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Role of the Guarantee Judge in the Investigation in the Criminal Procedural Systems of Chile, Uruguay, and the Federal Argentine System

Rol del Juez de Garantías en la fase de Investigación de los sistemas procesales penales de Chile, Uruguay y Argentina Federal

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Abstract

The role of the judiciary in Latin American criminal procedural systems has been significantly modified with the transition from inquisitorial or mixed models to accusatorial and adversarial models. This shift has allowed for a focus of judicial work on protecting rights and guarantees in the investigative and intermediate phases and on adjudication during the trial phase. However, these new roles require criteria and standards to precisely delineate the tribunals' actions within the context of a tripartite criminal procedural system that allocates highly differentiated functions and tasks among prosecutors, defense, and the judiciary.

Keywords: *Guarantee Judge; Role of Guarantee Tribunals; Powers; Criterion; Standard; Protection of Guarantees; Control Ex officio*

Resumen

El rol de la judicatura en los sistemas procesales penales latinoamericanos se ha modificado sensiblemente con la transición desde modelos inquisitivos o mixtos a modelos de corte acusatorio y adversarial. Ello ha permitido una focalización de la labor jurisdiccional en la protección de derechos y garantías en la fase de investigación e intermedia y en lo adjudicatario en la fase de juicio. Estos nuevos roles demandan, sin embargo, criterios y estándares para delimitar con precisión la actuación de los tribunales en el contexto de un sistema procesal penal tripartito que asigna funciones y tareas muy diferenciadas entre fiscales, defensa y poder judicial.

Palabras claves: *Juez de Garantía; Tribunal de Garantías Rol; Funciones; Criterio; Estándar; Cautela de Garantías. Control de Oficio*

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I. INTRODUCTION

The implementation of accusatorial criminal prosecution and judgement systems, in some cases featuring evident adversarial characteristics, replacing mixed or reformed inquisitorial systems in various Latin American countries since the 1980s, has entailed a redefinition of roles and functions within the criminal justice system operators. The most significant of these adjustments involves the substantive separation of tasks and roles between investigation and prosecution on one hand and the protection of rights and adjudication or judgment on the other.[1] These now differentiated and separated roles and tasks were assigned in the old procedural models to judges —under the inquisitorial model[2]— or were assigned to prosecutors under the oversight of judicial bodies —within the mixed or reformed inquisitorial model[3]—.

Judges are tasked, on one hand, with safeguarding the rights and guarantees of all subjects involved in a criminal process,[4] and furthermore, with adjudicating the case in a trial setting when necessary[5]. In this latter scenario, it should be noted that some countries in the region have moved towards implementing jury systems during the trial phase, as seen in several Argentine provinces.[6] This debate is just starting in the cases of Uruguay and Chile.

This separation of tasks and roles has allowed for better control of rights and guarantees[7] during the investigative phase of criminal proceedings,[8] enabling the establishment of objectively impartial judges within the system as well as introducing jurisdictional actors tasked with scrutinizing requests or decisions made by criminal prosecution bodies in a focused, specialized, and more effective manner.[9] This allows requests and discussions concerning personal precautionary measures, confidentiality of investigations, extension of investigation deadlines, access to investigation records, among others, to be decided within a framework of increased oversight.[10]

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[1] TAVOLARI (2005), p. 271

[2] In the Chilean case, the inquisitorial system was characterized by a single judge who investigated, accused, and adjudicated cases. This model persisted until the year 2000 when a gradual implementation of an adversarial accusatorial system began by region, fully established by 2005. However, despite this, the inquisitorial system remains in force for cases involving events that occurred before the year 2000 and for Human Rights cases, as per the legislator's agreement at the time.

[3] This model existed in Uruguay until 2014, and in Argentina, it still persists in some provinces and in the federal system, with the exception of the provinces of Salta and Jujuy, which have already implemented the accusatorial system, soon to be implemented in the provinces of Mendoza and Rosario.

[4] GONZÁLEZ POSTIGO (2021), p. 32.

[5] HORVITZ (2002), p. 198.

[6] Provinces of Buenos Aires, Neuquén, San Juan, Chaco, Mendoza, Río Negro, Entre Ríos and Chubut, Catamarca and Ciudad Autónoma de Buenos Aires. Likewise, Brazil and some countries from Central America have trials by jury for the adjudication of serious criminal cases.

[7] DUCE (2016), pp. 60ff.

[8] Jorge Sáez specifies that the precautionary role of the judge of guarantees unfolds across five stages or moments: the investigative phase, resolution concerning alternative resolutions to trial, intermediate phase, trial phase, and execution phase. SÁEZ (2013), p. 4

[9] See article 9 CPPArg.

[10] GALLARDO (2020), pp. 7-10.

Additionally, in most accusatorial criminal procedural systems, orality was introduced as the foundation for debate, replacing the classic written model of case files with hearings, thus allowing for the effective enforcement of the principles of immediacy, concentration, and contradiction. The establishment of oral and public hearings[11] is the material basis to enable and promote the confrontation between opposing parties with conflicting interests and differentiated roles. It also serves as the space where they can substantiate their positions and challenge each other's arguments.[12]

This logic of contradiction, proper of the adversarial accusatorial system, allows for the identification of arguments and justifications that aid the judicial body tasked with resolving the dispute,[13] thus improving its decision-making and the grounds upon which it stands.[14] Indeed, the adversarial nature of the hearing stands as one of the most efficient and effective mechanisms to enhance the quality of information upon which the judges presiding over guarantee or oversight functions must base their decisions.[15]

The oversight task regarding guarantees entrusted to judicial bodies finds its foundation in the dynamics and separation of tasks inherent to the accusatorial system, as well as in explicit rules outlined in the new criminal procedural codes.[16]

In the case of Chile, we first encounter the provision of Article 83 of the Political Constitution, which specifies that investigative actions by the prosecutor's office ["fiscalía"] that affect rights require prior judicial authorization. In turn, within the Chilean Criminal Procedural Code ["*Código Procesal Penal de Chile*", onwards, CPPChi], several articles highlight the precautionary function of the judges responsible for ensuring guarantees. In this way, we find firstly Article 9,[17] which specifies that any action by the Prosecution ["*Ministerio Público*"] that involves the infringement of rights and guarantees will require prior approval from a judicial body. Then, Article 10[18] states in a broad manner the duty of the judge to intervene, upon request or *ex officio*, when the defendant cannot exercise the rights and guarantees granted by law, the Constitution, or international treaties. This rule is not explicitly

[11] See article 111 CPPArg.
[12] BLANCO (2022), pp. 110ff.
[13] GUZMÁN (2006), p. 183.
[14] GONZÁLEZ POSTIGO (2021), pp. 80ff.
[15] BLANCO (2022), pp. 110ff.
[16] See arts. 10 of the CPPChi, 14.1 CPPUru, 9 and 56 CPPArg.
[17] Art. 9 CPPChi: "Prior Judicial Authorization. Any action in the procedure that deprives the accused or a third party of exercising the rights ensured by the Constitution, or limits or disturbs them, will require prior judicial authorization" (journal transl.).
[18] Art. 10 CPPChi: "Precautionary Measures for Guarantees. At any stage of the procedure, when the Guarantee Judge deems that the defendant is unable to exercise the rights granted by the judicial guarantees established in the Political Constitution, laws, or international treaties ratified by Chile and in force, they shall, *ex officio* or upon request, take the necessary measures to enable such exercise.

If those measures are insufficient to prevent a substantial affectation of the defendant's rights, the judge shall order the procedure's suspension for the shortest possible time and summon the involved parties to a hearing, to which those who attend shall participate. Based on the gathered information and the arguments presented during this hearing, the judge will decide whether to continue the procedure or to temporarily dismiss it.

However, it shall not be understood that there is a substantial affectation of the defendant's rights when it is proven, by the Prosecution or the complainant attorney, that the suspension of the procedure requested by the defendant, or his attorney is solely intended to delay the process" (journal transl.).

established in the Criminal Procedural Code of Uruguay ["*Código Procesal Penal de Uruguay*", onwards, CPPUru], notwithstanding the provision in Article 23 of the Political Constitution of Uruguay, which assigns roles to judges for the protection of rights.[19] The Federal Criminal Procedural Code of Argentina ["*Código Procesal Penal Federal*", onwards, CPPArg] does not establish an explicit rule for the precaution of guarantees, but this role is somewhat indicated in its Articles 56, 129, and 232 by identifying the critical role of these courts. Some Provincial Codes, such as the Criminal Procedural Code of Tucuman ["*Código Procesal Penal de Tucumán*"], indirectly address this in Article 143 sec. 1°, stating that "it is the duty of the Judge to oversee compliance with constitutional principles and guarantees."

This role of jurisdictional bodies must at times be performed proactively and not solely reactively or upon request from the defense. This is a crucial point to clarify because it is reflected in formal aspects such as guiding and managing hearings,[20] but it also manifests in substantive matters that require proactive action by these same judges, as evidenced in the rule of Article 10 CPPChi just mentioned.

It's evidently not a matter of the tribunal replacing the role of the prosecutor or the defense, but rather distinguishing roles and focusing the function of judges on monitoring potential infringements of rights. At this point, the judiciary responsible with enforcing guarantees will inevitably be obliged to balance the extremes inherent in the tension between the efficiency and effectiveness of the criminal prosecution and the adequate and necessary protection of due process guarantees.[21] This, in turn, will require specifying the criteria or standards according to which conflicting requests are resolved, creating clearer guidelines for operators to adapt their future actions and arguments.

The precautionary function, in turn, has two different ways of being fulfilled: either *ex officio* or upon request from one of the parties.

II. ROLE OF PROTECTING RIGHTS AND GUARANTEES OF THE JUDGE DURING THE INVESTIGATION PHASE. PRECAUTIONARY FUNCTIONS IN FAVOR OF THE DEFENDANT.

In the following sections, we will review a selection of topics or scenarios requiring necessary intervention by the guarantee judiciary ["*judicatura de garantías*"], identifying cases where the proactive or *ex officio* role of judges is necessary and justified, in favor of the defendant, and other instances where this will occur upon the request of the interested party.

1. Cases Related to the Duration of Criminal Investigations.

This is a matter that naturally concerns judicial bodies in criminal procedural matters,[22] as the duration of criminal investigations is directly related to a central guarantee for the defendant, which is the timely or reasonable trial or without undue delays.[23]

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[19] Art. 23 CPR Uruguay: "All judges are accountable under the law, for the smallest infringement against people's rights, as well as for deviating from the established procedural order therein" (journal transl.).
[20] GONZÁLEZ POSTIGO (2021), p. 93.
[21] DUCE & RIEGO (2002), pp. 218ff.
[22] RIEGO (2018), pp. 48-49.
[23] This guarantee is explicitly established in the American Convention on Human Rights, art. 7.5: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings..." This guarantee is also contemplated in article 9 number 3 of the International Covenant on Civil and Political Rights.

1.1.- The guarantee of a trial without delays or within a timely or reasonable period is, in turn, related to three distinct aspects:[24]

1.1.1.- The duration of the investigation period in general, as part of due process and linked to Article 8.1 of the American Convention on Human Rights (ACHR).[25]

1.1.2.- The duration of an investigation in cases where a person is subject to a personal precautionary measure, due to a greater impact on the rights and guarantees of the defendant. In these cases, as Professor López[26] reminds us, the guarantee of Article 7.5 of the ACHR operates in a specific manner.

1.1.3.- The duration of the trial as the adjudication phase.

These three aspects or links also have distinct precautionary control mechanisms.

Indeed, the duration of the investigation, in general, is closely monitored by the judicial body during the formalization of the investigation[27] and in relation to its complexity.

In turn, the duration of an investigation with a requested and decreed precautionary measure is overseen by the guarantee or oversight tribunal ["*tribunal de garantías o control*"], associating, as far as possible, the adoption of the precautionary measure with a debate on the reasonableness of the necessary investigation period requested by the prosecutor's office. Likewise, it is monitored through constant checks on the persistence of the reasons that justified the personal precautionary measure, as individuals who are accused or charged have the right to ensure that investigations and trials proceed without resulting in the infringement of their freedom[28] or other rights or guarantees. In this same vein, the Inter-American Commission on Human Rights has asserted, through a report, that Article 7.5 of the ACHR is based on the premise that "no person should be punished without a prior trial which includes the presentation of charges, the opportunity to defend oneself, and a sentence. All these stages must be completed within a reasonable time. The time limit is intended to protect the accused with respect to his or her fundamental right to personal liberty, as well as the accused's personal security against being the object of an unjustified procedural risk."[29]

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[24] As indicated by Professor López, "The Inter-American Court, following the European Court, has used what it calls the 'overall assessment of the procedure' to determine the reasonableness of the period. This implies that it is not a guarantee that applies only to the trial stage but to the entirety of the procedure" (journal transl.). HORVITZ & LÓPEZ (2002), p. 75.

[29] Art 8.1 ACHR: "Every person has the right to a hearing with due guarantees and within a reasonable time by a competent, independent, and impartial tribunal, previously established by law...".

[26] HORVITZ & LÓPEZ (2002), p. 73.

[27] In most Latin American criminal procedural legislations, there are no systems for controlling the duration of investigations before their formalization. In these instances, only the statute of limitations for the specific offense ["*prescripción de la acción penal*"] applies, along with mechanisms like pre-investigation judicial control as contemplated in the legislations of Chile (art. 186) and Uruguay (art. 264, final section). In Argentina's criminal procedural legislation, art. 253 of the CPP establishes a maximum duration period for not-formalized investigations when the prosecutor's office is aware of the perpetrator and notifies him of the ongoing investigation. In such cases, the period is 90 days, extendable by another 90 days for formalizing the investigation.

[28] This is one of the reasons behind the right to a speedy trial in the American system. *Smith v. Hooey* (1969).

[29] *Gimenez v. Argentina* (1996).

In the case of the trial period, guarantee or control judges ["*jueces y juezas de garantía o control*"] possess fundamental tools to prevent trials from unduly prolonging. Here, rules of admissibility of evidence[30] emerge to ensure a genuine control of probative relevance, avoiding the introduction of evidence presented for dilatory purposes, or as excessive, or aiming to establish public and notorious facts, among others. The duration of the trial is also monitored through tools such as evidentiary agreements or proof conventions that guarantee judges can encourage or state, although without the power to impose their judgment on the parties.

The guarantee of timely trial is also linked to the guarantee of due process[31] and the right to be presumed innocent. In fact, the presumption of innocence has unequivocal manifestations in the rule of treatment and the burden of proof; however, it is also related to the necessity of clarifying within a reasonable time the status of being a defendant or charged individual, and the subsequent accusation made against the passive subject of state prosecution. Put differently, the defendant has the right for the facts constituting the formalization ["formalización"] or subsequent accusation to be clarified in a timely manner because such investigations directly impact his or her presumption of innocence, which brings negative effects in social and personal terms.[32]

1.2.- Criteria for Determining the Reasonableness of the Investigation Period

In some legal codes, the determination of the investigation period and the standards or criteria to determine it are expressly regulated. This is the case in the CPPChi, which establishes in Article 234 that the judge, on their initiative or upon a party's request, can set an investigation period during the formalization hearing to safeguard the guarantees of the involved parties, as far as the characteristics of the investigation allow. This rule outlines the criteria associated with determining the time period for carrying out the investigation, which are the affected guarantees on one hand and the complexity of the investigations on the other.[33]

In the case of the CPPUru, Article 10 stands out, explicitly stating that every person has the right to be tried within a reasonable period, entrusting the tribunal with the role of taking measures for its proper preservation. And related to the guarantee of a reasonable period is Article 265, which establishes a maximum duration for the investigation, specifying that it cannot exceed one year from the formalization. The prosecutor's office can exceptionally and justifiably request extensions from the tribunal, not surpassing one additional year.

It should be remembered, in any case, that these deadlines are established in favor of the defendant and not the State, thus they can indeed be reduced or monitored by the Guarantee Judge at any point in the process, not solely when there is a request from the prosecutor's office to extend the deadline. Consequently, the defense can, following the formalization of the investigation and in connection with Article 266.6 letter d) CPPUru, request a reduction of the maximum legal period established by the rule, in accordance with the guarantee of a timely trial. Furthermore, during the same hearing of formalization of the investigation and subsequent to it, the defense can urge the tribunal, or the tribunal can *ex*

[30] The exclusion of evidence due to overabundance, dilatory purposes, evidence of public and notorious facts, exclusion of irrelevant evidence, or the exercise of powers to motivate agreements regarding evidence.

[31] LÓPEZ & HORVITZ (2002), p. 72.

[32] In this same vein, the United States Supreme Court reasons, acknowledging that part of the guarantee of a speedy trial refers to "minimize anxiety and concern accompanying public accusation." *Smith v. Hooey* (1969).

[33] LÓPEZ & HORVITZ (2002), p. 545.

officio,[34] determine the precise duration of the investigation based on the characteristics of the case and the arguments and evidence presented by the parties. What the rule does not establish, however, unlike the CPPChi, relates to the criteria for determining the reasonableness of the period. Nevertheless, these criteria should be associated with the following elements:[35]

1.2.1.- Complexity of the investigation. In these cases, the following variables should be considered:

1.2.1.1.- The number of witnesses to be examined, their location and the difficulties involved in summoning and finding them.

1.2.1.2.- The need to conduct expert examinations in a case and the time and complexity involved.

1.2.1.3.- The number of offenses under investigation and the quantity of defendants linked within the same case.

1.2.1.4.- The need to obtain information involving investigative actions abroad and working relationships with state agencies of other countries. This is an issue that arises in transnational criminality.

1.2.2.- While the determination of the period is typically related to the time needs presented and argued by the prosecutor's office, it is no less true that in some cases, the dilemma facing the Guarantee Tribunal will relate to the time needs invoked by the defense to present exculpatory evidence. In these instances, the affected guarantee is not related to the timely trial period but rather concerns the defendant's legal defense and her need for time to present background information or evidence to refute the charges and seek her own evidence or request investigations from the prosecutor's office.

1.3.- Affected guarantees and the level of their impact.

The determination of the period also depends on the procedural situation of the defendant, as a case where the person under investigation is subject to preventive custody ["*prisión preventiva*"] is not comparable to one where the person remains subject to a prohibition to leave the country ["*arraigo nacional*"]. Beyond the difference in the standards that may need to be demonstrated concerning the factual basis and the necessity of caution regarding precautionary measures of different intensities, it is evident that the reasonableness of the period will be analyzed with more flexible criteria when the precautionary measure implies a lesser infringement of the defendant's rights. This is inherent in the application of proportionality criteria.

1.4.- The conduct of the accused and their defense in the case.

In fact, unwarranted delaying actions by the defense such as absence in certain hearings, requests for extensions in others, or motions causing delays in the investigation can also be taken into account by the Guarantee Judge.

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[34] BLANCO *et al.* (2005), p. 84.

[35] These elements should be regarded as valid for all the analyzed procedural legislations. See *König v. Germany* (1980) of the European Court of Human Rights and *Genie Lacayo v. Nicaragua* (1997) of the Inter-American Court of Human Rights.

In the case of the CPPArg, rules related to the reasonable time period are found in Articles 18, 119, and 265 of the Code. Article 18 establishes the reasonable period as a guarantee or right of the defendant, Article 119 sets the maximum time limits for the duration of the process, and Article 265 sets a specific maximum period from the formalization of the investigation. In addition to these articles, Article 253 of the Code regulates a hypothesis of a time limit for not-formalized investigations, which the Codes of Chile and Uruguay do not contemplate. In the Argentine case, Article 256 establishes the right of the accused to request limiting the maximum investigation period once the case has been formalized, which is equivalent to the provision mentioned in Article 234 of the CPPChi and an expression of the guarantee of the reasonable period.

2. Case of Necessary Investigative Measures Arbitrarily Dismissed by the Prosecutor's Office Affecting the Right to Defense.

This second case or hypothesis of the tribunal's intervention relates to another guarantee, which is the right to defense, specifically obtaining exculpatory evidence, while also being linked to the potential violation of the prosecutor's office's objectivity principle.

A first approach suggests that these sorts of issues should fall solely within the scope and concern of the Prosecution itself,[36] and, although this is partly true, as it's primarily the responsibility of the prosecutor's office to act in line with principles of accountability and objectivity,[37] it is no less true that the violation of these guarantees implies or should imply an intervention by the Guarantee Tribunal to prevent infringements on procedural prerogatives that impact the presumption of innocence or the effective exercise of the right to defense.

What this is about is enabling, at the request of the affected party, especially the defense, to lodge a complaint before the Guarantee Tribunal in cases where the prosecutor's office arbitrarily and without basis dismisses lines of investigation or specific investigative actions that could reasonably generate pertinent and valuable information to discredit the charges or accusations, or to demonstrate elements that mitigate criminal responsibility.

In the case of the Chilean criminal procedural system, this procedural attribution is granted to the defense, the victim, and the complainant ["*querellante*"] at the closure of the investigation, without hindering its earlier request or use.[38] The CPPUru establishes a similar rule in Article 260, allowing the defendant and the victim to challenge before the judicial body the prosecutor's refusal to conduct precise, relevant, and useful investigative actions. In the CPPArg, Article 260 also provides for the possibility of the defense requesting investigative procedures from the Prosecution and appealing to the judge in case of refusal. This rule is more restrictive than the equivalent norm in Chile or Uruguay, as it allows the request for investigative procedures only in two specific cases, namely, when these procedures risk being frustrated if not performed at that time or when they are necessary for resolving a personal precautionary measure.

The notion of requesting investigative procedures from the prosecutor's office by the involved parties requires establishing judicial criteria to prevent harming the tribunal's impartiality or encroaching

[36] Mechanisms for complaints and review must be established within the prosecutor's offices for the actions or omissions of the prosecutors in charge of investigations that imply arbitrary, biased, or tunnel-visioned criminal directions or lack the required objectivity or independence.

[37] Art. 3 Organization Act of the Prosecution ["Ley Orgánica Constitucional del Ministerio Público"] of Chile.

[38] See art. 257 CPPChi.

upon the exclusive powers of the Prosecution. In this sense, the following lines or guidelines can be identified to establish legitimate areas of judicial intervention:

2.1.- The Guarantee Tribunal cannot and should not assess the criminal-policy merit of the investigative lines decided by the Prosecution.

2.2.- The Guarantee Tribunal shall not give instructions to the police related to actions regarding specific investigations.

2.3.- The tribunal must establish its stance on investigation requests by the defense in bilateral hearing[39] contexts to enable the prosecutor's office to explain the reasons for discarding a specific line of investigation.

2.4.- It may also be reasonable, before setting a trial hearing, to verify that the defense has exhausted the instances of administrative complaint with the Prosecution itself.

2.5.- The intervention of the tribunal should be considered as a last resort ["*ultima ratio*"] and only in cases where the arbitrariness of the prosecutor's office in denying investigative actions is evident. This implies that the defense needs to present reasonable and plausible arguments regarding the necessity to direct the investigation toward specific supplementary lines or to carry out a specific investigative action to obtain information relevant to discrediting or mitigating the defendant's responsibility.

2.6.- The tribunal, before determining its definitive position, must verify if the defense is capable of independently carrying out the action requested to the prosecutor's office, as in this latter case, it is reasonable to consider it as part of the defense's autonomous investigative actions.

To determine the extent of the defense's autonomy, the tribunal must verify whether the information is accessible to the defense independently of the actions of the prosecutor's office.[40] Another determining criterion is the financial impossibility of the defense to conduct the investigative procedure, such as in the case of a specific expert examination. In this latter scenario, the defense must also address other arguments and standards, such as the proportionality of the investigative measure, its strict necessity, the significance of the affected legal interest, among others.

2.7.- It might be reasonable to dismiss requests that were previously approved or authorized but couldn't be carried out due to negligence on the part of the requesting party, or generally due to actions attributable to the requester.[41]

2.8.- The tribunal shall discard investigative procedures requested from the prosecutor's office by other involved parties when these are requested solely and evidently for the purpose of delaying the investigations.

3. Case of Prosecutor's Office's Denial of Access to the Investigation File for the Defense

This is a more evident case of rights and guarantees infringement that requires the intervention of the Guarantee Tribunal. Indeed, as mentioned in the previous section, the right

[39] As established by art. 260 final section CPPUru.

[40] There are cases where the intervention of the prosecutor's office is essential to obtain the information needed by the defense. This occurs in situations where the information is held by an authority or public official over whom the defense has no powers.

[41] As established by art. 257 sec. 3° CPPChi.

to defense has various manifestations, among which stands out the right to access evidence or incriminating proof and, in turn, to present exculpatory evidence.

The prosecutor's office is the public entity responsible for criminal investigations and therefore for gathering the information that allows for charges or accusations. In the investigation phase, this data or information needs to be known by the defense in order to analyze and verify its consistency and credibility, thereby highlighting deficiencies in the respective hearings. Timely knowledge of this information becomes a necessary condition for challenging it during the corresponding hearing. Apart from this contradictory function, access to this information is the essential prerequisite for defining the substance of the defense; that is, knowing what I must defend against and what evidence to present on my defense.[42]

These issues form the basis upon which the Guarantee Tribunal must rule to determine the defense's access to the prosecutor's office's case file, thus safeguarding the right to defense.

Now, it is evident —and acknowledged as such by all legislations— that the prosecutor's office can declare the confidentiality of investigations and their supporting evidence. This finds normative support in most of the criminal procedural codes in the region.[43] However, the Defense can challenge the necessity, suitability, or proportionality of the imposed secrecy before the Guarantee Tribunal. The above requires the Guarantee Tribunal to assess the following aspects:

3.1.- Prosecutor's office's justification to establish the absence of any alternative means other than secrecy to ensure the investigation's objectives.

3.2.- Prosecutor's office's justification to explain the extension of secrecy, that is, to what extent the confidentiality should cover in terms of records or investigative actions and the reasoning behind it.

3.3.- Justification regarding the confidentiality's duration.

3.4.- Justification regarding the individuals affected by the imposed confidentiality.

3.5.- Justification regarding the exact material under confidentiality, whether it affects the source of information or the entirety of information, both its source and content.

A final aspect that merits attention concerns the evaluative consequences of secrecy, as the confidentiality regarding the source of the invoked information generates an impossibility for the affected parties to confront its truthfulness (credibility issues, interests, etc.), therefore limiting the logic of contradiction, shifting a greater burden of argumentation onto the prosecutor's office to address the lack of information about the source supporting the provided data.

4. Case of the Defendant's Rights Affected During Detention and Its Judicial Oversight

The legality of detentions during detention control hearings or initial hearings entails a significant role for the Guarantee Tribunal, even warranting proactive actions to protect the rights of the detained defendant.

[42] See art. 6.3.b) of the European Convention on Human Rights.
[43] See arts. 182 CPPChi, 259 CPPUru, and 234 CPPArg.

Indeed, it is possible to identify situations where the tribunal's intervention is justifiable *ex officio*,[44] meaning, even in cases where the defense remains passive. Some of the highlighted scenarios include:

4.1.- Cases where the detained defendant shows significant and visible injuries, the origin or clarification of which has not been part of the allegations by either party. In such instances, it seems justified for the tribunal, on its own initiative, to inquire with both the prosecutor's office and the detainee regarding the origin of the injuries.

4.2.- Cases where there is evidence of the detained defendant not being informed of their rights beforehand, which the tribunal must proceed to rectify by reading the defendant his or her rights.

4.3.- A third issue that may warrant an official intervention by the tribunal relates to verifying the defense's prior access to the prosecutor's office's case file, ensuring that the defense attorney is in a position to adequately perform their function of scrutinizing and confronting the prosecution evidence.

4.4.- An issue that could warrant intervention on part of the tribunal, albeit more limited, concerns cases where the prosecutor's office alleges and argues the existence of a justifying hypothesis for detention without providing pertinent and detailed information about the invoked cause. This requires judicial intervention to inquire, through questioning, for details such as the time frames that justify the flagrancy invoked by the prosecutor's office.

4.5.- A final scenario where judicial intervention *ex officio* might be necessary concerns the time the detained individual has spent in police custody before being brought before the judicial authority.

In cases where there is a violation of the fundamental rights of the detained defendant, it is reasonable for the tribunal, at the request of the defense, even to receive additional information to decide on the potential infringement.

The necessary proactivity in the analyzed hypotheses often clashes with established practices that demonstrate a passivity incompatible with the demands arising from the protection of rights by the judiciary.[45]

5. Case of Manifestly Irrelevant Defense Actions in the Process Resulting in Significant Defenselessness

This is a very complex case that deals with situations where the defense's intervention in the legal process, particularly during a hearing, reveals a blatant lack of knowledge or competence on part of the defense attorney, thus infringing upon the rights of the defendant. In certain legislations, such as the Chilean, this can be remedied and penalized by declaring the defense as abandoned and replaced by a public defender, relying on Article 106's final provision in the CPPChi.[46] This section addresses situations of factual abandonment of the defense, which aligns with various scenarios, including the provision of an evidently deficient and visibly inadequate defense.

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[44] HORVITZ & LÓPEZ (2002), pp. 387ff.

[45] FANDIÑO *et al.* (2017), p. 195.

[46] "In case of the defense attorney's resignation or any situation where the defense is effectively abandoned, the tribunal must appoint a public defender to take over, unless the accused arranges for a defense attorney of their choice beforehand" (journal transl.).

In other legislations, specific procedural remedies aren't established for this scenario of defenselessness, yet they often place the tribunal in a position to address the issue of rights infringement through *ex officio* interventions by the tribunal.

5.1.- Guiding criteria

What has been mentioned in the preceding paragraphs implies clarifying some prior aspects concerning what might be deemed a provision of services that undermines or is incompatible with the procedural rights of the defendant. Indeed, for this to occur, it is necessary to have a clear understanding of the following elements:

5.1.1.- The potential scenario of declaring defense abandonment in the described cases is not synonymous with the tribunal's strategic disagreements over the defense's actions or arguments. It is not the role of judges to assess the consistency or merit of the outlined and defended case theories.

5.1.2.- The potential declaration of abandonment also does not cover hypotheses of specific and perfectly legitimate interpretative discrepancies by the defense.

5.1.3.- The potential declaration of abandonment also does not cover hypotheses of specific and perfectly legitimate interpretative discrepancies by the defense.

5.2.- Serious infringements of the right to legal defense

Let's now look at scenarios where there could indeed be a significant infringement on the rights of the defendant concerning having legal representation.

5.2.1.- Cases where the defense blatantly displays a lack of understanding of the procedural stage of the proceedings and persists in making arguments that do not correspond procedurally. If such an evident action occurs repeatedly during a hearing, it could lead to the hypothesis of requesting the abandonment of the defense.[47]

5.2.2.- Another comparable case to the previous one involves scenarios where the defense disregards the applicable rules of the case or situation, invoking non-existent, repealed, or irrelevant norms.

From the perspective of the Guarantee Tribunal, the remedies for cases of rights violations of the accused due to incompetent defenses or those displaying a glaring lack of knowledge of rules or stages could be the following:

a.- Declaring *ex officio* the abandonment of defense when the Criminal Procedural Code grants this attribution.

b.- Suspend the hearing, when possible and advisable, so the defense can adequately prepare their arguments and supporting evidence.

c.- Notify the defendant about the issues affecting his rights and propose the option of appointing a replacement defense attorney.

d.- Intervene more actively and *ex officio* in overseeing the prosecutor's office's requests, asking for the evidence and supporting facts invoked independently of the defense's

[47] An example of this nature might be cases where the defense, during a trial preparation or indictment hearing, requests the presentation of witnesses to be examined and cross-examined without making arguments about the actual focus of the hearing, which is to control the admissibility of evidence requested by the prosecutor's office.

actions. This is a highly intricate scenario that needs to be executed without compromising the judge's impartiality.

6. Case of the Court's Intervention in Agreements Between Parties for the Application of an Alternative Resolutions to the Trial

In alternative resolutions to the trial ["*salidas alternativas al juicio*"],[48] guarantee or control judges must also intervene to approve and verify that they comply with the legal requirements.

The analysis conducted by tribunals in hearings regarding the admission requirements leads to debates that need to establish standards by which the judicial scrutiny remains reasonable and necessary, without encroaching upon legitimate prerogatives or roles of the other system operators.

6.1.- Checks that guarantee or control judges must carry out in the case of alternative resolutions to trial, which are reasonable and necessary:

6.1.1.- Control over the actual voluntariness or consent of the accused to engage in negotiations entailing the application of a conditional suspension of proceedings ["*suspensión condicional del procedimiento*"], a restorative agreement ["*acuerdo reparatorio*"], or an abbreviated procedure ["*procedimiento abreviado*"], aimed at ruling out undue pressures, illegitimate coercion, or distortion of information by the prosecutor's office or even by the defense.

6.1.2.- Control over the actual and free understanding of the defendant regarding the effects generated or implied by accepting the alternative resolution to trial, including the waiver of a trial and the potential conditions imposed as a result of the agreement.[49]

6.1.3.- Control over the compliance with formal requirements such as the type of crime or affected legal interest, as well as the limits of the imposed sentence and its legal and formal compatibility with the agreement reached by the parties.

6.1.4.- In the case of the abbreviated procedure, the tribunal must also verify the existence of material evidence accepted by the defendant, which will form the basis for the final adjudication by the tribunal.

6.2.- Variables of a negotiation that should be left to the parties

On the contrary, the elements that should not be subject to judicial control relate to the following elements:

6.2.1.- Merits in terms of criminal policy, that is, the judgement of convenience regarding the substantive aspects of the agreement.

6.2.2.- The judgment of merit regarding the admissibility of a specific circumstance mitigating the responsibility of the defendant. At this juncture, it involves the assessment carried out by the prosecutor's office regarding the material grounds of the invoked mitigating circumstance, requiring the courts to demand a minimum threshold of plausibility.

[48] In this regard we refer to conditional suspensions of proceedings, repealed in the case of the CPPUru, restorative agreements, or an abbreviated procedures.

[49] FONTANET (2022), pp. 41-44.

6.2.3.- The greater or lesser public interest in the appropriateness of the agreement or in the continuation of the criminal prosecution by the prosecutor's office, especially in the case of restorative agreements and conditional procedure suspensions.

7. Intervention of the Guarantees Court in Personal Precautionary Measures Debates

The guarantee or control judges play a central role in assessing the admissibility of precautionary measures requested by the prosecutor's office, and when applicable, by the complainant.

Although different legislations differ on certain issues related to standards concerning the necessity for caution, they share a reasonably common foundation in the structure and regulation of material prerequisites and the actual requirements in terms of precautionary necessity. The focal point, therefore, lies in the role that judges are expected to assume in this discussion and the standards according to which they must decide.

7.1.- Determination of standards or criteria for the discussion and admissibility of a personal precautionary measure.

Regarding this, it is important to highlight the following applicable criteria in the three legislations under study:

7.1.1.- The judges should not suggest or propose specific personal precautionary measures,[50] nor should they apply subsidiarily and *ex officio* a more severe precautionary measure than the one requested by the prosecutor's office or even a less severe measure that was not debated by the defense. Doing so would compromise the impartiality of the tribunal and its role in safeguarding rights within the criminal process.

7.1.2.- To rule on requests for personal precautionary measures put forth by the prosecutor's office, the judge must verify the material conditions and necessity for precaution regardless of the requested measure. This assessment does not prevent adjusting the intensity of the precautionary measure, or even the material condition, in cases where a less severe precautionary measure than preventive custody is requested.

7.1.3.- In certain cases, and in order to safeguard the rights of the defendant, guarantee judges can revoke or substitute the precautionary measure that is currently in force, even *ex officio* during a hearing.[51]

7.1.4.- Judges, in the discussion of personal precautionary measures, must strictly observe compliance with the principles of legality ["*legalidad*"], jurisdictional character ["(*jurisdiccionalidad*"], exceptionality, subsidiarity, provisionality ["*provisionalidad*"], and proportionality.[52]

The exercise of weighting, which judges must carry out concerning the extremes of the debate, holds particular relevance in these matters, as it does in cases involving the admissibility of intrusive measures. This involves balancing the efficiency and effectiveness of the

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[50] This is coherent with the provisions of. 221.1, 221.2 y 224.1 CPPUru. Likewise, it is coherent with the provisions of arts. 140 and 155 CPPChi, and with arts. 209 and 210 CPPArg.

[51] Art. 226 CPPArg. In the case of Uruguay, this is recognized in Article 233 and requires a request from the party; however, there are no significant issues in allowing the tribunal to carry out such control even *ex officio* when it indeed constitutes a scenario of precautionary necessity. In Chilean criminal procedural legislation, this authority to revoke or modify precautionary measures appears in Article 144 CPPChi.

[52] GALLARDO (2006), p. 13.

investigation on one hand and the impact on specific rights and guarantees on the other. In this exercise of balance, they must apply the variables of necessity, suitability, and proportionality of the requested precautionary or intrusive measure.

8. Judicial Interventions in Non-Formalized Investigations

Another hypothesis or scenario that justifies the intervention of the Guarantee Tribunal refers to criminal investigations directed against a person who has not been formally charged, that is, he is under investigation without a formal attribution of responsibility before the guarantee or control judge.

Distinct criminal procedural legislations expressly regulate or establish through general rules the prerogatives of the control or guarantee tribunal concerning investigations that have not been formalized, in order to prevent the violation of the rights of the individuals under investigation. In this regard, the criminal procedural legislation of Chile expressly regulates the intervention of the Guarantee Tribunal to address and decide on requests made by the individual under investigation but not formally charged. Indeed, there exists a figure called "judicial control prior to formalization of the investigation" ["*control judicial anterior a la formalización de la investigación*"][53] that allows an individual subject to criminal investigation, or who becomes aware of being the target of criminal prosecution by the State, to request the intervention of the Guarantee Judge in a formal hearing to safeguard his or her rights, clarify the facts, gain access to the information, and even request a period for the formalization of the investigation.

This expressed rule bears a resemblance, albeit more general, in the Federal criminal procedural legislation of Argentina, which establishes in Article 232 that it is the judge's responsibility to ensure the proper compliance with procedural guarantees, and this may occur during a hearing.[54] In the case of Uruguay's criminal procedural legislation, a rule similar to the Chilean one is contemplated, stating that any person affected by an informal investigation may request the intervention of the judge to clarify the facts under investigation and ask for a deadline for formalizing the investigation.[55]

8.1.- Jurisdictional criteria regarding not-formalized investigations

Notwithstanding the aforementioned, it is a procedural prerogative recognized in most of the criminal procedural codes of Latin America that the Prosecution can conduct criminal investigations without the need to formalize them.[56] This is consistent with the idea of conducting preliminary inquiries that allow the prosecutor's office to gather the necessary

[53] See art. 186 CPPChi.

[54] Art 232 CPPArg: "The judge is responsible for overseeing compliance with procedural principles and guarantees, and upon request, ordering pre-trial evidence, if applicable, resolving exceptions, and other requests specific to this stage.

The judge will address the submissions in a hearing according to the principles set forth in Article 111" (journal transl.).

[55] See art. 264 final section CPPUru: "Any person who considers him of herself affected by an investigation that has not been judicially formalized may request the judge to order the prosecutor to provide information about the facts under investigation. The judge may also set a deadline for the formalization of the investigation" (journal trans.).

[56] See arts. 236 CPPChi, 256.1 in connection to art. 264 final section of the CPPUru, 255 and 256 CPPArg.

information for making a formal attribution of criminal charges before a judge and subsequently request personal precautionary measures, alternative resolutions to the trial, or file accusations to bring the case to trial. However, these prerogatives must be compatible with the guarantees and rights of those who are the passive subjects of criminal investigations.[57] Therefore, it is necessary for the guarantees or oversight tribunal to have the authority to regulate situations where there might be an infringement of the defendant's procedural rights or an impact on their guarantees.[58]

From the above, arises the need to identify reasonable and justified interventions by the judiciary in these scenarios, including the following:

8.1.1.- Summoning a hearing at the defense's request to determine the legal status of the person purportedly under investigation, thus allowing clarification as to whether he or she is indeed being criminally prosecuted by the prosecutor's office. For this purpose, the prosecutor's office must attend such hearing and clarify the precise legal status of the alleged defendant.

8.1.2.- At the same hearing, the defendant and his or her defense can request access to the materials and background information of the investigation held by the prosecutor's office. These materials must be provided by the Prosecution unless they invoke and justify the necessity, suitability, and proportionality of withholding some or all the information contained in the prosecution's investigation file.

8.1.3.- Likewise, the defendant and his defense may request in said hearing the clarification of the facts on which base he or she is being investigated by the prosecutor's office.

8.1.4.- Lastly, the defendant and his or her defense may request the definitive dismissal of the proceedings ["*sobreseimiento definitivo de la causa*"] if there's evidence substantiating said decision.[59]

8.2.- Unjustified Jurisdictional Interventions

It is also necessary to clarify those scenarios or situations where the intervention of the guarantee or control tribunal is not justifiable. Indeed, among the matters that fall outside or should fall outside the prerogatives of these tribunals are the following:

8.2.1.- It doesn't seem justifiable for judges to be able to order the formalization of an investigation by the prosecutor's office. Indeed, this is an inherent prerogative of the Prosecution and corresponds to decisions based on criminal-policy merit, which involve considering the need for additional information, relevant investigative leads not yet exhausted, scarce or poor-quality background information, the necessity for new information to request personal precautionary measures, avoiding tunnel vision, among others.

Despite an explicit norm in the legislations of Chile and Uruguay granting the judge the authority to set a deadline for the prosecutor to formalize, this rule must be interpreted or applied in accordance with the following judicial criteria or standards:

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[57] The person under investigation but not yet formalized acquires the status of defendant, which has clear legal grounds. See arts. 7° CPPChile, 63.1 CPPUru and 64 CPPArg. Likewise, this condition endows him or her with rights, as steams from arts. 93 CPPChi, 65 CPPArg and 64 CPPUru.

[58] RIEGO (2018), pp. 50ff.

[59] This prerogative arises in Chile for the individual defendant according to Article 93, letter f) CPPChi. Similarly, in the case of Uruguayan legislation, it stems from Article 64, letter g) CPPUru.

a.- As formerly indicated, the formalization of the investigation is above all a power of the prosecutor's office.

b.- The possibility for the judge to set a deadline for the prosecutor to formalize should be used only in extreme cases where there is clear evidence of sheer arbitrariness in the prosecutor's opposition to formalization, thus verifying an impact on the principle of objectivity. In other words, this is one of the situations where a principle of judicial deference towards the prosecutor's office must operate.

c.- This authority to set a deadline should be considered a last resort option when there are no other means to remedy a violation of rights, such as allowing the defense access to the prosecutor's office's investigation records without implying the formalization of the investigation.

d.- A more specific point concerns the effects resulting from setting a deadline for formalization and the potential non-compliance with that obligation within the stipulated time.

This is a more complex scenario, although it could well be noted that one effect could be the suspension of the proceedings as a measure for protecting guarantees.[60] Another solution could involve the judge exercising stricter control over the information or evidence found by the prosecutor's office during the period between the expiration of the set deadline and the moment the prosecutor's office decides to materially formalize, as long as this control is associated with, or considered that, such data or evidence were obtained affecting the rights of the unformalized defendant. This could even affect the *inadmissibility* of that evidence concerning the appropriateness of personal precautionary measures and ultimately, in scenarios of exclusion of evidence.[61]

e.- A final point worth highlighting relates to the necessary preservation of the prerogative of the defendant to request, at any stage of the process, the definitive dismissal of the proceedings if the conditions are met.

9. Interventions of the Guarantee Tribunal in Scenarios of Investigation Closure and the Impact on the Right to Defense

The closure of a criminal investigation would appear to be one of the inherent powers of the Prosecution that should be exercised exclusively without judicial intervention, which seems sensible and reasonable in many cases. However, there are scenarios where such requests may require a cautious oversight by guarantee or control judges. Among the hypotheses or situations that justify judicial intervention are the following:

a.- Firstly, there are cases, as mentioned in previous sections, where the prosecutor's office has arbitrarily and without foundation discarded specific investigative actions that could be suitable for disproving the criminal responsibility of the defendant. The concurrent guarantee in these instances pertains to the material and effective possibility of presenting exculpatory evidence, which would imply postponing the closure of the investigation or reopening it.

b.- Tribunals could also delay or postpone the closure of the investigation when prior actions by the prosecutor's office itself have generated situations of defenselessness or

[60] This is a solution grounded in Chilean criminal procedural legislation under Article 10 CPPChi.
[61] BLANCO *et al.* (2005), p. 41.

cautionary needs. This might occur in cases of a re-formalized investigation or an expansion of the facts constituting the original formalization, followed immediately or within a very short period by a closure of the investigation, effectively hindering the defense's search for exculpatory information. This becomes notably relevant in situations or cases where the majority of the inculpatory material has been obtained between the time of the formalization's expansion and its closure.

c.- Cases where the investigation was declared confidential, and the confidentiality was lifted shortly before the investigation's closure. Indeed, this scenario involves the prosecutor's office requesting reserve over certain portions of their investigative file, resulting in a clear infringement of the right to defense. If this confidentiality is lifted shortly before the investigation's closure, it might hinder the search for evidence to discredit the information protected by the reserve or to find exonerating evidence.

III. CONCLUSIONS

As it can be observed, the role of safeguarding rights and guarantees by guarantee or control judges in the adversarial criminal process is a fundamental element. They act as the entity responsible for striking the necessary balance to resolve inherent tensions within the extremes of the prosecution and adjudication system, such as efficiency and efficacy, and ensuring due care for the rights of the individuals involved in the process. This requires norms, but above all, specific criteria, and standards to guide the actions and strategic decisions of the legal operators. The foregoing sections attempt to elucidate some of the most complex scenarios of judicial intervention in Guarantee Tribunals, without aiming to exhaust all possibilities, but rather outlining and making explicit some of the more controversial and intricate situations in the investigative and intermediate stages of the criminal process, identifying elements that can be useful in substantiating the decisions that tribunals must make in their protective function.

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