Chile’s Revamped Criminal Justice System

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ABSTRACT

While much has been written in Spanish, and to a certain extent in English, about the criminal procedure reforms sweeping Latin America, scant information is available in English that describes the novel process itself. This paper seeks to provide a general overview of one of the most successful such reforms in the region, the revamped system of criminal justice in Chile.

BACKGROUND INFORMATION

In December 2000, Chile’s new code of criminal procedure came into effect. The new code replaced the former written, secret and inquisitional system in place since 1907 with an oral, public and adversarial procedure. In addition to modifying bodies of law, the complex reform process included the installation of a series of new institutions, including the Office of the Public Prosecutor (Ministerio Público), the Office of the Criminal Public Defender (Defensoría Penal Pública), Guarantee Court (Juzgados de Garantía—special courts to safeguard the rights of the defendant and the victim during the investigation process) and Oral Criminal Trial Courts (Tribunales Orales de Juicio Penal). It is important to note that under the old system, the tasks of investigating, indicting and adjudicating a criminal case were in the hands of a single investigating judge known as a juez de instrucción.

The reform was implemented gradually, with different geographic regions phased-in over a period of five years (2000–2005). The process concluded on June 16, 2005 with a roll-out in the Santiago Metropolitan Region, bringing the new criminal procedure into force across the entire country for those crimes committed after the start-up date in each region.

Under the new system, prosecutors replace judges as the lead investigators of criminal activity. Following case initiation, proceedings commence with a present-ment hearing, followed by a complaint hearing, a formal investigation, the filing of an accusation, preparations for trial and the trial itself (in a single-judge Guarantee Court or before a three-judge panel in an Oral Trial Criminal Court depending on the specific circumstances of the case), a verdict, appeals to the Appellate and Supreme Courts and sentence implementation overseen by the Guarantee Court. Each of these phases will be described in greater detail below.

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The new system seeks to provide speedy, efficient, transparent and impartial access to justice while respecting fundamental human rights and striking a balance between the government’s coercive power and individual rights and liberties. The new system replaces the negative features of the old model—including a partial judge and slow, inefficient proceedings—with new legal concepts designed to safeguard individual rights and liberties and solve criminal cases promptly. The reform is grounded on a series of underlying principles, including:

1. Due process;
2. Right to defense;
3. Equality before the law;
4. Presumption of innocence;
5. Impartiality;
6. Public access and oral proceedings in all cases and hearings;
7. Efficiency (reflected in alternative dispute resolution mechanisms);
8. Concentration (hearings are conducted in a single session with a verdict announced shortly after closing arguments);
9. Confrontation (especially of witnesses via cross-examination); and
10. Procedural immediacy (personal contact between the judge and the parties as a prerequisite for the validity of all hearings).

I. THE PARTICIPANTS

According to Title IV of the new Criminal Procedures Code (CPP), the participants (sujetos procesales) in the new criminal system are the Office of the Public Prosecutor (OPP), Office of the Criminal Public Defender (OCPD), the defendant, victims, criminal complainants, law enforcement and the courts.

A. Office of the Public Prosecutor

The OPP is the cornerstone of criminal prosecution in the new system. This autonomous, hierarchical and constitutionally-ranked body is tasked with: investigating criminal acts; determining punishable participation or accrediting the in-

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1. Additional principles and actionable provisions of law in Chile can be found in the U.N. International Covenant on Civil and Political Rights, ratified by Chile in 1999, and the American Convention on Human Rights (Pact of San Jose, Costa Rica).
2. The new code is the Código Procesal Penal. The old code, Código de Procedimiento Penal, was also abbreviated CPP.
3. Pursuant to Article 12 of the Criminal Procedures Code (CPP), the intervening parties (intervinientes) are: the prosecutor, the defendant, the criminal defender, the victim, and the criminal complainant. Witnesses are considered to be third parties. The distinction between “participants” and “parties” is germane to the exercise of certain rights.
nocence of the accused; exercising public criminal action as established by law and adopting measures to protect victims and witnesses.\textsuperscript{5}

Although the OPP issues direct orders to law enforcement during a criminal investigation, under no circumstances may the OPP hear or adjudicate cases. Any actions that deprive the defendant or third parties of the exercise of rights guaranteed by the Constitution or that restrict those guarantees require prior judicial authorization (this includes wire-taps, lifting of bank secrecy, etc.).

The OPP is led by a National Prosecutor who is responsible for overall leadership of the Prosecutors Office at the national level. The National Prosecutor sets objectives, policies and institutional guidelines and plans for the OPP in terms of both public prosecution of criminal cases and institutional management. Administratively, the OPP is divided into geographic units at the regional and local levels. Regional Prosecutors (\textit{Fiscales Regionales}) are responsible for performing the duties and exercising the powers of the Office of the Public Prosecutor in a specific region or geographic portion of that region either personally or through deputy prosecutors. Deputy Prosecutors are, in turn, tasked with directing the investigation of the cases and pressing charges against suspects based on the investigation. Toward this end, Deputy Prosecutors (\textit{Fiscales Adjuntos}) may order other agencies, including Law Enforcement and the Medical Examiner to engage in given actions. Deputy Prosecutors are also responsible for ensuring the protection of victims and witnesses and are supported in legal, administrative and operational affairs by Prosecutorial Assistants (\textit{Asistentes del Fiscal}).\textsuperscript{6}

In addition, the OPP is empowered to apply alternative solutions in grappling with its case load. The options include postponing investigations until further information is available, desisting from an investigation once initiated, temporary suspension (deferred adjudication)\textsuperscript{7} of the charges against a defendant and Restitution Agreements\textsuperscript{8} reached between the perpetrator and the victim. Most of these decisions, however, require the approval of the Guarantee Judge and must meet specific applicability provisions (see below).

Another important feature of the new system is that victims can oppose the OPP’s use of its discretionary powers to dismiss a case during the investigative phase by filing an independent criminal complaint (\textit{querella}), thereby forcing the OPP to move forward with the investigation. Moreover, certain victims who have filed such a complaint can file an accusation and continue on with the case through trial even if the OPP decides not to pursue the case in court.\textsuperscript{9}

\begin{itemize}
  \item \textsuperscript{4} Although most crimes are pursuable by OPP prosecutors at their own initiative, some require that a crime report be filed first (\textit{acción pública previa instancia particular}) while others, such as writing bad checks, can only be prosecuted via private criminal complaint (\textit{acción privada}). CPP, arts. 54-55.
  \item \textsuperscript{5} Law 19640 [Office of the Public Prosecutor], art. 1, Diario Oficial, Oct. 15, 1999 (Chile).
  \item \textsuperscript{6} \textit{Id.} tit. II.
  \item \textsuperscript{7} CPP, art. 237.
  \item \textsuperscript{8} \textit{Id.} art. 241.
  \item \textsuperscript{9} \textit{Id.} arts. 109, 111, 258.
\end{itemize}
Once in court, the OPP may also request the use of one of three time-saving alternative trial procedures (see “Courts” below) to expedite case resolution.

B. Office of the Criminal Public Defender

The Office of the Criminal Public Defender (OCPD) was created by law\textsuperscript{10} in 2001 and falls under the direct supervision of the President through the Ministry of Justice. The OCPD is led by a National Public Defender and composed of regional and local public defenders, following a structure quite similar to that of the OPP.\textsuperscript{11} The distinguishing feature is, however, that not all public defenders are employed directly by this office: some are in fact private attorneys whose offices have participated in a strictly regulated public tender process to serve in this capacity.\textsuperscript{12} Thus, both sets of defenders, both “public-public” and “private-public” are tasked with providing professional defense to those individuals under formal investigation or accused of a criminal offense that comes under the jurisdiction of the new criminal procedure. Specifically, public criminal defenders are responsible for:

\begin{enumerate}
  \item[a)] Defending the procedural rights and liberties of the defendant and ensuring his/her actual and equitable participation in the proceedings.\textsuperscript{13}
  \item[b)] Representing the defendant in court; taking part in every judicial proceeding and hearing commencing with the initial action against the defendant through final judgment.
  \item[c)] Assisting defendants and informing them of procedures and options.
\end{enumerate}

Public defenders are provided free of charge for those defendants unable to afford an attorney (income under US $200 a month, approximately). Those able to pay are charged on a sliding scale (in practice, only 3\% of all defendants represented by the OCPD make such co-payments).

Defendants who wish to hire their own private attorney at their own expense may do so.

C. Victims

Pursuant to Article 83 of the Constitution of Chile, one of the three key functions of the OPP is to adopt protective measures for victims and witnesses. This constitutional mandate is new under the reform and represents a substantive de-

\textsuperscript{10} Law 19718 [Office of the Public Defender], Diario Oficial, Mar. 10, 2001 (Chile).
\textsuperscript{11} Id. tit. II.
\textsuperscript{12} Id. tít. 3 \& 5 \& 3.
\textsuperscript{13} Id. art. 2.
parture from the previous system in which such individuals were afforded no special protection or treatment.

The Criminal Procedures Code (CPP) further specifies the protective duties of the OPP regarding victims, stating that “it shall be the duty of prosecutors during the entire procedure to take measures or request them, if applicable, to protect victims of crime; to facilitate their involvement in the proceeding, and to avert or limit to a minimum any inconvenience they may have to bear as of the result of their participation in said proceedings.” The same section establishes that prosecutors are bound to: “Order on their own initiative or request of the court, if applicable, measures aimed at the protection of the victim and his/her family in the face of probable harassment, threats or attacks.” This provision extends the protective duty of the OPP to the victim’s family. The law also requires the OPP to provide similar protection for witnesses.

In broad terms, such protection is provided via two mechanisms:

1. Prosecutor-ordered protection

Prosecutors may adopt the following measures on behalf of victims or witnesses on their own initiative. No court order is required as this set of measures does not impinge on the rights of the defendant. They include:

- a) Periodic rounds by law enforcement (Carabineros de Chile (uniformed) and Policía de Investigaciones (plainclothes detectives)) at the witness’ home or workplace;
- b) Priority telephone contact for a witness with the police;
- c) Confidentiality of domicile during the investigation and at trial;
- d) Witness subpoena and statement at a location other than the local Prosecutor’s Office, when accepted by the witness;
- e) Arranging for changes to telephone numbers or requesting a private number for the witness;
- f) Provision of cellular telephones with emergency numbers; and
- g) Provision of personal alarms.

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14. CPP, art. 78.
15. Id. art. 78(b).
16. Id. art. 308.
17. Id. art. 109; see also Guía para la Protección de Víctimas de Delitos, Victim and Witness Protection Division, Office of the Public Prosecutor, Chile. 2002.
Geo. J. Int’l Law: The Summit

2. Court-ordered protective measures

To implement these measures, prosecutors must obtain court authorization because they affect the rights of participants or third parties or because it is required by law. Key measures in this category include:

d) Interim measures, such as: pretrial custody of the defendant and other restrictive measures of his/her freedom, including restraining orders;\(^\text{19}\)

e) Change of identity and/or relocation, as provided for in specific statutes;\(^\text{20}\)

f) Confidentiality of witness identity during trial.

In addition, if petitioned, the court may adopt several protective measures where there is reasonable cause. These measures include:\(^\text{21}\) barring access or ordering the removal of specific individuals from the courtroom; barring access by the public in general or ordering the room cleared in order to hear specific testimony; prohibiting the prosecutor, other participants and their lawyers from delivering information or making statements to the media during the course of the trial and the use of identity distorting measures, including folding screens to separate witnesses from the rest of the courtroom, statements by closed circuit television, disguises and voice distortion techniques.

Special provisions also permit children to testify from a separate room via closed circuit television. In an effort to reduce secondary victimization and make children more comfortable, the attorneys for the defense and the prosecution prepare a list of questions that are then read to the minor by the Presiding Judge who sits in the separate room with the child.\(^\text{22}\)

While U.S.-style depositions are not an option in the Chilean system, the new procedures do allow evidence to be produced during preliminary hearings to trial to ensure the availability of a victim or witness’ statement at trial, when there is a fear of the death or physical or mental disability of the witness that would prevent him from appearing at trial.\(^\text{23}\) Procedurally, a special hearing is held prior to the trial in the presence of all participants entitled to attend the trial to hear the evidence contributed by the protected individual.\(^\text{24}\) This evidence is subsequently included in the oral trial by reading the statement from the record of that hearing.\(^\text{25}\)

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18. CPP, art. 308.
20. See, e.g., Law 20000 [Illegal Trafficking of Narcotic and Psychotropic Substances], art. 35, Diario Oficial, Feb. 16, 2005 (Chile).
21. CPP, art. 292.
22. Id. art. 310.
23. Id. art. 191.
24. Id.
25. Id. art. 331.
Nonetheless, this technique has run into practical snags that make its application rather less than widespread.

D. Criminal Complainant (querellante)\(^{26}\)

As noted above, the new code allows victims and, in very limited cases, other interested parties to file a criminal complaint and carry forward a prosecution even in the absence of the OPP.\(^{27}\) This feature is carefully regulated in the CPP, which requires that parties who take advantage of this option be diligent in their proceedings, comply with all legal time limits and participate in certain hearings, under penalty of having the case dismissed. Defendants so prosecuted may also petition for damages if the complainant proves irresponsible or negligent in processing their case.\(^{28}\)

E. Law Enforcement

Chile has two nation-wide police forces, the uniformed *Carabineros de Chile* and the plainclothes *Policia de Investigaciones de Chile*. Both forces are considered to be auxiliary institutions to the OPP in the investigation of criminal events.\(^{29}\) Both forces investigate crimes at the behest of the prosecutor’s office, implement coercive measures as ordered, and are required to follow orders and report to prosecutors on the results of their investigations.\(^{30}\) Although as a general rule law enforcement needs an order from the prosecutor (or the court, as the case may be) to take action, officers can perform certain duties at their own initiative,\(^{31}\) such as:

1. Aiding victims of crime;
2. Arresting perpetrators of *in fragranti* crimes or individuals with outstanding arrest warrants against them;
3. Safeguarding crime scenes;
4. Collecting crime scene evidence;
5. Identifying witnesses and taking initial statements;
6. Receiving crime reports from the public; and

\(^{26}\) *Id.* tit. IV ¶ 7.
\(^{27}\) *Id.*
\(^{28}\) *Id.* art. 119.
\(^{29}\) *Id.* tit. IV ¶ 3.
\(^{30}\) *Id.* art. 80.
\(^{31}\) *Id.* art. 83.
Performing “identity checks.”

F. Courts

The courts of the first instance are divided into two levels:

1. Guarantee Courts

As a general rule, Guarantee Court judges play a role akin to that of a magistrate judge in the U.S. federal system (see specific functions below). These judges may also hear and adjudicate cases involving lesser crimes (in simplified, abbreviated or monitoring proceedings) and approve or reject “Restitution Agreements” (see below).

Guarantee Courts are composed of one or more judges who sit on single-judge benches, whose main functions are to: a) grant authorization for investigative procedures that curtail or otherwise impede the exercise of constitutional rights; b) try and adjudicate cases under simplified, abbreviated, or monitoring procedures; c) oversee implementation of sentences stemming from guilty verdicts handed down against individuals deemed criminally liable and supervise security measures for those involved in criminal acts who are not found criminally liable (i.e. the mentally disturbed) and d) conduct hearings during the investigative phase and resolve ancillary proceedings that arise during that stage.

Common hearings before the Guarantee Courts include:

a. Initial appearance and complaint hearings.

b. Interim measure (‘medidas cautelares’) hearings during the investigation, including pretrial detention (and setting time limits for such

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32. Pursuant to Article 85, CPP, when there are sufficient grounds to suggest that a crime has just been committed, is about to be committed or has just been attempted, among other cases, law enforcement may require a person to produce a valid form of identification. Persons who fail to produce such I.D. can be retained at a police station or other public facility for up to eight hours while their identity is verified. Moreover, police can search the person, their personal possessions and vehicle during the course of the spot check (even when the person produces valid identification). This form of investigative detention is called a control de identidad and the person so retained is considered controlada (controlled) rather than detenida (arrested).

33. Id. tit. IV ¶ 1.

34. Id. art. 70.

35. Id. art. 468.

36. Id. art. 458.

37. See e.g., id. arts. 71, 169.

38. Id. art. 95.

39. Id. art. 139.
c. Simplified Procedure: Used when the offense involved is a misdemeanor (falta penal) or lesser crime (delito simple) for which the OPP has requested an effective sentence of no more than 540 days of prison time.

d. Abbreviated Procedure: May be requested by the Prosecutor when the period of incarceration he/she has proposed is under 5 years. The defendant must agree to this procedure and acknowledge the facts as stated in the accusation filed by the Prosecutor.

e. Monitoring Procedure: Used solely when the offense committed is a misdemeanor punishable solely by fine.

f. Restitution Agreements: This now widely-used alternative system of restorative justice is a further innovation under the reform and consists of an agreement between the victim and the defendant that brings the case to a close. The agreement must be approved by the Guarantee Judge in a public hearing, with all parties present. While the prosecutor can voice opposition to the agreement, the OPP cannot impede such an accord from moving forward so long as the Guarantee Judge finds that it complies with the law. This option is available only when the case under investigation involves a legally-available protected interest of an economic nature, lesser injury or crimes of negligence. Should the perpetrator fail to comply with the terms of the agreement, the case returns to court.

g. Pretrial conference on discovery and motions.

2. Oral Criminal Trial Courts

These courtrooms, known by their Spanish acronym TJOP (Tribunal de Juicio Oral en lo Penal), are composed of three professional judges who sit in a collegiate tribunal that hears and conducts the oral trial and acquits or convicts the defendant. These courts are primarily responsible for:

a. Hearing and adjudicating cases where an offense has been committed, pursuant to the Criminal Procedures Code.

b. Ruling on any ancillary proceedings initiated during the oral trial.

c. Acquitting or convicting defendants and rendering final judgment based on the evidence presented at the trial.

40. Id. art. 157.
41. Id. art. 308.
42. Id. art. 406.
43. Id. art. 392.
44. Id. art. 241.
45. Id. art. 277.
Judges have access to a summary of the case and admissible evidence prior to trial (auto de apertura de juicio oral) but are not privy to the particulars of the proceedings that took place before the Guarantee Court.

3. Appellate Courts

Chile did not introduce substantive changes to its appellate court structure or the Supreme Court to accommodate the new criminal system. New regulations were introduced, however, to grapple with the need for additional procedures. For example, adjudication handed down by both Guarantee Courts and Oral Criminal Trial Courts is generally subject to review by a superior court via a motion for review or annulment, according to specific provisions of law.

As a general rule, the decisions of Guarantee Courts made during oral proceedings cannot be appealed. However, when the ruling is issued in writing, the issue was not debated in open court or where the decision “brings the proceeding to a close, makes it impossible to continue or suspends it for over 30 days” the ruling can be challenged at the Appellate Court. As a result of a March 2008 modification to the law, when the Guarantee Judge denies a prosecutor’s request for the defendant to be remanded she remains in custody until the Appellate Court issues its ruling. Previously, defendants were released on their own recognizance while pending appeal.

Rulings handed down by the Oral Trial Courts are not subject to appeal but can be challenged through a motion to review or annul. Pursuant to Article 373 of the CPP, the trial and/or the judgment can be declared null and void:

a. When rights enshrined in the Constitution or international treaties in force in Chile have been substantively violated at any stage of the proceedings or in the judgment; or
b. When an erroneous application of law has substantively affected the outcome.

In addition, in keeping with Article 374, trials and judgments will be declared null and void in cases of serious procedural breaches (including rulings handed down by courts lacking jurisdiction, when the mandatory minimum number of judges is not met, where participants required to be present were absent, where effective defense has been hampered, etc.) Violations of Article 373(a) are heard by the Appellate Court. Violations of Article 373(b) and Article 374 are heard by the Supreme Court.

46. Id. art. 281.
47. Id. arts. 352, 364.
48. Id. art. 370.
49. Id.
50. Id. arts. 364, 372.
II. The Process

The procedure involves three stages: an investigative phase, an intermediate phase and a trial phase.

A. Investigative Phase

This step is administrative in nature and led by the prosecutor rather than the courts. While each institution has its own in-house procedures and court appearances are carefully regulated, the official investigative phase is characterized by a lack of bureaucratic formality and an absence of the rigid structures inherent to the previous system of criminal prosecution. For example, in the past, all court orders had to be processed in writing, via official procedures and channels. Today, instructions can be given over the phone (with a notation made in the case file or other subsequent written confirmation), by fax, email or any other channel the prosecutor deems reliable.

1. Case Initiation: criminal cases can commence via three mechanisms\textsuperscript{52}.

1. Crime report: victims or witnesses of a crime can file a report with either of Chile’s two law enforcement agencies,\textsuperscript{53} Carabineros de Chile (uniformed), Policía de Investigaciones de Chile (plainclothes detective force).

2. Criminal complaint: victims, certain public institutions and, in specific cases, any resident, can file an independent criminal complaint. The complaint is filed and logged at the courthouse and then forwarded by the court to the local prosecutor’s office. The criminal complaint is broadly used by victims of crime who oppose the prosecutor’s decision not to pursue an investigation in their case.

3. At the prosecutor’s initiative (\textit{sua sponte}): prosecutors can order law enforcement to commence an investigation when information comes to their attention that a crime has been committed. This includes cases of \textit{in fraganti} crimes in which an arrest has been made.

\textsuperscript{51} Id. book 2, tit. I.
\textsuperscript{52} Id. art. 172.
\textsuperscript{53} Id. art. 173.
Once a crime has been reported to the OPP, the prosecutor is generally obligated to take measures to determine the events, the identity of participants and so forth within a reasonable timeframe.\textsuperscript{54} However, the law provides for three discretionary case management powers (\textit{alternativas a la investigacion}) that the prosecutor can use to close a case or postpone investigation. This prosecutorial discretion is designed to save resources, reduce congestion in the criminal prosecution system and respond to the principles of legality and objectivity contained in Chile’s primary bodies of law.

The discretionary case management powers are:

a) Opt out (\textit{no iniciar la investigacion}):\textsuperscript{55} the prosecutor may decide not to initiate an investigation when no investigative actions have been undertaken and:
   i) The facts of the case are not criminal in nature, or
   ii) The statue of limitations on the acts has run its course.

In such cases, the prosecutor must justify their decision and seek approval from a Guarantee Judge.

b) Temporary archive (\textit{archivo provisional}):\textsuperscript{56} The prosecutor may decide to archive the case and postpone investigation until further information is available. This option is available to the prosecutor if the initial information provided is insufficient to allow for investigative actions to be conducted and until such a time as the Guarantee Judge becomes involved in a case (for example, if a wire tap order is needed). At that point, the prosecutor’s option precludes. If the crime involved would carry a sentence of over 5 years and 1 day, the decision to archive must be approved by the Regional Prosecutor. Victims can oppose the “temporary archive” by petitioning for the case to be reopened, filing a complaint with the OPP or filing a criminal complaint. In the latter case the OPP is obligated to move forward with the investigation.

c) Streamlined procedures (\textit{principio de oportunidad}):\textsuperscript{57} A prosecutor may choose not to initiate an investigation or abandon an investigation underway when:
   i) The events involved do not gravely compromise the public interest; and
   ii) The potential sentence is below 541 days of prison; and

\textsuperscript{54} See \textit{id.} art. 77.
\textsuperscript{55} Id. art. 168.
\textsuperscript{56} Id. art. 167.
\textsuperscript{57} Id. art. 170.
iii) The crime was not committed by a civil servant in the performance of his/her duties.

In applicable situations, the prosecutor notifies the Guarantee Judge of his/her decision to apply streamlined case management and provides the grounds for such a choice. The Judge then notifies the parties who have 10 days to oppose the decision. Should the judge find that the case the prosecutor is seeking to streamline carries a sentence of over 541 days or involves a civil servant in the performance of his/her duties, the judge can reverse the prosecutor’s decision at his own initiative.\(^58\)

After a second 10-day window for complaint, criminal action expires. Thus, the prosecutor may NOT reopen such a case if additional information surfaces subsequently. This is the primary distinction between the “opt out” and “temporary archive” discretionary powers, as the latter two techniques do allow a prosecutor to reopen a case at a later date.

Lastly, if the prosecutor opens an investigative case file (una carpeta) and later decides that a case is simply not worth pursuing, he/she must close the case pursuant to the regulations on case closure.\(^59\) He/she is precluded from applying prosecutorial discretion for that purpose.

2. Initial appearance or presentment hearing (audiencia de control de detención)\(^60\)

In cases of in fragranti crimes, law enforcement and prosecutors must present the detainee before a Guarantee Judge within 24 hours of the arrest. Failure to do so will lead to the immediate release of the defendant, as will failure to appear by an appropriate representative of the Prosecutors Office (Deputy Prosecutor or Prosecutorial Assistant).

3. Complaint hearing (audiencia de formalización de la investigación)

According to Article 229 of the Criminal Procedures Code, at the complaint hearing the prosecutor communicates to the defendant, in the presence of the Guarantee Judge, that the OPP is currently investigating him/her with regard to one or more specific crimes. The defendant must be present at this hearing. In Spanish, this phase is called formalización de la investigación or “formalization of the investigation.” This stage differs from an arraignment in the typical U.S. procedure in that the defendant does not enter a plea in Chile. Moreover, an admission of guilt by a defendant in Chile (reconocimiento de responsabilidad) at any stage in the pro-

\(^{58}\) Id. This is one of the very limited cases in the new system in which the judge is empowered to take the initiative or order the prosecutor to proceed in a given fashion.

\(^{59}\) Id. art. 248.

\(^{60}\) Id. art. 94.
ceedings does not preclude a trial. It may, however, lead to the use of an alternative procedure (see below).

The “formalization” of the case at the complaint hearing has three major effects:

1. The statute of limitations on the criminal action is suspended;
2. The statutory timeframe for the investigation commences (a maximum of two years); and
3. The prosecutor is barred from using the “temporary archive” discretionary case management tool.

Moreover, at the complaint hearing (or thereafter), the parties can request a series of additional procedural actions, including:

1. Interim measures (relief of assets, pretrial detention, etc.)
2. Alternative dispute resolution measures
3. Judge’s approval of Restitution Agreements
4. Reduction in the time allotted for the investigation
5. Immediate trial
6. Simplified proceeding

4. Alternative dispute resolution mechanisms

During the investigative phase and after the complaint hearing, the prosecutor, public defender, victim and/or criminal complainant can propose the use of non-traditional dispute resolution mechanisms. The new CPP provides for two such mechanisms:

1. Restitution Agreements (acuerdos reparatorios). This option is available only when the case involves a legally-available protected interest of an economic nature (for example, property or assets), minor injury or crimes of negligence (including negligent homicide).
2. Deferred adjudication or “temporary suspension of the proceeding”

61. *Id.* art. 233.
62. The statute is suspended, but not interrupted. In other words, the time remaining in the statute of limitations resumes if the prosecution subsequently decides not to proceed with the case.
63. *Id.* art. 232.
64. *Id.* art. 245.
65. *Id.* art. 241.
66. *Id.* art. 235.
67. *Id.* art. 390.
68. *Id.* book 2, tit. 1 ¶ 6.
69. *Id.* art. 241.
Adjudication can be deferred for first-time offenders for a period of between one and three years as long as the time to be served, were the defendant to be convicted, is under three years. The case will return to court for prosecution if the defendant is charged with a new crime during the period of the suspension or otherwise violates the conditions of the deferral.

5. Close of the investigation

The OPP can close a case at any time during the investigative phase (capped by law at two years) by communicating this intent to the Guarantee Judge. Within 10 days of that communication, the prosecutor may take one of three actions (Article 248):

1. Desist (decisión de no perseverar en el procedimiento) because of a lack of evidence on which to base an accusation. In this case, the Guarantee Judge orders any existing interim measures lifted and the statute of limitations continues its course normally.

2. Request that the case be dismissed with (sobreseimiento temporal) or without prejudice (sobreseimiento definitivo). In the latter case, the defense can oppose the prosecutor’s request and ask the judge to order the case dismissed with prejudice.

3. Petition for dismissal with prejudice: Pursuant to Article 250 of the CPP, the Guarantee Judge grants such dismissal when clearly: a) no crime was committed; b) the defendant did not commit the crime; c) there are extenuating circumstances (mental illness, for example); d) criminal liability has been exhausted (time-barred); e) when an event has subsequently transpired that precluded criminal responsibility; f) the matter has already been tried (res judicata). The Guarantee Judge may not, however, order dismissal with prejudice when international treaties prohibit a crime from being subject to a statute of limitations or amnesty.

4. Petition for dismissal without prejudice: Pursuant to Article 252 of the CPP, the Guarantee Judge orders dismissal without prejudice when: a) after committing the crime, the defendant became mentally deranged; b) when the defendant fails to appear and is declared in contempt; c) when a civil matter needs to be decided before the criminal case can be heard (for example, determining family ties to decide whether a homicide is aggravated on the grounds of those ties). Dismissal without prejudice puts a stay on the proceeding. The Guarantee Judge can reopen the case at the request of any of the parties when the obstacle to proceeding has been removed.
3. File a formal accusation: should the prosecutor decide to press charges, he or she may do so in writing or orally in a special hearing before the Guarantee Judge. Criminal complainants may “adhere” to the charging instrument. At this point, the Judge will set a date for a pretrial conference.

6. The accusation

The charging instrument or statement must contain:

1. The identity of the defendant(s) and defense counsel;
2. A description of the facts of the case and their legal attributes;
3. A description of any mitigating factors involved in the case;
4. The form of participation in the events the defendant is charged with;
5. A description of applicable legal principles;
6. An outline of the evidence the OPP intends to present at trial including, as a general rule, a list of witnesses (if applicable);
7. The sentence requested; and
8. When applicable, a petition to proceed using the Abbreviated Procedure (this is the last chance for such a request).

The accusation may only refer to those events and individuals included in the original complaint, although the legal attributes may be different (for example, the complaint described the events as a homicide and the accusation describes the same events as negligent homicide).

It is important to note, however, that should the prosecutor opt not to press charges at this stage (no perseverar), the attorneys for a criminal complainant may file a private accusation (assuming they have been present throughout the process pursuant to the corresponding provisions of law). In this case, as mentioned above, preparations for trial would move forward without the presence of the public prosecutor.

B. Intermediate Phase

The fundamental component of the intermediate phase is the pretrial conference on discovery and motions before the Guarantee Judge. Within 24 hours of the presentation of the charging instrument by the prosecutor, the Guarantee Judge issues an order for a pretrial conference to be held in the subsequent 25 to 35 days.

76. Id. art. 93(f).
77. Id. art. 259.
78. Id. art. 259.
79. Id. art. 258.
80. Id. art. 260.
Although the pretrial conference is the last opportunity for alternative dispute mechanisms and other trial-averting procedures, as in the U.S. system, this hearing focuses primarily on evidentiary exclusion and in general seeks to pave the way for the trial to proceed uninterrupted by ancillary matters or issues of procedure. U.S.-trained attorneys are likely to find Chile’s rules of evidence and stipulations quite familiar, with arguments centered on such issues as fruit of the poisonous tree and other admissibility doctrines. Perhaps the greatest difference is that Chile does not have a separate code of evidence (although this author believes that one is very much needed) and provisions are found primarily in the CPP and, alternately, in other bodies of law.

The result of the pretrial conference is a summary of the case containing: a description of the charges, requested penalty, any stipulations the parties may agree to and a list of evidence to be submitted, including the names of witnesses and the subject matters they will testify to (but not the content of that testimony). As noted above, this document is known as an auto de apertura de juicio oral and is the only information on the case the trial court judges will receive.

C. Trial Phase

The trial is conducted before a panel of three judges sitting on an Oral Criminal Trial Court. A clerk calls the court to order, the judges enter and after a series of administrative procedures (including verifying the identity of the defendant and the reading of the charges), the attorneys proceed with opening remarks.

In general, the trial structure is very similar to that of any U.S. court, with the prosecutor calling his/her witnesses first, cross-examination by the defense, followed by the defense witnesses and cross-examination by the prosecutor and, finally, closing arguments. Perhaps the biggest variations come in the use of objections, the right to rebuttal and the right of judges to pose questions to witnesses to “clarify” the information received on direct and cross examination of evidence.

Unlike the old system, which used a highly regulated system of evidence (prueba tasada), the CPP specifically calls for a system of “free” or unregulated evidence (libertad de prueba). In essence, this means that any evidence declared admissible at the pretrial conference can be presented. The judges assess the value of each witness or expert’s testimony and present that assessment in the ruling. Thus,
statements inadmissible in most U.S. courts under hearsay restrictions are allowed in Chilean courtrooms.

As a general rule, only evidence submitted via oral testimony will be considered by judges, with written documents serving solely to support those statements. For example, a police officer will have to testify as to the contents of a police report in order for that evidence to be included in the record. The report itself is not sufficient.

Chile does not currently have a transcription service available in its courtrooms. Instead, audio of all hearings is recorded and kept in an electronic file. Copies are made available to participants and may be cited during appellate proceedings.

Immediately after closing arguments, the judges deliberate before announcing an acquittal or conviction. If the trial has run over two days or has been particularly complex, judges may defer the announcement of their decision for up to 24 hours. If the defendant is found guilty, petitions for clemency are heard, a date is set for sentencing (generally within five days) and the defendant is remanded (when applicable).

The ruling itself, containing, a review of the facts and circumstances of the case, all the evidence presented, the legal and theoretical grounds for the decision, is drafted by one of the judges who heard the case. A summary of this decision is read at the sentencing hearing in open court.

III. Sentencing Parameters

Chile’s sentencing system includes a set of mandatory parameters (as opposed to guidelines), supplemented by discretionary assessment of aggravating and mitigating circumstances. Thus, although the prosecutor or criminal complainant may request a given amount of prison time within the mandatory range, the judges may increase or diminish the sentence based on their reading of the legal grounds for the case.

89. One major exception is the result of drug tests performed to ascertain the purity of substances seized by law enforcement. By special provision of law, these results are admissible even if the technician who performed them does not testify in open court.
90. Id. art. 329.
91. Id. art. 334.
92. Id. art. 41.
93. Id. art. 339.
94. Id. art. 343.
95. Id.
96. Id. art. 344.
97. Id. art. 342.
98. Id. art. 346.
**CHILE’S JUSTICE SYSTEM**

Crimes are classified as “serious”, “less serious” and minor or “misdemeanors,” with each classification in turn broken down into three “degrees” (grados) or levels:

1. The most serious crimes carry a sentence of life in prison (without parole), which replaced the death penalty some years ago.
2. Other serious crimes (crímenes) carry sentences of between 5 years and 1 day to 20 years of prison.
3. Other somewhat less serious crimes (simples delitos) carry sentences of between 61 days and 5 years of prison time.
4. Other minor crimes and certain misdemeanors (faltas penales) carry sentences of between 1 and 60 days of incarceration.

The system can be summarized as follows:

<table>
<thead>
<tr>
<th>Type of crime</th>
<th>Total Time</th>
<th>Lower End</th>
<th>Mid Range</th>
<th>Upper End</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious</td>
<td>5 years+1 day to 20 years</td>
<td>5 years+1 day to 10 years</td>
<td>10 years+1 day to 15 years</td>
<td>15 years+1 day to 20 years</td>
</tr>
<tr>
<td>Less Serious</td>
<td>61 days to 5 years</td>
<td>61 to 540 days</td>
<td>541 days to 3 years</td>
<td>3 years+1 day to 5 years</td>
</tr>
<tr>
<td>Minor/Misdemeanor</td>
<td>1 to 60 days</td>
<td>1 to 20 days</td>
<td>21 to 40 days</td>
<td>41 to 60 days</td>
</tr>
</tbody>
</table>

Supplementary sentences include suspension from public service, bans on exercising certain professions, fines, etc.

**IV. STATUTE OF LIMITATIONS**

The responsibility of the accused expires when he passes away, has served his sentence, receives amnesty or pardon, or the forgiveness of the victim (the latter only for so-called “private action” crimes or when the statute of limitations has run its course (Article 93, Criminal Code).

In Chile, the statute can expire for either criminal action (acción penal) or the sentence (pena).

The statutory period for criminal action begins to run on the date on which the offense was committed. It is notable that if two and one half years or more have

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99. Codigo Penal [Criminal Code], art. 21 (Chile) (hereafter CP).
100. See id. art. 56.
101. Id. art. 22-23.
102. Id. book 1, tit. IV.
103. See, supra note 6.
104. CP, art. 95.
elapsed between the date of the commission of the offense and the date on which the investigation began, the sanction is mitigated under certain circumstances.\(^{105}\)

The statutory period is interrupted when a person commits another crime or misdemeanor (interruption causes a new statutory period to run all over again).\(^{106}\) Further, Article 100 of the Criminal Code provides that for any period the offender spends abroad during the running of the statute of limitations, such period extends the initial limitations period one day for every day spent abroad to a maximum of five years.

Special limitations are applicable for certain crimes (such as sex offenses), but as a general rule the statute will lapse and crimes will no longer be actionable after:\(^{107}\)

a) 15 years of the offense for the most serious crimes.

b) 10 years for other serious crimes.

c) 5 years for less serious crimes.

d) 6 months for minor crimes and certain misdemeanors.

Sentences also expire within these timeframes, starting on the date of the conviction or breach (if the defendant had started serving her sentence).\(^{108}\)

V. MUTUAL LEGAL ASSISTANCE

Although Chile does not have a single entity responsible for international mutual assistance in criminal matters, requests have traditionally been received through diplomatic channels, that is via the Ministry of Foreign Affairs (MFA) or central authorities as designated in international treaties. From the FMA, they are dispatched to the competent authority on a case-by-case basis. Currently, however, requests for some forms of assistance (information and other aspects under prosecutorial purview) can also be addressed directly to the OPP. The catch is that if the assistance requested involves activities prior to the roll-out of the new procedures in Santiago (2005), the OPP may have to remit the petition to the MFA for processing.

If the matter involves a request for action by a court, the petition should be addressed to the MFA and not the OPP (the MFA forwards the petition to the Supreme Court which, in turn, sends it to the appropriate court of first instance). If the request is based on an international treaty in which a Central Authority is designated, it should be addressed directly to that authority. In the absence of a treaty, the principles of reciprocity and international cooperation apply. That said, it is important to note that under the old procedural system the Supreme Court has been known to reject letters rogatory for assistance in the absence of a treaty when the request is for enforcement measures.

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105. *Id.* arts. 96, 103.
106. *Id.* art. 96.
107. *Id.* art. 94.
108. *Id.* art. 97.
VI. Extradition

Pursuant to Article 440, requests for passive extradition must be addressed to the Ministry of Foreign Affairs which then forwards them to the Supreme Court. The MFA acts solely as official conduit. The decision on the granting or refusal of the extradition falls to a Justice of the Supreme Court, in the first instance, and to a tribunal of the Supreme Court upon appeal or motion of annulment.\textsuperscript{109}

Should the requesting state fail to appoint other representation, the OPP is responsible for representing the interests of the petitioner\textsuperscript{110} in all cases involving events after June 16, 2005. The OPP is required by law to respect the principle of objectivity and must ensure proper application of the law and bring to light all evidence, even if doing so is disadvantageous to the petitioner.

A treaty is not required for extradition to be granted. Domestic legislation\textsuperscript{111} only requires that the individual requested be in Chile and be charged with a crime punishable by at least one year of imprisonment (or has been sentenced to that) in the petitioning nation. Moreover, Chile does not have a Constitutional or legal statute that impedes the extradition of its citizens. Rather, the law\textsuperscript{112} sets forth that extradition shall be granted if:

1. The identity of the person requested is proven.
2. The crime for which extradition is petitioned is eligible for such proceedings pursuant to treaties or, in the absence of those, is in keeping with the principles of international law.
3. The background information on the proceedings suggests that in Chile the defendant would be charged as a result of the events alleged against him. In other words, documentation must be submitted to provide sufficient basis for the prosecution of the defendant in Chile had the crime been committed there.

Although domestic law does not contain grounds for refusal, such reasons can be found in international treaties ratified by Chile and generally acknowledged principles of international law. Supreme Court case law has recognized, among others, the contents of the Code on Private International Law, known as the “Bustamante Code” and the Montevideo Convention on Extradition as illustrative of those principles. Thus, petitions may be refused if they:\textsuperscript{113}

1. Lack double incrimination. That is, when the events the individual subject to extradition is accused of fail to constitute a crime in the petitioned country.

\textsuperscript{109} CPP, arts. 441, 450.
\textsuperscript{110} \textit{Id.} art. 443.
\textsuperscript{111} \textit{Id.} art. 440.
\textsuperscript{112} \textit{Id.} art. 449.
2. Are grounded in political or related crimes. The exception is the assassination of the Head of State or any other person in a position of authority. Terrorism is treated as a common crime in Chile rather than a political crime.

3. Intend to secure the defendant’s appearance before an Ad Hoc tribunal.

4. Involve crimes of exclusively military jurisdiction.

5. Involve crimes not currently subject to prosecution in the petitioning or the petitioned State because of amnesty, pardon, or lapse of the statute of limitations.

6. Involve a person tried and acquitted, convicted and who served that time, or if there is a trial pending against said individual in the petitioned State for the same events upon which the extradition request is grounded.