a survey in 2006, 54% of the Mapuches who knew the CAM responded that the CAM represented them either a little or a lot. 117 By 2009, the CAM was not very popular anymore among Mapuche communities or in the Mapuche movement. Still, a significant part would still have agreed with a female Mapuche student who said: “I disagree with their methods, but I do think it is necessary for some people to be more radical in this fight” (Interview C-40).

---

117 The question was posed how many Mapuches knew the CAM. 33% of the surveyed Mapuches affirmed that they knew the CAM. Of these 33%, there were 22% who answered that the CAM represents them a lot, and 32% answered that the CAM represents them a little. About 16% of the Mapuches that were surveyed responded that the CAM represents them in some form (CEP 2006).
The question whether Mapuche activists intended to create fear among (a subset of) the population was also addressed in the case against the CAM members. In its verdict, the court pointed out explicitly that the goal of the CAM is legitimate as it is even recognized in the Indigenous Law No. 19,253, in which the land is recognized as “the main fundament for the existence and culture of indigenous people” (Fuenzalida no year). This judicial interpretation shows the ambiguity of the meaning of a “goal.” Criminal law scholar Norrie already analyzed the distinction between a “causing motive” and an “ulterior intention” as well as the strategic ways in which courts and other actors can switch between these two modes (1992:38).

Prosecutors in the CAM case had argued that the goal was to “intimidate” and “pressure victims to buy peace, ceding parts of their predios,” while they “seek to create a climate of insecurity, instability and fear in various sectors of the region.” Thus, while the prosecutors relied on the “causing motive” in order to argue that the CAM was a terrorist organization, in their decision the court explicitly emphasized the legitimacy of the ulterior intention (land transfers) in order to come to its verdict. On 27 July 2005, the court considered that whereas the CAM did “prepare” for its actions in terms of deciding what to do when the police come and how to evade arrest. However, the court deemed that this is not the kind of premeditation that is sufficient to convict the CAM as a terrorist or criminal organization.
Membership in a terrorist organization: Discursive shift from the individual to the collective

In the case against the CAM, there was not only a shift in the legal interest. The prosecutors also changed the focus from the individual to the collective. This has several important consequences, such as the choice of defendants and the kind of liability that is at stake. The search for an organization and different functions of different members, for example, also led to the indictment of a defense lawyer for collaboration with the CAM. In addition, in their initial indictment in December 2002, the prosecutors also accused a Chilean mill owner of having financed the CAM. Both of these charges were later dropped.

The use of this doctrinal device of charging an “organization” forces the prosecutors to create an image of that organization. During the trial, competing images of the CAM were offered: Mapuche activists defended the CAM as a legitimate organization engaged in a legitimate struggle. The prosecutors, on the other hand, constructed an image of the CAM as a well-trained hierarchical organization with connections to foreign terrorist groups. They argued that the CAM had created “cells” and that there was a functional hierarchical structure distinguishing between “leaders” and “operative members.” A landowner called the CAM a “logo organization” as cells could just adopt the signature. Indeed, one of the expert witnesses even argued that the CAM had a “mediatic front” consisting of electronic newspaper El Gong and the CAM publication Weftun. The prosecutors dedicated a lengthy analysis to 29 issues of the Weftun and particular news sections in which, for example, forestation policy was analyzed.
or a report given of an event of the Mapuche sport *palin* in one of the occupied properties.

Relevant is thus that the image upon which the prosecutorial narrative was based influenced the way in which evidence was selected and interpreted. During the first preliminary hearing on 6 December 2002, evidence included ETA pamphlets that defendants had in their rooms, pictures of Che Guevara, as well as audiotapes of Victor Jara, a well-known communist singer-song writer who was killed in the early days after the Pinochet coup (Gutiérrez and Madariaga 2002). The Temuco judge who decided that the pre-trial detention could be prolonged confirmed that this was brought as evidence (Interview C-36). During the trial in July 2005, piece of evidence #25 was “subversive literature” including the (apparently legally significant) sentence: “Capitalism is a giant only for those who are at their knees.” These pieces of evidence were interpreted to signify a dangerous motive and objective. The fact that such examples are used evidence in the courtroom has caused outrage among Mapuche activists. One activist accused in the case Poluco Pidenco, claiming innocence, sighed: “they say that our *nguillatúns* [religious ceremonies] and *palins* [sport games] are meetings to conspire about crimes! They should get to know our culture” (Interview C-30).

Over time, different actors have offered highly different accounts about the nature, membership, and capacities of the CAM. Speculations about CAM membership in 2009 by former CAM members and some other Mapuche activists often invoked a picture of a loose group of “lost youth” trying to find meaning in their lives without many connections to the Mapuche movement or communities and lacking serious operational capacity. CAM members
and their supporters, however, continued to defend the CAM as a principled organization, close to the Mapuche communities, as well as the legitimacy of their demand for land and autonomy. A longtime member of the CAM emphasized in 2009 that what is important about the existence of the CAM is not so much its structure or its members. He pointed out that what counts are the ideas of the CAM.

If a Mapuche community executes a “productive recuperation” and talks about “territorial control,” that means that the CAM is alive, even if there are no actual links between that community and the organizational structure of the CAM. It is the radical ideas and radical methods of the CAM that are important. (Interview C-72)

Other accounts in the media and especially from right-wing politicians have claimed a very different picture of a professional, foreign-trained, hierarchically organized guerilla group that had access to heavy weaponry and the willingness to cause great havoc. In contrast, in its decision to acquit the CAM in 2005, the court pointed out that the CAM lacked the necessary material means and leadership for terrorist attacks (27 July 2005).

The shift from the individual to the collective and the charge of “membership” also influenced the kind of liability that was at stake. The defendants in the CAM case were accused of specific participation in different events without much overlap. Together, though, they were held responsible for the “organization.” Prosecutors argued that they even did not have to prove that the defendants had participated in any of the events that were “programmed by the
organization” (opening statement, lawyer representing the Department of Internal Affairs, June 2005). The crime consisted only of the membership and the consciousness, knowledge, and will to be a member of the organization and its criminal plans. The prosecutors asserted that it was also not necessary for the defendant to be aware of the details of any of the actions that the organization executed. Unlike the crime of conspiracy in the United States (next chapter), there is no specific action required on behalf of the defendants to be guilty of membership in a criminal or terrorist organization. “The crimes are committed also if the criminal program is not put into action” (ibid. June 2005).

The ambivalent line between the political arena and the criminal justice arena

The contentious criminal proceedings have elicited the participation of many different voices in the meta-conflict about the terrorism qualifications. Ultimately, the intense debate about the appropriateness of the terrorism qualifications and the use of anti-terrorism legislation in these cases is about the question where the line should be drawn between the political arena and the criminal justice arena. This is not only a discursive battle between landowners and Mapuche activists. It is also a controversy between different government agencies and changing perspectives over time. In the previous chapter I already identified the ambivalence of the Chilean “definition of the situation,” which alternates between downplaying the situation and denying that the situation is like “Chiapas,” “Al Qaeda,” or a “civil war” on the one hand and pointing to links with foreign terrorist groups and the threat to human lives and economic stability on the other hand. While in some cases the prosecutors adopted the narrative of the
landowners and qualified actions such as the arson of a plantation as “terrorist” acts, other arsons were prosecuted as common arsons. The prosecutorial narrative thus reflects the ambivalence with which the Chilean state tried to demarcate the line between the criminal justice arena and the political arena. The result is continuous ambivalence in the use of the Anti-Terrorism Law.

The push into the criminal justice arena is supported by a belief in the effectiveness of a conviction. Figueroa’s grandson, for example, told me during the trial against the Lonkos of Traiguén: “I want the violence to stop. That is what the trial is for: one person in prison, as a precedent” (Field notes, April 2003). Whereas liberal legalism stresses individualization, the de-contextualization of a case, and the proportionate punishment of a single perpetrator, the belief in the effectiveness of bringing a conviction as a deterrent example forefronts the identity of Lonko Pascual Pichún as a Mapuche leader. When this goal-rational motivation is taken to its extreme, the situation becomes, as one defense lawyer said, one in which “they want to convict someone, guilty or innocent” (Interview C-25). Expressing a similar confidence in prison sentences, in a reaction to the first Poluco-Pidenco verdict the sub-secretary of the Department of Internal Affairs, Jorge Correa, affirmed that the judges had “contributed to the pacification of the provinces in the south of Chile” (Toledo 2007:286).

The use of anti-terrorism legislation has led to criticism both within Chile and internationally. Before a parliamentary commission, several Chilean lawyers criticized the lack of due process
and the erroneous use of anti-terrorism legislation (Comisión de Constitución 2006). Chilean legal scholar Myrna Villegas claimed that the use of the Anti-Terrorism Law in these Mapuche-conflict cases is an example of enemy penology (2007). A lawyer representing the office of the United Nations High Commissioner for Human Rights for Latin America and the Caribbean attended the trial against the CAM as an observer which led him to use a comparison with the 2005 bomb attack in London to condemn the use of anti-terrorism legislation regarding the arsons in the Mapuche conflict: “Aquí por amenazas o por quemas de un potrero se quieren aplicar los mismos criterios con los que se actúa frente a quienes pusieron las bombas en Londres. La desproporción no puede ser mayor” [Here, for threats or burning a field they want to apply the same criteria with which they act against those that laid bombs in London. The disproportionality couldn’t be bigger] (cited in: Cayuqueo 2005c). International human rights organizations have equally expressed their concern about the use of anti-terrorism legislation (HRW 2004; FIDH 2003; Vargas 2010). Secret cables published by WikiLeaks showed that also American officials were critical and had close contact with the Chilean government about Mapuche “terrorism” and the CAM. Their assessment was that media reporting of the Mapuche actions were exaggerating the situation and that in fact Mapuche actions were hardly violent and mostly targeting property. Indeed, the cables also pointed out that the three deaths that resulted from the conflict in the past ten years had all been young Mapuche activists (U.S. Embassy in Santiago 2010; Gallego-Díaz 2010). In this debate about the application of the Anti-Terrorism Law, the Chilean government even had to account for this use before the Human
Rights Commission of the UN during the 2009 proceedings of the Universal Periodic Exam (Univisión 2009).

Some of these criticisms of the Anti-Terrorism Law stick with the liberal legalist framework and call for the changing of terrorism charges into ordinary criminal charges. Liberal critics have argued that the sentences are too high and disproportionate to the damage that was done. For example, five years imprisonment is a high sentence for a mere “terrorist threat” if one takes into account that in Chile there have been cases in which murder has yielded a sentence of five years. Many of these criticisms, however, have gone further and actually pushed the situation back into the political arena, questioning more fundamentally the transfer to the criminal justice arena. Former UN Special Rapporteur Rodolfo Stavenhagen, for example, condemned the use of anti-terrorism legislation, claiming that a legitimate demand had been criminalized (Stavenhagen 2003:§40): “Charges for offences in other contexts (such as terrorist threat and criminal association) should not be applied to acts related to the social struggle for land and legitimate indigenous complaints” (ibid. 2003:§69–70).

A major theme in the battle for interpretation around the use of the Anti-Terrorism Law in these cases is the issue of property damage. The former sub-secretary of the Department of Internal Affairs defended the policy of including arson as a terrorist offense, arguing that Spain and Germany have similar provisions (Jorge Correa in: Comisión de Constitución 2006:31). In the CAM case, however, the court stated that any concept of “terrorism” should include
“contempt for human life” asserting that no such thing had emerged from the available evidence. On 5 July 2006, the Chilean parliament proposed to change the Anti-Terrorism Law to the effect that only those actions that affect lives, not material things, could be qualified as terrorism. Landowners, however, resisted the idea that attacks on property would not be protected in the Anti-Terrorism Law. Using the vocabulary of “human rights,” they resisted the idea that some human rights would be more fundamental than other human rights (Villegas 2007). Landowners thus explicitly defend the inclusion of property damage within the relevant legal interests of anti-terrorism legislation. At the same time, in the courtroom they continue to emphasize the threat that arsons pose to human lives. For example, during the trial against the CAM, many witnesses expressed their fear of bodily injury. A forestry private security guard said:

> Considering everything said before, a generalized feeling of fear in this line of work exists, for those who dare to do so see themselves exposed to suffering personal aggressions or even to losing their lives and their goods due to the attacks. (Declaration 28 May 2003 before the prosecutor in Temuco)

Most remarkable in the described cases is the persistence with which prosecutors continued retrials in criminal cases after the judges had acquitted the defendants or rejected the terrorism qualification. These adamant attempts to convict Mapuche activists under terrorism charges and reverse acquittals have been heard loudly and clearly within the Mapuche movement and Mapuche communities. Their translation of this practice has been that they are being
persecuted for claiming their Mapuche identity and for demanding their lands back. Giving voice to this belief, the defense lawyer Fuenzalida criticized that in the courtroom it seemed to be sufficient for the defendant to be Mapuche to assume that he or she was part of an organization or movement that aimed to create fear.  

Despite the fact that prosecutors have thus worked hard to obtain convictions on terrorism charges, even they have been ambivalent about the terrorism label, not entirely prepared to push Mapuche activists into the stigmatized place of being viewed as “terrorists.” “They are not terrorists but their actions are terrorism,” said one of the lawyers in the prosecutor’s office (Interview C-11). Remarkably similar was the statement from a high official at the Department of Internal Affairs:

"Magistrado, es muy simple. En Chile no hay terrorismo, pero en Chile sí se han cometido delitos terroristas y esa son cuestiones completamente diferentes... Hay dos personas que ya fueron condenadas por amenazas terroristas, pero decir que hay personas que han cometido delitos terroristas no nos puede llevar a decir que en Chile hay terrorismo." (HRW 2004)

Thus, even though it was clear that even the prosecutors felt awkward about declaring these Mapuche activists “terrorists,” they maintained that the actions definitely fall within the

---

118 “Al parecer bastaba para los jueces para tener por acreditado el delito de terrorismo que fuera un mapuche el supuesto autor del hecho, ya que con ello se entendía automáticamente que integraba una organización o movimiento que tenía por objetivo ejecutar actos para infundir temor en la población. Se calificaba la acción y se penaba, en definitiva, atendiendo a la categoría de la persona imputada, acercándonos peligrosamente a un derecho penal de autor” (Fuenzalida no date).
parameters of terrorist actions: “Even if it is not like ‘Bloody Sunday’ in Northern Ireland,” said another prosecutor, “it is the same underlying logic” (Interview C-13).

In 2006, there were even legislative efforts to move the situation back into the political arena. A parliamentary commission studied the anti-terrorist prosecutions and made a comprehensive proposal including provisions about land transfers and a call for a pardon for Mapuches who were convicted for crimes connected to land demands and who rejected violence (Comisión de Constitución 2006:75; Comisión de Derechos Humanos 2006). The significance of this law lies in the fact that the legislature attempted to modify judicial verdicts that were understood to be final. It thus shows the struggle between the different state powers about the scope of the criminal justice arena. Another legislative effort tried to add a provision to the Indigenous Act, explicitly connecting the criminal cases to the demands for land. Under this provision, indigenous people were to be punished under ordinary laws (instead of terrorism charges) only if they committed crimes while demanding the rights protected in that law. This provision thus not only reinforced the distinction between indigenous people and non-indigenous people at the time of committing crimes, it also reinforced the motive as the key element for determining the available laws in criminal proceedings. The provision further added that if the court were to decide that the (criminal) acts “exceeded the claims” (such as land demands) (i.e. were disproportionate), the punishment could be raised (Navarro, no date). Both legislative proposals were rejected.
Not only the legislative branch but also the executive powers have been critical of the use of the Anti-Terrorism Law. For example, President Bachelet avowed in her presidential campaign in 2006 not to use the Anti-Terrorism Law in the conflict (Cooperativa 2006). She did not fulfill her promise, which itself represented an executive encroachment upon the independence of prosecutors and judges. For a while between 2004 and October 2008, no new criminal prosecutions were started under the Anti-Terrorism Law. Indeed, typical of the Chilean ambivalence, incidents such as arson of trucks on the highway that had been qualified as “terrorism” before were later prosecuted as “common arsons” (e.g. Case Chamichaco). In October 2008, however, the anti-terrorism legislation returned into play when some students gathered at the highway of Temuco intending to block the road. They allegedly threw a Molotov cocktail at a police car and were indicted under terrorism charges (Case Fennix and Jonathan). Since then, many more Mapuche activists have again been charged under the Anti-Terrorism Law for the arson of trucks, buses, plantations, and houses. These terrorism charges led to a long hunger strike initiated in 2010 by those detained activists in order to demand that the terrorism charges be replaced with common criminal charges, igniting again a debate about the appropriateness of the terrorism qualification between prosecutors and other government officials. In a major case in 2011, fourteen defendants were acquitted of these terrorism charges (Case Cañete). Thus, the interpretive battle and the ambivalence about the terrorism label are still ongoing.
Continued criticism of a lack of prosecutions and convictions regarding land occupations and arsons has thus led prosecutors to reframe their prosecutions and assert a broader interest than just the specific truck or plantation that was set on fire, adopting the terrorism narrative as promoted by landowners. The use of the Anti-Terrorism Law has, however, been very controversial, and prosecutors have not consistently categorized arsons as terrorism. Instead, the Chilean state has been deeply ambivalent, which is reflected in charging decisions, the national debate, and judicial decisions.

9. Discursive shift at the Inter-American Commission of Human Rights

Dissatisfied with the criminal proceedings against them, Mapuche activists have taken some of their cases to the Inter-American Commission on Human Rights (IACHR). Four cases in which anti-terrorism legislation was applied were admitted after domestic means were exhausted. Individuals can bring cases to this commission and allege that the state has violated their rights as laid down in the American Convention. In these procedures the tables are turned: the state has to defend itself as defendants claim that during the judicial proceedings against them the state has not abided by the rules. In some cases, the commission made recommendations for “amicable settlements,” which means that the parties are encouraged to settle the case out of court. If an amicable settlement cannot be reached, the commission can decide to “admit” cases for actual consideration. The decision to admit cases is a moment of triage in which the

---

119 The next stage is for the Commission to investigate the cases and issue a report with recommendations. These reports remain, however, unpublished, unless the Chilean state does not comply with the report’s recommendations.
commission decides whether cases, if the allegations are proven, violate the human rights of the American Convention. In legal lingo, in the first admission stage the case is not judged on its merits, but prima facie.

Table 5 Cases brought to the Inter-American Court of Human Rights (IACHR)

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Allegation</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consejo de Todas las Tierras</td>
<td>27 February 2002</td>
<td>Violation of American Convention</td>
<td>Admitted after amicable settlement was rejected</td>
</tr>
<tr>
<td>Pascual Pichún and Aniceto Norín (the “Lonkos of Traiguén”)</td>
<td>21 October 2006</td>
<td>Violation of American Convention</td>
<td>Admitted</td>
</tr>
<tr>
<td>Poluco Pidenco</td>
<td>23 April 2007</td>
<td>Violation of American Convention</td>
<td>Admitted</td>
</tr>
<tr>
<td>Víctor Ancalaf</td>
<td>2 May 2007</td>
<td>Violation of American Convention</td>
<td>Admitted</td>
</tr>
</tbody>
</table>

The proceedings before the IACHR have become a new battleground in which the role of the commission is disputed, as is the precise nature of “amicable settlements” in relation to law and politics as well as the legitimacy and legality of the Chilean criminal proceedings vis-à-vis Mapuche-conflict cases. With its specific and exclusive focus on the violation of human rights as laid down in the American Convention, the IACHR is an exemplary institution of liberal legalism. It is not surprising, therefore, that petitioners (defense lawyers representing defendants) framed their concerns about the “criminalization of the Mapuche activists” within the logic and language of liberal legalism and appealed to the right of equality before the law (Art. 24 of the
American Convention). Using that vocabulary, the petitioners addressed some of the central issues of the meta-conflict, such as the identity of the defendants, as they argued that their clients were convicted based upon assumptions related to their ethnicity instead of their individuality and the facts of the case. For example, the “Lonkos of Traiguén” (Pascual Pichún and Aniceto Norín) claimed before the IACHR that their case of violation of human rights is not an isolated incident but part of a consistent pattern in which indigenous people who reclaim their land rights are systematically repressed by the state, especially by the use of anti-terrorism legislation and the Law on State Security (in: IACHR 21 October 2006). The commission seems open for this narrative. In its *prima facie* judgment in the case of Ancalaf, for instance, the commission considered that the application of a “special penal regime more severe than the common regime because of his ethnic origin” could constitute a violation of Article 24 of the American Convention (IACHR 2 May 2007).

The Chilean state tried to avoid a discussion about the complaints about its domestic proceedings by framing the international involvement as a breach of its sovereignty. For example, in the CTT case it affirmed its right to “use all available legal proceedings to re-establish the public order when it is threatened or broken” (communication, 5 June 1998 in: IACHR 27 February 2002, consideration 22). This view was supported in the Chilean media, for example in an article in the newspaper *El Mercurio* that criticized that the “external jurisdiction” of the IACHR made a joke out of the authority of the Supreme Court as it induced the Chilean government to negotiate about sentences that were delivered (Molina 2000). Also,
in the case Poluco Pidenco the Chilean state emphasized that the IACHR was not a court of fourth instance with the authority to revise the facts and evidence but a complementary control with a subsidiary character to provide recourse when due process has been violated, but not to reverse the judgments of lower courts (IACHR, 23 April 2007, consideration 37).

In response to the allegations that the Chilean proceedings had violated due process, the Chilean state defended the way in which the arrests and trials had taken place by the appropriate and legitimate police and courts. If mistakes were made, for example in the identification of some of the defendants, then these mistakes should not be taken out of their context, the Chilean state argued. The state rejected the interpretation that these errors were a “plot destined to violate deliberately rights or judicial guarantees, [the errors were] certainly not a discriminatory policy against the indigenous of the Mapuche ethnic group” as the petitioners claimed (cited in: IACHR 27 February 2002).

While domestically the Chilean state has emphasized the separation between the political arena and the criminal justice arena, in the IACHR proceedings, politics encroach upon the logic of criminal justice. For example, in the case of the CTT, the IACHR brought politics back into the case as the proposed “amicable settlement” had to deal with land demands, thus clearly pushing the situation back into the political arena. Indeed, the Chilean state responded in kind (and thus acknowledging the relevance of the land demands) by emphasizing that it had made efforts to “promote the development of the indigenous peoples that inhabit its territory,” for
example by enacting the Indigenous Law and founding CONADI. The Bachelet government has attempted to negotiate with the Consejo de Todas las Tierras and also with the lonko of Mapuche community Temulemu, Pascual Pichún. The government even offered Pichún more lands if he would drop the case before the IACHR, but he refused. During a meeting with fellow Mapuche activists, he said that he was more interested in the larger struggle and the rights of Mapuches than receiving more land for his own community (Field notes, meeting Temuco, May 2009).

In the case of Ancalaf, proceedings before the IACHR also blurred the boundary between the criminal justice arena and the political arena. The displacement of Mapuche communities because of the construction of the hydroelectric dam Ralco led to an amicable settlement before the IACHR (in a separate case) after petitioners (not Ancalaf) had claimed irregularities in the permissions given to the energy company Endesa. This settlement also included provisions regarding the criminal case against Ancalaf, who was being prosecuted for his alleged involvement in the arson of trucks in resistance to the construction of Ralco. The Chilean state was held to provide “humanitarian assistance in favor of the family of señor Ancalaf Llaupe” (IACHR Report of amicable settlement 30/04 cited in IACHR, Case Ancalaf, 2 May 2007, footnote 8). In addition, the state had to contemplate “benefits” if Ancalaf were to be convicted in the criminal proceedings against him. This settlement put the criminal case against Ancalaf squarely in relation to the administrative irregularities that occurred during the building of the hydroelectric dam Ralco.
Thus, in the proceedings before the IACHR, not only is the Chilean state suddenly in the position to defend its criminal proceedings. The IACHR also pushes the Chilean state explicitly to understand the criminal cases in relation to the demands for lands and to find a solution within the political arena. Further, the proceedings before the IACHR question the appropriateness of the use of the Anti-Terrorism Law. When actual or potential international audiences are involved, “terrorism” is the standard neutralizing argument to counter allegations of human rights violations. The Chilean state has also used this label in order to justify its proceedings and its use of, for example, anonymous witnesses. The IACHR still has to give its final answer whether or not to accept this qualification in the Chilean cases.

10. Conclusion: the paradox of simultaneous oppression and impunity

In these two chapters I have explored the dynamics of criminal proceedings in the context of what is known as the “Mapuche conflict.” Specifically, I have examined when and how the prosecutorial narrative in these proceedings transformed as a consequence of the collective mobilization and claim-making and the understanding of single events as part of a larger whole. When did the prosecutor take the differences between a pyromaniac and a Mapuche activist into account? When did these differences become “legally relevant”? How were these differences described and what effect did they have on the criminal prosecutions, charges, arguments, and sentences? I traced the prosecutorial narrative as constituted in criminal
prosecutions related to the Chilean-Mapuche territorial conflict. I analyzed the key concepts in this narrative and the way these concepts are given their content and meaning in the battle of interpretation that takes place in the criminal justice arena.

Most importantly, I hope to have shown that the voice of the prosecutor is doing much more than “just applying the law.” Instead, the prosecutorial narrative becomes part of an intense debate about the events that led to criminal prosecutions, thus constructing images of defendants and victims that are deeply contested. The prosecutors thus inevitably engage in identity politics. Similarly, the objects that are at the core of contentious events, such as the property, land, plantations, and the best way to conceptualize their value are disputed. Significantly, not only that what is expressed in prosecutorial decisions and oral arguments, but also the silences in the prosecutorial narrative are heard loudly as well. The perceived successes and failures of criminal prosecutions in meting out justice are translated into mobilization and discursive action by “victims” and “prisoner supporters,” thus drawing actors and arguments into the criminal justice arena. The complexity of these criminal prosecutions is not only due to the fact that it is difficult to find perpetrators or evidence. It is equally difficult to construct the boundary between the criminal justice arena and the political arena. Wherever prosecutors attempt to exclude “politics,” other actors will bring it back in, be they prisoner supporters, the Chilean government itself in negotiations with CONADI, or the Inter-American Commission on Human Rights. Just as important, by re-contextualizing events as part of a larger whole, the interpretive prosecutorial operations that attempt to demonstrate such connections between
single events bring in a larger context, while at the same time denying the political meaning of choosing that context.

So, how does the Chilean criminal justice system work in the “Mapuche conflict”? How is the rule of law defined, asserted, defended, rejected, and criticized? How does the prosecutor deal with the competing narratives that struggle for hegemony in the criminal justice arena? How is criminal justice produced, or maybe we should say co-produced, by the various voices that participate in the meta-conflict? Who are the producers and what does their product look like?

The first remarkable feature of the criminal proceedings and the battle for interpretation that surrounds them is the enormous number of people that get involved with the production process of criminal justice. Its language is adopted by many different people and organizations, in meetings between high-placed officials in Santiago, at the fireplace in a remote house in a Mapuche community, in public demonstrations in Temuco, and in business e-mails between forestry companies. While they all draw upon the basic framework provided by the criminal law, such as the dichotomy between victim and perpetrator, and liberal notions of equality and the presumption of innocence, their specific uses of the vocabulary and the translation of their lived experiences into that general framework differ greatly. Their experiences and the meaning they give to those experiences differ. The analysis also showed how over time, definitions can change. For example, symbolic occupations which were considered to be radical in the early 1990s would not be considered radical today.
There is an explicit effort on the part of the prosecutors to present the criminal trials as objective, in line with the presumption of innocence, and in accordance with a strict use of evidence to come to conclusions. Still, the analysis of the cases demonstrates how the prosecutorial narrative inevitably engages with the meta-conflict and how it shifts discursively between de-contextualization and re-contextualization. The prosecutorial narrative inevitably reproduces the ideas and assumptions of one of the competing narratives, for example, by portraying plantations as crucial to the development of the economy of Chile or by emphasizing their monetary value. Similarly, the prosecutors claim to act in the public interest, but this highly depends on the interpretation of key concepts, such as security. For example, landowners demand the protection of their “physical and juridical security” and assert this as a public interest. Their definition of “security” is not accepted, however, by Mapuche activists, who emphasize the survival of their people and the threat to their livelihoods because of forestry plantations encroaching upon biodiversity and water availability.

It is remarkable that, just as in Spain, both the challengers to the status quo and the defenders of the status quo, both those who are given the role of “victim” in criminal proceedings and those who are subjected to trials as “defendants,” are highly dissatisfied with the role and performance of criminal trials. Both landowners and Mapuche activists continue to perceive the criminal justice system to be unjust, characterized by political decisions, and particularly partial to their disadvantage. They mobilize as “victims” or “prisoner supporters” to engage with the
criminal justice policy and in the definition and qualification of specific events as crimes. In response to the calls by landowners, at various times the prosecutorial narrative turned towards a re-contextualized approach drawing on the terrorism narrative in order to secure convictions and broaden criminal liability. Mapuche activists have resisted such criminalization and continue to push the situation back into the political arena, with some success.

The Chilean-Mapuche territorial conflict and the process of criminalization that has been such an intricate part of the conflict dynamics over the past twenty years pose difficult challenges to the liberal democratic pretentions of the Chilean state. Prosecutors are struggling to maintain the established order without losing legitimacy among significant parts of the population. While prosecutors rhetorically emphasize the “legitimate aspirations of the Mapuche people,” they simultaneously underscore the liberal distinction between ends and means. Mapuche activists, however, challenge the status quo not only with their demands for land reform, but also because they are asking the following questions: What methods are allowed in a legitimate struggle for which the state does not provide the appropriate methods to achieve these legitimate objectives? And to what extent should the rule of law be respected, which is partially responsible for actually blocking the achievement of legitimate objectives?

Instead of assuming a fixed, externally available rule of law, an analysis of the meta-conflict reveals the different kinds of rule of law that each of the actors collectively imagines and proposes, for example when they argue about what qualifies as terrorism. In the trial against
the CAM, the lawyer representing Forestal Mininco juxtaposed a “terrorist organization” with the “rule of law” and argued that the terrorist organization imposed a different way to “resolve conflicts” than that which is the accepted form in the “model of social coexistence which is called ‘the rule of law’” (Oral proceedings, June 2005). Landowners consequently refer to the rule of law as the framework that gives them the right to protection. Mella and Le Bonniec (2004) point out, however, that the “rule of law” which is so defended today is a relatively recent construction in the Araucanía. Only 130 years ago, there still was another, non-Chilean, order. The land ownerships which are at the center of the current disputes originated in the same rule of law that was then imposed upon the region and the Mapuches who inhabited it. Indeed, in one of the cases on the Law on State Security defendants were qualified as “violators of ‘our’ judicial system,” thus perpetuating the Us-Them divide (del Valle 2001). Recognizing the discrepancies in the understandings of the rule of law, one of the Lumaco community members said: “The rule of law is for them. No peñi, not one of us can defend our law. […] We don’t steal from nobody: the Mapuches reclaim their rights” (Interview C-60).

Ambivalent criminalization

The prosecutorial narrative and the decisions in the criminal justice arena may appear contradictory in many ways. Harsh laws alternate with acquittals and leniency. Claims about a possible “Chiapas” and links to international “terrorism” are followed by downplaying statements about a “few radicals.” In these two chapters about the Chilean-Mapuche territorial conflict and the development of the prosecutorial narrative, I have aimed to locate these
contradictions within the discursive battle that is taking place in the criminal justice arena, in which images of “terrorism” compete with images of “legitimate social protest.” This battle continues to this day and none of these images has achieved clear hegemony. This battle becomes visible in the criminal justice arena as a battle for the relevant context to interpret the criminalized events.

An analysis of the process of criminalization in the Chilean-Mapuche territorial conflict is full of paradoxes. I have pointed out the ambivalent images that are at work to interpret the problem. This ambivalence is also pervasive in criminal proceedings and decisions. While many Mapuche activists have experienced arrests, raids, and charges, only a few are finally convicted. Those who are convicted are often convicted for lesser charges than were initially brought. I have shown the intense struggle for interpretation that swamps the criminal justice arena as landowners, forestry companies, and private business farmers are angry about what they perceive as continuing impunity. They advocate the “terrorism” narrative and harsher measures. On the other hand, Mapuche activists receive support from a significant part of the Chilean population as well as from international sympathizers and human rights organizations. They challenge the state in its definitions of the situation and the course of criminal proceedings.

While activists are prosecuted, the state engages in many efforts to negotiate and seek dialogue with “the” Mapuches, and its leaders and conflictive communities in particular, thus
partially placing the situation in the political arena. While blaming a few radicals for the violence, the government continues to frame the “Mapuche problem” as an issue of poverty, education, and integration. While the demand for land restitution is recognized as legitimate, more radical proposals for alternative scenarios of progress, development, and autonomous decision-making are not taken into account. Chile continues to be a país forestal, and the Mapuches continue to be “its indigenous people.” That seems to be non-negotiable and indeed necessary and “natural.” The frequent negotiations with defendants and the fact that some defendants are even offered money or land in exchange for retracting more radical demands or challenges to the state indicate that some government officials think that such offers may be enough to appease the individual activists.

The liberal ideology of the “separation of powers” sometimes turns into a “denial of responsibility” as the Mapuche conflict is tossed around like a hot potato between the various governmental powers involved. The transfer to the criminal justice arena is, in a sense, a denial of responsibility of actors in the political arena. It is a denial to deal with the structural causes of the conflict and the competing land demands. At the same time, law and politics continue to be thoroughly mixed, which was also visible, for example, in some of the legislative efforts to soften the impact of the anti-terrorism legislation.

Criminalization of those with legitimate claims to land (acting with illegal tactics) distracts from the state’s responsibility to solve the existing tensions between different legal claims to land
which are based on different laws. This tension was visible, for example, when the Electricity
Law took precedence over the Indigenous Act and the hydroelectric dam Ralco was built, while
Mapuche communities were displaced. Underlying all of the criminal cases are unresolved
disputes about land rights, indigenous rights, private property, and the right to and appropriate
use of natural resources.

The transfer into the criminal justice arena leaves these contentious events and their
underlying demands in the hands of the police, prosecutors, lawyers, and judges, whereas they
do not have the instruments to engage in the logic of political persuasion or negotiation, let
alone resolution of these disputes. Mapuche activists similarly frequently are captured by the
criminal justice dynamics and fight their struggle exclusively within the criminal justice arena,
such as when they engage in prisoner support mobilization and denounce state repression.
Their energy is expended on endless debates about traitors and mutual suspicion in Mapuche
communities. Their focus on individual police officers and individual landowners impedes a
translation into the concepts and ideas that would be necessary to address the structural
competing interests. The displacement of the actual issues to an arena and logic fundamentally
incapable of addressing these issues explains the widespread impotence experienced by all
actors in the Chilean-Mapuche territorial conflicts.
Competing narratives for re-contextualization

Contentious criminalization in Chile is thus characterized by ambivalence about the boundary between the political arena and the criminal justice arena. The very transfer of events into the criminal justice arena is often accompanied by partial cancelations of such transfers or odd combinations with continued interaction in the political arena. This ambivalence is also reflected in the meta-conflict surrounding criminal proceedings. Most fundamentally, the competing voices in the meta-conflict propose different contexts for interpreting the events that become the subject of criminal proceedings. These voices push the prosecutors to depart from a de-contextualized understanding. Indeed, over the course of the contentious episode since the early 1990s, criminal cases have frequently been placed within the context of the “Mapuche conflict.” When the “Mapuche conflict” classification is used, however, it is important to question the meaning it is given, because it turns out that actors offer radically different interpretations. Criminal prosecutions that re-contextualize single incidents within a context of “terrorism” expand the time frame beyond the narrow incidents of arson or theft. They simultaneously, however, ignore the alternative context with an even larger time frame that Mapuche activists propose in which the entire history between Chile and the Mapuche people is taken into account. The re-contextualized criminal law vocabulary, logic, and structure thus inevitably produce an image in the courtroom that is heavily contested.

The prosecutorial narrative has mostly interpreted the “Mapuche conflict” as a context of continued attacks on landowners. The prosecutorial narrative has, on several occasions, shifted
discursively from the individual to the collective, from isolated incidents to a pattern, and from a narrow legal interest to a broader legal interest. Thus, taking “terrorism” as the relevant context, prosecutors have departed from a narrow focus on the protection of property, which can be defined by indicating a specific time, place, and owner, to a broader legal interest such as, for example, national security or democracy, which is not necessarily located in a specific time, place, or person.

While events are often classified as “Mapuche conflict” cases, thus assuming certain motives and identities, alternative explanations for forest fires and the role of, for example, ordinary mafias in the theft of wood receive scant attention. Also, if members of a Mapuche community take wood from an adjacent plantation, it is not clear why it is legally relevant whether or not this is part of a larger scheme of “ideological infiltration.” Paradoxically, the re-contextualized narrative seems to reinforce the notion that the motivation behind actions is always political, whereas many voices among landowners, but also within the Mapuche movement, dispute that.

In addition to a struggle about the context and “terrorist” nature of the crimes, actors also have competing accounts of who is actually leading and participating in the struggle. Ultimately, this discursive struggle about the identity of defendants and their claims to representation is simultaneously a debate about the Chilean democracy and the prosecutorial claims to act in the public interest. The prosecutorial narrative has reproduced an image in which Mapuche radicals
are considered to be “violent” and even “terrorist.” The voice of Mapuche activists is thus ignored and discredited. Prosecutors emphasize the role of outsiders, foreigners, and infiltrators in the planning and execution of crimes, taking advantage of the Mapuche identity and grievances. The dichotomy between the good Mapuches and the external radicals legitimizes a harsh response against the “radicals.” Mapuche activists, however, argue that the struggle is about the Mapuche people and that the role of outsiders is wrongly interpreted, overstated, or simply untrue. Landowners and prosecutors view the CTT and the CAM as instigators and manipulators and contrast them to the “peaceful” Mapuche. “The CTT and CAM manipulate and instigate communities and put ideas in their heads. The people in the communities do not invent and want ‘this’ themselves,” said one forestry manager (Interview C-34).

The prosecutorial narrative thus perpetuates the notion that the “community members” are the “real” Mapuches who have the legitimacy and whose will is imagined to be more authentic. The prosecutors thus negate the possibility that the defendants in these trials represent the Mapuche people or even their own Mapuche communities. Denying the defendants the capacity to represent, the prosecutors claim to act in the “public” interest. While certainly the CAM has lost popularity and legitimacy during the past decade, activists argue that both the CTT and the CAM did and to a certain extent still do enjoy a certain legitimacy and representativeness among the Mapuche movement and the Mapuche communities. Mapuche activists dispute, therefore, that the prosecutors act in the general public interest.
Thus, just like in Spain, the prosecutor’s office in Chile has become a key actor within the larger dynamics of the Chilean-Mapuche territorial conflict. In the next chapter, I turn to the mobilization of environmentalist activists in the United States, their challenges to the status quo, their protest actions, and the subsequent criminal prosecutions. While the meta-conflict about the criminal prosecutions and the patterns of victim mobilization and prisoner support mobilization in the United States are highly similar to those in Spain and Chile, the overall development is different. The prosecutorial narrative in relation to extremist environmentalist protest in the United States is not expansive like in Spain or ambivalent like in Chile. Instead, the narrative zooms in on a small group of activists and portrays them as eco-terrorists. Doing so, it marginalizes them by drawing boundaries between those that are pushed into the criminal justice arena and those that are forced to choose sides and – if they cooperate with law enforcement efforts – stay within the political arena.
VI. Eco-Radicals Claim Defense of Animals and the Earth in the United States

Who are the real eco-terrorists? And when does that which is offensive, obnoxious, or dangerous become illegal or even terrorism? These are the central questions at stake in the meta-conflict that surrounds the criminal prosecutions in relation to “extremist” environmentalist activism.

1. Introduction: Who are the real eco-terrorists?

In October 1997 Peter Young raided six mink farms in the Midwest. He was arrested for these acts after seven years of living as a fugitive. When he got to talk to his lawyer, his counsel said: “it is incredible; it seems that the prosecutors are more interested in your friends than in the issues in the indictment. They are making a master list with the names of your friends” (Interview US-15).

This illustrates what activists have dubbed the “Green Scare.”
In the words of journalist Will Potter, who allegedly coined the term, the “Green Scare” is the “disproportionate, heavy-handed government crackdown on the animal rights and environmental movements, and the reckless use of the word ‘terrorism’” (Potter 2011b). This raises some questions. Do prosecutors, FBI agents, and judges also perceive a “Green Scare”? Or does the “Green Scare” only exist in the minds of paranoid animal rights and environmentalist activists? And how do targets and victims of animal rights and environmentalist protest activity talk about the criminal prosecutions against the activists?

The counterpart of the Green Scare is “eco-terrorism.” The researcher’s guide to safety, security, and media relations at the University of California at Davis, elaborated by the UC Davis police department in 2002, described that “[t]he history of animal/environmental extremist groups can be traced to England, with all groups now falling under the broad category of ‘eco-terrorism’ – defined as any crime committed in the name of saving nature” (2002:2). The guide continues to describe the Animal Liberation Front, the Earth Liberation Front, and a short history of the attacks on researchers at UC Davis by animal rights extremists and groups in opposition to genetically modified agriculture.

In this and the next chapter I will describe what happens in this phenomenon labeled alternatively as the Green Scare or as the law enforcement response to eco-terrorism. I will trace its features, nature, and emergence. When did the term “eco-terrorism” emerge? When did investigation and prosecution of animal rights activists become a matter of dealing with a
movement instead of individuals? In the next chapter I focus on the prosecutorial narrative and choices in criminal prosecutions in relation to the environmentalist struggle in the United States over the past decades. The main emphasis will be placed on the last ten years, in which law enforcement has stepped up its efforts to counter extreme protest tactics and achieve detentions and convictions.

This chapter starts with a short introduction to the competing goals at stake in the conflict: animal rights and preservation of nature versus the use of animals and the earth for human purposes. I pay attention to the mobilization of activists, their tactics, and the relations between “radicals” and mainstream actors. Then I briefly discuss the U.S. criminal justice system and its legislation as far as it is relevant to understanding the criminal prosecutions of the past twenty-five years, which brings us to the processes that take place in the criminal justice arena. I devote special attention to the development of the state’s “definition of the situation,” which guides the assessment of the seriousness of the challenge the United States faces. I discuss some of the prevalent images that prosecutors draw upon to understand and respond to “eco-terrorism.” Such images portray the nature of “organizations” like the Animal Liberation Front and the Earth Liberation Front, the people that are attracted to this activism, the people that are the driving forces behind the actions, and the likelihood that material destruction will turn into violence against human beings. With “eco-terrorism” as the dominant lens for government action, the situation transfers to the criminal justice arena. In an analysis of the meta-conflict in the criminal justice arena, I describe the mobilization of the targets of
environmentalist and animal rights protest activity as “victims” in criminal proceedings as well as “prisoner support mobilization” and the way in which defendants and their sympathizers challenge the criminal proceedings and the classifications of conduct that prosecutors put forward.

After this “setting the stage” of the political conflict and the transfer of a significant part of that conflict into the criminal justice arena, the next chapter analyzes in depth the ways in which the state has used its criminal justice apparatus to criminalize the tactics that activists employ, exploring some of the main debates such as the tension between free speech and internet organizing and the role of Federal Bureau of Investigation (FBI) involvement in activist cells. I will analyze the competing classifications of the environmentalist protest activity and the way in which these discursive efforts get translated into the choices the prosecutor makes, such as who gets indicted, what charges are brought, and how the law is interpreted and the criminal law doctrine applied. I analyze the prosecutorial narrative and the specific discursive shifts that characterize its development throughout the 1990s and 2000s. In particular, I will identify three shifts that profoundly influence the way in which environmental protest is characterized and prosecuted: (1) the shift towards proactive prosecution; (2) the shift from the definition of conduct as sabotage or property destruction to “eco-terrorism”; and (3) the shift towards the prosecution of “aboveground” activities.
Just as in the other country studies, I have had to make choices about what to select. There have been many prosecutions and ongoing criminal cases in relation to the environmental movement. Without aiming to provide a comprehensive or even representative overview of all those cases, I have selected several cases in order to illustrate the argument that I will make in these chapters. In this research, I am most interested in the way in which prosecutors draw the boundary between the political arena and the criminal justice arena. I have thus selected cases that demonstrate the characteristic features of this process of boundary drawing. It will become clear that in the United States, an important voice in this process is the Federal Bureau of Investigation (FBI).

I will describe what I have called the “marginalization” of actors that occurs as the prosecutorial narrative proceeds to mark the boundary between the political arena and the criminal justice arena. The marginalizing discourse in the United States centers on the concept of “eco-terrorism” and enables the isolation of activists who are prosecuted under that label. Solidarity across the radical and mainstream spectrum of environmentalism in the United States is weak. Criminal prosecutions draw upon and reproduce the dividing lines and debates among such groups from different sides of the spectrum about the legitimate means of struggle for animals and the earth. The prosecutorial narrative establishes firm walls between the criminal justice arena and the political arena, ignoring voices that question that boundary.
I thus explore how the prosecutorial narrative asserts and draws upon the different logics that are dominant in the political arena and the criminal justice arena. The political arena and the logic of democracy in the prosecutorial narrative place importance on the “public opinion” and “persuasion” of people while reaching for their “hearts and minds.” At the same time, many environmental activists do not feel that public support will save the earth and the animals. Instead, their experience is full of stories in which political negotiations were decided by other factors than public support as the lack of transparency or the power of money turned out to make it difficult to achieve victories by increasing public support. Some activists thus have turned to “direct action” which sidesteps public support and simply “does the job.” The prosecutorial narrative locates such action outside of the political arena and defines it as criminal.

My fieldwork in the United States took place in the fall of 2007 and the fall of 2008. During that time I attended a two-week criminal trial in Sacramento. I also interviewed two prosecutors, five criminal defense lawyers, and four environmentalist activists and I conducted participant observation during an animal rights conference in Boston and during several animal rights protests in New York City. I have tried to arrange interviews with pharmaceutical companies, but they declined due to “security reasons.” In Germany, I had an informal conversation with representatives of a pharmaceutical company which also has offices in the United States. My request for an interview with the FBI in Washington was rejected with the argument that they would not be allowed to reveal much information. In addition to interviews and participant
observation, I have collected numerous books and articles, legal transcripts, legislation, public declarations, and government reports. I watched videos on YouTube of protest actions and materials collected by activists working undercover in the meat industry or research laboratories. I further visited many websites of environmentalist activists, websites from those who are directly affected by such protests, like fur farmers and scientists, and those who campaign for harsher measures against activists, like the Center for the Defense of Free Enterprise. For detailed information regarding my data I refer the reader to the methodological appendix.

2. Challenge to the liberal democracy

I start out with a brief description of this conflict, the actors, competing goals, failed civil lawsuits and political negotiations, the development of protest tactics that fundamentally challenge the status quo, and the responses to those tactics. I will write a tiny bit on the underlying philosophy of “speciesism,” which is important for understanding the radical claims for animal rights and wilderness. Far from being complete, this short introduction merely serves to discuss how these issues and events form the basis for contestation in the criminal justice arena.
The contention: Animal rights and wilderness versus the human use of animals and the earth

Just like the “Mapuche conflict,” the eco-conflict in the United States actually refers to a collection of struggles and disputes that have also changed over time. Environmentalism is an issue that goes back a while in American history, engaging actors across the political spectrum. It is worthwhile to note, for example, that conservationism was given a big boost by President Theodore Roosevelt, who introduced the national parks in the early 1900s. The environmentalist movement consists of various actors, ranging from animal rights groups to activists concerned with the sea, the forest, and specific geographic struggles. During the 1990s, for example, many activists of Earth First! were involved in the struggle for the Headwoods wilderness area, where they opposed the Pacific Lumber Company. Other struggles address wolves, whales, buffalos, horse slaughtering practices, protection of the red squirrel habitat in Arizona against an observatory, or the environmental impact of genetic engineering. In each of these struggles, the opponents or targets of the demands of the challengers vary. They can be hunters, scientists, universities, companies, circus operators, or the government.

The environmentalist movement, its demands, and its opponents

The environmentalist movement in the United States is thus highly diverse and I will not go into full detail, as this has been done elsewhere (e.g., Scarce 2006, Jasper and Nelkin 1992). I will point out some important differences between the groups that together form the environmentalist movement and clarify the terminology that I use for these different actors. In his list of actors in the “environmental movement,” Scarce includes those who protect the land
(for example Earth First!), the sea (such as the Sea Shepherds), and the animals (such as the Animal Liberation Front). I also refer to all activists that struggle for both earth and animals as “environmental activists,” thus specifically including “animal rights” activists. Indeed, while these groups tend to have a distinct focus, there is good reason to analyze them as belonging to a single broader movement. Many animal rights activists have come from the wilderness corner and vice versa, and thus there is an overlap in activists. Also, some companies are targeted both for animal rights issues and for biodiversity concerns, an example being Monsanto. As we will see in these chapters, the government and the targets also lump environmental protest actions together under the umbrella term “eco-terror.” And environmental activists maintain a website for “eco-prisoners,” reporting on all the prisoners from these diverse struggles together. As a consequence, I will also refer to them as one movement.

Within the broader environmentalist movement, there is an important distinction between activists that care for animals or the earth out of a humanist concern and those that put animals and the earth first. Broadly speaking, the first category is interested in animal welfare (as opposed to rights) and in the conservation of nature for human purposes (such as recreation, tourism, and hunting). The second category regards this interest as reflecting “speciesism,” which means that species membership (such as being human) is the basis for special rights and benefits. These activists reject human needs or human superiority as a valid basis for the use of animals and the earth. Instead, they emphasize the independent value of nature and claim to further the interests of the animals and the earth for their own sake, thus,
for example, advocating for animal rights instead of animal welfare and advocating for wilderness instead of sustainable development.

This perspective is visible, for example, in the name chosen by the group Earth First!. Activists of Earth First!, the Sea Shepherds, and the Animal Liberation Front all share the same premise that society should abandon the human-centered perspective towards nature. Wilderness is not scenery, animals are not meat, and minerals are not resources. All of those words ("scenery," "meat," "resources," and also "progress") reflect the bias of a society that tends to look at nature as something to be used ("exploited") by human beings. These are murky issues, also within the environmental movement, also for the more radical activists. Not all radical animal rights activists, for example, reject animal welfare laws. But it is not their ultimate goal. What should be clear is that the fundamental divide is not between people who love animals and people who do not. It is about changing the relationship between humans and the earth. Animal rights activists, for example, do not have "pets." At most, they may have "companion animals" – "I cannot own another living being," said activist Janet.

This philosophy of "speciesism" leads to many concrete and difficult questions, such as whether animal testing should also be rejected when it concerns life-saving medicines. A pharmaceutical researcher asked me: "will those animal rights activists be consistent and refuse medicine when they get a specific illness that we provide the treatment for?" In these issues, all facts and

---

120 Private conversation at a birthday party, October 2007, Boston
morals are disputed: activists may claim that the research can be done in other ways, without using animals in a cruel way, or without using them at all. This is not the place to go into these details. Suffice it to note that given the way society in the United States is organized, the number of specific issues challenged by environmentalist activists is vast: fur, vivisection, circus animals, hunting, logging, construction projects, SUV’s (sport utility vehicles), the meat industry (slaughterhouses, chicken factories), research labs; each of these “targets” provides ample room for discussion, protest, and action in the environmentalist movement.

Only some of the groups or individuals involved in environmental activism have been the subject of criminal investigations and prosecutions, most particularly individuals believed to act in name of the Animal Liberation Front (ALF), the Earth Liberation Front (ELF), and the campaign Stop Huntingdon Animal Cruelty (SHAC). These groups will therefore receive the most attention in these chapters. The relation between these groups and the broader environmentalist movement, though, will come to the center of my analysis of what goes on in these criminal prosecutions.

Before we turn to those criminal prosecutions it is important to describe the actors on the other side of the story, i.e., the “targets” of environmental protest and their allies. The list of individuals, companies, and organizations using animals and the earth for specific human-centered purposes is long: circus people, hunters, logging companies, biomedical researchers, animal testing companies, pharmaceutical companies, fur farms, etc. There are also
government organizations on this side of the equation, ranging from agencies such as forest services to certain senators or Congress members defending these interests. Indeed, activists often point out the complicity of the government in continuing what they see as harmful practices, as scientific research is often subsidized and also logging operations have received many subsidies, which in the end is taxpayer money.

These actors have often created associations and alliances speaking on their behalf, such as the Fur Commission, the National Association for Biomedical Research (NABR), and the National Animal Interest Alliance (NAIA). There are also organizations that were specifically founded to create a voice against radical or extremist environmentalism and animal rights advocacy, for example Wise Use, the Natural Resources Defense Council, Center for the Defense of Free Enterprise, Animal Concerns Community, and the websites Activist Cash and Meatingplace. Ron Arnold from Wise Use argues against the perspective held by many environmentalists that a catastrophe is imminent if humanity does not change its current practices. Instead, he argues that “[t]he earth and its life are tough and resilient, not fragile and delicate (Arnold 1996). In response to the demands of animal rights activists, Teresa Platt from the Fur Commission explicitly favors the domestication of animals:

So what are the goals of these terrorists, and how desirable are they in reality? Although much has changed in the last million years, some things have remained constant. Water, undrinkable salt water to boot, still covers 75% of the Earth’s surface. About 10% of the landmass – or just 2.5% of the planet – can support agriculture to feed and clothe us. The other 97.5% of the planet can support grazers and predators and birds and fish, animals which consume what are to us inedible plants and animal life and convert them to food and clothing for our use – but we must take the lives of these animals to reap these benefits. The domestication of animals over

See, for example, Scarce (2006:25) on subsidies to logging companies.
the last ten thousand years has contributed greatly to the Earth's ability to provide for us all. (Fur Commission 1999)

Similarly, a scientist whose research is funded by the National Institutes of Health claimed the social benefits of their work:

Responsible use of animals in research aimed at improving the health and welfare of the mentally ill is the right thing to do, and we will continue because we have a moral responsibility to society to use our skills for the betterment of the world. (Daily Mail Reporter 2010)

Environmental activists pose a strong challenge to the liberal democracy as they claim to speak for those who have no voice. This is not just a description of the fact that human beings cannot understand the language of animals. More fundamentally, it addresses the fact that within the human system of democracy, animals and nature do not have a voice. They do not count, they do not have a vote, and their interests are not considered. Within this system, the earth and the animals only count if there are human interests at stake. It is that fundamental exclusion that is challenged by environmental activists. The concept of “animal rights” expresses this notion clearly, and as such it is a highly controversial idea, often ridiculed by opponents. For example, animal researcher Walsh (2000) warned of the “dangers of reckless philosophical views.”
Environmentalist demands challenge the status quo as they demand profound changes in the organization of industry

Just as in the other country-studies, in order to justify their collective actions, the environmentalist challengers of the status quo claim the urgency and legitimacy of their grievances and actions, challenge the state’s jurisdiction, dispute the validity of current laws, or point out the deficiencies of political avenues. They often actively construct their own “laws” and rules for engagement, sometimes explicitly defending the use of destructive action to achieve their goals.

In this section, I describe the different protest activities developed by the activists, which are informed by their ideology, the de-legitimization of the legal and political structures to get things done, their frustration with other forms of protests, their lack of confidence in the state and big companies, and the legitimization of illegal actions. This development of tactics is a dynamic process of interaction between targets, activists, the media, and law enforcement. Activists constantly search for tactics that are the most effective and the least costly, while taking into account certain moral principles. The development of protest tactics and their controversial status draws ultimately on competing views regarding constitutionalism.

---

122 Some “targets” challenge the sincerity of the motivations of activists. They claim that, instead of reflecting a real concern for animals and the wish to save them, the actions are more inspired by a desire for adventure or profit (Interview US-17). While this may be the case in some specific instances, it does not fundamentally alter my analysis or argument. What is relevant is that the activists commit their actions while employing a certain discourse. I analyze this discourse, what it communicates to others and how it is heard, and how this discourse works its way into the criminal justice arena.
democracy, and liberalism. Below in section 3 and in the next chapter I will discuss how these debates are brought into the courtroom.

Self-proclaimed “eco-warrior” Dave Forman described the situation as a war:

The ecologist Raymond Dasmann says that World War III has already begun, and that it is the war of industrial humans against the Earth. He is correct. All of us are warriors on one side or another in this war; there are no sidelines, there are no civilians. Ours is the last generation that will have the choice of wilderness, clean air, abundant wildlife, and expansive forests. The crisis is severe. (1991)

This citation expresses very well several elements from the radical eco-discourse that are important for understanding the activists and their tactics. We observe (1) a sense of urgency, (2) a need to take responsibility, (3) a necessity to choose a side, (4) a war perspective, (5) there is no neutral ground, and (6) what is at stake is enormous: the Earth.

Compassion, urgency, and responsibility are the three keywords in the discourse of challengers of the status quo in each of the country studies. Also U.S. activists often appeal to anger, passion, and compassion. In a talk at New York University animal rights activist Peter Young expressed his sentiment of compassion by referring to a quote from an activist from the

---

123 “We control ourselves a little too often. I think we downplay our emotions and downplay our anger a little too often, and I think in a lot of ways it’s made us impotent” (Harper 2002b:2542).
Weather Underground in a documentary about that group. Young argued that this quote captures what makes a good activist. “Why would you go so far?,” a former activist from the Weather Underground was asked. The answer was: “there wasn't a single moment between 1965 and 1974 that I was not haunted by the images of Vietnam; down to while I was making toast.” Thus, Young argued: “It is very emotional. Whenever in the evening I am doing some hedonistic thing such as reading a book I want to feel the guilt. Not excusing inaction. Place that burden on yourself” (Field notes October 2008).

Similarly, at one of the New York City protests I attended, an activist was wearing a sweater of the Animal Liberation Front with the motto: “If not now, when? If not you, who?”124 The sense of urgency and responsibility expressed in these short lines is a returning feeling among activists. Young (2005b) voiced this sense of urgency that activists have explicitly as a reason for his mink releases: “It was just before pelting season 1997, and within a month all mink on American fur farms would be dead. [...] I can say I appreciate the sense of urgency that drove us this far. As bad as jail can be, I’d have always felt worse doing nothing.”

In addition to urgency and compassion, environmentalist activists voice a clear sense of obligation to act for those who do not have a voice, and they urge others and themselves to educate themselves about what is happening in their neighborhoods and in their country. This knowledge subsequently creates a responsibility to act upon it. An animal rights activist offered

124 In the next chapter, we will encounter a case in which an activist was questioned in court about wearing such an ALF t-shirt (Case Feldman).
as a comparison helping an old woman in the street who is assaulted. “You could not just do nothing when you see that happening, when the old woman does not have the means or strength to defend herself and you do” (Interview US-15). The activists thus express an emotion of personal suffering because of the destruction and cruelty that they perceive. Their judgment is that they would be guilty and complicit if they did not act, making them prepared to sacrifice their own freedom for these higher values.

Arguing that democratic avenues are too slow (urgency is needed to save dying animals and the disappearing wilderness) and compromises are not acceptable, radical activists challenge the liberal democracy and its faith in legal and political avenues. This emphasis on “No Compromise!” – the title of one of their magazines – is one of the major differences between radical and non-radical activists. As radical activists proceed to defend animals and the earth, they construe their own rules that guide their decisions. Thus, they profoundly challenge the U.S. legal system and the legalistic call for strict obedience to the laws. These activists emphasize, however, that law-breaking for their political goals is not just a blank check for doing anything that would be most effective. Instead, they have engaged in multiple efforts to establish guidelines for their actions. For example, Foreman has written a book, *Ecodefense: A Field Guide to Monkeywrenching*, which intends to “establish guidelines for monkeywrenching that would help it be more effective, strategic, ethical, safe, and secure” (1991:119).

Well known among activists (and incidentally also prosecutors) are further the ELF and ALF.

---

125 As another example of such rule-making before actions, Scarce described an activist group that formulated a “standard non-violence agreement” before they initiated an action to lock themselves to logging machinery (2006:69).
guidelines, to which everyone who wants to claim an action in the name of the ELF/ALF has to abide. Most important in these guidelines is the respect for any animal, human and non-human.

**ALF GUIDELINES:**
1. TO liberate animals from places of abuse, i.e. laboratories, factory farms, fur farms, etc, and place them in good homes where they may live out their natural lives, free from suffering.
2. TO inflict economic damage to those who profit from the misery and exploitation of animals.
3. TO reveal the horror and atrocities committed against animals behind locked doors, by performing non-violent direct actions and liberations.
4. TO take all necessary precautions against harming any animal, human and non-human.
5. To analyze the ramifications of all proposed actions, and never apply generalizations when specific information is available. (ALF 2011a)

The willingness of extremist activists to place the lives of animals above the U.S. laws constitutes a direct challenge to the rule of law. In addition, their conviction to place the lives of animals and the urgency to preserve wilderness above the current wishes of the majority of the U.S. population is a challenge to the democracy. Justifying their position, activists sometimes argue that “the people would want this if they knew,” and they criticize the lack of transparency of the meat industry and the fact that slaughterhouses and laboratories are always and on purpose hidden in buildings without windows (Interview US-15). In their defense of civil disobedience and property damage, activists often refer to distinctively American examples, such as the Boston Tea Party and the anti-slavery campaign including the Underground Railroad (Cook 2006, Scarce 2006:74). Many activists further told of specific experiences where they felt that the democratic avenues did not provide real possibilities for change, for example when a governor vetoed a decision of a majority of a state legislature with
the argument that the impact would be economically crippling, thus annulling the democratic victory fought for by the activists (Interview US-16).

Ecological sabotage (ecotage) is the destruction of technology in defense of nature (Scarce 2006:12), such as smashing laboratory equipment used by vivisectionists, ramming whaling vessels, or tree spiking. Justifying such actions, activists often argue that they are non-violent as they take precautions to avoid injuring others. For example, tree spikers warn loggers before the trees are cut and arsonists have aimed to only strike unoccupied buildings (Scarce 2006:13). Some activists challenge the notion that the destruction of property is violence. Indeed, they argue that it is exactly the fact that animals are turned into “property” which makes it okay to kill them, instead of being the violent act that activists claim it to be. Beef instead of cow, poultry instead of chicken, and pork instead of pig are the linguistic masks that hide the lives of the animals and turn them into food for human beings. Activists also define their actions as “defense” and reject the notion that they are the aggressors. They focus their attention on the crimes that they perceive are committed by their targets and view their own actions as the proper prevention of such crimes. They thus redefine their own actions accordingly. For example, Australian radical environmentalist John Seed argued that destroying a bulldozer to preserve the environment is “property enhancement” (Scarce 2006:12). Despite such justifications, the legitimacy of illegal tactics such as sabotage has been and still is heavily debated within radical organizations, like Earth First!.  

---

126 For example, tree-scaping has been controversial since it was first used. What is tree-scaping? Nails are hammered into trees. The nails do not harm the trees but can damage the lumber mill saw blades.
While some activists explicitly call for property destruction, there is no open discourse justifying the use of violence against human beings. Central to the justifications of law-breaking is the distinction between “property” and “animals” (in activist lingo “human and non-human” animals). Thus, while law-breaking and material damage are frequently accepted, there is a general taboo on harming any living being. The only exception here might be a remark by a surgeon and one of the “press officers” of the ALF, Jerry Vlasak. During a conference in 2003 he remarked that killing an animal researcher would save (animal) lives. This highly controversial remark has been interpreted by some as justifying the assassination of animal researchers. Vlasak has argued that he is “not advocating, condoning or recommending that anybody be killed” (citation from a 26 July 2004 BBC interview in: Best, no date).

**General overview tactics**

In this paragraph I will provide an overview of the range and development of the tactics that environmental activists have employed throughout the past decades. The range of tactics used by environmental activists is very broad. It is impossible, therefore, to provide a detailed description of all different kinds of actions. I will focus on the major characteristics and developments, discussing some of the most important and contested tactics.

---

Those nails can be, however, dangerous for those taking the trees down. They have to be taken out before cutting the trees. Such tactics are thus imposing costs on the companies. Activists always announce tree spikes in order to avoid harm to human beings and to protect the trees.  

His remark has been reproduced on many websites, for example the site *Animal Scam*: “I don’t think you’d have to kill – assassinate – too many vivisectors,” Vlasak said, “before you would see a marked decrease in the amount of vivisection going on. And I think for 5 lives, 10 lives, 15 human lives, we could save a million, 2 million, 10 million non-human lives” (*Animal Scam* 2011).
Protest activity often forms part of what activists call “campaigns,” which consist of a coordinated series of actions against a specific target or for a specific cause. Such campaigns may include both legal and illegal activity, including tree sits, home demonstrations, spray painting, sabotage, and undercover investigations. Each of these actions has its own logic and justification. Some activists only engage in actions that will appeal to the larger public. Others care only about the direct effect of their actions on animals and the earth. Some of the tactics of activists are geared towards gaining publicity and being “newsworthy.” In this regard, it should be noted that actions that include major material damage and undercover actions often achieve far more attention in the media than actions of civil disobedience or a banner that has been hanged. During the course of three decades a couple of actions have received major intention due to their specifically high impact. For example, in 1987 there was an arson attack on the Animal Diagnostic Laboratory of the University of California at Davis which caused $4.6 million in damages. In 1997, the construction of a ski resort in Vail, Colorado, was attacked, causing $12 million in damages. Those actions and the high cost that was inflicted are rather exceptions. Most of the tactics that figure in these chapters had a lower impact in terms of damages but were employed far more frequently.

Tactics of activists are not only dependent on the expected media impact but also on the expected law enforcement response. Activists engaging in civil disobedience expect short jail times and low fines. Those engaging in covert actions try to avoid arrest. The legality or illegality
of an action thus always plays a role either in the assumed effectiveness or in the way the action is carried out. With some of the tactics the whole point is to keep within the boundaries of the law. Other tactics emphasize direct effect over legality. Activists often refer to the concept of “direct action” to explain the choice of their tactics and the possibility to break the law. Direct action is not intended to persuade the larger public such as is the case with leafleting and demonstrations. While these latter protest activities start the “career” of most activists, often activists shared their frustration with such forms of protest and complained that they do not “work” (Interviews US-5/15/16).

In light of their specific relation to the rule of law and the different logics of the political and the criminal justice arenas, protest tactics can be divided into (1) the use of lawsuits, court injunctions, and appeals to law enforcement; (2) vigilante actions focused on the enforcement of existing laws (such as undercover investigations); (3) communicative action, which can be further divided into purely persuasive action (such as leafleting), communication that is offensive (yelling “puppy killer”), and messages that include property damage (spray-painting red – to signify the blood of animals – paint on fur and butcher shops); (4) direct action aimed at directly obstructing perceived future harm to animals or the earth, which can be further divided into legal action (boycott), civil disobedience (tree sitting, locking oneself to a machine or truck, occupation of a building), and property damage (tree spiking, sabotage of machinery, also known as “monkeywrenching,” and arson).

128 Monkeywrenching = ecotage = sabotage in name of the environment (Scarce 2006:72).
Environmental activist activists have made use of lawsuits and court appeals on many occasions, thus playing according to the rules. They have been active in the drafting of environmental laws and, for example, the Animal Welfare Act in 1985. They often file complaints against organizations they allege to have violated such laws. Sometimes this is successful. For example, in 1998 the United States Department of Agriculture (USDA) filed a lawsuit against Huntingdon Life Sciences after People for the Ethical Treatment of Animals (PETA) released an undercover video in which monkeys were thrown around and a seemingly conscious monkey was dissected in the laboratory in New Jersey. The USDA fined the company $50,000 for 28 alleged violations of the Animal Welfare Act (Cook 2006). Environmental activists have also taken legal action against infrastructural and logging projects and challenged environmental impact assessments (EIA). Such efforts have increased control over animal research as well as oversight for construction projects.

Some activists have taken the enforcement of existing laws a step further and acted as vigilantes, such as the Sea Shepherds and also, for example, In Defense of Animals. The laws are there, but because they argue that the enforcement is not good enough, in their actions they aim to draw attention from law enforcers or simply enforce the law themselves.¹²⁹ A specific kind of such vigilante work consists in undercover investigations. Activists have engaged in

¹²⁹ For example, In Defense of Animals struggled to end cocaine experiments at New York University in which monkeys were used. In 1995, the U.S. Department of Agriculture backed IDA’s claims by accusing the foundation of “keeping several dozen chimpanzees in undersize cages and causing the avoidable deaths of at least five chimpanzees” (Revkin 1995).
undercover investigations in order to disclose bad practices, animal cruelty, and other violations of the law. For example, in 1981 Alex Pacheco of PETA went undercover at the Institute for Behavioral Research. His findings led to a police raid of the laboratory and the prosecution of the lab researcher. The case is known as the “Silver Spring Monkeys” and is credited with starting the animal rights movement and leading to the Animal Welfare Act in 1985 (Scarce 2006:121). Material resulting from such undercover investigations is often also used for educational purposes to inform the public.

Communicative action can be either purely persuasive or, as we will see in the next chapter, be classified as bullying, terrorizing, or stalking. The latter form of communicative action thus specifically straddles and sometimes explicitly challenges the line between the political arena and the criminal justice arena.

Direct action is not necessarily illegal. Activists have engaged in legal direct action such as boycotts of shops and products. For example, at the end of the 1990s, PETA called upon consumers to boycott companies like Colgate whose products were tested at Huntingdon Life Sciences. Within months, Huntingdon lost half of its customers (Kolata 1998). Characteristic of direct action, however, is that it sidesteps the indirect avenues of political dialogue and persuasion, favoring an approach based on the immediate action of individuals to create an effect.
Prioritizing the goal above strict obedience to the law, activists have also engaged in civil disobedience actions, including sit-ins and lock downs. Civil disobedience is overt and can still be intended to change “hearts and minds,” which means engaging in the logic of communication and persuasion in the political arena. It can also, however, be intended as a direct action. Such actions are often closely connected to parallel legal steps. For example, while a court is deciding on an injunction, activists may engage in a road blockade in order to prevent logging until the court has issued an injunction. This was the case, for example, when environmentalist activists challenged the legality of the construction of a road in 1982 in the Little Granite Creek area and the validity of the environmental impact assessment. The judge did not issue an injunction on the construction, meaning that the construction would start despite the pending lawsuit. Only in hindsight can it then be established whether the road should have been built. Some activists refused to accept this logic as it would be too late for the nature lost in the process. Thus they resorted to direct action in order to prevent the road from being built before the lawsuit had been heard in court. Earth First! members also blockaded bulldozers in order to delay construction until a court injunction could halt the building of the road. Thus, such civil disobedience aims to do exactly what a legal decision could enforce later on. In North Kalmiopsis, such a blockade continued for three months until the injunction was granted. In these cases, activists explicitly frame their actions as protective. Drawing upon the language and thinking of the criminal justice system, they frame the actions of the other as “crimes.” Direct action is then framed as the “prevention of a crime,” and these activists
criticize the “moderate mainstream” that lets the crime occur and determines the legality of the action only afterwards.

While the abovementioned examples of direct action are overt, at other times, activists have argued that the existing laws and possibilities for lawsuits are not sufficient and have resorted to covert “direct” action.

Where all animal welfare and most animal rights groups insist on working within the legal boundaries of society, animal liberationists argue that the state is irrevocably corrupt and that legal approaches alone will never win justice for the animals.

–ALF Press Office (CrimethInc 2011b)

For example, when in 1989 activists broke into the lab of a researcher at Texas Tech University whom they called a “career vivisector,” they argued that there was no point in alerting the authorities of the “cruelty” of the experiments, because the federal Animal Welfare Act does not cover animals during experiments; lacking even a requirement to use anesthesia. Such break-ins have led to considerable damages; in this case $70,000 worth of damage (Scarce 2006:124–125).

The tactics of activists thus always express a specific relation to the existing rule of law, either employing it, pushing it, challenging it, or openly or covertly breaking it.
Defending the status quo

Targets of environmentalist protests do not just sit on their hands. Some companies and academic researchers have initiated civil lawsuits against activists. In other cases, they have asked the judge for injunctions, for example in order to establish a minimum distance between protesters and the company. Alternatively, or in addition to such measures, some decided to employ security cameras and private security companies in order to provide protection to individual employees.130 Companies affected by the SHAC campaign initiated several civil lawsuits against SHAC.131 Such lawsuits impose financial burdens on activists as they have to spend money on discovery and deposits. Protestors engaged in tactics like lockdowns often were ordered to pay restitution (Scarce 2006:76).132 While it is important to be aware of the range of actions employed by targets, most of my attention will go to the ways in which targets

---

130 These measures were taken in response to the SHAC campaign. In the civil lawsuit with the plaintiffs TEVA Pharmaceuticals and Svokos, the president of New Jersey corporation Plantex, against SHAC, it was mentioned that “Svokos’ installed security cameras at his home, and employed a private security company to protect his family and home from defendants’ unlawful activity.” In addition, Plantex “installed security cameras and other security systems in its Hackensack, New Jersey office as a result of the SHAC USA campaign” (Decision in Teva Pharmaceuticals USA v. Stop Huntingdon Animal Cruelty USA).

131 For example, Huntingdon relation Stevens filed a lawsuit against SHAC. SHAC activist Josh Harper mentioned this in a speech (Harper 2002:2550).

132 An example of such a combination of both criminal and civil lawsuits occurred in 1987, when activists occupied a truck to prevent the building of a road that subsequently would enable logging in North Kalmiopsis, a wilderness area in Oregon. Six activists (dubbed the “Sapphire Six”) were arrested and convicted to fifteen to twenty days in jail in addition to a fine of $250–350 per person. They also had to pay compensation of $1,761 to the logging company (Scarce 2006:69). In addition to this criminal trial, the logging company Huffman & Wright filed a civil lawsuit as the activists had locked themselves to one of its trucks. Scarce described the lawsuit as a “SLAPP”: Strategic Lawsuit Against Public Participation, where community organizations or activists end up spending all their money defending themselves in court instead of challenging projects of a developer or corporation. It was the first lawsuit against an act of civil disobedience in which punitive damages were demanded. After a week-long trial, the jury awarded the company $25,000 in punitive damages and $5,000 in actual damages. Scarce describes how this lawsuit intensified the debate between advocates of civil disobedience and advocates of “ecotage,” and Earth First! activist Foreman argued that such lawsuits pushed activists away from (overt) civil disobedience towards (covert) “monkeywrenching” (Scarce 2006:70).
of environmentalist protest have formed alliances and engaged in the criminal justice arena to call upon the state and the rule of law for better protection of their interests.

**Popular support – extremism, supporters, and polarization**

If you are opposed by a minority, it is easy to neutralize them, and your actions need not cause much resentment; but if you are opposed by the vast majority, then you are never going to be safe, and the more blood you shed, the weaker your hold on power becomes. So the best policy you can pursue is to try to win the allegiance of the populace. (Machiavelli 1994:122)

Machiavelli emphasizes the “allegiance of the populace” as an important consideration for rulers. It is important, therefore, to pay attention to the position moderate organizations and activists take towards extremist activists, the boundary-drawing, and polarization, specifically between the moderate mainstream and the extremist fringe. Moderate environmental organizations explicitly distance themselves from the “radicals,” as they call them, considering them unrealistic in their demands and violent in their means.

Several terms are commonly used to distinguish between different activists across a wide spectrum of possible forms of activism. Thus, we often encounter labels such as radical, mainstream, moderate, or extreme. I find it useful to explain how I use these labels and propose that activists can be distinguished according to three indicators. First, it is possible to assess the number of people activists represent or the amount of popular support they receive,
which I will refer to with the words mainstream or fringe. Further, activists can be distinguished according to how strictly they define their goals. They can be open for negotiation, which stands in contrast to “radical” activists who reject compromise.\textsuperscript{133} Finally, activists can be distinguished according to the means they use, which can be moderate or extreme.

Of course, the exact meaning of these labels is continually contested, relative, and locally constructed. For example, while “extremist” is often a euphemism for “violent,” it can also mean engaging in more aggressive, more confrontational, or illegal behavior without destroying property or injuring a living being. Further, it is important to emphasize that the labels represent a continuum, although they are represented here as if they were dichotomous. Also, while theoretically the alternative combinations of these six positions can lead to a variety of sorts, there often tends to be a silent assumption that activists can be classified as either fringe, radical, and extreme or as mainstream, open for compromise, and moderate. This aligning of characteristics, however, while it indeed sometimes is the case and is certainly reproduced in existing narratives regarding the environmentalist movement, does not follow logically and should be established empirically instead of being assumed. Groups and individuals in the environmentalist movement are constantly categorized in terms of these labels and also actively claim these labels for themselves. For example, the Humane Society (“We’re the nation’s largest and most effective animal protection organization,” Humane Society 2011) and

\textsuperscript{133} This distinction resembles the difference between revolutionary or reformist activists. These words are not used that much, however. Especially within the environmentalist movement, “radical” activists talk more about the importance not to compromise on fundamental issues.
the Sierra Club ("We are the largest and most influential grassroots environmental organization in the United States," Sierra Club 2011) belong to the moderate mainstream.

In terms of the means that they employ, Earth First!, the Hunt Saboteurs Association and People for the Ethical Treatment of Animals (PETA) straddle between moderation and extremism. On the extreme side we find the Animal Liberation Front (ALF), the Earth Liberation Front (ELF), the Sea Shepherds Conservation Society, and Stop Huntingdon Animal Cruelty (SHAC). ELF and ALF go much farther than Earth First! went. There are no “street theater” or tree-sits in the name of the ELF, as Scarce (2006) put it. As I said, labels like “moderate” and “radical” are relative and dependent on subjective judgment, and individuals and organizations can also change over time. The website ActivistCash, for example, calls the Humane Society a “radical” organization as it developed from an animal welfare organization to an animal rights group. Indeed, challenging its self-proclaimed moderate stance, a full page advertisement in the *New York Times* brought by the Center for Consumer Freedom claimed that the Humane Society was helping a “terrorist” group to raise money (Potter 2008). In this way, the labels are just one expression of the way in which voices compete in the criminal justice arena about the nature and legal meaning of such actions.

Characteristic of the dynamics within the broad spectrum of the environmentalist movement is that there is widespread popular support for “compromising” goals, animal welfare, and basic

134 "The Humane Society of the United States (HSUS) is a radical animal rights group that inaccurately portrays itself as a mainstream animal care organization” (Activist Cash 2011d).
conservation of nature, whereas there is very little support for radical goals, such as the
demand for animal rights and the claim to go back to wilderness. The Sierra Club has 1.4 million
members, and the Humane Society claims to be backed by 11 million Americans (Sierra Club
2011; Humane Society 2009). The ALF and the ELF do not have memberships, and public
support is hard to measure, but it is generally assumed that the numbers are small, especially in
comparison to these “mainstream” organizations. Thus, while the general public opposes cruel
treatment of animals, they do eat meat and think animals can be used to develop medications
for human beings. And while most people are in favor of some conservation of nature for
recreation purposes, they do not support a return to wilderness.

Mainstream organizations actively resist the tendency by the press to lump all environmentalist
organizations together. In a press release in 2003 the Sierra Club publicly distanced itself from
the Earth Liberation Front and complained that their actions hurt the entire movement (Sierra
Club 2003).\textsuperscript{135} Such boundary drawing is also evident in the following statement by Caryl Terrell,
Sierra Club legislative coordinator in Madison: “I walk in to a meeting of the Natural Resources
Committee and they say 'Oh, you're with those extremists!' So I have to take time explaining
that the Sierra Club isn't part of this and doesn't support these actions” (citation from Shepard

\textsuperscript{135} In an earlier statement, Sandy Bahr, legislative liaison for Arizona’s Sierra Club chapter, said that “[t]hey make it
more of a challenge for us because, unfortunately, we all get lumped together in the eyes of the public”
(Vanderpool 2001).
Express Metro: in Sierra Club 2003). Similar press releases are sent out, for example, by the Humane Society in reaction to actions by the Animal Liberation Front.\textsuperscript{136}

Not only in their words, but also in their actions the mainstream organizations try to create a distance from “extremist” organizations or individuals. An example is that the Sea Shepherds Conservation Society’s board of directors (not so moderate themselves) kicked Jerry Vlasak off the board of the Sea Shepherds after he had expressed the opinion that killing a scientist or animal tester could save many animal lives. PETA also publicly rejected extremist means when it was reported to assert that

\begin{quote}

PETA has no involvement with alleged ALF or ELF actions. PETA does not support terrorism.

PETA does not support violence [...] In fact PETA exists to fight the terrorism and violence inflicted on billions of animals annually in the meat, dairy, experimentation, tobacco, fur, leather, and circus industries. (Frieden 2005)
\end{quote}

Scarce describes the “old” environmentalist movement as being “realist” and “pragmatic” and following the politics of lobby and compromise (Scarce 2006:15). Indeed, the mainstream groups are squarely in the political arena, engaging in negotiation and compromise. It is here

\textsuperscript{136} The day after a hearing before the Committee on Environment and Public Works on 18 May, the Humane Society sent a letter to Senator Inhofe in which it complained that witness David Martosko of the Center for Consumer Freedom purported to show in his testimony how ‘mainstream animal charities’ are funding criminal activities of the Animal Liberation Front (ALF) and the Earth Liberation Front (ELF). [...] This information is severely distorted and the suggestion that The HSUS supports any illegal action, or that it has ties to groups like the ALF and ELF that it has repeatedly denounced, is patently false and outrageous. (Humane Society 2005)
that many current radicals were disillusioned. Those open for compromise, however, argue that the hard-line stance will never lead to a seat at the bargaining table. Radicals on the other hand have given up their belief that it is possible to achieve the change that they want to see through the political and judicial channels. They refuse to engage in the logic of bargaining and “give-and-take.” The radical “wing” of the movement decided not to accept compromise anymore and instead sits in front of bulldozers or up in trees. This distinction between compromise and radicalism, though, is not as strict as it might seem. For example, Earth First! was founded with the explicit goal to make the proposals of the Sierra Club look reasonable (“niche theory,” Scarce 2006:6).

The labels “mainstream” and “radical” are relevant to understanding the meta-conflict in the criminal justice arena and the construction of the prosecutorial narrative, because they are part of the images that turn up in criminal proceedings. For example, during the sentencing hearing of activist Daniel McGowan, the prosecutor referred to an incident in which McGowan threw a pie in the face of the Sierra Club president. Prosecutor Peifer was reported to have commented on this incident, claiming that this was “more than a symbolic act” and that by this time Daniel had given up on “mainstream” environmentalism (Anonymous 2007).

U.S. government officials draw upon and reproduce the observed (and promoted) difference between the moderate environmentalist organizations and extreme “eco-terrorists.” For example, during the hearing on the Animal Enterprise Terrorism Act before the Subcommittee
The US federal criminal justice system

Before we turn to the transfer of the dynamics in the eco-conflict to the criminal justice arena, it is important to provide some basic information about the United States’ criminal justice system. The United States is made up of fifty states and a federal district, and each state has its own law enforcement structure in addition to the federal law enforcement. I have limited most
of my research to federal prosecutions. This is the level where most of the high-profile criminal cases against environmental activists have taken place and also where the FBI and the Joint Terrorism Task Forces (JTTF) operate. It should be noted, though, that many of the developments at the federal level, such as the Animal Enterprise Terrorism Act, have been replicated at the state level (Parker 2009).

There are some significant differences in comparison with the Spanish and Chilean prosecutions. In Spain, “terrorism” prosecutions are the exclusive domain of the Audiencia Nacional in Madrid. In Chile, almost all prosecutions in relation to the “Mapuche conflict” are done in the southern offices in Temuco and Concepción. This type of geographical clustering is not present in the United States. Environmentalist actions take place across the United States, and there is no similar mechanism through which cases become the exclusive province of one or two attorney offices. Still, there has been substantial effort to coordinate activities and ensure cooperation between different agencies and different attorney offices. This is apparent, for example, when in the press release after the conviction of the SHAC defendants the New Jersey prosecutor thanked FBI agents in New Jersey, Minnesota, Seattle, and Little Rock as well as the U.S. Attorney’s offices for the districts of Minnesota and Arkansas (United States Attorney’s Office, Dist. of N.J. 2006). Many government agents were involved in this investigation, at different levels and across different states. Coordination is often facilitated by

\[137\] I did not exclude from my analysis particular cases that have received a lot of attention within either the activist community or among the target community. For a complete analysis of the development of criminal prosecutions and the prosecutorial narrative, it would have been necessary to gauge the extent of state prosecutions in order to determine the shift towards the federal level. This, however, was outside the limited scope of my investigation.
the Joint Terrorist Task Forces. It is noteworthy that many of these environmentalist cases are taken up on the federal level, while generally the majority of criminal cases are dealt with at the state level.\textsuperscript{138} The shift from state prosecutions to federal prosecutions is significant: because prosecutors at the federal level represent the whole nation, their involvement reinforces the message that these cases are of national concern.

\textit{The process of a criminal prosecution}

In this section I will briefly explain some of the main features and agents of criminal proceedings in the United States which turned out to be relevant in the prosecution of environmental activists: the FBI, federal attorneys, the grand jury, plea bargaining, the jury (selection), and the judges. Criminal proceedings are guided by the presumption of innocence, which is repeatedly communicated in judicial and prosecutorial documents. For example, below the press release announcing the indictment of activist Rod Coronado in 2006 the following was printed in bold letters: “An indictment itself is not evidence that the defendant committed the crimes charged. The defendant is presumed innocent until the Government meets its burden in court of proving guilt beyond a reasonable doubt” (U.S. Attorney California 2006). Below I describe some of the steps that are taken in U.S. trials in order to prove the guilt of a defendant while respecting the presumption of innocence.

\textbf{The Federal Bureau of Investigation}

\textsuperscript{138} Formally, cases can be admitted at this level only when the facts involve the “crossing of interstate lines.” This, however, is not problematic at all. Even a phone call across states can already be construed as crossing state lines (Interview US-13).
As I have indicated earlier, the FBI is an important actor in shaping the prosecutorial decisions in relation to the prosecution of environmental activists. The FBI has launched undercover operations and engaged in investigative work before cases have gone to trial. The case against Stop Huntingdon Animal Cruelty (SHAC), for example, was the result of a two-year investigation by the FBI with assistance from the New Jersey State Police. In another case, FBI informant “Anna” did undercover work for two years before the “cell” in which she operated was arrested. The FBI strongly focuses on intelligence in their attempts to deal with what they have labeled a domestic terrorism threat.\(^{139}\) While overall between 1993 and 2003 the number of special agents dedicated to the FBI’s counterterrorism programs more than doubled, the FBI created an entire section devoted to the study of eco-terrorism (Lewis 2004). Cooperation between the FBI and other state agencies is facilitated in the Joint Terrorism Task Forces (JTTF). The FBI claimed that the JTTF’s played an important role in the arrest of several ELF “cells” (Lewis 2004). These task forces have been criticized for their broad mandate. Since the scandal of the Counter Intelligence Program (COINTELPRO) between 1956 and 1971 there had been guidelines for the FBI regarding their undercover operations in political organizations, limiting such investigations to occasions where there were indications that a crime had been or was to

\(^{139}\) From the testimony of the Deputy Assistant Director of the Counterterrorism Division of the FBI:

[W]e have strengthened our intelligence capabilities. Since 2003, we have disseminated 64 raw intelligence reports to our partners pertaining to animal rights extremism and eco-terrorism activity. In addition, since 2004 we have disseminated 19 strategic intelligence assessments to our federal, state and local counterparts. And we have developed an intelligence requirement set for animal rights/eco-terrorism, enabling us to better collect, analyze, and share information. (Lewis 2005)
be committed. In 2002, Attorney General John Ashcroft changed these guidelines, permitting FBI investigations in many more instances. In 2008, a new set of guidelines was issued.140

Since 2002, the FBI has often emphasized its work regarding eco-terrorism, as it has made “the prevention and investigation of animal rights extremists/eco-terrorism matters a domestic terrorism investigative priority” (Lewis 2004). In 2004, the FBI declared that in 34 FBI field offices they had over 190 pending investigations associated with ALF/ELF activities (ibid.). In 2005 the FBI affirmed that eco-terrorism is “one of the FBI's highest domestic terrorism priorities” (Lewis 2005).

**U.S. Attorneys**

Prosecutors are important professional “characters” in charge of executing the liberal legalist paradigm in criminal proceedings.141 The prosecutor represents the government and in trial transcripts the prosecutor is also literally referred to as “the Government” as they present criminal cases “on behalf of the United States.” As they perform a professional role, the outcome of a criminal prosecution does not have the kind of impact it has on the defendant. “Whether we win or lose, we walk out through the same door,” as one prosecutor put it (Interview US-2). Federal U.S. Attorneys are appointed by the president for terms of four years.

140 A historic explanation of the development of the guidelines can be found in the speech by Hon. Robert Scott in the House of Representatives (Scott 2008) and (Kozaryn 2002). The Department of Justice released a transcript with background information about the new guidelines that were issued in 2008 (Department of Justice 2008). The FBI issued a factsheet about these guidelines (FBI 2008b). The current guidelines can be found at: http://www.justice.gov/ag/readingroom/guidelines.pdf.

141 For the concept of “characters” I draw upon Fairclough (2003:213).
In contrast to attorneys at the state level, it is not an electoral position. There are 94 U.S. Attorneys, one for each judicial district, each acting as the chief federal law enforcement officer within his or her particular jurisdiction. U.S. Attorneys and their assistant U.S. Attorneys are part of the Department of Justice, and the Executive Office of United States Attorneys provides support and oversight. I interviewed two assistant U.S. Attorneys who were the lead attorneys in specific “eco-terror” cases. These prosecutors often work closely with FBI agents and take part in the decisionmaking about the criminal investigation.

When I started my interview with the prosecutor in the SHAC case with a general question about the animal rights movement, he immediately claimed to have no overview of the bigger picture. “I don't study the animal rights movement,” he said, thus reaffirming his commitment to a de-contextualized narrative. While the FBI does monitor the environmentalist/animal rights movements, the two U.S. prosecutors that I interviewed refused that approach. When I asked them about the fact that the FBI had designated the environmentalist activists as the number one domestic terrorism threat, they shrugged and indicated that they thought that was just an FBI spiel with which they did not have much to do. One prosecutor added that while the SHAC defendants apparently thought the prosecution was a “Bush” policy, he asserted that “nobody from Washington ever told us to do this case.” He thus referred to “Washington” as shorthand for the politicians from whom the prosecutors distance their policy, which is asserted to be based on the law, not on politics. These prosecutors thus claimed their decision-making autonomy while defending their prosecutorial decisions and allocation of time and resources in
terms of the gravity of the alleged crimes: “We don’t go after people smoking pot” (Interview US-13). The U.S. Attorney in Oregon made a similar point when he explicitly stated that “we would be seeking the same [terrorism] enhancement if this case had been prosecuted under the previous administration. This is not a political prosecution” (Terrorism Enhancement Hearing, Case Operation Backfire 2007:19).

**Grand juries**

Grand juries are bodies that deliver indictments and are a pivotal aspect of the criminal justice procedures. This aspect receives ample attention in the section below on prisoner support mobilization, as activists perceive the grand juries as a crucial element in the “Green Scare.” Prosecutors present their case before grand juries in order to obtain an indictment. They can subpoena people to come and testify before the grand jury. Witnesses testify without a defense lawyer, even though the witness may be indicted later on.

**Plea agreements**

As with all criminal cases in the United States, plea bargains are the key to most of the “Green Scare” prosecutions. In a plea agreement, the defendant waives his or her right to a trial. Indeed, trials are rare. Some activists have gone to trial and almost invariably received harsh sentences. During one trial, I interviewed a prosecutor who emphasized that he had tried to settle the case (Interview US-1). “The kid goes for more years than necessary now.” Also, he explained that as a prosecutor it is always better to get a guilty plea, as this excludes a possible
appeal, because in the United States the right to appeal is reserved exclusively for the defendant. In addition, the prosecutor emphasized that it is good for the “public” when people admit what they have done. The prosecutor viewed it as the best demonstration that the prosecution was correct and legitimate. During trial the mere existence of a plea bargain of co-defendants cannot be construed as evidence against the defendant. The prosecutor emphasized, however, that the plea bargain of co-defendants has symbolic leverage for the prosecutor, not only because co-defendants are witnesses at the trial, but also because it means that defendants acknowledge the prosecutorial authority, the basis of the charges, and punishment. Even though a trial is likely to be evaded if possible, prosecutors may decide to go to trial to send the message that it is just not possible to receive a low plea bargain without cooperation. In his justification for taking the case to trial, the prosecutor asserted that he would like to prevent any “kid down the line” from getting sentenced to prison. “That is worth it” (Interview US-1). In the next chapter, I will discuss in more depth this image the prosecutor produced of “kids” who will be deterred by prosecutions.

The plea bargain system in the U.S. has created many fights within the activist community. Previous friends, colleagues, and even former partners have turned against each other in order to receive the best plea bargain. There are several different plea bargains one can get. A non-cooperating defendant gets a plea bargain in which the defendant does not cooperate with the FBI or the prosecutor. A cooperating defendant, in contrast, promises to assist the prosecution in exchange for a favorable plea bargain. Activists who had gone through the process of plea
bargaining invariably could tell about the different offers that they received from the prosecutor. For example, Peter Young said that he was offered a plea bargain in exchange for returning to the activist community after his sentence as a mole. Another offer was to name names of people he used to have contact with (Interview US-15).

Cooperating defendants often justify their cooperation by saying that they did not reveal anything “that the FBI didn’t know already.” Still, these defendants are invariably criticized harshly by the activist community and often excluded from further support. If one defendant decides to go to trial (and thus refuses any plea bargain), a plea bargain of cooperating co-defendants often includes the consent to be a witness against their co-defendant. The first defendant to agree to a cooperating plea bargain thus gets what is called the “best seat on the bus” as any plea bargain after that is likely to be less beneficial to the defendant, because that defendant often cannot offer more worthwhile information to the prosecutor. Prosecutors call this strategy to get multiple defendants to enter a plea agreement “working up the chain” (Interview US-2).

Though trials are a relatively rare phenomenon in the U.S. (in the estimation of one prosecutor, U.S. Attorneys have about one trial per year, Interview US-2), cooperation by activists against other activists is a recent phenomenon. One of the defense lawyers attributed this to the high sentences that have come into play: “Those federal sentences finally cranked them down,” he said. “They are kids” (Interview US-3). Prosecutors and judges are well aware of the dynamics in
the activist community which involve people being labeled as “snitches” and people that do not cooperate as “heroes.” I will return to this dynamic in the section on prisoner support mobilization.

Judge and jury

In the U.S. system, juries decide upon the facts of the case, that is, whether they consider that the prosecutor has proven the facts “beyond a reasonable doubt.” The selection of a jury is highly important for the outcome of the case. Therefore, prosecutors and defense attorneys have the opportunity to strike jurors that seem to be partial and in the jury instructions the judge warns the jury that they are not “partisans.” During such a selection process in the case against Rod Coronado, the prosecutor asked the jurors about their attitude towards strict obedience of laws:

In the present case, the court will instruct you as to the law and the elements of the crime. In some cases, jurors disagree with the law. For example, some jurors think that the drug laws should be changed. If that happens in the present case, and you disagree with the law as the judge describes it.

142 Flies on the Wall (2007) reported the following position expressed by Judge Aiken in the sentencing hearing of Jonathan Paul:

There's something that hasn't been understood. 'Generally, I honor negotiations.' Block, Zacher, McGowan and Paul decided to limit cooperation. 'That was your choice' and 'choices have consequences.' Others made their choice and face the detriment of being labeled as a 'snitch.' Non-cooperators decided to be hailed as heroes for keeping their integrity 'so to speak.' Non-cooperators face detriment of not getting the same sentence as cooperating defendants. Doesn't know what information Paul could have given. 'Right or wrong, that's the system.' 'Don't put it back on me.' Without the government offer, Aiken could not depart downward from the mandatory minimum. Doesn't like it when she keeps reading about the government overreaching in these cases. 'Everybody could have rolled the dice at trial.'
to you, will any of you have any difficulty setting aside your personal feelings and following the judge’s instructions? (Government’s Trial Memorandum 2007:11)

This question anticipates (and tries to avoid) the possibility of “nullification,” in which jurors can decide that even though the defendant violated the law they still judge that (under the specific circumstances) the conduct did not constitute a crime.

The judge decides on the legal questions, such as which evidence is regarded admissable. During a significant part of the trial, the parts in which the lawyers and the judge argue about legal questions, case law, and interpretations of the law, the jury is not present. The judge gives the jury instructions about the way in which they should interpret the law. While the jury decides on the facts of the case, these legal decisions give the judge an influence on the framing of the case that should not be underestimated. For example, in one case, the judge could decide the timeframe in which the behavior of an FBI informant was legally relevant, thus influencing the (factual) determination of the existence of “entrapment.” The judge also plays a pivotal role in the admission of evidence, for example by denying any evidence that would reveal and explain the political motive of defendants. Asked whether defendants used a particular trial to expose their political cause, one prosecutor answered that the judge would not let them, for example by denying the defendants the possibility to let the jury vote whether animal testing is right or wrong (Interview US-13).

---

143 This case against Eric McDavid is discussed in more depth in the section on prisoner support mobilization.
The jury system provides an interesting opening through which popular support for a cause and public opinion regarding the legitimacy of certain tactics is allowed to play a role in criminal proceedings. For example, in the early 1980s four Earth First! members were summoned to report to the police for removing signals that had been placed in the mountain of Little Granite Creek to mark a road that was to be built there. Referring explicitly to the local opposition to that road, a local lawyer told the activists that “there ain’t a jury in Teton County that will convict you” (Scarce 2006:65). During trials, prosecutors have to make sure that their arguments appeal to a jury. This might be the reason why the personal fear of individual victims is emphasized during trials, whereas economic costs resulting from protest activity is not given as much attention, even though this is a factor mentioned often in FBI reports and congressional hearings. One prosecutor acknowledged that juries do not necessarily care as much about all violations of the law, whereas some violations really move them. Thus, in one of the cases the fact that a company was affected was “less sexy,” whereas upon hearing a story about a seven-year-old kid that wanted to protect his mother the jury was “shocked,” and the prosecutor told that while hearing the witness some of the jurors were crying. On the other hand, the prosecutor admitted that charging people for “stealing seven beagles” was not a “viable prosecution” because jurors would not be moved by it (Interview US-13).

**Legislation**

The United States has a common law system. Though this system is known to be based on case law, in the field of criminal law there are actually many statutes that provide the rules. For
example, the Model Penal Code is the basis upon which the federal government and most state
governments base their criminal codes, and the Rules of Evidence provide the framework for
the admissibility of evidence. Many different kinds of provisions have been the basis for
prosecutions against environmental activists, such as property destruction, stalking, giving false
statements, incitement of violence, arson, and various conspiracy charges.

While in Spain and Chile people were charged as “members” of a criminal or a terrorist
organization, in the United States there are no provisions criminalizing membership in an illegal
organization. The relevant legislation for dealing with organized crime in the United States is
the Racketeer Influenced and Corrupt Organizations Act (RICO). This act does not allow for
prosecuting mere membership. Instead, it enables the prosecution of acts that are performed
“as part of an ongoing criminal organization.” It also allows for the prosecution of leaders who
ordered crimes or assisted in crimes. In a recent case, two activists were charged on the basis of
the RICO statute (“Hugh and Tiga,” see next chapter for more details).

Below I discuss the Animal Enterprise Terrorism Act as well as the concept of “conspiracy,”
which is frequently used in the proceedings against environmental activists. But first I describe
briefly the “terrorism enhancements” which have been used during the past decade (USSG §
3A1.4.). The enhancement can be applied when a defendant is convicted of an offense that
involves or is intended to promote a “federal crime of terrorism” that is “calculated to influence
or affect the conduct of government by intimidation or coercion, or to retaliate against
government conduct.” While the enhancements were drawn up in 1994 in order to increase penalties in relation to international terrorism, McLoughlin (2010:51) argues that events such as the Oklahoma bombings have stretched its application beyond the terrain of international terrorism, “giving it far-reaching power and leading to devastating consequences,” making it into a “draconian” provision (2010:54). A defendant can be tried during a jury trial for a common crime, which can then turn into a terrorist offense for sentencing purposes when the judge decides to apply the enhancement.

The enhancement has been a matter of continued contestation in the Green Scare cases. For example, in response to complaints from the defendants, during the hearing in the Operation Backfire case, the prosecutor addressed the history and applicability of the terrorism enhancement at length (Terrorism Enhancement Hearing 2007:20–26). In the next chapter I will discuss the case of Eric McDavid. He was convicted for a conspiracy to commit arson, which normally carries a maximum sentence of five years imprisonment. Because of the terrorism enhancement he was ordered to serve nearly twenty years in prison. In addition to increasing the sentence, the enhancement can have serious consequences for the prison security designation as well as life after jail.

**The Animal Enterprise Terrorism Act (AETA)**

---

144 For more critical comments about the terrorism enhancement, see, for example, Floyd (2007) and Harris (2007).
The precursor of the AETA (enacted in 2006) is the Animal Enterprise Protection Act of 1992. Remarkable about these laws is the fact that they turn specific conduct into “terrorism” when it is directed at “animal enterprises.” This locates the criminality of the conduct not only in the nature of the action but also in the specific target, which is deemed to deserve special protection. Thus, this act made animal rights protests into a category of their own.

After the AEPA was enacted in 1992, it did not take long for calls to sharpen the law. Already in September 1993, the U.S. Department of Justice and U.S. Department of Agriculture Report to Congress on the Extent and Effects of Domestic and International Terrorism on Animal Enterprises described a trend of attacks on individuals, researchers, and their property and threats towards their families (Gekas 1993). While the AEPA was only protecting the enterprise, this observation led to the proposal of an amendment to protect *individuals* engaging in an animal enterprise. But there was another problem with the AEPA. In the next chapter I will discuss in great detail the criminal case against the SHAC defendants, which was based on the AEPA. Under that statute it was difficult, however, to prosecute the defendants for the tactic of “secondary targeting” (protest tactics directed at corporations doing business with animal enterprises). Only animal enterprises were protected in the AEPA, not corporations that do business with animal enterprises. Targets of such protests called for attention to this gap in the legislation, which led to the AETA. In 2005 the FBI stated that one of their “greatest challenges” was the lack of federal criminal statutes “to address multi-state campaigns of intimidation,
threats, and damage designed to shut down legitimate businesses” (Lewis 2005)\textsuperscript{145} and one prosecutor argued that animal rights activists “make these new laws necessary” (Interview US-13). Interestingly, this would imply that the conduct of activists did not constitute any crime, but that significant sectors deemed the tactics to be criminal at the moment that activists invented these tactics.\textsuperscript{146} The AETA was introduced to the House of Representatives on 4 November 2005. The law had been prepared by the American Legislative Exchange Council (ALEC), an organization with the mission to defend limited government, free markets, and federalism. Many food and pharmaceutical companies have representatives on the ALEC board. A year later the AETA was passed into a law. Many states in the U.S. have since used this federal law as a template for state laws against “animal enterprise terrorism” (Parker 2009).

In Spain, representatives of victim organizations and prosecutors accused the left-nationalist movement of a conscious circumvention of the law. In the U.S. the Committee on the Judiciary similarly described environmental activists as “[a]rmed with a knowledge of existing law,” thus “avoid[ing] direct involvement with the animal enterprise” (Senate Report 2006). Also, during a hearing in the Subcommittee on Crime, Terrorism, and Homeland Security, Representative

\textsuperscript{145} FBI deputy Assistant Director Lewis of the Counterterrorism Division stated in his testimony before the Senate Judiciary Committee:

While it is a relatively simple matter to prosecute extremists who are identified as responsible for committing arsons or utilizing explosive devices, using existing federal statutes, it is often difficult if not impossible to address a campaign of low-level (but nevertheless organized and multi-national) criminal activity like that of SHAC in federal court. (Lewis 2004)

\textsuperscript{146} It is important to note that government officials have discrepant views about the need for such new legislation. While the FBI and targeted corporations have argued in favor of a new statute, one of the prosecutors that I interviewed stated that he was satisfied with the common criminal legislation and did not need any new legislation (Interview US-1).
Scott argued that activists “skilled at avoiding the laws” had “taken advantage” of what was perceived as a “loophole” in the law. Thus, whereas activists viewed secondary targeting as a legitimate tactic which was also used, for example, by anti-apartheid activists (Potter 2007:2), Scott called it a “loophole” in the AEPA. Brent McIntosh, deputy assistant attorney general of the Justice Department, argued that “animal rights extremists have tailored their campaigns to exploit limits and ambiguities in the [AEPA]” (2006). The AETA is thus a direct response to the notion that there were no adequate statutes to deal with campaigns like the SHAC campaign. One of the SHAC lawyers said about the use of the AEPA in that case: “they [prosecutors] were aware that they were trying to fit square pegs in round holes” (Interview US-14). Just as in Spain and in Chile, legislation in this instance thus clearly responded to the innovative tactics of activists.\footnote{One criminal defense lawyer in the SHAC case pointed out that also the law on stalking had been amended as a result of the SHAC prosecution (Interview US-14).}

In the next section on victim mobilization, I will go into more detail regarding the systematic lobby in which various actors engaged, pushing for an improved, harsher federal law which would be easier to apply than the AEPA (Walsh 2000). A long list of supporters of the AETA includes universities, agricultural organizations, and medical and biotechnology associations; to name a few: the Utah Pork Producers, Laboratory Animal Management Association, Minnesota Agri-Growth Council, Friends of Rodeo, University of California, and the National Animal Interest Alliance (Fur Commission 2011a).
The Animal Enterprise Terrorism Act stipulates (Title 18, §43 (a)):

Sec. 43. Force, violence, and threats involving animal enterprises
(a) Offense- Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce--
(1) for the purpose of damaging or interfering with the operations of an animal enterprise; and
(2) in connection with such purpose—
(A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;
(B) intentionally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family (as defined in section 115) of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation; or
(C) conspires or attempts to do so;
shall be punished as provided for in subsection (b).

The AETA expands the scope of the AEPA in three important ways. Whereas the AEPA stated that one must have the “purpose of causing physical disruption to the functioning of an animal enterprise,” the AETA talks about the purpose of “damaging or interfering” with its operations, thus widening the potential scope (Potter 2007). Also, the AETA includes placing a person in “reasonable fear” in addition to damaging or causing the loss of property as the actus reus. Further, the AETA explicitly includes any “person or entity having a connection to, relationship with, or transactions with an animal enterprise.” This enables the prosecution of secondary targeting.

The AETA sparked protest from groups who oppose the vague language and its over-inclusive scope. Opponents of the act include lawyers and activists organized in the National Lawyers Guild, Equal Justice Alliance, the Humane Society of the United States, the Center for
Constitutional Rights (CCR), and many local activist groups that set up websites like www.noaeta.org and www.stopaeta.org. The CCR argued that the AETA is

aimed at suppressing speech and advocacy by criminalizing First Amendment-protected activities such as protests, boycotts, picketing and whistleblowing. It targets animal rights activists, but includes language so broad and vague it could be used to prosecute labor activists who organize a successful boycott of Wal-Mart, or union folks who picket a university cafeteria. (Center for Constitutional Rights 2010b)

The AETA does not only punish destructive behavior or conduct that instills reasonable fear of bodily injury. Indeed, punishment is also possible, even if the conduct does not result in economic damage or fear of bodily injury. In the paragraph on the penalties it reads that one can be punished for an attempt or conspiracy to violate the AETA with a fine or imprisonment not more than one year (or both):

if the offense does not instill in another the reasonable fear of serious bodily injury or death and (A) the offense results in no economic damage or bodily injury; or (B) the offense results in economic damage that does not exceed $10,000. (AETA, § 43 (b), emphasis added by author)

Activists therefore argue that the concern with eco-terrorism has nothing to do with a fear of bodily injury or even the use of violence. Instead, they argue that corporations fear the losses
for their company that may even result from non-destructive civil disobedience. For example, Potter (2007) argued that

[the bill is] not about stopping “violence,” because violence hasn’t taken place. It’s about classifying “non-violent physical obstruction,” crimes that do not “instill in another the reasonable fear of serious bodily injury,” and property crimes as “terrorism,” in order to demonize and silence dissent.

Activists not only criticized the content of the AETA, but also the procedures behind its enactment. They specifically condemned the fact that the act was voted upon during a session in which only six House representatives were present (Interview US-6/16). They argue that this fundamentally undermines the democratic quality of the law. Activists also criticized the lobby work by ALEC and the connections it facilitates between corporations and legislation.

**Conspiracy – the joy of every prosecutor**

Prosecutors in the United States frequently charge defendants with “conspiracy.” Not only in what activists label the “Green Scare cases” but in many criminal cases conspiracy plays an important role. Whereas continental criminal law has developed the possibility to prosecute preparatory activities, in the United States the conspiracy charge makes it possible to intervene in the early stages of alleged criminal conduct.\(^{148}\) The conspiracy clause thus offers prosecutors

---

\(^{148}\) While I compare the conspiracy to the criminalization of preparatory activities, there are important dogmatic differences in the relation that is required in different jurisdictions between the early stages and the actual crimes. The requirement for the overt act in relation to a conspiracy is only that it expresses the willingness to go on with
a way to deal with the dilemma, at which point they should intervene when there are indications that a crime may be about to be committed. Such efforts to criminalize early stages respond to the catch-22 of the criminal law, which with its reactive focus would require prosecutors to wait until a crime has been committed, while on the other hand there is the urge to prevent crimes once there is knowledge of an upcoming crime.

A conspiracy is an illegal agreement. Several things are important to understand about conspiracy. First, conspiracy in itself is a crime. Second, conspiracy is considered to be more dangerous than other offenses. Third, conspiracy needs an overt act; otherwise it would amount to the prosecution of thoughts. I will discuss each of these elements in detail.

Conspiracy is in itself a crime. This is diametrically opposed to the opinion of many activists that those convicted for conspiracy had “done nothing.” The support group of Eric McDavid wrote:

   Eric was imprisoned for what amounts to thought-crime – no actions were ever carried out, and Eric was charged with a single count of “conspiracy” – a powerful legal tool often used by the state to crush dissent. (Support Eric 2011b)

Thus, at the core of a conspiracy, there are two crimes. The conspiracy is a crime in itself, and there is the crime that is the subject of the conspiracy.
Conspiracy is considered to be more dangerous than other offenses. A prosecutor might be the only person who could believe this. The theory is that because conspirators are with multiple people, there is a greater likelihood that they will not back down from the planned crime. During his closing arguments against defendant Eric McDavid the prosecutor cited co-defendant Lauren Weiner, who had said about their attempts to mix chemicals in preparation of an incendiary device: “we learned from that [...] we slow down. We get a double-boiler...” He emphasized that she said: “we learned.” And argued

[t]hat's just the problem with a conspiracy. Since before this country was founded, conspiracy has been viewed as a more serious crime because it involves not one person but more people coming together. People who can all contribute their own knowledge to the issue at hand. People who, when other conspirator's [sic] attention is lagging, or their enthusiasm is waning, they can say, no, we got to keep moving. (Trial transcripts, Day 8, 25 September 2007, p.1337)

Conspiracy needs an overt act. Prosecutors emphasize that they do not prosecute thoughts. A conspiracy is an agreement to commit a crime and an overt act in the execution of that crime. This overt act requirement does not enter into details regarding what kind of overt act it has to be. Pretty much anything that can be construed as a step towards the execution of the crime can be considered an overt act. The prosecution has to provide evidence of an overt act that demonstrates the person's commitment to the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy; however, it must be an act
that furthers or tends toward the accomplishment of the plan or scheme.\textsuperscript{149} The conspiracy charge thus always has to be distinguished from the “substantive” crime which was the subject of the conspiracy and which may or may not have been committed. I will come back to conspiracy charges in the next chapter in my discussion of the trial of Eric McDavid. The prosecutor in that case emphasized during her closing arguments: “Conspiracy isn’t just talking about a crime; it is an agreement and a step” (field notes, participant observation, 25 September 2007).

Defining the situation: How environmental protest became the #1 domestic terrorism threat

Extreme environmental protest challenges the daily practices of pharmaceutical companies, logging companies, animal researchers, and the meat industry. Extremists also challenge the liberal democracy in their criticism of political negotiations, their refusal to accept compromises, and their commitment to their own guidelines and disregard for U.S. laws as they pursue their goals. While this challenge is far from existential and does not fundamentally threaten the legitimacy of the state, the concept “eco-terrorism” has become the major lens through which this “threat” is approached. In a CNN article on 24 August 2005, John Lewis, an FBI deputy assistant director and top official in charge of domestic terrorism, declared that “the No. 1 domestic terrorism threat is the eco-terrorism, animal-rights movement” (Schuster 2005). In this section I describe some of the main features of this image of “eco-terrorism.”

\textsuperscript{149} This section is drawn from the jury instructions on “conspiracy” in the SHACcase.
While I will focus on what labels government agencies such as the FBI and the Justice Department use, it is important to realize that such labeling by criminal justice agencies takes place within the general approach that the U.S. government has taken vis-à-vis the entire constellation of environmental demands (including the moderate and mainstream) challenging the status quo as well as the voices defending the status quo. This therefore would require looking beyond government agencies engaged in the definition, investigation, and prosecution of crimes. The framing of the whole situation also involves the agencies, members of Congress, and institutions that are engaged in environmental and animal welfare policies as well as the regulation and administration of all practices in which the earth and animals are used for human purposes. Taken together, the state inevitably consists of many and often contradictory practices and frames. It is outside the scope of this research, however, to sketch the range and development of environmental and animal welfare policies in the United States. As has been mentioned above, though, criminal prosecutions should be located in a complex mixture of interactions that include round tables, dialogues between companies and activists, negotiation between activists and the government, environmental impact assessments, the enactment of new laws regarding national parks or animals, administrative regulation of meat facilities or laboratories, civil lawsuits about the construction of roads, and the entire spectrum of protest actions.

Defining the situation means that the government decides in which “box” to put the perceived threat as well as what the best response is. In Spain I described a shift from a “war” approach to
a “criminal justice” approach. In Chile, the government keeps vacillating between a “political”
approach and a “criminal justice” approach. In the United States, I argue that the state
definition of the situation is based on the strong distinction between extremist “eco-terrorists”
and moderate “environmentalists.” This distinction forms the basis for the continuous effort
with which state actors emphasize and reproduce the boundary between the political and the
criminal justice arena. The definition of the situation makes a strong separation between the
accepted political goals and means on the one hand, while “extremist” actions are firmly
relegated to the criminal justice arena as “eco-terrorism” on the other. In this way, the U.S.
government has decided which groups can be ignored or excluded at no risk and which groups
cannot be “barred from the magic circle” (Nieburg 1968:19),

In 2002, the House Resources Committee, Subcommittee on Forests and Forest Health, in
Washington, DC, held a hearing on “The Threat of Eco-Terrorism” in which the FBI Domestic
Terrorism Section Chief stated that there had been acts of “eco-terror” since 1977, the moment
in which the Sea Shepherds were formed as a breakaway from Greenpeace:

The FBI defines eco-terrorism as the use or threatened use of violence of a criminal nature
against innocent victims or property by an environmentally-oriented, subnational group for
environmental-political reasons, or aimed at an audience beyond the target, often of a symbolic
nature. (Jarboe 2002)
Important to note here is that (1) the victims are “innocent,” and (2) “property” is explicitly included in this definition of terrorism. Jarboe further identified a clear emergence of a threat that previously did not exist (2002).

The relevant classification of contentious events related to the environmental movement has been subject to governmental debate, for example in the hearing before the Senate Committee on the Judiciary on 18 May 2004, where the chosen title of the hearing was “Animal Rights: Activism v. Criminality?” The political goals of the alleged perpetrators are generally recognized as such, and the difficulty is framed as one of distinguishing between lawful protest activity on the one hand and extremist protest that “crosses the line” on the other hand. It is worth it to quote Brent McIntosh, deputy assistant attorney general of the Justice Department:

> Before I conclude, let me spend a moment on people the Department does not prosecute. The Department is acutely aware of the importance of protecting the first amendment rights of those who lawfully protest the treatment of animals. Let me say this as clearly as I can: The Department does not prosecute and does not wish to prosecute those who lawfully seek to persuade others. (McIntosh 2006)

Thus, McIntosh openly and explicitly addressed the “good” part of the environmentalist movement, which acts according to the logic of the political arena: the logic of persuasion. In drawing this line, the Justice Department explicitly allies with the animal rights organization Humane Society, as McIntosh claims that “the Department has found wide common ground
with members of the Humane Society and the ACLU. […] We all agree that any tactic or strategy of involving violence or threats of violence is not to be tolerated.” This move to establish a line between kinds of conduct thus also draws a line between organizations, separating, for example, the Humane Society from SHAC. While the Humane Society is located in the “We” (all agree...), SHAC is marginalized. A similar move constructing alliances between organizations based on the law and lawful means (instead of alliances based on the underlying political issue) happened in Spain in the Pact of Ajuria Enea, where the traditional alliance of Basque nationalists versus Spanish unionists was transformed into an alliance of “constitutionalists” versus “terrorists.” I understand the U.S. prosecutorial narrative to construe, produce, or reaffirm this “line” between what is lawful and unlawful, marginalizing the extremist individuals from the moderate organizations that stick within the political arena.

The chosen terrorism frame further distinguishes between an “international” and “domestic” form,¹⁵⁰ and “special-interest terrorism” is defined as “groups seek[ing] to resolve specific issues, rather than effect widespread political change” (Jarboe 2002). Activists protest against this notion of a single issue as they perceive it as belittling. Indeed, they emphasize the relation of the seemingly “single” issue with the entire economic system, as well as the fact that there are “lives on the line” (Interview US-15). While environmental activists attempt to draw attention to the plight of animals and the earth, the United States government increasingly puts

¹⁵⁰ “Domestic terrorism is the unlawful use, or threatened use, of violence by a group or individual based and operating entirely within the United States (or its territories) without foreign direction, committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives” (Jarboe 2002).
the emphasis on the threat that extremist “eco-terrorists” pose. It is worth remembering that “environmental terrorism” also has (or had) a very different meaning, namely the kind of attack that uses biological weapons or aims to cause a natural disaster in order to terrorize a population. At this moment, however, the popular understanding of “eco-terrorism” as applicable to property destruction by environmental activists may have superseded this other meaning of the term.

The threat: Economic costs, escalation, risk for human lives, decentralized network

The dominant frame for “extremist” actions now is the “eco-terrorist” frame. Government actors highlight the following aspects: (1) the perceived economic impact of protest actions; (2) the risk of escalation; (3) the risk for human lives; and (4) the difficulty to deal with decentralized networks of “cells.”

Increasingly throughout the past decade, government agencies emphasized that the economic cost inflicted by environmental activist affected not just single target companies, but the entire society. For example, the FBI claimed that the actions have a “huge economic impact” consisting of “losses of more than $110 million since 1979” (FBI 2008a). As many different actions are thus understood as one phenomenon affecting “the” economy, this harm is redefined from harm to individuals (or companies) to harm to society as a whole. This re-definition then paves the way for the use of “terrorism” as the criminal offense. A bulletin to law enforcement by the Department of Homeland Security warned that “[a]ttacks against
corporations by animal rights extremists and eco-terrorists are costly to the targeted company and, over time, can undermine confidence in the economy” (Department of Homeland Security 2006).

Since the early 1990s, government officials have predicted a growing trend of violence by environmental activists. Already in 1992, members of Congress spoke about a growing trend of violence by animal rights extremists, which led to the Animal Enterprise Protection Act. Such references to the “growing threat” of animal rights “extremists” have continued throughout the 1990s and 2000s, such as in the Senate Committee on the Introduction of the Animal Enterprise Terrorism Act or in testimonies by the FBI that refer to an “escalation in violent rhetoric and tactics” (Senate Report 2006). For example the following incident provided ingredients for that perceived escalation. On 26 September 2003, an “improvised explosive device wrapped in nails” exploded at the headquarters of Shaklee, Incorporated, in Pleasanton, California” (Lewis 2004). A claim of responsibility was issued via an anonymous communiqué by the “Revolutionary Cells of the Animal Liberation Brigade”:

We gave all of the customers the chance, the choice, to withdraw their business from HLS (Huntingdon Life Sciences). Now you will all reap what you have sown. All customers and their families are considered legitimate targets... You never know when your house, your car even, might go boom... Or maybe it will be a shot in the dark... We will now be doubling the size of every device we make. Today it is 10 pounds, tomorrow 20... until your buildings are nothing
more than rubble. It is time for this war to truly have two sides. No more will all the killing be
done by the oppressors, now the oppressed will strike back. (Lewis 2004)

In a testimony before the Senate Judiciary Committee in 2004, the FBI presented this
communiqué as an example of an “escalation in violent rhetoric,” noting threats of “potential
assassinations of researchers,” and stressed that there may be a

   new willingness on the part of some in the movement to abandon the traditional and publicly
stated code of nonviolence in favor of more confrontational and aggressive tactics designed to
threaten and intimidate legitimate companies into abandoning entire projects or contracts.
   (Lewis 2004)

In addition, the FBI observed that attacks were growing in frequency and size while
simultaneously perceiving an expanding list of potential targets and an increasing willingness to
use arson. Thus, the adopted eco-terrorism frame shifted the attention from actual harm to the
potential injuries that may be caused in the future because of this perceived pattern of
escalation.

A feature of the eco-terrorist frame is thus the emphasis on the potential danger to human
lives. Activists routinely claim that they are careful that their actions do not hurt “human or
non-human” animals. Activist Rod Coronado, for example, has declared that he often
postponed or cancelled actions when safety could not be ensured. Indeed, even James Jarboe,
the chief of the domestic terrorism section of the FBI, testified before the House Resources Committee that animal rights groups, including the ALF, “have generally adhered to this mandate” (Jarboe 2002). At the same time, however, FBI officials emphasized the potential danger that extremist environmental actions pose for human lives (FBI 2004). For example, while the FBI interpreted a failed explosive device as a potential danger to human lives, an activist argued that the failed device was intended as a warning, saying that “it is not brain surgery; if they had wanted to bomb the place, they’d have done so” (Interview US-16). The perceived risk to human lives is also visible when FBI officials expressed their fear of a “lone wolf” like the Unabomber, an individual held responsible for the death of three people and the injury of 23 others (Cook 2006).

Thus, the FBI has created an image of a threat to society in which everyone is assumed to be affected by the economic damage. Further, the intensity and frequency of attacks are said to be increasing, and the rhetoric is interpreted as indicating that further escalation is likely. The FBI also perceives a potential threat to human lives. A final feature of the eco-terrorist narrative is the image of a dangerous underground network which makes it difficult to prosecute perpetrators because of their loose organization in “cells” in horizontal networks. The FBI argues that extremist activists who commit their actions in name of the ALF and the ELF present unique challenges, because there is little, if any, known hierarchical structure to such entities. The FBI further noted that the activists “exhibit remarkable levels of security awareness when engaged in criminal activity, and are typically very knowledgeable of law enforcement
techniques and the limitations imposed on law enforcement” (Lewis 2004). A prosecutor similarly said that “in theory the mafia isn’t that hard to wipe out” while asserting the difficulty to approach the horizontal network of the ALF and ELF as traditional methods to pressure local people to testify against those higher up the chain do not work (Interview US-1). In the government’s sentencing memorandum in the case against Rod Coronado in 1995, the prosecutor described this difficulty of prosecuting ALF members:

The FBI has designated the ALF as a domestic terrorist organization. In terms of organization, this designation is particularly apt because the ALF has adopted the "cell" structure of such terrorist organizations as the Irish Republican Army, making investigation of the organization and identification of its members very difficult. As a result, until today, no known member of the ALF has ever been convicted of a felony. (Government’s Sentencing Memorandum, Western District of Michigan, 31 July 1995, page 1)

While the FBI has thus adopted the concept of “eco-terrorism” as a key concept in the development of its policy and the organization of its investigative units, from within the U.S. Government there has been strong criticism of the FBI policy and its focus. In December 2003, the Audit Division of the U.S. Justice Department criticized the FBI and recommended it to focus its intelligence reports on
the high risk of international terrorism and any domestic terrorist activities aimed at creating mass casualties or destroying critical infrastructure, rather than information on social protests and domestic radicals’ criminal activities. (Department of Homeland Security 2008:xi)

The audit advised the FBI to stop investigating animal rights and environmental activists from its Counterterrorism Division and to shift these cases to the FBI’s criminal division, “except where a domestic group or individual uses or seeks to use explosives or weapons of mass destruction to cause mass casualties” (Department of Homeland Security 2008:x). The Justice Department criticized the broad definition the FBI employs and suggested that: “Although the activities of such groups fall under the FBI’s definition of domestic terrorism, a more focused definition may allow the FBI to more effectively target its counterterrorism resources” (Department of Homeland Security 2008:34; Potter 2011c). Further, while the FBI had declared that eco-terrorism constituted a major domestic terrorism threat, in its May 2008 “Ecoterrorism Threat Assessment” the Department of Homeland Security wrote that “[c]urrently, ecoterrorist movement activities do not represent a serious threat to U.S. national security” (Department of Homeland Security 2008:34). Thus, whereas animal researchers and fur farmers demand government attention and label the harassment they suffer as terrorism, the Justice Department and Department of Homeland Security place more emphasis on the prevention of mass casualty attacks. Despite this internal criticism, the term “eco-terrorism” continues to be part of the FBI vocabulary.\footnote{On 23 August 2011, eco-terrorism remained on the website of the FBI as one of the focuses of its investigations (FBI 2009).}
The definition of the situation in the eco-terrorism frame thus relies on the strict separation between the moderate mainstream and the extremist fringe. The application of this frame subsequently guides the selection of facts and the translation of specific events into criminal vocabulary.

The “Transfer” – from animal rights to activists’ rights, from defending the earth to defending activists

In Chapter 1 I described that in liberal democratic regimes the assumption is that ample political and legal avenues exist to solve political contention. Above I indicated that some environmentalist activists have lost faith that political and juridical avenues will satisfactorily respond to their concerns, partly because they feel a sense of urgency. Many activists who have engaged in more extreme tactics generally experienced that their previous participation in demonstrations, leafleting, and political dialogue had not gone anywhere. Also, whereas a lawsuit might be possible in the case of extreme proven animal cruelty, such a lawsuit would not work in the case of “mere” animal testing, as that is legal according to U.S. law. That sense of dissatisfaction made them search for other tactics that would be more effective. Depending upon the perspective, the clear illegality of some tactics, the disruptive or offensive character of others, or – as activists claim – their effectiveness in challenging the status quo have led to calls for criminal prosecution. While prosecutors thus claim that criminal investigations and
prosecutions are the reaction to the increase in illegal attacks, activists argue that their effective challenge to economic and corporate interests is behind the “crackdown.”

Either way, part of the contention about the use of animals and the earth has transferred into the criminal justice arena. This radically changes the logic as well as the significant actors who approach the issue and decide what is relevant. The transfer to the criminal justice arena means that disruptive events become translated into the language and logic of the criminal law. While activists continue to challenge the legitimacy of animal testing, the prosecutor takes for granted that animal testing is mandated by the Food and Drug Administration. When the prosecutor puts that issue beyond discussion and asserts the separation between means and ends, the move towards the criminal justice arena effectively de-politicizes the criminal proceedings.

The huge law enforcement efforts of the past years have significantly shifted the attention of activists from the animals and the earth to themselves, their freedom, relations between activists, prisoner support, and legal proceedings. Activists came to place more emphasis on what they call “security culture,” which involves being careful with communication, exchanging personal data, and taking caution in relations with unknown people. More significant for my purposes is that criminal trials not only divert energy and money; the conversation among the different actors in and around such trials also changes substantially from a debate about animal rights and the use of the earth to a discussion on violence versus non-violence, the legality
versus the illegality of different tactics, and the attribution of specific criminal liability to individuals for their actions.

To summarize, while moderate claims for animal welfare and conservation of nature have widespread popular support, radical notions such as animal rights and the struggle for wilderness are generally viewed skeptically and perceived as a fundamental threat to the current way (daily practices and businesses) of American life. While the government in the United States deals with the moderate mainstream in round tables and lawmaking initiatives, the extremist fringe is squarely located in the criminal justice arena. While the dispute about animal welfare and nature conservation is thus further continued within the logic of the political arena, the more radical demands for animal rights and wilderness do not really play a role in those conversations. Instead, the government subjects the tactics that extremist activists use to the logic of the criminal justice arena. In the FBI usage the label “animal rights activist” has tended to become synonymous with “extremist,” and the dominant frame for understanding the phenomenon has become “eco-terrorism.”

3. Mobilization and discursive action in the criminal justice arena

In the criminal justice arena, victim mobilization and prisoner support mobilization are two distinct forms of action that compete for dominance as they engage in definition-work regarding criminal prosecutions. In this meta-conflict actors are imagining the liberal order,
attacking that order, claiming that order, and defending that order. Just like in Chile and in Spain, the competing actors in the episode claim victimhood. Some, however, receive official recognition for their account in the criminal justice arena and within the socially validated syntax that criminal law offers for condemnation (of perpetrators) and solicitude (for victims), whereas other claims are ignored. Victimhood is not an objective given. Instead, it has to be acquired. Environmental activists claim to speak for “those that have no voice.” Eco-activists claim that the animals and the earth are the “real” victims. They do not claim victimhood for themselves but claim to be fighting for the “voiceless.”

Environmentalists thus try to push the behavior of their opponents into the criminal justice arena, employing the criminal law vocabulary to label their actions, for example when the former executive director of the Sierra Club talked about the “ecological grand larceny” (David Brower in: Scarce 2006:xii) in reference to what is happening to the earth. Animal rights activists say that meat is murder and call the owners of animal testing companies assassins. However, this account is seldom honored in criminal proceedings. Even though there have been a few cases in which, for example, the Department of Agriculture started a lawsuit alleging “animal cruelty,” such “victimhood” is not often acknowledged. Indeed, these trials rarely take place in the criminal justice arena as most of such cases tend to be civil lawsuits. In addition to such attempts to gain attention for the victimhood of animals and the earth, there have been several incidents where activists were injured, for example tree sitters because the tree was cut while they were sitting in it, or because a nearby tree was cut which fell on the tree sitters’ perch. No
logging company or logger has been prosecuted for such injuries (Scarce 2006:174). For example, activists called for a criminal investigation of the death of activist “Chain” after a tree sit and the removal by a logging company. However, no criminal case was opened. This lack of criminal prosecutions in the cases in which activists claim to be victimized contributes to their suspicion of the state. Targets of environmental protest, on the other hand, have been quite successful in claiming victimhood. In this section, therefore, I focus on the mobilization of targets of environmental protests as “victims.” Defendants in trials that are recognized as part of the “Green Scare” on the other hand tend to mobilize and receive support as “eco-prisoners.”

In each of these mobilizations, we can observe that people try to address the “larger public” and achieve the identification of that larger public with their position. A common way to achieve this is to generalize the danger of becoming a victim or being prosecuted. Thus, victim mobilizers claim that the bombs of activists can kill innocent bystanders. Prisoner supporters claim that the AETA can be used to prosecute “anyone having a blog.” Even though none of this has happened so far, the danger thus sketched is intended to appeal to the fear of the American people. The larger public is thus invited to either identify with the fear of becoming a victim or target of harassment by environmental activists or of being subjected to repression by being called before a grand jury, being spied upon by the FBI, and having overt political activism criminalized. Criminal proceedings thus induce an “identification split” as people identify either with the defendant or with the victim. This can exacerbate an already existing tendency
towards a polarization of society. This identification split is enacted visibly in courtroom proceedings. I could observe this, for example, in the trial against Eric McDavid, which I attended in September 2007. As is usual in trials, the courtroom was clearly divided into a group on the left and a group on the right. The supporters of the defendant sat on the right. Even when the right side was getting full, supporters preferred to squeeze in there rather than to sit on the left side behind the prosecutors, which was practically empty aside from a sole reporter from the local newspaper, the *Sacramento Bee*.

**Victim mobilization – appealing to government protection**

Potentially “punishable facts” happen all the time, but only a certain part of them are translated into the criminal justice lingo. “Victims” set this process of criminalization in motion when they actively translate their narrative into the criminal law framework, attempt to criminalize actions that were previously not regarded as criminal, or change the qualification of actions that were not taken seriously enough. The targets of environmental protest (i.e., pharmaceutical companies, animal researchers, logging companies, the meat industry, and others) have mobilized in order to appeal to government protection. As “victims” mobilize and become a single united actor, they can thus become effective “troublemakers,” propose an alternative narrative, and transform the way the prosecutor constructs a criminal case. I will analyze how these actors have claimed the victim label and taken steps towards creating these institutionalized positions of power in order not to be ignored.
1. Self-identification as victim and the forging of alliances

2. Declaration of a common problem: “eco-terrorism”

3. Demanding protection from the state

4. Defining actions as criminal: employing criminal law

The claim of being a “victim” is part of the conversation that takes place in the criminal justice arena and such claims are invariably contested. For example, Newkirk of PETA disputed claims from scientists that they were being terrorized. According to her, scientists “learned a long time ago that the way to get the spotlight off their own bad deeds is to become the victim” (Kolata 1998).

1. **Self-identification as victim and the forging of alliances**

Targets of environmental protest have been successful in claiming the status as victim. Indeed, they have been able to create a collective of actual or potential victims. I will limit myself here to a brief overview of the alliance of what have become labeled as “animal enterprises” in order to illustrate the impact of such collective identity and the resulting lobbying and claim-making.

Targets of animal rights protests have allied to lobby for the enactment of laws and for congressional hearings on the subject of eco-terrorism. As the targets of environmental protest try to throw their weight around, they connect with key persons, create networks, and forge alliances. They befriend specific senators or house representatives and they engage in concrete
lobby work. The National Association for Biomedical Research, for example, played an important role in getting the AEPA through Congress. In 2000 a National Animal Interest Alliance (NAIA)-sponsored petition requested that the Senate Judiciary Committee convene hearings on the subject of animal rights terrorism. Various alliances have been active in the preparation of the AETA, which was enacted in 2006. The creation of alliances is promoted by the narrative that potentially all industries are at risk. Brian Cass, the managing director of Huntingdon Life Sciences, was reported to have claimed that “[t]he number of activists isn’t huge, but their impact has been incredible. [...] There needs to be an understanding that this is a threat to all industries. The tactics could be extended to any other sectors of the economy” (CrimethInc 2011b).

Such alliances are at times constituted of weird bedfellows, such as hunters and lab-academics and veterinarians. Some actors have specifically called for such united actions, such as scientist Walsh, who describes himself as “a victim of animal rights terrorism.” He “challenges the lab animal community to unify in its response” (Walsh 2000). This call for unity among victims to struggle against their common enemy is characterized by an eagerness to demonstrate that they are what Charles Tilly called “wunc” – worthy, united, numerous, and committed. Walsh is explicit on the point of reminding politicians “just how many of us there are.” He asserts the existence of a “collective us,” which includes “the scientists, the farmers, the cattlemen, the rodeo and circus and motion picture entrepreneurs, the furriers, the hunters

---

152 Indeed, representatives of a pharmaceutical company shared their doubts whether they really wanted to associate with fur farmers and meat producers as they searched for better protection of their employees against harassment by animal rights “extremists” (Interview US-17).
and fishermen, the physicians, the conservationists.” He argues that all these groups together “constitute the vast majority of Americans.” Walsh calls on the “responsibility” to respond:

> It is the animal enterprise community that deserves criticism – it is us. We have failed to respond to the challenge of the animal rights community and to promote Congressional action to beef up the Act, and we have failed miserably. This, I believe, is a reflection of the state of our disarray and our confusion on this issue. (Walsh 2000)

The very concept “animal enterprise,” which became a legal term with the enactment of the AEPA, constructs this “collective us” of different kinds of businesses and sectors. It thus creates the legal reality in which different entities are conceptualized as a coherent category. According to the AETA, an animal enterprise includes commercial or academic entities that use or sell animals or animal products for profit, food or fiber production, agriculture, education, research, or testing, as well as zoos, aquaria, animal shelters, pet stores, breeders, furriers, circuses, and other lawful competitive events between animals.

2. Declaration of a common problem: “Eco-terrorism”

In their declaration and construction of a common problem, the targets of protests coined the label eco-terrorism and insisted upon its use to label protest activity, thus emphasizing the gravity of the threat. They defined the harm that they suffer as something bigger than personal injury. In addition, they put emphasis on the danger of the attacks, thus shifting the attention
from the actual past harm to the risks in the future, from what has happened to that what has not happened yet.

In networks and alliances, targets of environmental protest have made a concerted effort to make the problem known. For example, Teresa Platt, representing fur farmers, said: “We need to evaluate how big it is and put it into perspective. [...] I don't think the government took it seriously or acted as quickly as they should have” (Hollenbeck 1999). When the FBI turned around and did announce the threat posed by animal rights and environmentalist activists, the Fur Commission claimed a role in the changed direction of the FBI’s priorities:

In talking to FBI agents, the redirection of FBI manpower to include eco- and animal rights terrorism entailed a bottom-up educational process. Fur America’s Fur Netwatch, an Internet info distribution system, has been a vital component in that process. Over the last year, the people of the fur trade have been key players with other animal- and resource-based industries in a concerted effort to push eco- and animal rights terrorism up the government’s priority pole. These efforts have resulted in a strong statement of commitment from the FBI. (Fur Farm Letter March 1999)

In each of the country cases victims’ advocates organized in the form of demonstrations, petitions, political lobby, and legislative proposals. Just as in Chile, industry groups in the U.S. have placed full-page ads in major newspapers in order to draw attention to the topic. Targets of environmental activism have been active in submitting information for congressional
hearings and, for example, estimates of damage and destruction in the United States claimed by the Animal Liberation Front during the past ten years, as compiled by national organizations such as the Fur Commission and the National Association for Biomedical Research (NABR), put the fur industry and medical research losses at more than 45 million dollars, and this number found its way into the testimony of Domestic Terrorism Section Chief Jarboe before the House Resources Committee (Jarboe 2002). During the hearing on the Animal Enterprise Terrorism Act before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary of the House of Representatives on 23 May 2006, tactics such as “secondary targeting” were discussed. Many organizations that were concerned about animal extremism prepared statements for that hearing.\footnote{\textsuperscript{153}}

Victim advocates often tried to drive home the severity of what they are suffering. Platt, for example, feared that attacks in the U.S. might escalate to the level that they had in Britain. She cited a London newspaper, the \textit{Independent}, that called the ALF attacks, "the most sustained and sophisticated bombing campaign in mainland Britain since the IRA was at its height" (Hollenbeck 1999). Others have explicitly emphasized the personal and terrorizing element of the tactics they face. For example, in an article in the \textit{New York Times} in 1998, Dr. Walsh was quoted as having reported one of the messages that he received: “We will kill you and every member of your family in the exact same way you killed the cats. No matter where you hide!}

\footnote{\textsuperscript{153} Just to give some examples of organizations that submitted statements in support of the bill: Frankie Tull, the president of the National Association for Biomedical Research, submitted material for the hearing record, and also Dr. Bruce Bristian, president of the Federation of American Societies for Experimental Biology, prepared a statement, as did Mark L. Bibi, the general counsel of Life Sciences Research, also known as Huntingdon Life Sciences, and the Executive Director of the Fur Information Council of America.}
We will slice open your heads and cut the nerves in your brains while you are alive” (Kolata 1998).

Targets of environmentalist protests also emphasized the threat to human lives. While animal rights and environmentalist activists stressed time and again that their actions are not violent and will never hurt a living being, Teresa Platt aimed to demonstrate the opposite. To indicate the willingness to harm human beings, animal researchers have pointed out that activists have sent letters with razor blades. The construction of a narrative depicting the environmentalist activists as violent draws upon examples from across the world, for example including the murder of Pim Fortuyn in the Netherlands (Platt 2008), even though (while the perpetrator in that case was known for his radical environmentalist ideas) it has not been demonstrated that his motive was indeed related to such environmental concerns. Teresa Platt also referred to Ted Kaczynski (alias the Unabomber) in order to emphasize the willingness of environmentalist activists to take lives. She explicitly mentioned that his writings were published in the Earth First! journal and that the ELF “has long considered Kaczynski one of their own” and included him in their list of political prisoners (Platt 2008), invoking the Unabomber to confirm the image of “eco-terrorism.” Thus, the targets of environmentalist protests created a narrative in which their individual problems became a shared problem of eco-terrorism with a common perpetrator.

154 In my interviews in 2008 many activists denied that this practice occurred in the United States, but in 2010 a researcher at UCLA was reported to have received such letters (Daily Mail Reporter 2010).
3. Demanding protection from the state

The eco-terrorism narrative claimed the existence of “impunity” regarding the harm perpetrated against the targets of such crimes. The victim advocates thus demanded better protection from the state while drawing upon the rule of law, the law as a tool, their right as citizens to government protection. This discourse was supported by government officials. For example, in a debate on the AETA in 2006, Representative Scott emphasized the responsibility of the state vis-à-vis citizens: “Citizens engaging in lawful activities [...] are entitled to be protected from criminal acts and to be able to go about their lawful activities free from threats to their person or property and that of their family and associates” (Committee on the Judiciary 2006). Indeed, sometimes even activists pointed to the disparity between their actions and the successes achieved by law enforcement agencies. In 2008, for example, an activist posted a long list on Indymedia with all the actions claimed by the ELF or the ALF and actions attributed to them. The list described at least eighty actions. His username was “ELF supporter,” and he wrote as an introduction to the long list: “Something like 12 ELF activists ever have been arrested. Look at this list. Then tell me who's winning, pig” (ELF Supporter 2008).

A “victim of animal rights terrorism,” as he calls himself, Walsh complained about the sheer inactivity on the part of prosecutors and the fact that there were no prosecutions under the AEPA. I will quote at his criticisms at length:

Unlike the Animal Welfare Act, a topic that yielded more than 1,600 hits on my global search of the internet, no one seemed to care very much about the Act that offered such hope for so
many just seven years ago. I immediately picked up the phone and began calling colleagues who I knew could help me understand how this potentially important piece of legislation, written to protect honest users of animals from animal rights terrorists, had suffered such undignified rejection at the hands of the federal prosecutors it was designed to energize. I was then stunned to learn that no one has been prosecuted under the provisions of the Act. No one. Not a single soul since the Animal Enterprise Protection Act became the law of the land. While there may be many explanations for the dormancy of prosecutors in the use of this legal tool, we can all be certain that the failure to exercise the Act in the courts is unrelated to the level of animal rights activity during the period since its enactment. On the contrary, a strong case can be made that the overall level of animal enterprise terrorism in the US has dramatically increased since 1992. Numerous laboratory break-ins have occurred during this time frame, violence and vandalism at fur farms are on the rise, as are animal releases from research and animal husbandry facilities around the world. During this period, death and bomb threats have continued to flow from activists as freely as small talk at the local tavern, and animal rights leaders continue to egg on their foot soldiers with inflammatory talk of revolution. (Walsh 2000)

This citation expresses several recurring items of the narrative presented by the “victims.” First, it clearly expresses frustration about the fact that a law that was supposed to protect them was not used at all. Second, it states the perception of an actual increase of “animal enterprise terrorism” during the 1990s. This observation is supported, for example, by the Foundation for Biomedical Research (2006), which has recorded “illegal incidents” since 1981 and emphasized the “explosion” of animal rights and eco-terrorism after 1995, reaching especially high levels in the 2000s. Third, Walsh’ account creates a common identity of “honest users of animals” versus a common enemy of “animal rights terrorists” (who are divided into leaders and foot soldiers – a theme picked up later by prosecutors).

In its demand for protection from the state, the Foundation for Biomedical Research has taken the effort to document the incidents experienced by their industry. They translate events into criminal law categories, such as arson, theft, bombing, vandalism, and harassment, thus
sending a message to the state. As an illustration I provide one of the tables which they
included in their illegal incidents report below (FBR 2006:13).

**Table 6 Total illegal incidents reported by Foundation for Biomedical Research 1981–2005**

<table>
<thead>
<tr>
<th>Year</th>
<th>Arson</th>
<th>Theft</th>
<th>Bombing</th>
<th>Vandalism</th>
<th>Harassment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>1982</td>
<td>0</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1983</td>
<td>0</td>
<td>5</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>1984</td>
<td>0</td>
<td>5</td>
<td>0</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>1985</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>1986</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>1987</td>
<td>1</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>1988</td>
<td>0</td>
<td>5</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>1989</td>
<td>2</td>
<td>5</td>
<td>2</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>1990</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>1991</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>1992</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1993</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>1994</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>1995</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>1996</td>
<td>0</td>
<td>6</td>
<td>2</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>1997</td>
<td>5</td>
<td>4</td>
<td>0</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>1998</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>1999</td>
<td>3</td>
<td>8</td>
<td>5</td>
<td>7</td>
<td>4</td>
</tr>
</tbody>
</table>
Impunity is not necessarily the same as a lack of protection, because protection does not have to come through more punishment. Still, the two are strongly connected in the discourse of the victims, who complain that they are not being protected and demand criminal prosecutions. Walsh accuses Congress: “Our elected officials appear to be telling us that crimes committed against scientists and farmers and rodeo performers and all other honest animal users do not rise to a sufficiently high level of significance to warrant serious action” (2000). The prosecutor of the SHAC case drew upon this narrative of impunity when he told me that the victims felt that nobody was out there for them, that people were victimized and frustrated (Interview US-13).

4. **Defining actions as criminal: Employing criminal law**

Having established a common identity as “animal enterprises” and portrayed actions against individuals as part of a larger pattern with a common perpetrator, victim advocates are ready to translate their narrative into the logic and vocabulary of criminal law. Their narrative can then
construe and blame a unified actor, organization, or identity group, which is held responsible for the harm they suffered. In addition, this narrative construes a legal interest that lies beyond the experience of an individual animal researcher, a single fur farmer, or a specific animal testing company. Instead, the protected good at stake becomes the national economy or the safety of millions of Americans.

Innocence (a fundamental concept in the logic of criminal law) provides the link between those that are actually targeted and the rest of society. The innocence claimed by the victim advocates is part of the identity they establish for themselves, in opposition to the identity of the perpetrators. Walsh refers to people like him as “honest animal users.” He uses self-descriptions such as “law-abiding citizens” and “compassionate, law-abiding user of animals” as opposed to those who commit their crimes “under the cover of darkness” (2000). In their self-descriptions as innocent victims, the advocates do not ignore the criticisms from environmentalist activists and frequently defend their role in the status quo. Thus, the Fur Commission references fur farmers as “those who make their living in concert with the Earth” and “resource caretakers” (Fur Farm Letter March 1999) and Teresa Platt from the Fur Commission appears with a dog in her arms in one of their press releases (Fur Commission 1999).

Victim advocates construe their narrative specifically in contestation to the existing de-contextualized prosecutorial narrative. They resist the downplaying of incidents at the local level. Indeed, they argue that the problem is not local, not even national, but international. I
was not able to obtain an interview with companies in the United States, but in an informal conversation with representatives of a pharmaceutical company in Europe, they told me of their frustration that the local police see “only graffiti” and thus think that it is “not such a big deal.” They, however, compared the tactic of secondary targeting to mafia-style extortion, thus presenting an alternative narrative about what is going on and about the gravity of that problem. They advocated the reassessment of the “polite” legal campaign of sending of letters to a company “asking” them to stop animal testing in light of the acts of vandalism and terrorizing. They emphasized that by just looking at individual attacks, one does not see the connection. Their narrative puts the focus on that connection and they pointed out that the context should be taken into account, arguing that statistics should indeed take account of the specific motive of animal rights extremism in order to be able to see the magnitude of the problem. They demanded that police should be aware that graffiti saying “Stop HLS” is not just harmless graffiti but should be reported. They wanted the local police to be aware of the existence of that larger problem in order to reveal that it is “not just a stupid boys joke” but “more organized” (Interview US-17).

Based upon their narrative, it can be observed that, just as happened in Spain and in Chile, these victim advocates lobby collectively for the adoption or application of specific laws and engage in debates about the affected legal interests. They engage with the criminal law language and terminology as they identify harm, define actions as crimes, provide accounts for criminal liability, and demand higher sentences. Animal researcher Walsh does exactly that, as
he calls upon the authorities to take the animal rights protests more seriously. He redefines acts, arguing the gravity of the offense ("dangerous to society") if understood in its proper context:

If an animal rights terrorist violates my right to privacy by protesting in front of my home, then punches me in the nose when I answer the doorbell and terrifies my five-year-old son in the process – all for the explicit purpose of either making a spectacle of me for the benefit of public relations, or to intimidate me into submission – the action constitutes something worse and far more dangerous to society than a simple punch in the nose. I claim that the act is actually a smack in the nose of all of us – to society – and thereby constitutes a significantly larger offense, one that warrants a proportionally larger penalty. Perhaps a ten-year sentence would be excessive in this scenario, but the hateful disposition of the crime combined with the perpetrator’s global intent requires us to think more in terms of extended, rather than minimal, penalties when it comes to animal enterprise terrorism, as it does in cases of hate-inspired crimes generally. In this vacuum, the law becomes truly toothless. (Walsh 2000)

As argued earlier in this chapter, the mobilization by targets of environmental protests has been highly successful as the FBI has adopted this narrative in which the phenomenon is defined as “eco-terrorism,” and Congress adopted the AETA. In the next chapter I will analyze how these factors provided the basis for discursive shifts in the criminal prosecutions.

**Prisoner support mobilization: Eco-warriors instead of eco-terrorists!**

Prisoner supporters challenge the liberal juridical institutions and refuse to act according to the scripts that construe them, thus denying their legitimating function. Instead they call upon people to “Honor the Fallen, Remember the Snitches, Resist the Greenscare!,” as was written in a public call for solidarity events and prisoner support (Potomac Earth First! 2007). Activists sympathizing with eco-defendants have refused to give criminal proceedings legitimacy, take them seriously, comply with judicial demands, or simply do not believe prosecutorial claims.
Such refusal has been expressed in basic activities of support to those that faced investigation and prosecution, such as communication with prisoners, support for fugitives, vocal support for the continuation of protest actions, and financial support, thus condemning the state response.

I will discuss several aspects of mobilization in support for the “eco-prisoners,” using the four elements described in Chapter 1. In their mobilization, activists construct reality from the perspective of a Green Scare in which “green” is as suspect as “red” once was and in which the government is thought to be overreaching in its attempt to squash that opposition.

1. Creation of a prisoner support group: a call for solidarity
2. Criticisms within the framework of liberal legalism: de-legitimization of the state
3. Bringing the “political” back in: identification as a political prisoner
4. Persuading the public of the political definition: changing the impact of criminal prosecutions

1. Creation of a prisoner support group: A call for solidarity

The infrastructure for prisoner support is often set up by prisoner support groups. Unlike prisoner support activity in Spain and Chile, prisoner support groups in the United States are usually organized around specific defendants. Thus, there is a specific website and a specific support group for Peter Young, for Eric McDavid, and for Briana Waters. Family members, close friends, and fellow activists play an important role in these support groups. While in
comparison to the other country studies, support in the United States is rather fragmented and decentralized, the core activities like visiting and writing prisoners, attending hearings, organizing benefit concerts, and publishing information on blogs and websites are very similar.

While the cause if political, it should not be forgotten that prisoner support can be about practical things, such as this call for donations to pay for the gas in order to travel to prison:

[Prisoner’s name] is currently being held in [location], CA – which is almost 7 hours from where I live. Renting a car and paying for gas is incredibly expensive, and it's a cost I just can't carry on my own. The support [prisoner’s name] has received from all of you over the last four years has been amazing, and we are more than thankful for all you have done. [Prisoner’s name] has shown a steadfast, unwavering commitment to do the right thing and fight the outrageous charges against him, despite facing severe repercussions for that decision. Please consider making a donation to support him, however small. Every tiny bit helps. (E-mail on a listserv on 24 February 2010)

The request for such support is often directed at an imagined collective of fellow activists and sympathizers. This is visible in messages in which activists invoke a collective “us,” such as when they argue that “[e]very conspiracy case directed against radicals sets a precedent for more of the same; defending one of us is literally defending all of us” (Conspiracy 2011). Support can come from individuals, but also from organizations and companies. For example, upon his release from prison, Peter Young received donations ranging from food home delivery to skateboards, provided by organizations such as Alternative Outfitters, Vegan Essentials, New Eden Records, and Vans (Support Peter 2007).

Prisoner support can also become more substantive than providing gas to drive to the prison. For example, when Judi Bari and Darryl Cherney were accused of having fabricated the bomb
that injured them, Greenpeace hired a private detective to find the real perpetrators (Scarce 2006:85). Also, some activists showed a rather different kind of solidarity when on 29 April 2006 activists identifying with the Animal Liberation Front raided a Minnesota fur farm and dedicated the raid to imprisoned “mink liberator” Peter Young.

2. **Criticisms within the liberal legalist framework: De-legitimization of the state**

An important strategy to criticize the state response, used by prisoner supporters in each of the country studies, is to demand that the state live up to its own rules. In this strategy activists claim the rule of law as the framework that puts restrictions on the state’s authority to limit the freedoms of citizens and the rule of law as the protection against arbitrary use of state violence (Note that this is a different claim to the rule of law than the claim by victims!). The attention is thus deflected from the defendant and the alleged crime, but shifted to the legitimacy and legality of the state’s prosecution and use of investigative authorities. Thus, activists have strongly criticized the use of undercover agents and informants, alleging that the state is not uncovering existing crimes but actively manufacturing crimes by entrapping activists. Typical allies in this kind of challenge to the state are criminal defense lawyers and organizations such as the National Lawyers Guild and the American Civil Liberties Union. In a clear reference to the rule of law framework, defendants and their supporters have claimed their constitutionally protected freedoms of speech and association, arguing that the criminal cases against them restrict those freedoms.
Activists have further crimitized conspiracy charges as “thought crime” and argued that this contradicts the very principles of a liberal state. Emphasizing this contradiction, they aim to discredit the state in its attempts to prosecute activists. With this strategy, activists specifically appeal to an audience that is broader than their fellow political activists:

   Many in our society – and not just radicals – are uncomfortable with the idea of people being persecuted for thoughtcrime. We need to find ways to address people outside our social and political circles about the prevalence of conspiracy charges, so as to utilize this opportunity to discredit the state and delegitimize conspiracy-based cases. The broader the range of people who disapprove of this tactic, the more the hands of the authorities will be tied. (Conspiracy 2011:7)

Such an appeal to a larger audience was also present when activists emphasized that SHAC activists were prosecuted only for “having a website.” Pointing to the potential danger of governmental overreach, activists argued that peaceful activism all over the U.S. was at stake and that not just environmentalist, but many social justice activists should be worried. Activists thus attempt to create awareness among the wider population of the existence of what they perceive as arbitrary or political repression. They argue that the larger public should be concerned about this repression, not only because it is unjust, but also because it might victimize them at some point. For example, on 11 January 2010 an eco-activist sent out an e-
mail on a listserv calling on people to support a defendant charged with conspiracy regarding an ALF action in 2004 at the University of Iowa. He wrote:

Over the last ten years, the government has led a campaign to smash radical environmental and animal liberation movements. This campaign is referred to as the "Green Scare" by activists and organizers involved in these movements. Some believe that these movements have been targeted because they are "bastard movements," often unsupported and unpopular within the broader left, and thus a place that the government can set precedent and normalize their tactics of repression, with passive consent from society and the larger left. These same tactics have been used to divide and repress social movements against oppression since the chicken & the egg, and this will continue as long as our movements remain divided. (Bold in original statement)

**The entrapment defense in the case of Eric McDavid**

The heavy involvement of undercover agents and informants constitutes another target of activists within the liberal legalist framework. For example, the defense in the trial of Eric McDavid relied entirely on this claim to the rule of law. His impeccable character, his entrance into the courtroom with a white shirt, and the attendance of mostly family members all communicated obedience to the state, a belonging to the American community and its rule of law. Alleged plans to bomb a dam were denied or at least not defended. The attention focused on the defense of “entrapment” and the message that the government was abusing its powers. The few fellow activists that attended the trial did not leaflet or protest. They did not spread a message of environmentalism. Nobody defended illegal actions. Nobody during the trial defended any actions in favor of environmental demands. The political ideas of the defendant were not explained. Indeed, family and friends on the witness stand showed surprise about that political side of the defendant. The message was that the defendant would “never hurt a fly”

---

155 The charges came after the defendant had refused cooperation with a grand jury, for which he was jailed for contempt of court.
and that the government’s informant had seduced him into and co-manufactured the conspiracy that he was charged with.

In September 2007 I attended this trial against Eric McDavid in Sacramento, California. He was convicted for conspiracy of arson and, because of a terrorism enhancement, sentenced to almost twenty years in prison. “Anna” testified during the trial against McDavid. She was an FBI informant and part of the “cell” of which the defendant also was a part. She played a pivotal role in his arrest and prosecution. Activists would add that she also played a crucial role in manufacturing and funding his alleged crime. His supporters criticized the government for playing dirty and violating its own rules.

During the trial the defendant, his two co-defendants, and the FBI informant were portrayed as a group of friends who were planning to do something “big.” They were frustrated with staging protests as they felt that they did not really work. Something “big” involved making a bomb. Armed with the book “The Poor Man’s James Bond,” “The Survival Chemist,” and some recipes that “Anna” provided them with, they started out mixing chemicals. They had not really decided yet on what they were going to bomb, but they were doing reconnaissance and there were some candidates, such as the governmental Institute of Forest Genetics, engaged in genetic modification. While they were in this process, they were arrested.

The FBI presented his arrest as a timely intervention, preventing potentially serious harm:
In early 2006, eco-terrorist Eric McDavid and two associates met in a secluded cabin in Dutch Flat, California to discuss making improvised explosive devices and to choose targets to bomb. Soon after, they began casing the targeted facilities and buying supplies to make bombs. But before they started mixing the ingredients, we swooped in and arrested them. (FBI 2008a)

Activists, on the other hand, present his arrest and subsequent conviction as entrapment:

Eric McDavid is a political prisoner, currently serving a 20 year sentence in federal prison for “thought crime.” He was arrested in January 2006 (as part of the government's ongoing "Green Scare" campaign against environmental and animal rights activists) after being targeted by an undercover informant who formulated a crime and entrapped Eric in it. Eric was targeted by the state for his political beliefs, and his case is important for everyone who dares to stand up. (Support Eric 2011a)

While this is a legal defense, the judge made it clear that the trial was not going to be an indictment of the FBI, the Justice Department, or confidential source (CS) Anna (field notes, September 2007).

Unlike some of the other trials I had attended in Chile or Spain, this courtroom was not packed with supporters. There were no signs, no leaflets, nothing to rally for an environmentalist cause; nothing to claim the action that was on trial; nothing to support Eric McDavid as an
activist. The supporters that were present were dressed formally and behaved silently and obediently. The message was clear: this activist was being supported as a peaceful and ordinary person. His family and old friends – not the activist community – were the most important presence in the room. The defendant had a cheerful smile every morning when he entered the courtroom, wearing a decent dress shirt. The defendant did not use his right to a last word to reclaim or reinterpret the incident for which he was on trial; he did not address his fellow activists to urge them to continue the struggle. The defendant and his supporters kept politics and activism outside of the courtroom. The supporters sat silently throughout the trial and listened. The choice for this defense within the liberal legalist framework reflects the lack of popular support for actions that involve such alleged plans for bombing campaigns.

3. Bringing the “political” back in: Identification as a political prisoner

While in the case of Eric McDavid, the defense downplayed or ignored the political motivations of the defendant (at least during the trial), the criminally actions of other defendants are openly embraced and defended as political. This means that the criminalized conduct is specifically placed within the context of the environmental demands of the challengers of the status quo. Calls for solidarity with prisoners are then not (only) based on a perceived arbitrary or unjust state response but on the shared political ideology between fellow activists and the defendant or prisoner. The Spring 2005 Earth First! journal thus called upon activists: “Remember, Peter is in there for the animals and the activist community should be there for him.” As they claim the identity as a “political” prisoner, activists vehemently resist the label of
eco-terrorists, priding themselves instead as “eco-warriors” (Foreman 1991) and referring to their targets as, for example, “animal abuse facility.” They thus resist imposed labels – a contestation that is also fought out in the courtroom.

Some activists specifically highlight the importance of continuing this battle in the courtroom. For example, Earth First! activist Roselle criticized Greenpeace for not using trials as a method for creating more public awareness and publicity (Scarce 2006:169).\(^\text{156}\) He emphasized that for Earth First! the trial and jail time are as important as the initial action that led to the arrest. Claiming to be “political” prisoners, activists reject the courtroom as a legitimate venue for deciding the issue at hand, refusing to accept the rule of law. Unlike the strategy that de-legitimizes the state by pointing at contradictions between that rule of law and the state response, “political” prisoners refuse to play the game that is expected from them as defendants. Thus, Peter Young said in his statement in court:

> I don't wish to validate this proceeding by begging for mercy or appealing to the conscience of the court, because I know if this system had a conscience I would not be here, and in my place would be all the butchers, vivisectors, and fur farmers of the world. [...] It is to those animals I answer to, not you or this court. (Young 2005a)

Claiming to be a “political” prisoner is a fundamental challenge to the state’s criminal justice system and its criminal prosecutions. It is noteworthy that while the Spanish and Chilean

\(^{156}\) Indeed, as an activist for Greenpeace, Roselle pled guilty because Greenpeace wished so to *avoid* a show trial.
governments explicitly rejected the label “political prisoners,” no government official in the
United States seems to take any effort to publicly dispel notions of “political” prisoners. This is
possibly an indication of the weakness of the challenge posed by environmental activists.

In the face of crime definitions and the publicly ritualized condemnation of their actions,
activists adamantly redefine their own conduct, often trying to turn the tables. Activist Rod
Coronado, for example, defended the ALF:

> If truth and morality were the driving force behind mainstream journalism, the business
practices and actions of animal and earth destroying industries, the world’s militaries and police
would be reported as the true acts of terrorism that they often are. And the actions – be they
legal or illegal – of the animal rights movement would be presented for what they really are:
actions that not only respect the sacredness of all life, but also alert the public and consumers to
government and corporate fraud, the endangerment of human and environmental health; and
economic policies that readily cater to big business at the expense of taxpayers, public lands and
wildlife. (Coronado 1999)

Activists sometimes employ a criminal law logic or vocabulary to defend their position, for
example when they refer to the concept of “extensional self-defense” developed by
philosopher Steven Best, which argues that it is acceptable to provide self-defense for those
that cannot defend themselves, such as children and animals (Interview US-16).

As activists aim to put alleged crimes in a different perspective, they often make comparisons
with other crimes. For example, an activist pointed out that a man who killed a woman while
driving drunk received a ten-year jail sentence, whereas activist Jeffrey Luers was sentenced to
22 years and 8 months for causing several thousand dollars of fire damage to some sport utility
vehicles. The activist concluded that this “disparity” in sentencing can be expected from a “society whose values are so predominantly capital-centric” (Harper 2002a).

Criminal defense lawyers play an important role in crafting the kind of challenge that is posed to the state’s prosecution. In the Basque Country defense lawyers are an integrated part of the nationalist left as they form the lawyer-collective for ETA defendants. In the case of the Green Scare there is not such a tightly knit lawyer community, but there are some important nodes. The Civil Liberties Defense Fund in Oregon does its share of Green Scare cases, and there are more “Green Scare lawyers” who have their fair share of these cases. Another legal support to animal rights and environmentalist activists is the “Green Scare hotline” operated by volunteers of the National Lawyers Guild in New York City. With the transfer to the criminal justice arena, legal support has become essential for activists, taking up a significant amount of their time and resources. There are, for example, grand jury trainings teaching activists about their rights in grand jury hearings.

Lawyers and activists make a distinction between so-called “political lawyers” and “ordinary lawyers.” Political lawyers know how to deal with a political case. Political defendants usually do not want to plead out. They want to stick with their co-defendants, do nothing that is detrimental to an entire movement, and not compromise on their political beliefs. Unlike ordinary lawyers, political lawyers support these positions. Ordinary lawyers, on the contrary, will try to persuade their clients to do what is best for the individual client given the available
evidence against them, which usually means being the first to plead guilty. A “political” defense lawyer I interviewed had given activists permission to tell FBI agents that he is their lawyer. He said that he was almost charged with “obstruction of justice” because of this, as FBI agents who knocked on doors “from Phoenix to Michigan” encountered activists claiming their right to be silent, telling them that he was their lawyer. When asked for his motivation to take up these “Green Scare” cases, the lawyer responded that “these kids are the only real dissent in this country” (Interview US-3).

“Political” prisoners fight their criminal cases not just for their own liberty, but for the whole movement. Former SHAC prisoner Darius Fullmer, for example, claimed to be fighting his appeal not necessarily for his own freedom or justice but to create a better precedent for the movement, thus placing the collective goals of his activism above his individual justice:

Right now I’m focused on the appeal because we have to get rid of this law, the Animal Enterprise Terrorism Act. It's a horrible precedent, not just for the animal rights movement, but for anybody who believes in freedom of speech, whether that's a labor union, environmentalist or anybody who values their right to speak their mind. (in: Barbi and Barbi 2008)

Once these criminal prosecutions are labeled as “political,” they contribute to the “career” of activists, certifying their dedication to the struggle. Having been in jail thus can add to the credibility and (perceived) commitment of activists. Similarly, having been called in front of a
grand jury also has this feature. In the activist discourse community “real” activists have been called before grand juries.

4. **Persuading the public of the political definition: Changing the impact of criminal prosecutions**

As prisoners and their supporters rally around the concept of “political” prisoners, they attempt to persuade their fellow activists and the larger public of the political nature of the situation, thus transforming the criminal degradation ceremony and the impact of the criminal prosecutions. Activists, for example, try to alleviate life in prison for their detained peers in order to reduce the fear of prison that the state uses to deter activists from their actions. They also make their interpretation of the “crimes” public through official press offices and communiqués. Crucially, they compete with law enforcement officers for the “hearts and minds” of the public, persuading people not to comply with criminal investigations. They try to dissuade fellow activists from falling for government cooperation; severely condemning “snitching” and cutting off contacts with those that do cooperate. Indeed, activists have not only condemned but also resisted grand juries, accepting time in jail for refusing to testify.

As activists engage in the work of redefining criminalized conduct, providing support to prisoners, obstructing investigations, and trying to persuade the public of the political definition, they attempt to alter the effect of criminal prosecutions. They try to counter the stigmatization that comes with their degradation to “criminals” and they try to keep people out
of jail, arguing, for example, for lower sentences. Prison is an essential part of the penal experience and activists attempt to soften that. Indeed, Peter Young openly called for a “demystification” of the prison experience, arguing that it may not be as bad as one might fear. He reasoned that if activists lose their fear of prison, they may be bolder in their activism (Young 2008). Criminal prosecutions, the threat of a high sentence, and life in prison have different effects on different activists. As a consequence of criminal charges, some people turn against their former fellow activists. Some leave the path of activism entirely. Some renounce the use of violence or the use of specific means, such as arson. In other cases, activists are turned into heroes within the movement. They remain active, publicly, and speak at public conferences. Examples of such “heroes” within this discourse community are Peter Young and Rod Coronado. On 6 November 2010, Peter Young had 1,384 friends on Facebook, arguably not despite his conviction under the AETA, but because of it.

There has been much “public relations” activity by and on behalf of the “political” prisoners. Apart from the specific websites dedicated to single prisoners, former prisoners and their lawyers have appeared on Democracy Now! and written articles on Indymedia and CounterPunch. In order to inform fellow activists and the larger public of the criminal prosecutions against eco-activists, defense lawyers, sympathizers, and defendants have traveled and given speeches on many occasions. An important aspect of prisoner support work is the redefining of the conduct or event that forms the basis for the criminal allegation. In the United States, there are specific “press offices” for the ALF and ELF engaged in this work that
publish or even write the communiqués to announce and explain actions in name of the ALF or ELF.\textsuperscript{157} These offices function explicitly as a liaison between the public and underground animal rights or environmentalist activists. As an example of such definition-work, the press office of the ELF redefined the concept of eco-terrorists, designating as the “real” eco-terrorists the CEOs of Cargill and Halliburton.

As a crucial link between the public and the underground actions, such communiqués have received attention from prosecutors. Already in the mid-1990s there were indications that prosecutors attach importance to these speech acts and view such acts as central to the activist’s actions. In the government’s sentencing memorandum in the case against Rod Coronado in 1995, the prosecutor specifically pointed out that the ALF operates with violent acts, and that publishing about such acts is a fundamental part of the ALF strategy, since “publicizing the attacks and threatening future violence also furthers this goal by intimidating potential victims into abandoning their activities.” It becomes obvious that the prosecutor attaches great importance to these publishing activities in a later statement in the memorandum to the effect that the plea agreement was not only significant because Coronado accepted full responsibility for the arson at Michigan University, but

\begin{quote}
[e]ven more important is the fact that the defendant acknowledges that he directly engaged in the public dissemination of the arson attacks. As described previously, the threats Coronado circulated were at least as important as the arson attacks themselves since they furthered ALF's
\end{quote}

\textsuperscript{157} http://www.animalliberationpressoffice.org/
goal of threatening violence against other scientists, farmers and consumers if they did not bow to the ALF's demands. (Government’s Sentencing Memorandum, 1995, footnote 2, page 13)

In the analysis of the SHAC case in the next chapter, I will show how the prosecutorial narrative construes criminal responsibility in that specific case, partly because the activists were publicizing underground attacks.

**Choosing sides: Supporting or obstructing law enforcement**

Popular support for extreme tactics is a key problem for law enforcement. Evidence is frequently difficult to collect without the cooperation of citizens. In the criminal justice arena, authorities and prisoner supporters therefore battle for the sympathy of the American public and for assistance, either in the investigation of crimes or the obstruction of such investigations. The FBI asks citizens for their cooperation in the search for “eco-terrorists.” For example, on their website they announced that “You can help. Have you seen Daniel Andreas San Diego, an animal rights activist wanted for his alleged involvement in two bombings in California in 2003? If so, contact us” (FBI 2005a). At the same time, animal rights activist Peter Young called upon fellow activists to reflect on their response to Daniel Andreas:

> It is impossible to know where Andres San Diego is hiding, but please ask yourself what you would do if he showed up at your door tonight, asking for help. San Diego faces a potential life sentence if arrested, and is out there somewhere right now literally running for his life. (Young 2011a)
These contradicting demands upon the American public illustrate the competition between moral judgments and the competition for authority that challenges the state and its “rule of law.” Moderate environmentalist activists and organizations are specifically called upon to choose sides. The Sierra Club, for example, “does not condone any acts of violence” (Sierra Club 2003). As a consequence of its position, the Sierra Club actively supported law enforcement by offering a reward to anyone who could help to find the perpetrators in a specific case. While the Sierra Club actively contributed to law enforcement, the Department of Homeland Security (DHS) suspected various animal rights groups of assisting “eco-terrorists”:

PETA, the Fund for Animals, In Defense of Animals, the New Jersey Animal Rights Alliance, and certain individuals within the HSUS are known or suspected of having financial ties to individuals and groups associated with ecoterrorism. In addition to financial ties to ecomilitancy, both HSUS and PETA, or at least individuals within those organizations, have an established record of supporting individuals and/or groups commonly associated with ecoterrorism. (Department of Homeland Security 2008:9)

In the same year that this DHS report came out, the Humane Society provided $2,500 as a reward for information leading to the resolution of the car bombing of an animal researcher in California (Brown 2008), clearly distancing itself from the tactics employed by more extremist activists. A notification on 18 February 2010 on the Humane Society (HSUS) website stated that
the Department of Homeland Security had changed its assessment regarding the Fund for Animals and the HSUS.

Cooperating defendants and FBI informants

An important issue among activists in relation to criminal prosecutions is how to deal with informants or cooperating defendants: former or current activists who have decided to cooperate with the FBI and prosecutors in the prosecution of fellow activists, often as part of a plea bargain for criminal charges and the threat of high sentences against them. This has destroyed trust and solidarity within the activist community. One activist said: “The Anna-thing freaked everyone out” (Interview US-4), referring to the FBI informant in the case against Eric McDavid. Many activists had met her, as she had infiltrated the activist scene. As the activists do not trust each other anymore, collective action is strongly impeded. A journalist told me he observed a sadly high level of alcohol and drug use and a general disillusionment among the West Coast environmentalist community after a period in which many inside informers were revealed (Interview US-10). There also was mention of activists being prosecuted for retaliating against cooperating defendants (Rayburn 1999).

Activists try to convince fellow activists not to give in to government pressure, for example by pointing out that compared to the cooperating defendants the non-cooperating defendants received proportionately shorter sentences (Conspiracy 2011).\(^{158}\) They emphasize that when

\(^{158}\) This was allegedly the case in the Operation Backfire cases.
“nobody talks, everybody walks” (Conspiracy 2011:7). Many activists severely condemn what they call “snitching.” Those guilty of it are viewed with contempt. For example, Peter Young, whose co-defendant cooperated with the government, wrote:

> For the sake of clarity, let us be uncomfortably honest: to snitch is to take a life. By words and by weapons, each day lives are taken in the most egregious of crimes. When this happens in the courtroom, we call it "cooperation." I call it violence, and I call anything done to keep an informant out of the courtroom "self defense." – Peter Young, animal liberation prisoner (North American Animal Liberation Press Office 2011)

Aware of the risk of losing the respect of their fellow activist community and thus losing their status as political prisoners, activists are careful in their communications when they announce plea agreements, often explicitly pointing out that the agreement does not involve cooperation with the government. Some prisoner support groups have explicitly distanced themselves from some prisoners that were labeled as traitors because of their cooperative plea bargains. Interestingly, this selective prisoner support work (only supporting prisoners who refuse to “name names”) even became an issue during the sentencing of eco-activist McGowan. An observer reported that the prosecutor and judge had emphasized that McGowan had been only willing to support those who had not cooperated with law enforcement and that his current support was filled with “like-minded people” (Anonymous 2007).

**Grand juries: Forced cooperation with the justice system and contempt of court**
Activists view grand juries as instruments of repression against aboveground activists (Rod Coronado in: Best & Nocella 2004:352–353). When Coronado was arrested in 1994, four people had spent between five and six months in jail for refusing to testify because of the investigation against him (ibid.:351). Grand juries can issue subpoenas that force people to testify without the presence of a lawyer. They can hold people in contempt when witnesses refuse to share information which may be “in the public interest to enforce the criminal laws of the United States.” Therefore, activists organize “grand jury” workshops in which lawyers explain to activists how to deal with grand jury subpoenas and what their rights are. Activist websites refer readers to materials with information about the grand jury proceedings. Co-perpetrators who decide to cooperate with the grand jury proceedings waive their right to non-incrimination when they testify before the grand jury.

Various activists and also people at the margins of the movement have decided not to cooperate and refused to answer some of the questions. The judge can then hold the witness in civil or even criminal contempt. For example, in 1993 PhD student Rik Scarce was held in contempt of court after refusing to give access to the materials and sources that he had collected during the writing of his book *Eco-Warriors* (2006). The judge did not accept his claim to the importance of scholarly independence and the confidentiality of his sources (2005), and he was imprisoned for six months. In 2006, activist Jeff Hogg spent six months in jail for refusing

---

159 See, for example: http://grandjuryresistance.org/, there is also a “Grandjuryzine” with Know Your Rights info. The support website for Scott DeMuth refers to a journal article by Michael E. Deutsch (1984) on “The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists” in the *Journal of Criminal Law & Criminology* (Support Scott DeMuth! 2011a).
to answer grand jury questions regarding the arsons under investigation in Operation Backfire.

Those that refuse to testify and are held in contempt often become “heroes” within the environmentalist movement. This occurred on 3 November 1992, when Jonathan Paul was jailed for civil contempt in Spokane, Washington, for refusing to testify in front of a federal grand jury. During his sentencing hearing in 2007, the prosecutor recalled this episode as he told the court that Paul had been held for five months and was a “hero” and “inspiration” to those who “resist legal prosecution” (Flies on the Wall 2007).

Grand jury investigations can thus lead to subsequent imprisonment when witnesses refuse to testify. Thus the state does not only try to persuade citizens to voluntarily contribute to law enforcement. Indeed, activists have also been prosecuted for making false declarations before a grand jury, initiating another spiral of prosecution and imprisonment where citizens’ compliance with law enforcement efforts is at stake. For example, in November 2003 Robert Brooks and Hargit Singh Gill were indicted for making false declarations before the grand jury on 2 July 2003. In addition, they were charged with making false statements to FBI agents.

Grand jury subpoenas and subsequent cases of civil and criminal contempt thus form a clear example of how the conflict dynamic after transferring into the criminal justice arena leads to renewed contestation and litigation. This even led SHAC activist Kevin Kjonaas to call the grand juries “one of the best things that ever happens to animal rights movements” since they make people active (SHAC trial exhibits, Volume V:2196).
Just as in Spain and Chile, challengers of the status quo, and sometimes also their family and friends, become disillusioned with the court system – if they ever had any confidence at all in the promise of the rule of law. This is illustrated, for example, in the following reflection by supporters of Eric McDavid after his request for an appeal was denied:

For some of us, our biggest mistake was believing that we ever had any options in the first place. It became all too easy to fall into their trap of successive illusory next-chances. Every time we lost bail, or a motion, or trial, or at sentencing, or at the appeal... there was always something waiting in the queue that could possibly save us from our imminent hell. But the state created that queue – not us. [...] If anything, the court's decision is an affirmation of what we have known to be true all along. The “justice system” works only for the interests of it's [sic] creators. If it starts to falter in it's [sic] mission, it gets fine tuned (i.e. laws and rules get rewritten) to put it back on the proper trajectory. (Support Eric 2010)

Contested truths – the problem with evidence – credibility of undercover activists

I look at the criminal justice arena as a site of contestation about definitions and interpretation of conduct, labels, identities, and events. Criminal trials pretend to construct an officially honored version of the truth of what happened during one or a series of events. Criminal proceedings claim to offer a truth that could be accepted by society and thus contribute to social peace. In fact, in the context of environmental protest, it is incapable of creating such shared truths. The lack of consensus about the meaning of evidence is one important factor. I will illustrate this contestation with the debates about undercover videos provided by animal rights activists.

Documentation unearthed in undercover investigations forms the basis for animal rights outrage and activism. Activists have used it as justifications for their actions, also actions that
are illegal. As such, activists often try to have such material allowed in the courtroom when they defend themselves against criminal allegations. However, these materials are equally often denied such access. Given the impact materials from undercover investigations can have on the public, activists had warned that the AETA could be used against undercover investigators (Potter 2007:4). And indeed, only five years after the enactment of the AETA, the very act of undercover investigations has become the explicit object of legislative efforts as several states started considering penalizing such conduct, thus bringing it into the criminal justice arena as a crime (Potter 2011d). Indeed, a state lawmaker in Florida called the very act of conducting such undercover investigations “terrorism” (Potter 2011e) and the European law enforcement agency EUROPOL issued the warning that animal rights activists “use disinformation methods in order to discredit their targets and weaken their public acceptance. Images of sick and abused animals are embedded in video footage and made public” (Potter 2011e).

Materials collected by undercover activists have been subjected to lawsuits on several occasions. In some of these cases, targets accused of animal abuse argued that materials were selectively edited (Carnell 2000; Carnell 2004). For example, in 1997, PETA activist Michelle Rokke worked undercover at Huntingdon Life Sciences as an employee while documenting and collecting video material of the way in which the animals were treated. In response, Huntingdon filed a civil lawsuit under the Racketeer Influenced and Corrupt Organizations (RICO) Act against PETA and the undercover activist, Michelle Rokke, for stealing trade secrets
and trying to put HLS out of business. According to PETA, the material showed, for example, how scientists performed surgery on a monkey, removing its organs while the monkey was still able to feel what happened.

Huntingdon, however, maintained that the video material was cut and pasted in such a way that it only seemed as though the monkey were being tortured, while in fact it was anesthetized. While Huntingdon argued that an independent agency regularly inspected Huntingdon and did not find evidence to support the allegations made by PETA, it did fear the negative publicity that might result from the videos. Indeed, while Procter & Gamble investigated Huntingdon and did not find any evidence that the Animal Welfare Act had been violated, Procter still stopped working with Huntingdon because the videotape showed “lab technicians behaving in an uncaring manner” (Kolata 1998). Eventually, this lawsuit was settled out of court and PETA agreed to destroy all of the materials it had collected as well as to not conduct any undercover investigations for five years. In return, Huntingdon dropped the RICO charges (Kolata 1998). Michelle Rokke was under court order to refrain from commenting in public about HLS.

The contestation about the credibility of materials collected by undercover activists shows similar features as the contestation about specific sources of evidence in Spain and Chile. First, the dispute about the interpretation of evidence leads to a cycle of lawsuits (civil lawsuits in the case of the U.S.) in which opposing parties accuse each other of injuring the other party and
purposefully fabricating harmful evidence (Carnell 2000; Carnell 2004). Second, the assessment whether the evidence is credible or not seems to rely entirely on previously held beliefs about the core issue, that is in this case the treatment of animals, the existence of animal cruelty, the definition and interpretation of animal cruelty, and enemy images of the opponent. Thus, the contestation about the evidence produces more legal activity, while the evidence remains disputed. Instead of contributing to a shared truth, such contested evidence becomes part of the larger contention.

4. Overview

In this chapter I sketched the dynamics of the contention around the usage of animals and the earth, describing the various actors involved in challenging the status quo or defending the status quo, the ways in which tactics are justified, and how tactics challenge the U.S. democracy and its rule of law as activists consciously break the law for their beliefs. The U.S. government and particularly the FBI have come to define the situation as “eco-terrorism.” With this label, the situation transfers to the criminal justice arena, excluding the underlying demands regarding destruction of the earth or animal cruelty. In the criminal justice arena “victims” and “prisoner supporters” form alliances as criminal cases unfold, and these polarized identities obtain institutional meaning. Victim alliances and their push for the eco-terrorism narrative and definition of the facts are important factors in the creation of the prosecutorial narrative. Prisoner supporters attempt to counter that narrative as they challenge the penal response and
the definition of protest activity as crimes. In the next chapter I will analyze the development of
the prosecutorial narrative and the way in which it responds to the different voices in the
criminal justice arena.
VII. Marginalizing Criminalization in the United States

The previous chapter introduced the environmentalist movement and its tactics for driving companies out of business, stopping construction of roads or dams, or stopping scientific animal experimentation. Thus, it challenges the status quo. The government has labeled some of these tactics as crimes and, more specifically, as “eco-terrorism.” Crime is, however, not a pre-given fact of reality but socially constructed and disputed, and indeed, victim groups and prisoner support groups have mobilized to present and contest definitions of crime in an attempt to influence the prosecutor, the larger public, or both. Thus, in and around criminal proceedings a “conversation” ensues in which I zoom in on the different collective “voices” of victim groups, prisoner support groups, and the prosecutors. In the previous chapter it was shown how specific targets of environmentalist activism ally to claim victimhood and push the state for more effective protection and punishment of perpetrators. At the same time, defendants and their sympathizers are dissatisfied with the state’s definitions and condemnation of their protest actions. They continue to mobilize and draw attention to their underlying demands as they challenge the definitions and categories presented by the state.
This chapter analyzes the prosecutorial narrative as it responds to the different voices in the criminal justice arena. I will show how the state changes old images and creates or adopts new images, crime definitions, and categories. This analysis is based on an overview of criminal prosecutions during the past thirty years and draws upon press releases from attorney’s offices, indictments, opening statements, and closing arguments in trials and other trial transcripts as well as in-depth interviews with two prosecutors.

I examine how the state constructs its courtrooms as the correct place to deal with the charges that they level against defendants. I trace the construction of criminal cases, by observing how the different actors, the prosecutors, the jury, the judges, and even the stenographers participate in imagining and producing this space, in which a certain logic, framework, and discourse is accepted as the correct vocabulary to communicate and interact, in which the roles and identities are given form. Upon receiving a criminal complaint, the prosecutor will define the situation to decide whether, how, and against whom to build up a criminal case. What information is deemed relevant to define the nature of the event? What information is excluded from consideration? What kinds of questions are asked to determine what happened?

In this exploration, I ask how the prosecutorial narrative institutionalizes certain “truths” while “marginaliz[ing] other ways of looking at the world” (Lacey and Wells 1998:10).

In the United States I interviewed two prosecutors. In these conversations, both adhered strictly to the ideology of liberal legalism and its separation of law and politics. One prosecutor
claimed that “as a general rule and one I certainly practiced in this case, I do not look at the political motivations of defendants. I look to their intent (not to be confused with motive) and their actions” (personal e-mail communication with author). Just as in Spain and in Chile, both prosecutors emphasized their concern for individual victims. Again, in the words of this prosecutor:

I also look to the victims. That the defendants believed in their cause is of no moment if they are breaking the law and causing victims harm. In this case, the defendants terrorized the victims, made them move from their homes, put them in constant fear and altered the manner in which they raised their families. Given that, and the fact that I believed (and the jury agreed) that the activities of the defendants were violative of the laws, the case was brought. I have no doubt that the defendants believe in their cause but belief in one's cause does not excuse violation of the laws. (ibid.)

By emphasizing the existence of “victims,” prosecutors legitimize the practice of dealing with the disruptive and contentious actions in the criminal justice arena. This then requires a separation between the political issue on the one hand and the criminal activity on the other. Thus, also during trials, prosecutors continue to address and erect the boundary between the different arenas, indicating what “belongs” where. This boundary between the two arenas is often referred to spatially as “crossing the line.” Thus, the prosecutor in the SHAC case argued before the jury that animal testing is not “the issue in this case”:

The defendants in this case are against animal testing of any kind. They don't believe that it should be run at all, but that really is not the issue in this case, ladies and gentlemen, because
the FDA requires the testing be done. *That is where the line is.* But the defendants in this case convinced themselves that they have a monopoly on what was right; and that that monopoly gave them a license to victimize others without regard to the law. They believe their monopoly gave them the right to *cross the line* so rather than an attempt to change the system through lawful means, the defendants decided they were going to shut down this company, this company that gauges in wholly lawful activity at any cost. (Trial transcripts, Case SHAC, volume VI, p. 41, 7 February 2006, emphasis added by author)

Challengers of the status quo systematically question this exclusion of their primary grievance from the trials, thus challenging the separation of law and politics.

The criminal proceedings lead the political mobilization to shift from the political arena to the criminal justice arena, and the government criminal justice agents inevitably become an actor in the political contention. The state works with a criminal justice system that is premised on the liberal notion that it stays out of politics by formalizing categories and excluding context. This framework is built, however, on assumptions of abstract individuals and a society in consensus (Norrie 1993:57). The existence of social and political conflicts has been ignored from its conception in the ideology of liberal legalism, in which crime was stripped of its context. Instead of excluding context systematically, in the criminal cases discussed below events are re-contextualized in the context of “eco-terrorism,” and the prosecutorial narrative inevitably tells a story which becomes part of the contention and subject to mobilization. I explore how this narrative shifts from de-contextualization to a re-contextualized narrative and explore the consequences of this re-contextualization in the actual criminal prosecutions. What is the chosen context? How can this re-contextualization be observed? What are the concrete discursive shifts?
Given the independence and decentralized operation of different prosecutors it is not possible to speak of one prosecutorial narrative. Instead, it would be more accurate to talk about multiple prosecutorial narratives. Still, as I am studying exclusively federal cases and to a large extent also the involvement of the FBI in shaping the prosecutorial narrative, it is possible to observe general tendencies. Indeed, the prosecutorial narrative should not be understood as the narrative of a specific prosecutor, but the narrative of the prosecution. It is the narrative that guides the entire process of investigating, charging, prosecuting, and accusing a defendant by building a case and constructing a narrative of good and bad, of guilt and criminal responsibility, of criminal conduct and the relevant facts of the case. As such, it is never only the narrative of a single prosecutor, but a construction that has many authors and draws upon an available grammar and repertoire.

For this chapter I selected a few criminal cases which I discuss in depth to demonstrate the typical competing discourses that contest each other in these criminal prosecutions. In the course of this analysis I highlight three specific discursive shifts in the prosecutorial narrative that characterize its intervention regarding contentious environmentalist activity which has become labeled “eco-terrorism.” As a first discursive development I trace the introduction and use of this label through various prosecutions over the course of the past decades. The other shift in the prosecutorial narrative is the move towards proactive investigations, infiltrations, and prosecutions, mainly initiated by the FBI. This emphasis of the FBI on the monitoring of
anarchists, environmentalists, and other groups of activists is highly controversial.\textsuperscript{160} I further discuss the shift towards the prosecution of certain aboveground (i.e., overt) activities, which can be understood as a result of the difficulty to find the activists that engage in covert activities. This shift provokes debates and questions similar to those in Spain, where speech acts and symbolic expressions have become the target of various criminal prosecutions. The criminal case against the activists of Stop Huntingdon Animal Cruelty (SHAC) is exemplary for this shift to the prosecution of aboveground activity, and I will analyze this case in great detail.

I argue that the prosecutorial narrative in the United States is engaged in boundary drawing by forging the exclusion and marginalization of “extremist” actions and activists from the terrain of legitimate agency. As the narrative communicates with the larger public, and specifically those that are engaged in “legitimate” environmental protest, it encourages “moderate” and “mainstream” organizations to distance themselves from all actions and actors that have been labeled “eco-terrorist.”

1. First classification: Dying earth and animals or eco-terrorism?

I understand re-contextualization as a dynamic set of multiple shifts in the prosecutorial narrative on a possibly broad range of elements. These shifts can include the audience that is

\textsuperscript{160} Pro-active FBI investigations are not limited to the environmental movement. Recent revelations have indicated the thorough control the FBI had over anti-war activists involved in the Israeli-Palestine conflict. Reports about such surveillance emerged in the aftermath of the Republican Convention in 2008. See, for example, the broadcast by Democracy Now! on 23 December 2010, available at: http://www.democracynow.org/2010/12/23/fbi_expands_probe_into_antiwar_activists
addressed, the kind of criminal liability that is chosen, the time frame, the legal interest, the image of the perpetrator, and all the other elements described in more depth in Chapter 1.

These many possible shifts together constitute a re-contextualization, while at the same time describing or constructing that context as the relevant or even “natural” context that should be taken into account. It is the very description of that context which is often deeply contested by the various actors in the contentious episode. The basic description of that context, which is often considered as “background,” can color or influence the interpretation of everything that happens on the screen. Indeed, that “background” can be responsible for filters and selective recognition of relevant elements, actors, or events that determine what “really” happened.

Which context is chosen and how that context is described is thus highly relevant. Although this context can be constantly changing or modified in the narratives of different actors, specific labels tend to receive a meaning that is shared and understood once it is drawn upon. When an event is thus classified as a “case of” eco-terrorism, this can lead to a series of choices in criminal proceedings which would not have been available had that classification been lacking.

Over time, and drawing upon the narrative proposed by targets of environmentalist protests, the prosecutorial narrative has constructed the context of “eco-terrorism” while environmentalist activists have advocated a broader context which includes the “crimes” of animal cruelty and destruction of the earth as the relevant background against which their actions should be interpreted. Indeed, activists would argue that the earth is not just dying: it is being killed.
While prosecutors always can choose to de-contextualize an event and ignore “the” context, they can also choose to address the context and thus co-create the collective interpretation of that context. At different stages in criminal investigations and prosecutions, I have traced the way in which prosecutors either keep context out, or bring it in. In this section I address some of the instances where prosecutors have re-contextualized events and framed a criminal case as a “case of” eco-terrorism, showing how this affects their choices in the presentation of that case before juries and judges. The effort to put a specific incident into a larger context is explicitly visible in trials that start with expert witnesses who explain the “relevant” context, for example the background of the Earth Liberation Front and its ideology. One prosecutor explained the pragmatic reason for such a witness, arguing that the motive should be explained and “the jury should have some background or frame of reference” (Interview US-1). While a motive is not required for a conviction, according to this prosecutor a motive helps the jury to understand why a defendant did something, which can add to their conviction that he or she is guilty. This “context” can also color the severity of a crime. In this case of “conspiracy to commit arson” the prosecutor labeled the defendant a “kid” while simultaneously stating that “it [the alleged arson] is a big problem.” To support that assertion he referred to the arson in the UC Davis veterinary school and the arson in the ski resort in Vail, Colorado. The conspiracy to arson in this particularly case was thus linked to arsons that had occurred ten or even twenty years before in name of the ELF, even though the defendant was not alleged to have

161 The first witness in the trial against Eric McDavid was Bruce Naliboff. He was a lieutenant from the Criminal Intelligence Unit from the UC Davis Police Department who declared on the ELF, ALF, and anarchism. He was also one of the contributors to the safety and security guide for UC Davis.
participated in those earlier arsons. The motive can thus be used to construe a “pattern” and this “category” of cases thus colored the perception of the threat posed by this defendant.

Just as in Chile, there have been incidents in which the classification of events has been explicitly disputed. For example, on 3 March 2008, buildings under construction in Seattle were set on fire. Spray-paint on the scene declared *Built green? Nope black. McMansions in RCDs r not green.* It was signed “ELF.” While the FBI and the Seattle Joint Terrorism Task Force declared it a case of eco-terrorism, activists argued that this was probably not the ELF or anyone else with environmental motives, but that the real motive was to claim insurance. Also, journalist John Vidal wrote in the *Guardian* that the action probably had more to do with “fraud or political smearing and dirty tricks than with terrorism” (Vidal 2008).

The context of “eco-terrorism” also seemed to play a role in the case of Kevin Olliff, a SHAC activist who was prosecuted for the theft of a USB stick. While defendants can generally be released on bail in order to ensure that they will appear before the court, in the case of flight risk or danger to the community, a judge can deny bail. Some activists have spent their pre-trial time in prison for exactly these reasons. Olliff’s bail was initially set at $10,000, which is the standard for one count of commercial burglary.\(^{162}\) After serving eight months in jail, the district attorney sought a bail increase, however, and after a hearing the bail was raised to $500,000. Kevin Olliff reported of this hearing that the arguments were not related to the shoplifting but

\(^{162}\) For data on the median and mean bail in state courts in 2006, see statistics provided by the Bureau of Justice Statistics stating that $10,000 is the median bail for felony offenses (Cohen and Kyckelhahn 2010, table 7, page 7).
to his activities of “terrorizing families” in the campaign against Huntingdon Life Sciences (2008). Indeed, he mentioned that actions by others in that campaign had also been discussed in relation to his bail, which clearly illustrates the classification of his person within a particular context.

Thus, at various stages of criminal proceedings a case can be categorized as “eco-terrorism.” Such re-contextualization can start a script in which activists are induced to take a position in relation to that context of environmental protest, cut off contact with fellow activists, or denounce violence. For example, prisoner Kevin Olliff (2008) reported that the prosecutor offered a plea bargain that involved requiring him to ask the government specific permission to be in contact with any known “anarchist” or “activist” until five years after his release. The prohibition from interacting with environmentalist groups or individuals is a frequent part of plea deals. The government showed it was serious about such provisions when on 3 August 2010 Rod Coronado was sentenced to four months in federal prison for allegedly violating the terms of his probation (of a case in Arizona in 2004), for “associating” with Earth First! cofounder and former Greenpeace U.S.A. Director Mike Roselle by accepting his “friendship” on Facebook and for accessing an unauthorized computer outside his home (Rosenfeld 2010).

More defendants have reported such offers from prosecutors, in which the goal seemed to be to keep defendants from engaging in (extremist) activism or to publicly denounce the use of violence for activist purposes. The message in many of the plea bargains and sentencing
hearings is that defendants have to apologize, renounce their violent past, send a good message to young people, provide the right example, change their perspective on the use of violence, and in the future only work within the boundaries of the law. Thus, the guilty plea is not just about retribution of past actions, it is also about the opinions of activists, the message they send, and what they plan to do in the future. In the case of William Viehl (accused of raiding a mink farm) the judge only reduced the sentence after Viehl showed remorse (Young 2010).

Jury trials involve a “voir dire” in which prosecutors and defense lawyers are allowed to ask potential jurors questions in order to assess whether they are able to maintain objectivity and neutrality. Often in these questions, the prosecutor determines whether jurors have strong views regarding animal rights or environmentalism. For example, in the 2007 trial against Rod Coronado, the prosecutor proposed to tell the jurors that the case would likely involve evidence that the defendant had attempted to convince others that they should commit arson to protect the earth and the environment and to then ask the jurors whether they could not be fair either to the defendant or to the United States in this type of case.

Thus, at every stage of criminal proceedings de-contextualization or re-contextualization plays a role in the questions that are asked and the conditions that are placed. Once a case is re-contextualized as a case of “eco-terrorism,” the case is connected to other “eco-terror” cases, information about the ELF/ALF or anarchism is brought in, and the jury is questioned regarding
its attitudes towards environmentalism. The communication of the prosecutorial narrative emphasizes the “line” between lawful activism and eco-terrorism, pushing or cajoling defendants to “return” to lawful activism.

2. Identity politics on trial: The identity of defendants

A political identity is the public collective answer to the questions “Who are you?,” “Who are we?,” and “Who are they”? (Tilly 2003:32). Just as in Chile, identity politics forms an integral part of the criminal prosecutions in the United States and is evident in the labels used in press releases, indictments, during the trial, and in the communications of “victim” and “prisoner support” groups. Such politics is about the placement of boundaries between different identity categories and about the stories that “us” and “them” tell about the identities. The labels chosen by prosecutors to describe the defendants can be significant in construing the image of the perpetrator of a “crime.” In this section I describe the different images that prosecutors produce to describe the defendants. I show how prosecutors often tend to emphasize anarchist ideology over environmentalist motives. The narrative further construes a distinction between “kids” on the one hand and “leaders” on the other. While prosecutions aim to imprison the leaders, they also serve to communicate to the white middle-class “kids” not to go down that path. These labels say something about the role of defendants, their dangerousness, or their disposition to the use of violence, and as such, these labels are invariably contested.
Identity politics in the courtroom challenges liberal criminal law ideology because it tends to become intertwined with political motives and because social identities reference a collective and thus move away from the abstract individual that is the subject of criminal law. Social identities not only assume the existence of a category or group of people but also a continuance of that identity through time. This is contrary to the de-contextualization of specific criminal conduct taken out of and separated from such historical continuities.

**Anarchist identity as dominant**

Subjects always have multiple identities. However, one identity can be chosen as the “relevant” or “dominant” identity. Tilly argues that the government sorts political identities into legitimate/illegitimate and recognized/unrecognized. As prosecutors “separate law and politics,” they often emphasize the anarchist credentials of defendants while downplaying environmental motives. Anarchist ideology, and specifically its call for “direct action,” is then taken to provide the justification for the use of methods that are illegal or violent and thus relevant in the criminal justice arena, while environmental motives are referred back to the political arena and ignored in the context of criminal proceedings. Thus, we can observe prosecutors focusing their attention on the anarchist ideology of defendants.

During the trial of defendant Eric McDavid, the “anarchist” lifestyle of the defendant was discussed at length: the fact that he traveled by hitchhiking, engaged in shoplifting, and

---

163 The focus on anarchism has led anarchists to draft a document specifically from the perspective of the use of conspiracy charges against anarchist groups and individuals (Conspiracy 2011).
attended anarchist conventions organized by the organization CrimethInc. His co-defendant explained how they would panhandle or steal in order to feed themselves. They did train hopping and dumpster diving. It was pointed out that Eric had read the book *Evasion*, in which an anarchist describes her lifestyle (this led a supporter to comment that if such books were suspicious her bookshelves would certainly bring her into trouble as well, Interview US-4). The focus on anarchism is already clear in the affidavit, in which special FBI agent Walker stated that “Eric McDavid, age 28, is an anarchist” (p. 3). The affidavit further described the protest activities that McDavid was involved in and how McDavid was introduced to anarchist thinking by his friend Ryan Lewis, who was later convicted for an ELF arson attempt of a building under construction. The affidavit also described co-defendant Zachary Jenson and the fact that one of his favorite books was *Days of War, Nights of Love* by CrimethInc. “This book contains a chapter-by-chapter description of anarchist values and objectives,” commented the affidavit. During the trial, environmentalism was not ignored, but it did not play a primary role. The focus of the trial was on the alleged violent plans. The message is clear: whereas many groups may be environmentalist, only the dangerous ALF and ELF combine environmentalist ideology with anarchism.

Activists similarly play with identities by representing themselves as the victims of government repression. For example, Scott DeMuth specifically foregrounded his identity as a “PhD student” when he refused to testify before a grand jury about an alleged ALF action at the

---

164 Whereas pages 3–9 of the affidavit are devoted to the background of the defendants, pages 10–13 are devoted to the actual acts that constitute the conspiracy to “use fire or explosives to damage property, in violation of Title 18 U.S.C. §844 (n)” (p. 14).
University of Iowa where he was studying, turning the fact that he was held in contempt into a repression of “academics” and “researchers.”

**Young middle-class kids**

The construction of “eco-terror” as a single phenomenon is supported by the image of a coherent collective of actors with comparable motives and backgrounds.

The image painted of many of the defendants is that they are young, idealist, carried away. The people “down the chain” are manipulated by some ideologues. A certain paternalistic attitude appeared in the interviews with the prosecutors, as they referred to “preventing these kids from doing stuff they later regret” (Interview US-1). The younger eco-activists were often perceived as middle-class kids who somewhere had taken a different turn and should just be brought back to the right path, which given their identity, background, and socio-cultural-economic environment should not be too difficult. They were thus portrayed as well-thinking intelligent individuals, engaged in youthful experimentation. The danger of their actions was seen as being more a consequence of naïveté than of bad nature. One prosecutor viewed young activists as “victims” of the ideology and older “cell” members to which they were attracted (Interview US-1). Given this image of, for example, the SHAC defendants, the prosecutor expressed his hope that the prosecution would discourage others who might be eager to “save the world” and would otherwise be “lulled into” such activity (Interview US-13).
The prosecutor thought that these defendants could engage in activity that “in retrospect” they would not be “happy” with (ibid.).

The intended audience of the prosecutorial narrative in these trials consisted thus of other “kids” who were potentially attracted by websites or books that explain them how to turn their beliefs into action and give their lives meaning. Indeed, in a conversation with one prosecutor it seemed almost as if he was more concerned with those future kids than with victims of the protest activity: “I don’t want to see these people sent to prison for stupid stuff” (Interview US-1). He expressed that the problem is that “the people that I have to prosecute are all babies.” He hoped that one of the public “eco-terror” trials would function as a deterrent to other “kids” who might get swooped away by romantic ideals and the incisive writing of figures like Derrick Jenson. He said that he hoped that this trial would make them think twice before they walk down this dangerous path (Interview US-1).

In my conversation with a younger activist, he expressed what he called a feeling of “invincibility,” admittedly due to the fact that he and his fellow activists were predominantly white and upper middle class. They simply felt that they would not be prosecuted. He commented on an experience he had when he was arrested during a protest. He said that it was the first time that he really realized his privilege. He was the only white person; the others on the police bus were black, female, and transgender. The policemen were genuinely nice to him; they told him that he shouldn’t be doing this stuff. He went to college and he had a bright
future before him. The other people “didn’t have anything going for them.” Then he felt that even if he wanted to be equal to them that would be impossible. He was singled out because of his skin color and his college attendance. The other people did not have jobs and were black. He said that he experienced a feeling of “invincibility” which meant an “absence of fear.” He believed that the Green Scare “crackdown” was supposed to instill such fear in the white middleclass activists that dominated the radical environmentalist protests (Interview US-5).

The righteous attitude of these middleclass “kids” probably made people angry. According to one of the defense lawyers, their disrespectful attitude during home demonstrations absolutely “pissed off” the judge in the SHAC prosecution (Interview US-14). This lawyer also described a scene where Laura Gazzola, one of the SHAC defendants, did a pirouette on the stairs of the courthouse after a day of trial. All the journalists were outside waiting to interview people. She described that people were looking at Gazzola as if she were still in another world, not really understanding that she was on trial for a federal crime, maybe going to jail for a long time. Indeed, a fellow activist commented that she had never thought that she would be caught (Interview US-5).

**Big fish, leaders, and ideologues – members of “criminal” organizations**

In opposition to those who are identified as “babies” or “kids” are the so-called “big fish.” These are the “masterminds,” manipulators or, as one prosecutor said, the “sheep slaughterers” (Interview US-1). He told me that he thinks that the people behind websites and the
“ideologues in the movement” are the real danger and bear the responsibility for the crimes committed. These masterminds, he said, are the authors of inciting books and films, such as Derrick Jensen and Craig Rosebraugh. The prosecutor remarked that it was problematic that those enticing those young and naïve kids into the crimes were not serving any time. He pictured them “behind the screens” and argued that “those people know what they are doing: they are sending the sheep to the slaughter.” As will be discussed below, in the SHAC case the prosecutors specifically decided to go after those higher up in the hierarchy, charging the defendants with a campaign to “enlist” animal rights activists in activity that would harm the business of HLS (SHAC Indictment 2004, #4). The prosecutor in the SHAC case recurs to a war metaphor to describe the relationship between “generals” who are planning and coordinating the actions and “foot soldiers” who are executing them.

In another case the prosecutor accused two organizers of a home demonstration against Huntingdon Life Sciences of “corruption of minors” because two of the demonstrators were under age. A state police agent commented to a local newspaper that “[i]t was indeed a corruption of minors. These kids were led to believe they were doing something in the city and ended up on private property in suburban Chester County” (Nawrocki 2004). Here again, a distinction is made between “kids” who can be manipulated and organizers who are held responsible. The judge later threw the charge out, arguing that the state had failed to prove intent (ibid.).
Sometimes, criminal justice agents describe activists as “leaders.” For example, SHAC activist Andy Stepanian was labeled a “leader of the Animal Liberation Front” when he entered prison (Stepanian 2009). Also, McDavid was positioned as the leader of his “cell,” and therefore as a danger for the others. The prosecutors pictured him as having drawn in the other co-defendants, as a hard-liner who was prepared to do anything for his ideals (Field notes, Trial, September 2007). Also, Jonathan Paul was portrayed as a “leader” in animal rights circles, making it so important that he renounce the use of fire (Flies on the Wall 2007). Such alleged role of “leadership” is relevant because federal sentencing guidelines provide for an “upward departure” in the guidelines if the defendant occupied a leadership role in the planning and execution of the crime (see §3B1.1, “aggravating role”).

“Big fish,” “ideologues,” and “leaders” can only play a role when single events are re-contextualized into a bigger picture. Just like the prosecutorial emphasis on anarchism at the expense of environmentalism, I understand the efforts to distinguish between middle class “kids” on the one hand and long-time “leaders” or “ideologues” on the other hand as one of the tools with which the prosecutorial narrative engages in the process that I call marginalization. The prosecutorial narrative distinguishes between those who actually do not properly “belong” in the criminal justice arena and should be prevented from “crossing the line” and those who should be dealt with in the criminal justice arena and held criminally responsible for the harm that is inflicted.
3. Changing the image: From sabotage and vandalism to “eco-terrorism”

Since the 2000s terrorism enhancements and the AEPA/AETA have been used more and more in trials against environmentalist activists. Underlying this usage is a changing image of environmentalist actions which increasingly stresses their alleged “terroristic” nature. In this section, I trace the usage and meaning of the emerging “terrorism” image in the prosecutorial narrative, identifying the transition of environmentalist actions from “sabotage” and “vandalism” to “eco-terrorism.” The label “terrorism” has become a central topic of dispute in the meta-conflict, and both victim advocates and prisoner supporters work towards establishing the “correct” meaning of actions as well as the boundary between what is terrorism and what is not, employing analogies, metaphors, and examples in order to defend their positions. In tracing the development of the application of the term “eco-terrorism” I look at the example of how releasing animals turned from theft or destruction of property into a terrorist offense. As the word terrorism came to be attached to such cases, it changed the meaning of such conduct while simultaneously the concept “terrorism” received a new connotation as “eco-terrorism” obtained its own more specific meaning vis-à-vis “terrorism.”

The image of eco-terrorism in the prosecutorial narrative

The previous chapter already described the changing definition of the situation by government actors, such as the FBI, and the emergence of the eco-terrorism narrative as pushed by targets of environmental protests. This narrative was also frequently adopted in criminal prosecutions,
guiding prosecutorial arguments and decisions. Thus, during sentencing hearings, prosecutors have drawn on the eco-terrorism narrative to emphasize the fear of the targets of environmentalist actions. For example, in the sentencing memorandum of Coronado in 1995 the prosecutor specifically referred to the fear and intimidation experienced by victims, who were “so afraid of the defendant and others like him” that they would not speak with the court’s pre-sentence investigator unless anonymity was guaranteed. The victims in the prosecutorial narrative are “ordinary citizens” who now live in fear:

Scientists, business owners and farmers around the United States still live in fear that a bomb will be waiting for them the next time they go to their offices, farms or laboratories. The defendant's actions on behalf of the ALF may not have ended scientific research, but they have succeeded in making ordinary citizens of this country afraid to respond the ALF’s claims that there exist no legitimate reasons to use animals in scientific research. (Government Sentencing Memorandum, 31 July 1995, p.19–20)

Environmentalist activists have contested this prosecutorial claim that victims are living in fear, dismissing that fear as a construct. Journalist Will Potter, for example, argued that the eco-terrorism “threat” has been manufactured since the 1980s (Potter 2007).  

---

165 “They [industry groups] are doing everything they can to create this fear through scare-mongering: that’s the point. In light of this political climate, it’s impossible to discuss ‘reasonable fear,’ because industry groups are throwing all their weight into making the unreasonable seem reasonable – into making the public afraid of non-violent activists, so they can push a political agenda” (Potter 2007).
In their construction and justification of the terrorism label, prosecutors have further stressed the danger of the extreme tactics used by environmentalist activists. One prosecutor pointed out that with tactics like arson and bombing it is never possible to guarantee total safety and said that it was a “grace of God that people have not been killed” (Interview US-1).\(^\text{166}\) Just as other U.S. Attorneys and FBI officials, he thus does not credit the precautionary measures of activists, but simple luck (Costanzo 1998). “It was pure luck that no one was killed or injured by their actions,” said the U.S. Attorney from Oregon in the Operation Backfire case (Terrorism Enhancement Hearing 2007:12). Activists and their lawyers dispute this “luck” attribution. “We are all glad no one was hurt. But in our view, that was not luck. That was design” (defense lawyer, Terrorism Enhancement Hearing 2007:80). This contention even led the defense lawyers to bring a witness who had done a statistical study to measure “how likely it was that all of the arsons committed by the ELF and ALF over the course of its history, as tracked by the FBI, have never resulted in a single injury or death” (Terrorism Enhancement Hearing 2007:104). Thus, whereas the activists emphasize that their actions only result in material damage, the prosecutorial narrative proclaims otherwise. The prosecutor argued, for example, in the case against the “cell” known as the “Family”:

> Defendants’ acts spanned five years, five western states, and were wholly intended to intimidate, coerce, frighten, punish, and demoralize people, not buildings. People. People in government, people in business, people in private and public life. Directed at people, not buildings, for the purpose of changing or paying for, in the sense of retaliation, lawful public policy by government and lawful activity by business. This is a classic case of terrorism, despite their proclamation of lofty humane goals. They attempt to soft-pedal their criminal conduct as

\(^{166}\) The strategic use of language to emphasize danger was visible, for example, in the closing arguments against Eric McDavid, when the prosecutor emphasized that the defendant was about to start a “bombing campaign” in California. The term “bombing campaign,” however, contrasts starkly with the term “sabotage,” which was used in the “factual basis for plea” of cooperating co-defendant Zachary Jenson.
somehow admirable because it was aimed at property, not people. They are wrong. It was aimed directly at people. (Terrorism Enhancement Hearing 2007:9–10)

In addition to the emphasis on the fear of victims and the danger of physical injury, the eco-terrorism narrative emphasizes the motive of defendants in order to justify the terrorism label and the application of the terrorism enhancement. While motives are traditionally excluded from the criminal justice arena, the terrorism label brings the motive back, though frequently ignoring the ecological concerns and instead construing the motive narrowly as coercion of the government. Thus, in the case against the Family, the prosecutor used activist communiqués to argue that their motive was to “retaliate against the government for rounding up wild horses and sending them to slaughter,” which then legitimated the application of the terrorism enhancement (Terrorism Enhancement Hearing 2007:29).

The successful application of the terrorism label often leads to increased sentences and more severe prison conditions. Not only can terrorism enhancements result in prison sentences of nearly 20 or 22 years imprisonment (Eric McDavid and Marie Mason, respectively), it also influences the jail time itself. Prisoners are transported under maximum security conditions, and some environmentalist activists have been imprisoned in so-called Communication Management Units (CMU), which are prisons for those whose cases are either very political or media-sensitive. In such special prisons, incoming and outgoing communication is monitored more intensively than in ordinary prisons. All communications are controlled. Prisoners are allowed visits only four hours per month and a fifteen-minute phone call per day (Stepanian 2009). Also, without actual prosecutions or convictions, the threat of being labeled a “terrorist”
can already have an impact. For example, Will Potter reported that after a SHAC-related leafleting action the FBI had threatened to put him on the domestic terrorist list, that he (a journalist) would never work at a newspaper again, and that his girlfriend would lose her scholarships, because “scholarship committees don’t want terrorists as recipients” (2011a:13).

Underlying the meta-conflict about the appropriateness of the terrorism label is the implicit or explicit comparison with other crimes that are deemed to be graver or other criminals who are deemed to be more dangerous than environmentalist activists. Comparisons are a major device in the conversation in which the meaning of terrorism is disputed and boundaries between what is terrorism and what is not are drawn. Activists frequently invoked the fact that anti-abortionists were not labeled “terrorists” even though anti-abortionists engaged in the killing of doctors (Potter 2007). Defense lawyer Lee argued in the Backfire case that

[i]t's about who these defendants are. It's about what the concept of terrorism means in these troubled times, about whether we still know the difference between [...] Osama bin Laden, Timothy McVeigh, and the people sitting in this room who adhered firmly to a credo of not killing and injuring people. (Terrorism Enhancement Hearing 2007:64)

Comparisons with other crimes are employed by all voices in the meta-conflict in order to create a seemingly “objective” scale of graveness and thus infer a “just” label and

---

167 These comparisons occur also in cases in which there are no terrorism charges. Prisoner Tre Arrow provided a long list with other crimes committed in Oregon in order to demonstrate the discrepancy between his sentence (22 years and 8 months for burning three sport utility vehicles) and the lower sentences in other cases (attempted murder, assault, rape) (Luers 2011).
corresponding sentence. During the sentencing hearing of the “Family,” the prosecutor made a comparison with the Ku Klux Klan:

The defendants' argument is there was no injury to human beings, no danger to humans, and therefore, there was no terrorism. If that's the standard, the Ku Klux Klan did not commit terrorism when they traveled in the dark of night, three, four o'clock in the morning, burning black churches in Mississippi. No one was inside the churches, no one was there to be injured. They may not have wanted to injure anybody. They just burned buildings. So according to the defense theory, that's not a terroristic act. (Terrorism Enhancement Hearing 2007:12)

This comparison personally upset the African-American lawyer of McGowan, who perceived the comparison as an insult. In a media interview the lawyer emphasized that the Ku Klux Klan was about murder and that therefore the comparison could not be made so lightly (Stepanian 2009). Indeed, driving home the significance of re-contextualization and the interpretation of events, the creation of patterns, and the use of a broad or narrow timeframe, the defense counsel Lee argued that the fact that the KKK sometimes burnt empty churches cannot be viewed in isolation from the fact that at other times people were killed inside those churches, such as four girls in a Birmingham church (Terrorism Enhancement Hearing 2007:58). However, the prosecutor argued that

[t]hey compare themselves to the wrong people, frankly. They should be comparing themselves to Jack Dowell. [...] Jack Dowell is serving a sentence of 30 years in prison for burning a building,
The emergence of “terrorism” as a label for environmental action

By 2009, the term “eco-terrorism” had become normal currency within the criminal justice system, as it is, for example, used in affidavits written by FBI agents, who refer to eco-terrorism without any additional explanation (e.g., the criminal complaint against Steve Murphy, California 2009). While the concept “eco-terrorism” is new and its systematic and broadened use in criminal investigations and prosecutions a recent phenomenon, the terrorism label in relation to environmental activity has been around in public discourse at least since the 1980s, for example when the tactic of treespiking led opponents to brand it as “terrorism” (Scarce 2006:77). It took a while, however, for such public discourse to be translated into courtroom discourse and measures. For example, even though during the sentencing hearing of Rod Coronado in 1995 his actions were framed as part of a “terrorist” campaign, he pled guilty for common arson, and was sentenced to four years in prison – nothing like the nearly twenty years defendants received ten years later for arson attacks for which the terrorism enhancement was requested.

---

168 While the majority of “terrorism” prosecutions took place during the 2000s, there were also some earlier incidents where activists were investigated because of alleged “terrorist” activities. For example, around 1990 Judi Bari and Darryl Cherney were under investigation for alleged terrorist activity (Scarce 2006:280).
169 “A terrorist combines violence and threats so that those that disagree with him are silenced, either because they have been victimized by violence or because they fear being victimized” (Government Sentencing Memorandum, 31 July 1995, p. 19).
In order to trace the development of the terrorist label in relation to environmentalist activity, it is instructive to take a closer look at one of the documents in which the FBI made a “chronological summary of terrorist incidents in the United States 1980–2005” on an Excel worksheet, including codes describing the “terrorist” action, the (alleged) perpetrators, and whether the action involved killings or injuries. In this document, the FBI qualified as “terrorism” acts committed by a wide variety of groups fighting for an even wider variety of goals, ranging from the Jewish Defense League to the Armenian Secret Army for the Liberation of Armenia, and from the Justice Knights of the Ku Klux Klan to the Red Guerrilla Resistance (FBI 2006). In the 1980s, these different militant organizations seem to have flourished, engaging primarily in bombings or shootings.

The first environmental action listed by the FBI in this document is an act on 14 May 1986 in Phoenix, Arizona, attributed to Earth First!. The FBI coded that action as “sabotage” and noted that nobody got killed or injured (FBI 2006). The second environmental incident qualified as “terrorism” on this FBI list occurred in 1987 in California and was attributed to the ALF. It was the first ALF arson in the United States, and this arson of the veterinary building under construction at the University of California at Davis was investigated by the FBI because of the “terroristic” nature of the attack (Scarce 2006:223).

During the 1980s, a total of seven environmental actions were qualified as “terrorist incidents”: four sabotages, two arsons, and one incident of malicious destruction of property. For the
1990s there are only three actions of “eco-terror” on the list: one incident of malicious destruction of property, one action of fire bombing, and one arson. A surge in environmental “terrorist” actions, however, is visible after 1999. For 1999–2005 the list includes four bombings, seven incidents of malicious destruction of property (a few of them with theft), 24 arsons (some multiple, some attempted), one burglary, one tree-spiking incident, and two incendiary attacks. Thus, while the 1980s and 1990s paint a quiet picture on the environmentalist front as far as the “terrorist” variants are concerned, after 1999 the FBI noted a total of 49 eco-terrorist actions in only seven years.

The FBI chronology requires a little “decoding” to understand what some of the actions were. For example, the charge “vandalism/destruction of property” (such as in Harborcreek in 2002) refers to two actions of mink releases (200 and 50 minks, respectively). The action in West Covina in 2003 (coded as “vandalism and destruction of property”) refers to the destruction of more than 125 SUV’s and Hummers at several car dealerships. “Vandalism” in July 2000 in Rhinelander consisted of the hacking down of experimental trees. As the list only reports acts of “terrorism,” the list is not comprehensive of all eco-protest actions. As mentioned, the Excel worksheet also lists two columns indicating the number of people killed or injured. In some of the other terrorist incidents there were casualties (for example, the bombing of an abortion

---

170 This explicatory information is based on a list of events posted by an “ELF supporter” on the independent media website Indymedia Seattle (ELF supporter 2008). Interestingly, even though the list posted by the activist is considerably longer, some events listed by the FBI are not mentioned by the activist. I have not been able to come across one trustworthy comprehensive overview of the actions attributed to or claimed by environmentalist activists.
clinic by Eric Robert Rudolph led to eight injured). For all the environmentalist actions, both columns are empty.

So, during the 1980s and 1990s “terrorist” actions were attributed only sporadically to environmentalist activists or groups. It is only since 1999 that environmentalist actions have literally taken up the majority of the listed actions.\textsuperscript{171} This raises the important question whether the government “crackdown” perceived as the Green Scare is a simple response to an increase in extreme actions by environmentalist activists, or whether the FBI recognition and “count” of terrorist attacks is an artifact of the Green Scare. An indication of the latter is that since 1999 the FBI started to list as “terrorist incidents” the kinds of actions that in the 1980s and the 1990s did not appear on this list. For example, the mink releases done by Peter Young in 1997 are not listed on the FBI list, while mink releases are in fact listed in later years (such as the mink release in Harborcreek in 2002). This indicates that in 1997 mink releases were not officially considered “terrorism” yet, and therefore did not make it to this FBI list on terrorist incidents.

Indeed, overviews of the extreme environmental protest in the 1980s show that already during that decade bombs were placed and animal releases occurred – actions that were listed as “terrorism” after 1999. Although these incidents might have increased in frequency in later

\textsuperscript{171} Non-environmental actions listed by the FBI after 2000 are only two attacks by anti-abortionist activists, the 9/11 Al Qaeda attack, the anthrax mailings, a shooting involving an Egyptian immigrant, and one arson on behalf of the “Aryan Nations.” The other 47 actions are attributed to the ELF or ALF (and two actions to Daniel Andreas San Diego and one action to “Revenge of the Trees”).
years, the fact that such actions occurred makes it possible to observe that at that time they were labeled differently, as many of these actions do not turn up in the FBI terrorism chronology. Between 1980 and 1987, apart from animal releases, other covert acts consisted of threats and (fire)bombs, arson, paint bombs, or fake bombs, and there were spray painting, gluing of locks, damaging of windows, stealing of research data in a break-in, and some undercover investigations. For example, there was a bomb threat to an animal laboratory veterinarian in Chicago, Illinois, in the fall of 1982. Then on 20 March 1983, a bomb was placed outside the home of a researcher, the bomb was later found by a family member. In 1985, activists hurled an ax into the front door of an animal researcher and left a threatening letter (Guither 1998:221–224). None of these incidents in the early 1980s turn up in the FBI chronology.

Some of the actions in the 1980s also led to considerable damage. For example, on 9 December 1984 at the City of Hope Research Institute in Duarte, California, $500,000 in damage was registered when the ALF organized a break-in, stealing dogs, cats, rabbits, mice, and rats. On 20 April 1985 at the University of California, Riverside, there was an ALF break-in leading to estimated damages of $600,000 for stealing rats, mice, pigeons, monkeys, cats, rabbits, opossum, and gerbils. And on 2 June 1987, a fur store in St. Louis, Missouri, was firebombed, with an alleged one million dollars in damage (Guither 1998:221–224). These incidents do not, however, appear on the FBI chronology. Indeed, the FBI’s notation of environmentalist “terrorism” incidents only starts with the arson in 1987 at the University of California, Davis.
Such discrepancies in labeling continue in the 1990s when, for example, a firebomb in a fur store, reportedly resulting in more than $2 million in damage, does not turn up on the FBI chronology (12 November 1996, Bloomington, Minnesota, Fur Commission 2011c). I thus conclude that since 1999 the FBI categorizes as terrorism a broader range of actions than it had previously.

**Understanding incidents as a common phenomenon: Creating a pattern**

The FBI chronology shows that the actions that are collectively imagined as “eco-terrorism” are attributed to or claimed by different actors or networks, are coded with a wide variety of labels, and occur across the United States, from Arizona, Washington, and California to Illinois, Maryland, and Pennsylvania. Thus, while the range of actions and their geographical spread indicate wide variation, the FBI makes claims about “eco-terror,” thus construing it as a single phenomenon that can be analyzed as a coherent category. Construing this phenomenon, in 2008, the FBI commented on

- The sheer volume of their crimes (over 2,000 since 1979);
- The huge economic impact (losses of more than $110 million since 1979);

---

172 It is also noteworthy that whereas today the FBI mainly portrays the ALF and the ELF as a threat, during the 1980s and 1990s many other organizations were involved in animal releases, such as the Urban Gorillas, Band for Mercy, the Farm Freedom Fighters, True Friends, the Animal Rights Militia, the Justice Department, and the Straight Edge Gang (see, for example, Guither 1998:221–233).

173 Actions are attributed to or claimed by Earth First, the Earth Liberation Front, the Animal Liberation Front, and the Evan Mecham Eco-Terrorist International Conspiracy, in addition to actions which were apparently not claimed but for which “animal rights extremists” were “suspected.”

174 Vandalism, arson, destruction of property, theft, burglary, tree spiking, attempted arson, incendiary attack, malicious destruction, sabotage, bombing, and firebombing.
The wide range of victims (from international corporations to lumber companies to animal testing facilities to genetic research firms);

Their increasingly violent rhetoric and tactics (one recent communiqué sent to a California product testing company said: “You might be able to protect your buildings, but can you protect the homes of every employee?”). (FBI 2008a)

These observations then led the FBI to conclude that eco-terrorists and animal rights extremists are “one of the most serious domestic terrorism threats in the U.S. today” (FBI 2008a). Having established eco-terrorism as a category, the FBI claimed that the economic impact is “huge” and that “over 2,000 crimes since 1979” (on average about 66 per year) is a lot. Such statements only gain meaning in comparison with other categories of crime, but what are meaningful comparisons? For example, there were 15,241 murders in 2009; there were 89,000 incidents of forcible rape and 408,217 incidents of robbery in 2009 (Disaster Center 2011). FBI crime statistics can tell us that in 2006, 2,105 law enforcement agencies reported 7,722 hate crime incidents involving 9,080 offenses (FBI 2006). Does it make sense to compare the phenomenon of environmentalist actions to such categories of crimes in order to compare their volume or economic impact? As illustrated above, the very issue of adequate comparisons and analogies is a topic of debate in the meta-conflict.

The coining of the term “eco-terrorism” has led to the perception of a “pattern” and a relation between single “events.” By bringing a set of actions under one term, different actors, targets, motivations, and tactics are brought into relation with one another. The impact of such
classification is the creation of a specific category of crimes that can be counted, understood as a pattern, and to which specific motives or a modus operandi can be attributed. Thus, having classified specific events as “eco-terrorism,” in 2008 the FBI reported that “[o]ur efforts have paid off,” as it claimed that the investigations regarding “eco-terror” since 2005 had resulted in indictments against thirty individuals (FBI 2008a). These thirty individuals, who may be charged with separate and different crimes, are thus understood as belonging together in a meaningful category. This common phenomenon was also invoked, for example, when a prosecutor referred to the first ALF arson at the University of California at Davis in 1987 as a “proto-arson” and Jonathan Paul as a “proto-arsonist,” as this attack supposedly encouraged others to engage in arson (Flies on the Wall 2007).

Thus, the FBI and prosecutors create a narrative that connects actions of environmentalist and animal rights activists into a pattern. This narrative is reproduced in courtrooms. For example, during the sentencing hearing against William Viehl, who had released mink in Utah, the prosecutor showed a slideshow that displayed images from arsons attributed to or claimed by the ALF, as well as communiqués for actions of which Viehl was not accused (Young 2010). This prosecutorial strategy was also employed in Chile, where in the trial against the “Lonkos of Traiguén” victims from a wide range of attacks were called upon to testify about their experiences, even though those attacks were not attributed to the defendants. This is a typical example of how prosecutors draw upon and enact re-contextualized narratives in concrete decisions such as their choice for witnesses and other evidence. While the prosecutor charged
the defendant for a single event (alleging direct involvement and criminal responsibility for that incident), the prosecutor re-contextualized that event in a pattern of ALF actions, implying that only in that context the jury and judge could achieve proper understanding and interpretation of the meaning of the case. Activists dispute this way in which the terrorism label is used to reinforce a pattern and a connection between separate events. They, in turn, have taken this linguistic and representational battle into the courtroom. For example, the defense lawyer of Scott DeMuth filed a motion to bar the prosecutor from talking about other ALF actions (which would reinforce the “pattern”) and using the words “terrorism” or “terrorist” to describe the actions DeMuth was charged with (Supportcarrie 2010).175

The creation of a pattern was at the core of the case against the “cell” called the “Family,” also known as the Operation Backfire case. Seventeen defendants were implicated in seventeen attacks, including the $12 million arson of the Vail Ski Resort in Vail, Colorado, in 1998 and the sabotage of a high-tension power line near Bend, Oregon, in 1999. The defendants were accused of attacks on federal land and animal management sites, private meat packing plants, lumber facilities, and a car dealership with damages reaching $80 million. The exact conspiracy as in the indictment of the “Family” was as follows:

175 DeMuth was initially indicted for conspiracy under the AETA for the 2004 raid on the University of Iowa, which was attributed to the ALF even though, according to his supporters, the prosecutors did not present much evidence that would connect him to that event. In April 2010 DeMuth was re-indicted and the new indictment contained a new allegation, this one of involvement in a different ALF action (a ferret release at a farm that occurred in Minnesota in the spring of 2006). His supporters commented that “though the prosecutor seemed poised to make an argument connecting all ALF actions across the years and across the country under a single conspiracy, there appears to have been no real connection between the two actions” (Scott DeMuth 2011b).
The general purposes of the conspiracy were to influence and affect the conduct of government, commerce, private business, and others in the civilian population, by means of force, violence, sabotage, mass destruction, intimidation, and coercion, and, by similar means, to retaliate against the conduct of government, commerce, and private business. To achieve these purposes, the conspirators committed and attempted to commit acts dangerous to human life and property that constituted violations of the criminal laws of the United States and of individual states. (Terrorism Enhancement Hearing 2007:9)

Significant and reminiscent of the Kale Borroka allegations in Chapter 3, is that not all defendants in this case were accused of participating in all of the crimes that were allegedly committed as part of the conspiracy. They allegedly committed the crimes in changing combinations of participation. In most of the suspected crimes three or four of the defendants were involved, “family members” as the prosecutor called them. The government chose not to prosecute the defendants for the separate crimes in the concrete constellations in which they allegedly had committed the various acts. Instead, the members of the “cell” were prosecuted for the conspiracy to commit those various crimes, a clear move of re-contextualization of each of the separate incidents into a larger pattern, involving a larger group of co-conspirators, a larger collective of targets and victims, and a specific shared motive. At the same time, and stressing their adherence to the core values of liberal legalism, both the prosecutor and the judge in this case emphasized that the sentencing of the defendants would be “individualized.”
The creation of the common phenomenon of “eco-terrorism” thus involves the construction of a pattern between separate incidents, the creation of a collective of perpetrators with certain traits or linkages with specific organizations, the creation of a collective of victims, and the attribution of a motive. This then enables the prosecution of a “cell” such as “the Family.”

**Releasing animals: From theft or destruction of property to terrorism**

As an example of the changing label regarding environmentalist tactics, in this section I show two things. First, I show that the prosecutorial narrative about the release of animals has changed from “theft” or “destruction of property” to (animal enterprise) “terrorism.” Of course, the development of the AEPA and later the AETA form a central part of this transformation. I further show how society is polarized between voices that view the release of animals as the “liberation” of “victims” that are held in dire conditions and maltreated on the one hand and voices that view such releases of animals as an attack on legitimate animal enterprises that provide society with the necessary production of food and clothes on the other hand. These voices enter into the meta-conflict in the criminal justice arena as they promote or dispute the charges leveled by the state.

The first act of “animal liberation” occurred in March 1979, when activists broke into a lab of the New York University Medical Center in the name of the Animal Liberation front, “liberating” two dogs, two guinea pigs, and a cat (Jasper & Nelkin 1992:33; ALF 2011b). After years of such actions, labs are now built and designed with the knowledge in mind that there are people who
might want to enter them for “animal liberation” purposes. Research laboratories using animals have come to be equipped with security cameras and other surveillance and security measures. In the early 1980s this was not the case yet (Scarce 2006:215). Since then, raids have been conducted at fur farms, laboratories, and factory farms.

During the 1980s, the FBI did not label such “animal liberations” as terrorism. For example, on 26 October 1986, activists released 264 animals from the University of Oregon and inflicted $120,000 worth of damage on the laboratory (ALF 2011b). This incident did not make it onto the FBI’s “chronology of terrorist incidents” (FBI 2006). One of the “big fish” in animal liberation, Jonathan Paul, was prosecuted for this “burglary”; however, the charges were dismissed on 1 May 1991 (Flies on the Wall 2007). By 2009, however, the release of animals had been transformed into a terrorist offense. In that year, two activists were convicted to 21 and 24 months under the Animal Enterprise Terrorist Act for the release of 650 mink from a fur farm in Utah in August 2008 (“AETA 2 case”), the first time that the AETA led to prison sentences (Young 2010).

The Fur Commission claims to have played an important role in redefining the nature of such actions of releasing animals. Peter Young raided six mink farms in the American Midwest in 1997. He released between 8,000 and 12,000 mink, and two fur farms went out of business. Fur farmers reported that “1997 was a dark time for U.S. fur farmers as eco-terrorists struck

---

176 During his later sentencing hearing on 5 June 2007 in Operation Backfire, this action was described as the “theft of animals.”
repeatedly” and lamented the lack of government attention to their plight (Fur Commission 2009). Teresa Platt, director of the Fur Commission, an association representing mink-farming families, described how they proceeded to “engag[e] political will” (Platt 1999a). In 1998, on a tour in Europe, Director of the Federal Bureau of Investigations (FBI) Louis Freeh said that “[e]co- and animal rights terrorism [...] was not an issue, not a priority and not on the agency’s ‘radar screen.’” The fur farmers were outraged by this lack of serious attention to the raids they experienced. Therefore, they allied with many other “animal- and resource-based industries” and engaged FBI agents in what they called a “bottom-up educational process” to achieve the “redirection of FBI manpower to include eco- and animal rights terrorism” and “push eco- and animal rights terrorism up the government’s priority pole.” They prided themselves on the fact that these efforts have resulted in a strong commitment from the FBI (Platt 1999a).

In this meta-conflict about the adequate definition of the release of animals, different voices rely on different understandings of animals and their relation to human beings. Viewing animals as property enables a charge like “property destruction.” Deliberately employing criminal law language, animal rights activists claim that meat or fur is the same as “murder.” They describe animal enterprises as “torture facilities” and “hell.” Teresa Platt from the Fur Commission, on the other hand, described “animal enterprises” as “those who feed, clothe and shelter the Earth's inhabitants” (Platt 1999a). In a press release, the Fur Commission emphasized the “vital role we play in helping clothe this planet’s 6 billion people, with a product that is not only
practical and beautiful, but is also natural, sustainable and environment-friendly” (Fur Commission 1998).

In this section I traced the development of the concept “eco-terrorism” and its increasing application in cases of environmentalist action. This changing image of various forms of environmentalist activism means that there are concrete discursive shifts in the prosecutorial narrative. In the following sections I will identify two important discursive shifts which are a consequence of the re-contextualization of events into a pattern of “eco-terrorism.” First, I explore the move from reactive prosecution of past harm to the proactive investigation of potential future danger. Second, I explore the shift from the prosecution of underground (covert) activities towards the prosecution of aboveground activities, which activists often had deemed to be legal.

4. Future danger instead of past harm: The shift towards proactive prosecution

The prosecutorial narrative has shifted from a reactive focus on past harm to a proactive approach to deal with future danger. Indeed, in 2004 the FBI publicly announced its commitment to a proactive approach. Proactive investigations occur before a criminal event has occurred and to a great extent these investigations are focused on specific individuals, organizations, or places, not on specific criminal conduct. Activists and also critical lawyers have
criticized the investment of time and resources in such proactive investigations. For example, lawyer Amanda Lee argued that “FBI domestic terrorism investigations [...] are frequently out of proportion to the danger of the crime involved” (Bloom 2011). The proactive shift is visible in conspiracy charges designed to punish preparatory activities before a planned crime has taken place. It is further observable in the use of undercover FBI agents who monitor activists and meetings, a practice which has initiated a debate about the precise nature of such undercover activity and even raised the question of when it amounts to entrapment. The shift is lastly expressed in an increasing preoccupation with perceived processes of radicalization.

There is no clear turning point in which proactive investigations became more common. However, throughout the years, and especially with the increased talk about “eco-terrorism,” proactive involvement of the FBI has become more institutionalized and frequent. In 2004, Deputy Assistant Director of the Counterterrorism Division of the FBI John E. Lewis announced the proactive approach of the FBI regarding the “threat posed by animal rights extremists and eco-terrorists in this country”:

The FBI’s commitment to address the threat can be seen in the proactive approach that we have taken regarding the dissemination of information. Intelligence Information Reports (IIRs) are used as a vehicle for delivering FBI intelligence information to members of the Intelligence, Policy and Law Enforcement Communities. (Lewis 2004, emphasis by author)
Lewis described that since March 2003, the FBI had established a Domestic Collection, Evaluation, and Dissemination Unit which in one year issued twenty Intelligence Information Reports related to animals rights/eco-terrorism activity. These reports are part of the FBI’s “proactive information campaign”:

This campaign has included ongoing liaison with federal, state, and local law enforcement and prosecutors, relevant trade associations and targeted companies and industries. The FBI has established a National Task Force and Intelligence Center at FBIHQ to coordinate this information campaign, and develop and implement a nationwide, strategic investigative approach to addressing the animal rights/eco-terrorism threat in the United States. (Statement before the Senate Judiciary Committee, 18 May 2004)

The proactive approach was visible, for example, in the early intervention and the conspiracy charge in the case of Eric McDavid. His case was taken to trial before the allegedly planned arson had taken place. Thus, the defendant was charged with conspiracy. In his closing arguments, the prosecutor emphasized that the defendant was about to start a “bombing campaign” in California. Justifying the proactive approach, the prosecutor sketched the dilemma the FBI faces:

But does the FBI make the risk assessment at that point that, well, these people, they are talking about the White House, and they are talking about the Pentagon, and they are talking about the World Trade Center, but they haven't decided on which one they are going to go after, so I guess
we don't have a conspiracy. That's not what the conspiracy law requires. [...] We don't have to wait until the conspirators are crawling under the fence with bomb in hand or taking any closer steps, lighting the match. We just have to make sure we have a fully-formed conspiracy. (Closing arguments, 25 September 2007)

The trial was a “conspiracy trial,” which meant in the words of supporters that the defendant “hadn’t done anything.” The prosecutor disagreed: “What if they had met a real chemistry student?” (FBI informant “Anna” had presented herself as a chemistry student). “There were no signs of them calling the mission off. At what point do you intervene?” (Interview US-1). Recall that a conspiracy consists of the following elements: (1) agreement to commit a crime; (2) overt act in execution of that agreement. A big chunk of the trial against McDavid was devoted to detailing the overt acts that the “kids” undertook in executing their plans. The prosecutor forcefully argued his case that these “kids” were playing a dangerous game. Activists, on the other hand, have pointed out that the recipe the FBI had provided them with was wrong, and that “Anna” did not have a small role in the group dynamic that led to their experimentations in the first place. Journalist Will Potter said that “[t]he guy didn’t do anything, [...] At the worst, he hung around with a group of people who talked tough. In court, Anna actually complained that the group spent too much time hanging around and smoking pot” (Bloom 2011).

Such prosecutions have led activists to warn fellow activists of conspiracy charges:
Conspiracy charges are convenient for police and federal agents in that they do not require authorities to prove that any actual illegal activity took place, only shared intent. In that regard, they are an ideal weapon to wield against ideologically-based communities; they also lend themselves to government agents’ efforts to entrap naïve activists. (Conspiracy 2011)

In addition to conspiracy charges and such early intervention, the proactive approach to “eco-terrorism” is further characterized by the use of undercover agents. This is not new in relation to environmentalist protests. Already in the 1980s, the FBI focused its energy on the surveillance of “radical” environmentalist groups. Earth First!, for example, was infiltrated and spied upon almost from its founding in 1980 (Scarce 2006:280). While FBI informants are thus not a unique feature of the 2000s, they are an important characteristic of the proactive approach. Given the importance of these undercover investigations in providing evidence, it is not surprising that in the trial against Rod Coronado in 2007 the prosecutor proposed the following question in the voir dire:

> In order to investigate suspected criminal activity, law enforcement agents sometimes go undercover and pretend to be someone they are not. Does anyone have strong feelings, for or against, the use of undercover agents? Would your views prevent you from being fair and impartial in this case? (Government’s Trial Memorandum, 5 September 2007, p. 11)

---

177 This information emerged in the trial against the FBI initiated by Judi Bari and Darryl Cherney for false accusations against them in 1990 after their car exploded. Also, in 1989, FBI undercover agent Mark Fain played a crucial role in a “cell” of Earth First! in the case of the “Arizona Five” (Scarce 2006:85–86). Scarce reported that after raids in May 1989 every Earth First! member believed that the FBI was tapping his or her phone (Scarce 2006:86).
Activists have criticized this reliance on such undercover agents, claiming that FBI infiltrators act as “agents provocateurs.” As mentioned in Chapter 6, in the case of Eric McDavid activists claimed that the prosecution was invalid because of “entrapment.” The defense argued that if McDavid was radicalizing, this was only under the influence of Anna, with whom he was deeply in love. The defense lawyer argued that without “Anna” there would have been no conspiracy, no get-together in California to start preparing a bomb, and no action in order to make it happen. A major question during the trial, therefore, was whether or not the defendants would have gone along with their plans if it had not been for “Anna.” While activists called this trial a prosecution of “thought crime” and “Orwellian” (Interview US-16; Support Eric 2011b), the prosecutor argued during the closing arguments that the purpose of the entrapment defense is to protect the unwary innocent, not the unwary criminal. Merely providing an opportunity is not entrapment (Interview US-1). The prosecutor emphasized in his closing arguments:

And, yes, it's true that Anna did some things at the FBI direction to facilitate that meeting. [...] All the FBI did was bring these four co-conspirators together in one location to find out if they were serious about what Eric McDavid had talked about. [...] if they had gotten together that

---

178 The prosecutor disagreed: “The crime is the agreement. It doesn't have to be successful. [The defense lawyer] tries to show that they could never have succeeded. We know that they would not have succeeded. The FBI would never have let them succeed. It was important to know whether they were serious about this” (Interview US-1).

179 This means that once the defense raised this defense, the prosecution had to prove that (1) there was no inducement by the government, or, if that could not be proven, that (2) the defendant had a predisposition to commit the crime that was the subject of the conspiracy.

180 “To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.” (trial transcripts McDavid, Day 8, 25 September 2007, p. 1267)
weekend, and if they had gone hiking, and there had been no discussion of any conspiracy or any bombing campaign, game over. [...] But that's not what happened. And fortunately, you have that on tape. (25 September 2007).

The case of McDavid also exemplifies the third feature of the shift towards proactive investigation, which is the change in the object of investigation from past crimes to current processes of radicalization. Confidential source Anna was deployed initially with a focus on (anarchist) gatherings, spaces, and events where it was suspected that crimes might occur or be prepared. “Anna” met McDavid during protests and an anarchist convention in Des Moines and it was his observed radicalization (after “Anna” had initially described him as “harmless”) that led the FBI to provide opportunities to see how “serious” he was. This concern with radicalization was also visible in the proposed “Violent Radicalization and Homegrown Terrorism Prevention Act” of 2007. This law proposed to establish a national commission that would

[e]xamine and report upon the facts and causes of violent radicalization, homegrown terrorism, and ideologically based violence in the United States, including United States connections to non-United States persons and networks, violent radicalization, homegrown terrorism, and ideologically based violence in prison, individual or “lone wolf” violent radicalization, homegrown terrorism, and ideologically based violence, and other faces of the phenomena of violent radicalization, homegrown terrorism, and ideologically based violence that the Commission considers important.
This draft law illustrates this shift in attention to radicalization processes. The proposed law provoked much criticism from activists and was never enacted.

Having explored this shift in the prosecutorial narrative from a focus on past harm to the investigation of current radicalization or future crime, in the next section I explore instances of another discursive shift in the re-contextualized prosecutorial narrative: the shift towards the prosecution of certain aboveground activities.

5. Prosecution of “aboveground” activities: Distinguishing the “political” from the “criminal”

The prosecutorial narrative draws the boundary between the political and the criminal. In interviews with activists, they often expressed that indeed there are certain acts that are “unambiguously illegal,” such as the release of animals. However, they maintained that in other criminal cases “people hadn’t done anything” or that their “legal actions” were charged as crimes. Covert activity is often generally understood to be criminal (undercover investigations being an important exception). Aboveground activity, however, is generally far from “unambiguously illegal” and its prosecution can lead to severe contestation.
In this section, I describe competing voices in the meta-conflict and how the prosecutorial narrative draws a line between aboveground activities that are the proper domain of the political arena and aboveground activities that “cross the line” and should be considered to be criminal. First I discuss the prosecution of certain aboveground activities which were not prosecuted before, and which activists had considered to be legal (and still argue that they should be). Here I focus on cases of public speech in which the prosecutorial narrative re-contextualizes these speech acts in order to connect them to covert criminal activity. In this way, criminal responsibility is established, holding aboveground activists responsible for (directing and inciting) underground actions. In the second part, I explore the process of boundary drawing between what is criminal and political in aboveground activity in a case of civil disobedience. The conduct was clearly illegal, but DeChristopher and his supporters claimed to be justified in resorting to the actions given specific special circumstances. In this case, the prosecutorial narrative purposefully excluded context in order to de-politicize the offense.

Each of the cases discussed in this section have created social mobilization outside of the courtroom, stirring up emotions and turning the names of some of the defendants into metaphors for those debates. The themes resonated with a larger public, seen in the fact that many voices have taken up positions and thoughts, thus engaging in the meta-conflict, debating right and wrong, legitimate and illegitimate, and the boundary between the political and the criminal.
Public expressions as inciting or directing criminal activity

Generally, extremist groups engage in much activity that is protected by constitutional guarantees of free speech and assembly. Law enforcement only becomes involved when the volatile talk of these groups transgresses into unlawful action. (Lewis 2004)

In this section, I explore the way in which the prosecutorial narrative describes this “transgression into unlawful action” in relation to public speech. I explore the criminal prosecution of two specific kinds of speech: (1) publishing addresses of potential “targets”; and (2) providing information about incendiary devices or other “weapons.” In both of these cases, the prosecutorial narrative links these public expressions to illegal underground activity and the speech is construed as incitement or inspiration for such activity. This involves a re-contextualization of the speech acts to create a pattern and a causal link.

Publishing addresses of potential targets

In 1996 some activists for the ALF produced the first hardcopy publication of “The Final Nail,” which was a list of targets for animal “liberation” activities, including laboratory animal suppliers, trappings, slaughter houses, and fur farmers. Young openly emphasized the power of information in an interview in the activist journal No Compromise:
What I believe would see the greatest surge of direct action is providing people with more names and addresses. This is what made The Final Nail so successful in the 90s, and it’s what has made the anti-HLS campaign so successful today. It is something that would make animal abuse no longer an abstraction but something with an exact physical location, erasing most people’s excuse for turning away. Knowledge bears responsibility. I would like to see a Final Nail for labs. This, I think, would really set things off. (Young 2005b)

Law enforcement officials have long been aware of such documents and how they facilitate, for example, mink farm raids (Justin Grand Jury Transcripts 2000). A prosecutor called “The Final Nail” the “Bible” for animal rights extremists (Cascadia 2007).

Victim advocates have engaged in serious efforts to label such “hit lists” as incitement. Already in 1999, Teresa Platt from the Fur Commission spoke out against this tactic of making “hit lists.” She referred to a decision in another case in which similar hit lists for abortion doctors were put on the web. In February 1991, a jury in Portland, Oregon, ruled that materials produced by the defendants constituted a “true threat” to the lives and safety of abortion providers (Platt 1999b). While the American Farm Bureau Foundation initiated a civil lawsuit to stop the government from releasing private information from farmers, at the time no criminal prosecutions were initiated against the authors of “The Final Nail.” In 2002 the Fur Commission pointed out that “terrorists” had used the addresses in “The Final Nail” to coordinate raids and send razor blades and other threats to fur farms. They also asserted that the Unabomber used the addresses to select some of his targets (Fur Commission 2002). Again in 2009 they criticized
such publications and argued that Young “set up Voice of the Voiceless to disseminate hit lists for use by violent vegan extremists and help raise money for those caught breaking the law. It is a matter of opinion whether his rhetoric should be viewed as ‘educational’ or incitement” (2009).

In 2004 the government indicted six SHAC activists who kept a website on which they published the addresses of employees of Huntingdon Life Sciences and the home addresses of CEOs and employees from companies doing business with HLS. The case exemplifies the shift towards aboveground activity, as the prosecutors in that case deliberately shifted their attention from what one of the prosecutors called the “foot soldiers” who engaged in acts of vandalism that were experienced as threatening, terrorizing, and stalking. Instead, the prosecutors decided to focus on the “generals” who allegedly coordinated and incited such protest by publishing addresses on the Internet and calling upon people to demonstrate. The SHAC activists were convicted in 2006, and their sentences were confirmed on appeal in 2009. I will explore this case in much more detail in the next section as an example of the various discursive shifts in the re-contextualized prosecutorial narrative.

Despite the SHAC prosecution and the possible implications for the redefinition of such activity as criminal, activists have continued to publish names and addresses of potential targets. In 2009 Peter Young made a compilation of all the information about fur farms in the United States (Young 2011b). “The Final Nail” is now also available on the web. Adding voice to the
boundary-drawing, the site has a disclaimer stating that “[a]ny names and addresses on FinalNail.com are published solely for educational, research or other lawful purposes. We do not encourage illegal activity or behavior” (Final Nail 2011).

There have been more attempts by prosecutors to draw the publishing of addresses within the criminal justice arena. For example, in 2009 Kevin Olliff and ALF Press Officer Linda Greene were indicted for conspiracy to stalk and threaten a public officer or school employee. As the first of the overt acts, the prosecutor listed that

unnamed and/or unidentified co-conspirators listed University of California at Los Angeles (UCLA) Professor Lynn Fairbanks as the “target” on the uclaprimatefreedom.com website, publishing her photograph, date of birth, personal contact information and a statement about her alleged animal experimentation at UCLA. (Indictment 2009)

Instead of directly defining such activity as criminal, the prosecutorial narrative thus brought the publishing of information about a “target” under the purview of criminal conduct as an “overt act” in a conspiracy. It is significant that this overt act was, however, not even executed by the defendants, but by unnamed or unidentified co-conspirators.

*Providing information about incendiary devices or other “weapons”*

The publishing of addresses as “targets” has thus become a contentious practice which has been translated as criminal in some instances but not all. Another contested aboveground
activity is the publication or public explanation of aggressive tactics and the manufacture of potential weapons.

Already in the 1980s and 1990s, activists engaged in the publishing of aggressive protest tactics. For example, in the 1980s Earth First! published a journal with a column on “eco-tactics” that were “unconventional,” including, for example, suggestions on how to destroy a helicopter (Scarce 2006:74). Earth First! founder Foreman published Ecodefense, which Scarce compares to the Anarchist Cookbook, including instructions for manufacturing explosives. As far as I am aware, the authors were never prosecuted for these publications.

In 2006, however, a criminal case brought such speech acts into the criminal justice arena. In February 2006, Rod Coronado was indicted for a speaking engagement on 1 August 2003, where he allegedly did “teach and demonstrate the making and use of a destructive device [...] with the intent that the teaching, demonstration and information be used for, and in furtherance of, an activity that constitutes a federal crime of violence, to wit, arson” (Indictment 2006).

The government described the facts of the case as follows:

On August 1, 2003, Defendant Rodney Coronado gave a lecture and demonstration a few hours after and a few miles away from the most expensive politically motivated arson in the history of the United States. During the lecture, he demonstrated to the audience how to build an
The government argued that Coronado had the intention that listeners would commit arson. In order to back this argument, the government specifically referred to one incident of arson that occurred on 1 August, fifteen hours before Coronado’s speaking engagement. This arson destroyed a 200-unit condominium complex in San Diego. The government pointed out that when Coronado was introduced as a speaker, a local activist reminded the audience that Coronado’s speech was particularly timely because the “Earth Liberation Front paid San Diego a visit last night.” The prosecutor also emphasized that in his speech Coronado spoke approvingly of the San Diego arson and that he talked about fire as a “cleansing force” (Government’s Trial Memorandum 2007:5).

The U.S. Attorney’s press release in 2006 immediately re-contextualized the event, connecting the speech to the ALF and the ELF, and thus imbued it with the meaning that eco-terrorist cases have received over the years. Special Agent Torres from the Bureau of Alcohol, Tobacco, Firearms, and Explosives commented: “When organizations such as ELF/ALF engage in these senseless acts of violence, it threatens us all. ATF will continue to aggressively pursue these types of cases and bring this type of criminal activity to a halt” (emphasis added by author). This citation employs the narrative device of target-generalization, as he emphasizes that “it threatens us all” in combination with the reference to an assumed special and coherent
category of crimes (“this type of”). In calling the acts of violence “senseless,” he rejects and refuses to recognize proposed political motives as valid.

Different narratives exist about what exactly happened during this speaking engagement. Prosecutors argued that the explanation of the incendiary device followed the concrete question of an unidentified woman who had asked how she could make a “bomb for an action” (Government’s Trial Memorandum 2007:6). Coronado disputed this and described that he was simply asked “what he had done in Michigan” (Defendant’s Memorandum, 24 March 2006), a statement that was supported by an audiotape presented by defense lawyer Tony Serra during the trial.

The very fact, however, that the narratives dispute what exactly provoked Coronado to explain the “device” shows the fine line that currently separates the political arena from the criminal justice arena. In this way the prosecutorial narrative communicates that there is such a line and that in some cases the line is crossed. The jury instructions framed the issue as a line between free speech and incitement, stating that while the Constitution does guarantee the freedom of speech, it “does not protect speech or advocacy that is directed to solicit or produce imminent lawless action and is likely to incite or produce such action” (Jury Instructions 2007, No. 11). The prosecutorial narrative thus emphasizes the limits of free speech, for example when Special Agent Dzwilewski commented that “America will not tolerate terrorists. Whether you were born here or abroad, we will not stand back and allow you to terrorize our communities under
the guise of *free speech*” (U.S. Attorney California 2006, emphasis added by author). The recurring theme is that activists are suspected to manipulate the law for their own purposes and abuse the rights they have.

While activists believe that the government specifically targeted Coronado because he has been an important figure in the animal rights movement and declined to testify before a grand jury in another case, they clearly interpreted the prosecution as a message that the government is prepared to prosecute speech acts. The initial trial resulted in a hung jury. The prosecutor decided to re-try Coronado and seek an additional indictment in Washington, D.C., for a speech Coronado had delivered at the American University in January 2003. In the ensuing negotiations, Coronado decided to plead guilty in return for a one-year prison sentence.

**Civil disobedience**

In this section I continue to explore the way in which prosecutors draw the boundary between what is political and what is criminal in relation to aboveground activity. Above I explored the meta-conflict and the prosecutorial narrative regarding conduct which was not prosecuted before and which activists assumed to be legal and protected by free speech. Here I explore the prosecutorial narrative about conduct that is clearly illegal, but which activists have claimed as legitimate civil disobedience (defined as overt and nonviolent law breaking) given the special

---

181 In September 2005 Coronado had been invited to testify before a grand jury that had been convened regarding the San Diego arson. He declined. According to the defense this is the reason why Coronado was indicted for his speech more than two years after the fact. Activists emphasized that a year before the trial Coronado had renounced violence and arson as adequate methods for the struggle (Rosenfeld 2010).
circumstances. I thus explore the competing claims about civil disobedience and its potential to confer legitimacy to law-breaking.

Tree sits and other kinds of public blockades have been a common protest tactic since the early 1980s. Some environmentalist activists have argued that such tactics used to be more accepted and did not lead to harsh criminal prosecutions (Interview US-16). Few people were arrested or prosecuted for such protest. This may indicate that prosecutors accepted assertions that such actions were indeed civil disobedience. If activists were prosecuted, it seems that the convictions did not result in long sentences. Indeed, different sources report that if there were arrests for overt protest activity (such as the occupation of an office) this mostly led to the charge of trespassing (Guither 1998:221–233). In contrast, recently there has been a case where prosecutors specifically rejected the notion that tactics could be considered “civil disobedience” and prosecuted accordingly, rejecting the claims to “political” activity, explicitly arguing the “criminal” nature of the tactics.

---

182 I have not been able to find much data regarding such prosecutions. That is why I tentatively concluded that there were not major or harsh prosecutions, or that at least they did not result in long sentences. Scarce mentions some of the arrests and convictions during the 1980s. In 1983, 44 Earth First! activists were arrested for “peacefully blockading the Bald Mountain Road” in North Kalmiopsis (2006:68). In 1987 the Sapphire Six spent 15–20 days in jail for locking their bodies to a truck. In 1988 Mike Roselle was prosecuted for an action with Greenpeace for hanging banners. He pled guilty and got four months, with three on suspension; however, in the end he had to stay in jail the other three as well. Scarce described tree sits in 1989 where only three tree sitters were arrested who had turned themselves in to the authorities (2006:183). This was in Montana. It was during the National Tree Sit Week. Darryl Cherney of Earth First! spent ten days in jail for sitting in a tree that belonged to a lumber company.
The case against Tim DeChristopher: Classic de-contextualization

On 19 December 2008, Tim DeChristopher participated as a bidder in an auction and increased the bids on 22,000 acres of land in Utah national parks. In addition, he acquired parcels worth $1.7 million for an action claimed by himself and his supporters as a nonviolent act of civil disobedience. He was charged with “two violations of federal law in connection with a scheme to interfere with the competitive bidding process during the sale of Bureau of Land Management oil and gas leases in Utah in December 2008” (U.S. Attorney District of Utah 2011). After his arrest, DeChristopher actually raised money for a first payment that he owed the Bureau of Land Management (BLM) for the parcels that he bought during the auction. The payment was rejected by the BLM, however, as it was “too little, too late” (Riccardi 2009). In March 2011, a jury found him guilty on both charges. On 26 July 2011, Tim DeChristopher was sentenced to two years in prison, a three-year probation, and a $10,000 fine. DeChristopher announced that he would appeal his conviction and sentence. Online commentaries publicly hailed him as a “hero.”

In the competing narratives that vied for dominance in this trial, disagreement was expressed at different levels. First, the contestation revolved around the question of the harm that had been done or prevented, including the question of which “public” was either served by

---

183 The failure to pay was clearly not the reason for the prosecution. The defense wanted to argue that the initiation of these criminal proceedings was politically motivated, claiming that in at least twenty-five other cases where bidders failed to pay, no prosecution was initiated. This defense was excluded from the trial (van der Zee 2011).

184 See, for example, some of the comments filed under his official sentencing statement, which is reproduced on the Peaceful Uprising website.
DeChristopher’s action or needed to be protected from such “criminal” acts. Second, the
different voices disputed the role of criminal proceedings in maintaining the rule of law and,
alternatively, the role of acts of law breaking (civil disobedience) in demanding the rule of law
and holding the government accountable to its own laws.

In the sentencing recommendations, the prosecutor described the seriousness of the offense
and the particular harm that was inflicted, specifically reproducing the value assumption of the
hegemonic discourse by emphasizing corporate financial losses:

The defendant derailed the oil and gas lease auction in one afternoon. The auction was the
culmination of months, if not years of BLM and other agency preparation. Of course, that work
was funded by United States taxpayers. Investors and businesses, too, expended considerable
resources in preparation for and participation in the auction. The various money loss
calculations probably give only symbolic illustrations of the seriousness of the defendant’s
crimes, whether those losses are for the $139,000 cost of the auction, the $1.8 million price of
the successful fake bids, or the $600,000 estimated loss by one businessman at the auction.
Nonetheless, they are all accurate examples of how the defendant’s conduct greatly impacted
others. (Prosecution sentencing recommendations 2011)

The prosecutorial narrative thus produces a harm assessment with references to corporate loss
calculations, taxpayers as a legitimate beneficiary, and the price of the parcels. This narrative is
supported by an oil executive who stated that parcels on which DeChristopher did not bid went
for an average of $12 per acre, whereas those on which he did bid averaged $125. Challenging
that narrative on its own ground, DeChristopher pointed out that as companies were still willing
to pay that price, that price far more resembled the real worth, and that paying anything less
would be “stealing” from the public. In addition, DeChristopher pointed out that this money
was paid to the Bureau of Land Management, a government agency, thus directly benefiting the taxpaying public that the prosecutor claimed to protect in the prosecution.

DeChristopher, however, did not only challenge the prosecutorial narrative on its own terms, but also wanted to shift the terms of the debate. The question of what harm was at stake would have been addressed publicly if the defense lawyers had been able to use the “necessity” defense (claiming that his actions prevented a greater harm). This would have allowed addressing the motivations of DeChristopher and his concern with climate change and global warming as well as the alleged governmental actors’ violations of federal law and administrative regulations prior to and during the auction. These concerns were at the core of a civil lawsuit against the Bureau of Land Management (BLM) that aimed to force the government to re-evaluate the parcels up for auction and was only decided upon after the auction had already taken place.\(^{185}\) Acknowledging the merits of the complaints of the environmentalist organizations that the BLM was making an “irreversible and irretrievable commitment of resources” including the “likelihood of permanent damage to public land,” the judge in that civil case granted a temporary restraining order. After being re-evaluated by Interior Secretary Salazar, only 29 of the 116 parcels up for auction actually went through (Proffer 2009).

The judge ruled, however, that this necessity defense was not available, which meant that DeChristopher was not permitted to argue that he was acting in order to prevent greater environmental damage. The prosecutor thus managed to de-contextualize and de-politicize the case, excluding the legitimacy or legality of the auction from the trial:

```
Whether the BLM was correct in its decision to offer these parcels for oil and gas lease sales was not the question which this jury was asked to resolve. The jury was asked to determine whether Mr. DeChristopher’s disruption of the BLM’s auction of oil and gas leases violated federal law. We believe that the jury properly found that it did. (U.S. Attorney District of Utah 2011)
```

DeChristopher argued that his actions were necessary because at the time of the auction, several investigations had revealed the level of corruption and bribery in the BLM’s preparation of such auctions (Official statement 2011). The prosecutor, however, argued that the civil lawsuit proved the existence of lawful means to resist the auction. “The SUWA lawsuit exemplifies everything that the defendant’s random, spur-of-the-moment, criminal protest efforts in this matter were not” (written response to proffer 2009:2).

Thus, the conversation shifted from the question about harm to the meaning of the rule of law and the meaning and legitimacy of civil disobedience. The prosecutor de-contextualized the action of DeChristopher and explicitly addressed the distinction between legitimate political

---

186 In order to be able to resort to a necessity defense (and thus in this case effectively shift the terms of debate about the harm caused by his action) a defendant has to fulfill four conditions, such as the threat of imminent death or serious bodily harm and the absence of legal alternatives.
action and illegitimate criminal action. In the press release, the U.S. Attorney specifically indicated that DeChristopher could have engaged in lawful action instead of civil disobedience. 187 Elaborating on the range of possibilities in the political arena, the prosecutor specifically mentioned the actions that would have been admissible:

For example, he did not take the time to articulate reasoning in a filed formal protest within the BLM proceedings. He did not initiate or join a lawsuit to bring to light perceived impropriety in a court of law. Nor did he focus creativity and sacrifice as others did in freely voicing their objections to the auction in the public forum. (Prosecution sentencing recommendation 2011)

The prosecutor thus emphasizes this boundary between the political arena and the criminal justice arena as he said that “[t]he public square is the proper stage for the defendant’s message, not criminal proceedings in federal court” (ibid.).

Ultimately, the dispute thus addressed fundamental questions about the way in which the rule of law was threatened, by whom it was threatened, and how that rule of law should be protected. DeChristopher criticized the state of the rule of law in the United States, stating that “the rule of law is dependent upon a government that is willing to abide by the law. Disrespect

187 “We recognize that individuals have deeply held opinions when it comes to the use and management of our public lands. As citizens of this country, we are free to hold and express these differing views. However, there are ways to express these opinions and advocate for change without violating the law, disrupting open public processes, and causing financial harm to the government and to other individuals, [...] Mr. DeChristopher had several reasonable and lawful alternatives by which he could have expressed his objections to the sale of these oil and gas leases” (U.S. Attorney District of Utah 2011).
for the rule of law begins when the government believes itself and its corporate sponsors to be above the law." He defended his resort to civil disobedience in reference to the rule of law:

The rule of law was created through acts of civil disobedience. Since those bedrock acts of civil disobedience by our founding fathers, the rule of law in this country has continued to grow closer to our shared higher moral code through the civil disobedience that drew attention to legalized injustice. The authority of the government exists to the degree that the rule of law reflects the higher moral code of the citizens, and throughout American history, it has been civil disobedience that has bound them together. (Official statement, 26 July 2011)

The prosecutor took the criminalization of speech acts a step further when his defense of his action was construed as “unapologetic” and therefore as one of the grounds for demanding a strict sentence (Prosecution sentencing recommendations 2011). The prosecutor criticized that the defendant had “championed and marketed his course of criminal conduct as successful, necessary and all-American” and “encouraged and invited others to follow his path, and literally join him in jail by committing criminal acts in the name of a movement” (ibid.). Indeed, calling the act of civil disobedience “courageous,” his supporters had claimed that “[a]n outbreak of jury trials (and willingness to serve time if necessary) could create a political atmosphere that allows a reasonable governmental response to climate change – while bringing the damaging injustices of our current system into the spotlight” (Peaceful Uprising 2011). The prosecution therefore argued for a “significant term of imprisonment” in this case, in order to send the message that “[t]he rule of law is the bedrock of our civilized society, not acts of ‘civil
disobedience’ committed in the name of the cause of the day. A significant term of imprisonment will underscore this truth for the defendant and the community” (ibid., emphasis added by author).

The competing narratives surrounding this trial thus addressed not only the legality of the auction or the legitimacy of DeChristopher’s participation in the bidding process. Digging deeper into the competing visions of the rule of law, the space for civil disobedience, and the proper role of criminal proceedings, the legal questions about the accessibility of the necessity defense and the admission of evidence before the jury subsequently also turned into a debate about the proper role of the jury in criminal proceedings. With a reference to the founding fathers, DeChristopher had argued that “juries should be the conscience of the community and a defense against legislative tyranny” (Official statement 2011) and organized a book study group that read about the history of jury nullification. Some of the participants in that book group later began passing out leaflets to the public about jury rights, which led the prosecutor to argue that DeChristopher was trying to influence the jury, “persuading them to abandon or ignore rules and laws governing their service” (Prosecution sentencing recommendations 2011).

The prosecutor explicitly reaffirmed some of the central premises of a society based on the rule of law, in particular strict obedience to the law as a central tenet of liberal legalism, and some of the specific functions of punishment, as he called upon the court to “fashion a penalty that
promotes respect for the law, and justifies law-abiding society’s reliance on the rule of law for protection and order” (Prosecution sentencing recommendations, 19 July 2011). Indeed, the prosecutor specifically emphasized the communicative aspects of such a sentence, stating that given the level of media attention to the case, many were watching the eventual sentence. The prosecutor specifically considered that “[a]mong the many listening to the Court’s sentence” there are those that consider “the defendant’s invitation and encouragement to join him outside the bounds of law, and inside jail. Accordingly, the defendant’s sentence should effectively communicate that similar acts will have definite consequences” (ibid.). This strong emphasis on deterrence reflects a concern with future crimes over past harm.

Ultimately, the competing narratives specifically addressed the very notions of legitimacy of the courts and criminal proceedings that are at the core of all the criminal cases discussed in this dissertation. It is clear that what was at stake in this case was far more than a single auction that was disrupted. Instead, what was at stake was DeChristopher’s public advocacy of the legitimacy of such disruptive action that intentionally broke the letter of the law. The prosecutorial narrative clearly spoke out to deny that legitimacy, relying on a classic de-contextualized narrative to keep the political demands out of the courtroom.

---

188 Interestingly, unlike many of the other challengers of the status quo encountered in this dissertation, DeChristopher differentiated between “disagreement with the law” and “disrespect for the law.” He emphasized his respect for the law, despite disagreeing with it, as he highlighted that he did not “burst out and tell the jury that I successfully raised the down payment and offered it to the BLM. I didn’t let the jury know that the auction was later reversed because it was illegitimate in the first place” (Official statement, 26 July 2011)
These criminal prosecutions of aboveground activity, whether speech acts or civil disobedience, have thus put the very line between criminal and political conduct at the center of the interpretive battle between defendants, their supporters, victim advocates, and the prosecutors. In the previous sections I have explored the three important discursive shifts that can be observed in the prosecutorial narrative in so-called “eco-terrorism” cases: the emergence of the concept “eco-terrorism”, the shift towards proactive investigation, and the focus on aboveground activity. In the next section, I will analyze in detail the development of the prosecutorial narrative in the SHAC case. This case exemplifies these discursive shifts.

6. Penal response to the SHAC model, or when does the offensive, obnoxious or threatening become terrorism?

In this section I analyze in detail the emergence of the “SHAC model” and the criminal justice response to it. Within the activist community, this is one of the best-known cases against animal rights activists. In brief, at the end of the 1990s, vivisection activists started to take a different approach to their protests. They chose Huntingdon Life Sciences (HLS) as the focus of their campaign and turned to secondary targeting, home visits, and economic sabotage. These new tactics were highly effective in driving companies away from doing business with HLS.189

Companies were concerned about the SHAC model and the effect it was having on their operations.

---

189 The SHAC campaign has been an international effort, with activists in Britain, the Netherlands, and various other countries involved. In 2007, a police campaign in Britain, Amsterdam, and Belgium led to the arrest of 32 people. The international campaign and the subsequent prosecutions outside of the United States are relevant for understanding the impact of the campaign on Huntingdon Life Sciences. In this section I focus, however, on the actors, campaign activities, and prosecution in the United States.
business operations and their employees. Prosecutors were unable to find and prosecute the
perpetrators of illegal actions that occurred during this campaign, such as the flipping over of a
car or the spray-painting of a house. And when they prosecuted such actions on vandalism
charges, the sentences were low.

Prosecutors shifted their perspective from a focus on isolated cases of vandalism and
investigated the people that ran the SHAC website, which was at the core of organizing this
campaign. In 2004, six activists were indicted for conspiracy to violate the Animal Enterprise
Protection Act in addition to several counts of violating the Interstate Stalking Statute and
conspiracy to use a telecommunications device to abuse, threaten, and harass persons. It is
quite uncontroversial to state that the SHAC tactics were offensive and obnoxious. 190 There is
considerable disagreement, however, on the point of whether this offensive and obnoxious
behavior, and especially the roles of the people running the website, should be considered
criminal. The prosecutorial narrative in the SHAC case puts the illegal actions into the context of
the SHAC campaign to change the definition of the crime and allot criminal responsibility to
those behind the website. The SHAC activists were judged guilty by a jury and convicted to
sentences ranging from one to six years. The convictions were confirmed on appeal.

190 The SHAC campaign is known for its offensive tactics. It should be mentioned, though, that they were not the
first to employ tactics whose primary aim was to offend. In 1988, anarchist activists within Earth First! organized a
“puke-in” (vomiting) at a shopping mall to protest against consumerism (Scarce 2006:89).
The SHAC model: “There should be a law against this”

Stop Huntingdon Animal Cruelty (SHAC) was originally founded in the United Kingdom in 1999. Their goal is to close down Huntingdon Life Sciences (HLS). In the UK the SHAC campaign proved highly successful, and Huntingdon Life Sciences moved its office to the United States.

Huntingdon was founded in 1952 and tests pharmaceuticals, industrial chemicals, food additives, and other substances on animals. It is a contract research organization, generally conducting its experiments on behalf of the company that wants to sell the product. Such research is often a legal requirement in order to bring drugs and chemicals to the market. After the experiments in which such products are applied or injected, the animals are killed and dissected. Sometimes, animals are anesthetized and dissected while they are still alive. This practice is called vivisection. Since 1995, Huntingdon has had an experimental facility in New Jersey (Cook 2006).

The indictment against the SHAC activists describes HLS as “one of the leading pharmaceutical testing companies. As part of its drug testing procedures, many of which are mandated by law, HLS uses animals for, among other things, testing the safety of drugs and chemicals that various manufacturers seek to bring to market.” The SHAC activists present a different narrative when they describe that in the HLS facilities animals are forced to inhale and ingest excessive amounts of chemicals such as pesticides, coffee sweeteners, diet pills and genetically modified organisms (GMO’s), for weeks or months on end. Then they are killed and dissected. Products known to have been tested at HLS include Splenda, Viagra, Olestra, and Baycol. Every day an average of 500 animals – including dogs, cats, mice, primates and rabbits – die inside HLS. HLS has been exposed in five undercover investigations revealing vicious animal cruelty and sloppy, fraudulent science. Among other atrocities, workers were exposed punching 4-month-old beagle puppies in the face, dissecting a
live monkey, falsifying scientific data, and violating Good Laboratory Practice laws over 600
times. (SHAC7 2008)

SHAC USA was founded in 2000. Based in New Jersey, they put up a website which listed the
home addresses of chief executive officers of the companies that make use of HLS test results
or have shares in HLS (“secondary targets”). SHAC USA called for the closure of HLS and, among
other things, urged activists to write letters to HLS shareholders. SHAC also posted addresses of
CEO’s and other employees working at customers and investors of HLS and called on activists to
protest. At the same time, animal rights activists conducted “home visits” in front of the
residence of an HLS employee or the CEO of suppliers or affiliates of HLS. In several instances,
unknown activists would visit at night, spray-painting the house, throwing rocks through
windows, or damaging a car.

I will discuss in more depth three elements of the SHAC model: secondary targeting, home
visits, and nuisance campaigning. The question at the core of the criminal proceedings against
SHAC is how to understand the SHAC model. Specifically, where is the line between the criminal
justice arena and the political arena and how should define the events and different
responsibilities be defined? The website Activist Cash\textsuperscript{191} described the SHAC method as
extortion: “SHAC extorts U.S. companies into severing their business relationships with firms
that it doesn’t like” (Activist Cash 2011c). Activists, on the other hand, were excited that they

\textsuperscript{191} This site was created by the Center for Consumer Freedom and aims to provide detailed and up-to-date
information about the funding sources of organizations and activists, “whether respectable or radical,” with a
specific focus on activist groups that concentrate on “food- and beverage related issues” (Activist Cash 2011a;
2011b).
had finally found a model that actually works. In the case against SHAC USA, the prosecutorial narrative drew those in charge of the website into the criminal justice arena.

**Home visits, nuisance campaigning, and secondary targeting**

In order to get a better grasp on “home visits” and the legal restraints that are now in place to control such demonstrations, and also to obtain access to people in the animal rights community, I was active for two months as a “legal observer” with one of the animal rights groups in New York City. I was open to them about my research and the fact that I was not an animal rights activist. Home visits consist of chanting and leafleting. During these protests the activists would show vivisection pictures and shout messages through a megaphone, such as “puppy killer” and “your neighbor is a murderer.” As such, these visits are based on the principle of naming and shaming. One of the questions raised by the criminal prosecution of the SHAC model is whether and at what point such demonstrations become intimidating and threatening.

Home visits challenge some of the unwritten rules of the freedom of speech in the political arena. Home visits turn the politics of animal testing into a personal matter. Working at HLS or

---

192 Legal observers are trained by the National Lawyers Guild. As a legal observer at any public demonstration, my function would be to protect the activists from improper incursions on their freedom of speech. Legal observers do not participate in the protest and can be easily recognized by their green caps. For example, when the police would intervene, I would jot down what happened and possibly later in court testify about the sequence of events. While police intervention had been a problem that activists had reported in earlier demonstrations, I never encountered such intervention during these home visits in the fall of 2007.

193 You can observe such a home visit at ‘Huntingdon Life Sciences Andrew Baker Home Demo 8-30-09’ uploaded by nyc4animals on 31 August 2009, available at: [http://www.youtube.com/watch?v=9zE48-xVc30](http://www.youtube.com/watch?v=9zE48-xVc30), which shows a demonstration in front of the house of Andrew Baker, the CEO of Huntingdon Life Sciences, in New York City.
being affiliated with HLS is not “business” anymore, but redefined by activists as a personal moral decision. “Companies hide behind their corporate logo,” said one activist (Harper 2002b). Thus, activists challenge the boundary between “private” and “public” which is so central to liberalism. They go after “people who are just flesh and blood, like you and me and we target them in a manner that we know is going to cause them discomfort and force them to make that decision” (ibid.). As the activists make it personal, they disregard business hours, business locations, or pure business arguments. Instead, they do a home visit on Christmas Day and make “jokes” about the alleged mistress of a CEO.

One of the SHAC defendants, Josh Harper, called the SHAC tactics “nuisance campaigning.” In his words, the SHAC campaign “was people like all of us making that phone call every day. It was people like us setting [sic] at home on our computer, and maybe we’ve got a graphic design program, so we make up a poster that says anything, bike for sale, something like that, and it has Stevens’ phone number on it” (Harper 2002b:2550). The “nuisance campaign” would lead companies to incur enormous costs, for example due to the time spent answering the phone while facing a “phone blockade” or a website that is unavailable due to an e-mail blockade. Another important tactic in the nuisance campaign is the so-called black fax, which makes the fax machine of a company unreachable and exhausts the cartridge. In another instance, a stink bomb thrown into an office prompted people to leave the building, and as they did not work for a day, the company had 750,000 dollars in damage.\footnote{194 They also engaged in “Electronic Civil Disobedience,” which they called the “21st century version of the infamous ‘sit-in’.”}
The SHAC model contains another significant and contested ingredient: the shift from targeting HLS directly to pressuring HLS by targeting its customers and suppliers. This strategy is known as “secondary” or “tertiary” targeting. Protesting in front of an “animal abuse facility” is useless according to the vast majority of activists, as “those people know that what they do is wrong.”

The logic behind secondary targeting is simple: HLS does need its shareholders, but the shareholders do not need HLS. This logic is explained, for example, in this e-mail by an animal rights activist group calling for a demonstration at the house of the CEO of the office supply company Staples:

Staples might not seem to be an important part of the equation, but try running a business or a laboratory without paper, pens, paperclips and printer ink. Will Huntingdon Life Sciences simply switch to another vendor for their supplies? Probably so, but first they have to find a company that is not only willing to partner with animal abusers, but equally important they will need to find a supplier that is willing to deal with the aggressive attention of a relentless global campaign by animal activists. (Win Animal Rights mailing list, 19 June 2008)

Activists accuse such secondary targets of “condoning” the animal cruelty of HLS, calling them “collaborators in torture.” Secondary targets include banks, cage suppliers, lawyers that sign contracts, investment banks, auditing companies, shareholders, and its clients or customers (companies commissioning testing research to be done at HLS), which are often pharmaceutical

---

195 From a sample letter: “Novartis are condoning and encouraging this lawbreaking and cruelty by their continued financial support of HLS.”
companies, biotech companies, or companies selling household products such as Colgate toothpaste.¹⁹⁶

The SHAC model departs from the liberal logic of achieving change in the political arena

The SHAC model openly complemented “old” tactics focused on education and persuasion with bolder and more confrontational tactics. They were disillusioned with the battle in the political arena. SHAC defendant Gazzola said: “we’re tired of protesting outside of empty buildings. We’re tired of writing letters. This campaign is about economic sabotage.” The prosecutor criticized that the SHAC campaign was not about persuasion and education. He quoted Lauren Gazzola after insurance provider Marsh pulled out of HLS. “We fucked them up and then they pulled out.” The prosecutor emphasized: “Her words. Not we educated them. Not we appealed to their conscience” (trial transcripts SHAC case). He thus criticized the way in which the defendants departed from the logic of political liberalism. What happens when a company is designated as a “SHAC target”? The prosecutor described the past experiences, such as “smashing windows in your home, vandalizing your car, threatening calls at all hours of the night, e-mail bombs to crash computers, and ordering goods and services in other people’s names” (ibid.). It should be noted here how the prosecutor “personalizes” his description by using the colloquial “your” home, “your” car, etcetera, reproducing the notion that this can happen to anyone.

¹⁹⁶ See also the transcript of the hearing on the Animal Enterprise Terrorism Act before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary of the House of Representatives on 23 May 2006. During this hearing tactics such as “secondary targeting” are discussed.
A journalist once asked a SHAC activist what gives them the mandate to employ a campaign of harassment and intimidation. Their answer was that “our knowledge of the suffering animals endure at HLS is all the mandate we need to rescue them using any means at our disposal.”

The SHAC activists do not expect much from the available routes for change in the U.S. liberal democracy. Defendant Harper said that if they “wait around for permission from the police or other people who’ve held themselves up as alleged leaders” then “nothing is going to change” (Harper 2002b:2561). He argued that only when individuals take action and “make life hell on these abusers, that is when we see results” (Harper 2002b:2563). While the question of the journalist seems to refer to the liberal democratic notions of a valid representation and a majority backing such action, the SHAC activists pride themselves on employing tactics with a very different logic, as they claim that the strength of this model is that with only five people they can be very effective and drive companies away from supporting HLS. SHAC activists also criticized the problem that the legal and democratic avenues exclude many people from direct participation, as you need lawyers and specialization (“you don’t need a PhD to throw [a] rock through a window”) (Harper 2002b).

SHAC activists argued that disillusionment with the available routes in the political arena had profoundly incapacitated animal rights activists. The asymmetry of power that dominates the arena made them believe that they were not going to win against “big corporations and mighty

---

capitalism,” and therefore they were not even really trying. Indeed, Harper said that when investor Charles Schwab pulled out of HLS, even “Financial Times called us when they heard that, to verify and the guy on the phone was just stunned. People in the business world are like ‘Charles Schwab dropped a stock?!’” (Harper 2002b). The SHAC campaign, however, inspired activists to really go for it and believe in winning.

The SHAC tactics did not have full support in the activist community. Indeed, they led to internal discussion. SHAC activists were aware that what they were asking activists to do (for example to make phone calls to employees at their home addresses) was controversial. During a speaking engagement in 2002 in which a SHAC activist called upon animal rights activists to participate in the campaign, one activist criticized the methods, saying “I wouldn’t want these things to happen to me.” SHAC activist Harper, however, was brief and responded “well, you are not a puppy killer” and considered that a few annoying phone calls do not weigh up against what it is those employees are supporting (trial transcripts SHAC case). These internal discussions illustrate the profound way in which these activists had stepped outside of the liberal logic that rules the political arena. The liberal logic promotes the use of political engagement which should apply across the board. Thus, when an activist brought up the topic of whether the SHAC tactics would be considered appropriate if they were applied by anti-abortion activists, Harper does not accept that line of thinking. He rejects the argument that “methods” are something that you justify without looking at the ends. On the contrary, he argues that the justifiability of means can only be assessed with an eye to the ends; that is, the
righteousness of the cause. Resisting the liberal dichotomy between means and ends, Harper thus rejected the assumption that the tactics would only be justifiable if they were justifiable in anybody’s hands.

The tactics employed by SHAC were thus also considered to be extreme within the activist community even before the criminal prosecution had started against them. A lawyer of their case expressed: “SHAC decided to leave the ranks, to be unpopular, be aggressive, and be offensive. They were unaware though that what they were doing might be considered illegal. In their view PETA did not go far enough and was in bed with corporations” (Interview US-14). Still, even though many of the activists were not at ease with the tactics employed by SHAC, they did not agree with the criminal prosecution against them. It is exactly this line between what we are not comfortable with and what we criminalize that is explored at length in this dissertation.

Subjects in the political arena are supposed to be open for dialogue and arguments in order to engage in a meaningful political debate. The SHAC activists, however, explicitly portrayed most of their opponents as beyond the point of being reasonable partners of a dialogue in which they could be persuaded. During that speaking engagement in 2002 already mentioned above, one activist voiced the criticism that it is hard to change people’s minds by intimidation. Harper responded that it would be alright if people could be reached and made aware of the harm that they are doing, but he thought that the people working in HLS could not be persuaded anyway.
SHAC activists thus portrayed an image of the CEOs of companies who just work for profit and do not care about the cruelty against animals. Therefore they would not respond to appeals to their conscience and only act due to pressure. Similarly, the employees at Huntingdon Life Sciences were believed to be beyond their reach for educational efforts, as “they know what they are doing,” considering the cruelty shown on undercover videos (2002b). At the same time, the SHAC activists have benefited from individuals working inside other companies who did not think it was right to support HLS and who had come forward sharing information with SHAC. Therefore, SHAC activists advocated a dual mode of education and direct action. Thus, they spent their time by making literature and videos that are informative and support tables in the streets of New York City in order to pass out information. However, in the meantime, activists were also called upon to put pressure on HLS and its affiliates.

This departure from the liberal logic of the political arena does not mean that the SHAC activists embraced everything. For example, Harper criticized an incident in Britain in which Andrew Gay, marketing and public relations director at HLS, was thrown ammonia in his face. At the same time, he expressed to appreciate the “diversity of tactics” as a method that creates uncertainty in the opponent, and “they never know what to prepare for” (2002b).
The SHAC model was very effective

The SHAC model has been incredibly effective in driving investors, shareholders, and customers away from HLS. In Britain, Huntingdon was unable to receive any loans from banks. The British government had to step in and provide loans. In 2003 Huntingdon moved its headquarters to the United States, as U.S. laws provide greater anonymity for shareholders, thinking that this would make it harder for SHAC to identify and target shareholders (Cook 2006). SHAC activists were still able to reduce Huntingdon’s worth on the stock market by pushing it out of the more exclusive “Over the Counter Bulletin Board” into the lower-rated “Pink Sheets,” which meant that the stock could no longer be purchased by many institutional investors and hedge funds. The stock dropped from $15 in 1999 to $1 in 2004 (Cook 2006). In 2007, this led Managing Director Brian Cass to call upon the financial community to stop treating Huntingdon as “radio-active” (Jack 2007).

Also the prosecutor in the SHAC case asserted that the SHAC tactics were “absolutely” effective. Other companies saw what had happened to Marsh and they “didn’t want any part of that. That’s why [they] got out.” During the trial, the prosecutor described that the companies pulled out because of the disruption of their business and the fact that the lives of their employees are “turned upside down” (trial transcripts SHAC case).

Josh Harper and many other animal rights activists boast of the success and the effectiveness of the SHAC model. “In one week time, we knocked out five market makers” (Harper 2002:2553).
The SHAC campaign was successful and provided the activists with a model that could be applied to any target. This is the reason the SHAC activists were so excited. Harper (2002b) said:

[W]e are with this campaign for the first time in a long time, developing an actual model, an actual way to confront these companies successful [sic] ... I care very much about the animals inside of HLS [...] but I’m – I’m even more excited at the idea that once we beat them, on this battlefield, you know, then all the skills that we’ve learned, everything that we’ve taken from this, all the contacts we’ve made, having this international movement, all of that structure is still gonna be in place.

It was exactly this prospect of a spread of this model that worried many corporations. The Foundation for Biomedical Research pointed out why they were so concerned with the SHAC model:

Many activists have therefore been convinced that the SHAC case was just a test case, and that similar law enforcement efforts would be launched against other social justice movements. They viewed the repression as an indication of the effectiveness of the tactics developed by SHAC, and the fear by corporations and the government that these tactics would be replicated by other activists in other struggles.

The website “Activist Cash” has a profile on SHAC and makes explicit what threat is posed by the SHAC campaign:

SHAC’s obvious purpose is the extermination of Huntingdon Life Sciences, but there’s more to this group than just forcing a single company out of business. The group’s leaders have made it clear that once HLS is closed (“and it will close,” they insist), every other lab in the Western world that engages in animal testing will be on their radar screen. The bigger picture, though, extends beyond the world of medical research to the larger world of animal rights. Whether or not SHAC’s outward confidence is largely bluster, its real purpose is to incubate new and ever more frightful tactics for the rest of the animal rights movement to adopt. (Activist Cash 2011c)
Beyond the issue of research and the debate surrounding animal rights, there is a larger and more troubling message surrounding this regrettable pattern of capitulating to activist attacks. This is because those who seek to attack any corporation for any reason have, thanks to SHAC, now been provided with an effective model to gain publicity for their cause, seriously harm the company with which it has any complaint, as well as its employees, customers and vendors. (Foundation for Biomedical Research 2006)

Despite the impact on Huntingdon’s worth on the stock market, the prosecutor emphasized that for him the SHAC prosecution was about the individual victims and their right to a secure life (Interview US-13). “Their lives will never be the same again.” Activists, on the other hand, were convinced that the problem they posed was not about individual victims but about the enormous economic threat their demands and tactics posed to HLS and other companies. The SHAC president argued in 2006 that it was SHAC’s message, not its methods that troubled authorities:

Americans are totally in support of firebombing and killing and blowing little kids apart in Iraq. It's not the tactics. It's the belief that's controversial. The tactics – Americans, they love that shit. [...] SHAC USA supports what all Americans would support if their children were locked up, being experimented on, with their limbs being severed, with their eyes being burned out. That’s what SHAC USA supports. (Cook 2006)

*Civil lawsuits*
Civil lawsuits against SHAC USA preceded the criminal indictment. On 1 April 2005 a court found SHAC to be responsible for the violence in the SHAC campaign.

The court would have to turn a blind eye to find that there is no causal nexus between the SHAC website and the violence thereafter produced. The court need also be concerned about what appears to be an escalation of the level and intensity of criminal behavior. (Decision in TEVA PHARMACEUTICALS USA v STOP HUNTINGDON ANIMAL CRUELTY USA, 1 April 2005)

The court decided that what SHAC did was “ratify” the illegal activity.

Accordingly, this court is satisfied, at least at this stage, that a prima facie showing has been made that SHAC ratifies the illegal activity every time it publicizes, and implicitly encourages, the activities on the website after the fact. (ibid)

Even though the court thus ruled against SHAC, the activists did not have much money, so there was not much to get from them out of such civil lawsuits.

The indictment

In May 2004, John Lewis, deputy assistant director of the FBI, explained before the Senate Judiciary Committee in Washington, D.C., how the FBI approached their investigation of the SHAC campaign (Lewis 2004). Lewis testified that in 2001 the FBI offices that had experienced SHAC activity, the corresponding U.S. Attorney’s offices, the FBI Headquarters, and the
Department of Justice explored other “[i]nvestigative and prosecutive strategies” to address the “problem presented by SHAC and to prevent it from engaging in actions intending to shut down a legitimate business enterprise.” This again demonstrates the proactive attitude of the FBI and U.S. Attorney offices. The nationwide coordination and federal investigation, in which more than a hundred FBI and Alcohol, Tobacco, and Firearms agents participated, indicates that the issue was allotted priority and the status of a national problem, as opposed to a private or local problem of a single company.

Lewis indicated in his testimony that the SHAC members “appear to engage in conduct that, while criminal (such as trespassing, vandalism or other property damage), would not result in a significant, particularly federal, prosecution.” Thus, Lewis addressed the difficulty of achieving “results” by following the standard de-contextualizing approach in dealing with the SHAC model. However, “given SHAC's pattern of harassing and oftentimes criminal conduct, and its stated goal of shutting down a company,” they searched for other options. The next section analyzes in more depth how this “pattern” was constructed and how the “goal of shutting down a company” was criminalized. The FBI response also reflects the attitude that characterized the approach to the SHAC model: Departing from the conviction that the SHAC tactics “crossed a line,” the conclusion was that if the SHAC activists go around established legal means new legal means had to be made. “There should be a law against this,” expressed the prosecutor this sentiment (Interview US-13).
The indictment contained six counts. The first count charged the SHAC defendants with a conspiracy to violate the Animal Enterprise Protection Act (AEPA). The second count was a conspiracy charge under the Interstate Stalking Statute (Title 18, United States Code, Section 2261A). The third to fifth counts were substantial charges under the Interstate Stalking Statute, alleging that victims were in a reasonable fear of death or serious bodily injury. The sixth count was again a conspiracy charge under Title 47, United States Code, Section 223(a)(1)(C), which prohibits making phone calls in order to annoy, abuse, threaten, or harass.

This is not a case where the facts are disputed, or where responsibility for those facts is disputed. In this case, the very qualification of those facts as a “crime” is disputed. And the attribution of criminal responsibility is disputed. The way in which facts are connected into a pattern and the way in which criminal responsibility for the behavior of others is attributed—that is what is at stake here. The behavior that is turned into a crime here was done overtly. The SHAC activists have explained their tactics in detail over and over again in public speeches. This is not a case about hidden or underground behavior. The government exhibits included pictures of the SHAC offices and their computers. These activists were not fugitive.

The Animal Enterprise Protection Act had been used in the guilty plea against Peter Young, who had “liberated” minks. The act had never been put before juries and judges in a trial, however. That means that there was no jurisprudence that could determine the interpretation of the statute, and the prosecutor pointed out that they were “out there defining the statute”
(Interview US-13). The Animal Enterprise Protection Act, however, could not be used in relation to incidents in which the “targets” were not “animal enterprises.” This posed a problem because of the SHAC strategy of secondary targeting.

In addition to violation of the AEPA, therefore, the SHAC defendants were charged under the stalking statute (McIntosh 2006). The prosecutor was aware of the fact that the common crime image of stalking does not coincide with what the SHAC people were doing. But, as he argued, “we interviewed a lot of people, and these people were truly stalking-victims. They were so scared, so victimized,” and thus the crime was stalking (Interview US-13). As the prosecutor thus created the “image” of a “stalking victim,” this approach begs some questions: What is a “stalking victim,” i.e., what are the typical characteristics or conditions? What does it mean when the existence of a crime is argued on the basis of the kind of victim that was “created” instead of the actions that were done? Was SHAC’s activity criminal because it fitted the stalking statute? Or was the activity considered to be outside of legal boundaries, and was a statute sought that could be made to fit the facts?

Re-contextualizing events into the SHAC campaign

Here I review the law enforcement response and the way in which the issue got framed through the criminal justice lens. This section shows how the actors and their behavior got translated into criminal law terminology, how the labels of “victim” and “perpetrator” were assigned, how the criminalized actions were defined, and how individual criminal liability was construed. In
this way, I analyze closely the narrative that the prosecutor (and FBI) has constructed in this case, the way in which this narrative drew on criminal law logic, and what evidence it relied on. I also analyze how this institutional narrative has been received and contested in the activist community. I will specifically describe in more depth how the prosecutorial narrative is re-contextualized and how that re-contextualization is constituted in criminal doctrine in four specific shifts:

1. Blurring the line between law and politics, between means and ends
2. From isolated incidents to a pattern
3. Construction of a collective of co-conspirators and a collective of victims
4. From direct criminal responsibility to indirect responsibility

Blurring the line between law and politics?

The SHAC prosecutor claimed to distinguish between law and politics by distinguishing between the political motive of animal rights and the criminal intent to cause damage. This line between law and politics was addressed explicitly when the prosecutor took the time to explain what the trial was about and what the trial was not about. Thus, the prosecutor emphasized that it was not Huntingdon that was on trial. Indeed, he pointed out that animal testing is actually mandated by the government. The separation between law and politics was thus formally maintained through a distinction between means and ends. The trial was about the SHAC tactics and the question whether these are acceptable in their struggle against Huntingdon and
animal experimentation. At the same time, however, and blurring this line, in the jury selection and the examination of witnesses, the prosecutor also addressed or responded to issues related to animal testing and the various arguments defending and challenging it.

Sometimes the defense lawyers pushed to have the broader context of the case taken into account, while the prosecutor resisted a broader view. For example, the defense attorneys wanted to strike a juror who works for Merrill Lynch. The SHAC campaign had been targeting Merrill Lynch in the past and had succeeded in having them stop doing business with HLS. In the specific indictment, however, the case of Merrill Lynch was not mentioned and the prosecutor argued that he could not “be responsible for all the companies they've targeted” (Trial transcripts SHAC case, Jury Selection, p. 205). The court agreed with the prosecutor and denied the challenge because the defendants were “not being charged in this trial by the Government as taking actions against that company.” This is an example where restricting the reading of the facts allowed a juror that was viewed as a “former target” by the defendants. The narrow definition of who was in the indictment provided the court with the basis for denying a challenge for cause. In other instances, however, the prosecutor agreed to strike jurors because of their strong views on animal testing or because a juror had close relations to people involved in animal testing. The prosecutor agreed that those jurors “may find themselves in the middle of a trial in a position they may not be able to be objective and the safest thing to do, and fair thing to do would be to excuse them both, now.”

---

201 When the defense lawyers asked to strike two potential jurors during the jury selection due to their predisposition, the prosecutor agreed with the concerns brought up by the defense:
When I spoke with the prosecutor of the SHAC case, he told me of victim Marinn McLennan from an insurance company in Texas and remarked that she “had nothing to do with HLS.” She had never heard of it and was “never involved.” The prosecutor described the harassment she suffered from animal rights activists and in explaining the prosecution against the SHAC defendants he said that “people shouldn't have to live their lives like that, especially people who don't have anything to do with animal testing” (Interview US-13). In this little added reasoning the context of the conflict enters the ordinary liberal reasoning. From a criminal law perspective a crime is a crime, and it should not matter whether or not the victim is involved with animal testing or not. It seems that the prosecutor is arguing that the victim was somehow more “innocent” than if she actually had engaged in animal testing. By therefore condemning the tactic of secondary or tertiary targeting, the prosecutor engaged in a subtle assessment of the political issue and the “suitability” of the target.

**Undercover investigations at HLS: Defining what the trial is about**

The issue of animal cruelty was also effectively excluded from the trial by excluding evidence from undercover investigations at HLS in order to expose the ongoing “cruelty” inside the company. The best known of these investigations was conducted by PETA activist Michelle

---

While this case I don’t think involves the efficacy of animal testing, certainly the allegations re the defendants are, again, it’s what drove the defendants. If someone is that close in their family, or with the business relationship they may find that they cannot be objective, and frankly I think everyone would like an objective jury in the first instance, so I think that really both juror 1 and the gentleman, a contractor who has a silent partner may be very involved in this, both of them may find themselves in the middle of a trial in a position they may not be able to be objective and the safest thing to do, and fair thing to do would be to excuse them both, now. (Trial transcripts, jury selection, 6 February 2006, p. 200–201)
Rokke. She was employed there as an associate technician from September 1996 until May 1997. She secretly videotaped behavior of her co-workers, took documents from desks, and copied documents from computers. In the previous chapter, I already described in more detail the subsequent lawsuit, in which Huntingdon claimed that PETA and Rokke had engaged in stealing trade secrets and trying to put HLS out of business.

Animal rights activists tend to view these investigations as heroic individual actions and among the most effective. The prosecutor referred to these investigations as “those five, quote, unquote, undercover investigations,” which he argued were “nothing more than trespassing or being on the Huntingdon Life Sciences’ property under false pretenses” and “hearsay” (Trial transcripts, 7 February 2006, p. 7–8). Thus, “undercover investigations” were redefined in legal terminology as “trespassing” and “hearsay.” Indeed, the prosecutor claimed that “these things never happened, the undercover investigations, and to start to allude to them as if real and had a basis, would be improper” (p. 11–12).

The prosecutor thus argued that it would be improper to relate any of these investigations in the trial, pointing out that there was already a civil lawsuit filed against HLS on that very issue.

It’s our position Huntingdon Life Sciences is not on trial here, and understanding a certain amount of this information is going to leak in, we don’t think that the defense should be permitted to open on, or cross-examine on either this civil complaint that is in its early stages, or the five undercover investigations. (p. 9)
The assertion that “Huntingdon is not on trial here” is familiar in each of the country studies. In Spain, for example, it was the Audiencia Nacional that was not on trial. Here it is HLS that is not on trial. The compartmentalization of civil lawsuits and criminal lawsuits serves here to exclude the alleged cruelty at HLS from the trial, just as the division of a Spanish National Court and local courts served to exclude the torture issue from the trial against Gestoras pro Amnistía.

The court:

In general, we do not allude to other litigation in a criminal or a civil suit. This is a trial about the allegations in this Indictment, and the offenses to, the charges in this Indictment, and not any other litigation. Period. I can’t imagine when I would permit it. (Trial transcripts, SHAC case, p. 13)

Not only is the separation between the different lawsuits relevant, so is the separation between what is on the SHAC website, which is the subject of the trial, and the information from the undercover investigations which is on the SHAC website. The SHAC website is the centerpiece of the indictment and the allegation of criminal responsibility. While the prosecutor excluded the undercover investigations from the discussion, the defense attorney argued that “you can’t look at the website without looking at the entire context of the website, including the educational stuff” (Trial transcripts, SHAC case, p. 11). Here we see the game of determining (broadening/narrowing) the “relevant” context.
Is it allowed to campaign to drive Huntingdon out of business?

The discourse of formal rationality maintains that any political end can be pursued as long as the democratic and legal procedures are followed. In the case of SHAC, however, activists have wondered whether the very goal to put HLS out of business was already sufficient for criminal prosecution. While animal rights activists reject the notion that HLS is a “legitimate” business, the FBI takes it as its task to prevent its closure. In May 2004, John Lewis, deputy assistant director of the FBI, explained before the Senate Judiciary Committee in Washington, D.C., that the FBI had started the investigation in 2001 in order to address the “problem presented by SHAC and to prevent it from engaging in actions intending to shut down a legitimate business enterprise” (Lewis 2004). In my interview, the SHAC prosecutor said that SHAC was “pushing around” a company (Interview US-13). It is the question whether that in itself was already the crime that they were committing as in the criminal proceedings against SHAC, it was ambiguous whether the goal of putting HLS out of business in itself is an illegal goal, and whether just the agreement to that goal is therefore an illegal agreement and a conspiracy. Count 1 of the indictment seems to indicate this. The government contended that the SHAC defendants were conspiring to physically disrupt the operations of HLS and drive it out of business, with the intent to cause a loss of property to HLS in an amount exceeding $10,000.

The jury instruction read that the Animal Enterprise Protection Act determines that whoever
for the purposes of causing physical disruption to the functioning of an animal enterprise […] intentionally damages or causes loss of any property, including animals, or records used by the animal enterprise, or conspires to do so, commits an offense under the statute. (Jury instructions, Volume VI, p. 23/2697)

The jury instruction clarified that physical disruption as a consequence of lawful action is excluded from this offense, which may be intended to exclude legitimate boycotts from criminalization. Activists have, however, become suspicious of the perceived blurring between legitimate ends and illegal means (Interview US-16).

*From isolated incidents to a pattern – from vandalism to terrorism*

In my interview with the prosecutor in the SHAC case, he described that a policeman in a small town couldn’t make the connection between the incidents at that small-town level, explaining the need for a federal investigation and prosecution (Interview US-13). Also, Brent McIntosh, deputy assistant attorney general of the Justice Department, addressed the shift from the local level to federal jurisdiction during the hearing of the House Subcommittee on Crime, Terrorism, and Homeland Security on the proposed bill of the Animal Enterprise Terrorism Act, 23 May 2006, Washington. He argued that “considered individually,” the various actions are “State crimes.” However, local police lack investigative resources and a “nationwide perspective” to “put these local offenses into context as a multijurisdictional campaign of violence.” Thus the local “State crimes” became re-contextualized as a “multijurisdictional campaign of violence.”
Only when the case was taken to the federal level could the case be turned into the big case it was. Actions were committed in California, Boston, and Illinois. “Three acts of vandalism are not that bad” said the SHAC prosecutor. Indeed, the “individual acts of vandalism are not so bad.” “The magnitude of the separate incidents, the combination of all these acts of vandalism turned it into something that can properly be called ‘terrorism.’” He also emphasized the damage done to the lives of affected individuals: “Their lives will never be the same again” (Interview US-13).

Agirre has argued that the key to constructing a series of offenses as one consistent crime is the concept of a “pattern,” i.e., the existence of sufficient elements in common among individual offences to consider them as a whole, like a single and greater entity. Agirre argues that “the problem is that the ‘pattern’ is a procedural construct, a concept shaped by the process, often of fuzzy boundaries” (2004:19). This can have consequences for the kind of story that the prosecutor tells. For example, Agirre speculates that “the prosecution will tend to highlight the most dramatic, the gravest aspects of a purported overall picture, even if they are not central to the pattern” (2004:19). The construction of a “pattern” in the SHAC case transformed the prosecutorial narrative. Instead of focusing on the isolated incidents of vandalism, the prosecutor extended the time frame (Kelman 1981) and argued that many incidents together constitute the offenses of terrorism and stalking as charged in the indictment. How did the

---

202 For example, in the Rome Statute of the International Criminal Court, a crime against humanity is defined as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Among other offenses, the list mentions murder, torture, and rape. In order to link distinct incidents of murder, rape, and torture and argue that they constitute a “crime against humanity,” the prosecutor has to show a “pattern.” Common indicators that can show the existence of a pattern may refer to the victims, the geographical area of commission, the chronology, or the purpose and modus operandi of the perpetrators (Agirre 2004:18).
prosecutorial narrative choose the relevant facts and connect the different incidents that occurred in different states and at different times? It is this perceived and constructed pattern that explains that HLS Director Brian Cass from England was invited to testify about an attack on his person in England, even though the SHAC defendants were not accused of any events in England.

Regarding many crimes there is little doubt at what moment it is committed: “you know it when you see it” and it is either committed or not committed, without any space in between. There are crimes that are less clear when they are committed. I call these crimes “threshold crimes.” It means that a certain action is not a crime when it is only done a few times. It becomes a crime, however, when it is done many times. The difference between a few and many is obviously not so clear. Stalking is a perfect example of a threshold crime. A home visit one time is not stalking. A home visit four times may be stalking, but probably not. But somewhere along the way, when the acts multiply, the acts together may become the crime of stalking.

**Blurring legal and illegal actions**

203 Similar reflections have been made regarding “status crimes” (such as homelessness or being a drug addict) which became regarded as unconstitutional in the United States. “What the statute attempts to proscribe is not the commission of some act or acts, as is usually the case in most crimes. Rather it seeks to punish a person because of his status. The offense consists of being a certain kind of person, that is, an idle person...” (Supreme Judicial Court of Massachusetts in: Sidman 1972:54).
As the prosecutor connects the dots and puts separate events into a bigger picture, he describes many actions, both “underground” activity and overt actions that are “merely” offensive. This makes it difficult to tease out what exactly was illegal and which actions still continue to be legal. While in a typical de-contextualized narrative only those facts are selected that lead directly to the qualification of the crime, in a re-contextualized account many more activities and events are included and considered “relevant” in the description of the crime, while maybe not necessarily illegal on their own. Thus, the prosecutor described how the car of an HLS employee was flipped over and the home of an investor was “ransacked” – both in and of themselves clearly illegal actions of property destruction. In that same list, he described how people had gone to the house of a female senior executive on Mother’s Day, and that she was “spit at” and told to “get the F out of our neighborhood.” While these last actions of “spitting” and telling someone “to get the F out of the neighborhood” are certainly offensive, as isolated acts they are certainly not in the same category as ransacking a house, and probably not even illegal. However, as part of the pattern, activists worry that this pushes actions such as “spitting” and offensive language too far into the criminal spectrum.

In another example, the prosecutor argued that SHAC gave instructions on their website and that among them was the announcement that every week there would be a week-long phone or e-mail blockade against an HLS investor. It is not clear whether the prosecutor only mentioned this example to demonstrate the “control” that the SHAC website exerted over unknown “foot soldiers,” or whether this specific tactic of “blockades” is in and of itself illegal.
It is this uncertainty that is worrying other activists who consider their work to be restricted through this sentence. This blurring of legal and illegal activities is very similar process to the cases in Spain, where the prosecutorial narrative constructed the ETA network as the basis for multiple prosecutions. In both country studies activists started to worry at which point their (previously) legal activities become illegal. There is no clarity as to when exactly otherwise legal activities become illegal because of the combination and mix or alleged relation with underground illegal actions.

*Construction of collectives of co-conspirators and victims*

The prosecutorial narrative in the SHAC case also exemplifies the shift from individual perpetrators and victims to larger collectives. During the trial, the defense lawyer of defendant Harper argued that “the government has a theory. The government is making the entire universe of animal rights activism and activists unindicted co-conspirators” (Trial transcripts SHAC case). Indeed, the prosecutor argued that the SHAC defendants entered into a conspiracy not only with each other, but also with unknown others who would read an act upon the calls and information posted on the SHAC website. Regardless of the unknown and unindicted co-conspirators, the prosecutor had construed a group out of the six defendants and the SHAC organization.\(^{204}\) At the same time, the prosecutorial narrative described a collective of victims – often referred to as “law-abiding employees” or “law-abiding citizens” (McIntosh 2006) – that

---

\(^{204}\) One other activist McGee had initially also been indicted; however, his charges were subsequently dropped. Because McGee was alleged to have actually engaged in an act of vandalism, activists speculated he had only been indicted to strengthen the link between the coordinators of the website and actual vandalism (Interview S-5). The prosecutor refused to explain why the charges against this particular person were dropped (Interview S-13).
consisted of all the targets of SHAC and every employee or associate that had been targeted in any of the tactics that were used, or maybe also those that felt threatened due to what happened to others. Only count 4 and count 5 identify two specific individual victims. These individual victims, however, explicitly represented many more families and were meant as illustrations. This was apparent, for example, when the prosecutor started the opening statement with the story of S.D. and her little son who had fear of the “animal people.” “And that fear, ladies and gentlemen, is why we are here today, because what was happening to S.D. and her family was happening to families all across America.” Thus, the prosecutor construed a collective of victims that consisted of “families all across America” (trial transcripts SHAC case).

**Criminal responsibility: Generals and foot soldiers**

In combination with the construction of a “pattern,” these collectives of co-conspirators and victims lead directly to the next issue: the determination of criminal responsibility. Were SHAC activists to be held responsible for actions of others? Were they “generals in a war” in which others were foot soldiers? That is the view the prosecutor in the SHAC case put forward. The prosecutor anticipated in his opening statement that the defense would claim that the SHAC defendants were responsible for the entire campaign, but not for the “illegal stuff.” He expected that they would say: “We ran a legal campaign.” The prosecutor, on the contrary, created an image in which the SHAC defendants were directing their “foot soldiers.” He claimed that the defendants could not exempt themselves for the illegal actions that happened as part of the campaign. “The law is not naïve,” the prosecutor said. Thus he pictures the defendants as
trying to push the boundaries of the law or circumvent the law in order to pursue aggressive tactics while claiming a purely “legal” campaign. He asserted, however, that the law cannot be circumvented so easily (Interview S-13). While the defendants claimed to be squarely within the political arena, the prosecutor pushed their actions into the criminal justice arena.

During the SHAC trial a young student testified that he had been engaged in the tactics described on the SHAC website. For example, he sent black faxes to the investment bank Stephens because it was announced as a SHAC tactic. He was a witness for the government and the prosecutor specifically re-contextualized the black faxes and put them into the context of the alleged conspiracy by making it clear that this student “of his own free will knowingly and willingly participated in this conspiracy.” Thus, the prosecutor decided not to define this single action of sending black faxes as a separate crime and prosecute the perpetrator accordingly. Instead, the re-contextualized prosecutorial narrative turned this witness into a co-conspirator (although he was not indicted as such). The choice of the U.S. Attorney to focus on the people running the website makes this a case in which the “big fish” are prosecuted while these “foot soldiers” are let go. This choice contributes to the uncertainty among activists about what exactly is illegal: coordinating a collective action of sending black faxes or actually sending the black faxes?

The SHAC indictment construes a causal story of actions:
19. On or about February 15, 2001, the SHAC Website posted an announcement which stated in part: “we’ll be at their offices, at their doorsteps, on their phones or in their computers. There will be no rest for the wicked.”

20. On or about March 6, 2001, the SHAC Website listed the “top 20 terror tactics” that could be used against organizations and individuals in order to harm HLS and ultimately cause it to shut down.

21. On or about March 31, 2001, after the SHAC Website postings described above, protesters appeared at the New Jersey residence of HJ, an HLS employee, and banged on the windows and doors at his home.

22. On or about April 2, 2001, after the SHAC Website postings described above, rocks were thrown through windows of HJ’s home; one of the cars in HJ’s driveway was overturned and vandalized; and a second car in HJ’s driveway was also vandalized. (SHAC indictment, 2004)

Nowhere in the SHAC case did the prosecutor prove or even argue that the SHAC defendants were themselves present on 31 March or 2 April. He claimed that that was not necessary: “The charge is not that they did this, only the conspiracy to do it. Sometimes they were there: that was not necessary, but made it easier” (Interview US-13).

In order to demonstrate that the defendants were indeed criminally responsible for the alleged acts, the prosecutor described that the SHAC website listed actions such as smashing windows in your home, vandalizing your car, threatening calls at all hours of the night, sending e-mail bombs to crash computers, and ordering goods and services in other people’s names. He pointed out that above this list the SHAC website read: “don’t read this as an extensive list of accomplishments to be proud of, which is it, but a list that can be outdone and surpassed” (p. 26). The prosecutor emphasized that the SHAC website specifically called for such illegal actions and described that the website called upon activists to “make your home visits count” and posted three pictures: one of a home demo, one of the HLS worker’s car flipped, and one of an HLS worker’s house with red paint on it. The prosecutor asked the rhetorical question: “where
does it say, write a letter to these people? It certainly doesn’t say that, and those pictures certainly don’t suggest it” (Trial transcripts, SHAC case).

The defendants were charged because they were responsible for their own actions. They were not charged because of some sort indirect responsibility, although actions of others did play a role in the story. The prosecutor claimed that SHAC defendants were responsible for directing and organizing the activities executed by the “foot soldiers.” The criminal responsibility of the SHAC activists was based solely upon their postings on the website. It was not alleged or proven that they actually participated in the vandalizing actions. The prosecutor explained why the information on the SHAC website made the defendants criminally liable:

   The first time I can claim that I didn’t know that you were really going to do that. The second and third time I know that you are actually going to do it. And every time I announce the success of the organization. At some point during the continuum, you become complicit. We indicted the people in the leadership roles. [...] If you fight a war, they were generals sitting at their desks, planning. The generals are guiltier than the foot soldiers: they provide information and they were the ones that took the credit. These defendants were on the phone saying: “we did it.” These defendants decided that the targets were going to be Deloitte & Touche. That person is to me as guilty as the foot soldier. (Interview US-13)

Thus, as one piece of evidence, the prosecutor presented an ALF poster (government exhibit 8048) that was on the SHAC website and also found on a computer in the house where three of the defendants lived. The poster claimed several actions that were committed against HLS and those associated with them.
100 windows smashed, 44 beagles liberated, 15 office attacks, 10 ferrets liberated, 8 ATMs attacked, 8 web attacks, 7 paint attacks, 4 stink bomb attacks, 4 house attacks, 1 smashed car, 1 flipped car, 1 sunk yacht.

What exactly was the argumentation that linked the SHAC defendants to these actions and made them criminally responsible for them? The SHAC defendants were not charged as perpetrators of these specific crimes and it is not clear whether they could have been charged as such. Instead, the prosecutor argued that these actions were part and parcel of the bigger scheme and conspiracy of “terrorizing” and “stalking” the SHAC targets. The prosecutor argued that defendants went on to the next target “knowing that in the past when they had identified targets, violent acts and illegal acts followed” (trial transcripts, SHAC case).

The construction underlying this type of criminal responsibility is the “conspiracy.” It is important to be clear on the point that in this case, it was not (only) about “incitement,” which would leave open when and how someone does an illegal act. Instead, it was about “coordinating and directing,” including when exactly, for example, an e-mail blockade would occur. Prosecutors argued that the SHAC defendants conspired among each other and with all the people participating in the SHAC campaign, specifically those that committed the illegal acts. The prosecutor pointed out specifically that it was legally possible to conspire without knowing all of your co-conspirators. What was required was that everyone be aware of the agreement and act in furtherance of it. Without SHAC, no campaign, argued the prosecutor. By
making the SHAC website into the *sine qua non* of the campaign, the prosecutor established the causal story.

Activists, on the other hand, are left with many questions: Are the SHAC defendants directly criminally liable for the illegal actions which were on an ALF poster? Is it because they had the poster on their computer or website? What was alleged to be the relation between the ALF and SHAC? Does it matter for the conviction whether or not the SHAC defendants *agreed* with these tactics? Does it matter for the conviction whether or not the SHAC people *said* that they agreed with these tactics? In this regard, activists wonder whether it is of any use that they put disclaimers on their website, disavowing any responsibility for illegal actions (Interview US-16). An e-mail by SHAC UK containing a sample letter and the e-mail addresses of employees of a secondary company, for example, also contained the following disclaimer:

**DISCLAIMER AND INFORMATION** - All details in this action alert are provided for informational purposes only, and should not be used for any illegal activities as defined by the jurisdiction you live in. SHAC are not involved in, and do not encourage, any form of harassment or illegal action. Nothing in this action alert has the purpose of inciting such behaviour. Please keep all communications polite.

The prosecutor, however, argued forcefully that the disclaimers on the SHAC website should be put in “context.” He described that “someone can walk into a bank, rob it at gunpoint, and all
the while wear a sign saying I’m not robbing this bank. But you are robbing that bank” (trial transcripts, SHAC case). In this way, the prosecutor dismissed the value of the disclaimer.

**Tensions around the boundary between the political arena and the criminal justice arena**

The prosecution of the SHAC defendants has raised various questions that all address the position of the SHAC tactics and the conduct of the defendants in relation to the political arena and the criminal justice arena. I will discuss some of these issues that have been debated inside as well as outside the courtroom: What is the difference between education and intimidation? What is the domain of protected speech and peaceful assembly, and when does speech turn into the crime of “threats”? Activism and (free) speech are often closely related.

At the beginning of his opening statement against the SHAC defendants, the prosecutor addressed the “line” between permitted and even stimulated political engagement on the one hand and illegal action on the other:

> We all encourage our young people to be involved in the social issues of the day, but always within a framework of what is just and what is fair. What we don’t encourage and where we draw the line is that lawless behavior that steps on the rights of others, because we don’t want people involved in causing what happened to Sally Dillenback and her family. In this case, the evidence will show that the defendants went well over the line. They went from having a
concern for animal welfare something that is worthwhile and praiseworthy to a campaign of thuggery and intimidation. (Trial transcripts, SHAC case)

The prosecutor employs the plural, asserting that “we all encourage” and “we don’t encourage.” He makes normative statements and draws a line between what “we” find desirable and what “we” consider to cross that line. Who is the “we” that is drawing this line? For whom does the prosecutor legitimately speak? How do actors in society organize and move in order to co-determine that “line” and maybe even move the line a little bit? The prosecutor addresses not only what is permitted as tactics, but even ventures into the terrain of the goals that are considered “worthwhile and praiseworthy,” thus blurring the distinction between means and ends. He specifically praises a concern for “animal welfare,” whereas the SHAC defendants have explicitly distanced themselves from animal welfare organizations and taken a firm position as animal rights advocates.

The prosecutor often draws on this distinction between tactics that are permissible and those that are illegal. He asked the jury rhetorically whether the SHAC defendants were only intending to be involved in letter writing, standing outside a building and “simply protesting” or “calling and complaining” (trial transcripts, SHAC case). As the prosecutor thus expresses the boundary between the political arena and the criminal justice arena, he asserts more than specifies the exact difference between “simply protesting” and “stalking” or “illegal action.” He opposes what he views as a “tyranny of the minority.” “Bullying the NYSE, that is not what this
country is about; this country is about protesting legally. It is well within their right to write letters” (Interview US-13).

What SHAC did was offensive and obnoxious. Many people I have spoken to agreed with that, also animal rights activists, also some of the lawyers involved in Green Scare cases. The dispute therefore is not about whether what SHAC did was offensive or obnoxious. The dispute is also not about whether or not they should not be doing this kind of offensive and obnoxious protest activity because it is offensive and obnoxious. The question in the meta-conflict about this criminal case is whether this offensive and obnoxious protest activity is criminal or even terrorist activity.

*The “chilling effect”*

Various lawyers and activists consistently portray the SHAC case as an attack on free speech (Boghosian 2007). They fear the case may have a “chilling effect” on other activists as the line between legal political speech and illegal speech has been blurred. Matthew Strugar, cooperating counsel with the Center for Constitutional Rights on the SHAC case, claimed that the court’s decision gives the government a “carte blanche to prosecute organizers of internet-based social justice campaigns that involve any hint of intimidation by rouge third parties. That kind of liability flies in the face of decades of Supreme Court precedent” (CCR 2010a).
In my interview with one animal rights activist who organizes home demonstrations focused on closing down HLS, she expressed her concern that a lawyer had told her that despite disclaimers she might be held responsible for the information she publishes on the Internet, even though that information may be publicly available. She is at a loss regarding how to determine the boundary between what is legal and what is illegal. She ends every e-mail with the following disclaimer:

[Name animal rights group] is an independent non-profit organization not affiliated or associated with SHAC, SHAC USA or any other group or organization and does not conduct or incite any illegal activity. The above information is not meant to incite or request any illegal actions or illegal activities of any kind. If you have any questions about the legality of any act, we encourage everyone receiving this (or the) action alert(s) to check your local laws and ordinances before proceeding to do anything.

Indeed, she reported to me that she was being more careful with public statements, fearful that her declarations would be misconstrued. She also had fear of experiencing a raid by the FBI (Interview US-16).

Threats, fear, and protected speech

In the chapter on Spain, I devoted an entire section to the criminalization of speech acts as “glorification” of terrorism, briefly discussing the case of Iñaki de Juana, who was tried for the publication of two articles that were alleged to be threatening. The SHAC case incited a similar
debate about the political or criminal nature of speech. When does speech depart from the political arena and the protection of the First Amendment? Not all speech is protected. Legal scholar Holmes famously held that falsely shouting “fire” in a theater is not protected speech, as it can cause havoc and damage.\textsuperscript{205}

The rules for this debate were brought into the courtroom through the jury instructions. They provided the jury with a concise summary of the meaning of the right to free speech and to peaceful assembly (the First Amendment). The instructions clarified that the constitutional right to freedom of speech protects symbolic or expressed conduct as well as actual speech. The jury instructions described this fundamental right as embodying the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. This commitment to public debate is typical of liberal democracy. The instructions further asserted that people have the right to make their voices heard on public issues. This means that people must have the opportunity to have their voices heard collectively, if individually they would be too faint or lost. This then clarifies the right to association. However, speech is not protected when it constitutes a “true threat” in order to protect individuals from the fear of violence.\textsuperscript{206}

The instructions explained that intimidation is a type of true threat that exists when an actor or speaker directs a threat to a person with the intent of placing that person in fear of bodily harm.

\textsuperscript{205}“The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Holmes in: Schenck v United States, Supreme Court, 249 U.S. 47, 1919.

\textsuperscript{206}The relevant jurisprudence here is the case Brandenburg v. Ohio, 395 U.S. 444(1969).
or death. According to these instructions, however, only fear of bodily injury is recognized as intimidation; fear of property damage was not mentioned.\textsuperscript{207}

Count 2 of the indictment clearly indicates that the defendants were charged with inspiring “reasonable fear of the death of, or serious bodily injury to that person, or a member of the immediate family, or a spouse, or partner, or intimate partner of that person.” The defendants and many animal rights activists question whether there was a “reasonable fear” of death or bodily injury, given that the tactics had never included such things. The prosecutor, however, argued that telling “targets” that “we know where you live” and telling Marsh employees “we will treat you no different than we would treat Brian Cass” (which, the prosecutor added, one of the witnesses testified to have clearly understood as a reference to the beating of the British HLS director Brian Cass), is not protected speech, but a threat.\textsuperscript{208}

An important aspect of the fear of the SHAC tactics was the intrusion of privacy. Activists participating in the SHAC campaign have used tactics that they call “satire.” Much of this satire is not really funny, however, by most standards. They posted the underwear of a woman on the Internet with her menstruation blood. They had found this in the garbage. Funny? Probably not. Terrorism? Probably not. The general feeling was, as the prosecutor told me, that there should

\textsuperscript{207} In the SHAC case the issue was whether there was a reasonable fear of physical harm. The AETA actually already criminalizes once emotional distress occurs; see chapter 6.

\textsuperscript{208} Fear is thus only possible if a “target” interprets the actions in a certain way. It is this interpretation that can be more or less “reasonable.” These considerations are not new to criminal doctrine. Indeed, there are many cases in which it has come up, for example in the Goetz case, where the defendant argued to have acted out of self-defense, and thus the reasonable belief that he was in danger.
be a law prohibiting this. Different communities have different standards with which they interpret “jokes” and “satire,” and in this case, that debate became a key part of the criminal prosecution.

The difference between educating and stalking

The political arena is dominated by two logics: persuasion and negotiation. While persuasion is about changing the hearts and minds of the opponent, negotiation is a power-based logic. Persuasion thus entails informing, educating, and providing arguments in favor of a certain position. This is, for example, the modus advocated in the following citation from one of the e-mails from the group Win Animal Rights in their campaign against HLS: “As always, please keep all correspondence, with the above, polite and informative. A picture is worth a thousand words. You can find pictures at: http://www.shac.net/HLS/photos.html” (4 January 2008). The defense lawyers argued that the objective of SHAC defendants also was to educate people about animal testing.

As the prosecutor addressed these arguments and described what education is and what the difference is between education and intimidation, the debate turned to the shifting boundaries and logic of the political arena and the criminal justice arena. The prosecutor was very specific about what the defendants should have done: “If this is a campaign about education you might go to the decision makers and want to talk to them about what animal testing is all about” (trial

209 Dynamics of negotiation are typically determined by resources and the parties’ “best alternative to a negotiated agreement” (BATNA).
transcripts, SHAC case). The prosecutor emphasized that in the standardized “form letter” on the SHAC website there was no word about animal testing and no attempt to appeal to the conscience of the companies. The prosecutor argued that the information that was put up on the website (where employees live, what they look like, and where their kids go to school or where they go to church) could only have been obtained by “stalking” someone. Further, this information could not be understood to have been intended to “educate” that employee, but instead, in combination with the twenty terror tactics and the knowledge of what happened to other “targets,” the purpose of this information could only be understood to have been threatening.

The prosecutor thus established a “line” between “advocating your beliefs” (the logic of persuasion) and “threatening someone to get them to do what you want” (the logic of coercion). The prosecutor talked about this line as if it were clear-cut, arguing that the SHAC defendants “crossed the line.” The prosecutor gave examples of other organizations that were also protesting against HLS and they “knew about that line, and they stayed on the right side.” He described that these organizations did not list the home addresses of employees on their websites. They did not tell someone else to throw a brick through somebody’s window.

The prosecutor also dismissed the argument that the defendants were only reporting “news,” just as the New York Times can report about church fires in Alabama. The prosecutor argued
that the New York Times does not applaud those actions. The prosecutor argued that the New York Times did not say, “here are ten other churches you can go after.” And the New York Times did not publish a matchbook with the church addresses.

The difference between “organizing” and “conspiracy”

As mentioned above, some activists argued that the SHAC case can have a chilling effect on other campaign organizers. Some prosecutorial arguments and uses of evidence can easily hamper legitimate organizing, they argued. For example, Josh Harper was held responsible, among other things, for speeches he held across the country. Why? The prosecutor argued that during these speeches he would tell people how not to get caught. The prosecutor was explicit about the move towards putting the events into a context. He was frank about the fact that none of the defendants was charged with any individual speech. Instead he said that “you should consider them in the context of deciding what was Josh Harper’s intent and his state of mind when participating in this campaign” (trial transcripts, SHAC case). Thus, the speeches were re-contextualized as it was argued that they should be seen as part of the campaign.

The central medium in the SHAC campaign was the SHAC website. This has created questions in the activist community about the criminalization of internet-based activism. The prosecutor argued in his closing argument that a website is the ideal medium for a conspiracy, because a

---

210 Of course, there are many times that news sources do indeed give such evaluative comments. It is almost impossible to report without emitting an evaluation in the kinds of words that are chosen and the facts that are selected. It will mostly be a gradual than a categorical difference between reporting news on the one hand and applauding or condemning on the other hand.
conspiracy is an illegal agreement in which you want to communicate with your co-conspirators without it being found out that you are a part of the agreement. In this regard, activists were concerned about a further argument the prosecutor made. He claimed that communicating without divulging “who is part of the illegal agreement” could be helped with encrypted communication, such as PGP (trial transcripts, SHAC case). The prosecutor thus linked the use of PGP by the SHAC defendants to the intent to communicate this illegal agreement: the conspiracy. The prosecutor argued that activists said things on the phone like “I can’t talk about that. I’ll send you something over PGP.” Activists were outraged about the fact that using PGP could thus be construed as evidence for participating in a conspiracy. Similarly, the prosecutor argued that the criminal conspiracy was also the reason why Lauren Gazzola called herself Angela Jackson during an interview with the radio. Activists argued that the prosecutor here turned the case on its head. They argued that it was precisely the awareness that effective activism could launch a criminal investigation that motivated Gazzola to take on an assumed name and that they needed to protect themselves against such repression.

**Beyond the SHAC case: The Animal Enterprise Terrorism Act**

As described in the previous chapter, the SHAC campaign and its strategy of secondary targeting led to the enactment of the Animal Enterprise Terrorism Act. Representative Scott brought up his concern that the law might lead to the prosecution of activists engaging in “peaceful civil disobedience:”
If a group’s intention were to stage a sit-down, lie-down or to block traffic to a targeted facility, they certainly run the risk of arrest for whatever traffic, trespass or other laws they are breaking, but they should not be held any more accountable for business losses due to delivery trucks being delayed any more than anyone else guilty of such activities. (Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, 23 May 2006, Washington)

Brent McIntosh, deputy assistant attorney general of the Justice Department, testified during the same hearing. He asserted that while federal prosecutors were “well equipped” to prosecute activists that use arson or explosives, “not all animal rights extremists use arson and explosives.” This indicates a clear move towards proactively focusing on the aboveground activities of the activists that are considered to organize and direct protests.

It did not take long for other activists to be charged for “home visits” under the new AETA. In 2010, the first case charged under this new law came before a judge. The indictment described the behavior of the four defendants as “criminal trespass, harassment, and intimidation at a bio-medical researcher’s residence in the East Bay,” which was construed as an overt act in the conspiracy. Defense lawyers from the CCR claimed that the only thing that the activists were doing was “chanting, leafleting and chalking on public sidewalks in front of University of California researchers’ homes, and using the Internet to conduct research on the activities of the protested company” (CCR 2010b). Others, however, did not see innocent chanting and leafleting, but threats and intimidation. “Any reasonable person would see it as threats,” said J. David Jentsch, a neuroscientist at UCLA who had experienced such harassment himself (Miller
2010). On 12 July 2010, a judge dismissed the indictment of the AETA4, arguing that the indictment did not specify the criminal conduct alleged to have been committed by the four defendants:

In order for an indictment to fulfill its constitutional purposes, it must allege facts that sufficiently inform each defendant of what it is that he or she is alleged to have done that constitutes a crime. This is particularly important where the species of behavior in question spans a wide spectrum from criminal conduct to constitutionally protected political protest. While “true threats” enjoy no First Amendment protection, picketing and political protest are at the very core of what is protected by the First Amendment. (Order dismissing indictment against AETA4 without prejudice)

While the case did not result in a conviction, it does demonstrate a continued attempt to categorize these activities (which are known as “home visits”) under the label of terrorism. It thus responds to the mobilization by scientists and employees in animal enterprises who, like Walsh of the National Animal Interest Alliance, view the animal rights activists as “small-time terrorists” (Walsh 2000).

Not only at the federal level, but also in state prosecutions home demonstrations have been the subject of prosecutions, for example in the case against Kevin Olliff, who was accused of stalking and a conspiracy to commit stalking after participating in home demonstrations. Olliff was alleged to have conspired with unnamed and/or unidentified co-conspirators who placed
an improvised incendiary device at the house of one of the targets. The only thing that Olliff was alleged to have done as an overt act was to participate in home demonstrations in which they chanted, for example, “free the animals A-L-F” and mentioned the name of the target. The prosecution also requested to have a gang enhancement applied, arguing that the ALF is a “criminal street gang” and that Olliff’s expressions during home demonstrations showed his affiliation with the ALF (Indictment 2009). The judge, however, ruled that the ALF cannot be qualified as a gang.

The detailed analysis of the prosecution of the SHAC defendants should serve as an in-depth example of the impact of a re-contextualized narrative on the prosecutorial choices in a criminal case and the multiple debates that emerged with it. It is clear that the prosecutorial narrative re-contextualized a series of events into a pattern, construing a conspiracy, a collective of co-conspirators, and a collective of victims, igniting intense debate about the exact nature of the role and activities of the SHAC defendants and whether that should be categorized and dealt with in the political arena or in the criminal justice arena. The case served to marginalize SHAC activists from the broader animal rights community, severing links of solidarity, and sending a strong message to the more moderate groups and individuals to distance themselves from such tactics of “nuisance campaigning.”

7. Conclusion
When I introduced the eco-conflict in the United States at the beginning of the previous chapter, I juxtaposed the twin concepts Green Scare and eco-terrorism. In the past two chapters I traced these concepts and their development as well as the actors behind these two different frames that claim to capture reality. Who are the real eco-terrorists? And when does the offensive, obnoxious, or dangerous become illegal or even terrorism? Those are the central contentious questions in the criminal justice arena. I analyzed the prosecutorial narrative as a voice in the conversation with various other voices in society that challenge the government to take a position. Some images are adopted in the narrative of the prosecutors, others are rejected.

Radically different images exist regarding the status quo that protesters confront: animal torture versus legal animal testing; meat as murder versus a profitable and necessary meat industry; unnecessary killing of animals versus a legitimate fur industry providing people with clothes; unnecessary destruction of nature versus construction projects to fulfill human needs; destruction of pristine lands versus the legitimate drilling for oil to deliver energy. The images proposed by activists are generally ignored in criminal prosecutions, relegated to the political arena. There are no prosecutions of Huntingdon Life Sciences for the “murder” of four hundred animals every day. Instead, prosecutors proclaim the legality of the work of HLS as prescribed by the laws on animal testing.
Both environmentalist activists and the targets of their demands employ the language of criminal law. In their efforts to seek justice, change, or punishment they call upon the government to adopt their perspective and invest time and resources in criminal prosecutions or lawsuits in order to redress wrongs. I paid attention to the way in which the state has responded to environmentalist protest activity and distinguished between what it deemed legitimate and political and what has to be prosecuted as illegal and criminal. Dickson points out that there are “cases and investigations that do not have to be initiated and that could be ignored with little or no serious consequences” (in: Holden Jr. 2006:19). By not taking up certain cases, the government marginalizes the voices of those that felt victimized. This happened initially with fur farmers and animal scientists. They, however, were able to mobilize successfully as victims in the criminal justice arena, drawing attention from the government. This is not the case for many of the environmentalist demands, which even when they are framed in the language of criminal law – if only as a provoking slogan such as “meat is murder” – are hardly adopted by the state, and are ignored in prosecutorial narratives.

While the prosecutor claims to act in name of “the” public interest, I presented the different voices in the meta-conflict that contests that concept. Activists challenge prosecutorial claims to speak in name of a particular “public,” such as the “law-abiding citizens.” Animal enterprises allied with other environmentalist targets to push the government to adopt eco-terrorism as the proper label for extremist environmentalist protest. “Prisoner supporters” resist government prosecutors and rally for support under the banner of the Green Scare. The
competing narratives in the criminal justice arena always include a construction of good and bad. Criminal justice concepts lend themselves perfectly to this in the form of justifications, excuses, the “necessity” defense, principles of proportionality, attenuating circumstances, or duress in order to defend the morality and legitimacy of their position. Analogies with other criminal cases or metaphors are another tool with which demarcations are made between good and bad. The vocabulary chosen by activists to talk about their tactics is often explicitly disputed in criminal prosecutions: animal liberations versus property destruction or animal enterprise terrorism; the successful pressure on secondary targets versus the coordination of a terror campaign; legitimate civil disobedience versus criminal obstruction of lawful government proceedings.

Describing the way in which the prosecutorial narrative claims control over conduct and mobilizes criminal law vocabulary to translate events into categories operable in criminal proceedings, I have presented it as a “marginalizing” discourse. Thus, I contrast it with the dominant developments that I identified in Spain and Chile. The prosecutorial narrative in Spain is largely expansive, pushing the boundaries of the criminal justice arena into the political arena and claiming authority over conduct that was previously left untouched by criminal law categories. The prosecutorial narrative in Chile during the past twenty years has been profoundly ambivalent, as it keeps going back and forth in its usage of criminal proceedings to control events.
Prosecutorial narratives separate the political and legitimate from the criminal and illegitimate. In doing so, the prosecutorial narrative in the eco-conflict in the United States identifies a specific category of actions as “eco-terrorism” and draws a strict boundary between those engaging in lawful political action and those that “crossed the line.” The narrative affirms the boundary between what is criminal and what is political. It gives signals to potential lawbreakers that they better stay away from that fine line where permitted protest turns into law breaking. I interpret the prosecutorial narrative in the United States as a balancing act as it navigates between fringe and mainstream, between extremists and moderates, between radicals and compromisers. In this navigation process the prosecutorial narrative actively contributes to producing those boundaries between the extreme and the moderate and pressures actors to take a stand. Mainstream organizations, for example, are pressured to distance themselves from “extremist” actions, and “extremists” are pressured into leaving activist circles and denouncing the use of “violence.” The animal rights and environmentalist movement has become increasingly split over the use of radical versus moderate means in the struggle for animal rights and the conservation of nature. Moderate organizations are distancing themselves from extremist activists. I understand this to be a mutually reinforcing process. The mainstream rejection of extremism provides more leeway for the government for harsher prosecutions, and at the same time the distance sought by moderate organizations is a consequence of these prosecutions.
In return, the prosecutorial narrative ensures that moderate (“welfare”) demands are squarely located in the political arena. Given the widespread support for moderate environmentalist demands, it is imperative that mainstream environmentalists not be lumped into the category of “eco-terrorists.” For example, the SHAC prosecutor made it a point during the trial to point out the “glaring difference” between SHAC and other [animal rights] organizations, who would not go “to the extremes,” because “they did not want to break the law.” Indeed, while activists attribute widespread paranoia to the Green Scare, the prosecutor holds the activists themselves responsible for creating a “paranoia” and making “legitimate animal rights activists” scared of the government. Thus, the SHAC prosecutor specifically isolated the SHAC campaign from other animal rights activity, also emphasizing that he would have “no desire to go after them if they alter their modus operandi” and he emphasized that out of thousands of people who are involved in animal rights activism, only six had been indicted (Interview US-13).

The increased adoption throughout the 1990s and 2000s of the term “eco-terrorism” in the prosecutorial narrative, and most importantly within the FBI, has led to a diversion of energy and resources in these prosecutions. The political “ecological” motive which is at the core of the concept of “eco-terrorism” is essential in (a) the creation of a link between distinct actions and actors and (b) the perception of heightened danger. More than the specific harm in each of the cases, it seems to be the superior attitude of activists that challenges the status quo. Their insistence on “higher laws” and their outspoken willingness to break the law are viewed as
problematic and indeed, the attitude of the defendants in the SHAC case enraged the jury and the judge (Interview US-14).

The eco-terrorism narrative further involved a shift towards proactive investigations and the construction of criminal liability for aboveground activity through concepts such as “coordination” or “incitement.” The shift to proactive investigations as well as the emphasis on deterrence reflects the concern of prosecutors with potential future victims and the fear of an escalation of tactics. To a large extent, the intended audience of the prosecutorial narrative consisted of potential future lawbreakers, “kids” that might get carried away by ideologues or the encouragement of “heroes” like Rod Coronado or Tim DeChristopher. This concern shifts the focus from the prosecution of individuals for past harm to the attempt to investigate and prevent the radicalization of a specific sector of a political movement as well as the marginalization of those that were considered “big fish” and possible “examples” for others.
Conclusion: A Critical Analysis of the Production of Criminal Justice

In the introduction I wrote that this dissertation can be seen as a long response to prosecutor Ms. Vidal in Chile, who told me that she was “just applying” the law (Interview C-10). While it would be easy to dismiss her comment as mere rhetoric, I have taken her position seriously. My analysis may therefore read as a litany against the straw man that I built of prosecutors claiming they are “just applying the law,” while most would concede that politics can never be entirely excluded or ignored. Still I find it important to address that rhetoric, because it is used over and over again in the practices and language of criminal justice agents, the government, and the media. Indeed, the proposed “solution” to experienced problems is still often more law and better law.

My criticism of the view that law is autonomous (and just a matter of application) does not mean that I adopt the view that law is just an instrument in the hands of the elite and simply politics by other means. Academic debate has largely moved on from that dichotomous representation as it is has turned out to be far more complicated than that. If the so-called “elites” had had their way, criminal prosecutions in the countries in the episodes in this study would probably have looked very different. Large transnational companies in Chile, for
example, would not complain about the lack of convictions and sentences. Indeed, most surprising is the outcome that often even the actors whose account of victimhood is honored in criminal proceedings continue to be dissatisfied, even if the prosecutorial narrative has made a shift in their direction, such as through the adoption of their proposed “context” for reconstructing events. One might have expected that either the victim or the defendant (and their respective supporters) would be content with the criminal prosecutions. The pervasive discontent, however, is the most persuasive piece of evidence suggesting that criminal prosecutions and the “rule of law” should not be expected to “solve” perceived injustices. Instead, prosecutions continually produce images that are deeply contested and are thus unable to create an authoritative narrative.

Ms. Vidal was certainly aware of the fact that criminal prosecutions involve much more than just applying the law, especially in the “hot” context of the Chilean-Mapuche territorial conflict. Her statement, however, expresses an ideal that is very much alive. Her words reflect the ambition of the prosecutor’s offices not only in Chile, but also in Spain and the United States, not to get involved with the politics of a case. Her refusal to acknowledge the complexity of “just applying the law” communicates the promise of benefits that come with faithful adherence to the rule of law. As I have argued in Chapter 4 and 5, her speech was the uncomfortable counterpart of the ambivalent tensions in the prosecutorial narrative in the courtroom. My dissertation is a call to bring these tensions out in the open, instead of denying them and concealing them to the public. The analysis shows how changes in the prosecutorial
narrative play a role in criminal prosecutions. Specifically, I have shown how such changes often expand criminal responsibility and turn courtrooms into the central sites of contention and prosecutors into major actors in the larger conflicts. My ethnographic analysis has shed light on the micro-encounters and micro-mechanisms behind such broad terms as “criminalization” and the “rule of law.”

I will start this concluding chapter with a brief recap of my central argument. Liberal democracies claim legitimate power and a liberal criminal justice system that can adequately deal with challenges to state order. Major contentious episodes, however, pose a dual challenge to liberal democracies. First, the state has to respond to the challenges to the status quo and – with or without reforming the status quo – effectively restore order while facing claim-makers or defenders of the status quo with grievances that are shared by a larger group in society; and second, in responding to disruptive protest activity the state has to act in such a way that it upholds its claim to liberal legalism. This is the dilemma of the short-term interest in order and the longer term interest in legitimacy.

In the scholarly literature, this puzzle about the challenges of state legitimacy goes back to Weber. In order to understand and enable analysis of variations in the state response, several scholars have developed ideal types of different modalities of law as the state negotiates its own legitimacy vis-à-vis challenges to order. Drawing inspiration from the available scholarly literature and building on the work of, for example, Balbus (1973), Thompson (1975), and
Nonet and Selznick (1978), I developed the modalities of de-contextualization versus re-contextualization. My dissertation provides data from real situations where the variation between such modalities is explored in actual criminal prosecutions. I argue that in the context of a contentious episode, despite the claim of liberal legalism to bracket political ideologies, criminal proceedings can become the arena in which the political contention is played out. I provided three case studies of criminal proceedings in distinct contentious episodes to show what this looks like.

I thus set out to explore the puzzle of what the criminal justice arena looks like when the government is prosecuting people in a major contentious episode, i.e., people with political claims representing a larger constituency. Describing a common pattern of what I have called “contentious criminalization” in Spain, Chile, and the United States, I argue that the meta-conflict about the criminal proceedings contributes to a shift of the political mobilization from the political arena into the criminal justice arena. This means that the criminal justice agents inevitably become an actor in the political contention. Thus, although the liberal state works with a criminal justice system that is based on “formal rationality,” which is premised on the notion that it stays out of the political contention by formalizing categories and excluding context, in the previous chapters I have demonstrated how this comes to be increasingly difficult and the prosecutor will inevitably tell a story which becomes part of the contention and subject to mobilization.
My study has been “semiotic” in the sense that I take the criminal law to be a language. I studied it as if it were a language that communicates and has a standard grammar and can develop local slang. Criminal law and the social practice of criminal prosecutions thus constitute a system of signification. Understanding the prosecutorial narrative as a semiological phenomenon means asking how the signs receive their meaning and how and what they signify.

In my analysis, the relation between prosecutorial narrative and criminal law was viewed as loosely equivalent to that between “parole” and “langue” á la Saussure, i.e., the criminal law is that which is codified and not used, whereas the prosecutorial narrative is the application and use of that language. As such, the chosen medium of criminal law and criminal proceedings contributes to the message it sends. For example, use of the “terrorism” label triggers more resources, but the use of this code word tends to undermine the claim of manageability which is the underlying message when a state labels conduct as “merely” criminal. Using this lens of meaningmaking does not mean ignoring material aspects. On the contrary, linguistic categories and images have material consequences when, for example, terrorism enhancements and CMU’s (special prisons) turn activists, defendants, and prisoners into “terrorists,” which can deeply affect their treatment, the length of the prison sentence, and even life after prison.

The prosecutorial narrative is the account that has the officially recognized judicial status of charging, indicting, and arguing the guilt of a defendant for an alleged crime. Criminal prosecutions can trigger a meta-conflict, which is expressed in the collective action of different groups that engage in the criminal justice arena, challenging or provoking the prosecutorial
narrative. I have shown not only that the prosecutorial narrative engages with these competing voices that enter the criminal justice arena, but also how we can usefully conceptualize the changes that result from such engagement.

Processes of victim mobilization and prisoner support mobilization take the narratives and meaning of criminal prosecutions out of the courtroom and bring the features of the political contention into the courtroom. Thus, new actors and identifications are created and “interpretive communities” whose members share the same codes emerge (Chandler 2002:230). The different interpretive communities of prisoner supporters and victim mobilizers engage in signifying practices in order to communicate the “preferred reading” of an indictment or verdict, for example, when prisoner supporters invert the meaning of a prison sentence from condemnation into heroic resistance. The conventions within the codes employed by such communities become naturalized among its members and different interpretive communities “decode” the criminal justice messages in different ways, fomenting further polarization. The claim of liberal criminal justice that it applies equally to everyone loses traction once the roles of victims and perpetrators become systematically allocated to competing actors. In the interaction with different interpretive communities and their competing narratives, prosecutors frequently replace the default prosecutorial strategy of de-contextualization with re-contextualization. This dissertation has shown how in each of the country studies the choices of the prosecutor can change significantly as a consequence of a shift to a re-contextualizing
narrative, leading to the use of different laws, a choice of different defendants, and demands for higher or lower sentences than under the de-contextualized representation of events.

In these processes of contentious criminalization, the battles in the meta-conflict surrounding criminal prosecutions address questions that impinge on the political contention. Interventions in that “conversation” are therefore both deeply morally charged and at the same time fundamentally dispute the prosecutorial representation of reality. Examples of these questions are: What is ETA? Who is the real eco-terrorist? Do the defendants represent the Mapuche people? The answers to these questions do not only determine prosecutorial choices in criminal indictments but also perpetuate or challenge a certain perspective on the political contention. The answers to these questions are therefore inevitably partial and political, instead of neutral and objective as advocates of liberal legalism would claim them to be.

While I thus claim that the prosecutorial narratives are partial and political, my analysis was not about specific prosecutors and their biases. Indeed, while every prosecutor has biases, the point of law is not that the people executing it do not have biases. Law is there to ensure that these human biases do not determine the legal decisions. Instead of pointing fingers at individual prosecutors, this dissertation explores structural tweaks in the criminal justice system. My research question was straightforward: in the course of a contentious episode, will a shift in the prosecutorial narrative occur, and if so, when (as a result of which processes?), how (what changes in criminal doctrinal devices constitute that change?), and which narrative
does the prosecutor then choose? In these last pages I want to reflect briefly on the findings presented in this study. What is their significance? What do the findings tell us about law? What do the findings tell us about democracy and liberal legalism? How is “justice” performed in the institutions of the liberal democracy?

What happens in the criminal justice arena is much more than just the meting out of punishment. Hulsman (1997) claimed that if you look closely at what happens in the criminal justice system, it is a myth that it is about punishment. He asserts that punishment is something that we all know and understand, for example within the context of a family in which parents sometimes punish children. In his understanding, what happens in criminal proceedings, a conviction and the subsequent execution of the sentence, is something else.

So I do not consider criminal justice as a system that dispenses punishment but as a system that uses the language of punishment in a way which hides the real processes going on and generates support by presenting those processes incorrectly [sic] as similar to processes known and accepted by the public. (1997:1)

I have put a spotlight on the voice of the state as it engages in criminal prosecutions. I have shown that such prosecutions are not just about formal rules, bureaucratic proceedings, and invisible movements of defendants, detainees, and prisoners. Instead, I emphasized that we can study what the state is communicating in these proceedings in a conversation with different actors in society. And while prosecutors can choose what they say, they cannot
control the meaning and interpretation of their words as they are understood, translated, and transformed in that conversation. The data presented in this ethnographic study, with a perspective rooted in the daily reality of criminal proceedings, show how the dynamics of the political contention move into the criminal justice arena and reveal the subsequent limitations of liberal legalism as the founding ideology of the criminal justice system. In his piece on liberal legalism, Bhuta emphasizes the hoped-for legitimating function of criminal law:

Criminal law as a social institution derives its efficacy from its ability to euphemise and authorise coercion (in the name of the Community, the People, the King). Instrumental to this successful authentication is the potential of the trial medium to elevate events and conduct from the realm of private happenings and partisan constructions into “an official, authoritative and quasi-neutral sphere.” (Bhuta 2005)

At stake, then, is nothing less than the battle about the legitimate use of the state’s coercive power and the establishment of legal order. The competing voices of “victims” and “prisoner supporters” in the meta-conflict transform the “official, authoritative and quasi-neutral sphere” of trials, exposing the multiple possible constructions of reality.

The prosecutorial narrative may often seem a seductively objective description of what happened. Without suggesting that such a narrative is somehow untrue, in each of the three country studies I have shown that meaning-making is an inherent part of building a criminal case and the narrative inevitably presents a particular and partial version of events. Making
visible the competing narratives has shown how the prosecutorial narrative is not a natural statement of fact. A comparison of these narratives can thus lead to a “de-naturalization” or “de-familiarization” (Chandler 2002) of that prosecutorial narrative, uncovering the choices and assumptions that it takes for granted. It might seem like stating the obvious that in criminal trials against animal rights activists the prosecutor does not adopt their notion that animal testing companies are the “real eco-criminals” just as it may be taken for granted that ethical questions about animal testing and voices about animal cruelty are excluded from their trial and the issue of land claims is excluded from trials against Mapuche activists. It might seem natural that federal prosecutors in the United States do not prosecute Huntingdon Life Sciences for “animal cruelty” or for “murdering” four hundred animals per day. These prosecutorial decisions are indeed taken for granted as natural, which betrays an essential feature of the hegemonic discourse which is reflected and reproduced in the prosecutorial narrative and choices.

My work is primarily empirical, focusing on the description and explanation of the phenomenon of contentious criminalization, studying the criminal justice system as a medium or channel of state communication with citizens. Law is, however, at the same time a normative system, the legitimation for the application of force and a symbolic system. The moral aspects of criminalization have been the subject of debate by scholars in law and philosophy. Especially relevant here is the debate about the state’s justification to punish offenders “whose offences are closely connected to serious social injustice which they have suffered” (Duff 1998 in:
Gargarella 2011:23). In an article published in *Criminal Law and Philosophy*, Gargarella challenges the state’s authority for such punishment (2011). That debate mirrors many of the issues that have been explored empirically in the past pages, addressing similar aspects such as the limits of contractualism (the imagined social contract between citizens and the state) and democracy. For example, Gargarella describes, in contrast to an ideal situation of democratic decision-making, the situation in which

some people listening to the discourse of the law are no longer able to identify their voice at all [...]. What they hear instead is another voice, one that is illegitimate, foreign, incomprehensible, and distant. This strange voice, however, is backed by state force, which enables it to impose its will on those who do not understand it, do not adhere to it, or directly reject it. (2011:24)

Indeed, my data show that in each contentious episode there are people who “are no longer able to identify their voices at all” and they express fundamental criticism on the liberal democracy, complaining about their exclusion from the political process and the law-making procedures.

As philosophical and ethical discussions, these arguments need a translation to actual situations. I hope that my in-depth analysis of actual cases in which people express such alienation of democratic decision-making and the subsequent battle for interpretation in criminal prosecutions against them can advance these debates about the state’s legitimate use of its coercive apparatus. For example, Gargarella asserts that his arguments apply to such
situations in which there is “marked, unjustified social inequality” (2011:21). That begs the question of where that line is drawn (he refers, for example, to apartheid South Africa) and who gets to decide that. Of course, these very questions become disputed in the meta-conflict about the contentious criminal prosecutions.

In providing a detailed ethnographic analysis of three cases of contentious criminalization, I aimed to offer the descriptions where more abstract theoretical treatments lack such an empirical basis. An example of such a theory is the typology of a “criminal law of the enemy” in the work of Jakobs (Jakobs and Meliá 2006) which begs an empirical analysis of the social process in which people are converted into enemies as well as the actual features of such criminal law in practice. I hope that my study provides the needed empirical data for rethinking the applicability and usefulness of such theoretical concepts.

**The voice and story of the prosecutor**

In processes of contentious criminalization, much of what the prosecutor does will be contested. However, some approaches are likely to be more contentious than others. What is more, the *kind* of contestation is likely to be different. A de-contextualized prosecutorial narrative is likely to be criticized for not being effective enough and for not giving due credit to the “real” nature of the event (which depending on perspective is argued to be either political or terrorist). Re-contextualized approaches, however, are even more vulnerable to criticism and
a sure way to fuel and complicate contention. These narratives not only are more likely to be criticized as partial. In addition, with re-contextualization the contention shifts from narrow criminal questions about who did what to broader questions of identity, ideology, and politics.

Criminal proceedings are always a site of contestation. Prosecutors and defense lawyers always face each other in a battle for the interpretation of events and the determination of good and bad. I have shown, however, that the battle for interpretation in the cases of contentious criminalization is different. Instead of – or in addition to – a dispute about the role and conduct of the defendant (which is the routine material of contestation in the courtroom), the various voices in the meta-conflicts in the cases of contentious criminalization engage in a struggle about (1) the very conception of the events as a matter that should be dealt with in the criminal justice arena and (2) the relevant context in order to interpret the disputed events.

The empirical chapters describe how in the process of contentious criminalization victims and prisoner supporters propose a highly different and competing reading of the relevant context that should be taken into account, as alternatives to the default de-contextualized representation of events. The alternative interpretations lead to an often radically different representation and valuation of what happened. Because of their context-based meaning, these new images and definitions of crime in the re-contextualized prosecutorial narrative and the corresponding criminal prosecutions challenge the claims of liberal legalism as an ideology
based on a unified public interest, abstract individualism, legal determinism, formal rationality, and a separation between law and politics.

In the detailed analysis of several of the criminal prosecutions in these contentious episodes, I have shown the tension between liberal legalist premises and the re-contextualized prosecutorial narratives in terms of the scope of the legal interest, the scope of criminal liability, the scope of the legally relevant context, and the weakening of the separation between law and politics. Liberal legalism is not exactly what it claims to be when it operates in this murky business of dealing with challenges to order in contentious episodes. This does not mean that by deviating from liberal legalism the state necessarily violates the requirements of due process or is prosecuting otherwise innocent people. The argument is that the political contention challenges liberal legalism and the framework that it has constructed for criminal proceedings at the roots.

The picture that emerged in these ethnographies is that of a searching state, shifting vocabulary in the definitions of the situation and the conceptualization of the “crimes” that become the subject of criminal prosecutions. Prosecutors shifted their focus from the charging of individuals to the prosecution of groups and organizations, in the process creating or drawing upon collective identities. Whereas politics was excluded, people were persuaded to drop their radical ideology. History far beyond concrete times and places of specific and isolated criminal conduct was drawn into the courtroom. Patterns were constructed and aboveground speeches
were linked to underground acts of sabotage or vandalism. The meaning and validity of the rule of law became contested in the meta-conflict that surrounded each of these discursive shifts.

Most interesting in my findings are the discursive shifts that could be identified in the prosecutorial narrative. For example, in Spain, prosecutors redefined acts of street violence from public disorder into terrorism. In the United States, alleged responsibility for vandalism of cars and houses in the SHAC campaign became prosecuted as stalking and terrorism. Also, acts that were previously not regarded as illegal came within the reach of the criminal justice arena, such as pictures of imprisoned ETA militants in the streets of the Basque Country. Some might be skeptical and argue that such shifts are not the result of meaningmaking processes and interpretive changes but simply the consequence of changed facts on the ground. Of course, this would be a possibility in the case of which it would still be justified to ask what these changed facts are, why these changes are considered to be legally relevant, and why these changes warrant the qualification of terrorism, whereas this qualification is deeply disputed by a significant number of people. However, in many of the cases described in this dissertation, not even the prosecutors argued that their discursive shifts were due to actual changes in facts on the ground. For example, investigative judge Garzón deliberately advocated in favor of such a discursive shift, proposing a different vocabulary to describe ETA. Not only are novel images an attempt to better reflect the allegedly “real” nature of an act, they also often represent prosecutorial attempts to be more effective in yielding convictions and higher sentences.
Of course, discursive shifts can be a consequence of new laws, as is the case with the Animal Enterprise Terrorism Act in the United States, or the consequence of new evidence, such as when prosecutors in Spain argued that seized documents finally proved connections between ETA and some left-nationalist sociopolitical organizations. I am not arguing that discursive shifts are somehow illegal, even though it is important to note that legislative changes often are preceded by experimental prosecutions in which the new images and interpretations are already tested or in which legal boundaries are pushed. While changes in legislation can enable the discursive shifts, this does not take away the basic fact that such shifts reflect, reproduce, or create different understandings of crimes and criminal actors. Irrespective of the legal operations behind it, mink releases in the United States are represented radically differently in the prosecutorial narrative now than they were twenty years ago.

Prosecutors sometimes explicitly acknowledged the importance of “context” in explaining discursive shifts, for example when the chief prosecutor in Spain argued that certain conduct should be qualified differently in times of an ETA truce than in times when ETA continues its deadly operations (Interview S-21). The importance of context in the qualification of events was also visible in the analogies that interviewees relied on to make their point, for example when they emphasized the difference between burning an ATM in Andalusia or in the Basque Country or the difference between arson in the national park Torres del Paine in Chile or the burning of a plantation by a Mapuche activist. This battle about such analogies is so significant because it informs the translation of a complex event into the ordinal measure of prison years, which
signifies gravity and simultaneously puts different events on a single scale. The examples show how context is crucial for the interpretation of events and subsequent penal decisions.

The relevance of understanding this process of re-contextualization and its potential consequences increases when it can be applied to other contentious episodes. I think that it can. Re-contextualization occurred, for example, during what was labeled the “riots” in London in August 2011. The newspaper *Economist* reported that one man was given 18 months in custody for handling a stolen television. Context played a significant role in this judicial decision as “[j]udges point to the widespread fear caused by the riots as an aggravating factor. In ordinary circumstances similar crimes would probably result in community sentences” (*Economist* 2011). Such severe punishment was supported by the general public according to a survey that stated that 70% of voters thought that sentences should be more severe for crimes committed during the riots (ICM Poll, ibid.).

*(De-)criminalization and (de-)politicization*

During the trial against the Lonkos of Traiguén I approached one of the Chilean prosecutors and asked whether the opening statement of the lead prosecutor had not been somewhat political. “Not at all!” he replied, arguing instead that the opening statement had “technically” addressed all the elements that would be necessary to prove that the conduct constituted “terroristic” arson and threats (Field notes, April 2003). This response set me on the path to search for the
competing meanings of political and technical modalities of criminal prosecution and to
develop useful conceptualizations of processes of politicization, de-politicization,
criminalization, and de-criminalization.

In my analysis, and drawing upon available scholarship, I have developed two distinct ways to
think about politicization and de-politicization in relation to criminal proceedings, and they are
dependent on the unit of analysis: the contentious episode or the criminal prosecution. First, I
have visualized spatially the tension between what in liberal democracies is imagined as the
“political arena,” in which it is stipulated that what happens inside is about “persuasion” of
“political opponents” and the public as “citizens” of a given “polity.” In addition, a “criminal
justice arena” is imagined in which “prosecutors” are engaged in the response to “crime”
(mostly conceptualized as harming a “victim”) and the meting out of “punishment” to the
alleged “perpetrators.” The interaction, overlap, and shifts between these two arenas is
complex, which is insufficiently addressed in the concept of a simple “transfer” of issues, actors,
and arguments from one arena to the other. Complexity can be introduced into the linear
metaphor by constant awareness that this transfer can be partial, repeated, reversed,
contested, intended, or unintended, and that modifications (of issues, actors, and arguments)
can and do occur in that very process.

The analytical boundary between the political arena and the criminal justice arena, as well as
the processes and narratives that constitute, reject, move, or modify this boundary, provides a
way to think about the many possible modalities of criminalization, conceptualized as the
expansion of the boundary of the criminal justice arena at the expense of the political arena.
This means that conduct, events, or actors which were previously understood in political terms
are translated into the logic and vocabulary of criminal justice, acted upon by criminal justice
agents. The opposite process, de-criminalization, is then – in line with common understanding
by criminologists – a “process that refers to the removal of labelling social problems or deviant
behaviours as crimes” (Lee in: Sage dictionary of criminology 2006:114). In similar terms, de-
politicization can – as described by David Held – be viewed as treating an issue as if it were not
a proper subject of politics (1996:130). This conceptualizes (de-)politicization and (de-
criminalization as locating an episode and the events and disputes that constitute it inside or
outside the political arena respectively the criminal justice arena.

In the analysis of the chosen country studies of contentious criminalization I have identified
three different modalities of boundary constitution/moving/modification which were possible
to observe over the course of two decades of contention and criminal prosecutions: expansion,
ambivalence, and marginalization. The unit of analysis of these processes is ultimately the
entire contentious episode. Of course, it is also possible to identify such processes at the micro-
level of single proceedings, trials, or even at the level of single documents such as an
indictment. These micro-level processes collectively constitute the process at the level of the
contentious episode. Important is that these modalities address the way in which the imagined
boundary between the political arena and the criminal justice arena is drawn. As such, they
describe the complementary processes of criminalization and de-criminalization and the way in which content is given to the meaning of the “political” and the “criminal” in a given society. It should of course be kept in mind that the imagined boundary between the criminal justice arena and the political arena is not only produced by the prosecutorial narrative and my focus excluded many actors (such as judges, police, prison guards, the press) that are involved in the actual labeling of events, conduct, and actors as criminal.

Second, in order to conceptualize the role of politics in criminal proceedings I have not only looked at the drawing and performing of the boundary between the political arena and the criminal justice arena, but also at processes within the imagined criminal justice arena. Once placed inside the vocabulary and logic of this arena, criminal prosecutions and the construction of the criminal definition of events can be performed in many different ways. Instead of asking whether politics plays a role in these cases, I have focused on how it plays a role and what that means for the “law” and its claims to objectivity and authority behind criminal prosecutions. How are political elements consciously brought into proceedings, consciously ignored or rejected? How do political elements inevitably come to play a role because of certain prosecutorial choices, such as the prosecution of a collective and the production of a collective identity? How do the structure and vocabulary of criminal law sometimes favor de-contextualization and at other times require re-contextualization of the harm resulting from problematic events? The particular way in which politics plays a role within the criminal justice arena can be usefully visualized in the ideal-typical juxtaposition between a de-contextualized
and re-contextualized prosecutorial narrative. Using these terms, I move away from a
dichotomic understanding of politicization versus de-politicization and instead focus on the
different ways in which the prosecutorial narrative deals with the political context of crimes.

The distinction between these two modalities of the prosecutorial narrative addresses the
multiple ways in which the prosecutor can represent problematic events as crimes. “The menu
is not the meal,” writes Hulsman in this respect (1997:3). The representation of reality by the
prosecutor in the courtroom is always a reconstruction, and as such always partial and
selective. The conceptualization of discursive shifts between two ideal types addresses the
different ways in which cases can be framed and the underlying interplay of legal choices of
criminal law and theory and images of reality. The prosecutorial representation of reality is
enabled and constrained by the vocabulary and logic of criminal law. Prosecutorial choices like
the choice of defendants, the criminal offense, and the argumentation for guilt and a sentence
are thus an inherent part of the representation. In reality, the relation between the two ideal-
typical modalities is far more complex than a simple binary categorization can reveal.
Complexity should be introduced by an awareness of the many possibilities of deviations and
mixtures of as well as switches between these modalities.

Thus, I have developed concepts that can describe the formulation and changes of the
prosecutorial narrative over time as it reconstructs contentious events in order to subject them
to the operations of the criminal justice system and at the same time draws the boundary
between the political arena and the criminal justice arena. There are thus multiple moments in this process that determine how politics play a role in criminal cases. Bringing events into the criminal justice arena is in itself an act of de-politicization. Such de-politicization is, however, performed differently under the modality of de-contextualization than under the modality of re-contextualization. The chosen context in the re-contextualized modality is further pivotal for the way in which political elements are either recognized or excluded.

While I have focused on the commonalities between the country studies in order to sketch the characteristic features and shared mechanisms of contentious criminalization processes in liberal democracies, it has also been instructive to note some of the differences. For example, criminal defense lawyers in the United States generally adhered strictly to the discourse of liberal legalism as they professed that they do think that their clients should be punished for their crimes, just not for the terrorist enhancements that are requested. This contrasts starkly with the criminal defense lawyers in Spain, who remained silent and refused to recognize the courts as legitimate, while their clients, ETA militants, requested them to refuse any legal defense. Some of the differences between the countries illustrate the local construction of crime, and the importance of context for the interpretation of conduct. For example, while the housing of fugitives is harshly prosecuted in Spain as collaboration with terrorism, no such acts are prosecuted in Chile.
The complexity and unintended consequences of criminal prosecutions were the reason for me to start this research. In order to provide a better understanding I have tried to simplify reality through visual models and typologies while identifying common mechanisms and processes. At the same time, I have aimed to provide in-depth description and analysis of the many different cases, actors, and voices on the ground in order to show the complex reality behind abstract terms and generalization. I hope that in the interaction and balancing of simple abstraction and detailed ethnography the reader has been able to gain more understanding of the interplay between legal ideologies and practices and their impact in real-life conflicts and prosecutions.
1. **General secondary sources**


2. Spain

In this section the reader can find the bibliographical sources that I used in my description and analysis of the Spanish case.

**Books and journal articles**


Bestelako, Euskal Herria (no date) ‘Another Basque Country in another Europe’, pamphlet.


EPPK (no date) ‘PRES.O.S. Basque Political Prisoners Situation and Prospects’, pamphlet.


Moreno Campo, Juan Carlos (1996) Represión del terrorismo, una visión jurisprudencial, Editorial General de Derecho, S. L.


Vercher Noguera, Antonio (1991) Antiterrorismo en el Ulster y en el País Vasco, Barcelona: PPU.


**Newspaper articles**


Gara (2007) Interview with ETA, 8 April 2007


**Online sources**


**Trial transcripts**

Clarification of terminology:
Instruction judges produce “autos de procedimiento,” which are the dossiers or judicial orders declaring closed the investigative phase of the process. Cases are known as “sumarios,” which Human Rights Watch (2005) translates as “committal proceedings.” The instruction judges at the Audiencia Nacional work in different divisions, which are known as “juzgado central de instrucción,” which can be translated as “Central Court of Instruction.” The Supreme Court is the Tribunal Supremo, which is divided into different “Salas.”

Case publishing ETA communiqués Luis Felipe
   Verdict Tribunal Supremo (rejection cassation arguments) 2nd bench, Madrid, 3 March 1981.

Case Endorsement (Apología)
Verdict Tribunal Supremo, Sala 2ª, Madrid, 3 March 1981.

Case false complaint against Begoña Lalana
3289/92 Instruction Court #34 Madrid.
Initial complaint from José Angel Iniciarte: 22 May 1992.

Case Julen Larrinaga

Petition for transfer
Petition (1997) petition dated 1 October 1997 to the “Juzgado de Vigilancia Penitenciaria” in order to be transferred to a prison in the Basque Country.

Case Marey

Case Batasuna, Sumario 35/2002-M (membership of a terrorist organization)

Case Egunkaria, Sumario 44/2004

Popular Accusation, Asociación de Víctimas de Terrorismo, Provisional Conclusions 26 June 2007.

Case torture allegation

Caso Baker Iruñea-Pamplona Sumario 144/05
Verdict Second section Audiencia Provincial Naffaroa/Navarra, Iruñea/Pamplona, 8 July 2005.

Verdict Tribunal Superior de Justicia Navarra/Nafarroa, Sala de lo Civil y Penal, 14 December 2005.

Case Murder Judge Lidón, Sumario 51/2005

Case Jarrai/Haika/Segi Sumario 18-1 and 15-2
Expert report about the criminal justice response to the Kale Borroka, 20 December 2002, Bilbao, submitted during the trial.

Concluding statements of the prosecutor, Audiencia Nacional, Sala de lo penal, 4ª Sección, 11 April 2005, Juzgado Central de Instrucción, Nº 5.


Case Otegi

Verdict Tribunal Supremo, 8 June 2007.

Case Kale Borroka
Auto de procedimiento, 19 October 2007, Juzgado Central De Instrucción Nº 5, Madrid.

Case Sumario 18/98

Case flag wavers, Sumario 67/2007


Case Mayor Hernani, Sumario 19/2008 or 35/2008

Decision Juzgado central de instrucción Nº 1, April 2008, 19/2008.


Case Gestoras pro Amnistía Sumario 33/2001
Indictment.

Verdict Audiencia Nacional, Madrid, Chamber Section 4a, 15 September 2008.

Verdict Tribunal Supremo, Madrid, 13 October 2009.

**Legislation**

Laws on Amnesty


Law foundation Audiencia Nacional


Laws on terrorism


Criminal Procedure


Law arranging compensation for victims of terrorism


UN Resolution 43/173 on penitentiary conditions

General Assembly of the UN, 9 December 1988, available at:

Law on Citizen Security

Kale Borroka

Laws on penitentiary regime
Penitentiary Reglamento 1996, Spanish laws on penitentiary policy provide that reinsertion is the goal of the sentence and that therefore the prisoner should be provided with activities and education.

Pacto de Lizarra, 12 September 1998

Anti-terrorism pact PP-PSOE 2000
Acuerdo por las libertades y contra el terrorismo, 8 December 2000, Madrid.


Other


3. Chile

In this part I have provided the references to the materials that I used for the chapters on Chile.

**Books and journal articles**


Cayuqueo, Pedro (2005b) ‘“El mapuche es depredador... torcido, desleal y abusador”’, *Azkintuwe Noticias*, 21 June 2005.


CORMA (1999b) Letter to newspaper El Diario Austral, 6 December 1999, on file with author.


CORMA (2001) Letter from a forestry company in Galvarino a Juan Eduardo Correa, Vice President of the CORMA in Santiago, 23 November 2001, from the CORMA archive, on file with author.


CORMA (no date a), ‘Consecuencias del conflicto indígena en la IX Región, asociadas al sector forestal’, document from the CORMA archive in Temuco, on file with author.
CORMA (no date b) ‘Falencias comunicacionales conflicto Mapuche’ Document from the CORMA archive in Temuco, on file with author.

CORMA (no date c) ‘Informe Policial Revela: Mapuches en Actos Terroristas’, Public Declaration, from the CORMA archive, on file with author.


Defensoría Pública Penal (2009) Document with overview criminal cases related to the “Mapuche conflict” prepared for the visit of the UN Special Rapporteur, April 2009, on file with author.


Marimán, José (2004) ‘¡Que despierte y se pronuncie el gigante silenciado!’, Azkintuwe, No. 4 Year 1, February 2004.


Ministry of Planification (Mideplan) (2002) Protocol of a meeting organized by Mideplan about the Indigenous Lands and Water Fund, 19 November 2002. The meeting was attended by officials from Forestal Mininco, Forestal Arauco, CONAF, the agency for Agrarian Politics and the sub-secretary of Agriculture, on file with author.

Mininco (1999a) ‘*Forestal Mininco S.A. y la comunidad*’, Summary 1999, on file with author.

Mininco (1999b) ‘Plan de buena vecindad 1999’, draft for a discussion with the management of public affairs, on file with author.


San Martin, Sergio (1997) Importancia de la Cultura Mapuche, lo que la historia calla, Santiago.


   —. (1999b) ‘Millalemu interactúa y beneficia a su comunidad’, *Tierra Nueva*, No. 19, September, p. 22.


Univisión (2009) ‘¡ASI DE CARADURAS! Gobierno de Chile niega en la ONU que abuse de su ley antiterrorista contra mapuches... Dice que sólo son 16 VECES en menos de diez años. Unas


Newspaper articles


**Online sources**


commission on the constitution, justice and regulation, on the proposal for a law on probation in cases of those convicted for terrorist crimes and other crimes, in cases related to violent reclamations of rights laid down in the Indigenous Act.


**Trial transcripts**

**Case Consejo de Todas las Tierras (CTT)**

Verdict Court of Appeals Temuco, Case Rol N 24.486, 6 September 1994, on file with author.

Comisión Interamericana de Derechos Humanos (CIDH), Interamerican Commission of Human Rights (IACHR), report N° 9/02 about admissibility, Petition 11.856 Aucán Huilcamán and others, Chile 27 February 2002

**Case Lumaco**

Judicial decision on preventive detention, Antonio Castro Gutiérrez, 17 December 1997, Temuco, Rol No 02.97

Letter from WATU Acción Indígena, 29 December 1997, on file with author.

Defense statement by lawyer José Lincoqueo, Court of Appeals Temuco, 5 January 1998, on file with author.

Official request by the *Intendente* [regional governor] of the 9th region, Oscar Eltit Spielmann, requesting the Appeals Court to apply the State Security Law, 2 December 1997, on file with author.

Indictment by prosecutor Luis Troncoso of the Second *Fiscalía* [prosecutor’s office] of the court of Appeals of Temuco, 29 April 1998, on file with author.

Case Fundo Ginebra
Criminal complaint with the Juez de Garantía of Collipulli, 7 February 2001, by the SOFO on behalf of Gerardo Jequier.

Criminal complaint with the Juzgado de Letras of Collipulli, 27 February 2001, by Gerardo Jequier.

Transcripts of the Audiencia de Formalización de la Investigación, 8 May 2003, Collipulli, hearing with defendant Juan Francisco Llanca Ahilla.

Case Arnaud Fuentes
Appeals Court Temuco, 5 March 1999

Case José Nain and Marcelo Catrillanca
Verdict Tribunal de Letras Collipulli, 6 April 2001, Rol Nº 29.759.

Verdict Court of Appeals, Temuco, 4 January 2002

Verdict Supreme Court, 29 July 2003

Case Temulemu
Verdict Court of Appeals Temuco, 4 June 2003, Rol 875-02, on file with author.

Case Ancalaf
Verdict against Victor Ancalaf, Appeals Court Concepcion, 4 June 2004
Case Rol N 24.486

Comisión Interamericana de Derechos Humanos (CIDH), Interamerican Commission of Human Rights (IACHR), report about admissibility, 2 May 2007

Case Nain & Santander

Case Lonkos of Traiguén
Declaration before the police by landowner Rafael Figueroa about arson of his house, 3 August 2002, Traiguén, on file with author.

Field notes, trial 31 March–9 April 2003
Audio oral proceedings, 31 March–9 April 2003

Verdict Tribunal Angol, 14 April 2003

Verdict Tribunal Angol, 27 September 2003

Comisión Interamericana de Derechos Humanos (CIDH), Interamerican Commission of Human Rights (IACHR), report about admissibility, 21 October 2006

Case Cayupe

Case Chequenco

Case CAM
Audio oral proceedings, trial 21 June 2005, opening statements prosecutors and private accusers

Declaration on 28 May 2003 before the local prosecutor in Temuco by Gustavo Adolfo Aranela Salazar, working for private security company ASS Ltda in Fundo Poluco Pidenco for forestry company Mininco, on file with author.

Case Juan Patricio and Jaime Marileo Saravia
Letter to the President of the Court of Appeals in Temuco, 9 April 2009, on file with author.

Case Poluco Pidenco

Comisión Interamericana de Derechos Humanos (CIDH), Interamerican Commission of Human Rights (IACHR), report about admissibility, 23 April 2007

Case Rucañanco
Case Nueva Imperial
Request prosecutor to police, 19 February 2002, charges: violent usurpation, theft and arson

Legislation

Decreto Ley No 701
Law to promote forestry

Ley Indígena [Indigenous Act], 19.253
Enacted 28 September 1993, modified 9 May 2008

Ley Seguridad Interior del Estado [Law on State Security], 12.927
Enacted 3 July 1975, modified 5 October 2004

Ley de Conductas Terroristas [Law on Terrorist Conduct], 18.314
Enacted 16 May 1984, modified 14 November 2005

ILO Convention 169

Ley Orgánica Constitucional Del Ministerio Público [Law on the Public Ministry Law], 19.640
15 October 1999

Other


4. United States

In this section the reader can find all the bibliographical sources which I have used to describe the case in the United States.
Books and journal articles


**Newspaper articles**


Jack, Andrew. ‘Call to resist animal rights threats’, Financial Times, 16 September 2007


http://www.guardian.co.uk/environment/2008/apr/03/greenbuilding.ethicalliving [Accessed 2 August 2011]


**Online sources**


Young, Peter (2005b) Interview with Peter Young, *No Compromise* 28.


**Trial transcripts**

Case AETA4


Case DeChristopher


Written response to defendant’s proffer necessity defense, #4, 30 October 2009

Case Coronado 1995

Case Coronado 2007
Indictment, 15 February 2006, Southern District of California

Government Trial Memorandum, 5 September 2007, Southern District of California

Jury Instructions, 17 September 2007

Case Feldman

Case Hugh Farrell (“Tiga and Hugh” – “I-69”)

Case McDavid

Case Murphy

Case Olliff

Case Operation Backfire
Terrorism Enhancement Hearing Transcript, 15 May 2007, District of Oregon

Case SHAC: transcripts and exhibits
SHAC trial transcripts, first instance, February 2006, Appendix I–VI, including jury instructions

SHAC Indictment, 27 May 2004, Newark, New Jersey


Decision in Teva Pharmaceuticals USA vs. Stop Huntingdon Animal Cruelty USA, 1 April 2005 (civil lawsuit)

Case Young and Justin

Legislation

Animal Enterprise Protection Act 1992

Animal Enterprise Terrorism Act S.3880 2006

Other

Appendices

Appendix – Methodology

In this appendix I discuss in some more detail the specific choices that I made in each of the country studies regarding the people that I interviewed and the criminal cases that I selected for further analysis. I will also address my approach to analyzing the collected data. Tilly argued that in any empirical research you always need two theories (2007:47): one theory to explain the phenomenon under investigation and one theory embodying explanations of the evidence concerning that phenomenon. The phenomenon is contentious criminalization, and while the dissertation has dealt with my analysis of that process in its various forms, this appendix is devoted to the second kind of theory.211

I do not here address the research design or the choice of the contentious episodes and the countries that I studied, because I have explained that in the introduction. I specifically focus on explaining the choice for and the reliability of the data that I collected as the evidence on which my analysis is based and I discuss the validity of the claims I draw from that evidence.

211 “Three questions clamor for attention: First, how does the phenomenon under investigation leave traces? Second, how can analysts elicit or observe those traces? Third, using those traces, how can analysts reconstruct specified attributes, elements, causes, or effects of the phenomenon?” (Tilly 2007a:47).
I address the following questions:

- How did I select criminal prosecutions?
- How did I identify and construct the competing narratives?
- How did I construct the prosecutorial narrative?
- How did I gauge the development over time?

It is important to emphasize that my research had a strong exploratory character. This means that many of the concepts that now occupy a core position within my analysis only formed during or even after my fieldwork. Key examples of such concepts are “victim mobilization” and “prisoner support mobilization.” The concepts “political arena” and “criminal justice arena” also grew out of my research. This means that my search for data was adjusted to such emerging concepts as my analysis progressed. I will clarify how the research developed as I was doing it.

1. Choosing relevant criminal prosecutions

In each of the contentious episodes I have studied the prosecutorial narrative throughout the criminal cases that are related to that contention. The criminal cases are the instantiation of the prosecutorial narrative as well as the lens through which I could study that narrative. Without indictments, opening arguments, and prosecutorial press releases I would not have been able to study the construction of that narrative, its construction of reality, its interaction with other
voices in the criminal justice arena, its material impact on the demanded sentence, or its development. Of course, the sheer volume of those criminal cases, especially in relation to the Spanish-Basque episode, made it important to make a selection. However, the important first step in this process was in itself highly contentious: which criminal cases are “related” to the contentious episode? Before making a selection, in each case I started with collecting the different definitions of the contentious episode as such and the different perspectives regarding criminal cases that were considered to be a part of that.

This exploration of the different available definitions of the contentious episode and the criminal cases in it turned into the conceptualization of the meta-conflict and the processes of victim mobilization and prisoner support mobilization. The voices of “victims” and “prisoner supporters” make claims about the relevant criminal cases as well as about events that they deem to be the material for criminal cases. The collection of these voices in lists of “political prisoners” and declarations of victimhood resulted in a broad notion of the kinds of offenses, targets, victims, perpetrators, or laws that would indicate that a criminal case was considered part of the “population of cases” that would constitute the pool out of which my selection would come. In each of the country chapters I have addressed this contentious definitional process.

The methodological problem is that while it is relatively easy to determine the “connection” between a criminal case and the contentious episode once narratives have re-contextualized
criminal cases, it is far more difficult to get an overview of the relevant criminal cases before they were re-contextualized. As is visible in the country chapters, I have often categorized criminal cases according to the conduct that was the subject of the charge. Thus, in the Spanish-Basque contentious episode, for example, I distinguished between “street violence,” “murders,” and “speech and symbolic expressions.” Such initial categories can be subsequently problematized given potential contention around them. Indeed, those categories offered just a starting point for collecting the competing narratives about them. In the Chilean-Mapuche episode, for example, I distinguished between “land occupations” (symbolic or productive) and “arson in plantations.” This means that in each episode I took the underlying complex of contentious events as my starting point for categorizing the criminal cases. This enabled me to ask whether such events had or had not been prosecuted before, and if so under what laws and guided by which narrative.

At the core of my inquiry is, therefore, the very moment at which incidents of street violence in the Basque Country became defined, perceived, and interpreted as being “linked” to the Spanish-Basque contention. Similarly, the questions that have driven my research are what exactly the features of incidents of theft of wood that become understood as a “Mapuche-conflict case” are, how this changed over time, which voices participated in the meta-conflict, and how the prosecutorial narrative engaged with these voices. At the same time, these questions posed methodological difficulties. I have generally not been able to use ordinary crime statistics which, for example, show how many cases of “theft” or “arson” occurred in
2004 in the 9th region in Chile. These are the de-contextualized formal categories in the language of criminal law and did not provide the information I needed. Such statistics either provided far more thefts or arsons than those I was interested in or left out conduct because it was sometimes recorded as one crime, sometimes as another or not at all. In the country-specific sections below I provide more details about the sources I used to find the criminal cases that I was interested in.

Conceptually, however, the emic categories of conduct (Kale Borroka or “street violence”) and the criminal cases dealing with that conduct provided the opportunity to study the macro-development of the prosecutorial narrative over a period of two or three decades. Starting with such emic concepts of conflict-related-crimes and despite the frequent mismatch with official crime statistics, I have collected data about the incidence of such conduct and its criminalization. For example, I collected overviews of specific kinds of actions of animal rights activism, such as the “liberation” of animals, and information about the criminal justice response. It is important to note, however, that these overviews are always already based upon a conceptualization of that conduct as animal rights activism, and that the information is dependent on the fact that an animal enterprise reported the incident to the police or the media. Due to these methodological problems, my analyses of the discursive shifts in the prosecutorial narrative rely more on a qualitative tracing of the argumentation within specific cases than on a quantitative change in the actual prosecution and transfer of events into the criminal justice arena.
While my initial focus in Chile and the United States had been on the micro-analysis of the prosecutorial narrative in several particular trials that had met with a strong response among many different actors, it was my fieldwork in Spain and the Basque Country that drew my attention to the macro-level. Taking the long duration of the conflict into account, I developed the analysis that in the prosecution of conduct such as street violence (*Kale Borroka*) or the public expression of support for ETA or its militants the prosecutorial narrative had undergone a shift over the course of one or two decades. The purpose of my return visits to Chile and the United States was thus to use the same method of developing categories of conduct and comparing and analyzing criminal cases over time in order to complement micro-analysis of single trials with an understanding of changes on that macro-level. In each episode I conducted cross-case comparison and analyses in order to make claims about macro-level changes in the prosecutorial narrative, whereas within-case analysis served to make sense of the micro-level content of and meaning-making by the prosecutorial narrative.

I further used my in-depth analysis of single cases in order to illuminate the broader macro-level analysis. Through cross-case comparison, it is possible to argue that activities previously prosecuted as “collaboration with ETA” currently are classified as “membership in ETA.” Only from this macro-perspective it is visible that both the macro-trials and the revolutionary tax prosecutions are means to impede ETA from getting access to money. Obviously, however, cross-case comparison and analysis requires within-case analysis as well, and the micro-level
thus inevitably constitutes the material for the macro-level. I connected the micro- and the macro-level through the concept of “categories” of criminalized conduct, for which I draw upon the ways in which actors within the episodes categorized disruptive events and criminalized conduct. The term street violence (Kale Borroka, as everyone calls it) is widespread and used by people from every political signature, including prosecutors and judges. The meaning of the term and the perspectives regarding criminal prosecution of street violence differ widely though, as demonstrated in Chapter 2 and 3.

By taking these conduct-based categories as a starting point, I interrogated the competing narratives about their framing of the events that were subjected to criminal charges. These narratives would not necessarily always address specific events or criminal cases. Indeed, narratives about, for example, land occupations in Chile, often addressed such events in general without discussing particular occupations. At other times, “famous” land occupations would serve frequently to make an argument and thus gain mythical proportions. I collected information about these narratives, relying on a variety of sources. Books, websites, newspapers, and interviews all contributed to the construction of these macro-narratives about contentious conduct, such as the release of animals from research labs and fur farms in the United States or street violence in the Basque Country. Competing narratives about such conduct would translate the events into the criminal law framework in different ways. I analyzed such alternative translation operations with questions like: What is the territory and time period in which the alleged events took place? What are the relevant identities of the
actors that were involved? What is the label given to the criminalized conduct? What is the sentence that is demanded?

I facilitated a quick and cursory reading of many criminal cases at this level of categories by simply boiling them down to a few questions that constitute the core of the criminal charge, which are generally presented in the indictment:

WHAT (Act) – Which conduct is subject to the penal system?
WHAT (Harm) – What is the harm that has been done?
WHO (Perpetrator) – Who is subject to the penal system?
WHO (Victim) – Who is perceived as victim?
CHARGE (Offense) – What is the offense that fits this action?

The indictment reflects most concisely the choices the prosecutor made in terms of the “who-what-and-why” of the prosecution. I thus used the template of an indictment as a starting point to analyze more broadly what the prosecutor was doing. A prosecutor “brings a case,” which means that he or she takes certain facts out of the flow of history and starts labeling them, indicating a specific relation between certain acts and actors, pointing out a specific harm or danger because of these actors, and asking for a trial in which facts can be adjudicated and the guilty can be “condemned.” It is this process in which my analysis aims to dig a little deeper, both jurisprudentially and sociologically.
I thus first attempted to form an overview of the different categories of criminal cases, and then I proceeded by selecting some specific criminal cases from each category, drawing up the development of the prosecutorial narrative about that category of cases. In order to do so, I attempted to diversify the selected cases, for example by looking for cases from early years and cases from later years, cases that received a lot of media attention and cases that received less media attention, cases before and after major legislative changes, or cases before and after major contentious events that received nationwide attention. In addition, I made an effort in each episode to look at cases in which challengers of the status quo were defendants as well as criminal cases in which defenders of the status quo or targets or political opponents of the challengers were defendants. Thus, after having identified “arson in plantations” as a relevant category of criminal events in the Chilean-Mapuche contentious episode, I searched for specific criminal cases over a period of time in order to analyze the competing narratives and the development and possible transformation of the prosecutorial narrative in relation to such arsons.

The selection of criminal cases for in-depth analysis then facilitated an analysis at the micro-level of linguistic construction of the narrative and its arguments of criminal responsibility as well as a detailed representation of legally relevant facts. In each of the episodes I selected some criminal cases in which I invested the time to attend the trial and/or interview the prosecutors, defendants, victims, defense lawyers, and various supporters or sympathizers. In
such micro-analysis, I would not analyze a shift over time regarding a category of conduct. Instead, I would delve into the specific details of a case, for example the case in which Julen was accused of throwing a Molotov cocktail in a train station in Bilbao in 1992. In such a case, I would go beyond and behind the narratives about general categories of conduct and ask specific questions in order to construct the competing narratives about that particular event, probing what that specific action meant to the perpetrator, to the target, or to the prosecutor. How did different actors label that specific event, and how did they locate it in a broader context or select the legally relevant facts? Which aspects were taken for granted? How were relevant identities constructed? What meaning, for example, did in that case the train station have for the different actors?

While I make this separation between the macro-level and the micro-level for the purpose of explanation and as a guideline during my analysis, in reality my actual analysis often blurred these lines. Sometimes I spent more time on a single case of which I initially had only wanted to give a cursory reading. The analysis of many cases was thus somewhere between cursory reading and in-depth analysis. This was also related to practical issues such as the accessibility of trial transcripts and the possibility to interview relevant actors in the criminal case. In each of the episodes I attended one or two criminal trials, while all of these trials lasted several days or even weeks.
Contentious events and contentious protest tactics thus formed the basis for my categorization of criminal cases. However, not all contentious action led to criminal prosecutions. Thus I was also interested in the absence of criminal prosecutions. For example, offering housing to fugitives in Chile has not led to any criminal prosecutions, as it has in Spain. I also wanted to know, for example, when the prosecutions of speech acts started in Spain and I wanted to know whether there were successful de-contextualized prosecutions of small-scale eco-vandalism in the United States. I have tried to answer such questions through legal databases. For example, in Spain I had access to an overview of all the investigations started at the Audiencia Nacional. This, however, as pointed out above, was not always a sufficient means of answering such questions because of the de-contextualized categories used there. The Audiencia Nacional data only coded the charge and, as has become clear in Chapter 3, one of the interesting findings of my research is that the kinds of conduct covered by charges (such as “membership in a terrorist organization”) can change dramatically over time. This is only visible, however, in an analysis that goes into more depth than the simple crime statistics. I therefore tried to gauge the answers to these questions by asking lawyers, prosecutors, activists, or longtime targets about the existence of such prosecutions.

**Biases**

Biases are systematic and structural errors which thus skew the conclusions that can be drawn from the data. Mistakes are not systematic but can of course invalidate certain conclusions.
Mistakes could, for example, arise from translation errors, because neither Spanish nor English is my first language. In order to overcome the impact of such translation mistakes I have often given the original quote in Spanish and the English translation only in parentheses. Furthermore, I tried to deal with the issue of translations by providing a glossary in the appendix. More important than such or other kinds of mistakes, however, in this appendix I reflect on how my method of data collection, my research design, and data analysis have possibly produced biases in my findings.

My approach relies on the continuous tension between two different units: the contentious episode on the one hand and the criminalized event on the other. When taking contentious episodes as the starting point for understanding the dynamics in and around criminal proceedings, one is directly at odds with perspectives that negate the political context and conflict, for example the voices in Spain that refuse to talk about a “conflict.” When taking criminalized events as the starting point for criminal proceedings, however, one immediately accepts the ability of the state prosecutions to select and determine which events are criminal. In my analysis, I have attempted to go back and forth between these different starting points.

When I take criminal prosecutions as my starting point, the relevant actors are inevitably always already divided into “victims” and “defendants.” My ability to construe their competing narratives about the criminalized events then also depends on whether the defendant acknowledges participation in those events. When I take the contentious episode as the
starting point for inquiry, on the other hand, the actors are divided into challengers of the status quo or defenders of the status quo, with some actors who may simply define themselves in opposition to violence, such as anti-ETA organizations in the Basque Country.

The choice of my criminal cases inevitably influenced my characterization of the prosecutorial narrative. For example, in Chile I frequently used the prosecutorial narrative in the trial lonkos of Traiguén in my analysis. Some have argued that this was a particularly “bad” trial (Interview C-47). If that is so, it might have skewed my analysis. Still, while it may be true that it was a particularly bad trial, as such it had an enormous impact, for example on the dynamics of prisoner support mobilization. Thus, cases were not always selected in order to be representative of many more criminal cases, but because they are part of the development of the prosecutorial narrative. The trial against the lonkos of Traiguén is a good illustration of the ambivalence that I observed in the Chilean prosecutorial narrative, constituting as it did one of the attempts to experiment with criminal prosecutions and apply a new law and the many new possibilities offered by the Penal Reform.

A further methodological challenge is that criminal prosecutions often take a long time and are difficult to put in direct relation to the climate at the moment that the disputed events occurred. This makes an interpretation of relations between what happens inside and outside the criminal justice arena vulnerable.
Lastly, in each of my cases I have presented the analysis of the criminalization of protest activity of the challengers of the status quo. This does not mean, however, that this is necessarily always the case. While it might seem theoretically logical, it remains an open empirical question whether the tables could have been turned and under what conditions that would occur.

Collecting data in three different countries

I would like to mention some of the methodological implications of the fact that my data collection took place in three different countries. I have argued that theoretically the liberal ideology underlying the different criminal justice systems is more relevant than the specific codification and implementation in the different countries. Methodologically, however, the different legal systems influenced my choices in data collection. For example, in the United States, I was able to use the voir dire process and jury instructions as a way to gauge the prosecutorial discourse, whereas this was not possible in the Chilean and Spanish systems. Also, the massive amount of plea bargains in the United States has the implication that cases rarely go to trial, even if political cases tend to go to trial more often than ordinary cases. This meant that often I only had the possibility to use arguments from a sentencing hearing, but not transcripts from trials. In Spain, there is an active investigative judge, which means that the prosecutor only enters actively into the proceedings once the investigative judge has closed the investigation and written the “summary.” This “summary” is an important part of my data in Spain. Indeed, in Spain I understand the investigative judge as an important shaper of the
prosecutorial narrative, just as I consider the FBI an important contributing actor in the United States.

Doing the research in different countries and on different episodes also meant that in each country I had access to different sources. For example, in Spain I had no access to current clandestine ETA members, and no easy access to former ETA members. In Chile, however, I talked extensively with more radical activists. On the other hand, in Chile I could not lay my hand on many trial transcripts due to a lack of digitalization and difficult archiving restrictions, whereas in Spain I had access to a great digital judicial database with all the verdicts of many different trials. In the United States, I had digital access not only to verdicts but also to trial transcripts, although only in the cases that there had been a trial. Due to these differences, in each of the countries I had to find the appropriate ways to trace the production and construction of the prosecutorial narrative.

2. The construction of competing narratives

In the introduction I already mentioned that as data I collected meanings defined as “the linguistic categories that make up the participants’ view of reality and with which they define their own and others’ actions” (Lofland and Lofland 1984:71). My data collection was guided by the construction of competing narratives. In each episode I started out with the sketch of an overview of the political contention and the different actors involved in that contention. While I
broadly divided actors into “challengers” on the one hand and “defenders” or “targets” on the other, I was careful to be attentive to an existing spectrum of stances among these two broad sides to avoid a simplified dichotomy. In each of the country cases I then turned to the state in order to gather how different state agents defined the contentious episode and the challenge to its authority, the rule of law, or democratic proceedings.

From an analysis of the competing narratives around the demands for changing the status quo, I moved to the specific actors mobilizing in and around the criminal justice arena. The categories of “victim mobilization” and “prisoner support mobilization” grew out of my initial fieldwork. Once I had developed these categories, I used them in order to collect further data about their activities and the narratives they presented. In each country I thus ended up constructing six distinct narratives:

- The narrative challenging the status quo
- The narrative defending the status quo
- The state’s definition of the situation
- The narrative of victim mobilization
- The narrative of prisoner support mobilization
- The prosecutorial narrative
Each of these narratives is constructed by many different actors. The narratives are thus defined by what they do more than by who is doing it. Below I provide details on the sources I used to construct these narratives in each country, also explaining how I gauged the changes of the narratives over time. Before doing so I will say a bit more in general about the way in which I used interviews, documents, and particularly legal documents to construe the narratives.

Given the importance of interpreting data and its meaning in its local context (Chabal and Daloz 2006), I have taken considerable time in each country to understand that context and spent at least seven months in each of the countries. Generally, I based my analysis of the narratives challenging and defending the status quo on a combination of primary and secondary sources, including books, newspaper articles, press releases, websites, and interviews. I further relied on witness testimonies during trials to obtain access to the construction of events and their translation into the criminal law vocabulary. Such testimonies were also available from hearings in Congress or in investigations from parliamentary subcommittees. I also conducted many interviews. I interviewed several lawyers in order to gain access to trial transcripts or relied on their expertise in order to determine the relevant population of criminal cases. Apart from such expert interviews, the interviews were entirely focused on the process of meaning-making.

**Interviews**
My interviews were highly non-standardized. That is not to say that they were not prepared. On the contrary, every single interview was prepared in depth. I had a general structure with topics and themes that could be adapted to the type of interviewee (challenger or defender of the status quo, defendant, victim, prisoner supporter, or prosecutor). I did in-depth research on the person that I was about to interview and composed the many specific questions that I wanted to ask him or her about a specific criminal case or specific events that led to a criminal case. In each interview I explored the meaning-making regarding contentious events that led to criminal prosecutions, examining the use or rejection of criminal law vocabulary to describe, condemn, defend, justify, or prosecute such events and the reasons to place or withhold blame. In preparation for the interviews, I selected specific events or categories of conduct and collected competing narratives. Comparisons of such narratives revealed that people routinely exaggerate or tend to leave things out, thus providing a skewed representation of reality. Because of my interest in meaning-making, however, these representations of reality – skewed or not – were exactly what I needed. Given the explorative nature of the research, I gave interviewees the space to provide input they thought was important and some interviews thus moved beyond the questions that I was asking.

Talking about illegal conduct and the risk of self-incrimination made interviews with defendants difficult. In the Spanish-Basque case I spoke with people who were experienced and knew for themselves what they wanted to say. In the Chilean-Mapuche case it was not that simple: I often talked with young people who were just finding out the possibly devastating impact a
criminal prosecution can have, or I talked with people from the countryside for whom the government and its rules is another world that, in their minds, does not operate with any logic or rules. In such cases I spent more time clarifying their choice to speak with me about possibly illegal tactics. I have always taken various measures to ensure confidentiality as described below.

Interviews were not necessarily the main source to collect information about the competing narratives. Some actors routinely published press declarations in which they presented their narrative about events and their translation into criminal law. Indeed, some actors have published entire books on these themes. I relied heavily on these written records. Interviews, however, had several complementary advantages. First, I could ask questions about their narratives, pushing actors to reflect deeper or challenging them to respond to a “devil’s advocate” by confronting them with the competing narrative. Interviews also enabled actors to correct my understanding of their narrative. Second, interviews enabled me to obtain information that was not in writing, either because I could ask questions about events or prosecutions that they had not commented on in writing or because I could explore meaning-making by actors who were not the press release writers but, for example, family members. A last important function of my interviews was to infuse my research and writing with personal accountability, that is to say, I wanted to make myself personally accountable to the individuals that I interviewed, whether they were landowners or Mapuche activists, whether they belonged to Gestoras pro Amnistía or to the Spanish rightwing political party La Falange. Not only did I want to acquaint myself with their visions as the data for my research, I also wanted
to understand where they were coming from in order to make my writing accountable to them. Whatever I wrote was to be intelligible to these interviewees.

It is tempting to want to know whether people really believe or mean what they say. In this dissertation, however, I describe what people do and what they talk about. I describe the vocal and physical confrontations as they take place. Even though it is interesting, and for other purposes definitely relevant, whether the rhetoric of actors is genuine or instrumental, for the purposes of this research I decided to leave that out of the equation. So, for example, in Spain the victim organizations refuse to recognize a political conflict behind the violence. I focused on their position, the way in which they pronounce this position, when and how that position came to be formulated, and how they use it to justify their forms of action. It is a different kind of research to examine whether that position is just a propaganda technique or sincerely their belief. Similarly, despite allegations that Mapuche activists simply cut down trees to make more money, I do not examine their “real” motives and just describe the narrative in which Mapuche activists express that they want to live in harmony with nature as my analysis focuses on the ways in which such competing images enter the courtroom and are possibly adopted by the prosecutorial narrative.

While I always made clear that I was researching the different perspectives, in order to open the conversation I did adapt my presentation to the vocabulary used by person whom I interviewed. For example, in conversation with the victim organizations in Spain I would
present my research as being about the struggle against terrorism, whereas in conversation with Basque prisoner support groups I would present it as being about legal repression or the criminalization of social movements.

In many of my interviews I used a recording device. I do, however, agree with anthropologists who maintain that having these technological gadgets should not detract from the task at hand. As Bohannan put it so expressively: “Anthropology provides an artistic impression of the original, not a photographic one. I am not a camera” (in: Conley and O’Barr 1990:196). I only selectively transcribed my interviews from the audio recordings. Mostly I relied on my written interview notes in order to analyze the interviews.

For all formal interviews I received full consent. Given the sensitivity of the subject, however, I have decided to maintain confidentiality for every person I have interviewed, especially also where I draw on informal conversations. Some specifically asked me not to mention their name. Others, such as a landowner in Chile, expressed concern that information would land in the wrong hands or be abused. Whenever I have used publicly available information such as from books or the Internet I do refer to the name under which it was published, whereas I describe my interviewees in general terms (such as “animal rights activist”).

Participant observation
In some instances I observed protest tactics or political meetings. While interviews are about what people say, participant observation is about what people do in real time and space such as in institutionalized routines. One of the functions of participant observation is to get access to people. Another function is to use observations as data to contrast with data from other sources (triangulation). I further attended several criminal trials. Criminal prosecutions tend to be long. They can last days and even several weeks. My observational analysis of criminal proceedings is therefore inevitably a very small selection of all these dynamics and everything that is going on during and around trials.

**Biases in the collection and interpretation of data**

Biases in my interpretation of data can arise from my personal background as Dutch, female, academically schooled, and politically left-leaning. Of course, just like my interviewees, I am also a member of multiple interpretive communities. I have my own ways to code and decode communication. Therefore, I have always tried to play the devil’s advocate in interviews and challenge my own assumptions. Some of these personal characteristics also offered advantages in my fieldwork. In Spain, for example, people frequently remarked that the research that I did could only be done by an outsider, a foreigner not tainted by the local stereotypes and categories.
Frequently, there was a significant and structural difference between the kinds of contact that I was able to develop with different actors in the contentious episodes. For example, in Chile, in order to interview rural Mapuche activists I had to visit their homes and often had to stay at their places for multiple days because of the lack of daily buses and the long travel time to get there. In contrast, I interviewed forestry representatives in their offices. This difference reflected the fact that Mapuche activists were personally deeply involved with their cause and demands, whereas forestry representatives were only involved because of their work. The relations that I developed were therefore very different. Some Mapuche activists became friends, whereas my contact with landowners, forestry employees, and prosecutors never went beyond good contacts. I struggled with these differences because they seemed to turn me into a partial presence; and besides, a more personal relationship offers much more information, the possibility to see the world behind the propaganda talks, and therefore often also a different kind of understanding. I tried to correct this potential imbalance by arranging, where possible, multiple interviews with some of the forestry employees and prosecutors. Similar imbalances occurred in the United States because of the refusals from pharmaceutical companies and Huntingdon Life Sciences to grant me the possibility for an interview.

3. Data collection in Spain, Chile, and the United States

The first step in each of the country cases was to get an overview of the narratives challenging and defending the status quo as well as an overview of the contentious events and protest
tactics that formed the basis for subsequent criminal cases. A broad reading of secondary literature and surveys provided the initial mapping of the conflict, its actors, the various positions, the development of events, and the contentious behavior.

The second step was to turn to the criminal justice arena and explore the population of criminal cases as well as the various actors active in this arena. In order to achieve a comprehensive map of this arena and unearth the multiple ways in which events are translated into the criminal justice arena, I took a dialectical approach between the possible data sources and the information I was looking for, going back and forth between six alternative points of departure for the exploration of meaning-making and contestation. My points of departure were actors, events, situations, cases, laws, and chronology:

- Actors (victim organizations or prisoner support organizations)
- Events (specific incidents or categories of criminalized activity, such as arson at a plantation)
- Situations (the local context within which struggles developed, such as the land demands of Mapuche community Temulemu vis-à-vis forestry company Mininco)
- Cases (a specific criminal case against particular defendants)
- Laws (Law on State Security or anti-terrorism laws)
- Chronology (what happened in a specific year, for example during the 1980s)
I broadly identified the actors that enacted a certain narrative and searched for data with those actors as a starting point (thus, for example, approaching victim organizations). Jumping off a different starting point, I selected contentious events or categories of conduct which were the basis for criminal prosecutions and explored available data widely in order to identify the different ways in which such events were labeled, defined, and translated into the criminal justice arena. Thus, in an event-oriented way I searched for information about a category such as “Kale Borroka” or “land occupations” in all kinds of sources (newspapers, secondary literature and questions in interviews) or information about a particular event such as the ETA attack on supermarket Hipercor in Barcelona. Third, I took “situations” as my starting point for inquiry. This was mainly relevant in Chile, where specific struggles between specific Mapuche communities about specific pieces of land provided the context for mobilization, protest, arrests, and trials. Thus I took such situations as the starting point for a mapping of events, analyzing some of them in more depth. Fourth, I took criminal cases as a starting point to go back to the underlying facts that led to the criminal case (for example the case against Gestoras pro Amnistía) and explored in this way how different actors had defined and interpreted a sequence of events. How did victim organizations represent the role of Gestoras pro Amnistía and its relation to ETA? How did the defendants of Gestoras describe their work? Fifth, I explored the usage of particular laws within the context of the contentious episode, such as the prosecutions under the Anti-Terrorism Law in Chile or the prosecutions under the AETA in the United States. How has the AETA been used? What kind of conduct has been construed as fitting its provisions? Finally, I searched through the materials to ask questions about
chronology. What happened in the 1980s? What happened before the ELF was on the scene? What happened before Ron Arnold coined the term “eco-terrorism”? When did a certain tactic become used, notorious, or prosecuted? And what happened before that? This triangulation of six starting points for my inquiries enabled me to find more actors, cases, and perspectives than I might have previously been aware of.

Through qualitative analysis using software to analyze qualitative data (Atlas.ti) I analyzed the different interpretations and definitions of contentious behavior and the use of criminal law terminology by the different actors. For example, I identified categories and the construction of meanings in the prosecutorial narrative and compared the use of categories and the meanings given to actors or behavior in trials over time in order to identify the development and discursive shifts, thus tracing, for example, the changed interpretations of Kale Borroka in Spain.

For the purpose of detailing my data collection I present below a description of the sources that I used to construct the various narratives. While I thus focus here on a description of the data that I used to construct narratives that I have identified for analytical purposes as separate, I engaged in many activities that enabled me to observe the interaction and often confrontation between narratives. For example, attending criminal cases enabled me to observe the hostile attitudes between prisoner supporters and victims. Similarly, I was able to observe the dynamics between police and protesters during demonstrations in each of the countries.
Spain

My fieldwork in Spain took place from January 2008 until June 2008. I had a return visit in January 2010.

Narrative challenging the status quo

For this narrative I mainly focused on the discourse of the left-nationalist movement (*izquierda abertzale*) and the narrative produced by ETA demanding a “free and socialist Euskal Herria.” I collected documents produced by ETA, such as Oldartzen and Karramarro I and II, which were also frequently mentioned in the criminal trials against the “ETA network.” I conducted several interviews with people self-identifying as belonging to the left-nationalist movement. One of them belonged to the youth organization Segi, another belonged to the internationalist organization Askapena, and one was the family member of an incarcerated high-level ETA member. Some came from small villages, whereas others lived in Bilbao or San Sebastián. I also interviewed an active member of the Basque political party Eusko Alkartasuna, which does not really belong to the left-nationalist movement, but is not far removed from it. Further, during my fieldwork I was present at some of the major nationalist mobilization efforts throughout the Basque Country. I also attended several activities organized by the left-independentist movement, such as speeches and a youth conference. In addition, I relied on the many books, pamphlets, and articles produced by left-nationalists. For example, I have a CD with the entire
encyclopedia of ETA as developed by Txalaparta in the early 1990s. Interestingly, this CD has since been prohibited by Judge Garzón.

**Narrative defending the status quo**

For the narrative defending the status quo I mainly looked at the particular defense of Spain as a united country, specifically rejecting separatism. This narrative may to some extent be shared by a much larger share of the Spanish population. For the most explicit construction of this narrative, however, I turned for example, to the website of the small right-wing political party Democracia Nacional, which states in its party program that it is against separatists and independentists. I also interviewed a spokesperson of the right-wing political party La Falange and further relied on secondary literature and press releases produced by these actors.

**State definition of the situation**

For the state definition of the situation I relied heavily on the annual reports from the Office of the Attorney General. In addition, I collected documents from the Guardia Civil that analyze terrorism and ETA.

**The prosecutorial narrative**

In order to trace the general development of the prosecutorial narrative since the end of the 1970s I collected the yearly reports (*Memoria Anual*) of the Office of the Attorney General (*Fiscalía General del Estado* or Office of the Director of Public Prosecutions) of Spain from 1972
until 2008. From these reports I systematically selected the following parts: the introduction, in
which the prosecutor presents an overview of the year; the parts dedicated to the Audiencia
Nacional, to the tribunals of the Basque Country and Navarra (only since 1990 subdivided), to
the “evolution of delinquency,” and to the “terrorist delinquency,” in later editions specifically
referred to as “terrorism by ETA” and “terrorism by the environment of ETA”; and the statistical
data in the end listing the number of proceedings, trials, and the kinds of crimes. These reports
provide a unique series of documents that enables the researcher to trace the changes in
perception and definition. One can, for example, clearly see how the perception of street
violence has changed over time and how the idea that it was orchestrated from above came up
in the course of the 1990s.

For the specific analysis of the construction of criminal cases I collected “dossiers” from the
instruction judges, writs of the prosecutor, and many verdicts. In addition I interviewed an
instruction judge and the chief prosecutor of the Audiencia Nacional and read various books
written by prosecutors or instruction judges (e.g., Mestre Delgado 1987; Moral de la Rosa 2005;
Garzón 2006). I further observed arguments and behavior during two ongoing criminal trials in
the Audiencia Nacional.

**Victim mobilization narrative**

I explored the victim mobilization narrative in various interviews with members and
spokespersons of victim organizations and lawyers working on behalf of victims. In addition, I
used materials produced by such organizations. For example, the director of the main victim organization has published a book on all his experiences throughout the criminal trials he has attended and his communications with the government as a victims’ representative. Further, I used the victims’ testimonies as collected in a variety of projects, such as the “Pelota Vasca” (Medem 2003), and in other journalistic projects. In addition, I used press releases and other information on the websites of victim organizations.

**Prisoner support narrative**

I explored the prisoner support narrative in interviews with people from prisoner support organizations, their press releases, an interview with a lawyer of the Basque lawyers collective, an interview with a representative of an organization against torture, and various reports from human rights organizations. In addition, I attended events organized by prisoner support groups where defendants explained their criminal cases or where prisoners were honored.

**Selection of criminal cases**

At Deusto University in Bilbao, I had access to the digital library of all judicial verdicts in Spain. Using the search function in the database I collected verdicts from the Audiencia Nacional in cases regarding the different kinds of criminalized conduct in relation to ETA and the Basque struggle for independence, such as street violence, revolutionary tax, collaboration, membership, and glorification between 1975 and 2008. For example, I used the database in order to search the first case in which street violence was prosecuted by the Audiencia
Nacional. I further searched for the use of the criminal offense of endorsement (*apología*) throughout the 1980s and 1990s. And I searched for what kinds of behaviors were considered “collaboration” throughout the 1980s and 1990s. In addition to mining this large volume of criminal cases, I searched for the verdicts in specific cases which came to my attention through the secondary literature or in interviews. For example, I used the database to find the verdict in the case of the illegalization of the political party Batasuna, the case of Iñaki de Juana, and the case dealing with the murder of Miguel Ángel Blanco. In addition to collecting verdicts from the database, I collected prosecution statements and indictments, either from lawyers or from news sources (often newspapers would provide a link to judicial documents when they reported on a case). I acquired the entire trial transcripts and expert documents of the two macro-trials that had taken place by 2008: Sumario 18/98 and the case against Jarrai/Haika/Segi. These documents include, for example, analyses by the Guardia Civil and the Centro Nacional de Inteligencia.

Apart from obtaining insight in criminal trials through the documents that such trials produce, I attended several trials in person. I attended the trial against Gestoras Pro Amnistia (April–June 2008, Audiencia Nacional, Madrid). I chose this trial because it was underway while I was doing my fieldwork in Spain and was one of the so-called “macro-trials” in which the Spanish prosecution is engaged in dealing with the whole ETA network of organizations. In this specific trial I interviewed two defendants, a lawyer of the popular accusation, the spokesperson of the association of victims who are the popular accusation in this case, and two people from another
victim organization who attended the trial for several days. I also attended a trial against ETA members of the armed organization who were tried for the abduction of a businessman. In addition, I attended one day of trials at the other section of the Audiencia Nacional, which does not deal with terrorism cases, to gain a broader perspective on this specialized and contested court. I also attended one trial day at the Supreme Court of the proceedings to illegalize successors of the political party Batasuna (the Acción Nacionalista Vasca (ANV) and the Partido Comunista de Tierra Vasca (PCTV), June 2008).

Chile

This case is characterized by the fact that I conducted research for my Master’s thesis on the conflict in 2002–2003. I was able to use many of the documents and interviews that I collected back then in this dissertation. In March–May 2009 I went back to the south of Chile in order to update my materials and find additional material, specifically on the criminal justice system, which I had not explored in depth before. It should be kept in mind that my analysis in this episode is until mid-2009. Since then, a new wave of mobilizations led to a large number of detentions and new prosecutions under the anti-terrorism laws. I hardly covered this new wave.

Narrative challenging the status quo
In order to understand the narrative challenging the status quo I spent time in Mapuche communities that demanded land from adjacent landowners. In addition, I conducted many interviews with activists from a variety of backgrounds: young and old, male and female (although mostly male), urban and rural, university students and people without primary education, leaders and community members, and those that were identified as “real” Mapuches as well as “mestizos” or “Chileans.” In order to understand the local dynamics of specific land demands I spent more time in and collected more in-depth information about the community Choin Lafkenche near Collipulli and their demands vis-à-vis the forestry company Mininco, community Temulemu and their demands vis-à-vis Mininco and Juan Agustín Figueroa, community Juan Paillalef and their demands vis-à-vis local private landowners, and community Temucuicui and their demands in relation to the property of landowner René Urban. I further interviewed activists from the Mapuche organization Consejo de Todas las Tierras (CTT), activists from the Coordinadora Arauco Malleco (CAM), and also activists from Mapuche organizations that have not experienced criminal prosecutions since 1990, such as Konapewman, Aukinko Zomo, and Ad Mapu. I also engaged in participant observation in several cultural and political events, such as religious ceremonies, demonstrations, and political meetings. I further visited several activists in prison. In addition, I collected written information in the form of pamphlets, books, public declarations, and webzines and followed some e-mail lists. In this way, I attempted to understand the voice and variety of the Mapuche movement.

Narrative defending the status quo
In 2003 I interviewed representatives from a variety of larger and smaller forestry companies as well as one private landowner. In these conversations we talked at length about the Mapuche land claims, the history of those claims, and the role and position of forestry companies and private landowners. On my return visit in 2009 I chose not to pursue interviews with private landowners. It was made clear to me that they were suspicious of what would happen with the information that they shared. Past experiences have shown them that their appearance in, for example, video documentaries can be negative. This has led them to be cautious. In addition, it was not my intention to add to their suffering of harassment and have them talk about it more than necessary. I collected their testimonies in Senate reports, Senate hearings, and their testimonies during various criminal trials. I did, however, want to meet with the forestry company that owns most of the land in the 9th region and files complaints in many instances. Unfortunately, they refused to share their information on these complaints and what happened with them. The reason they gave for this refusal is interesting: They claimed that the information was sensitive and could potentially create problems for them with the office of the prosecutor. I did talk at some length with an employee at a private security company working for a big forestry company as well as the managers of forestry and agricultural alliances. In addition to these interviews, I collected information to construct the narrative defending the status quo from the websites of forestry companies, their magazines, and reports that they published. I also had access to the local archive of the forestry alliance CORMA in Temuco, where they kept newspaper clippings, research results, position statements, public declarations, and reports from meetings. For my interviews in 2003 I visited several of these
companies and I also attended a meeting on FSC certification and a national seminar on forestry where several forestry representatives were present and I received an organized tour of several plantations. In 2009 I also attended a cultural event for Mapuche communities organized by a forestry company. Lastly, I made use of public statements in interviews with landowners in Chilean newspapers.

**State definition of the situation**

I constructed the state’s definition of the situation from a variety of congressional reports and statements in interviews in the press by government officials. I further relied on the criminal complaints that regional and provincial governors filed in several of the cases against Mapuche activists. I spoke with the relevant lawyers for these governors, who, however, could only speak in a private capacity, not as representatives of the government. Both made clear in their answers, though, that the decision to file official complaints were taken in Santiago, not in the south. I also interviewed the mayor of Collipulli.

**The prosecutorial narrative**

Just as in Spain, in Chile I conceptualized the prosecutorial narrative as the narrative that enters the courtroom in the official quality of presenting before the judge a story that defines a crime and identifies a perpetrator. This means that both the prosecutor and private accusers can present that narrative. Thus, because of the similar function that private accusers fulfill during trials, I often took their framing to be part of the “prosecutorial” narrative. In practice, the
narratives of the prosecutor and private accusers were highly similar and complementary. It is possible, however, for private accusers and prosecutors to present different charges and a different argumentation. It is up to the judges to form their judgment. My construction of the prosecutorial narrative is based on the analysis of prosecutorial statements in many verdicts, oral recordings of several trials, and police transcripts, such as witness declarations. Only since 2004 has more digital information on criminal trials become available, and also statistics on the results of criminal prosecutions. In addition, in 2003 I interviewed various lawyers at the regional prosecutor’s office as well as the chief regional prosecutor in Temuco and a local prosecutor in one of the conflict areas (Collipulli). In addition, I interviewed the police chief of the most problematic area (Ercilla and Collipulli).

In 2009, my attempts to interview prosecutors fell flat. Interestingly, I was told that if an interview would be granted I was not supposed to ask any questions related to the “Mapuche conflict.” A befriended lawyer approached the regional prosecutor to request an interview for me. “As long as you are not going to ask questions about the Mapuche conflict, he is OK with it,” reported the friend. I will never know whether he was really OK with it, or where his limit of “questions on the Mapuche conflict” lay, because subsequently the prosecutor never responded to my reiterated calls, e-mails, or visits to his office. The message was clear though: talk law with legal actors and politics with the political actors. Both in 2003 and in 2009 I attended a criminal trial, which enabled me to observe the prosecutors “in action.” I also
collected written materials such as an opinion piece written by one of the prosecutors, the
website from the prosecutorial office, and audiotapes from various trials.

**Victim mobilization narrative**

When I announced to landowners that I wanted to know more about how the criminal justice
system works regarding cases that arise in the context of the Mapuche conflict, I invariably got
transferred to the lawyer administrating the cases. This would have been helpful if the lawyer
actually had the authority to give me information. Thus, instead of talking about law and
criminal justice with landowners, I got to talk with their lawyers, who as soon as I touched on
more political subjects referred me to their bosses, who subsequently refused to talk to me.
The superficial separation but intimate connectedness between law and politics was hardly
ever more obvious than in this play of sending me around and avoiding the subject. I
interviewed the lawyers for one of the bigger forestry companies and the lawyer for the
agricultural alliance. In addition, in order to construct the voice that claims victimhood, I relied
on written documentation, such as press declarations, testimonies during criminal trials, and
testimonies with congressional committees.

**Prisoner support narrative**

In order to understand the specific narrative that challenges the criminal definitions proposed
by the state, I selected the major criminal cases of the past twenty years and set out to
interview the defendants in each of these cases. In this way, I interviewed defendants of the
following criminal cases: CTT 1992, Lumaco 1997, Temulemu 1999, attempted homicide private security guard 2001, Ancalaf 2002, Lonkos of Traiguén 2003, CAM 2004, Poluco Pidenco 2004, Chamichaco 2009. In order to research the different meanings assigned to protest activity, it is, however, indispensable that an actor has actually done the action and also acknowledges participation. The Mapuche conflict offered a specific challenge here, as most if not all people accused of “underground” crimes publicly denied their participation. In some cases, other sources confirmed that innocence. In most cases, however, I had no way to independently check such assertions. I also interviewed five lawyers that regularly defended Mapuche activists in court. This was significant because often defendants had misunderstood central elements in their case. For example, one defendant said that he was sentenced with anti-terrorism laws, whereas his lawyer claimed that he was sentenced under the Law on State Security (Interview S-53). This example illustrates, on the one hand, the lack of knowledge and understanding that often exists and, on the other hand, the pervasiveness of the discourse that the anti-terrorism legislation is used in “Mapuche trials.” Further, I visited prisons and attended benefit events to raise support for prisoners. I also spoke with various activists that self-identified as prisoner supporters. In addition, I collected written documents such as lists with the “political prisoners” and public declarations.

Selection of criminal cases

I have tried hard to collect quantitative data, for example on the number of criminal complaints filed by forestry companies, the number of criminal offenses experienced by them, and the
number of criminal cases that went to trial. I asked the forestry company Mininco and the
governor of Malleco for their data on the criminal complaints they had filed and the result of
these complaints (investigations, prosecutions, trials, convictions). They confirmed that they
possessed these data, but in both cases I was denied access. The reason given by the forestry
company Mininco was that it was too sensitive and could have a deteriorating effect on their
relations with the Public Ministry. The governor did not give an explanation, but his lawyer told
me that he was unwilling to cooperate. Unfortunately, I have therefore not been able to collect
much quantitative information regarding criminal cases that could provide an indication of the
relevant population of cases. How many land takeovers were there in each year since 1990?
How many of these ended in a criminal trial? How many of these ended in a removal? How
many in detentions? It turned out to be virtually impossible to find the answers to these
questions. Landowners did not want to give any numbers that they had, and the office of the
prosecutor simply did not respond.

For my data collection on criminal cases I again turned to the method of “case collection” and
“situation collection.” I collected in-depth information on the following criminal cases: Consejo
de Todas las Tierras 1992; Lumaco 1997; Temulemu 1999; Lonkos of Traiguén 2003; CAM 2004;
Chamichaco 2009. In each of these cases I collected the following:

- interviews with defendants
- trial transcripts
- newspaper accounts about the event
- victim statements about the event in newspapers or other sources (judicial records, documentary)

In addition to the in-depth analysis of these key cases, I wanted to collect the transcripts of several other cases from different years and with different kinds of criminal offenses. I wanted to obtain at least one sentence for every year and at least one sentence for each of the frequently imputed criminal offenses: usurpación [usurpation], robo [theft], hurto [petty theft], daño [damages], desórdenes públicos [public disorder], incendio [arson]. But people kept telling me that what I was looking for was “not relevant.” Anthropologists learn, however, that this in itself is an important entry point for information. Interestingly, it turned out that while the narrative of prisoner supporters and the talk of “criminalization of a social movement” makes it seem that criminal cases on usurpation and theft are initiated frequently, there actually were not that many of such criminal cases that were pursued until a trial. As there were in fact less of those smaller criminal cases than I had expected, and because of the difficulty to obtain transcripts, I ended up with considerably less transcripts and less of a systematic selection principle than in Spain and the United States.

My aim was to collect trial transcripts from criminal cases that were related to the Mapuche conflict from 1990 to 2009, just like I had collected trial transcripts in Spain and the U.S., where many transcripts are available digitally. There were, however, several challenges. Lacking access to judicial databases, it was difficult to get an overview of the population of cases. It was
virtually impossible to find any specific opening statements or indictments or other speech acts by the prosecutor. Even verdicts, which are supposed to be public, were a hassle to obtain. Only since the Penal Reform of 2001 have there been an attorney general and public oral trials. Only since 2004 have trial verdicts been published on Internet databases. For hardcopy transcripts from trials before 2003 I went directly to the Court of Appeals in Temuco or to criminal defense lawyers. Through one of the lawyers I obtained many police documents that were used in the case against the CAM and several of the other cases that he had defended since 2000. Also, through one of the lawyers I obtained some of the complaints that were filed by victims. For cases after 2003 I found digital trial transcripts on databases of LexisNexis, V-Lex, and the website www.poderjudicial.cl. A severe limitation of these websites, however, is that they only give sentences from the Appeals Court or the Supreme Court. Sentences from the first courts, and thus the sentences that relate the course of events, were not possible to acquire, for which I could not use these websites in order to identify the prosecutorial narrative. In addition, these websites depended on the digitalization of the various tribunals. For example, it was not possible to access any of the sentences of the tribunal in the village of Collipulli or the village of Nueva Imperial through these websites. This severely limited their use as a way to retrieve quantitative data on the number of cases on a certain criminal offense or the number of cases with the use of a certain law. Further, trial transcripts have to be divided into those that belong to the old system and those that belong to the new system. The new system has oral trials that can be obtained in audio. I collected several of these oral trials through lawyers. In this way I actually had access to more in-depth information than just the verdicts. Regarding some of the
cases tried in the old system I have been able to recuperate in addition to the verdicts some of the other documents such as the defense statement through the courts and the lawyers.

I was present at two trials. In 2003, I attended the trial against the lonkos of Traiguén. In 2009, I attended the trial against three Chilean supporters of the Mapuche cause, the Chamichaco case. Both trials consisted of one week-long phase of opening statements, witness statements, and concluding arguments. I “selected” these trials simply because they were the trials that took place during my fieldwork.

United States

My fieldwork in the United States took place from September 2007 until November 2007 and in October 2008 and November 2008. Just as in Spain, after having mapped the conflict, I collected different overviews of events and analyzed how the events are described. I selected some (categories) of the events and explored in more depth how different actors labeled them at the time. I traced at which point the terrorism label came into the discourse, which actors introduced it, and at which point it played a role in the criminal proceedings.

Narrative challenging of the status quo

In order to gain access to the existing range of perspectives in the animal rights and environmentalist activist community and the meaning that events and concepts have for them,
I collected data in several different ways. I interviewed activists with whom I had come in touch by attending specific events (an animal rights conference in Boston and a trial against an environmental activist). These interviews provided me with the relevant websites, organizations, and books to look into and contacts for further research. Subsequently, for several months I did weekly participant observation during various demonstrations organized by an animal rights group in the New York area. This gave me the insight of an animal rights group in action and the conversations and practices within the group. I also attended various talks by animal rights activists, for example at universities in New York – often gathering places for the animal rights community. I conducted in-depth interviews with animal rights activists about their protest activities and their experiences with criminal prosecutions. In addition to interviewing activists I also interviewed several lawyers who have represented activists about their cases. In addition to these experiences and the field notes and interview transcripts I gained from them, I followed a variety of animal rights and environmentalist websites with frequency, subscribed to various mailing lists, and surfed the web extensively, viewing material on YouTube on SHAC protests and videos exposing animal cruelty. Finally, I read various books written by activists about their protest activity. While focusing on the groups that faced criminal prosecution, in this exploration of the range of perspectives available in the activist movement, through websites and news reports I also explored the position and views of the so-called “mainstream” organizations, such as the Sierra Club and the Humane Society. It became apparent that it is relevant to understand how different categories of groups interact to understand the state’s response to extremism.
Narrative defending the status quo

For the discourse defending the status quo I relied on the written documents produced by organizations such as the Fur Commission and the Center for the Defense of Free Enterprise available on the Web or in book form. Furthermore, I used testimonies provided before congressional committees. Unfortunately, the companies Huntingdon Life Sciences, Novartis, and Life Sciences Research refused to grant me an interview (Telephone conversation, September 2008).

State definition of the situation

For the state definition of the situation I collected data from proceedings in Congress and subcommittee hearings related to environmental protest or “eco-terrorism.” Testimonies by government experts in such hearings provide insight into the threat assessment the government makes. In addition, I collected data from the website of the FBI.

Prosecutorial narrative

In order to gain access to the perspective and discourse of prosecutors I used several bodies of data. I attended one trial against an environmentalist activist and interviewed the prosecutor in this trial. In addition, I interviewed the prosecutor of another well-known trial against animal rights activists. Further, I collected various press releases, indictments, and available trial transcripts in these cases and in many other criminal cases. Unfortunately the FBI turned down
a request for an interview after having considered that “they would not be able to disclose much information” (Telephone conversation, October 2008). A promise to answer a written questionnaire which I sent them per e-mail was not fulfilled.

In order to analyze what happened in courts I used the digital system “Pacer,” in which all trials in federal courts are registered and their documents are uploaded. The system Pacer enabled me to perform searches as long as I had the name of the defendant. This allowed me to, for example, get access to the trial transcripts in the case of Rod Coronado. Especially the opening and closing statements offered an opportunity to tease out the way in which the prosecutor presents the relevant context, and which parts are excluded as not relevant. Thus, I could analyze how the prosecutor translates the facts of the case, elements of the offense, and the arguments regarding causation, liability, and sentencing into legally relevant terminology.

Unfortunately, if a trial ended in a plea bargain, Pacer shows the different dates of court appearances and motions, but content is not disclosed. Many activists, however, uploaded legal materials on their support websites, including plea agreements and written notes from sentencing hearings. U.S. Attorney websites often publish indictments online, as well as press releases about trials.

Victim mobilization narrative

In order to gain understanding of the perspective of the targets and victims of activist protest activity, I relied on books and websites from organizations and individuals that had experienced
extreme animal rights and environmentalist activities. Some victims declared during trials, such as in the SHAC trial, so I could rely on their testimonies to analyze their discourse. In addition, I used their testimonies in congressional hearings. I tried to organize interviews with some of the companies that have been targeted by activists. Unfortunately, pharmaceutical companies either explicitly refused to give interviews or did not return my calls. The reason they gave for their refusal was security concerns, illustrating the seriousness of the matter. I had an informal conversation with representatives from a European pharmaceutical company which confirmed the perspectives that I had already gleaned from written documents.

**Prisoner support narrative**

For my analysis of the discourse of prisoner supporters, I mostly relied on the information provided on websites from support groups. In addition, I interviewed a prisoner supporter during one of the trials, an activist of the ALF Press Office, and a former prisoner. I also visited an action by prisoner supporters who were handing out leaflets and providing food on the streets of New York.

**Selection of criminal cases**

I attended one trial in the United States, the jury trial against Eric McDavid, which took place during my fieldwork period. Further, I chose the SHAC case as one of the cases to study in more depth as it emerged as one of the most important criminal cases, for both activists and targets of protest activity. Books, press releases, and interviews pointed me to relevant criminal cases. I
further used a variety of sources to get an overview of the development of extreme environmental protest activity. Most of these overviews start in 1980 (FBI 2006; Guither 1998:221–233; Foundation for Biomedical Research 2006; Fur Commission 2011c, 2011d; ELF supporter 2008). I used such overviews to trace the criminal prosecutions that were initiated at different moments, for example, regarding the release of animals from mink farms.
### Appendix – Abbreviations and acronyms

**Chapters 2 and 3**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ANV</td>
<td>Acción Nacionalista Vasca</td>
</tr>
<tr>
<td>AVT</td>
<td>Asociación Víctimas del Terrorismo</td>
</tr>
<tr>
<td>BVE</td>
<td>Batallón Vasco Español</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Court for Human Rights</td>
</tr>
<tr>
<td>EPPK</td>
<td>Euskal Preso Politikoen Kolektibo, Basque Collective of Political Prisoners</td>
</tr>
<tr>
<td>ETA</td>
<td>Euskadi Ta Askatasuna</td>
</tr>
<tr>
<td>ETAm</td>
<td>ETA-militar</td>
</tr>
<tr>
<td>ETApm</td>
<td>ETA-político-militar</td>
</tr>
<tr>
<td>GAL</td>
<td>Grupos Antiterroristas de Liberación</td>
</tr>
<tr>
<td>GRAPO</td>
<td>Grupos de Resistencia Antifascista Primero de Octubre</td>
</tr>
<tr>
<td>MLNV</td>
<td>Movimiento de Liberación Nacional Vasco</td>
</tr>
<tr>
<td>MPAIAC</td>
<td>Movimiento por la Autodeterminación e Independencia del Archipiélago Canario</td>
</tr>
<tr>
<td>PCTV</td>
<td>Partido Comunista de Tierras Vascas</td>
</tr>
<tr>
<td>Plan ZEN</td>
<td>Plan de Zona Especial Norte</td>
</tr>
<tr>
<td>PNV</td>
<td>Partido Nacional Vasco</td>
</tr>
<tr>
<td>PP</td>
<td>Partido Popular</td>
</tr>
</tbody>
</table>
Chapters 4 and 5

PSOE Partido Socialista Obrero Español
TOP Tribunal del Orden Público

CAM Coordinadora Arauco Malleco
CONADI Corporación Nacional de Desarrollo Indígena
CORMA Corporación de Madera
CTT Consejo de Todas las Tierras
FARC Fuerzas Armadas Revolucionarias de Colombia
FIDH International Federation for Human Rights
IACHR Inter-American Court for Human Rights
ILO International Labor Organization
Mideplan Ministerio de Planificación
MIR Movimiento de Izquierda Revolucionaria
SNA Sociedad Nacional de Agricultura
SOFO Sociedad de Fomento Agrícola de Temuco

Mapuzugun (Mapuche language):

Lamngen Sister
Lof Mapuche community
Lonko Community chief
Machi  Community healer
Nguillatún  Religious ceremony
Palin  Specific sport played by Mapuche communities
Peñi  Brother
Werken  Spokesperson for a Mapuche community
Winka/huinca  Pejorative word for “Chilean” – literally: thief

Chapters 7 and 8

ALF  Animal Liberation Front
CMU  Communication Management Unit
ELF  Earth Liberation Front
FBI  Federal Bureau of Investigation
JTTF  Joint Terrorism Task Force
PETA  People for the Ethical Treatment of Animals
SHAC  Stop Huntingdon Animal Cruelty
Appendix – Schematic illustration of indicators of the modalities in the prosecutorial narrative

<table>
<thead>
<tr>
<th>Modality of prosecutorial narrative</th>
<th>DE-CONTEXTUALIZATION</th>
<th>RE-CONTEXTUALIZATION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Element of criminal doctrine</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The prosecutor construes the case, selecting legally relevant facts and excluding the context, claiming to be politically neutral</td>
<td>The prosecutor re-contextualizes the criminalized events against the background of a broader context that is politically contested</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Narrowing versus broadening the legal interest</th>
<th>Legal interest</th>
<th>Subject of prosecution</th>
<th>Time frame</th>
<th>Guilt</th>
<th>Harm principle I</th>
<th>Harm</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal interest</td>
<td>Concrete and narrowly defined legal interest</td>
<td>Individual as perpetrator</td>
<td>Narrow time frame</td>
<td>Guilt for past harm</td>
<td>Clear demonstrated harm</td>
<td>Completed-realized harm</td>
</tr>
<tr>
<td>Subject of prosecution</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Time frame</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guilt</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Harm principle I</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Harm</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Abstract and broadly defined legal interest</td>
<td>Individual as member of an identity group or organization</td>
<td>Broad time frame</td>
<td>Future danger, status crimes</td>
<td>Consensus about immorality becomes sufficient</td>
<td>Preparatory activities and potential</td>
</tr>
<tr>
<td><strong>principle II</strong></td>
<td>is punishable</td>
<td>harm become criminalized</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------</td>
<td>----------------</td>
<td>--------------------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Narrowing versus broadening criminal liability**

<table>
<thead>
<tr>
<th>Conduct I</th>
<th>Actions at one time and place constitute the crime</th>
<th>Continuous sequence of acts which alone are not criminal constitute a “pattern” which constitutes a crime or which together constitute a more severe crime than each separate incident alone</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Conduct II</th>
<th>Crime is autonomous</th>
<th>Criminal conduct is dependent, i.e., refers to other actual or potential crimes, and the conduct would not be criminal without (the possibility of) those other crimes, for example “threat” or “glorification”</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Evidence</th>
<th>Every element of the crime has to be proven. Burden of proof squarely on prosecutor</th>
<th>Strategies to exclude elements from the need to prove it. Shift of the burden of proof to the defendant</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Punishing results</th>
<th>Results of an action only count into the crime when you intended and foresaw the result: knowing and willing is required</th>
<th>In certain positions you are supposed to have known and wanted the results. At the very extreme, strict liability becomes the norm</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Causality</strong></td>
<td>Responsibility is direct</td>
<td>Responsibility for the actions of others through hierarchical control (&quot;command&quot; responsibility), financial support for or membership in an organization, actions of solidarity, or acts of incitement and glorification (&quot;speech acts&quot;)</td>
</tr>
<tr>
<td><strong>Organization</strong></td>
<td>Clear definition of organization in correspondence with everyday use</td>
<td>Meaning of organization becomes thin: it does not correspond anymore to what is ordinarily understood as an organization</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Emphasizing versus loosening the separation between law and politics</strong></th>
<th><strong>Goal of criminal proceedings and punishment</strong></th>
<th><strong>Motive</strong></th>
<th><strong>Standard of success</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Set an example, destruction of leaders, fuelling internal conflicts, information gathering, destruction of an organization, restriction of a movement’s resources, prevention of an action</td>
<td>Setting an example, destruction of leaders, fuelling internal conflicts, information gathering, destruction of an organization, restriction of a movement’s resources, prevention of an action</td>
<td>No political motives are discussed</td>
<td>Ongoing procedures, value-rational action</td>
</tr>
<tr>
<td>Retribution, deterrence, incapacitation, re-habilitation</td>
<td>Setting an example, destruction of leaders, fuelling internal conflicts, information gathering, destruction of an organization, restriction of a movement’s resources, prevention of an action</td>
<td>No political motives are discussed</td>
<td>Ongoing procedures, value-rational action</td>
</tr>
</tbody>
</table>

**Motive**

No political motives are discussed

**Standard of success**

Ongoing procedures, value-rational action
<table>
<thead>
<tr>
<th><strong>Relation between judges and executive</strong></th>
<th>Clear separation of powers</th>
<th>Pushing off of responsibility, disputed jurisdiction and competence</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Investigation</strong></td>
<td>Reactive and offense-driven as a response to a criminal report or complaint</td>
<td>Proactive and suspect-driven on the basis of an identified threat</td>
</tr>
<tr>
<td><strong>Identity defendant and victim</strong></td>
<td>Exclusion of the identity of the defendant, victim or both as relevant to determining the crime</td>
<td>Explicit discussion of the identity of the defendant, victim or both as relevant to determining the crime</td>
</tr>
<tr>
<td><strong>Legislative justification</strong></td>
<td>Use of the ordinary, routine instrumentarium of laws</td>
<td>Use of special measures, special laws, special courts, reliance on confidentiality, secrecy</td>
</tr>
<tr>
<td><strong>Role of criminal justice within state reaction</strong></td>
<td>Last resort</td>
<td>First response</td>
</tr>
<tr>
<td><strong>Presumption of innocence</strong></td>
<td>Strict protection of the defendant as potentially innocent</td>
<td>Long pre-trial detention, the identity of the defendant as well-known leader or spokesperson becomes the basis for decisions</td>
</tr>
</tbody>
</table>
### Role of the Prosecutor

| Role of the prosecutor | The prosecutor represents the generalized public interest | The prosecutor represents the interests of a particular group or category of victims |
Appendix – Visual representation of contentious criminalization
Appendix – Overview of interviews

Due to the informal character of some of my fieldwork activities, not all communications were in the form of official interviews. Therefore, in this list of interviews I also include long informal conversations, even though I still refer to them in the text as “Interview”. Interviews and conversations lasted anywhere between one and four hours. With some informants I had multiple conversations.

This table does not include the “gatekeeper” or “expert” interviews that I conducted with people in order to obtain access to informants or a better understanding of, for example, the Spanish criminal justice system and legal databases. In Spain, such interviews included conversations with the dean of the law faculty in Bilbao, a law professor, the director of the Institute for Criminology in San Sebastián, and other researchers in the field of ETA, terrorism, and Kale Borroka.

Unfortunately, my request for an interview was not always granted. The difference between access and a refusal was generally related to my ability to find some personal recommendation from other actors and simply the ability to wait and persevere. Still, in some cases, actors refused to talk with
me, generally referring to “security concerns.” In Chile I was unable to interview some of the actors whom I had interviewed in 2003. Multiple attempts did not lead to an interview with the prosecutor in Temuco, Chile, in 2009. Similarly, spokespersons from the Chilean forestry company Mininco refused to talk to me in 2009. In the United States, I received rejections from the Federal Bureau of Investigations (FBI), the pharmaceutical company Novartis, and the controversial company involved in animal experimentation, Huntingdon Life Sciences. In Spain, while having interviewed the chief prosecutor from the Audiencia Nacional, the prosecutor in the case against Gestoras pro Amnistía refused an interview, while expressing ostensible depreciation and suspicion that I was somehow related to the defendants.

In the table below I organize the interviews chronologically per country study.
<table>
<thead>
<tr>
<th>Number</th>
<th>Place and date of interview</th>
<th>Short description of interviewee</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Bilbo-Bilbao, Jan./April 2008</td>
<td>Lawyer with Gestoras pro Amnistía and Basque human rights organization Behatokia, defendant in Case Gestoras pro Amnistía</td>
</tr>
<tr>
<td>2</td>
<td>Andoain, Feb. 2008</td>
<td>Director newspaper Egunkaria, defendant in case Egunkaria</td>
</tr>
<tr>
<td>3</td>
<td>Hernani, Feb./Mar./Jun. 2008</td>
<td>Lawyer of the Basque lawyer’s collective in the case 18/98, Jarrai/Haika/Segi and many others</td>
</tr>
<tr>
<td>4</td>
<td>Gernika, March 2008</td>
<td>Participant in anti-Falange demonstration</td>
</tr>
<tr>
<td>5</td>
<td>Bilbo-Bilbao, March 2008</td>
<td>Lawyer at Basque human rights organization Behatokia</td>
</tr>
<tr>
<td>6</td>
<td>Donostia-San Sebastián, March 2008</td>
<td>Previous member of Gestoras pro Amnistía, law professor in San Sebastián-Donostia</td>
</tr>
<tr>
<td>7</td>
<td>Bilbao, March/ June 2008</td>
<td>Left-nationalist activist from Algorta</td>
</tr>
<tr>
<td>8</td>
<td>Madrid, April 2008</td>
<td>Lawyer for the victim organization Asociación de Víctimas del Terrorismo</td>
</tr>
<tr>
<td>9</td>
<td>Barcelona, April 2008</td>
<td>Social justice activists in Barcelona</td>
</tr>
<tr>
<td></td>
<td>Location</td>
<td>Date</td>
</tr>
<tr>
<td>---</td>
<td>-------------------</td>
<td>------------------</td>
</tr>
<tr>
<td>10</td>
<td>Gasteiz-Vitoria</td>
<td>April 2008</td>
</tr>
<tr>
<td>11</td>
<td>Madrid</td>
<td>April 2008</td>
</tr>
<tr>
<td>12</td>
<td>Bilbo-Bilbao</td>
<td>April 2008</td>
</tr>
<tr>
<td>13</td>
<td>Madrid</td>
<td>April and May 2008</td>
</tr>
<tr>
<td>14</td>
<td>Madrid</td>
<td>April 2008</td>
</tr>
<tr>
<td>15</td>
<td>Gasteiz-Vitoria</td>
<td>April 2008</td>
</tr>
<tr>
<td>16</td>
<td>Madrid</td>
<td>May 2008</td>
</tr>
<tr>
<td>17</td>
<td>Bilbo-Bilbao</td>
<td>May 2008</td>
</tr>
<tr>
<td>18</td>
<td>Madrid</td>
<td>May 2008</td>
</tr>
<tr>
<td>19</td>
<td>Bilbo-Bilbao</td>
<td>May 2008</td>
</tr>
<tr>
<td>20</td>
<td>Madrid</td>
<td>May 2008</td>
</tr>
<tr>
<td>21</td>
<td>Madrid</td>
<td>May 2008</td>
</tr>
<tr>
<td>22</td>
<td>Madrid</td>
<td>May 2008</td>
</tr>
<tr>
<td>23</td>
<td>Bilbo-Bilbao</td>
<td>May/June 2008</td>
</tr>
</tbody>
</table>
24. Elorrio, June 2008  
   Leader of left-nationalist youth organization Segi, acquitted after a trial for collaboration with ETA.

25. Bilbo-Bilbao, June 2008  
   Left-nationalist activist, previous participant in Kale Borroka.

26. Hernani, June 2008  
   Lawyer for Gurasoak, an organization of family members of prisoners and defendants charged for actions of Kale Borroka.

27. Madrid, June 2008  
   Lawyer for victim organization Dignidad y Justicia.

28. Oñati, June 2008  
   Member of Etxerat, family member of imprisoned ETA militant.

29. Madrid, June 2008  
   Defendant trial Gestoras pro Amnistía.

30. Madrid, June 2008  
   Active member of political party Eusko Alkartasuna.

31. Madrid, June 2008  
   Victim of failed ETA attack, threatened by ETA and paying “revolutionary tax”

32. Bilbo-Bilbao, June 2008  
   Activist with Gesto por la Paz.

33. Madrid, June 2008  
   Swiss sympathizer with the left-nationalist movement.

34. Bilbo-Bilbao, June 2008  
   Apolitical youth from a small village in Gipuzkoa-Guipuzcoa.

35. Durango, January 2010  
   Former left-nationalist sympathizer.
### CHILE (C)

<table>
<thead>
<tr>
<th></th>
<th>Location</th>
<th>Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Santiago, Oct. 2002</td>
<td>Lawyer for Mapuche community in case Ralco</td>
</tr>
<tr>
<td>2</td>
<td>Mapuche community in the Alto Bío Bío, November 2002</td>
<td>Community member</td>
</tr>
<tr>
<td>3</td>
<td>Temuco, Dec. 2002</td>
<td>Employee at the National Forestry Corporation (CONAF)</td>
</tr>
<tr>
<td>4</td>
<td>Temuco, Jan. 2003</td>
<td>Vice-regional governor of the 9th region</td>
</tr>
<tr>
<td>5</td>
<td>Temuco, Jan. 2003</td>
<td>Director of Programa Orígenes, providing programs for indigenous communities</td>
</tr>
<tr>
<td>6</td>
<td>Temuco, Jan. 2003</td>
<td>General director at forestry company Millalemur</td>
</tr>
<tr>
<td>7</td>
<td>Temuco, Jan. 2003</td>
<td>Commercial manager at forestry company Magasa, ex-director of the CORMA</td>
</tr>
<tr>
<td>8</td>
<td>Temuco, Jan. 2003</td>
<td>Chief of the department of the administration of land at forestry company Mininco</td>
</tr>
<tr>
<td>9</td>
<td>Temuco, Jan. 2003</td>
<td>Lawyer for forestry company Mininco (junior)</td>
</tr>
<tr>
<td>10</td>
<td>Temuco, Jan. 2003</td>
<td>Head prosecutor regional public ministry of the 9th region</td>
</tr>
<tr>
<td>11</td>
<td>Temuco, Jan. 2003</td>
<td>Spokesperson public ministry in the 9th region</td>
</tr>
<tr>
<td>12</td>
<td>Temuco, Jan. 2003</td>
<td>Lawyer public ministry 9th region</td>
</tr>
<tr>
<td>13</td>
<td>Temuco, Jan. 2003</td>
<td>Lawyer public ministry 9th region</td>
</tr>
<tr>
<td>14</td>
<td>Collipulli, Feb. 2003</td>
<td>Police chief in Collipulli</td>
</tr>
<tr>
<td>15</td>
<td>Collipulli, Feb. 2003</td>
<td>Prosecutor in Collipulli</td>
</tr>
<tr>
<td>No.</td>
<td>Location</td>
<td>Position/Role</td>
</tr>
<tr>
<td>-----</td>
<td>-------------------------</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>16</td>
<td>Temuco, Feb. 2003</td>
<td>Lawyer for forestry company Mininco (senior)</td>
</tr>
<tr>
<td>17</td>
<td>Temuco, Feb. 2003</td>
<td>Chief of public relations, forestry company Mininco</td>
</tr>
<tr>
<td>18</td>
<td>Collipulli, Feb. 2003</td>
<td>Private security guard for forestry company Mininco</td>
</tr>
<tr>
<td>19</td>
<td>Collipulli, Feb. 2003</td>
<td>Mayor of Collipulli</td>
</tr>
<tr>
<td>20</td>
<td>Concepción, Feb. 2003</td>
<td>Mapuche activist, convicted for arson of trucks</td>
</tr>
<tr>
<td>21</td>
<td>Mapuche community near Collipulli, Feb. 2003</td>
<td>Family members of a convicted Mapuche activist: brothers, sister, parents, wife, children</td>
</tr>
<tr>
<td>22</td>
<td>Collipulli, Feb. 2003</td>
<td>Member of Mapuche community</td>
</tr>
<tr>
<td>23</td>
<td>Temuco, Feb./Mar./Apr. 2003</td>
<td>Convicted for arson of a truck, member of the CAM (in prison)</td>
</tr>
<tr>
<td>24</td>
<td>Temuco, Mar. 2003</td>
<td>Member of Mapuche organization Ad Mapu</td>
</tr>
<tr>
<td>25</td>
<td>Temuco, Mar. 2003</td>
<td>Defense lawyer in many “Mapuche conflict” cases</td>
</tr>
<tr>
<td>26</td>
<td>Mapuche community near Traiguén, Mar. 2003</td>
<td>Community member</td>
</tr>
<tr>
<td>27</td>
<td>Mapuche community near Los Laureles, Mar. 2003</td>
<td>President of her community, charged with attacking authority</td>
</tr>
<tr>
<td>28</td>
<td>Nueva Imperial, Mar. 2003</td>
<td>Mapuche student leader, former CAM member</td>
</tr>
<tr>
<td>29</td>
<td>Temuco, Mar. 2003</td>
<td>Member of Mapuche organization CTT</td>
</tr>
<tr>
<td>30</td>
<td>Temuco (prison), Mar. 2003</td>
<td>Member of Communist Party and member of a Mapuche</td>
</tr>
</tbody>
</table>
community, defendant in a case of arson of a plantation

31  Temuco, Mar. 2003  Employee at CONADI

32  Temuco, Mar. 2003  Director of Corps Araucaria

33  Temuco, Mar. 2003  Forestry engineer at forestry company Bosques Cautín

34  Temuco, Mar. 2003  Forestry engineer at forestry company Forestal Valdívía, subsidiary of Arauco

35  Temuco, Mar. 2003  General manager of the CORMA in the 9th region

36  Temuco, Mar. 2003  Judge in Temuco

37  Temuco, April 2003  Private landowner with property around Collipulli

38  Angol, April 2003  Son and grandson of a private landowner near Traiguén

39  Osorno, March 2009  Defendant on charges under the Anti-Terrorist Law

40  Temuco, March 2009  Daughter of a Mapuche activist

41  Temuco, April 2009  Mapuche activist organizing a benefit concert for prisoners

42  Temuco, April 2009  Lawyer with SOFO for private landowners

43  Temuco, April 2009  Researcher on the “Mapuche conflict” hired by several forestry and agricultural associations

44  Temuco, April 2009  Senior lawyer for forestry company Mininco

45  Temuco, April 2009  Lawyer for the regional governor of the 9th region

46  Temuco, April/May 2009  Defendant in the case against the CAM, former member

47  Temuco, April 2009  Defense lawyer with the public defenders, experience as lawyer in many cases related to the “Mapuche conflict”
<table>
<thead>
<tr>
<th></th>
<th>Location, Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>48</td>
<td>Temuco, April 2009</td>
<td>Defense lawyer with the Public Defense Office for Mapuches</td>
</tr>
<tr>
<td>49</td>
<td>Temuco, April 2009</td>
<td>Grandson of former farmers whose lands were expropriated during the Salvador Allende regime</td>
</tr>
<tr>
<td>50</td>
<td>Temuco, April 2009</td>
<td>Defense lawyer with the public defenders</td>
</tr>
<tr>
<td>51</td>
<td>Temuco, April 2009</td>
<td>Prosecutor at the regional office of the 9th region</td>
</tr>
<tr>
<td>52</td>
<td>Mapuche community near Ercilla, April 2009</td>
<td>Mapuche activist, spokesperson of his community</td>
</tr>
<tr>
<td>53</td>
<td>Temuco, May 2009</td>
<td>Defendant in the case against Consejo de Todas las Tierras</td>
</tr>
<tr>
<td>54</td>
<td>Temuco, May 2009</td>
<td>Director of the Corporación de la Madera (CORMA), forestry council</td>
</tr>
<tr>
<td>55</td>
<td>Temuco, May 2009</td>
<td>Director of the Sociedad de Fomento Agrícola (SOFO), association for farmers</td>
</tr>
<tr>
<td>56</td>
<td>Angol, May 2009</td>
<td>Lawyer for the Provincial Governor of the province of Malleco</td>
</tr>
<tr>
<td>57</td>
<td>Temuco, May 2009 (2x)</td>
<td>Defendant in a case of attempted homicide, former member of the Coordinadora Arauco Malleco (CAM)</td>
</tr>
<tr>
<td>58</td>
<td>Victoria, May 2009</td>
<td>Prisoner convicted for the Poluco Pidenco case</td>
</tr>
<tr>
<td>59</td>
<td>Labranza, May 2009</td>
<td>Defendant in the case for the productive occupation by community Temulemu, former member of the CAM</td>
</tr>
<tr>
<td>60</td>
<td>Mapuche community near Ercilla, May 2009</td>
<td>Mapuche activist, spokesperson of his community</td>
</tr>
</tbody>
</table>
Four defendants in the “Lumaco” case

61 Collipulli, May 2009  Mapuche activist, spokesperson (werkén) of his community

62 Collipulli, May 2009  Defendant in a case of arson of a truck

63 Temuco, May 2009  Defendant in the “Chamichaco” case

64 Temuco, May 2009  Private defense lawyer in many cases related to the “Mapuche conflict”

65 Angol, May 2009  Mapuche activist from a community near Traiguén, defendant in a case of arson of a truck

66 Temuco, May 2009  Husband of the chief of a Mapuche community, defendant in a case of “attack against authority”

67 Victoria, May 2009  Prisoner supporter, visiting Mapuche activists in prison

68 Mapuche community near Ercilla, June 2009  Mapuche activist, spokesperson of his community

69 Temuco, May 2009  Employee of Observatorio Ciudadano

70 Temuco, May 2009  Son of a Mapuche activist

71 Angol, May 2009  Supporter of defendants in the “Chamichaco” case

72 Los Angeles, June 2009  Defendant in the “Chamichaco” case
<table>
<thead>
<tr>
<th></th>
<th>Location, Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Sacramento, CA, Sept. 2007</td>
<td>U.S. Attorney (senior)</td>
</tr>
<tr>
<td>2</td>
<td>Sacramento, CA, Sept. 2007</td>
<td>U.S. Attorney (junior)</td>
</tr>
<tr>
<td>3</td>
<td>Sacramento, CA, Sept. 2007</td>
<td>Defense lawyer in “Green Scare” cases</td>
</tr>
<tr>
<td>4</td>
<td>Sacramento, CA, Sept. 2007</td>
<td>Prisoner supporter attending a trial</td>
</tr>
<tr>
<td>5</td>
<td>New York City, NY, Oct. 2007</td>
<td>Animal rights activist for PETA2 and Win Animal Rights</td>
</tr>
<tr>
<td>6</td>
<td>New York City, NY, Oct. 2007</td>
<td>Lawyer and anti-AETA activist</td>
</tr>
<tr>
<td>7</td>
<td>New York City, NY, Oct. 2007</td>
<td>Social justice activist</td>
</tr>
<tr>
<td>8</td>
<td>Washington D.C., Oct. 2007</td>
<td>Defense lawyer in Operation Backfire case</td>
</tr>
<tr>
<td>10</td>
<td>Washington D.C., Oct. 2007</td>
<td>Journalist and environmentalist activist</td>
</tr>
<tr>
<td>11</td>
<td>New York City, NY, Nov. 2007</td>
<td>Executive director of National Lawyers Guild</td>
</tr>
<tr>
<td>12</td>
<td>New York City, NY, Nov. 2007</td>
<td>Defense lawyer with National Lawyers Guild</td>
</tr>
<tr>
<td>13</td>
<td>Trenton, NJ, Nov. 2007</td>
<td>U.S. Attorney</td>
</tr>
<tr>
<td>14</td>
<td>Trenton, NJ, Nov. 2007</td>
<td>Defense lawyer SHAC case</td>
</tr>
<tr>
<td>15</td>
<td>New York City, NY, Oct. 2008</td>
<td>Animal rights activist, convicted under the AEPA</td>
</tr>
<tr>
<td>16</td>
<td>New York City, NY, Nov. 2008</td>
<td>Animal rights activist and press officer ALF</td>
</tr>
<tr>
<td>17</td>
<td>Freiburg, Germany, Aug. 2010</td>
<td>Representatives of pharmaceutical company</td>
</tr>
</tbody>
</table>
Appendix – Criminal cases overview

This list is far from a complete overview of all the criminal cases that are related to these contentious episodes in Spain, Chile, and the United States. It is not intended to be comprehensive. Instead, the cases described here are all mentioned in the text and serve as a clarification for the reader in order to provide some background to the arguments made in the relevant chapters and as a quick reference in order not to get lost in the many criminal cases presented along the way. After experimentation with a standard table to fill in information per case, I have chosen to write one vignette per case, as it turned out that the particularistic information was often the most relevant. I ordered the cases chronologically under the year in which the first trial or sentencing hearing took place.

These cases are a purposive selection out of all past and ongoing criminal prosecutions in the three selected contentious episodes. As discussed in the methodology appendix, the cases mentioned here have been selected using the following criteria: (1) the cases that have received the most attention as they have been widely reported on in news sources or distributed on activist websites by prisoner support groups and websites reporting about “political prisoners,” (2) cases regarding different kinds (categories) of conduct illustrating the prosecutorial narrative about that conduct, (3) cases that illustrate particularly well some of the discursive shifts in the prosecutorial narrative or features of the re-contextualization of events, and (4) cases from different years.
1. Selection of criminal cases in the Spanish-Basque separatist conflict

The information for the overview of the 13 cases below is based on a variety of sources, most importantly indictments, press releases, information from prisoner supporters, online news sources, reports from human rights organizations, and trial transcripts. I have tried to cross-check information but was not always able to.

1992 Julen Larrinaga
1993 Five council members of San Sebastián
2003 Illegalization Batasuna
2005 Baker in Iruña
2005 Jarrai/Haika/Segi
2006 Otegi honoring ceremony
2007 Fundación Joxemi Zumalabe
2007 Flag waving
2008 Mayor Hernani
2008 TAV and Beasain
2008 Gestoras Pro Amnistía and Askatasuna
2010 Egunkaria
2011 Revolutionary tax

1992 Julen Larrinaga

Larrinaga was accused in 1992 of throwing a Molotov cocktail into a railway station in Bilbao. His case was the first of its kind (street violence) that was taken to the Audiencia Nacional in Madrid and qualified as a “terrorism” case. He was convicted to ten years and six months imprisonment on 14 October 1993. This sentence was confirmed on appeal at the Tribunal Supremo on 8 July 1994.

1993 Five council members of San Sebastián

Five council members of San Sebastián were charged with “endorsement” of terrorism (apologia, of Article 268 in relation to Article 174-3 of the Penal Code) in abbreviated procedure 356/92. On 17 November 1993 the Tribunal Superior de Justicia de Bilbao acquitted them. The prosecutor appealed, but on 4 July 2001 the Tribunal Supremo rejected the cassation arguments of the prosecutor.

2003 Illegalization Batasuna

On 26 August 2002, Judge Garzón suspended the political party Batasuna. On 27 March 2003, the Special Chamber of the Tribunal Supremo declared Batasuna illegal under the new “Law of the Political Parties.” On 16 January 2004, the Tribunal Constitucional confirmed the verdict. On
30 June 2009 the European Court for Human Rights (ECHR) rejected the complaint filed by Batasuna and confirmed that the legalization had been a “necessity,” which was confirmed in a final decision on 11 November 2009 by the ECHR in Strasbourg.

**2005 Baker in Iruña**

On 13 March 2004, a neighbor killed a baker in Iruña-Pamplona. On 8 July 2005 he was convicted to twenty years in prison. His mother and father were also convicted due to their role in the incident. His mother was acquitted on appeal. The dispute about this case is whether it was a fight between neighbors or whether the political context of the Al Qaeda attack in Madrid and the initial attribution of those attacks to ETA should be taken into account in this particular criminal case. On 8 November 2006, the Tribunal Supremo rejected the cassation arguments.

**2005 Jarrai/Haika/Segi**

Jarrai was a left-nationalist Basque youth organization. In 2000 it fused with Gasteriak, a similar organization on the French side of the border. The new organization was called Haika.

On 6 March 2001, Judge Garzón ordered the arrest of fifteen members of Haika and charged them with membership in a terrorist organization. Later, more people suspected of links with the youth organization were arrested. On 1 May 2001 Garzón declared Jarrai/Haika to be illegal. The youth responded by founding a youth organization called Segi, which was declared illegal soon as well (5 February 2002). Some of its members were accused of membership in and
others of collaboration with a terrorist organization. On 20 June 2005, the Audiencia Nacional judged the organizations Jarrai-Haika-Segi to be illegal, but not terrorist organizations. On 19 January 2007, the Tribunal Supremo reversed that verdict and judged that the organization is a terrorist organization. 42 defendants were prosecuted and 23 members of Jarrai-Haika-Segi were ultimately convicted to six years imprisonment.

2006 Otegi honoring ceremony

In 2006 Batasuna leader Arnaldo Otegi was convicted to 15 months imprisonment for glorification of terrorism for a speech he held during an honoring ceremony commemorating the 25\textsuperscript{th} anniversary of the death of ETA militant “Argala.”

2007 Fundación Joxemi Zumalabe

In the Sumario 18/98, the Basque sociopolitical organization Fundación Joxemi Zumalabe was alleged to be part of the ETA network. The Fundación was active as an organization engaging in overt actions of civil disobedience. One of the actions which were debated during the trial was the project in which the Fundación made Basque ID-cards. In the verdict of the Audiencia Nacional in the Sumario 18/98 on 19 December 2007, eight members of the Fundación were convicted, with sentences up to ten years imprisonment. On 22 May 2009, the Tribunal Supremo acquitted the members of the Fundación Joxemi Zumalabe.

2007 Flag waving
On 15 November 2007, the Audiencia Nacional convicted two youth for the glorification of terrorism to one year in prison. They were proven guilty for waving a flag with ETA symbols during a soccer match. Judge Ramón Sáez Valcárcel wrote a dissenting opinion arguing that the defendants did not have the required intent to glorify ETA. Instead, he argued, they were indifferent to what was on the flag.

2008 Mayor Hernani

The mayor of Hernani, Marian Beitialarrangoitia, was accused of glorification of terrorism for a speech she held on 12 January 2008 after the detention of two alleged ETA militants. During a hearing at the Audiencia Nacional on 25 January 2008, the judge dropped the case. The prosecutor, however, appealed this decision to drop the case. During a second hearing on 3 April 2008 another judge ordered that the case be reopened. On 5 June 2009, the Audiencia Nacional convicted the mayor, and she was sentenced to one year in prison. On 19 March 2010, she was finally acquitted by the Tribunal Supremo.

2008 TAV and Beasain

During a protest against the High Speed Train on 3 November 2006, two protesters from Beasain were arrested and charged for “public disorder.” On 5 January 2008, the newspaper Gara published an interview with ETA in which ETA pronounced itself against the High Speed Train. Now, with this information, the protests in 2006 were viewed in a new light and the prosecutions undertaken within the framework of terrorism. While their case had been
scheduled to come before the court of Tolosa on 15 January 2008, the Audiencia Nacional intervened and the case was transferred from the local courthouse to Madrid.

**2008 Gestoras Pro Amnistía and Askatasuna**

Gestoras pro Amnistía (its successor is called Askatasuna) was a Basque prisoner support group alleged to be part of the ETA network. Members of the organization were charged with “membership” in a terrorist organization. In 2001, Judge Garzón declared Gestoras pro Amnistía an illegal organization. The trial took place in the Spring of 2008, and on 17 September 2008 the majority of the defendants were convicted. The Tribunal Supremo confirmed the verdict of the Audiencia Nacional on 16 October 2009.

**2010 Egunkaria**

Egunkaria is a Basque newspaper which was alleged to be part of the ETA network. Its director and various others were charged with “membership” in a terrorist organization. The newspaper was closed on 20 February 2003 as a measure within the criminal investigation. On 22 February 2006, an investigative judge of the Audiencia Nacional decided in a resolution that there was a relation between ETA and Egunkaria, so the case moved forward. On 6 June 2007 the state prosecutor of the Audiencia Nacional dropped the charges. The private party to the trial leading the Popular Accusation, the organization Dignidad y Justicia, moved forward with the case and filed a charge on 19 September 2007. On 12 April 2010, all defendants were acquitted.
2011 Revolutionary tax

The two Bruño sisters were accused of paying the “revolutionary tax” to ETA after receiving letters in 2003 and 2006. They were arrested on 12 June 2008. The trial took place on 2 February 2011. On 30 June 2011, the Audiencia Nacional convicted the two sisters to one year and three months imprisonment.
2. Selection of criminal cases in the Chilean-Mapuche territorial conflict

The information for the overview of the 18 cases below is based on a variety of sources, most importantly indictments, press releases, information from prisoner supporters, online news sources, reports from human rights organizations, and trial transcripts. I have tried to cross-check information but was not always able to.

1992 Consejo de Todas las Tierras
1997 Lumaco
1999 Temulemu
2001 Attempted homicide private security guard
2001 Case Fundo Ginebra
2001 José Nain & Marcello Catrillanca
2001 José Nain & Manuel Santander
2003 Lonkos of Traiguén
2003 Chequenco
2003 Víctor Ancalaf
2004 CAM
2004 Poluco Pidenco
2005 Case Czech in Torres del Paine
2007 Calfunao
1992 Consejo de Todas las Tierras

In 1992, 144 members of the Mapuche organization Consejo de Todas las Tierras (CTT) were indicted for membership in a criminal organization. On 11 March 1993, 141 of the defendants were convicted. This was confirmed by the Appeals Court in Temuco on 6 September 1994. The Supreme Court rejected the cassation. Having lost in all domestic courts, the CTT applied for admission to the Inter-American Court for Human Rights on 18 September 1996. The IACHR in Washington decided to recommend the possibility of a “solución amistosa” [amicable settlement]. In 2001 the Chilean state proposed a settlement including provisions about lands, elimination of penal antecedents, and symbolic reparation. The defendants decided to reject the proposal as “insufficient and unacceptable.” When the settlement failed, the IACHR admitted the complaints for further judicial consideration. The case is still pending before the court. None of the defendants has served time in prison.

1997 Lumaco

On 1 December 1997 three trucks were set on fire at a plantation of forestry company Arauco in Lumaco. This was the first incident of arson in the context of the Mapuche conflict. Twelve
people were indicted under the Law for State Security, because the action counted as the
destruction of means or elements that are used in public service or for industrial activities, such
as mines, agriculture, or transport, as described in the Law on State Security (Art. 6 sub c of the
Law 12.927 about State Security). One person decided to flee and became a fugitive. He was
judged later in 2000 and had to serve three years in prison. None of the other defendants
served time as they could fulfill their sentence by regularly reporting at the court.

1999 Temulemu

In the summer of 1998–1999, the Mapuche community “Temulemu” engaged in a so-called
“productive occupation” of the plantation Santa Rosa de Colpi of forestry company Mininco.
The investigative judge Archibaldo Loyola took up the case, and in May 2002 a total of sixteen
defendants were convicted. Twelve were convicted of usurpation and theft of wood in Fundo
Santa Rosa de Colpi and Fundo Chorrillos, respectively. They received sentences between eight
hundred days and four years and one day in addition to a fine. Two students, the wife of Lonko
Pichún, and another community member were convicted for “encubrimiento” [obstruction of
justice]. Another defendant was charged and convicted for “injuries” after a forestry guard filed
a complaint that he had been hit with a fist, which caused him injuries in addition to making
him lose his glasses. He received a sentence of 61 days. A lawyer, José Lincoqueo, was
convicted for inciting people to commit a crime as he had convinced some Mapuche
community members that entering the land of the forestry company was legal according to the
old Spanish treaties.
Two leaders of Mapuche community “Temucuicui” were prosecuted for incidents that occurred on 2 December 1999 during confrontations between the Mapuche community and the police and firefighters at the estate Alaska, property of forestry company Mininco. On 6 April 2001 they were convicted to five years and one day in the court of Collipulli in the 9th region. On 4 January 2002, the Appeals Court in Temuco judged that the defendants were not the “direct” authors of the crime, but the “indirect” authors. The court considered it proven that defendant José Nain had participated in the group that was throwing stones and branches to prevent the plantation personnel from putting out the fire, forcing them to call the help of carabineros, who also faced opposition. The judges therefore convicted the defendants as “indirect authors” according to the Chilean Penal Code, Art. 15 No. 1, which penalizes hindering the prevention of a crime. On 29 July 2003, the Supreme Court confirmed the decision of the Appeals Court, and the sentence remained five years and one day. Defendant José Nain spent five years in prison, whereas in 2010 Marcelo Catrillanca was still a fugitive.

In February 2000, private security guards working for the forestry company Mininco were attacked. The car was set on fire after an ambush at a plantation. Three members of Mapuche community “Catrío Ñancul,” the lonko of Mapuche community “Antonio Paillacoi,” and several CAM members were indicted. In 2001, seven defendants were convicted to three years and one
day for violation of Article 6 of the Law on State Security (crimes against the public order) and for attempted homicide. One of them was sentenced to four years. In March 2003 the Court of Appeals confirmed the sentence. One of the defendants, Julio Marileo, served only three months in prison.

**2001 Case Fundo Ginebra**

Mapuche community “Juan Ahilla Varela” demanded forty hectares of Fundo Ginebra, and a part of the community engaged in a “productive occupation” of the land. During the night of 20 January 2001, the private security guard and one of the landowners were injured. In June 2001, three members of Mapuche community “Juan Ahilla Varela” were accused of *homicidio frustrado* [attempted homicide], *lesiones graves* [severe injuries], and *robo con fuerza* [theft with force]. Two fled from the proceedings and went fugitive. One defendant was convicted to 818 days in prison.

**2001 José Nain & Manuel Santander**

On 11 July 2001, José Nain and Manuel Santander from the Mapuche organization Consejo de Todas las Tierras (CTT) were in a hearing in the *Juzgado de Garantía* of Victoria for an alleged crime. The judge decided to maintain their pre-trial detention. The subsequent reaction of the defendants led to a charge of “*atentados y desacatos contra la autoridad*” [contempt of court]. The case was heard on 2 October 2002 in the court in Angol. The prosecutor asked for 540 days imprisonment for having violated Art. 268 of the Penal Code. They were sentenced to 61 days
imprisonment. Defense lawyers argued that what the judges had interpreted as “violent” and “threatening” could be explained as a misunderstanding of the Mapuche culture, language, and their musical instruments. The Mapuche motto Marrichiweu, for example, was understood as a “cry for war” (Proceedings Angol 2 October 2002, #3).

2003 Víctor Ancalaf

In November 2002, Víctor Ancalaf was arrested by the Chilean police. Ancalaf was a former spokesperson of the CAM and a known resister of the hydroelectric dam Ralco in the Alto Bío Bío. He was accused of “terrorist” arsons after the governor of the Bío Bío Province presented a legal request for proceedings for three “terrorist” arsons of trucks in 2001 and 2002 in the Alto Bío Bío. He was convicted in the first instance in November 2003 for the three “terrorist” arsons and sentenced to ten years and one day. On appeal in June 2004 he was acquitted of participation in two of the arsons. With only one arson regarded proven he was re-sentenced to five years and one day.

2003 Lonkos of Traiguén

In 2001, two Lonkos of Mapuche communities near the village Traiguén in the 9th region were arrested and indicted for “terrorist” arson of the house and threats made to a private landowner, Agustín Figueroa, former State Secretary for Agriculture and member of the Constitutional Court, with a property of 1,800 hectares (Richards 2010:80). Later, a female Mapuche activist, Patricia Troncoso, was also arrested and charged with the same crimes. In
April 2003 the trial took place. Among the evidence were the testimonies of anonymous witnesses. On 14 April 2003, the defendants were acquitted. Unhappy with this result, Agustín Figueroa and the prosecutors took the case to the Supreme Court, where the verdict was nullified and a new trial was ordered. During the re-trial in September 2003, Patricia Troncoso was acquitted of all charges. The two Lonkos were acquitted of the arsons. They were, however, convicted for “terrorist threats.” They were convicted to five years and one day and served the time in prison.

Table 7 Trials in the case “Lonkos of Traiguén” against Pascual Pichún, Aniceto Norín, and Patricia Troncoso

<table>
<thead>
<tr>
<th>Date</th>
<th>Tribunal</th>
<th>Charges</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>14 April 2003</td>
<td>Penal Tribunal Angol</td>
<td>Terrorist arson of a house in Nancahue, 12 December 2001; terrorist arson of pine plantation in San Gregorio, 16 December 2001; threats of terrorist arson against owners and administrators of forestry <em>predio</em> Nancahue and San Gregorio.</td>
<td>Acquitted</td>
</tr>
<tr>
<td>2 July 2003</td>
<td>Supreme Court</td>
<td></td>
<td>Nullification, second trial ordered</td>
</tr>
<tr>
<td>27 September 2003</td>
<td>Different judges</td>
<td></td>
<td>Pichún and Norín are convicted for “terrorist threats,” 5 years and 1 day; they are acquitted for the terrorist arsons. Patricia Troncoso is acquitted</td>
</tr>
<tr>
<td>15 December 2003</td>
<td>Supreme Court</td>
<td></td>
<td>Cassation rejected</td>
</tr>
<tr>
<td>21 October 2006</td>
<td>IACHR</td>
<td>Violation of American Convention</td>
<td>Admitted</td>
</tr>
</tbody>
</table>

212 The introduction of the crime “terrorist threat” has led to criticism as it is not clear whether it means to threaten someone with a terrorist offense, or whether the threat itself is terroristic. It is the first time that someone has been accused of and convicted for this “new” crime (Villegas 2007).
2003 Chequenco

On 11 May 2001, eleven members of Mapuche community “José Millacheo Levio” from Chequenco, sub-region Ercilla, were arrested and charged with kidnapping, criminal organization, usurpation, theft, damages, and the illegal bearing and possession of arms. These offenses allegedly occurred in the context of the “recuperation” of a piece of land during the summer of 2001 (January–March). Six of the defendants were kept in pre-trial detention. During the course of the investigation the severe charges were dropped, and what was left when the case came to trial was the accusation of the theft of wheat. The prosecutor requested sentences of between 700 and 900 days in prison. The private accuser also demanded financial compensation for material and emotional damages. The trial took place on 13 and 14 January 2003 at the Penal Tribunal in Angol. Among the evidence were the testimonies of anonymous witnesses. The defendants were convicted to 541 days in prison and the payment of 2 million Chilean pesos.

2004 CAM

In December 2002, the police arrested many members of the organization Coordinadora Arauco-Malleco (CAM). They were charged with “membership in a terrorist organization.” In total, 18 alleged CAM members were indicted. Not all stood trial as some decided to go fugitive. The trial started on 8 October 2004 and lasted four and a half weeks. In November 2004, the eight defendants were all acquitted of the charges. The prosecutors, however, took the case to
the Supreme Court and asked for a nullification. The Supreme Court granted the nullification and decided that the case had to be re-tried and that the judicial decision should be different next time. On 27 July 2005, another court again acquitted the CAM members of the charges.

**2004 Poluco Pidenco**

In trial transcripts, the court described that in the morning of 19 December 2001 forestry brigadiers were “combating” the arson when they were attacked by about forty persons. Then the carabineros also came to the fundo and were attacked by stones thrown with slingshots. The arson lasted two days and destroyed about 108 hectares of pine and eucalyptus plantations with a value of 600,000 dollars. The entire Poluco Pidenco fundos are 328 and 1,378.8 hectares, property of Forestal Mininco. This case involved 10 defendants, who were initially charged with “terrorist arson.” Several defendants decided to escape the trials and were therefore tried in later trials. The judges in 2006 and 2007 came to a different conclusion regarding the qualification of the arson. They rejected the notion that the arson was “terroristic.” There is still one person fugitive in this case.

<table>
<thead>
<tr>
<th>Trial Date</th>
<th>Defendants</th>
<th>Verdict</th>
</tr>
</thead>
<tbody>
<tr>
<td>First trial August 2004</td>
<td>5 persons</td>
<td>Convicted of terrorist arson (10 years and 1 day)</td>
</tr>
<tr>
<td>Second trial April 2005</td>
<td>1 person</td>
<td>Convicted of terrorist arson (10 years and 1 day)</td>
</tr>
<tr>
<td>Third trial March 2006</td>
<td>2 persons</td>
<td>Acquitted, no participation and no terrorism</td>
</tr>
<tr>
<td>Fourth trial February 2007</td>
<td>1 person</td>
<td>Convicted of common arson, but no terrorism (5 years and 1 day)</td>
</tr>
</tbody>
</table>
2005 Case Czech tourist in Torres del Paine

On 17 February 2005, a Czech tourist caused an arson that destroyed about 5,500 hectares of the National Park Torres del Paine. He had been cooking in an area that was not designated for camping. He was indicted by the Public Ministry based on a law (*Ley de Bosques* [Forestry Law]) that also penalizes arson when it is the result of negligent behavior. However, in the end he was sanctioned with a fine of 121,000 Chilean pesos (the maximum fine for this offense, but depending on the exchange rate not more than 250 USD) and set free (by the Tribunal de Garantía [Warranty Court] of Puerto Natales).

2007 Calfunao

Between 21 and 23 December 2005, the Mapuche community “Juan Paillalef” protested against construction work by the Chilean Department of Public Works, which was building a road through the lands of the community. On 5 January 2006, the lonko of the Mapuche community, Juana Calfunao, and her sister were indicted for disorder on the public road. Juana Calfunao was additionally charged with threatening a police officer. During their arrest Juana Calfunao and her sister were hurt, and the presiding judge ordered for an investigation of the causes of their injuries. The trial for public disorder took place on 13 February 2006 at the Warranty Court of Temuco, and on 22 February 2006 they were sentenced to 61 days for public disorder. Juana Calfunao was sentenced to another 61 days for threatening a police officer. The allegations of maltreatment were shelved, to the dissatisfaction of the Mapuche community. Alongside the
criminal proceedings, the Department of Public Works promised that the machinery would not enter the community. On appeal, on 15 November 2006 at the Penal Tribunal in Temuco the judge confirmed the charges against Juana Calfunao. The members of the Mapuche community “Juan Paillalef” were upset about this verdict, and tumult ensued in the courtroom. What exactly happened is contested, but there were aggressive shouts and Calfunao’s sister hit the prosecutors. Twelve community members were arrested and indicted for assault against court authorities (Art. 264, Criminal Code), damages, minor injuries, and theft of the investigation dossier. In addition, Juana Calfunao was charged with threatening the prosecutor. On 31 October 2007 she was sentenced to three years imprisonment for assaulting a court authority. One of the legal issues in this case was the question whether a prosecutor could be a “court authority” as prescribed in Art. 264 of the Chilean Criminal Code. On 27 December 2007 a law was enacted (No. 20,236) in order to explicitly include prosecutors as authorities for the purposes of Art. 264.

2009 Cayupe

Carlos Cayupe was charged with attempted homicide as well as arson on a truck on the highway on 26 December 2007. Cayupe was accused of leading the group that staged this attack. In April 2009 he was tried after a year of pre-trial detention. Evidence against him included testimony of anonymous witnesses. He was convicted for arson and sentenced to five years imprisonment. He denies involvement in the alleged crimes.
In January 2008, Erick von Jentschyk, Juan Medina, and Alex Bahamondes were arrested and accused of the arson of two trucks on the highway in the 9th region near Chamichaco. The arsons took place after the death of activist Catrileo and were generally understood to be committed in revenge for his death by the Chilean police. The prosecutor qualified the arsons as "common" arsons (i.e. not terrorist). In May 2009, the court in Angol convicted the three defendants for participation in just one of the arsons. They were acquitted of participation in the other arson. I attended this trial, and in my perception it is incomprehensible that the court could judge that there was sufficient evidence for their participation in one of the arsons and not the other. It seemed a typically "ambivalent" move of the judicial authorities. The reason for their ambivalent decision might be that a conviction for the two arsons would have led to a mandatory sentence of seven years in prison which would then have to be served by doing time. With the conviction of only one arson, the accused were sentenced to only three years and one day, which meant that they could serve this sentence without entering prison, but by reporting regularly at the police station. Thus, the ambivalent finding of guilt enabled the courts to communicate a guilty verdict without having a severe impact on the Mapuche activists. Early 2010 one of the defendants, Erick von Jentschyk, died in the major earthquake that shook the country.

2009 Matías Catrileo
On 3 January 2008 various members of the CAM entered the property of a private landowner, Fundo Santa Margarita, in order to occupy it because it was claimed by a Mapuche community. The police came at six in the morning, and while the CAM members were running away the police fired some shots, which lethally hit Matías. The lack of confidence in fair proceedings led the activists to keep Matías’ body hidden for the government during the first few days after his death. The CAM members wanted to protect the body against tampering with the evidence that the police bullet had come from behind. The activists deeply distrusted the state’s forensic employees. For a long time, the police argued that Matías was killed when the police defended themselves against an attack as the activists were burning hay stacks on the land of the private landowner. In June 2009, the trial took place against the police officer whose bullet was responsible for the death of Matías Catrileo. As the evidence confirmed that the bullet had hit Matías in the back, the prosecutors charged the police officer with “unnecessary violence resulting in death” and asked for ten years imprisonment. The judges of the military court in Valdivia convicted the carabinero responsible for the death of Matías Catrileo to two years, a sentence he could serve in liberty while reporting regularly to the police. On 19 May 2010 the Catrileo family appealed the sentence at the Martial Courts in Santiago, where the judges raised the sentence to three years and one day, still to be served in liberty by reporting regularly to the authorities for 48 months. In 2011, the case was still pending before the Supreme Court where the Catrileo family is demanding a sentence of fifteen years. In 2010, Fundo Santa Margarita was transferred to the Mapuche community that demanded it.
2011 Case Cañete

In 2011 a major case came before the court in Cañete in the 8th region. 14 defendants were accused of various crimes, several of which, however, led to acquittals. They were all acquitted of the charges “terrorist organization” and “criminal organization for the theft of wood.” They were also acquitted of the charge “terrorist arson” and while the court agreed with the prosecutors that the arson could be indeed qualified as “terroristic,” it did not find sufficient evidence for a conviction. Only four of the defendants – all with leading positions within the CAM – were convicted. The court convicted them for an “attack on an authority” and “homicidio frustrado” [attempted homicide] for having attacked a prosecutor. However, regarding this charge the court rejected the prosecutorial narrative that the crime was “terroristic.” These four defendants were further convicted for “robo con intimidación” [theft with intimidation]. The main leader of the CAM, Hector Llaitul, received 25 years for his conviction for “attempted homicide.”
3. Selection of criminal cases in the United States eco-conflict

The information for the overview of the cases below is based on a variety of sources, most importantly indictments, press releases, online news sources, trial transcripts, and the information provided on the websites in support for individual defendants. I have tried to cross-check information but was not always able to. I have relied on various other websites, such as:

http://zinelibrary.info/files/ageofconspiracyPRINT.pdf

http://www.directaction.info/prisoners.htm

http://www.greenisthenewred.com/blog/category/prisoners/

http://www.greenisthenewred.com/blog/category/legal/

http://www.fbi.gov/

A short description of the following cases can be found below:

1989 Arizona Four
1993 Rik Scarce
1995 Rod Coronado
1998 Ted Kazcynski
1998 Douglas Joshua Ellerman
2001 Jeffrey Luers
2005 Peter Young
2005 Robert Brooks and Hargit Singh Gill
2006 Ryan Lewis

2006 SHAC7

2007 Operation Backfire or the “Family”

2007 Rod Coronado

2007 Eric McDavid

2008 Tre Arrow

2008 Briana Waters

2009 Marie Mason

2010 AETA2

2010 AETA4

2010 Kevin Olliff

2010 Scott DeMuth

2010 Carrie Feldman

2010 Steve Murphy

2010 Gina “Tiga” Wertz and Hugh Farrell

2011 Walter Bond

2011 Tim DeChristopher

**1989 Arizona Four**

In 1989, four Earth First! activists from Prescott, Arizona, were arrested and charged with conspiracy to destroy a power line in Arizona. The exact role of an undercover FBI agent in
creating the plot is disputed. Scarce wrote that Earth First! activists understood the resulting prosecution of Earth First! founder Dave Foreman and four others as the FBI’s intention to “send a message” to Earth First! (2006:278).

1993 Rik Scarce

As a PhD student in 1993, Scarce was asked to testify before a federal Grand Jury about an arson attack at the University of Washington, Seattle. He refused to answer some questions about his interviews with animal rights activists. He was therefore held in civil contempt and spent five months in prison.

1995 Rod Coronado

Rod Coronado was a public advocate of the Animal Liberation Front. In 1995 he was tried for an arson attack at Michigan State University in 1992. This attack was allegedly committed in the campaign Operation Biteback, a series of attacks on animal testing and fur facilities across the United States. He was sentenced to 57 months in prison. The case was prosecuted by the Western District of Michigan.

1998 Ted Kaczynski

Kaczynski was indicted in 1996 for a bombing campaign including multiple separate bombings starting in 1978 that killed three individuals and injured several others. He was sentenced to life
in prison without the possibility of parole. The case was prosecuted by the U.S. Attorney’s Office in Sacramento.

1998 Douglas Joshua Ellerman

Ellerman was accused of setting fire to the Fur Breeders Agricultural Cooperative mink farm in Sandy, Utah, in March 1997, causing nearly one million dollars in damage. He was accused of 16 counts including malicious destruction of a building engaged in interstate commerce, using a destructive device (pipe bombs) during a crime of violence, illegally making bombs, and aiding and abetting (Title 18, Sections 844(i) and 924(c), Title 26, Section 5861(f)). The Bureau of Alcohol, Tobacco, and Firearms (ATF) was involved in the investigation and although no terrorism charges were involved, the media labeled it a case of animal rights terrorism (Costanzo 1998). Ellerman pled guilty, and in 1998 he was sentenced to seven years imprisonment. He was additionally ordered to pay $750,000 in restitution. Costanzo wrote that the prosecutors hoped that their recent “successes” would help stop “a string of animal-rights terrorist attacks” that affected Utah mink farmers and other businesses over the past five years (1998). The U.S. Attorney (David Schwendiman) claimed that this sentence was the harshest ever given in a case involving an animal activist crime. Threatened with a 35-year sentence, Ellerman implicated three other animal rights activists in the event. A federal jury, however, acquitted the three as additional physical evidence of their participation was lacking.

2001 Jeffrey “Free” Luers
In 2001, Jeffrey Luers was sentenced to 22 years and 8 months in prison for burning three sport utility vehicles (SUVs) at a car dealership in Eugene, Oregon. He appealed his sentence, and in 2007 the Appeals Court remanded back to the Circuit Court for resentencing. In 2008, the Lane County Circuit Court reduced the sentence to ten years.

2005 Peter Young

Young released mink on six mink farms in the Midwest in 1997. He spent seven years as a fugitive before being arrested in 2005. His co-defendant Justin Samuels cooperated with the government. Young was charged under the AEPA and RICO. The RICO charges were later dropped. He pled guilty and was sentenced to two years in prison.

2005 Robert Brooks and Hargit Singh Gill

Brooks and Singh Gill were indicted for violation of 18 U.S.C . S 1623 – False Declarations Before Grand Jury (two counts) and 18 U.S.C, 3 1001 – False Statements (four counts). The subject of the grand jury investigation was an “act of vandalism” of an Old Navy store in Chico, California, in March 2003. The FBI described this incident in its report on terrorism incidents between 2002 and 2005 (FBI 2005b:8). The target in this description was a McDonald’s restaurant, and the act of vandalism consisted of graffiti statements such as “Animal Liberation Front,” “Meat is Murder,” and “Species Equality.” During the grand jury hearing, the defendants Brooks and Singh Gill were asked to identify two of the perpetrators. The defendants had testified that they did not see the faces of the female participants as they were wearing masks. In the indictment,
the prosecutor argued that the defendants were well acquainted with the female participants, and that therefore the statements before the Grand Jury were false. According to the prosecutors, the defendants were involved in driving the two women to the Old Navy store. They were convicted and in June 2005 received a $500 fine and 36 months probation.

2006 Ryan Lewis

Lewis was arrested in 2005 in relation to two attempted arsons and one count of arson of commercial buildings in California. The actions were claimed by the ELF. He was sentenced to six years in prison. After completing his sentence he will have a three-year term of supervised release and be ordered to pay $243,000 restitution. The prosecution was done by the U.S. Attorney’s Office of Sacramento.

2006 SHAC7

Defendants:

Kevin Kjonaas, Sentence: 6 years
Lauren Gazzola, Sentence: 4 years, 4 months
Jacob Conroy, Sentence: 4 years
Joshua Harper, Sentence: 3 years
Andrew Stepanian, Sentence: 3 years
Darius Fullmer, Sentence: 1 year, 1 day
The SHAC defendants were convicted on 2 March 2006. The convictions were confirmed by the Third Circuit Court of Appeals on 14 October 2009. All of the defendants were convicted of conspiracy to violate the Animal Enterprise Protection Act. Kjonaas, Gazzola, Conroy, and Harper were also convicted of conspiracy to harass using a telecommunications device (sending black faxes). Kjonaas, Gazzola, Conroy, and SHAC USA were convicted of conspiracy to commit interstate stalking and three counts of interstate stalking via the Internet.

2007 Operation Backfire or the “Family”

The defendants in this case were part of what the prosecutors called a “cell”, which was allegedly known by the defendants as the “Family.”

Defendants:

Chelsea Dawn Gerlach (cooperating defendant) – 9 years
Sarah Kendall Tankersley (cooperating defendant) – 3 years, 10 months
Stanislas Meyerhoff (cooperating defendant) – 13 years
Josephine Overaker (not arrested, believed to be abroad)
Suzanne Savoie (cooperating defendant) – 4 years, 3 months
Darren Thurston (cooperating defendant) – 3 years, 1 month
Kevin Tubbs (cooperating defendant) – 12 years, 7 months
Joyanna Zacher (non-cooperating defendant) – 7 years, 8 months
Nathan Block (non-cooperating defendant) – 7 years, 8 months
Daniel McGowan (non-cooperating defendant) – 7 years

Jonathan Paul (non-cooperating defendant) – 4 years, 3 months

Briana Waters (stood trial in 2008, her conviction was later reversed by an Appeals Court and remanded a new trial; while she was a non-cooperating defendant, she accepted a cooperating plea deal in 2011)

Justin Solondz (arrested in 2009 in China)

Rebecca Rubin (not arrested, believed to be abroad)

Joseph Dibee (not arrested, believed to be abroad)

Jennifer Kolar (cooperating defendant) – 6 years

Lacey Phillabaum (cooperating defendant) – 3 years in prison and 3 years probation

William Rodgers had been arrested in this same operation but committed suicide in prison shortly after his arrest.

On 19 January 2006 a Grand Jury in Eugene, Oregon, issued indictments against 11 people. Later, several more defendants were indicted. The defendants were implicated in 17 attacks, including the $12 million arson of the Vail Ski Resort in Vail, Colorado, in 1998 and the sabotage of a high-tension power line near Bend, Oregon, in 1999. The defendants were accused of attacks on federal land and animal management sites, private meat packing plants, lumber facilities, and a car dealership, with damages reaching $80 million. The FBI offered $50,000 each for information leading to the arrest of the fugitives. The U.S. Attorneys asked for the
application of the terrorism enhancement. The general hearing about this enhancement was on 15 May 2007. After that there were separate sentencing hearings for each of the defendants.

2007 Rod Coronado

On 15 February 2006 Coronado was indicted for describing the device that he had used during the arson at Michigan State University in 1992 during a speaking engagement. The charges: the Distribution of Information Relating to Explosives, Destructive Devices, and Weapons of Mass Destruction, in violation of 18 U.S.C. § 842(p)(2)(A). The prosecutor alleged that Coronado’s intent was that the device be used to commit arson. His trial in September 2007 resulted in a hung jury. He later entered a guilty plea and received a one-year prison sentence.

2007 Eric McDavid

Eric McDavid stood trial in September 2007, charged with conspiracy to commit arson (18 U.S.C. 371). His co-defendants Lauren Weiner and Zachary Jenson pled guilty for a maximum of five years. They cooperated with the government, testifying against McDavid. He was convicted by a jury and sentenced in 2008 to 19 years and 7 months imprisonment after the prosecutor had sought to apply the terrorism enhancement. In 2010 his request for an appeal was denied.

2008 Tre Arrow

In 2002, Tre Arrow was charged with involvement in two arson attacks in 2001 in the name of the ELF. His name was mentioned by a co-defendant who was facing a sentence of life in prison.
Arrow unsuccessfully asked for political asylum in Canada. In 2008, Arrow was sentenced to 78 months in prison.

2008 Briana Waters

Briana Waters was one of the defendants in the case Operation Backfire. She was accused of participating in an arson attack at the University of Washington in 2001. She decided to face trial. In 2008 she was convicted and sentenced to six years imprisonment. In 2010, the Ninth Circuit Court of Appeals reversed Briana's conviction and remanded for a new trial. In 2011 Waters pled guilty and promised to testify against co-defendants in the case.

2008 Kevin Olliff

Olliff was arrested for the theft of a thumb drive in February 2008. On 23 October 2008 his bail was raised from $10,000 to $500,000.

2009 Marie Mason

In March 2008, Marie Mason, Frank Ambrose, Aren Burthwick, and Stephanie Lynne Fultz were arrested and charged with conspiracy to commit arson; Mason and Ambrose faced additional charges related to acts of property destruction that occurred in 1999 and 2000. It came out that Ambrose, Mason’s ex-husband, had been assisting the FBI extensively in investigating environmental organizing since 2007; despite his cooperation, his plea bargain resulted in a nine-year sentence, two years more than the prosecutor had requested. Mason pled guilty and
admitted involvement in 12 other acts totalling more than $2.5 million in property damage. Mason was sentenced on 5 February 2009 at a federal court in Lansing, Michigan. She received almost 22 years.

**2009 Carrie Feldman**

In October 2009 Carrie Feldman was subpoenaed before the Grand Jury of Davenport in relation to the raid on the University of Iowa attributed to the ALF. She refused to testify before the Grand Jury and was imprisoned for four months in November 2009 for civil contempt.

**2010 Scott DeMuth**

In November 2009, DeMuth was subpoenaed before the Grand Jury of Davenport in relation to the 2004 raid on the University of Iowa attributed to the ALF. Together with Carrie Feldman, he refused to testify and was taken in custody for civil contempt. On 18 November 2009 he was indicted for conspiracy under the AETA for the raid on the University of Iowa. When Scott was re-indicted in April 2010, the indictment contained a new allegation of involvement in a separate ALF action that occurred in Minnesota in the spring of 2006. In September of 2010, he pleaded guilty to a single misdemeanor, conspiracy to commit animal enterprise terrorism in violation of the Animal Enterprise Protection Act (AEPA), for his involvement in a ferret release at a farm in Minnesota in 2006.

**2010 AETA2**
Alex Hall and Wiliam Viehl were arrested in March 2009 for a mink release in Utah and another attempted mink release in August 2008. They were charged with violation of the AETA. Wiliam Viehl entered a non-cooperating guilty plea and was sentenced in February 2010 to 24 months. Alex Hall was sentenced in June 2010 to 21 months.

2010 AETA4

Joseph Buddenberg, Maryam Khajavi, Nathan Pope, and Adriana Stumpo were indicted on 19 and 20 February 2008 and charged under the AETA with criminal trespass, harassment, and intimidation at a bio-medical researcher’s residence in the East Bay. The indictment was dismissed on 12 July 2010.

2010 Kevin Olliff

Unlike most of the previous cases, this case is not a federal case but the State of California v. Kevin Olliff. It is also a different case from his 2008 arrest. Olliff was arrested in April 2009 on state charges for protest-related activity against UCLA vivisectors three years earlier. He faced 10 felony charges, including multiple counts of stalking, conspiracy, conspiracy to stalk, and threatening of a public servant. The indictment also sought a gang enhancement penalty, alleging that the ALF was a criminal street gang and Olliff a member. However, the judge ruled that ALF does not meet the definition of a “gang.” Olliff did not make bail and stayed in jail for almost a year before he entered a non-cooperating plea agreement regarding six of the ten
felony counts against him in March 2010. On November 9, 2010, Kevin was sentenced to three years in prison after pleading "no contest" to stalking and conspiracy charges.

**2010 Steve Murphy**

In April 2010, Steve Murphy was sentenced to five years in prison after pleading guilty to charges relating to an attempted arson at a luxury housing development construction site in 2006 in Pasadena, California.

**2010 Gina “Tiga” Wertz and Hugh Farrell**

Hugh Farrell and Gina "Tiga" Wertz were arrested on 24 April 2009 and charged for organizing protests on 9 July 2007 against the construction of the highway I-69, specifically for staging an “office invasion.” Different activities were constructed as “racketeering” activity under RICO. The RICO charges were, however, dropped in March 2010. In July 2010 both pled to misdemeanor charges and received 15 months probation.

**2011 Walter Bond**

In February 2011, Walter Bond was sentenced to five years in prison in connection with an April 2010 fire at the Sheepskin Factory in Glendale, Colorado, that caused $500,000 in damages. Walter also pled guilty to arson charges related to fires at the Tandy leather store and Tiburon restaurant in Salt Lake City in June and July 2010. On 13 October 2011 he was sentenced to 87 months in prison (in addition to the five years he already received).
2011 Tim DeChristopher

DeChristopher was charged with one count of violating the Federal Onshore Oil and Gas Leasing Reform Act and one count of False Statement. In 2011 he was convicted to two years in prison, three years probation, and a $10,000 fine.