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Response of the Spanish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Spain

from 17 to 18 January 1997

The Spanish Government has requested the publication of the CPT's report on the visit to Spain from 17 to 18 January 1997 (see CPT/Inf (2000) 3) and of its response. The English translation provided by the Spanish Government of its response is set out in this document.

Strasbourg, 13 April 2000

Response of the Spanish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Spain

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ANSWER TO THE REPORT OF THE EUROPEAN COMMITTEE FOR PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENTS CONCERNING THE VISIT TO SPAIN OF A DELEGATION OF THIS COMMITTEE ON 17 AND 18 JANUARY 1997.

CIRCUMSTANCES OF THE TRANSFERRAL OF MR. JESÚS ARCAUZ ARANA TO SPAIN AND OF HIS STAY IN THE SPANISH CIVIL GUARD (GUARDIA CIVIL ESPAÑOLA)PREMISES

A. Firstly, it is necessary to underline that respect for human rights is one of the priorities of the Spanish Authorities. Hence, the goal of their undertakings is not only to prevent as much a possible the risk of ill-treatments, but also to end for evermore with the slightest hint of suspicion towards the Law Enforcement Forces and Agencies.

The Committee has always been aware and recognises too the difficulties in the fight against terrorism for societies. The reality of the difficulties does not prevent law enforcement for all the cases, but it should neither alter presumption of innocence of the officers concerned, nor can blame the Law Enforcement and Forces and Agenciesfighting terrorism for law infringements in a general way. However, if a police officer exceeds his/her authority -such behaviours are always highlighted by the media, usually due to its rare occurrence- officers with such a behaviour are not only committed for trial, but they incur also in a exhaustive enquiry on the side of the Public Administration Authorities that use all its lawful resources for finding out the responsible persons. The way of acting on the side of the Public Administration is highlighted in the 1997 Annual Report of the Spanish Ombudsman sent to the Spanish Parliament.

For the case that has originated the visit of your Committee's Delegation, the arrest and transferral of Mr. Jesús Arcauz Arana to the premises of the Directorate General of the Spanish Civil Guard until his was brought before the competent Judicial Authority after his imprisonment in France for seven years, the respect for the enforced legal regulations was scrupulous in every moment, as it was underlined by the Judge in charge of the Number 5 Magistrates' Central Court by his Resolution dated 14 February 1997, and even his care was extreme due to that seemingly, this person was in hunger strike.

It should be remembered that his stay as person under custody in the premises of the Civil Guard Directorate General was not extended until the five days that is the maximum term allowed by the Spanish legislation, but that his stay lasted two and a half days provided that the competent judicial authority ordered his court appearance.

As soon as Mr. Jesús Arcauz Arana was handed over in the border he underwent a medical examination in order to check that his transferral had not affected his health state. One of the more comfortable vehicles existing in the Directorate General of the Civil Guard was chosen Once in Figueras, he was examined by the forensic doctor.

When he arrived to Madrid, Mr. Arcauz was examined by the forensic doctor up to seven times. He was also examined in the Jiménez Díaz Foundation (The Concepción Hospital), and he underwent different medical tests. The Number 5 Central Magistrates Court Judge authorised a doctor designated by his family who accompanied by other three forensic doctors to make another medical examination to Mr. Arcauz. None of these four doctors founnd out ill-treatment physical marks on his body.

B. Please find below, in a detailed way the Civil Guard performance during the transferral and subsequent stay of Mr. Arcauz Arana in the premises of the Spanish Civil Guard Directorate General.

January, 14th 1997

1,20 Hrs.- Deportation of the arrested person at La Junquera. Then, he was cautioned and informed that he will be held incommunicado. Medical examination of the detainee by the Doctor of the Civil Guard., IV Zone Departure by escorted motorcade to the Figueras (Gerona) Spanish Civil Guard Barracks.

1,50 Hrs.- Arrested person's arrival to the Figueras (Gerona) Barracks. Medical examination by the Forensic Doctor of the Figueras Duty Magistrates' Court.

2,50 Hrs- Departure by escorted motorcade to the Civil Guard Directorate General (Madrid). This travel was made by van occupied by a driver, a co-driver and two Civil Guard Officers who travelled sat at both sides of the arrested person.

7,00 Hrs.-Stop at the petrol station Casablanca-Aragon Nr 38459, placed in the Km 12 of the High-way Madrid-Barcelona, close to the village named La Puebla de Alfidén (Saragossa).

10,00 Hrs.- Arrival to the premises of the Civil Guard Directorate General.

11,20 Hrs.- Medical examination made by the Forensic doctor posted to the Nr.5 Central Magistrates' Court, of the Audiencia Nacional.

18,10 Hrs.- Medical examination by the Forensic doctor.

January 15th 1997.

10,20 Hrs.- Medical examination by the forensic doctor

12,10 Hrs.- It is received a fax message from the Nr 5 Central Magistrates' Court, in the Civil Guard Directorate General by which it is ordered that the above mentioned arrested person be made an electrocardiogram.

12,15 Hrs. - Some dealings are made with the Medical Service of the Civil Guard Directorate General.

13,10 Hrs.- The electrocardiogram demanded is made by the Medical Service of the Civil Guard Directorate General.

15,20 Hrs.- Arrival of the Forensic doctor, bringing an order of the Nr. 5 Central Magistrates' Court where it is ordered the transferral of the arrested person to the Jiménez Díaz Foundation for making him an exhaustive medical examination. Immediately, it took place the transportation of the person under custody accompanied at every moment by the Forensic doctor of the Nr 5 Central Magistrates Court to that above mentioned Hospital.

18,10.- Detainee's return to the Civil Guard Directorate General.

23,40 Hrs.- Medical Examination by the forensic doctor.

January 16th 1997.

11,50 Hrs.- Forensic doctor Examination.

12,10 Hr.- Exit out of the cell and beginning of his statement in the presence of an officially appointed lawyer.

16,30 Hrs.- End of the arrested person statement.

17,10 Hrs.- Departure of the arrested person for the Nr.5 Central Magistrates' Court.

17,30 Hrs. Handing over of Mr. Jesús Arcauz Arana and of the proceedings to the above mentioned Court.

C. Concerning the different statements of the above mentioned arrested person that appear in the report of your Committee, the following points have to be underlined.:

1. Concerning Mr. Arcauz clothes, in the point 12 of that report that it is mentioned "he was kept naked except when a forensic doctor entered to perform a medical examination and when he was driven to the Hospital". However, as it is stated in point Nr. 34 of the same report, he said to Dr. Idoyaga (the one appointed by his family) that "he was not kept naked, and that he always was dressed and wearing shoes"-

That discrepancy between the both statements can not be attributed to the fact that he was dressed and wearing shoes during the former 48 hours, providing that from 15,30 Hrs on 15th January 1997 -when he was driven to the Hospital- and to the 20,05 hours on 16th of the same moth when he was examined by the doctor appointed by his family, there had not gone by 48 hours, but 28 hours and 30 minutes.

2. About the blindfolding, there is no coincidence between the statement in the point 11 and the one in point 12 “I was blinfolded” and “when he arrived to Madrid he was still wearing a blindfold”, with his statement to Dr. Idoyaga, in point 34 “after his arrival to Madrid, he was told that as soon as he arrived to Madrid he would be blindfolded” and that “once I got my eyes blindfolded they led me to a room...”.

3. Concerning the claps on his ears, in point 11 of the report, Mr. Arcauz said to the Delegation “Then the questioning started and it went by with slaps on my ears and loud claps near my ears”.

However, when questioned by Dr. Idoyaga about if he had been slapped on his ears, Mr. Arcauz answered “that no, but that he had heard claps near his ears””. Further on, as it stated on point 37 of the report, when the Delegation questioned him about the problem of the beeps in his ears, Mr. Arcauz asserted that “it was an old problem, but that now he can notice them even more due to the silence of the cell, and perhaps due to the loud claps that have been clapped close to his ears”.

4. In the point 15 of the report appears that Mr. Arcauz declared that “an interrogation team torture him by the so called “bag torture” six or seven times in an exchange of the interrogation”. However, he told Dr. Idoyaga that “before the first questioning he suffered “the bag torture” under ten minutes”.

At the same time he has estated that “as he was subjected to the “bag torture”, he was kicked in his testicles”, but Mr. Arcauz do not make any reference to this circumstance when in point 15 of the report he goes into details about the “bag torture”-

5. On point 18 of the report Mr. Arcauz, says that “he was allowed to sleep once during his arrest period at the Civil Guard Directorate General”, which it is not coincidental with his statement to Dr. Idoyaga when he told him after being questioned by this doctor about if he had been allowed to sleep that “he was conscious that he had slept twice; that in one of these times he was told that he had slept five hours; and two hour the other time, but that in both occasion he had got the impression that he felt rested”.

6. During his medical examination in the Audiencia Nacional on 16 January 1997, at 20,05 hrs by three Forensic doctors and Dr. Idoyaga, when he told about he abandonment of the thirst-strike he told that “he made it willingly and that the water he was given was from a sealing bottle” but however during the meeting that he had with the members of your Delegation, he told them that the water he was given was running water”

7. In point 11 of the report it appears that ”he was hit with an object that he could not see, that it seemingly was of glove type...., possible it was squared and with something as earth inside it” However, once again he told to Dr. Idoyaga that he received some slaps and some blows, mainly in his head and in all his body, but that he was not kicked or punched”.

D. Having regard to the above mentioned statements the following considerations should be taken into account:

1. The tranferral of Mr Arcauz from Figueras (Gerona) to the Civil Guard Directorate General, in Madrid did not take place in the way stated in point 11 of the report" a driver and a passenger in the front seat, and he in the back seat between to civil guard officials and, another Civil Guard sat just in front of him"; but it took place as above mentioned, with the following persons: driver, co-driver and two civil guards officials each one sat at both sides of the detainee, and it did not exist the rear passenger seat, as this space was used as luggage compartment for both the officials and Mr Arcauz himself luggage.

In order to verify that facts your Delegation could have the refuelling employee's statement who was working at the petrol station Casablanca-Aragon, Nr 38459, at Km 12 of the highway N-II, Madrid-Barcelona, close to the village named Puebla de Alfidén (Saragossa), where around 7,00 hours they stopped for refuelling the vehicle used for making the tranferral of Mr. Arcauz to Madrid, where the employee using the pretzel pump must have seen the interior of the vehicle.

2. Concerning the assertion of Mr. Arcauz, about that "he was still blindfolded when he arrived to Madrid and that he got the impression because of the activity that there were present a lot of Civil Guards officials", it should be pointed out that all the members of the Spanish Civil Guard are conscious that the transferral of a blindfolded detainee can be considered a crime (Sentence issued on 21st March 1998, by the San Sebastian Provincial Court).

3. About the threats "of his wife being molested" and those about "his children being killed, mutilated or disembowelled", they are by themselves completely absurd, provided that his wife and children whereabouts were and still are unknown.

4. In the point 12 of the report it is recorded that "they resorted to force to get him undress." It seems rare that after being stripped, his clothes did no show any kind of tear or violence marks. It is no be noticed that the clothes he was wearing when he was examined by the Forensic doctor on 14th January at 11,20 hours, were the same clothes that was wearing when he left Figueras.

5. When he explained how he underwent ill-treatments suffering "the bag torture", he told that the same was performed by a Civil Guard official who was standing and who hold his legs with the official's arms and no with the official's hands, and that in a similar way a second Civil Guard Official was holding him tightening the official arms around his chest". After that account, it is difficult to imagine the detainee self defending with all his strength and not becoming during the subsequent struggle whit bruises or physical marks on his skin, more over when he declared that he was completely naked.

6. Following Mr. Arcauz "the presumed ill-treatment were inflicted in a room of about 3 X 3 metres with a table and two chairs"- It is strange -that in such a small place; where there is the possibility that during a foreseeable struggle when "he were tortured by the bag method", the detainee becomes himself knocked against one of the walls or against one of the object standing around- he could underwent the above mentioned ill-treatments.

The above mentioned room that is not soundproof, that has a mirror that allows watching from outside what is happening inside it, also has a side that gives onto one of the inner streets of Directorate General, and the other side opens to one room that is used as dressing room, and a third wall where there is an elevator, do not make this place as an ideal place to commit an offence.

7. On the 18th item of the report, Mr. Arcauz says "the bed had a metal base, and it was a bed type military camp. In fact, the bed in question was a solid stone bench covered by a mattress, having no doubt on its composition, even to the touch. According to him, when he came back from hospital, he was not blindfolded, that is why he should have seen his bed´s structure.

E. Finally, in the light of the aforementioned, the following must be concluded:

It must be highlighted that on the Committee's own report, item 41, it is indicated that "in a report dated on 14.02.97, the Magistrate in charge for the Magistrate's Court NR. 5 agrees with the Public Prosecutor´s view, pointing out the non-existence of ill treatment to the person of Josu Arcauz Arana and, therefore, coming to the conclusion that "there not exist an offence of ill-treatment relating to Josu Arcauz Arana".

Furthermore, the CPT includes the Magistrate´s decision with regard to: "the international rules and the directions of the European Committee for the Prevention of Torture to avoid any possibility of ill maltreatment or tortures have been scrupulously respected.

In this line, it is flatly refused, not only by the administrative authority, but also by the judicial authority, any behaviour constitutive of offence or minor offence, since in every moment the action was scrupulously consistent with the observance of the existing legislation in our country (Ley de Enjuiciamiento Criminal y Código Penal, - Code of Criminal Procedure and Penal Code), as well as the relevant judicial control, it must be pointed out the lack of opportunity to commit the offence of tortures taking into account that during the 64 hours that Mr. Arcauz was under the Spanish Civil Guard custody, Mr. Arcauz was examined by a Forensic Doctor in eight occasions which means a medical examination every eight hours approximately. To this custody period, it should be deducted the visit to the Hospital Fundación Jiménez Díaz, and the one carried out by the Medical Services from the Spanish Civil Guard Headquarters, as well as the time spent during the way from Figueras to Madrid.

Also, it should be emphasised the insubstantiality of the grounds why Mr. Acaurz should be tortured, (to collect data to be exploited by the police) since six months passed from his arrest in France, and, in the light of the great changes undergone within the terrorist organisation, (on march 1992, ETA´s managerial leadership was broken up by the Spanish Civil Guard), the data he could provide were irrelevant.

SENTENCE 42/1998, PASSED BY THE "SALA DE LO PENAL DE LA AUDIENCIA NACIONAL (PENAL COURT, NATIONAL HIGH COURT), CHARGING MR. JESÚS ARCAUZ ARANA WITH AN OFFENCE OF TERRORISM, UNDER THE TERMS OF THE ARTICLE 174 BIS, PENAL CODE, BEING IN FORCE AT THE MOMENT THE FACTS TOOK PLACE. (December 27, 1990), MOTIVATING THIS CONVICTION.

Given the importance and the connection to the facts transcribed so far, the Legal Grounds and the Ruling of the said sentence are set out below.

"Evidences reliability

First. As main objection, the defence sets out the nullity of all the proceedings and, consequently, the impossibility of charging Mr. Jesús Arcauz Arana because of his rights were denied, both in the French State and the Spanish one, since he was illegally expelled from that country, based in a tacit agreement between the French and the Spanish authorities, to avoid the extraditional channel, so committing fraud in law. (penal code, art. 6.4).

This is the defence´s conclusion, who does not have any other support but his own deduction when interpreting the facts, but, -independently of what in the internal law of the French State could result in the appeal´s resolution, still pending in the French courts- as it is said, no irregularity is appreciated when arresting the defendant within the Spanish territory in connection with this procedure, since there exists a warrant for his arrest from October, 27 1987. according to summary 42/87, Central Magistrate´s Court, as it is known to this court, even when his testimony is not added to the case.

Second. The defence repeats, without a specific development, but by a formal reference, the questioning of Josu Arcauz´s judicial statement, made in the hearing of the summary 29/92, Central Magistrate´s Court NR. 2, case on which this Court passed the sentence on June, 12 1998, finding guilty the person now considered defendant as well. Sentence that is not final yet since it is pending of resolution the action brought for appeal to the Supreme Court.

It was put forward that it could not be taken into account as in the moment it was made, Mr. Josu Arzauz was not in good physic nor psychical conditions to freely declare due to the ill treatment inflicted on him, as well as his precarious health after the hunger strike he was keeping before his arrest.

By means of the evidence examined in the previous trial, and partly heard in the current trial, it is not possible to reach the alleged conclusion, since Josu Arcauz , was provided with an exhaustive medical care, as it is proved by the daily reports supplied by the forensic doctors that looked after him on: 14.1.97 (3.25 h) in the Barrakcs of the Civil Guard en Figueras, (Gerona), (11.20h, 18.00 h) in the Barracks of the Civil Guard in Madrid. On 15-1-97, the forensic doctor suggests a checking in a cardiological institution, taking him to the "Fundación Jiménez Díaz" in Madrid. The medical reports carried out that day, pointed out that he gave up his hunger strike, that he seemed recovered and that he was in a good psychological condition.

On 16-1-97 he is examined by a doctor at 8.35 Hs., and he made a statement before the Judge from the Magistrate´s Court NR. 5 who previously removes his incommunicado, having legal assistance by a lawyer of choice.

The said medical reports were repeated and increased as a result of the alleged ill-treatment and tortures reported, and they were confirmed by the doctors who seconded them, not so by the lawyer of choice appointed in that time by Jose Arcauz´s family, as stated in the proceedings. None of them, neither in the trial nor in the report referred to, appreciated external marks of injuries, and being aware that not all ill-treatment caused to a person leave marks, it is not possible, being objective, to acknowledge the existence of injuries when the maximum means were provided in order to prevent they took place, and the taking of the statement was preceded by a specific report confirming his good psychological condition to carry it out.

Conclusion that is not distorted by an increase of the enzymes, since the opinion of the experts establishing a slight increase is unanimous, being numerous the motives that could cause it, that is why it cannot be established a causal link with non-proved ill-treatment.

Third. As regards the reliability of the proof of handwriting made by experts during the hearing, informing on the handwriting in different letters addressed to Jose Arcauz, and in a note book seized on March 18, 1991; documents that they got in photocopies, (in compliance with rogatory commission), included in this process by evidence of those recorded in the Preliminary Proceedings 7/97 from the Central Magistrate´s Court NR. 5, there is no doubt on the experts´ opinion, strongly expressed in the trial, since they checked the samples against fourteen individuals handwriting recorded in their files, being identified three of them, among which, for sure, are the writings belonging to Josu Arcauz, Carmen Guisasola Solozába and Francisco Múgica Garmendia, alias “Paco”. Statements not questioned by any other evidence that, prevent from conferring, in the current case, the validity and effectiveness of the proof of handwriting carried out on photocopies when the conclusions established can also be obtained by other evidences, as it will be stated below:

Evidences´ assessment

Fourth. As regards the action of the Commando Gohierri-Cota and two other persons against the Barracks of the Civil Guard in Deve, it is considered evidence for prosecution all that taken into account in the judgment of conviction dated February 1, 1994, being already final, and that is recorded as a part of the current summary as documentation that the parties do not argue and consider as reproduced.

Fifth. Josu Arcauz is accused of direct participation in those facts, since he provided the four grenades JOTAKE, used in the attack to the Barracks of the Civil Guard in Deva, being the only responsible person for such material within ETA organisation in 1990.

The evidence relating to the responsibility of making possible for the commands to get the JOTAKE, was exclusively one of his tasks within the armed organisation. The said evidence was obtained by:

a. First of all from the correspondence kept with other ETA´s members: Carmen Guisasola and Francisco Múgica Garmendia, consisting of originals and non-questioned translations.

Letter from Carmen Guisasola dated 16-11-96 (F1.841-42):

"There, Josu has the graphic design they have sent to give them the JOTAKE. You must manage with the one responsible for the delivery so as to they receive the whole material. The "mugas" are warned to introduce the other material. Only 7 JOTAKE are left, and these are on your account, are not they?. At least that is what I have been told. I would like to get a detailed graphic design of the JOTAKE, just in case they fell down, since I have been told you are the only one who knows it, and I should request it from you....."

Letters from "Paco", Francisco Múgica Garmendia dated on 23 and 26-11-90. (F1 845 to 849 and 852).

"When the next meeting takes place, arrange these two meetings in a paper, with an intermediary, one of them to pick up the material, and the other with the JOTAKE, you must decide the ways to pass JOTAKE, we will pass the components together with the material..... In a paper sent to Carmen I´ve red several things and they are not clear... JOTAKE. We have an arrangement with those keeping them, but you must clarify how much money do we have to send them now, and how much at the end of the year. I tell you that around the middle of February, I will pass you a meeting to take the JOTAKE to a concrete place, he/she will arrange a previous meeting for you at the end of December.

"What about the meeting of Bizkaia command, likewise the material collection and if, in your part the JOTAKE are sent or not, answer yes or not, in the next meeting, I will arrange an appointment to pick up the JOTAKE. What kind of system do you use to pass the JOTAKE to the command, the telephone and the "zulo" (hiding-place) to leave the material and if with the JOTAKE you do the same or not...."

b. From the notes appeared in the seized note book the sheets for the days 13-7-90, 20-7-90, 27-7-90, 18-1-91, 19-1-91, 21-1-91, 26-1-91, 28-1--91, 2-2-91, 9-2-91 (Volume II from the documentary evidences).

c. From the judicial statement, in which he ratifies details included in the one made in the Civil Guard´s buildings, and rejecting others, he admits having kept the said correspondence in a moment that, a change in the executive committee was going to occur, in which he was going to be removed from the tasks he was responsible for so far. He also admitted that he was the owner of the note book, even when he did not give any complementary explanation to those that can be deduced from the own text of the notes. (Volume IV from separate documentary evidences). F1.1355, 1357, 1407, 1410). He specifically states:

".... Carmen Guisasola became to be a member from the executive committee. She was the new responsible for the legal commandos system, arranging to meet her at the pelota court in Bidart. In that meeting, Carmen told him that she was going to manage without him. He kept correspondence with Carmen Guisasola, in which he was informing her on the way the illegal system he only knew worked.

The main matters they dealt with were those relating to the persons responsible for the connections of the commandos, and the place where the JOTAKE were stored. Once Carmen was arrested, nobody else becomes to be a part of the executive committee, since Paco (Francisco Múgica Garramendia), takes the charge of the illegal system, and after keeping correspondence with Arcauz for a while, they agreed not to keep on working together, so that Arcauz was no longer responsible for the said system, and Paco, once he is informed by Arcauz on the way all the system worked, he started being in charge of everything related to the connections with the commandos, the storing and delivery of grenades JOTAKE.... it is true the role carried out by Arcauz as coordinator of all movements taking place in the years 1989 y 1990 relating to persons, materials and contacts addressed to the commandos.....”

The said items of proof are complementary and are mutually reinforced to establish that, among other functions, Josu Arcauz was, (at the moment the facts were being prosecuted), in charge of providing the commandos with the JOTAKE, when deciding their use in their actions. When asked by the Judge if he had handed over this material in every cases in which it was used, he denied it, which it does not mean he did not keep the truth, since, strictly speaking, he did not make the immediate and concrete handing over of the JOTAKE, to the members of the commandos, but Josu Arcauz acted, within the clandestine and hierarchical ETA´s running, making sure that such war material was always ready to be gotten by the perpetrators of the direct actions, which was possible through a net of connections that he also run, paid, and controlled.

That´s why the Court has no doubt that the JOTAKE grenades, used by the members of the commando Gohierri-Costa on December 27, 1990 against the Barracks of the Civil Guard in Deva, were provided by Josu Arcauz, who, by that time, distributed them according to the periodicity indicated in his note book, in accordance with the tasks he was responsible for within the organisation.

Specification of charges

Sixth. The stated proved facts constitute an offence of terrorism according to Art. 174 bis b of the Code of Criminal Procedure in force in the moment the facts took place, since Josu Arcauz, being a full member of the armed organisation, as markedly ETA is, handed over to other persons the grenades used in the launchin against the Barracks of the Civil Guard in Deva, with the aim of causing any material or bodily harm that could take place.

The same action is typified in the Code of Criminal Procedure passed by Organic Law 10/95. When enunciating the rules, it does not exist an exact correspondence, since the new Code of Criminal Procedure establishes different punishments according to the concrete results, which is not possible to establish in the current case, since, fortunately, there were no victims or damages, although it is evident the eventual means rean in case victims o damages have occurred, given the dangerousness and severity of the war means employed if the artefact had exploded within the Barracks. But even if we think about the slightest criminal possibility as is if a fire could have taken place, according to art. 571, in connection with art. 351, in a degree of attempt to commit a crime, the punishment corresponding to the crime, would exceed the one reserved to the same crime, according to the Penal Code of Procedure in force when the acts took place.

Seventh. Relating to the said crime, the defendant responds in concept of perpetrator as necessary collaborator, since Josu Arcauz provided the essential grenades JOTAKE so that the results of death and destruction involving the dramatic action could take place, which, if it did not happen it was because of a mistake in the calculation and the place where the shuttles were placed, not for the potential dangerous that such weapons meant.

And although Josu Arcauz was not informed on the way the action was planned, he was aware of the destructive power of that weapon, procuring a powerful mean to cause very serious damages against persons and properties, and that he was the only person within the organisation that could provide the direct perpetrators with such weapons, with which line of action he had to necessarily agree.

Eighth. There not exist circumstances that modify the responsibility.

Ninth. With regard to the sentence to be passed, it is appropriate to impose the severest/heaviest prison sentence (prisión mayor en su grado máximo), because the qualitative circumstance under the last paragraph of the Article 174 bis b) of the Penal Code cannot be appreciated in the accused person as he did not organise the facts nor directed its carrying out.

From out the penalties attaching to the main penalty, the suspension of the right to vote is not to be imposed because it has disappeared from the new Penal Code.

Tenth. Every person having criminal liability for a crime or offence is obliged to pay the court costs in pursuance of the Article 109 of the Penal Code and the Code of Criminal Procedure, Title XI.

VERDICT

Under the 1973 Penal Code in force when the facts occurred, we must declare Jesús Arcauz Arana guilty of a crime of TERRORISM as perpetrator for necessary collaboration without extenuating circumstances, and sentence him to ELEVEN YEARS IN PRISON with a penalty attaching to the main penalty of disqualification from public service during his term of imprisonment; and also to pay his own court costs and his share of those incurred together with the other five people already convicted...”

PRESENT SITUATION (NOVEMBER 1999) OF RECOMMENDATIONS MADE BY THAT COMMITTEE AFTER THE VISIT MADE ON JANUARY 17TH AND 18TH

A. Recommendation made in paragraph nr. 51 of the report.

As it has been previously pointed out, the respect for Human Rights is one of the prime concerns of the Spanish State. This sensitivity of the Spanish authorities to the respect for Human Rights is reflected in the efforts in regulations made in recent years.

Among the changes that have been made, the following ones can be emphasised due to their significance:

1. The Spanish Penal Code (Código Penal) in force, adopted by the Organic Law 10/1995, November 23rd, in its Title VII of Book II, under the title "About tortures and other offences against moral integrity" sets out the crime of torture with a wording similar to that set out in the International Convention against Torture, and the penalties to be imposed have been substantial and significantly increased.

Out from the five provisions which compose the new regulation -which will be transcribed below- only the Article 147 has a clear precedent in the Article 204 bis of the previous Penal Code text. But the significance of this legislative change goes beyond the inclusion of a series of new legal provisions. This reform is justified on the need of increasing the protection of fundamental rights, and quite specially, the right to moral integrity.

The fact of maintaining the regulation on the crime of torture, and even to increase its scope to cover any attack to moral integrity, evidences a clear will to eradicate such abhorrent actions.

Thus, the new provisions regulating the crime of torture have been worded as follows:

"Article 173:

Whosoever inflicts a degrading treatment on other person so damaging his/her moral integrity, shall be liable to be punished by more than six months and less than two years of imprisonment.

Article 174:

1. Torture is committed by any authority or public official who -abusing the power of his/her position/office, and in order to obtain a confession or any information from any person, or in order to punish a person for any action which he/she has committed or is suspected of having committed- would subject him/her to conditions or procedures which due to their own nature, duration or other circumstances would cause him/her physical or mental suffering, suppression or decrease of his/her knowledge, judgement or decision abilities, or would attack his/her moral integrity in any other way. A person guilty of torture will be punished by more than six months and less than two years of imprisonment if the attack would be serious, and more than one year and less than three years if it is not serious. Besides to the mentioned penalties, a penalty of absolute disqualification from public service for more than eight years and less than twelve years will be imposed in all cases.

2. Any authority or public official of prisons or detention centres for minors, who would commit the actions under the previous Article with regard to arrestees, detainees, prison inmates or prisoners, will be liable to the same penalties.

Article 175:

Any authority or public official who -abusing of his/her position/office and in cases other than those under the previous Article- would attack the moral integrity of a person will be punished by more than two and less than four years of imprisonment if the attack would be serious, and more than six months and less than two years if it is not. Besides to the mentioned penalties, a penalty of absolute disqualification from public service or office for more than two years and less than four years will be imposed in all cases.

Article 176:

The respective penalties as provided for in the previous Articles will be imposed on any authority or public official who -failing to perform the duties of his/her position/office- will let another person to commit the crimes set out therein.

Article 177:

In case that the offences under the previous Articles besides attacking moral integrity would cause injure or would endanger the life, physical safety, health, sexual freedom or property of the victim or a third person, those facts will be separately punished by the corresponding penalty for the crimes or offences committed, except when they were already specially punished by the law."

A comparative study of the Article 204 bis of the former Penal Code and the Article 174 of the new Penal Code lets us to observe:

- exclusivity of the term torture as being applied to "the authority or public official".
- extension of the scope of offence, not only to the aim of obtaining a confession or information, but also to the punishment.

- further accuracy in the description of the offence, including both "crude" torture and "scientific" psychological practices.

- rectification in disqualification from public service, which stops being "special" to become "absolute" (Special disqualification allowed the torturer to go on being a public official serving in another government department different to that where he/she was serving when the offence was committed. Absolute disqualification prevents him/her from performing any public office or position).

- independence between the term of imprisonment of the sentence and the period of disqualification from public service.

Disqualification, besides becoming absolute, will last for more than eight and less than twelve years.

- increase in sentences for torture. From a sentence of “arresto mayor” (imprisonment for more than one month and a day and less than six months) it changes to a sentence of “prisión” (imprisonment) for more than two years and less than six years if the attack were serious, and imprisonment for more than one year and less than three years if the attack were not serious.

Therefore, torture has at present a right definition and its punishment is the appropriate for serious offences (Article 33 of the Penal Code in force, at the classification of penalties - heavy/severe, less severe and light- includes “imprisonment for more than two years” as a heavy or severe penalty).

From the stated heretofore, it is possible to emphasise that -without forgetting or neglecting the educational work for preventing this offence- the importance of severe and heavy penalties is substantial. And it is unquestionable the higher efficiency of the new Penal Code on the torture prevention.

2. The Directive of the Secretary of State for Security (Secretario de Estado de Seguridad), dated December 20th 1996 governing the practice of stripping naked arrested persons in order to verify if they are carrying any dangerous item or incriminating evidence concealed in their clothes or bodies folds.

The practice of stripping naked arrested persons -during the police body searches- in order to verify if they are carrying any dangerous item or incriminating evidence concealed in their clothes or bodies folds, will have to fulfil the following conditions and requirements:

“First. The practice of stripping naked arrested persons during the police body searches will have to be decided by the police officer in charge of the police custody, and under his/her responsibility.

Second. The decision on the extent of the body search and, in its case, on to strip naked the arrested person, could be only justified on the grounds of protection of the own arrestee’s safety, as well as the safety of the police officers and other people who were next to them, or with the aim of recovering the items, instruments or evidence which the arrestee may reasonably be carrying and which could serve as a basis for determining his/her guilt.

Third. The decision to proceed to strip naked arrested persons will have to be briefly but sufficiently substantiated by the officer in charge, on the grounds of any or several of the reasons stated in the previous paragraph.

The procedure of body search by means of stripping naked the arrested person in order to verify if he/she is carrying any item or instrument concealed in his/her clothes or body folds, could be only followed when -according to the arrest circumstances, the nature of the alleged offence, the arrestee attitude, or any other circumstances duly assessed by the police officer in charge of authorising this procedure- the adoption of this procedure may be decided.

Fourth. This body search must be carried out in a room near or next to the cells, and it will be carried out by the custody officers in charge of the arrested person, and -if possible- the officers who made the arrest would also participate in it, always respecting the intervention of policemen or policewomen, according to the sex of the arrested person.

Fifth. The practice of stripping naked arrestees in order to verify if they are carrying any dangerous item or instruments concealed in their clothes or body folds, must be recorded in the relevant Arrestees Register-Book".

3.- The Directive of the Secretary of State for Security (Secretario de Estado de Seguridad), dated May 12th 1997 on the drawing up of police enquiry/proceedings is also transcribed due to its importance:

"First. Reports contained in the police proceedings will try to record all the objective facts which would clearly show reality without assessments or legal qualifications; therefore, all kind of subjective criteria and matters irrelevant to the criminal procedure will be avoided.

Second. Steps making up the police proceedings, such as reports on the actions carried out, must be chronologically ordered, stating previously their contents and indicating their results.

Third. It must be stated in the police proceedings the necessary details that will let to identify the police officers who have carried out every concrete activity, that is to say, those who have directly participated in each of the steps making up the police proceedings: investigations, surveillances, wiretappings, searches, arrests, questionings, etc.

When the action taken were a localisation or seizure of items during inspections, searches of premises, or any other similar action, it must be stated the police officer who did them.

Fourth. Actions based on non-sufficiently founded or generic concepts, such as "suspected attitude" or "received information", etc., or similar routine descriptions, must not be stated in the text of police proceedings. The *indicia* (indications) which had caused the police enquiry must be clear and concretely specified.

In this regard, when dealing with the adoption of any precautionary measure, such as an arrest or any other measure involving deprivation of any fundamental right, it must be stated in the police proceedings the "sufficient evidence" which -under Article 492 of the Code of Criminal Procedure- would justify such measures,

Fifth. Once a person has been arrested, he/she will be immediately cautioned -in such a form that it would be understandable to him/her- informing him/her on the facts imputed to him/her, the reasons causing his/her deprivation of freedom, as well as the rights that he/she has under the Article 520 of the Code of Criminal Procedure. The cautioning will be carried out by the arresting officer who will record this action in the report that will be included in the police proceedings notwithstanding the duty which the police officers receiving the arrestee have to write a document on the caution's contents and carrying out ("notificación de derechos").

Sixth. When, in the course of a police enquiry, it would be necessary to ask for an entry and search warrant or a mail interception warrant from the Legal Authority, this request will give a clear and detailed explanation of the pursued aim, origin of the enquiry, and the needs of such an investigative method.

In the course of any action, if there would be detected any new facts or *indicia* of the existence of any other punishable fact different to those for which the warrant was expressly issued, it will be recorded in the minutes and the Legal Authority will be immediately informed. No action of any kind will be carried out concerning those facts until the said Legal Authority will decide what he/she deems appropriate.

The same procedure will be followed when, in the course of a search of premises, it would be found any item of those that caused the investigation, or any *indicia* of any other offence.

Seventh. When appropriate, or in case of laborious or complex investigations, the police proceedings must be complemented by a "Diligencia de Informes" (Reports) which will summarise the contents of the police proceedings, its results, and as many data as it is deemed advisable in order to facilitate the global understanding of the carried out investigation.

4. Apart from the above mentioned effort made on regulations, the National Commission for Co-ordination of the CID (Criminal Investigation Department) Police (Comisión Nacional de Coordinación de Policía Judicial) was already studying the conditions of detention in Spain previous to the visit of the CPT delegation in January 1997. This National Commission is a organ chaired by the President of the Supreme Court of Justice (Tribunal Supremo) and the President of the General Council of the Judiciary (Consejo General del Poder Judicial), and it is also made up of the Public Prosecutor General of the State (Fiscal General del Estado), the Ministry of Justice, the Ministry of the Interior, the Secretary of State for Security, and a Senior Judge (Magistrado) of the Supreme Court of Justice. The Commission aim is to set the main lines of action for the CID Police to achieve unity of leadership in criminal investigation police forces.

This has resulted in the writing of a Handbook on Criteria for Carrying out Police Proceedings by the CID Police, that has been written in the framework of the Technical Commission under the National Commission for Co-ordination of CID Police. Members of the Public Prosecution Service, Judges and Senior Judges, as well as Police Forces officers have participated in this writing process.

In the writing process of the said Handbook , the following basic criteria have been applied:

- Circumstances surrounding police actions, and very specially those involving specific restrictions on rights and freedoms, such as arrests.

- Law Reports of the different national and international courts.

- Reports by the organs in charge of the protection of fundamental rights; among them the CPT recommendations should be emphasised.

The opportunity of writing this Handbook resulted not only from the necessity of unifying the existing criteria on the carrying out and development of some investigative actions, but also from the demand posed by the harmonisation of those actions with the constitutional provisions from which the legal powers to act stem (Article 104 and 126 of the Spanish Constitution) and rules and regulations issued for its development.

The Handbook that is already distributed among the different judicial, prosecutors and police services with competence in this field, collects the catalogue of the most usual steps/actions in the police proceedings, which are detailed as follows:

1. Entry and search.
2. Identification from photographs.
3. Identification parade.
4. Body searches.
5. Videos recording and photographs taking.
6. Interception of telecommunications (wire-tapping).
7. Mail and telegraph interception.
8. Arrest and cautioning.
9. Nomination of a lawyer.
10. Notification to family and Consulate.
11. Medical examination.
12. Habeas corpus.
13. Protection of witness.
14. Scene-of-the-crime technical examination.
15. Recovering of items ("custody chain").
16. Reports. (Summary of Proceedings)
17. Arrest under Art. 420 of the Code of Criminal Procedure.
18. Controlled delivery or circulation.
19. Transport of arrested/detained persons.

B. Recommendation made in paragraph nr. 52 of the report

In Spain, all the activities carried out by the Administration, as well as those fulfilled by their officers are subjected to a judicial control pursuant to the 1978 Spanish Constitution, article 106.1, which provides for the principle of supremacy of the rule of law and, therefore, the submission of every Administration and public authority to the law, under the control of judges and courts.

Judicial independence is a keystone in the Spanish legal system, and even the Spanish Constitution underlines it in its article 17.1, where it is provided that "justice emanates from people and it is administered on behalf of the King by Judges and Senior Judges, who are independent and responsible members of the Judiciary, who cannot be removed from their posts and who are only are submitted to the rule of Law."

Consequently, concerning the contents of this recommendation, the administrative authority just refers it to the judicial authority.

Nevertheless, it would be convenient to indicate that the possibilities provided in article 520 bis of the Spanish Code of Criminal Procedure are always applied under the strict authorisation and supervision of the Judicial Authority, given that the extension of the detention time for a period over 72 hours (for another 48 hours at the most), as well as the detainee's isolation, only can be granted by the Judicial Authority by means of a "substantiated" order.

C. Recommendation made in paragraph nr. 53 of the report

The article 17.3 of the Spanish Constitution guarantees the legal aid to the detainee during the police enquiry and committal proceedings, pursuant to the law, while the article 24.2 recognises this right in the framework of the actual legal guardianship with the meaning of guarantee of a fair action with respect to the defendant or accused.

On the other hand, the article 52.2 of this constitutional Text has introduced an authorisation to the Spanish law-maker, by which he can establish an specific scheme to deprive the detainee -partial and provisionally- of certain rights (the right to legal aid is among them) in order to facilitate the investigations concerning the activities of armed organisations or terrorists.

This double constitutional projection of the right to legal aid is not something original of the Spanish Constitution, there is an special parallelism with international conventions which regulate the human rights that have been ratified by Spain, although in the field of legal aid and assistance to the detainee, the Spanish Constitution is even more extensive and generous that those international conventions, at least explicitly.

Thus, the European Convention on Human Rights of 1950 establishes - in its article nr 5 - the right to freedom, and it provides for the rights of the person in preventive custody, among which legal aid has not been incidentally included, and the right to a fair action is provided in its article nr. 6, where the accused person's rights are established, and where the right to be assisted by a lawyer or his/her own choice is specifically mentioned.

This same pattern has been adopted, without any substantial difference, in the articles nr. 9 and 14 of the International Agreement on Civil and Political Rights of 1966. The first of them does not include the right of the detainee to legal aid, while it is recognised in the article 14 for the defendant of a crime in the same terms of the article 6 of the 1950 European Convention.

Consequently, in these international conventions the difference between a detainee and a defendant is of special importance regarding the right to legal aid, and in the case law of the European Court of Human Rights it is clearly highlighted.

The Code of Criminal Procedure -that reflected the authorisation contemplated by the Spanish Constitution to determine the terms of legal aid to be provided to the detainee- recognises, in its article 520, the right of both, the detainee and the defendant, to have a lawyer of his/her own choice, except (article nr. 527) for detainees held incommunicado -this isolation is always decided by the Judge- , in which the right to legal aid will be always exercised by means of an officially appointed lawyer.

Consequently, in Spain every person has the right to legal aid and assistance from the outset of his/her detention, and he/she will not be able to exercise this right in those cases in which -for exceptional reasons- the judge might decide it; but, in any case, the appointment of an official lawyer will be assured.

On this regard, the Spanish Constitutional Court has laid down that:

- Within the constitutional framework, the law-maker can impose to the ordinary contents of the fundamental rights those restrictions which might be justified for the sake of other constitutional benefits, and provided that these restrictions are in proportion and do not distort their essential contents.

- Due to the special nature or seriousness of certain crimes, or the subjective and objective circumstances surrounding them, it may be indispensable that police and judicial proceedings aiming at their investigation are carried out in total secrecy, in order to avoid that the knowledge of the investigation details by persons who are not party of the same could favour that other people -who are guilty or are involved in the investigated crime- abscond, or that evidences might be destroyed or concealed.

- For that reason, the Spanish Code of Criminal Procedure gives to the judicial authority exclusive powers to determine the detainee's isolation, an exceptional measure which is taken for a short time and that is aiming at keeping the detainee isolated from personal relationships who might be used to transmit information about the investigation to the outside, to the detriment of its successful results. In these cases, the appointment of an official lawyer is another measure that has been provided for by the law-maker, within his/her authority to regulate the right to legal aid and assistance, in order to reinforce the secrecy of the criminal investigations.

- Taking into account that prosecution and punishment of crimes are essential issues in the protection of social peace and public security, which are assets recognised by the articles 10.1 and 104.1 of the Spanish Constitution and, thus constitutionally protected, the restriction laid down in the Code of Criminal Procedure, article 527.a), is justified in the interest of these assets that, in case of being in conflict with the right of the detainee to legal aid and assistance, it empowers the law-maker to proceed to their conciliation, making use of the specific provision contained in the article 17.3 of the Spanish Constitution, preventing the choice of lawyer model. In this way, the measure of isolation of the detainee - taken under the conditions provided by the law- protects values which are secured by the Spanish Constitution and it allows the State to fulfill its obligation of providing security to the citizens, increasing their confidence in the functional capacity of the state institutions.

- The purpose of a lawyer's intervention during the first police proceedings is to ensure -with his/her presence- that the detainee's constitutional rights are observed, that the detainee is not coerced, nor subjected to a treatment that is not compatible with his/her dignity and freedom to make statement, and that he/she is duly cautioned advised as for his/her behaviour during the police questioning -included the right not to make any statement-, as well as for his/her right to check that, once concluded his/her statement in the lawyer's presence, it has been fairly transcribed in the written record of his statement that is submitted to him/her to be signed.

- The essence of the detainee's right to legal aid and assistance is not in the choice of lawyer pattern, but in the effectiveness of his/her defence, but what the Spanish Constitution tries to achieve is the protection of the detainee by the technical assistance of a lawyer, who will provide him/her moral support and professional assistance at the moment of his/her arrest, and this purpose is objectively achieved by means of an officially appointed lawyer, who assures the assistance effectiveness in a similar way to the lawyer of choice.

- The choice of an own lawyer is part of the ordinary contents of the detainee's right to legal aid and assistance, but it is not part of its essential contents, because the deprivation of this right and the consequent compulsory appointment of an official lawyer does not entail the lack of recognition or application of the same, nor prevent him/her from receiving the necessary protection.

Consequently, it can be concluded that the Spanish law on legal aid and assistance to the detainee does not contradict the international Conventions ratified by Spain, and the value for the basic rights and public liberties interpretation is provided in the article 10.2 of the Spanish Constitution because, as it has already been indicated, these rights are more restrictively recognised in the above Conventions than in our Constitution, as far as the first ones do not contemplate this right among the rights which are recognised to the detainee by the European Convention of Rome, article 5, and the International Agreement of New York, article 9; the articles 6 and 14 of these ones only recognise the right to have a lawyer of choice with regard to the accused during the criminal trial, while this right is not applicable to the detainee or to the person taken in custody during the police or judicial proceedings, case which is covered under the Code of Criminal Procedure, article nr. 527, par. a).

D. Recommendation made in paragraph nr. 54 of the report

The Ministerial Directive of 16 December 1997 has adopted the Protocol that forensic doctors must fulfill during the medical examinations made to the detainees. Following the Spanish medical-judicial tradition and the international experiences, this protocol is contemplated as an objective instrument, of an exhaustive nature, considered as a formality in the relationship between forensic doctor and the relevant Court.

As such an objective instrument, it compiles the medical history of the detainee, including his/her allegations concerning the treatment received by him/her during his/her detention period, and due to its exhaustive nature, it contains several sections -even drawings- which allows the forensic doctor to reflect the results of the medical checks carried out.

Therefore, once the medical examination of the detainee has been performed, and once the Protocol requirements have been fulfilled, we have at our disposal an instrument very useful that, with absolute objectivity, can reflect any of the following medical situations of the detainee:

- The detainee has made reference to a correct treatment and in the conclusions drawn from the medical examination no objective traces of ill-treatment can be appreciated.

- The detainee has not made reference to ill-treatment, but from the medical examination carried out, objective traces of a possible ill-treatment become evident.

- The detainee has made reference to ill-treatment, but from the medical examination carried out, no objective traces of ill-treatment are observed or, on the contrary, objective traces concerning every or some of the allegations of ill-treatment received by him/her are remarked.

However, in the Protocol the forensic doctor does not include his/her opinion about the concordance between the allegations of the detainee and the objective conclusions of the medical

examination carried out, because, as it has been above mentioned, the Protocol is conceived as an strictly objective instrument of a specific situation.

But we must take into account that the function of the forensic doctor does not finish when the Protocol has been fulfilled. Once this protocol has been completed, it is directly submitted by the forensic doctor to the Court, through his/her appearance before the Judge, where the medical expert will present his/her conclusions in view of the protocol contents. Then, if the Judge considers that it would be suitable, the forensic doctor -as an expert- will submit a report where, in view of the results of the medical checks carried out by him/her, he/she will make an assessment and a value judgement concerning the detainee's allegations.

Likewise, during the investigation, the Judge can decide the performance of additional medical tests and even a new medical examination, in which a doctor designated by the detainee's family will be authorised to take part.

The new tests carried out or the results of the new and plural medical examination will be also incorporated to the committal proceedings, and afterwards, the doctors having participated in the expert report performance will make a value judgement concerning the objective results obtained from these tests and medical examinations in connection with the detainee's allegations.

When the hearing comes, and in those cases where there exists a Protocol with objective pieces of information concerning possible ill-treatment, the forensic doctor, as well as the doctor/s of the defence will appear -as experts- before the Court and will testify concerning the evidence production.

Therefore, from the above stated, we can conclude that:

- The Protocol is an exhaustive instrument that gathers only and exclusively objective information.

- The objective information shown in the Protocol can determine the lack of evidence of ill-treatment or, on the contrary, that there are actually clear traces of an alleged ill-treatment. In this second case, the Judge will decide the appropriate orders aimed at investigating the alleged offence. This investigation can also be ordered by the prosecutor, as well as by the defence of the detainee, and even by any citizen through the prosecutor's office.

- If the objective information is not categorical or clear, the Judge will request to the forensic doctor an additional expert report to the Protocol, where the forensic doctor will set out his/he value judgement, that is, his/her conclusions concerning the detainee's allegations, in the view of the results obtained from the medical examinations carried out.

- By judicial resolution and at the doctor's proposal, additional tests, as well as a new medical examination can also be carried out with the participation, not only of the forensic doctor, but also of a doctor designated by the detainee's family. In both cases, records will have to be taken and following that, every doctor having taken part in these checks will set out his/her value judgement concerning the objective information reported.

- During the hearing, and in the view of the Protocol contents, the forensic doctor and the doctor of the defence will testify concerning their evidence production.

This Committee has learnt about several actions where this procedure has become evident.

Nevertheless, the Spanish Authorities -in accordance with the conversations they have had with some of the members of that Committee Delegation during their periodic visit to Spain (November-December 1998)- do not have any problem to examine the possible suggestions that might be additionally made to this recommendation.

E. Recommendation made in paragraph nr. 55 of the report

As for the contents of this recommendation, that is about the preparation of a Code of practice for interrogations by public order officers, we refer to the answer above provided to the recommendation made in paragraph 51, because this subject is dealt with in the Handbook of Criteria to be followed in the Judicial Police Proceedings.