

CHAPTER III

CAPABILITIES OF SPANISH GOVERNMENT AND ETA TO COMMIT TOWARDS POINT ZERO

This chapter will show how Point Zero agreement failed to be implemented by using regime compliance theory. The analysis will include two challenges that explain the reason behind the failure of the implementation process. However, the whole part of this chapter will only discuss the first challenge which is capabilities.

In order to make a better understanding, this chapter will be divided into three points. The first point will discuss the capability of regime to guarantee the compliance of both parties. The second point will discuss about the capability of Spanish government to commit towards Point Zero. It will be seen by the actions taken by government. After that the third point will be about the capability of ETA in which will be judged by looking at the actions taken by them that determine their capability to commit the agreement.

A. Capability of Regime to Guarantee Compliance of Both Parties

Regime compliance is important to be discussed to examine a failure of a peace agreement especially to analyze the implementation process of an agreement. Theory about compliance describe about why actors comply or do

not comply the law.²⁴ Regime compliance is the willingness of the regime, or parties involved in the agreement, to comply or commit towards the agreement and the implementation process. If both parties commit and obey the agreement then there is a big chance that an agreement can stop the violence and solved the conflict. On the other hand, without the commitment of both parties towards the agreement, the implementation would definitely fail.

There are different opinions on the meaning of regime itself. One of the most popular is the definition of regime from Stephen D. Krasner.²⁵ According to Krasner, regime is “explicit or implicit principles, norms, rules and decision making procedures around which actor expectations converge in a given issue-area”.²⁶ This meaning of regime refers to people interaction in an either formal or informal organization. Based on that definition, the meaning of the term regime in this paper refers to both Spanish Government and ETA. The use of the term regime is interchangeably with the word parties and adversaries.

To guarantee the compliance of parties, first thing that usually comes to mind is legal law. The importance of legal status toward the compliance mentioned by Christian Bell, “*treaties and international agreement are legally binding instrument with established enforcement mechanisms*”.²⁷ It is also can

²⁴ Zaelke, D., Kaniaru, D., Kružiková, E., (2005). *Making Law Work: Environmental Compliance & Sustainable Development*. London, England: Cameron May.

²⁵ Krasner, S., D., (1983). *International Regimes*. New York: Cornell University Press.

²⁶ Krasner, S., D., (1983). *International Regimes*. New York: Cornell University Press.

²⁷ Bell, C. (2006). *Peace Agreement: Their Nature and Legal Status*. US: The American Journal of International Law

be used as a tools to bring the case to the courts and tribunals once a regime broke the commitment (as the source of judgment process).²⁸

However there is ambiguity in defining whether or not the agreement is under international law. Vienna Convention on the Law Treaties of 1969 doesn't provide a clear definition about who can be called as "subject of international law". Fortunately, Chritian Bell on his book *Peace Agreements: Their Nature and Legal Status*, provide examples of who can claim as "subject of international law". First, the armed opposition protagonist group that sign an agreement and intended to bind to international law can be considered as "subject of international law" with recognition from such group under international law, particularly through humanitarian law.

Second is indigenous who arguably has a historical status as a "nations" before the pre-modern era. The status has to come with increasing recognition from international law. Indigenous here described as "peoples" entitled to create self-determination short of independent statehood.²⁹ The agreement then have to include evidence of their legal nature (languages, the commitment made of parties and provision for detailed reciprocal bargains) and the statehood notion (territory, sovereignty, language of "self-determination" and government).

²⁸ Bell, C. (2006). *Peace Agreement: Their Nature and Legal Status*. US: The American Journal of International Law

²⁹ ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independen Countries, June 27, 1989, 28 ILM 1382 (1989)

The third is the political and military leaders of minority group who claim a territory and demand to separate from the states they are belong to. Different with the indigenous people, this minority group has a weaker power with only has right to become a sub-state entities (such as federation). It happens because of the non-existence of recognition from other state (which is one of the requirements to be a separated sovereign state).

Point Zero has ambiguous legal status. The domestic law cannot cover this kind of agreement since the one who create the law is that state itself. It is then must use international law, but can this agreement fulfill the requirement to use international law?

As mentioned before, in Vienna Convention an agreement can meet international law when it is between subjects of international law (state or international non-state actor). Point Zero is not agreement between states; it is agreement between state (Spain) and non- state actor (ETA). Here, Spain is, obviously, part of subject of international law. So that, the problem here is the status of ETA whether or not it is belong to subject of international law. Refer to the definition of “subject of international law” by Christian Bell, there are three forms of subject of international law and here will be discussed from one by one which one is ETA belong to. First definition is that it is an armed group which becomes the main opposite of the state and signing the agreement that intended to be part of international law which is recognized by such group under international law. ETA can be considered as an armed group that

becomes the main opposition of Spain but there is no certain declaration from other country recognizing their existence. It means ETA does not belong to the first definition. Second, subject of international law is a group of people who has historical status as “nations” but, again, it must received recognition from other states. In this case ETA also cannot be categorized as the second definition described. The last, a group of people can be categorized as subject of international law if they are a separatist group who were being a minority in a state. Until here, this is the most suitable to describe the position of ETA under international law. However, this third category is lack in which the right of the subject of international law in the third condition is not to achieve an independent sovereignty rather only being a sub-state. Here, it means that even if ETA aimed and able to use international law for Point Zero, ETA cannot be a sovereign state rather only being sub-state which is still a part of Spain. For the subject of International law in the third condition usually want more from just being a sub-state since the relation between sub-state and state usually are not in harmony.³⁰ Then they will demand the bigger goal which is being fully separated. However, as known, one the requirement of creation of sovereign state is recognition from other state. While here, the problem of ETA is that there is no declaration from other state to recognize Basque people as a separated state from Spain.

³⁰ Bell, C. (2006). *Peace Agreement: Their Nature and Legal Status*. US: The American Journal of International Law

From the discussion above showed that Point Zero cannot be fully considered as an agreement under International Law. It is then affecting the pressure to obey the agreement. Refer to Christian Bell, peace agreement legalization is important to frame the obligation in legal term which means without clear and obvious legal status, the agreement lost the frame of the obligation in legal term and become less binding.

Beside agreement between states, an agreement must be considered as one of those categories to be able to use international law as well as its binding rule. Under legal law Abbot and his colleagues (2000) described the obligation as a constitute one, while actually there is also non-constitute obligation which is by using the existence of third party.³¹ The role of the third party is as the guarantor who can also increase the binding level of an agreement.

If legal status is the obligation in a constitution form, meanwhile obligation in non-constitution form can be achieved from the existence of the third party. However, in this case, the existence of mediator is just inside the discussion. It has never been brought into real action to appoint a country, an organization or a person to assist the implementation of Point Zero. Beside there is no realization, the discussion about the advisers or third party has never been announced publicly. It is then remain as private matters between

³¹ Abbot, K.W., Keohane, R.O., Moravcsik, A., Slaughter A.M., & Snidal, D. (2000). *The Concept of Legalization*. Massachusetts: The IO Foundation and the Massachusetts Institute of Technology

representatives of ETA and Spanish Government in the meeting. It means that Point Zero also has no third party.

When an agreement has no legal binding and mediators, then it is more likely to fail. Even though that statement is true but there is still hope for peace when both Spanish Government and ETA put a full commitment towards the agreement. It is such a prejudice if the failure of Point Zero implementation is only judged by the absence of legality. Therefore, the analysis will be continued to the other factor that might be affecting the compliance of the adversaries.

Actually, there during creation of Point Zero, there was a statement said that the other party and mediators will be informed and consulted when the agreement enter into crisis and before any action taken. When the a party takes action that can be defined as a rupture then the agreement is no longer existed and both parties are no longer bound to the agreement. There will be a Verification Commission formed as the third party to observe and supervise Point Zero implementation. Also, 4 mediators or advisers and up to 3 negotiator will represent each party in the next phase of the negotiation and there should be guarantee for this. All of these matters were agreed during this private meeting and unfortunately was not publicly announced by government..

B. Capabilities of Spanish Government to Commit towards Point Zero

In the case of ETA- Spanish government, since Point Zero agreement has no clear legal status the analysis will be focused on the other factors that can affect the compliance of an actor.

Jean Arnault (2001) mentioned several important challenges that may influence the commitment of regime during the implementation process.³² When regime faces these challenges and cannot overcome it, then there is big possibility that the agreement will be broken from the disobedience behavior. The most basic challenge comes from misjudgment of the implementation capabilities of the parties. The capabilities here included the capability to commit or to find the perfect time for the implementation. Usually negotiators overestimate their ability during the negotiation while actually they cannot give as much as compliance they are promised in the agreement.

To avoid the effect of miscalculation, a cautious negotiator will review the content of the agreement or delay or reschedule the implementation. This condition might worsen the relationship among parties and between party and the society. The other party would probably interpret this as a lack of willingness to resolve the conflict. It may be seen as the action to avoid their responsibility to implement the agreement. The society also will be disappointed since they have a big expectation towards the agreement and it has

³² Arnault, J. *Good Agreement? Bad Agreement? An Implementation Perspective*. Princeton, NJ: Princeton University, Center of International Studies. Retrieved from: <http://www.stanford.edu/class/psych165/Arnault.doc>

been seen as the hope for the better future. The opinion of society is very important regarding to the successful of implementation of the agreement.

In the case between ETA and Spanish government, this obstacle is very influential to the success of the implementation of Point Zero agreement. Since before Point Zero was signed, there are several failed talk attempt, trust become a very sensitive issue during the agreement implementation either between the Spanish government- ETA and citizen- both adversaries.

In accordance with Jean Arnault, Louis Kriesberg (1998) said that after the agreement reached, the negotiator will evaluate the outcomes.³³ It is usually happened when the form of conflict resolution is a win-lose agreement. This evaluation is used to measure the profit and loss of a party. According to Kriesberg (1998), an agreement will be long lasting if it completed two conditions which are stability and equity. He said “stability refers to the duration and degree of order and the prevention of renewed struggle. Equity refers to the degree of mutual acceptance of the outcome, particularly acceptance based on fulfillment of fundamental preferences of the membership on each side.”³⁴ If one of the adversaries feel like the agreement is less-beneficial then it is more likely to this loser to not to comply.

³³ Glaser, T. Summary of Constructive Conflict: Escalation to Resolution. *Beyond Intractability*. Retrieved from <http://www.beyondintractability.org/bksum/kriesberg-constructive>

³⁴ Kriesberg, L., Dayton, B. W. (2012). *Constructive Conflict: Escalation to Resolution Fourth Edition*. Maryland, USA: Rowman & Littlefield Publishers.

When Point Zero achieved, the first step taken by the government is declaring ceasefire which is followed with four important statements, those are:

1. *“To achieve a state pact that enables the declaration of the president of the government within 6 months”*
2. *“To tangibly reduce police presence – checkpoints etc. – as well as to stop police pressure regarding political activities of the patriotic left”*
3. *“To accept de facto that the patriotic left-wing organizations shall be able to carry out a political life under equal conditions with the rest of the political and social forces, with no limitations in their civil or political rights”*
4. *“Not to carry out detentions through the Civil Guard, the National Police, the police force of the Basque Country, or the French security forces”³⁵*

After that, ETA also declared ceasefire on 22 March. However, on 29 March, Spanish government arrests Arnaldo Otegi, an influential leader of Batasuna. He then released after paying \$300,000 bail. Two other Batasuna leaders, Jose Petrikorena and Juan Maria Olano, were also jailed and have to pay \$240.000 of each person to be released.

On 5 April 2006, Spanish government banned project of Basque people to announce the plan about their future was banned by the government. The announcement was about the plan to build the Basque country with left-wing ideology.³⁶ After that, Batasuna paid bails set by the National Court so the

³⁵ Zabalo, J., Aiertza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

³⁶ Zabalo, J., Aiertza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

process would not be blocked.³⁷ It is so obvious that this action is breaking the second, third, and last point of the official ceasefire declaration by government, which are “*To tangibly reduce police presence – checkpoints etc. – as well as to stop police pressure regarding political activities of the patriotic left.*”, “*To accept de facto that the patriotic left-wing organizations shall be able to carry out a political life under equal conditions with the rest of the political and social forces, with no limitations in their civil or political rights.*”, and “*Not to carry out detentions through the Civil Guard, the National Police, the police force of the Basque Country, or the French security forces.*”.³⁸ It also broke the second point of the agreement which is “*That such decisions would be adopted without any violence or coercion, in **compliance** with norms and legal procedures, **respecting democratic** methods and the **rights** and **liberties** of the **citizens***”.³⁹ In this point mentioned that the decision that will be taken by the Basque people is based on the democratic principles. However, the government of Spain blocked the process of the decision making that will be announced by Basque people. It is clear that such kind of thing is breaking the right and freedom of Basque people.

Still in the same month, Arnaldo Otegi was sentenced for 15 months in prison arrested again for participating in commemoration of ETA leader in

³⁷ Zabalo, J., Aiartza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

³⁸ Zabalo, J., Aiartza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

³⁹ Zabalo, J., Aiartza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

December 2003. On 18 April, activist of ETA, Ibon Meñika, also jailed.⁴⁰

When the National Court sends the leaders of ETA to prison, the tension is rising. Even though it is the government right to judge people who break the rule, but if looks from the reason of the indictment, this action is quiet questionable. The arrestment of Arnaldo Otegi in April 2006 was because of something happened three years before.

These actions are showing the indication that government of Spain cannot commit towards Point Zero agreement. By arresting the adversary, the Spanish government pressure towards the opposition regime which means worsen the relationship between parties. Those actions done by the government also damaged the relationship between Spanish governments by blocking the decision-making process of Basque people.

The condition even worse when the Prime minister, Jose Luis Rodriguez Zapatero, conduct meeting with political parties regarding to the peace process and soon as the talk finished, the leader of major party PNV (Basque Nationalist Party), Josu Jon Imaz (2006) stated that ETA must dissolved first before multiparty talk began.⁴¹ He said that based on the idea of “peace first, then politics”.⁴² It means that if ETA has not disarmed, the negotiation cannot

⁴⁰ Zabalo, J., Aiartza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

⁴¹ Zabalo, J., Aiartza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

⁴² Goodman, Al (2006, April 7). Three Basque leaders freed on bail. *CNN International*, Retrieved from <http://www.edition.cnn.com>

continue. Once again, on 19 May the Spanish National Court call 8 leaders of Batasuna to testify.

All of those facts proved that the government of Spain is cautious negotiator who tries to postpone the negotiation. The requirement about the legitimacy actually has been mentioned in the forth point of the agreement which is *“That in compliance with the resolution passed by the congress on May 17th, 2005, the government publicly stated that a dialogue process with ETA would be started, clearly pointing out the fact that political issues should only be solved through **the legitimate representatives of popular will**”*⁴³ However, it is then followed by the ceasefire statement, specifically in the third point which is *“To accept de facto that the patriotic left-wing organizations shall be able to carry out a political life under equal conditions with the rest of the political and social forces, with no limitations in their civil or political rights.”*⁴⁴ That proof showed that the requirement said by Josu Jon Imaz is not relevant. These kinds of inconsistent behavior prove that the government of Spain is kind of cautious negotiator which means that they are lack of capability.

Due to the urgency of due date of state pact which is within 6 months after the ceasefire, as mentioned in the official ceasefire declaration , Zapatero then declared that the talk with ETA will be soon started to take a mutual agreement between parties. He also adds that Basque people have to make their

⁴³ Zabalo, J., Aiartza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

⁴⁴ Zabalo, J., Aiartza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

decision under legal law. It is then followed with the agreement of PSOE to start talking with Batasuna.

When the relation among parties seems to get better, however in reality all the actions against Batasuna still continue, such as arrestment and police operation. This lack of commitment of government to stop the police force aggravates the relations with ETA. It is proved by the warning from ETA to stop the peace talks if Spanish government continues to violate the ceasefire declaration.

After that, on 29 June, Zapatero make a public statement declare that on July 1st the talk will be started, but it is only between PSOE and Batasuna. But, again, PSOE refuse to meet Batasuna until it is legalized. It is obviously, broken the third point of official ceasefire declaration by the Spanish government which clearly said that left-wing party have the same political right as other political parties and with no limitation. For so many times government has broken the guarantee.

There are total 106 people were arrested by the government in Basque Country in about 9 months after the ceasefire declaration. The 33 of them were isolated and 2 people were reported to be tortured. 45 summonses for organizing political initiative and 53 political activities were blocked at that moment. Also, 227 people were judged in 75 courts in Spanish National Court and Section 14 of Paris High Court. Totally, €1,493,000 bail must be paid by

Basque people to get back their right.⁴⁵ These evidences showed that the government side has broken the second, third and fourth point of the official statement made by government which are about the absent of police pressure to the political activities, acknowledge that left-wing party must equally treated like other parties and also cessation of detention.

Those series of actions were really affecting the trust of ETA towards the government of Spain. It is then lead ETA to go back on using violation means. On December 30th, ETA created a car bombing in Barajas airport. The minister of interior, Alfredo Pérez Rubalcaba announced that the peace process was violated. This is then become the end of the implementation process of Point Zero.

All of those things are the evidence of how the government of Spain tried to postpone the implementation of the Point Zero. It is also seen as the effort which is done to avoid the responsibility to commit as well as to delay the implementation process.

C. Capabilities of ETA to Commit towards Point Zero

After government announced a ceasefire declaration to actualized Point Zero agreement, on 22 March 2006, ETA also declared permanent ceasefire by sending DVD message to Basque Network Euskal Irrati-Telebista and the newspaper Gara and Berria.

⁴⁵ Zabalo, J., Aiartza, U. *The Basque Country: The Long Walk to a Democratic Scenario*. Berlin: Berghof Conflict Research

On 14 May, ETA responded all kind of arrestment and the statement from Josu Jon Imaz that Batasuna has to be legal before continuing the negotiation by declaring that the negotiation process could not proceed until the government terminated the attack. In this situation the implementation is more likely to be postponed. However the government was neglecting this statement and continues to avoid entering into implementation process.

When the Spanish National Court call 8 leaders of Batasuna to testify on 19 May, Batasuna announced that they will start talking with PSOE with two conditions. First, there must be guarantees that no action will be taken against them. And second is that they will not talk with PSOE until the Court declares the revocation of prosecution.

This statement caused tension on the relationship between adversaries. There are two point of views to examine the whether or not the statement of Batasuna is wrong. If it is seen from the forth point of Point Zero agreement which is *“That in compliance with the resolution passed by the congress on May 17th, 2005, the government publicly stated that a dialogue process with ETA would be started, clearly pointing out the fact that political issues should only be solved through the **legitimate representatives** of popular will”*⁶ the requirement said by Josu Jon Imaz must be fulfilled by ETA.

Meanwhile, in the other point of view the statement of Batasuna is not a form of cautious negotiator since it is only used to respond towards the

government behavior. If it is seen from the second, third and forth point that published by government after ceasefire, the refusal of ETA to continue the negotiation cannot be considered as a wrong step. The second point which is *“To tangibly **reduce police presence** – checkpoints etc. – as well as to stop police pressure regarding political activities of the patriotic left”* and the forth point which is *“**Not to carry out detentions** through the Civil Guard, the National Police, the police force of the Basque Country, or the French security forces”*⁶ can defend 106 people who were arrested by the government in Basque Country in about 9 months after the ceasefire declaration is made. It is also strengthen by the second point of Point Zero which is *“That such decisions would be adopted **without any violence or coercion**, in compliance with norms and legal procedures, respecting democratic methods and the rights and liberties of the citizens”*.⁶ While about the legality of the party, it can be based on the third point of government statement which is *“To accept de facto that the **patriotic left-wing organizations shall be able to carry out a political life under equal conditions with the rest of the political and social forces, with no limitations in their civil or political rights**”*.⁶ This statement clearly describes that government guarantee the equality of political right of left-wing organizations.

That kind of behavior of the government continued until 29 June, when the last talk attempt was rejected by PSOE. Looking at the situation, it was impossible to reach state pact to officially enable the declaration before the end

of July which is should be the 6 months deadline. In response to all this failure, ETA blamed the attitude of political parties, especially PSOE and EAJ-PNV.

The last action taken by ETA before the peace process fully ended is the car bombing that done in Barajas Airport on 20 December 2006. The bomb caused 2 people killed and 52 people injured.

This bombing attack is the form of abuse towards the second point of Point Zero agreement. In the second point, *“That such decisions would be adopted without any violence or coercion, in compliance with norms and legal procedures, respecting democratic methods and the rights and liberties of the citizens”*, clearly describe the prohibition of the use of violence and also respecting the right of citizen.⁶ That car bombing is a form of the use of violence and the fact that there are casualties from the bombing is breaking the people’s right to live.⁶

It also breaking the permanent ceasefire that declared by ETA on 22 March 2006. That was not the first time ETA broke the ceasefire. Even though ETA blame the attitude of PSOE and EAJ-PNV who always trying to avoid the peace talk but the bombing cannot be consider as a right way to be chosen.

ETA should have been more careful with the term of legitimacy in Point Zero. Even though the government statement can be used by ETA as the base of their statement, Point Zero is more fundamental and stronger.

As discussed above, in this chapter showed that Point Zero is lack in term of legality and third party existence, and also both ETA and Spanish Government is lack in ability to measure their capability to commit towards the agreement. All of this then influent the compliance of Spanish Government and ETA towards Point Zero.